

Recognition and Enforcement of Foreign Judgments in Personam and in Rem in the Common Law Provinces of Canada

J.-G. Castel *

Introduction

Although it is hardly necessary to stress the advantages to international relations and international trade which may result from universal recognition and enforcement of foreign judgments, it appears that the increasing volume of international and inter-provincial trade and business has not been followed by a comparable development of the facilities granted to creditors to recover on their claims. Each country has a tendency to protect itself against the intrusion of foreign judgments, to the prejudice of creditors in whose favour the judgments lie. The principle of territorial sovereignty is said to prevent foreign judgments from having any direct operation as such in any of the Canadian provinces. This attitude is principally due to a lack of confidence in other legal systems. It may be difficult for the enforcing court to ascertain the independence and legal ability of the foreign judge, and to assess the reliability of the foreign legal system. This difficulty is reinforced where the countries involved adhere to fundamentally different legal systems and thus may have different concepts of public policy and due process. To admit the principle of universal recognition and enforcement of foreign judgments would result in recognizing in a foreign judge a power superior in many instances to that possessed by the local legislature. For these reasons adequate safeguards must be provided. On the other hand a foreign judgment is a fact which cannot be ignored. This is why Canadian courts have had to recognize and enforce foreign judgments provided they meet certain conditions.

Diversity of laws is a distinguishing factor in international commerce. Businessmen are not generally concerned with the technicalities of the law. Their main problem is to protect themselves against the risk of insolvency of their debtors or any other impediment which may be placed in the way of the enforcement of their claims. From their point of view what is required is that the enforcement of judgments whether rendered locally or abroad be

* Professor, Osgoode Hall Law School, York University, Toronto. Editor, Canadian Bar Review.

prompt, certain and effective. Security of transactions appears as an underlying policy of major importance in this field of conflict of laws. Without this security commercial intercourse would be greatly lessened. Apart from these commercial relations, facility in the recognition and enforcement of foreign judgments has also become a social question due to the rapidity of transportation and the tremendous increase in human migrations.

The policy question is how easy and how fast a foreign judgment should be recognized and enforced without endangering local interests. Another difficulty consists in finding a way to coordinate the foreign and local legal systems as all civilized nations have the duty to assist one another in the administration of civil justice. From a theoretical point of view an equilibrium must be found between the principles of sovereignty and universality.

Scope of the Article

This article deals with the recognition and enforcement in Canada of foreign judgments *in personam* and *in rem* at common law and by statute. It also includes a section on the recognition and enforcement of foreign arbitration awards. The recognition and enforcement in Canada of foreign decrees of divorce or nullity of marriage, foreign guardianship or custody orders, foreign adoption orders, foreign judgments relating to the administration of estates or to succession, foreign adjudications in bankruptcy or foreign orders for the winding-up of companies are not discussed here.

Definition of foreign judgments

First it is necessary to determine the nature of the foreign document sought to be used in the courts of the forum. The test is not by what name the foreign document is called where it originated, but whether it appears to the court, which is called upon to give effect to it, to be in its essential character and effect a foreign judgment. Although, in principle, the enforcing court will apply its own rules and concepts in determining this point, it will also inquire into the domestic law of the foreign country involved. The determination of what is a judgment will be made by reference to the nature of the foreign suit rather than the technical name attached to it.

A foreign judgment may be defined as the final decision, decree or sentence of a judicial body or tribunal regularly established and exercising the jurisdiction conferred upon it by the law of the country or province of its creation, which determines the respective rights and claims of the parties to a suit therein litigated.¹

All judgments rendered outside a province or territory are foreign judgments,² as each province or territory is a foreign country or law district.³

In *Stolp & Co. v. H. W. Browne & Co.*⁴ the court, quoting Piggott on *Foreign Judgments and Jurisdiction*⁵ said:

The definition of a 'foreign judgment' implies that the Court which has pronounced it is a judicial tribunal established by the Government of the country in which it exercises its jurisdiction, or by some other Government with its authority. The tribunal must be a Court of Law within the ordinary meaning of that term... The decision of a dispute by any other person or body even with the consent of the parties, does not amount to a judgment; the remedy in case of failure to carry out the decision would probably lie on the contract to refer the dispute and accept the decision. Thus, an award of an arbitrator abroad does not come within the definition of a foreign judgment until it is made an order of Court; it is then merged in that order, which is in effect the judgment of the Court in the matter.

In general Canadian common law courts will assume that a foreign judgment or decree was correctly rendered until the contrary is shown.⁶ If a plaintiff proves the existence of a foreign judgment in his favour the onus shifts to the defendant to impeach it.⁷

I. Principles of Recognition

It is a well-known principle that the sovereignty of a state stops at its borders.⁸ As a corollary to this basic proposition, it is said

¹ It must be rendered on the merits. It does not matter whether the decision was rendered by a court of law or equity: *Gauthier v. Routh* (1843), 6 U.C.Q.B. O.S. 602, at p. 605. *Frederick A. Jones Inc. v. Toronto General Insurance Co.*, [1933] O.R. 428, [1933] 2 D.L.R. 660, (1933), 42 O.W.N. 278.

² *McFarlane v. Derbshire* (1851), 8 U.C.Q.B. 12. *In re Hamer, ex parte McGuinty & Co.* (1921), 2 C.B.R. 137, 63 D.L.R. 241 (Sask).

³ *Vezina v. Will H. Newsome Co.* (1907), 14 O.L.R. 658, at p. 664.

⁴ (1930), 66 O.L.R. 73, [1930] 4 D.L.R. 703, discussed *infra*, section V.

⁵ (3rd. ed., 1908), pp. 95-96.

⁶ *Gauthier v. Routh* (1843), 6 U.C.Q.B. (O.S.) 602 (C.A.); *Meagher v. Aetna Inc. Co.* (1873), 20 Gr. 354; *McPherson v. McMillan* (1846), 3 U.C.Q.B. 34 (C.A.); *Shearer & Co. v. McLean* (1903), 36 N.B.R. 284 (C.A.); *Bonn v. National Trust Co.* (1930), 65 O.L.R. 633, [1930] 4 D.L.R. 820 (C.A.).

⁷ *Thibodeau Machinery Co. v. Crown Iron Railing Co.* (1964), 46 W.W.R. 246 (Sask.); *Smith v. Smith*, [1923] 2 W.W.R. 389, at p. 392, 17 Sask. L.R. 203; *Marshall v. Houghton*, [1922] 3 W.W.R. 65, at pp. 70-71, aff'd [1923] 2 W.W.R. 553, 33 Man. R. 166, and see section V, *infra*.

⁸ In *Assiniboia Land Co. v. Acres* (1916), 10 O.W.N. 328, 28 D.L.R. 364, the Ontario Court refused to recognize a Saskatchewan judgment based on a statutory obligation that had no extraterritorial effect.

that no sovereign state can allow officers of a foreign state to carry out upon its own territory the decisions of the courts of that foreign state, because such action would violate the principle of sovereignty. The inability of the nations of the world to ascribe the same value or meaning to justice makes it unwise to recognize the validity of any foreign judgment without some supervision by the domestic courts. The citizens or residents of the country where the judgment is sought to be enforced should not be left without protection in respect to arbitrary measures which might be taken against them in foreign countries. Thus, it is generally agreed that no judgment of a court of one country can be executed *proprio vigore* in another country.

On the other hand, the right to maintain an action upon a foreign judgment or the fact that it is admitted to execution or declared executory after a special proceeding for that purpose, is also almost universally recognized, although widely differing methods are used to reach a satisfactory solution. To reconcile these two somewhat conflicting positions it is said that a foreign judgment is a specific command by a foreign sovereign, effective in the first instance only in the foreign jurisdiction. In the courts of the forum before which the creditor brings this judgment, it will receive such recognition and force as the law of the forum permits. The courts of the forum may recognize and enforce it, but in doing so they are not directly enforcing the foreign law or making a choice between that law and their own, as they would in a typical choice of law situation. A foreign judgment has in itself no right to recognition and enforcement, and whether effect must be given to it can be decided only under the law of the forum which enumerates all the conditions which must be met for that purpose. The forum will always determine the extent to which a foreign judgment will be recognized and enforced.

The most important problem is to determine the measure of respect which will be granted to a foreign judgment in Canadian courts. The practice which is now followed in Canada is the product of a long historical evolution which began in England.

Until the end of the seventeenth century, problems of conflict of laws were almost non-existent in England. Every court applied its own law exclusively and the sole issue was the competence of the court to adjudicate the case. Problems of conflict of jurisdictions were most important. Although as early as 1607 it became necessary for the English courts to consider the problem of giving effect to judgments of foreign countries,⁹ it was not until the

⁹ *Wier's case* (1607), 1 Roll Abr. 530.

eighteenth century that this branch of conflict of laws began to develop. This was due partly to the growth of the colonies and partly to the growth of England's foreign trade.

Basically foreign judgments have been viewed in terms of the independent territorial jurisdiction of courts, a fundamental concept in Anglo-Canadian law.

Huber was the first to have a great influence upon the development of conflict of laws in England. For him all laws are territorial and have no force and effect *proprio vigore* beyond the limits of the enacting state, but bind all persons found within the territory; thus, the enforcement of a judgment outside the territory of the court which rendered it must be based on some other concept than owing its effectiveness to the authority inherent in the judicial office. Huber was followed by Paul Voet and John Voet who carried to its logical conclusion the doctrine of d'Argentré, a jurist from Brittany, that all customs are territorial. Huber and Paul Voet who did not admit exceptions to the rule of territoriality as d'Argentré, Froland,¹⁰ and Boullenois¹¹ had for status and capacity, did not think that foreign judgments could have extraterritorial effect *de facto*. If any effect was to be given to them, it would be only by way of comity.¹² By comity they meant that the recognition of foreign judgments was a mere concession that a state allows to the acts of another state on grounds of convenience and utility and not as the result of an obligation. The enforcing courts are free to decide on the nature of comity. This is a judicial comity, because the discretion in applying the principle rests upon the judge and not the government.

Vattel also affirmed that in consequence of a right of jurisdiction of every sovereign to administer justice in all places within his own territory, which must be respected by other nations, the decisions made by the judge of that place within the extent of his authority, ought to be respected and to take effect in foreign countries.¹³ A distinction was made between rules of law having

¹⁰ Mémoire concernant la nature et la qualité des statuts, *etc.* (1729).

¹¹ Traité de la personnalité et de la réalité des lois, coutumes ou statuts, *etc.* (1766).

¹² Huber Vol. 2, lib. 1, tit. 3 *de conflictu legum diversarum in diversis imperiis* in *Praelectionum juris civilis* (1700); J. Voet, *De statutis* in *Commentarius ad Pandectas* (1704), s. 4, n. 14; P. Voet, *De Statutis eorumque concursu, etc.* (1661).

¹³ Vattel, *Law of Nations* (1758), Vol. 2, c. 7, s. 84; Story, *Commentaries on the Conflict of Laws* (8th ed., 1883), s. 585.

effect *ex proprio vigore* and those admitted only *ex comitatae*, and it was held that a foreign judgment ought to be recognized not as a matter of legal duty but as a matter of comity.

These views entered England in the 18th century. From there they reached Canada and by the middle of the nineteenth century became the basis of the Anglo-Canadian rules of conflict of laws.

1) Comity

The earliest decisions in England and some rather more recent Canadian ones¹⁴ give support to the view that the recognition and enforcement of foreign judgments is a matter of comity. For instance in the *Wier's* case¹⁵ it was held that English courts are bound to give effect to foreign judgments under the rules of the law of nations or of international comity, while in the *Cottingham's*¹⁶ case Lord Nottingham stated that it is against the law of nations to deny credit to the judgments and sentences of foreign countries. "For what right hath one kingdom to reverse the judgment of another? . . . And what confusion would follow in Christendom, if they should serve us so abroad, and give no credit to out sentences?"

In *Hilton v. Guyot*, an American case, Mr. Justice Gray said:

No law has any effect, of its own force, beyond the limits of the sovereignty from which its authority is derived. The extent of which the law of one nation . . . shall be allowed to operate within the dominion of another nation, depends upon . . . the "comity of nations" . . . "Comity" in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience and to the rights of its own citizens or other persons who are under the protection of its laws.¹⁷

¹⁴ *Barned's Banking Co. Ltd. v. Reynolds* (1875), 36 U.C.Q.B. 256, at p. 273; *Hutton v. Dent* (1922), 52 O.L.R. 378, at p. 380; aff'd 53 O.L.R. 105, 70 D.L.R. 582; aff'd [1923] S.C.R. 716, [1924] 1 D.L.R. 401; *Manning v. Thompson* (1867), 17 U.C.C.P. 606 (C.A.), at p. 611; *Richardson v. Allen* (1916), 10 W.W.R. 720, 11 Alta L.R. 245, 28 D.L.R. 134, affirming 31 W.L.R. 437, 24 D.L.R. 883 (C.A.).

¹⁵ *Supra*.

¹⁶ (1678), 2 Swans. 326 n.

¹⁷ *Hilton v. Guyot* (1895), 159 U.S. 113, at p. 163; in Canada in general see *Stevens v. Fisk* (1884), Cameron Supreme Court Cases 392, at pp. 424, 431; *Canadian Pacific Railway Co. v. The Great Western Telegraph Co.* (1889), 17 S.C.R. 151; The doctrine of comity was criticized by Rivard, J. in *Monette v. Larivière* (1926), 40 B.R. 350, at p. 357.

For Story the term "comity" is the most appropriate phrase to express the true foundation and extent of the obligation of the laws of one nation within the territory of another.¹⁸

Comity has been considered as part of the law of nations. But is there a law of nations with respect to the enforcement of foreign judgments? It is indeed interesting to note that the followers of the doctrine of comity have used the theory of voluntary international law as the ground on which the recognition and enforcement of foreign judgments is founded. Actually, it does not appear that there exists any true international obligation concerning the recognition and enforcement of foreign judgments.

The question of the effect to be given to foreign judgments is purely a matter of domestic law and in this case comity appears to be not a rule of international law but a rule of the domestic law of the forum. Rules of conflict of laws are not derived from international law but from municipal law. Thus it is impossible to bridge conflict of laws and public international law by the use of comity. Here the comity doctrine erroneously uses a pretended tacit international agreement as the basis of the recognition of foreign judgments.

Dicey comments vigorously upon the doctrine of comity as regards the application of foreign law and his remarks are equally applicable to the recognition and enforcement of foreign judgments. He says:¹⁹

If the assertion that the recognition or enforcement of foreign law depends upon comity, means only that the law of no country can have effect as law beyond the territory of the sovereign by whom it was imposed, unless by permission of the state where it was allowed to operate, the statement expresses, though obscurely a real and important fact. If on the other hand, the assertion that the recognition or enforcement of foreign laws depends upon comity is meant to imply that, to take a concrete case, when English judges apply French law, they do so out of courtesy to the French Republic, then the term "comity" is used to cover a view, which if really held by any serious thinker, affords a singular specimen of confusion of thought produced by laxity of language. The application of foreign law is not a matter of caprice or option: it does not arise from the desire of the sovereign of England or of any other sovereign to show courtesy to other states. It flows from the impossibility of otherwise determining whole classes of cases without gross inconvenience and injustice to litigants, whether natives or foreigners.

The English cases recognizing foreign judgments as a matter of comity did not necessarily give them the same force as domestic

¹⁸ Story, *op. cit.*, ss. 33-38.

¹⁹ Dicey, *The Conflict of Laws* (5th ed., 1932), pp. 10-11. See *infra* section II (4).

judgments.²⁰ Comity as applied to foreign judgments expresses a rule of local public policy operating on the international level. It is not a rule of international law. This policy has three aspects: 1) where the forum refuses to give any effect to a foreign judgment that is against the interests of local residents or domiciliaries; and 2) where the forum recognizes and enforces a foreign judgment because it is in the interest of these people to do so; 3) the interest of the forum in securing uniformity of decision. Actually international relations and courtesy have nothing to do with comity. The old theory of judicial comity has been superseded. The judge has become the keeper of the nation's conscience, as well as the protector of its interests, and these obligations set a limit to his actions. Comity thus becomes a sociological explanation for conflict of laws rules. If comity is defined as tantamount to public policy, the basic vagueness of the theory of comity becomes an advantage, as public policy is both a negative and a positive factor in the development of Anglo-Canadian law. Comity may then be interpreted and enforced by courts as being fixed by general usage, morality, economic or social considerations, or political or legislative declarations, sometimes applying only with respect to the relations with certain foreign countries.

The traditional doctrine of comity has been criticized for its uncertainty, vagueness, and difficulty of application. It has been urged that the word "comity" has no proper place in a discussion of the conflict of laws and that any comity involved is that of the state. Undoubtedly the doctrine of comity presents an internal inconsistency, because on the one hand it denies the intrinsic force of foreign judgments from the point of view of international law, and on the other hand it endeavours to provide an international basis for their recognition and enforcement. Today the doctrine of comity has lost its vogue, in part because of the tenuous and arbitrary basis upon which it seems to rest the rights of those claiming under foreign judgments, and its inability to explain the recognized exceptions to actions to enforce such claims; and, in part, because it has not proved congenial to the positivistic tendencies of Anglo-Canadian law which envisage the enforcement of foreign judgments from the point of view of the enforcing courts rather than of international law.²¹

²⁰ Today comity is no longer a basis for the recognition of foreign judgments or decrees in England. See *Indyka v. Indyka*, [1967] 3 W.L.R. 510 (H.L.) per Lord Reid, at p. 518, quoting Blackburn, J. in *Schibsby v. Westenholz* (1870), L.R. 6 Q.B. 155, at p. 159.

²¹ Yntema, *The Enforcement of Foreign Judgments in Anglo-American Law* (1935), 33 Mich. L. Rev. 1129, at p. 1146.

2) Reciprocity

The idea of resorting to the doctrine of reciprocity in recognizing foreign judgments as a logical consequence of the doctrine of comity also originated at an early period.

Text writers in the field of conflict of laws thought that reciprocity could advance the interests of non-resident nationals. They maintained that international law required equality of treatment. Story²² and Wheaton²³ believed that the application of foreign law was based on reciprocal wants, so that the nationals of the respective states involved would have their interests protected. Savigny²⁴ also was of the opinion that reciprocity would tend to unify conflict of laws rules. The idea which underlies reciprocity is to appeal to the self-interest of the foreign legislatures or courts in order to induce them to change a policy which is considered undesirable.

In England the doctrine of comity based on reciprocity in recognition has not been resorted to at common law as a theoretical basis for the recognition of foreign judgments. Dicey²⁵ is categorical when he says that, "The question of giving effect to a foreign judgment is not at common law in any way dependent on reciprocity of treatment". The weight of decisions supports his opinion. Thus, in *Russell v. Smith*²⁶ it was held that the enforceability of a foreign money judgment follows from the legal character of the adjudicated obligation as a debt and is no longer subject to investigation on the merits. It is, therefore, irrelevant whether or not the foreign country in which the judgment was rendered grants reciprocal treatment to English judgments. The recognition and enforcement of a foreign judgment takes place *ex debito justitiae* and reciprocity has nothing to do with it.²⁷

²² *Op. cit.*, p. 24.

²³ *Elements of International Law* (1836), p. 112.

²⁴ *System des heutigen römischen rechts* (1849), p. 28, note f.

²⁵ *Op. cit.* (6th ed. 1949), Rule 85, comment p. 403; also see (1896), 12 L.Q. Rev. 302; H.E. Read, *Recognition and Enforcement of Foreign Judgments in the Common Law Unity of the British Commonwealth* (1934), pp. 52-53, 125 *et seq.* See also Kennedy, *Recognition of Judgments in Personam: The Meaning of Reciprocity Archambault v. Solloway* (1957), 35 Can. Bar Rev. 123.

²⁶ (1842), 9 M. & W. 810, at p. 819; in Canada see Kennedy, *Recognition of Judgments in personam: The Meaning of Reciprocity* (1957), 35 Can. Bar Rev. 123.

²⁷ See also *Williams v. Jones* (1845), 13 M. & W. 628, at p. 633.

Reciprocity is only to be found as a prerequisite for direct execution by registration.²⁸

3) *Legal obligation*

The needs of trade and the fact that a judgment has often been considered as a law governing private rights analogous to a foreign contract led the English courts to find a new and broader explanation for the recognition and enforcement of foreign judgments. As early as 1835 Lord Brougham in *Warrender v. Warrender*²⁹ said that the courts of England can hardly be said to act from courtesy *ex comitatae* but *ex debito justitiae*. This doctrine was first fully stated by Lord Abinger and Baron Parke in 1842 in the case of *Russell v. Smith*³⁰ and was reaffirmed in *Williams v. Jones*.³¹ Baron Parke maintained that when a competent court has adjudicated a certain sum to be due from one person to another, a legal obligation arises to pay that sum, and an action of debt to enforce the judgment may be maintained. It is in this way, he says, that the judgment of a foreign or colonial court may be supported and enforced.

Subject to compliance with certain requirements, the decision of a foreign court imposes upon the parties against whom the decision is given a legal duty to obey it. To this legal duty corresponds the right of the person in whose favour the decision has been given that the foreign judgment should be obeyed. This reasoning does not explain why the foreign judgment results in a legal obligation, nor why it is enforced by the forum. It is also difficult to reconcile the legal obligation doctrine with the rule denying the possibility of a merger of the cause of action in a foreign judgment. Support for this doctrine is also found in *Godard v. Gray*³² and *Schibsby v. Westenholz*³³ in which Judge Blackburn said,

²⁸ See next section. In England jurisdictional reciprocity was recognized in *Travers v. Holley*, [1953] P. 246 in foreign divorce cases but rejected by the House of Lords in *Indyka v. Indyka*, [1967] 3 W.L.R. 510, especially by Lord Reid, at pp. 519-520.

²⁹ (1835), 2 Cl. & Fin. 488.

³⁰ (1842), 9 M. & W. 810, at p. 818 "Foreign judgments are enforced in these courts because the parties are bound to satisfy them".

³¹ (1845), 13 M. & W. 629, at p. 633.

³² (1870), L.R. 6 Q.B. 139, at pp. 148-150.

³³ (1870), L.R. 6 Q.B. 155, at p. 159.

We think that... the true principle on which the judgments of foreign tribunals are enforced in England is... that the judgment of a court of competent jurisdiction over the defendant imposes a duty or obligation on the defendant to pay the sum for which judgment is given, which the courts in this country are bound to enforce, and consequently, that anything which negates that duty, or forms a legal excuse for not performing it, is a defense to the action.

If the foreign court had jurisdiction to render the judgment according to English rules of conflict of laws, the judgment, if final, is conclusive in England and can only be impeached for a limited number of reasons. The doctrine that a valid foreign judgment imposes a duty or legal obligation on the defendant which the courts are bound to enforce has been recognized in Canada.³⁴ This obligation has also been held to arise upon an implied contract.³⁵

The doctrine of legal obligation, which in England disposed of the doctrine of comity, shows that a foreign judgment may be recognized and enforced, either as a judgment essentially homogeneous with a corresponding domestic judgment constituting a debt or implied contract, or as a source of legal obligation which does not require further justification.³⁶ It also indicates the character of the procedural method for its enforcement and has the merit of recognizing that the *res litigiosa* before the enforcing court is typically not an international *casus belli* but a private dispute. The background of this theory is to be found in Roman law, in the conception of the contractual or quasi-contractual transaction by which the parties are bound by their consent. Thus, the principal effect of this conception is that to enforce a foreign judgment, an action must be commenced *de novo* in the ordinary course of events.³⁷

³⁴ *Kingsmill and Davis v. Warrender and Wheeler* (1852), 13 U.C.Q.B. 18, at p. 68; *Fowler v. Vail* (1877), 27 U.C.C.P. 417, at p. 425, varied on appeal 4 O.A.R. 267, at p. 270; *Whitla v. McCuaig* (1891), 7 Man. R. 454, at p. 455; *Barned's Banking Co. Ltd. v. Reynolds* (1875), 36 U.C.Q.B. 256 (C.A.), at pp. 279-280; *Maguire v. Maguire* (1921), 50 O.L.R. 100, at p. 103; *Marshall v. Houghton* (1923), 33 Man. R. 166, at p. 179; *Livesly v. Horst Co.*, [1924] S.C.R. 605, at p. 610, per Duff J.; *Re Kerr v. Smith* (1894), 24 O.R. 473.

³⁵ *Jacobs v. Beaver* (1908), 17 O.L.R. 496, at p. 502: "A judgment, whether native or foreign, creates a debt between the parties"; in *Martel v. Dubord* (1885), 3 Man. R. 598: "A foreign judgment for a certain sum of money constitutes a simple contract debt for that amount from the judgment debtor to the judgment creditor, upon which an action of debt lies."

³⁶ *Schibsby v. Westenholz* supports this view (1870), L.R. 6 Q.B. 155.

³⁷ Yntema, *op. cit.*, at p. 1147.

4) Comity and legal obligation

Piggott criticized the doctrine of legal obligation.³⁸ He pointed out that the obligation has no legal basis because the sanction has been left in the foreign country, hence, a judgment debtor coming to England cannot be considered as a legal debtor there; he can only be a legal debtor of and in a foreign state. The inevitable result is that the obligation is destroyed by avoiding the sanction to which the person obliged has rendered himself liable.³⁹ Piggott proposed a new system called the doctrine of comity and obligation which combines the two preceding doctrines. He said:⁴⁰

States lend their aid mutually to enforce each other's judgments. There is a legal obligation existing against the debtor in the state where the judgment has been pronounced; the obligation has been disobeyed. By reason of the debtor's absence from the jurisdiction of its courts and there being no property on which execution can issue, the state is unable to enforce the sanction. By virtue of the comity of nations, a foreign state, to which the debtor has gone, will clothe the obligation deprived of its correlative sanction, with another sanction auxiliary to it, and by so doing will endue it with the power resembling that which it has lost.

And added:⁴¹

The result is, that not only is an obligation created, the sanction correlative to which is resident in the Sovereign Authority of the State whose courts have pronounced the judgment, and which may be enforced there at the discretion and instance of the judgment creditor; but there also comes into being in every other state a bare obligation — resembling somewhat the *nudum pactum* of the Roman Law — which, when the judgment debtor enters any foreign state, is clothed with an auxiliary sanction, enforceable by the foreign judgment creditor; and dependent upon international comity.

A foreign judgment will be enforced, first, under the influence of the comity of nations; secondly, because of the obligation created, and this, *jus* for *jus* and not *lex* for *lex*. In other words, a power resides in every member of the community of states to enforce the judgment of other states by means of an auxiliary sanction which has been created by the comity of nations.⁴²

5) Vested rights

For Dr. Read,⁴³ a foreign judgment is recognized because it establishes the existence of a foreign judicially-created substantive

³⁸ Piggott, *Foreign Judgments* (2nd ed., 1908), pp. 7-10.

³⁹ *Ibid.*, p. 11.

⁴⁰ *Ibid.*, p. 15.

⁴¹ *Ibid.*, p. 18.

⁴² For a criticism of Piggott's view see Read, *op. cit.*, p. 62.

⁴³ *Op. cit.*, p. 121.

right. A right which has been duly acquired under the law of any civilized country by virtue of the judgment is to be recognized and enforced by the forum. He states that the true basis of the recognition of a foreign judgment, lies in the fact that:

... a vested right has been created through the judicial process by the law of a foreign law district. This basis not only supports and explains the finality requirement and conclusiveness rule; it is implicit in the doctrine of territoriality of law. This however, is not to say that the Anglo-Dominion common law of foreign judgments gives effect to the so-called vested rights doctrine of conflict of laws to the extent of recognizing every right created by a foreign-territorial law through the judicial process. To be recognized as an operative fact the right must have been created by the law of a district which had judicial jurisdiction in the international sense and have satisfied other requirements...

In other words, a vested right has been created through the judicial process by the law of a foreign district.⁴⁴ It is not the judgment but the right vested under that judgment which is recognized and enforced. This doctrine which is closely related to that of legal obligation seems to beg the question by presupposing a right as vested, while the actual problem is whether it is vested. It does not inform us how and under what limitations foreign claims are to be recognized and enforced as vested rights. As Professor Yntema wrote:⁴⁵

The truth is that the vested right doctrine is a somewhat diffused or diluted version of the internationalist position. It supposes the existence of a supra national body of law by virtue of which not the laws of each state but rights and other relations created by such laws are effective in other states. If foreign rights are to be regarded as effective in the forum why not the law which creates such rights?

In general this approach to the problem has been severely criticized, especially in the United States, as not expressing a fundamental principle for the recognition and enforcement of foreign law or foreign judgments.⁴⁶ As pointed out by Professor Morris⁴⁷ the English doctrine of obligation has nothing to do with Dicey's and Beale's theory of vested rights⁴⁸ because the right which the foreign judgment creditor seeks to enforce in England is a right created by English law and not by foreign law. To give a valid

⁴⁴ *Ibid.*, pp. 63 and 126. See also Borm-Reid, *Recognition and Enforcement of Foreign Judgments* (1954), 3 *Int. and Comp. L.Q.* 49, at p. 55.

⁴⁵ (1939-1940), 49 *Yale L.J.* 1134, at p. 1139.

⁴⁶ See for instance Cook, *The Logical and Legal Bases of the Conflict of Laws* (1942), clis I-III.

⁴⁷ Dicey & Morris, *op. cit.* (8th ed., 1967), p. 968.

⁴⁸ See Castel, *Conflict of Laws* (2nd ed., 1968), ch. 3.

foreign judgment the foreign court must have had jurisdiction according to English conflicts rules. In other words the judgment must be valid according to the law of the enforcing court before any effect can be given to it.

In enforcing a foreign judgment the forum only applies its own law to the action. It will render a domestic judgment, although this judgment will be identical with that which was based on the law of the foreign country with which all the elements of the judgment are connected. The foreign judgment is incorporated into the new judgment rendered by the forum. Thus the forum does not enforce a foreign vested right, but creates a new right.

The common law technique of enforcing foreign judgments lends itself to this approach. The foreign judgment is considered only as a fact. By bringing an action upon that foreign fact, the plaintiff requests the court of the forum to create a right, to render a local judgment. If respect is paid to the foreign law, it is only by reason of economic, social or practical expediency, but not by reason of the compulsion exercised by the foreign judgment or the right vested under it. The recognition and enforcement of foreign judgments would then appear to be a question of policy of the forum, and in this way it is consistent with the old principle of comity. As the law of a state may direct its courts to refuse the creation of certain rights, where such rights would be against its public policy, similarly it may freely formulate the requirements for the recognition and enforcement of foreign judgments.

6) *Res judicata*

Professor Reese⁴⁰ has suggested that one must look beyond the usual reasoning of the courts in order to explain the basis upon which they enforce foreign judgments. A rigid scrutiny will show that *res judicata* is the hidden principle upon which foreign judgments are enforced in common law countries. *Res judicata* requires that there be an end to litigation, that those who have contested an issue, here or abroad, be bound by the result of the trial, and that matters once tried be considered forever settled between the parties. This fundamental principle of the common law must, no doubt, have influenced the minds of the judges when dealing with foreign judgments. It certainly affords a reasonable explanation for the basis upon which Canadian common law courts enforce

⁴⁰ The Status in this Country of Judgments Rendered Abroad (1950), 50 Col. L. Rev. 783, at p. 784.

foreign judgments although there has not been any Canadian authority basing the recognition of a foreign judgment on *res judicata* alone. It also explains the modern view that a foreign judgment is conclusive on the merits.⁵⁰ However, as the previous theories, it fails to account for the weight given by the courts to countervailing factors such as public policy and for the fact that a foreign judgment does not merge the original cause of action.⁵¹

In general, if in practice a foreign judgment is recognized and enforced in the common law provinces, possible explanations officially lie in one of two existing lines of thought, each independent of the other, although both may be, and on occasion are, used as the *raison d'être* for the treatment of foreign judgments by the courts of Canada. One line of thought bases recognition and enforcement on the fact that the foreign judgment is a formal pronouncement of the court of a foreign sovereign which requires recognition under the principles of international law or comity. The other argues that the foreign judgment is actually a settlement of a peculiar nature which deals with the rights of private parties, and because of the unique nature of this settlement the parties should be bound thereby as they would be bound by their own valid contracts. The latter view would appear to be more consistent with the nature of conflict of laws. These explanations, however, are mere devices used to cover a wider application of the more general principle of *res judicata*, which in fact is applied with equal force to both foreign and domestic judgments.

The only uncertainty which exists lies in the technical consequences of the application of the *res judicata* rule to foreign judgments as contrasted with domestic judgments. The difficulty experienced here in finding a rationale for the fact that the forum enforces foreign judgments, is only due to the unconvincing explanations as to the basis on which the forum, when faced with conflict of laws problems in general, resorts to the foreign law in derogation from the principle of territoriality of laws. Instead of looking for theoretical explanations, it might be better to approach the whole problem from a practical point of view. Justice to litigants and economic necessity, in other words, public policy, force the courts to take into consideration the fact that it is impossible to fairly determine the rights of the parties if foreign judgments were to be ignored.

⁵⁰ See section II (4).

⁵¹ See section II (4).

II. Actionability of Foreign Judgments

1) Jurisdiction in personam and in rem

Canadian courts will not give effect to a foreign judgment which was rendered by a court that lacked jurisdiction in the international sense.⁵² This is the most important of all requirements for the recognition and enforcement of foreign judgments in Canada. Was the foreign court entitled to summon the defendant and subject him to judgment? Did it have jurisdiction over the subject matter of the action? In general, at the time when the action was commenced, there must have been a substantial direct and durable relation or connection between the state or province where the foreign court sits and the subject matter or the person against whom that court gave judgment.

Characterization

Whether a foreign judgment is one *in rem* or *in personam* must be determined as a *fact* by the court in which it is sought to have the judgment recognized regardless of the opinion or view which may have been expressed by the foreign court.⁵³ This fact is to be arrived at by discovering the effect of the proceeding according to the law of the foreign law district.⁵⁴

Thus in *Jones v. Smith*,⁵⁵ the Ontario court examined the law of California to ascertain the effect of proceedings to distribute the movables of a testator who died domiciled in that State. Middleton J.A. said:

⁵² *Vezina v. Will H. Newsome* (1907), 14 O.L.R. 658, 10 O.W.R. 17; *Queen v. Wright* (1877), 17 N.B.R. 363 (C.A.); *Mattar and Saba v. Public Trustee* (1951), 3 W.W.R. (N.S.) 287 (Alta) aff'd [1952] 3 D.L.R. 399 (C.A.); *Burn v. Bletcher* (1863), 23 U.C.Q.B. 28 (C.A.); *Webster MacLaughlan Co. v. Connors Bros. Ltd.* (1935), 9 M.P.R. 345, [1935] 2 D.L.R. 483 (N.B.) see 10 M.P.R. 159, [1936] 2 D.L.R. 164 (C.A.); *Wanderers Hockey Club v. Johnson* (1913), 5 W.W.R. 117, 25 W.L.R. 434, 18 B.C.R. 367, 14 D.L.R. 42 (C.A.); *Bank of Ottawa v. Esdale*, [1920] 1 W.W.R. 913, 15 Alta L.R. 269, 51 D.L.R. 485; *Schneider v. Woodworth* (1884), 1 Man. R. 41; *Fairchild v. McGillivray* (1910), 16 W.L.R. 562, 4 Sask. L.R. 237; *State Bank of Butler v. Benzason* (1914), 27 W.L.R. 812, 16 D.L.R. 848; *Willie v. Martin*, [1931] 3 W.W.R. 465 (B.C.); *British American Investment Co. v. Flawse* (1911), 19 W.L.R. 253, 4 Sask. L.R. 372; *Curtis v. Curtis*, [1943] O.W.N. 382; *Capital Nat. Bank v. Merrifield*, [1968] 1 O.R. 3 (how to establish jurisdiction).

⁵³ *Burchell v. Burchell* (1926), 58 O.L.R. 515; See also *Evans v. Evans* (1911), 19 W.L.R. 237 (Alta), aff'd (1912), 50 S.C.R. 262 which illustrates the distinction between a judgment in *rem* and a judgment *in personam*. And *Bonn v. National Trust Co. Ltd.* (1930), 65 O.L.R. 633.

⁵⁴ Read, *op. cit.*, pp. 133-134.

⁵⁵ (1925), 56 O.L.R. 550, [1925] 2 D.L.R. 790, 27 O.W.N. 447 (C.A.).

It may well be that such an adjudication of the Court, to the English idea, is not strictly a judgment *in rem*, but it partakes strongly of the incidents of such a judgment... This, however, is immaterial, for it was determined by the Lords in *Castrique v. Imrie* (1870), 4 H.L. 414, that it is for the court of the domicile to determine whether the proceedings in that court are *in rem* or merely *in personam*, and that when that court determines that its proceedings are *in rem* all foreign courts must so treat the proceedings, although they would not be so recognized by the law of the country where the judgment is set up.

The California judgment was considered *in rem* although a similar Ontario judgment would not have so operated.

In the absence of proof of the foreign law, the foreign judgment will be deemed to be the same as a domestic judgment of a similar nature.⁵⁶

Quebec judgments in Ontario

In Ontario, sections 52 and 53 of the Judicature Act⁵⁷ do not affect the rules of international jurisdiction. A judgment of a Quebec court is to be treated in Ontario as a judgment pronounced in a foreign country.⁵⁸ These sections only refer to the conclusiveness of Quebec judgments.

General Principles

The foreign court must have had power to render a judgment that will be recognized by the courts of other countries.

In *Sirdar Gurdial Singh v. Rajah of Faridkote*⁵⁹ The Earl of Selborne stated:

All jurisdiction is properly territorial and *extra territorium jus dicenti impune non patetur*. Territorial jurisdiction attaches (with special exceptions) upon all persons either permanently or temporarily resident within the territory, while they are within it; but it does not follow them after they have withdrawn from it, and when they are living in another independent country. It exists always as to land within the territory, and it may be exercised over movables within the territory; and, in question of status or succession governed by domicil, it may exist as to persons domiciled, or who when living were domiciled, within the territory. As between different provinces under one sovereignty (e.g., under the Roman Empire) the legislation of the sovereign may distribute and regulate jurisdiction; but no territorial legislation can

⁵⁶ *Davidson v. Sharpe* (1920), 60 S.C.R. 72.

⁵⁷ R.S.O., 1960, c. 197 as am., discussed *infra*.

⁵⁸ *Curtis v. Curtis*, [1943] O.W.N. 382; *Vezina v. Will H. Newsome Co.* (1907), 14 O.L.R. 658.

⁵⁹ [1894] A.C. 670, at p. 683.

give jurisdiction which any foreign court ought to recognise against foreigners, who owe no allegiance or obedience to the Power which so legislates.

In a personal action, to which none of these causes of jurisdiction apply, a decree pronounced *in absentem* by a foreign court, to the jurisdiction of which the defendant has not in any way submitted himself, is by international law an absolute nullity. He is under no obligation of any kind to obey it; and it must be regarded as a mere nullity by the courts of every nation except (when authorized by special local legislation) in the country of the forum by which it was pronounced.

The doctrine of territoriality has greatly influenced jurisdictional theory.⁶⁰

The essence of the capacity to exercise jurisdiction lies in the relationship between the territory of the foreign country and the defendant. In other words, jurisdiction depends on the existence, at the time when the foreign action was commenced, of a bond between the person of the defendant and the foreign court sufficient to justify the creation of a right which will be recognized by the law of the forum. This is the basic Anglo-Canadian doctrine which recognizes that a court of a foreign country has jurisdiction to adjudicate the rights of a defendant who was present in the foreign country at the time the action was commenced and therefore could be served with a writ of summons. It has its foundation in the physical-power common law theory of jurisdiction which has been projected into the international field.

Jurisdiction is also based upon a wider conception than mere physical power, since submission of the defendant to a court which otherwise is not competent is recognized by Canadian courts. Voluntary appearance does not necessarily involve any physical power or relationship between the defendant and the foreign forum. Moreover, it is possible to submit to the jurisdiction, without being present, by consent, express or implied, as in contractual submission. But, if, in all these cases, the relation is not purely physical, it must nevertheless be durable and direct. It is not always necessary to enter the foreign country to consent effectively to the jurisdiction of its courts, and complete absence of physical power over a national or domiciled person, of or in, the foreign country does not destroy the jurisdiction of the foreign court; *a contrario*, it is to be noted

⁶⁰ *Walsh v. Herman* (1908), 7 W.L.R. 388, 13 B.C.R. 314 (C.A.); See also *Vezina v. Will H. Newsome Co.* (1907), 14 O.L.R. 658, at p. 659; *Richer v. Borden Farm Products Co.* (1921), 49 O.L.R. 172, at p. 174; *Frederick A. Jones, Inc. v. Toronto General Insurance Co.*, [1933] O.R. 428, at p. 433, [1933] 2 D.L.R. 660 (C.A.); *Webster MacLaughlan Co. Ltd. v. Connors Bros. Ltd.* (1935), 9 M.P.R. 345, at p. 351, [1935] 2 D.L.R. 483 (N.B.).

that mere physical power does not, in itself, confer jurisdiction in the case of temporary presence or occasional business by a foreign corporation.

It was stated by Dr. Read that if the primary basis of jurisdiction is physical power there are also secondary considerations of reason, expedience, and fairness involved in it. He believes that there has been a transition from the physical force theory of jurisdiction to the theory of reason, as expressed by his observation that:

Recognition by the common law that a valid foreign judgment conclusively establishes that a right has been created by the judicial process made that change logically inevitable, because the judicial process, of creating rights as distinguished from the executive function of enforcing them involves 'not an exercise of physical power at all, but of the intellectual process of making a decision.'⁶¹

Today a new trend is emerging which combines the best aspects of all previous theories and rejects the principle of territoriality. A foreign court will be deemed to have international jurisdiction if the defendant had a real substantial connection with the country of the court pronouncing the judgment. This new basis for the exercise of jurisdiction which so far has only been applied in the field of divorce has a bright future in other fields. It would not be surprising if in a few years it became the foundation of jurisdiction both internally and externally in actions *in rem* and *in personam*. Actually, some of the present jurisdictional rules already reflect this concept.

Quite often the question of the international jurisdiction of the foreign court is complicated by the existence of special statutes that have enlarged the authority of that court. At common law, the courts have often assumed that the rules of jurisdiction concerning domestic and international cases were the same, taking the position that what the court does itself the foreign court can do; on the other hand, when the jurisdiction of the court is enlarged by some statutory rules, there has been a reluctance to apply such rules on a reciprocal basis and extend by analogy the jurisdiction of the foreign court. Thus, it has been held that a foreign court cannot extend its process beyond its own territory so as to subject either persons or property to its decisions.⁶² Unless the defendant served

⁶¹ Read, *op. cit.*, p. 259.

⁶² *Deacon v. Chadwick* (1901), 1 O.L.R. 346, at p. 351; See also *Swaizie v. Swaizie* (1899), 31 O.R. 324, at pp. 330-1; *Richer v. Borden Farm Products Co.* (1921), 49 O.L.R. 172, 64 D.L.R. 70 (C.A.); *Webster MacLaughlan Co. Ltd. v. Connors Bros. Ltd.* (1935), 9 M.P.R. 345, [1935] 2 D.L.R. 483 (N.B.); cf. *Canada Wood Specialty Co. v. Moritz* (1909), 42 S.C.R. 237, 17 O.L.R. 53, 11 O.W.R. 1048, 9 O.W.R. 522, 887 (C.A.).

outside the territorial jurisdiction of the foreign court submitted to its jurisdiction, the judgment of that court is a nullity everywhere except in the country of the forum.⁶³

The *international* jurisdiction is the only one recognized by Canadian courts and it is irrelevant whether or not the foreign court was entitled, under its own domestic law of procedure or conflict of laws, to deal with the case.⁶⁴ The enforcing court will determine the international jurisdiction of the original court exclusively on the basis of its own rules of conflict of laws. In other words, the conflict of laws rules of the enforcing court state the cases in which a foreign court is competent to give judgment. Thus, a foreign judgment may have a wider effect internationally than locally.⁶⁵

It follows that a finding by the foreign court that it has jurisdiction is not binding on the enforcing court.⁶⁶ This does not mean that these rules are able to confer jurisdiction upon or take it away from a foreign court. The foreign court derives its jurisdiction from its domestic law only. What the enforcing court actually does amounts to testing, in its own terms, a requirement for granting territorial extension to the foreign judgment.

Actions in personam

The international jurisdiction of foreign courts in actions *in personam* is based on the principles of presence and submission.

The enforcing court does not inquire into the local jurisdiction of the foreign court under the latter's domestic law, although in certain cases it may examine the pertinent statutes setting up the foreign court to determine whether it had jurisdiction over the general subject matter. No inquiry will be made as to the correctness of the venue.⁶⁷ The general attitude is that when the foreign court took jurisdiction over the subject matter and the parties, the court

⁶³ *Wedlay v. Quist* (1953-54), 10 W.W.R. (N.S.) 21, [1953] 4 D.L.R. 620.

⁶⁴ *Vanquelin v. Bouard* (1863), 15 C.B. (N.S.) 341.

⁶⁵ *Pemberton v. Hughes*, [1899] C.A. 1 Ch. 781.

⁶⁶ *Frederick A. Jones Inc. v. Toronto General Ins. Co.*, [1933] O.R. 428, [1933] 2 D.L.R. 660 (C.A.); Per Marten, J.A.: "It is well settled law that if the existence of a fact is necessary to the jurisdiction of a Court of a State to act judicially a finding by that Court that the fact exists will not be conclusive in the Court of another State. For if the alleged fact is not true the foreign Court has no jurisdiction to act and its finding of fact is *coram non iudice*".

⁶⁷ See *Vanquelin v. Bouard* (1863), 15 C.B. (N.S.) 341; *Pemberton v. Hughes*, [1899] 1 Ch. 781 (C.A.); *Bater v. Bater*, [1906] P. 209.

knew its own jurisdiction and properly exercised it.⁶⁸ As Canadian courts do not sit as courts of appeal in respect to foreign judgments, the local competence of the foreign court to deal with the case before it, is determined by the rules prevailing in the foreign country.⁶⁹ As noted above, the only jurisdiction which really matters is the international jurisdiction of the foreign court. Where the foreign state had jurisdiction according to the standard set by the *lex fori*, all the interests of the forum are safeguarded.

It is customary for Canadian courts to cite the dicta of Lord Justice Buckley in *Emanuel v. Symon*⁷⁰ as representing the rules concerning international jurisdiction in actions *in personam*. These dicta are based on the views expressed by Fry J. in *Roussillon v. Roussillon*,⁷¹ and Blackburn J. in *Schibsby v. Westenholz*.⁷²

A foreign court will be recognized as possessing international jurisdiction with respect to actions *in personam* in the following situations:

- (1) Where the defendant is a subject of the foreign country in which the judgment was obtained;
- (2) Where the defendant at the time of the commencement of the proceedings was physically present in or a resident of, or domiciled in, the foreign country in which the judgment was obtained;
- (3) Where the litigant voluntarily had submitted himself to the jurisdiction of the court of the foreign country in which the judgment was obtained:
 - (a) where the defendant as a plaintiff or counter-claimant had selected the foreign court,

⁶⁸ *Pemberton v. Hughes*, [1899] 1 Ch. 781 (C.A.), per Lindley M.R.

⁶⁹ *Pemberton v. Hughes*, [1899] 1 Ch. 781 (C.A.).

⁷⁰ [1908] 1 K.B. 302.

⁷¹ (1880), 42 L.T. Rep. 679, 14 Ch. Div. 351. In Canada see: *Moritz v. Canada Wood Specialty Co.* (1908) 17 O.L.R. 53, 9 O.W.R. 522, 887, 11 O.W.R. 1048; *Deacon v. Chadwick* (1901), 1 O.L.R. 346; *Ontario Power Co. of Niagara Falls v. Niagara, Lockport and Ontario Power Co.* (1922), 52 O.L.R. 168, at p. 173; *Metropolitan Trust & Savings Co. v. Osborne* (1909), 14 O.W.R. 135, at p. 140, aff'd 1 O.W.N. 785, 16 O.W.R. 226; *Gifford v. Calkin* (1912), 45 N.S.R. 277, 9 E.L.R. 498; *Curtis v. Curtis*, [1943] O.W.N. 382; *Webster MacLaughlan Co. v. Connors Bros. Ltd.*, [1935] 2 D.L.R. 483 (N.B.); *Mattar and Saba v. Public Trustee* (1951), 3 W.W.R. (N.S.) 287, aff'd [1952] 3 D.L.R. 399 (Alta C.A.); *Fairchild v. McGillivray* (1910), 16 W.L.R. 562, 4 Sask. L.R. 237; *Walsh v. Herman* (1908), 13 B.C.R. 314; *Re Robertson, Robertson v. Robertson* (1875), 22 Gr. 449.

⁷² (1870), L.R. 6, Q.B. 155.

- (b) where the defendant voluntarily had appeared,
- (c) where the defendant had contracted to submit himself to the forum in which the judgment was obtained.

Ownership, by the defendant, of property within the foreign jurisdiction, in respect of which the cause of action arose is no longer considered by the courts as a good basis of personal jurisdiction over him.⁷³ However a judgment *in personam* rendered by the court of the situs will be valid to the extent of the property.⁷⁴

1) *Where the defendant is a subject of the foreign country in which the judgment was obtained.*

International jurisdiction based on allegiance has been recognized by Canadian authorities.⁷⁵ However, the matter is not yet settled

⁷³ See *Emanuel v. Symon*, [1908] 1 K.B. 302, at pp. 311-312; *Sirdar Gurdyal Singh v. Rajah of Faridkote*, [1894] A.C. 670; Read, *op. cit.*, p. 186; *Beaty v. Cromwell* (1883), 9 P.R. 547 (Ont.); Cf. *Buffalo & Lake Huron Railway v. Hemmingway* (1863), 22 U.C.Q.B. 562 (C.A.), where it was held that a party whose goods have been placed by himself or with his consent within the jurisdiction of a foreign court, is personally liable to the jurisdiction of that court, so far as any question or proceeding affecting the goods is concerned, as fully as a resident within the jurisdiction.

⁷⁴ *Burn v. Bletcher* (1863), 23 U.C.Q.B. 28 (C.A.).

⁷⁵ *Marshall v. Houghton* (1923), 33 Man. R. 166, affirming [1922] 3 W.W.R. 65, 68 D.L.R. 308 (C.A.); *Bugbee v. Clergue* (1900), 27 O.A.R. 96, at p. 99, aff'd (1902), 31 S.C.R. 66, per Armour C.J.: "So... we have a regular judgment binding on the defendant in the State of Maine according to the law of that State, and I see no reason why it should not be enforced against him, a subject of that State, following what was said by the Court in *Schibsby v. Westenholz* (1870), L.R. 6 Q.B. 155: 'If the defendants had been at the time of the judgment subjects of the country whose judgment is sought to be enforced against them, we think that its laws would have bound them'. And there is no hardship in so holding for the defendant, after he heard of the judgment and at any time since, could have had his writ of review in the Supreme Judicial Court of the State of Maine... and he still maintains his allegiance to the United States and disclaims any allegiance to this country." *Fowler v. Vail* (1879), 4 O.A.R. 267, at p. 272, varying 27 U.C.C.P. 417. A plea which denied the jurisdiction of the foreign court on several counts, but omitted to aver that the defendant was not a subject of the foreign country was held to be bad. Patterson J.A. said: "The court has 'jurisdiction of the person' of the defendant when he is a subject of the country, even though not a resident or domiciled in it; and he is therefore (under the English law) bound by a judgment recovered under the process of the country to which he owes allegiance." See also *British Linen Co. v. McEwan* (1892), 8 Man. R. 99 (C.A.). Contra: *Attorney-General of B.C. v. Busch Kewitz*, [1971] 3 W.W.R. 17, at p. 21 (B.C. Co. Ct.).

as there is no clear cut decision supporting the view that the defendant is bound where he is a subject of the foreign country but was never a resident therein and never submitted to the jurisdiction of its courts. In England, *Douglas v. Forrest*⁷⁶ is cited as the foundation of the doctrine of jurisdiction based upon citizenship. Later, in *Schibsby v. Westenholz*⁷⁷ and *Gavin, Gibson & Co., Ltd. v. Gibson*,⁷⁸ it was said that a subject of the foreign state owes permanent allegiance to that state in the exercise of its functions, including those of the judiciary. On the other hand, in the *Faridkote* case, Lord Selborne declared that while territorial jurisdiction generally attaches upon all persons so long as they are either permanently or temporarily resident within the territory, it does not follow them when they have withdrawn from the territory. However, he also said that no territorial legislation can grant jurisdiction which any foreign court ought to recognize against foreigners who owe neither allegiance nor obedience to the legislating power.⁷⁹

Unqualified personal allegiance appears to be an exception to the territorial limitation of jurisdiction.

The problem has been obscured by the fact that, at common law, jurisdiction is actually acquired by personal service upon the defendant. Will the court recognize the jurisdiction of the foreign court over the defendant, when such jurisdiction is based solely on citizenship of the defendant regardless of the mode of service? In *Bugbee v. Clergue*,⁸⁰ which involved an action brought on a judgment rendered in the State of Maine against a defendant at all times a subject of the United States of America, Osler C.J. said:

We adhere to the findings of the trial Judge, that when the proceedings were commenced the defendant was not a resident of the State [of Maine], but was, as he still is, residing and carrying on business in this country. I do not think it is shewn that the defendant has made this the country of his domicil in the sense of its being his permanent home, if that be an element in the case...

Unless the absence of notice to the defendant involves such a jurisdictional error as to compel our courts to regard the judgment as invalid, it seems clear, the defendant having been a subject of the foreign state in which it was recovered, that it was a judgment pronounced by a court of competent jurisdiction, that is to say, a court which had

⁷⁶ (1828), 4 Bing 686.

⁷⁷ (1870), L.R. 6 Q.B. 155.

⁷⁸ [1913] 3 K.B. 379.

⁷⁹ *Singh v. Rajah of Faridkote*, [1894] A.C. 670; See also *Emanuel v. Symon*, [1908] 1 K.B. 302.

⁸⁰ (1900), 27 O.A.R. 96, at p. 107, aff'd 31 S.C.R. 66.

jurisdiction to summon the defendant to appear before it and to decide such matters as it has decided.

In *Dakota Lumber Co. v. Rinderknecht*⁸¹ Scott J. was of the opinion that where the defendant was residing out of the jurisdiction of the South Dakota court at the time of the proceedings the fact that he was then a citizen of the United States did not give that court jurisdiction over him.

A British subject or a citizen of the United States is governed by the laws affecting the Empire as a whole or the federal laws and those of the particular state in which he resides and perhaps also those of the place where he was born.

It is not correct to speak of the United States as one "country" as each state is a separate country, a separate legal district, or a territory subject to one system of law. The term country has a legal, as distinct from political, sense. This distinction must be borne in mind in applying the rule that if a defendant was at the time of the judgment a subject of the country whose judgment is sought to be enforced, he would be bound by it. Here the defendant was not a subject of South Dakota when the original judgment was rendered. In federal states, for some purposes, allegiance is equivalent to residence.

If citizenship were to be recognized as a basis for jurisdiction, the enforcing courts should always determine whether the defendant had an opportunity to defend himself, and whether he had been properly served in the foreign country. Citizenship does not appear to be a practical basis for jurisdiction in a federal state like Canada.

2) *Where the defendant was at the time of the commencement of the proceedings physically present in or a resident of or domiciled in the foreign country in which the judgment was obtained.*

Physical presence

The first situation to be considered is where the defendant is within the territorial limits of a country under such circumstances as to owe temporary allegiance to it.

In Alberta it was held that the foreign court had jurisdiction if it appears that at the commencement of the proceedings, the defendant was physically present in the foreign country whether on a special visit or merely in the course of his travels even if very

⁸¹ (1905), 6 Terr. L.R. 210, (1905), 2 W.L.R. 275 reversing (1905), 1 W.L.R. 481 (C.A.).

soon afterwards he left the territorial area of the foreign jurisdiction.⁸²

The principle of presence is not based on political allegiance as such, but on allegiance within the limits of territorial jurisdiction. This represents a compromise between the conflicting notions of territoriality and nationality. It is an allegiance owed to the sovereign by all persons temporarily present in its territory.⁸³

If a non-resident is brought into the foreign state by force or by fraud on the part of the plaintiff or where the defendant came only as a witness, the foreign court will not validly acquire jurisdiction over him. Of course the defendant must be personally served within the foreign state.

There has been considerable criticism of jurisdiction over a defendant arising from temporary presence within the state, on the ground that the possibility of occasional hardship to the plaintiff's cause is insufficient to justify the adoption of rules depriving the defendant of the power to defend on the merits at his own place of residence. It is submitted, however, that this rule should be retained as long as the defendant was personally served and had an opportunity to be heard.

Residence

Residence of a defendant in a foreign country at the time when proceedings are begun against him gives the courts of that country jurisdiction over him.⁸⁴ Actually, it is often difficult to distinguish

⁸² *Forbes v. Simmons* (1914), 20 D.L.R. 100 (Alta), 8 Alta L.R. 87, 7 W.W.R. 97, 29 W.L.R. 445; See also *Macaulay v. O'Brien* (1897), 5 B.C.R. 510, at p. 515 (capias ad respondendum); compare *Casavallo v. Casavallo* (1911), 1 W.W.R. 212, 4 Alta L.R. 6 (divorce and alimony decree).

⁸³ *Forbes v. Simons*, (1914), 20 D.L.R. 100 (Alta.), 8 Alta. L.R. 87, 7 W.W.R. 97, 29 W.L.R. 445.

⁸⁴ *Emanuel v. Symon*, [1908] 1 K.B. 302, at p. 309; *Schibsby v. Westenholz* (1870), L.R. 6 Q.B. 155; *Re Robertson - Robertson v. Robertson* (1875), 22 Grant 449, at p. 456; *Read v. Ferguson* (1912), 8 D.L.R. 737, 3 W.W.R. 611, 22 W.L.R. 751, 5 Sask. L.R. 405. For cases involving lack of residence, see *Curtis v. Curtis*, [1943] O.W.N. 382; *Belcourt v. Noel* (1913), 3 W.W.R. 926, 23 W.L.R. 368, 9 D.L.R. 788 (Alta.); *Lung v. Lee* (1929), 63 O.L.R. 194, [1929] 1 D.L.R. 130 (C.A.); *Davidson v. Sharpe*, [1919] 2 W.W.R. 76, 12 Sask. L.R. 183, 46 D.L.R. 256, affirming [1919] 1 W.W.R. 469, aff'd [1920] 1 W.W.R. 888, 60 S.C.R. 72, 52 D.L.R. 186; *Gauthier v. Blight* (1855), 5 U.C.C.P. 122 (C.A.); *Brennan v. Cameron* (1910), 1 O.W.N. 430, 15 O.W.R. 331; *Cyr v. Sanfaçon* (1853), 7 N.B.R. 641 (C.A.); *McCullough v. Defehr* (1909), 11 W.L.R. 524 (Sask.); *Berry v. Lewis* (1960), 67 Man. R. 347; *McLorg v. Stanning* (1908), 7 W.L.R. 701 (Man. C.A.).

residence from mere presence. It could be argued that residence means nothing more than such presence of the defendant as makes it possible to serve him with a writ or other process by which the action is commenced. Thus residence for purposes of jurisdiction in the case of foreign judgments equals physical presence.

However, physical presence in the country must be distinguished from residence, on the ground that, service beyond the jurisdiction will be good in the case of residence, but not in the case of mere presence. In the latter situation, the defendant must be served within the jurisdiction.⁸⁵

In the case of a corporation, residence means the carrying on of some business at a definite and, to some reasonable extent, permanent place.⁸⁶

Residence is certainly a very realistic test of jurisdiction. It meets some of the criticisms raised against mere physical presence and is easier to ascertain than domicile.

Domicile

The courts of the various provinces assert jurisdiction *in personam* over a defendant domiciled within their territory.⁸⁷ Will they recognize a similar jurisdiction in the foreign courts? The answer is not clear. Morris believes that in England domicile is not a sufficient ground for the jurisdiction of a foreign court,⁸⁸ because only *dicta* support this view. Dr. Read does not agree with Morris on the ground that *Douglas v. Forrest* upheld domicile rather than nationality as a basis for jurisdiction.⁸⁹

The domiciliary doctrine of jurisdiction seems satisfactory since everyone must have a domicile. There will always be one country where a debtor may be sued. In fact in some Canadian cases there are indications that the domicile of the defendant, in the absence of residence would be sufficient to give the foreign court jurisdiction.⁹⁰

⁸⁵ Read, *op. cit.*, p. 156.

⁸⁶ *Littauer Glove Corp. v. F. W. Millington* (1928), 44 T.L.R. 746; *Frederick A. Jones Inc. v. Toronto General Insurance Co.*, [1933] O.R. 428, at p. 439.

⁸⁷ Ontario rule 25(c).

⁸⁸ Dicey, Morris, 8th ed., 1967, p. 984.

⁸⁹ (1828), 4 Bing. 686.

⁹⁰ *Fairchild v. McGillivray* (1910), 16 W.L.R. 562, 4 Sask. L.R. 237; *Haspel v. Haspel*, [1934] 2 W.W.R. 412, at pp. 414-415; *Burpee v. Burpee*, [1929] 3 D.L.R. 18, [1929] 2 W.W.R. 128, 41 B.C.R. 201; *Lung v. Lee* (1929), 63 O.L.R. 194, [1929] 1 D.L.R. 130 (C.A.); *Marshall v. Houghton*, [1923] 2 W.W.R. 553, 33 Man. R. 166,

Although domicile, as a ground for jurisdiction is superior to allegiance, it is not fully adequate due to the difficulties involved in ascertaining its existence. Dr. Read⁹¹ suggests that if domicile were to be adopted as a ground for jurisdiction, it should be accompanied by residence or presence. Under these circumstances why not reject domicile altogether and make habitual residence the sole test of compelled submission to the jurisdiction of the foreign court?

3) *Where the litigant voluntarily had submitted himself to the jurisdiction of the court of the foreign country in which the judgment was obtained.*

The question whether a defendant to an action in a foreign court has submitted to the jurisdiction of the court is one of fact.⁹²

a) *Where the defendant as a plaintiff or counter-claimant had selected the foreign court.*

When a person in his capacity as plaintiff, selected the foreign court as forum to bring his action, he cannot afterwards complain that such court had no jurisdiction to give judgment against him.⁹³

Any other rule would be contrary to the principle of *res judicata*. The plaintiff is deemed to have submitted to its jurisdiction and decision and any set-off, counterclaim, or cross action which may be brought against him during the course of the action. The rule applies whether or not the defendant in the cross action, was resident in the country where as plaintiff he originally brought

at pp. 182-183 affirming [1922] 3 W.W.R. 65, 68 D.L.R. 308 (C.A.); *McCullough v. Defehr and Dyck* (1909), 2 Sask. L.R. 303; *Richer v. Borden Farm Products Co.* (1921), 49 O.L.R. 172, at pp. 174-175 (C.A.); *Brennan v. Cameron* (1910), 1 O.W.N. 430, 15 O.W.R. 331; *Deacon v. Chadwick* (1901), 1 O.L.R. 346, at p. 352; *Gibbons Ltd. v. Berliner Gramophone Co.* (1912), 27 O.L.R. 402, at p. 404.

⁹¹ Read, *Op. cit.*, p. 160.

⁹² *Richardson v. Allen* (1916), 11 Alta. L.R. 245, 10 W.W.R. 720, 34 W.L.R. 606 (C.A.); *Mattar and Saba v. Public Trustee* (1952), 5 W.W.R. (N.S.) 29, [1952] 3 D.L.R. 399 (C.A.) consent to judgment is a submission to the jurisdiction of the court; *Dent v. Hutton*, [1923] S.C.R. 716, [1924] 1 D.L.R. 401.

⁹³ Dictum by Blackburn, J. in *Schibsby v. Westenholz* (1870), L.R. 6 Q.B. 155, at p. 161; *Re Robertson, Robertson v. Robertson* (1875), 22 Gr. 449, at p. 455; *Burpee v. Burpee* (1929), 41 B.C.R. 201; *Swaizie v. Swaizie* (1899), 31 O.R. 324, at p. 330; *Burnfield v. Burnfield*, [1925] 2 W.W.R. 629, [1925] 3 D.L.R. 935, rev. on other grounds [1926] 1 W.W.R. 657, [1926] 2 D.L.R. 129, 20 Sask. L.R. 407; *Deacon v. Chadwick* (1901), 1 O.L.R. 346, at pp. 349-350.

the action. This does not mean that a reluctant claimant in interpleader proceedings must submit to a counterclaim by the original plaintiff, which is in fact an additional claim, nor need the plaintiff submit to a cross action which could not have been made the subject of a counterclaim. It is understood that in the case where the action is brought in the name of the plaintiff without his authorization, he is not deemed to have subjected himself to the jurisdiction of the foreign court. If the defendant makes a counterclaim in the foreign court he also submits to the jurisdiction of that court.

b) Where the defendant voluntarily had appeared.

It is well established that a person who voluntarily appears as a defendant submits himself to the judgment of the foreign court.⁹⁴ This may occur in different ways: 1) the defendant may appear and plead to the merits without protesting lack of jurisdiction; 2) he may appear and although protesting to the jurisdiction, plead to the merits;⁹⁵ or 3) he may appear for the sole purpose of contesting jurisdiction.

In *Voinet v. Barrett*⁹⁶ it was held that an appearance, unless made under duress, pressure, or compulsion, is an election to submit to the jurisdiction from which the process has issued and constitutes voluntary appearance.⁹⁷

⁹⁴ *Harris v. Taylor*, [1915] 2 K.B. 580.

⁹⁵ *Richardson v. Allen* (1916), 28 D.L.R. 134, 10 W.W.R. 720, 34 W.L.R. 606 (C.A.) 11 Alta L.R. 245, affirming (1915), 24 D.L.R. 883, 31 W.L.R. 437; *McFadden v. Colville Ranching Co. Ltd.* (1915), 8 W.W.R. 163, 30 W.L.R. 909 (Alta).

⁹⁶ (1885), 55 L.J. Q.B. 39 (C.A.).

⁹⁷ *Richardson v. Allen* (1916), 10 W.W.R. 720, 34 W.L.R. 606, 11 Alta L.R. 245, 28 D.L.R. 134, affirming (1915), 31 W.L.R. 437, 24 D.L.R. 883; *Dudley v. Jones* (1876), 10 N.S.R. 306; *Kingsmill v. Warrener* (1852), 13 U.C.Q.B. 18; *Tilton v. McKay* (1874), 24 U.C.C.P. 94; *Re Robertson, Robertson v. Robertson* (1875), 22 Gr. 449, at p. 454; *Turcotte v. Dawson* (1879), 30 U.C.C.P. 23; *Solmes v. Stafford* (1893), 16 P.R. 78 aff'd 264; *Shearer & Co. v. McLean* (1903), 36 N.B.R. 284, at p. 291 (C.A.); *Baldwin & Co. v. Smith* (1911), 18 W.L.R. 207 (Sask.) (if the appearance is due to the defendant's mistake, he must prove it); *Charles H. Lilly Co. v. Johnston Fisheries Co.* (1909), 14 B.C.R. 174 (C.A.) (1909), 10 W.L.R. 2; *Wedlay v. Quist* (1953), 10 W.W.R. (N.S.) 21 (Alta); *Huntingdon v. Marion* (1925), 28 O.W.N. 221, aff'd 29 O.W.N. 187 (C.A.); *McLean v. Shields* (1885), 9 O.R. 699 (C.A.); *McFadden v. Colville Ranching Co., Ltd.* (1915), 8 W.W.R. 163 (Alta); *The Dominion Coal Co. v. Kingswell S.S. Co., Ltd.* (1898), 30 N.S.R. 397; *Harris v. Garson* (1921), 51 O.L.R. 37, at p. 40; *Grocers' Wholesale Co. v. Bostock* (1910), 22 O.L.R. 130, at p. 143, 2 O.W.N. 144, at p. 149, 17 O.W.N. 129, at p. 141, (1912), 3 O.W.N. 1588; *Star Kidney Pad Co. v. McCarthy* (1886), 26 N.B.R. 107, at p. 111.

If the defendant takes the chance of a judgment in his favour, he is bound.⁹⁸ Whether or not the defendant has voluntarily appeared is a question of fact.⁹⁹ A special or conditional appearance entered by the defendant solely for the purpose of objecting that the court has no jurisdiction over him should not subject him to the jurisdiction of the court.

Such appearance would seem to constitute a request that the court advise whether the defendant must answer or suffer a valid default judgment.

The court has, by the special or conditional appearance, limited jurisdiction to determine its ultimate jurisdiction, and its decision becomes *res judicata* between the parties.¹⁰⁰ Once the question of jurisdiction has been dealt with and the case is decided on the merits, the defendant who is not satisfied with the decision on the question of jurisdiction would have to appeal in the original state and not attack collaterally the judgment in the state where the judgment is sought to be enforced. If the defendant filed a conditional appearance to contest the jurisdiction of the foreign court but raised defences on the merits he is considered to have submitted to the jurisdiction of that court.¹⁰¹ It has been held that if the defendant takes no part in the proceedings and a default judgment is given against him, his appearance is not voluntary when later on he moves to set the default judgment aside.¹⁰²

Statutes in the original court may also provide that an appearance by a defendant for the sole purpose of objecting to the

⁹⁸ *Schibsby v. Westenholz* (1870), L.R. 6 Q.B. 155, per Blackburn J., at p. 162, citing *De Cosse Brissac v. Rathbone* (1861), 6 H. & N. 301, 30 L.J. (Ex) 238.

⁹⁹ *Richardson v. Allen* (1916), 28 D.L.R. 134, 11 Alta L.R. 245; *Bank of Ottawa v. Esdale*, [1920] 1 W.W.R. 913, 15 Alta L.R. 269, 51 D.L.R. 485 (Alta) reversing [1920] 1 W.W.R. 283, 51 D.L.R. 168 (C.A.).

¹⁰⁰ See *Kennedy v. Trites Ltd.* (1916), 10 W.W.R. 412 (B.C.): Defendants, resident in British Columbia, were sued in Ontario, and filed a conditional appearance, and later moved to set aside the writ and service, on the ground that the Ontario Courts had no jurisdiction. Defendants were unsuccessful in this application. They took no further part in the proceedings, and judgment was eventually entered against them. In an action in British Columbia upon this judgment it was held, following *Harris v. Taylor*, [1915] 2 K.B. 580, that defendants could not again raise the question of jurisdiction.

¹⁰¹ *McFadden v. Colville Ranching Co.* (1915), 8 W.W.R. 163, 30 W.L.R. 909 (Alta); See also *Richardson v. Allen* (1916), 28 D.L.R. 134 (1915), 10 W.W.R. 720, 34 W.L.R. 606, 11 Alta L.R. 245, affirming (1915), 24 D.L.R. 883, 31 W.L.R. 437.

¹⁰² *McLean v. Shields* (1885) 9 O.R. 699; *Bank of Ottawa v. Esdale* (1920), 51 D.L.R. 485, [1920] 1 W.W.R. 913, 15 Alta L.R. 269, Rev. [1920] 1 W.W.R. 283, 51 D.L.R. 168 (C.A.).

jurisdiction of the court shall subject him to its jurisdiction for all purposes.

Where the defendant enters an appearance in order to protect property belonging to him that has already been seized by the foreign court, the appearance is not voluntary.¹⁰³ However in *Huntington v. Marion* where the defendant entered a limited appearance to resist the interim seizure of his goods, he was deemed to have submitted to the jurisdiction in as much as he did not dispute the merits of the case.¹⁰⁴

The appearance is voluntary where the defendant, animated by fear, appears for the purpose of protecting property on which execution may be levied or which may be seized pursuant to an action *in personam* pending against him, and the property is actually within the territory of the foreign country.¹⁰⁵ It is also considered a voluntary appearance where the defendant, though having no property at the time the foreign action was commenced within the dominion of the foreign court, appears in the action brought against him, because he fears that a judgment rendered against him might be made effective, should he later bring property into the foreign state.¹⁰⁶

Actually it is difficult to see why there should be any difference between a case where the appearance is entered to protect property actually seized and a case where the appearance is entered to protect property which may become subject to seizure. The defendant appearing should not be bound in either case.

Where a defendant is sued in a foreign court and is not already subject to its jurisdiction *in personam* in the international sense, his wisest course of action according to Dr. Read:

... is to do nothing until he is sued on the resulting foreign default judgment in the court of his own law district. He may lose his property, if any,

¹⁰³ *Voinet v. Barrett* (1885), 55 L.J. Q.B. 39 (C.A.).

¹⁰⁴ (1925), 29 O.W.N. 187, aff'g 28 O.W.N. 221, where Riddell, J. said (at p. 223): "...the defendant knowing that to attack the *saisi* he must enter an appearance to the action, deliberately entered an appearance. He cannot be heard to say that this general appearance should have a special effect only and if the law is not as stated he entered an appearance being obliged to do so. In either cases he is bound." See also *Tilton v. McKay* (1874), 24 U.C.C.P. 94 (C.A.).

¹⁰⁵ *Voinet v. Barrett* (1885), 55 L.J.Q.B. 39 (C.A.); *De Cosse, Brissac v. Rathbone* (1861), 6 H. and N. 301, 30 L.J. (Ex.) 238; *Poissant v. Poissant*, [1941] 3 W.W.R. 646 (Sask.).

¹⁰⁶ *Voinet v. Barrett* (1885), 55 L.J. Q.B. 39 (C.A.).

situated in the territory of the foreign court, but he may be able to resist the execution of the foreign judgment against his property located elsewhere; whereas if he does anything that amounts to a voluntary appearance in the foreign action, according to the law of that court, he will likely be held to have consented to its jurisdiction and will lose that power of resistance. He should not even enter a protest against the jurisdiction before judgment in the foreign court, unless he can do so without entering a general appearance according to its procedural law, although probably he can later safely appear and move to set the judgment aside in the foreign court for want of jurisdiction — providing he is careful to make no further move, such as to contest an appeal from the decision on his motion. Possibly he may with impunity appear in a foreign action and protest the jurisdiction if property owned by him has been seized by the foreign court as basis for its jurisdiction, and it is still barely possible that in certain circumstances his appearance to save his property which has been seized in execution under the foreign judgment would be held to be involuntary.¹⁰⁷

To treat a special appearance as a general appearance denies the defendant an opportunity to be heard, and may indirectly deprive him of property without due process of law.

In *Richardson v. Allen*¹⁰⁸ Beck J. in a very illuminating dissenting opinion has clarified the great confusion of thought that has crept into many cases upon the subject.

1. A person who appears unconditionally as defendant in a foreign Court having no jurisdiction over his person, but having jurisdiction over the class of case in question, appears voluntarily and thereby submits himself to the jurisdiction of the Court so that he cannot afterwards object that the Court had not both statutory and international jurisdiction over him.
2. A person who appears by way of a conditional appearance merely (without other objection to the jurisdiction of the Court), appears voluntarily and thereby submits himself to the jurisdiction of the Court both on the question of jurisdiction and (if that is decided against him), the question of the merits, whether he defends on the merits or not, so that he cannot afterwards object that the Court had not both statutory and international jurisdiction over him.
3. A person who appears by way of a conditional appearance (which in itself is a method of testing only the *statutory* jurisdiction of the Court), but also protests in any appropriate way against the international jurisdiction of the Court, but takes no other part in the case, does not appear voluntarily, and does not submit himself to the jurisdiction of the foreign Court, and the Court in which the judgment issued upon would hold the judgment to have been given without jurisdiction.

¹⁰⁷ Read, *op. cit.*, p. 170.

¹⁰⁸ (1916), 28 D.L.R. 134, (1915), 10 W.W.R. 720, 34 W.L.R. 606, 11 Alta L.R. 245 aff'g (1915), 24 D.L.R. 883, 31 W.L.R. 437.

4. A person who appears and protests, as stated in the last paragraph, but, though maintaining his protest, contests the case on the merits, does not submit himself to the jurisdiction of the Court if his purpose is to protect property which has already been seized by the foreign Court; but so far as the decisions have gone up to the present time, no other purpose in making the protest, *e.g.*, to protect property which he has or may expect to acquire within the jurisdiction of the foreign Court from seizure under execution, will be effective to prevent the nullification of the protest.

He concluded as follows:

...I should be prepared to hold that where a plaintiff sues a defendant in a foreign Court which has no territorial jurisdiction over him, but has statutory jurisdiction over him, the defendant — inasmuch as he has no power to prevent the plaintiff doing so, and inasmuch as the Court would naturally and quite properly refuse to pay any attention to a protest founded only on the want of international jurisdiction — is under no obligation to make any protest on that ground but may appear and contest the merits and the statutory jurisdiction in the hope of a favourable decision, no matter what his reason for so doing may be, and that the plaintiff, having chosen the forum, is bound, but the defendant, being there against his will, is not bound.

In the present case, however, the defendant did protest in the only way open to him, namely, by defence; for the conditional appearance is distinctly confined to the purpose of contesting the statutory jurisdiction only.

Having made his protest he appears never to have withdrawn it, and under these circumstances, at all events, he ought, in my opinion, to be at liberty to contest the merits in the hope of success without being bound in the event of failure...

In the present case, however, it does not appear that the defendant did contest the merits beyond merely alleging a defence on the merits along with his protest against the international jurisdiction of the Court, but it does not appear that he ever took any further part in the action. The burden of proving submission is on the plaintiff.

A defendant who appears only to protest against the jurisdiction of the foreign court cannot be said to have submitted to its jurisdiction.

Sometimes, by virtue of the appearance, the jurisdiction of the court will not only attach to claims stated in the original complaint but also to claims stated by the plaintiff in his amended complaint.

As respects the form of appearance, it need not be made in person; it can be made by a barrister, counsellor, or solicitor,¹⁰⁹

¹⁰⁹ As to whether a solicitor had any authority to enter an appearance, see *McLean v. Shields* (1885), 9 O.R. 699 (C.A.) or had any instructions: *Beaty v. Cromwell* (1883), 9 P.R. 547.

and will be considered valid if the person actually appearing has been properly and duly authorized.¹¹⁰

While proof of the appearance may be made by the plaintiff, usually the burden of proof lies on the defendant to show that he did not voluntarily appear. As the foreign judgment is presumed to be valid, an insufficient negation of appearance will be fatal to the defendant's cause.

c) Where the defendant had contracted to submit himself to the forum in which the judgment was obtained.

A person, corporation or partnership, though not otherwise subject to the jurisdiction of the foreign court, may contract to submit to the personal jurisdiction of that court.¹¹¹

Consent to the exercise of jurisdiction may also result from the doing of certain acts.¹¹²

The contract to submit to the jurisdiction *in personam* of the foreign court must be either express or necessarily implied from the facts, it cannot arise by implication of law.¹¹³

Where the defendant in the original court was not subject to the jurisdiction of that court unless he had contracted to submit himself to it, and an action is brought on the foreign judgment, the plaintiff must prove that the defendant did so contract¹¹⁴ once

¹¹⁰ *Bugbee v. Clergue* (1899), 27 O.A.R. 96, at pp. 98, 107-8, aff'd (1900) 31 S.C.R. 66. As to whether a public trustee as administrator of the estate of a deceased had the power to contract to submit himself to the judgment of a foreign court, see *Mattar and Saba v. Public Trustee* (1952), 5 W.W.R. (N.S.) 29, [1952] 3 D.L.R. 399 (Alta C.A.).

¹¹¹ In general see *Hughes v. Sharp* (1968), 66 W.W.R. 103 (B.C.) (*Cognovit actionem*); *Carveth v. Railway Asbestos Packing Co.* (1913), 4 O.W.N. 872 (Election of Domicile); *Gifford v. Calkin* (1911), 45 N.S.R. 277; *Hart & Son, Ltd. v. Furness, Withy Co. Ltd.* (1904), 37 N.S.R. 74; *Metropolitan Trust & Savings Co. v. Osborne* (1909), 14 O.W.R. 135, aff'd (1910), 16 O.W.R. 226 (*cognovit actionem*); *Manitoba Windmill & Pump Co. Ltd. v. McLelland* (1911), 16 W.L.R. 283, 4 Sask. L.R. 127, varied 4 Sask. L.R. 500 (C.A.); *Harbican v. Kennedy*, [1937] 2 D.L.R. 541 (Man.); *New Hamburg Mfg. Co. v. Shields* (1906), 4 W.L.R. 307, 16 Man. R. 212; *Ritter v. Fairfield* (1900), 32 O.R. 350 (C.A.) (warrant of attorney); *Mattar and Saba v. Public Trustee* (1951), 3 W.W.R. (N.S.) 287 aff'd [1952] 3 D.L.R. 399, (1952), 5 W.W.R. (N.S.) 29 (Alta C.A.).

¹¹² *Copin v. Adamson* (1875), L.R. 1 Ex. D. 17, 45 L.J. (Ex.) 15; *Feyerick v. Hubbard* (1902), 71 L.J. (K.B.), 509, per Walton J., at pp. 510-512.

¹¹³ Read, *op. cit.*, p. 176. *Hart & Son Ltd. v. Furness, Withy Co. Ltd.* (1904), 37 N.S.R. 74; *Mattar and Saba v. Public Trustee* (1952), 5 W.W.R. (N.S.) 29, [1952] 3 D.L.R. 399 (Alta C.A.); Read, Consent as a Basis of Jurisdiction *in personam* of a Foreign Court [1931] 1 D.L.R. 1.

the defence is set up that the judgment is a nullity because the defendant did not submit to the jurisdiction of that court.

Where in a note the defendant has authorized any attorney to appear for him and confess judgment without process in favour of the holder of the note, and such judgment has been regularly obtained according to the foreign law, he is bound by it.¹¹⁵

It is not to be implied that a defendant has contracted to submit to the jurisdiction of a foreign court from the mere fact that he has made a promissory note payable in the foreign country.¹¹⁶

Similarly an agreement to submit to the jurisdiction of a foreign court is not to be implied merely from the fact that the defendant to the action therein had entered into a contract in the foreign country or into a contract intended to be performed therein. If an obligation to submit to the foreign court's jurisdiction exists it must be by virtue of an express agreement. It cannot arise merely by implication.¹¹⁷ However, a provision in a contract entered into in Quebec stating that the parties "elect domicile" at the place of the contract amounts to a submission to the jurisdiction of Quebec courts.¹¹⁸

A covenant in a mortgage that it is to be enforced in the manner provided by the statutes of the state in which the land is situate, does not seem to be such an agreement as will confer upon the courts of that state a jurisdiction which they would not otherwise possess.¹¹⁹

In *Copin v. Adamson*¹²⁰ it was held that a person, by becoming a shareholder in a company whose articles of association expressly provide that shareholders are amenable to the jurisdiction of the

¹¹⁴ *Mattar and Saba v. Public Trustee, ibid.*

¹¹⁵ *Metropolitan Trust and Savings Co. v. Osborne* (1909), 14 O.W.R. 135, aff'd (1910), 16 O.W.R. 226, 1 O.W.N. 785; In *Ritter v. Fairfield* (1900), 32 O.R. 350 (C.A.), a judgment recovered on a warrant of attorney in Pennsylvania was held valid; see also *Harbican v. Kennedy*, [1937] 2 D.L.R. 541 (Man.); *Hughes v Sharp* (1968), 66 W.W.R. 103 (B.C.); *New Hamburg Mfg. Co. v. Shields* (1906), 4 W.L.R. 307, 16 Man. R. 212.

¹¹⁶ *Gifford v. Calkin* (1911), 45 N.S.R. 277, 9 E.L.R. 498 reversing 9 E.L.R. 384 (C.A.).

¹¹⁷ *Mattar and Saba v. Public Trustee* (1952), 5 W.W.R. (N.S.) 29, [1952] 3 D.L.R. 399, aff'g (1951) 3 W.W.R. (N.S.) 287 (Alta C.A.), see also *Wedlay v. Quist* (1953), 10 W.W.R. (N.S.) 21 affirming 9 W.W.R. (N.S.) 527 (Alta C.A.).

¹¹⁸ *Carveth v. Railway Asbestos Packing Co.* (1913), 4 O.W.N. 872.

¹¹⁹ *Dakota Lumber Co. v. Rinderknecht* (1905), 2 W.L.R. 275, 6 Terr. L.R. 210, reversing 1 W.L.R. 481 (C.A.).

¹²⁰ (1874), L.R. 9 Ex. 345; (1875), L.R. 1 Ex. D. 17, 45 L.J. (Ex.) 15.

courts of the country of incorporation in any action concerning the rights or obligations of the shareholders, submits himself to the jurisdiction of these courts. The articles of association constitute an agreement on the part of every shareholder to be bound by a judgment rendered by these courts. However a person does not, by the mere fact of becoming a shareholder in a foreign company, submit himself necessarily to the jurisdiction of the foreign courts. This equally applies to a partnership.¹²¹

If the statutory law of the state of incorporation provides for the submission of the shareholders to the jurisdiction of the courts of that state, a judgment rendered by these courts should be binding on the shareholders.

In *Allen v. Standard Trusts Company*¹²² an action was brought in Manitoba to enforce a liability imposed by the laws of Minnesota on shareholders of an insolvent company incorporated in that state. The court held that the non resident shareholder was subject to these laws as he had accepted the status of shareholder in this company as determined by the certificate of incorporation and in addition had agreed to submit himself in common with all other shareholders to the jurisdiction of the Minnesota courts and to be bound by their process for the relief of creditors, as set forth in the statutes of the state, in the event of the company becoming insolvent. The foreign assessment order was binding on the executors of the deceased non resident shareholder.

The appointment of a resident agent to carry on the business of a corporation or partnership and to bring or defend suits with respect to it, amounts to consent to be sued there. A judgment against the shareholders or partners upon service on the agent binds them and is valid extraterritorially.¹²³

A party may contract that actual notice of proceedings against him in a foreign court need not be given him in order to render him amenable to the jurisdiction of that court.¹²⁴ It is also possible to contract to be bound by substituted service.

A waiver or acceptance of service of process in an action, though given by a defendant outside the state, may confer jurisdiction over him when the waiver or acceptance of service of process can be

¹²¹ *Copin v. Adamson*, *ibid* and *Emanuel v. Symon*, [1908] 1 K.B. 302.

¹²² (1920), 57 D.L.R. 105, [1920] 3 W.W.R. 990, 30 Man. R. 594, *aff'g* (1919), 49 D.L.R. 399, [1919] 3 W.W.R. 974.

¹²³ *Bank of Australasia v. Harding* (1850), 19 L.J.C.P. 345; see also *Bank of Australasia v. Nias* (1851), 16 Q.B. 717.

¹²⁴ *Vallée v. Dumergue* (1849), 4 Ex. 290, 18 L.J. Ex. 398.

construed as an express consent to the exercise of jurisdiction of the foreign court.¹²⁵

The danger in the case of a contract to submit is that the defendant is generally forced to enter into the contract. Since the foreign judgment is not open to an inquiry into the merits of the case, great injustice may result to him.

Reciprocity — Substantial connection

In *Swaizie v. Swaizie*,¹²⁶ Meredith, J. said:

...with what may seem some inconsistency, English courts sometimes assert a jurisdiction in themselves which they deny the right of a foreign tribunal to exercise in like circumstances.

For instance in Ontario, rule 25 of the Supreme Court confers jurisdiction on the domestic courts to entertain actions which they have no jurisdiction at common law to entertain. A judgment rendered by a court who has acquired jurisdiction over the defendant in accordance with the provisions of this rule will be valid locally but will have no extraterritorial effect. As pointed out by Armour, C.J. no province can,

...pass laws having any operation outside its own territory, and no tribunal established by (it) can extend its process beyond its own territory so as to subject either persons or property to its decisions.

Every exertion of authority of this sort beyond this limit is a mere nullity, and incapable of binding such persons or property in any other tribunal.¹²⁷ (Story on Conflict of Laws, 8th Ed. sec. 539).

Thus, Canadian courts discriminate against foreign courts by claiming jurisdiction in more cases than they concede to them. There is no reason why, as a first step, our courts should not enlarge the grounds of recognition of the international jurisdiction of foreign courts on the basis of reciprocity. In other words Canadian courts should recognize a foreign judgment *in personam*

¹²⁵ See for instance *Ritter v. Fairfield* (1900), 32 O.R. 350 (C.A.), at p. 357 where the defendant had waived service and notice by the terms of a warrant of attorney appended to a promissory note: "Judgment by confession is one instance of a party voluntarily submitting himself to the jurisdiction of the court"; also *Metropolitan Trust & Savings Co. v. Osborne* (1909), 14 O.W.R. 135, aff'd (1910), 16 O.W.R. 266 (promissory note containing a warrant of attorney to confess judgment without process) and *Tilton v. McKay* (1874), 24 U.C.C.P. 94 (C.A.) (waiver of personal service).

¹²⁶ (1899), 31 O.R. 324, at pp. 330-331.

¹²⁷ *Deacon v. Chadwick* (1901), 1 O.L.R. 346, at p. 351. See also *McCullough v. Defehr & Dyck* (1909), 2 Sask. L.R. 303; *Richer v. Borden Farm Products Co. Ltd.* (1921), 49 O.L.R. 172, at p. 174. Cf. *Wedlay v. Quist* (1953), 10 W.W.R. (N.S.) 21 (Alta C.A.), pp. 25-26.

rendered by a court that exercised jurisdiction on a basis similar to that exercised by the enforcing court in similar circumstances.

There does not seem to be any compelling reason against recognizing a jurisdiction which the forum itself claims. In *Travers v. Holley*,¹²⁸ it was declared that what entitles an English court to assume jurisdiction should be equally effective in the case of a foreign court. Where there is in substance reciprocity "it would be contrary to principle and inconsistent with comity if the courts of England would refuse to recognize a jurisdiction which *mutatis mutandis* they claim for themselves". Reciprocity is designed to enlarge the grounds upon which English courts will recognize the jurisdiction of foreign courts. The English Court of Appeal recognized a foreign divorce decree upon the principle that it had been granted by a court using a special statutory basis of jurisdiction comparable to that possessed by statute by the courts of the forum.

This decision does not, however, substitute a new basis for the recognition of foreign judgments. The already existing grounds of jurisdiction of the foreign courts recognized by English courts are not superseded. The English rules for the recognition of the jurisdiction of foreign courts are only extended to cover grounds similar to those resorted to in domestic cases. In 1958, in *Robinson-Scott v. Robinson-Scott*¹²⁹ the principle of *Travers v. Holley* was refined. What matters is whether on analogous facts, the English court could have taken jurisdiction: "It is not necessary that the foreign statutory grounds of jurisdiction be substantially similar to the English ones. It is sufficient that facts exist which would enable the English courts to assume jurisdiction".

Travers v. Holley was approved by the House of Lords in *Indyka v. Indyka*.¹³⁰ However, their Lordships were of the opinion that the rule of that case did not amount to more than a general working principle that changes in domestic jurisdiction should be taken into account by the courts in decisions as to what foreign decrees they will recognize.¹³¹ They searched for a more rational approach to the problem of jurisdiction and came to the conclusion that the real basis of the jurisdiction of a foreign court to grant a decree

¹²⁸ [1953] P. 246, [1953] All E.R. 794 (C.A.), at p. 800; see also Denning L.J. in *Re Dulles*, [1951] Ch. 842, at p. 851; Kennedy, "Reciprocity" in the Recognition of Foreign Judgments (1954), 32 Can. Bar Rev. 359; Kennedy, Recognition of Judgments *in personam*: The Meaning of Reciprocity (1957), 35 Can. Bar Rev. 123.

¹²⁹ [1958] P. 71.

¹³⁰ [1967] 3 W.L.R. 510.

¹³¹ Lord Wilberforce, at p. 559.

of divorce that will be recognized in England is the existence of a real and substantial connection between the parties obtaining the decree and the country of the court that granted it.

This principle of real and substantial connection is a very sound one, it goes much beyond reciprocity since the foreign court may have international jurisdiction in the eyes of the English court in a case in which the English court would not be able to exercise a similar jurisdiction.

Applied to foreign judgments *in personam* this principle would still leave the Canadian courts free to determine whether the defendant had a real and substantial connection with the foreign court. Furthermore it may not make it possible to recognize the jurisdiction of a foreign court based on grounds similar to those found in rule 25 of the Supreme Court of Ontario whereas reciprocity would. At least the principle of real and substantial connection disposes of the objection that since the jurisdiction of Canadian courts to order service *ex juris* is discretionary "so also (if the suggested extension of the principle of *Travers v. Holley* had prevailed) would have been its recognition of foreign judgments based on similar jurisdictional grounds".¹³²

Travers v. Holley and *Indyka v. Indyka* are decisions involving judgments *in rem* in matters affecting matrimonial status. They have been followed in matrimonial cases but not in judgments *in personam*.

It seems that, for instance, the Ontario courts could concede to the courts of foreign countries the same rights of jurisdiction which they claim for themselves under rule 25 so long as the foreign legislation involved does not differ in substance and spirit from its Ontario equivalent or the facts are such, that they would have enabled the Ontario court to exercise jurisdiction. This view is supported by the remarks of Denning, L.J. in *Re Dulles*¹³³ in his analysis of *Harris v. Taylor*.¹³⁴ The learned judge said:

... Those rules correspond with the English rules for service out of the jurisdiction contained in Ord. 11; and I do not doubt that our courts would recognize a judgment properly obtained in the Manx courts for a tort committed there, whether the defendant voluntarily submitted to the jurisdiction or not; just as we would expect the Manx courts in a converse case to recognize a judgment obtained in our courts against a resident of the Isle of Man, on his being properly served out of our jurisdiction for a tort committed here.

¹³² Dicey, Morris, *op. cit.*, 8th ed., 1967, p. 986.

¹³³ [1951] Ch. 842, at p. 851.

¹³⁴ [1915] 2 K.B. 580.

The opposition to this view has generally been along the lines of the often quoted remark of Lord Ellenborough:

Can the Island of Tobago pass a law to bind rights of the whole world? Would the world submit to such an assumed jurisdiction?¹³⁵

The traditional approach of the courts has been that the power of the foreign jurisdiction to legislate or exercise judicial control over persons outside its own territorial limits is in direct conflict with the principle of territoriality. All jurisdiction is properly territorial and *extra territorium jus dicenti, impune non paretur*.¹³⁶ Thus one may wonder whether *Travers v. Holley* is a sound decision, especially where English courts are given discretionary powers to issue writs or notices for service out of the jurisdiction. Should one condone a progressive abandonment of the common law rule that proceedings *in personam* are against only those persons who are within the territorial limits of our courts? Such an attitude would appear to be in direct conflict with common law principles of due process and natural justice, especially where it results in recognizing jurisdiction based solely on a service of a writ or notice served out of the jurisdiction. (Or based upon a writ served on the registrar or superintendent of motor vehicles or secretary of state.)

It has been suggested by Dr. Keenedy¹³⁷ that an extension of the grounds of jurisdiction of foreign courts on the basis of reciprocity is a sound principle in federal states, especially in the field of torts. He says:

At common law, an action could not be brought against an absent defendant for a tort committed within the jurisdiction. When the rule was changed domestically, it was not thought until recent reciprocity discussions that a judgment in such action would have validity abroad.

Today with the development and rapidity of transportation it may be desirable that the courts of the place where the tort was committed and where probably most of the witnesses are located

¹³⁵ *Buchanan v. Rucker* (1808), 9 East 192, at p. 194.

¹³⁶ *Sirdar Gurdayal Singh v. The Rajah of Faridkote*, [1894] A.C. 670, at p. 683; see also *Schibsby v. Westenholz* (1870), L.R. 6 Q.B. 155, where Lord Blackburn said, at p. 159: "...if the principle on which foreign judgments were enforced was that which is loosely called 'comity', we could hardly decline to enforce a foreign judgment given in France against a resident in Great Britain under circumstances hardly, if at all, distinguishable from those under which we, *mutatis mutandis*, might give judgment against a resident of France; but it is quite different if the principle be that which we have just laid down [the doctrine of obligation]".

¹³⁷ Keenedy, "Reciprocity" in the Recognition of Foreign Judgments (1954), 32 Can. Bar Rev. 359, at p. 379.

should have jurisdiction, and that any judgment arising from the new jurisdiction should be enforceable everywhere, especially in view of the fact that most of these claims are defended by insurance companies with little hardship on a foreign defendant. This author also maintains that in the field of contract the present area of rule 25 in Ontario or Order XI in British Columbia¹³⁸ is very reasonable and could easily be extended to foreign courts. It seems that, besides statutory grounds of jurisdiction, reciprocity could also be extended to cover common law grounds of jurisdiction.

As jurisdiction has always been the most important obstacle to recognition of foreign judgments, there is not doubt that the principle of jurisdictional reciprocity more than that of real and substantial connection can be an excellent method for facilitating the recognition and enforcement of foreign judgments in the forum. This principle should at least be followed in federal states where statutory as well as common law jurisdictional principles are not substantially different. It may even result in an indirect unification of rules of jurisdiction without the usual obstacles and inconveniences of a direct unification. To adhere strictly to the principles enunciated over sixty years ago in *Emanuel v. Symon*¹³⁹ is a sign of backwardness and not in the tradition of the Anglo-Canadian system. Whether the rule should be extended to judgments rendered outside Canada is a more delicate question.

Judgments in rem

Power over the thing that is the subject-matter of the action is an essential factor for the exercise of jurisdiction *in rem* concerning that thing.

The courts of a foreign state or sister province have exclusive jurisdiction to give a judgment *in rem* concerning any immovable situated within that state or province.

Conversely they have no such jurisdiction with respect to any immovable situated elsewhere.¹⁴⁰

¹³⁸ Ont. r. 25 (1) (e); B.C. O. XI (1) (e).

¹³⁹ [1908] 1 K.B. 302.

¹⁴⁰ *Duke v. Andler*, [1932] S.C.R. 734, [1932] 4 D.L.R. 529 reversing [1932] 1 W.W.R. 257, 45 B.C.R. 96, [1932] 2 D.L.R. 19, which varied 43 B.C.R. 549, [1931] 3 D.L.R. 561; see also *Burchell v. Burchell* (1926), 58 O.L.R. 515, at p. 525-6; *Re Mills* (1912), 21 O.W.R. 887, 3 O.W.N. 1036, (1912), 3 D.L.R. 614 (Ont.); *Haspel v. Haspel*, [1934] 2 W.W.R. 412 (Alta), where Ewing, J. said, at p. 415: "The Courts of the State of Washington have no right to deal with the title to real property within the jurisdiction of the Courts of Alberta"; see also *Chassey*

The courts of a foreign state or province also have general jurisdiction *in rem* concerning a movable located in that state or province but have no such jurisdiction when it is located elsewhere.¹⁴¹ Dr. Read¹⁴² points out that there are two cases that seem to support the view that a foreign court has no jurisdiction *in rem* concerning a movable when it is taken into the territory of that court against the owner's wish "although in both cases the decision was expressly rested upon a different ground".¹⁴³ He feels that in the case of a movable, a foreign court should not be able to destroy ownership without the consent of the owner as "ownership is not merely a nexus between a person and all the world concerning a thing; it is primarily a static relation between a person — the owner — and the thing owned".¹⁴⁴

In *Jones v. Smith*¹⁴⁵ the Ontario court relying on *in re Trufort*¹⁴⁶ held that where a court of the country of the domicile of the deceased adjudicates upon the distribution of his movables, that adjudication is binding upon the whole world irrespective of the situs of these movables. In that case the situs of the movables as well as the domicile of the deceased were located within the territory of the foreign court.

In *re Hickson*,¹⁴⁷ it was held that the rights conferred upon the Committee of a lunatic by the courts of his domicile with respect to his movables wherever situated are entitled to universal recognition. These cases indicate that in certain types of judgments *in rem* concerning movables international jurisdiction may be based either on the actual situs of the movables or on the domicile of

and Wolbert v. May, [1921] 1 W.W.R. 69, 29 B.C.R. 83, aff'd [1922] 2 W.W.R. 225, 68 D.L.R. 427 (Can.); *Re Trustee Act, Re a Certain Lot in New Westminster District* (1960), 32 W.W.R. 388 (B.C.). A foreign injunction will not be recognized as to land within another jurisdiction; *De Venne v. Warren* (1910), 45 N.S.R. 8, 8 E.L.R. 453.

¹⁴¹ *Burn v. Bletcher* (1863), 23 U.C.Q.B. 28 (C.A.); see also *Buffalo & Lake Huron Railway Co. v. Hemmingway* (1863), 22 U.C.Q.B. 562, at p. 567 (C.A.); *Joseph F. Michado v. The Ship "Hattie & Lottie"* (1904), 9 Ex. C.R. 11; *Van Every v. Grant* (1862), 21 U.C.Q.B. 542 (C.A.).

¹⁴² Read, *op. cit.*, p. 140.

¹⁴³ *Singer Sewing Machine Co. v. McLeod* (1888), 20 N.S.R. 341; *Houghton v. May* (1910), 17 O.W.R. 750.

¹⁴⁴ Read, *op. cit.*, p. 140.

¹⁴⁵ (1925), 56 O.L.R. 550; also *Senkiw et al. v. Muzyka et al.* (1967), 61 W.W.R. 58, 65 D.L.R. (2d) 622, aff'd (1969), 4 D.L.R. (3d) 708 (C.A.), aff'd (1970), 72 W.W.R. 314 (S.C.C.); *Ostrander v. Houston* (1915), 8 Sask. L.R. 132, 8 W.W.R. 367.

¹⁴⁶ (1887), 36 Ch. D. 600.

¹⁴⁷ (1927), 61 O.L.R. 180.

the owner. Actually, quite often the situs and the domicile of the owner will be the same since some movables are deemed to be located in the state where the owner is domiciled. As pointed out by Dr. Read:

If the court of the domicile is to be allowed a concurrent jurisdiction *in rem* over movables in these two instances, the justification for the exception to the territorial principle is probably to be found in a greater convenience in dealing with the movables of the owner as a unit.¹⁴⁸ convenience in dealing with the movables of the owner as a unit.¹⁴⁸

Competence of the foreign court under its own law

Once it has been established that, according to the rules of conflicts of the forum, the foreign court had international jurisdiction over the parties and over the subject matter, should there be an inquiry into the competence of the foreign court under its own law?

In *Pemberton v. Hughes*, a case involving a foreign decree of divorce, it was held that the foreign court must have had jurisdiction over the subject-matter and over the parties before its decree can be recognized in England.¹⁴⁹ This does not seem to mean that in practice there is any closer examination. Actually, *Pemberton v. Hughes*, usually is cited for the proposition that an English court will not inquire into the irregularities of procedure of the foreign court, even though their effect was to render the decree of dissolution of marriage a nullity under the local law.

In this case Lindley, M.R. said:¹⁵⁰

Assuming that the defendants are right, and that the decree of divorce is void by the law of Florida, it by no means follows that it ought to be so regarded in this country. It sounds paradoxical to say that a decree of a foreign court should be regarded here as more efficacious or with more respect than it is entitled to in the country in which it was pronounced. But this paradox disappears when the principles on which English courts act in regarding or disregarding foreign judgment are borne in mind. 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 entertain the sort of case which it did deal with and its competence to require the defendant to appear before

¹⁴⁸ Read, *op. cit.*, p. 144.

¹⁴⁹ [1899] 1 Ch. 781.

¹⁵⁰ [1899] 1 Ch. 781, at p. 790-791.

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.

There is no doubt that the Courts of this country will not enforce the decisions of foreign Courts which have no jurisdiction in the sense above explained, *i.e.*, over the subject-matter or over the persons brought before them... But the jurisdiction which alone is important in these matters is the competence of the court in an international sense — *i.e.*, its territorial competence over the subject-matter and over the defendant. Its competence or jurisdiction in any other sense is not regarded as material by the Courts of this country.

In this case the Florida court was internally competent to deal with a case of divorce. *Pemberton v. Hughes* was followed in *C. v. C.*¹⁵¹ There, the Illinois court having had international jurisdiction to grant a divorce, as the defendant was domiciled in that state, and also jurisdiction over the subject-matter, the Ontario Court refused to inquire as to whether the foreign court had made a mistake by not inquiring into the residence of the parties prior to the filing of the petitions. On the other hand, in *Castrique v. Imrie*¹⁵² which also involved a judgment *in rem*, Blackburn J. considered relevant:

...whether the sovereign authority of that State has conferred on the Court jurisdiction to decide as to the disposition of the thing, and the court has acted within its jurisdiction.

These words could be taken as an indication that the foreign court must have been competent according to its own law. However, Dr. Morris¹⁵³ maintains that:

A foreign judgment cannot be impeached in general, on the ground that the court which gave it was not competent to do so according to the law of the foreign court concerned.

Thus, in Canada, in an action on a New York judgment rendered by an inferior court, it was held that it was not necessary to aver that the cause of action arose within the jurisdiction of that court as determined by its local law.¹⁵⁴ On another occasion the court was of the opinion that the enforcing court will assume that the foreign court acted within the jurisdiction conferred to it by the foreign law.¹⁵⁵

¹⁵¹ (1917), 39 O.L.R. 571, at p. 574.

¹⁵² (1870), L.R. 4 H.L. 414, at p. 429.

¹⁵³ Dicey, Morris, *op. cit.*, rule 165 (2).

¹⁵⁴ *Prentiss v. Beemer* (1847), 3 U.C.Q.B. 270.

¹⁵⁵ *Meagher v. Aetna Insurance Co. et al* (1873), 20 Gr. 354, at p. 372; see also *McPherson et al v. McMillan* (1846), 3 U.C.Q.B. 30, at p. 33.

In the case of a judgment *in personam*, *Vanquelin v. Bouard* is usually cited as supporting this rule.¹⁵⁶

In this case, it was pleaded to a declaration on a judgment proceeding from a French commercial court for the amount of certain bills of exchange that the original action had been brought in the wrong court according to the French rules of procedure, because the defendant was not a trader when he accepted the bills, and because the bills falsely purported to be drawn at a place where in fact they were not drawn and where the defendant did not have his domicile. The plea was held bad on demurrer. Chief Justice Earle said:

But I am of the opinion that the judgment of a foreign court is valid if the court has jurisdiction over the person and over the subject-matter of the action; and it seems to me upon this plea that the court of the Tribunal de Commerce had jurisdiction over the subject-matter of the suit in which the judgment was obtained, *viz.*, the liability of the acceptor of a bill of exchange, and that if it were a matter of defense that the defendant was not a trader or not resident within the jurisdiction of the court, it was a matter which ought to have been set up by way of defence in that court, and cannot avail the defendant in an action upon the judgment here.

As the French court did not lack internal jurisdiction since it was competent to deal with the sort of case that it did deal with, it is doubtful that it affords a good support for the rule mentioned above.

It seems that in the case of a foreign judgment *in personam*, its validity should depend upon possession by the court pronouncing it, not only of international but also of local jurisdiction *ratione materiae*. Therefore, the enforcing court should be able to examine the statutory background of the foreign court in order to determine whether it had been given jurisdiction over the general subject-matter of the action and the parties but not further. This amounts only to a control over the foreign court by an inquiry whether it exceeded the jurisdiction conferred upon it by municipal law. It is then possible to draw a distinction between judgments which are irregular in the foreign country but are valid there until set aside, and judgments which are null and without legal effect in the foreign country because their rendition is beyond the power of the foreign court. *Pemberton v. Hughes* and *Vanquelin v. Bouard* seem to belong to the first category, although in the former case the court assumed the Florida judgment to be void.

¹⁵⁶ (1863), 15 C.B. (N.S.) 341, at p. 368.

In most cases the foreign judgment will be irregular rather than a nullity.

So long as the foreign judgment is rendered by a court having international jurisdiction and local jurisdiction over the subject-matter it should be recognized by Canadian courts, even if the venue is not correct, because our courts are not courts of appeal of foreign decisions. If the foreign judgment is void where it was rendered it should not be recognized and enforced. A court cannot recognize that which does not exist at law. A distinction must be made between incorrect use of an existing power and the usurpation of a nonexisting power.

To sum up, where a foreign court possesses jurisdiction over the parties and the subject-matter, in other words, has an existing power of jurisdiction, the enforcing court will not inquire into the correctness of the use of that power, unless the proceedings are contrary to Canadian views of substantial justice.

In 1956, at the Conference of Commissioners on Uniformity of Legislation in Canada, Dr. Read¹⁵⁷ stated that a foreign money judgment rendered in a court which had no jurisdiction in the local sense, that is no competence to adjudicate on the cause of action or concerning the person of the defendant, should be treated as a nullity although the court had international jurisdiction. The foreign court must have had jurisdiction under its own law and under the conflict rules of the enforcing court. His proposal was incorporated in section 3(6) of the Reciprocal Enforcement of Judgments Act adopted by most provinces of Canada.

3(6) No order for registration shall be made if it is shown by the judgment debtor to the court to which application for registration is made that,

- (a) the original court acted either
 - (i) without jurisdiction under the conflict of laws rules of the court to which application is made, or
 - (ii) without authority, under the law of the original court, to adjudicate concerning the cause of action or subject-matter that resulted in the judgment or concerning the person of the judgment debtor or without such jurisdiction and without such authority.

¹⁵⁷ 1958, Proceedings, p. 90. *E.g.* Alberta, S.A., 1958, c. 33, s. 3(6) and section IV, *infra*.

2) *The foreign judgment must be final and conclusive*

It is well settled that an action will not lie on a foreign judgment that is not final and conclusive.¹⁵⁸ The enforcing court must examine whether according to the law of the country where the judgment was rendered it is *res judicata* between the parties. Has the judgment determined all possible controversies between them? Is it still subject to be reopened, reviewed and modified by the same court from which it issued? What is the effect of an appeal to a different court? These are some of the questions which must be dealt with here.

If a judgment is to be considered final only when it leaves nothing for future determination or ascertainment as a prerequisite to effective execution and is not subject to subsequent rescission, review or modification by *any* court, it follows that any authorized procedure of review could prevent the recognition and enforcement of a foreign judgment in the forum.

Canadian and English courts have distinguished between a remedy given by the court rendering the judgment and one given by a different court.

The finality and conclusiveness of a foreign judgment is presumed in favour of a plaintiff who relies on it unless it is put in issue by the defendant's pleading.¹⁵⁹

Remedy given by the same court that rendered the judgment

In *Nouvion v. Freeman*¹⁶⁰ it was held that a foreign judgment rendered in proceedings of a summary nature will not be given any effect in England where it may be nullified or altered in later plenary proceedings between the same parties in the same court. In this case a "remate" judgment was obtained upon summary

¹⁵⁸ *Nouvion v. Freeman* (1887), 37 Ch. D. 244 (C.A.), aff'd (1889), 15 App. Cas. 1 (H.L.); *Gauthier v. Routh* (1843), 6 O.S. 602, at pp. 607-608; *Wood v. Wood* (1916), 37 O.L.R. 428, at p. 431; *Maguire v. Maguire* (1921), 50 O.L.R. 100, at p. 103; *McMillan v. Ritchie* (1851), 2 Allen (N.B.) 242, at p. 253; *Graham v. Harrison* (1889), 6 Man. R. 210; *Hadden v. Hadden* (1899), 6 B.C.R. 340, at p. 350; *Eastern Trust Co. v. MacKenzie Mann & Co.* (1916), 10 O.W.N. 445; *Ashley v. Gladden*, [1954] 4 D.L.R. 848 (C.A.), [1954] O.W.N. 558; *McIntosh v. McIntosh*, [1942] O.R. 574, [1942] 4 D.L.R. 70 (C.A.).

¹⁵⁹ *Smith v. Smith*, [1923] 2 W.W.R. 389, 17 Sask. L.R. 203, [1923] 2 D.L.R. 896 (C.A.); in *Smith v. Smith* (1954), 13 W.W.R. (N.S.) 207, [1955] 1 D.L.R. 229 (B.C.), it was held that "The onus is on the plaintiff to establish that the [alimony] orders are final" once the defendant denies their finality. As to proof that the judgment is final see *Whitla v. McCuaig* (1891), 7 Man. R. 454.

¹⁶⁰ (1887), 37 Ch. D. 244 (C.A.), aff'd (1889), 15 App. Cas. 1.

proceedings in a Spanish court for the recovery of a debt.¹⁶¹ An action was brought in England on the "renewed" judgment before the time for appeal or for plenary proceedings had elapsed. The House of Lords rejected the action on the ground that the judgment was not final since it could not be enforced against a request of the defendant for rehearing. The Spanish judgment was not *res judicata* with regard to the parties and did not extinguish the cause of action. The House of Lords applied the principle that if a judgment is subject to modification by the original court, the enforcing court cannot know the extent of the debtor's obligations.¹⁶²

Lord Watson said:¹⁶³

...no decision has been cited to the effect that an English Court is bound to give effect to a foreign decree which is liable to be abrogated or varied by the same Court which issued it. All the authorities cited appear to me, when fairly read, to assume that the decree which was given effect to had been pronounced *causâ cognitâ*, and that it was unnecessary to inquire into the merits of the controversy between the litigants, either because these had already been investigated and decided by the foreign tribunal, or because the defendant had due opportunity of submitting for decision all the pleas which he desired to state in defence. In order to its receiving effect here, a foreign decree need not be final in the sense that it cannot be made the subject of appeal to a higher Court; but it must be final and unalterable in the Court which pronounced it; and if appealable, the English courts will only enforce it subject to conditions which will save the interests of those who have the right to appeal.

A foreign judgment is not final if the judgment creditor must ask the original court to make an order for its enforcement, especially

¹⁶¹ Besides ordinary judicial proceedings, most legal systems provide for some kind of summary proceedings in certain specified cases. Although the judgment is executory on these proceedings, it is subject to reversal on appeal before the same tribunal. The action which is based on a legal document of indebtedness is brought before the president of the tribunal. The defendant can set up certain limited defenses but cannot dispute the validity of the contract under which the debt arose. Either party, before execution based on the "renewed" judgment is served, may be allowed to continue within a certain time and in the same court in respect of the same matter, ordinary plenary proceedings in which all defenses are available and in which the "renewed" judgment has no effect whatsoever. A judgment rendered in plenary proceedings renders the "renewed" judgment inoperative. The "renewed" judgment may be enforced at once upon giving security, although an appeal or plenary proceedings are pending. If plenary proceedings are not taken within a certain stipulated time, the "renewed" judgment becomes conclusive and binding upon the parties.

¹⁶² See also *Gauthier v. Routh* (1843), 6 O.S. 602 (C.A.); *Graham v. Harrison* (1889), 6 Man. R. 210.

¹⁶³ (1889), 15 App. Cas. 1, at p. 13.

where the original judgment may, by this procedure, become liable to abrogation or alteration.¹⁶⁴ If the foreign court retains the power to vary it in respect of the sums sued for, such judgment is not final.¹⁶⁵

An interlocutory or provisional order for the payment of money into court is not final. This includes an interlocutory or collateral order for the payment of costs.¹⁶⁶ Of course, where the order for the payment of costs is part of the final decree of the foreign court which disposes of the whole matter under dispute, the judgment will be deemed final.¹⁶⁷

The foreign judgment must be more than an order which merely requires something to be done, pending the prosecution of the action. It is very important to emphasize that the foreign judgment must be *res judicata* in the court which rendered it. To hold otherwise would be to place the judgment creditor in a better position in the enforcing court than in the country where he secured the judgment. Furthermore it would be impossible for the courts to enforce a foreign provisional or interlocutory judgment without interfering with the discretion of the foreign court. As was pointed out by Lord Herschell in *Nouvion v. Freeman*:¹⁶⁸

...in order to establish that... [a final] judgment has been pronounced it must be shown that in the Court by which it was pronounced, it conclusively, finally, and for ever established the existence of the debt of which it is sought to be made conclusive evidence in this country, so as to make it *res judicata* between the parties.

In the Court of Appeal¹⁶⁹ Lord Justice Lindley was of the opinion that:

The test of finality and conclusiveness of any judgment is to be found in the view taken of it by the tribunals of the country in which it is pronounced, and if a judgment leaves the rights of the parties uninvestigated and undetermined, and avowedly leaves those rights to be

¹⁶⁴ *Martin v. Trofimuk* (1960), 32 W.W.R. 520 (Alta); *Beatty v. Beatty*, [1924] 1 K.B. 807.

¹⁶⁵ *McIntosh v. McIntosh*, [1942] O.R. 574 (C.A.).

¹⁶⁶ *Gauthier v. Routh* (1843), 6 O.S. 602, at p. 607; *Patrick v. Shedden* (1853), 22 L.J. Q.B. 283; *Graham v. Harrison* (1889), 6 Man. R. 210 (C.A.), at p. 215; *Sheehy v. Professional Life Ins. Co.* (1857), 2 C.B. (N.S.) 211 on appeal (1857), 3 C.B. (N.S.) 597 (Ex. Ch.).

¹⁶⁷ *Russell v. Smyth* (1842), 9 M. & W. 810; *McPherson v. McMillan* (1846), 3 U.C.Q.B. 34; *Maguire v. Maguire* (1921), 50 O.L.R. 100; the plaintiff was not allowed to recover arrears of alimony but was entitled to recover the costs awarded by the foreign judgment.

¹⁶⁸ (1889), 15 App. Cas. 1, at p. 9.

¹⁶⁹ (1887), 37 Ch. D. 244, at p. 255 (C.A.).

determined in some other proceeding, the judgment cannot be treated here as imposing an obligation which our tribunals ought to enforce.

With respect to judgments rendered in default of appearance, the foreign procedure again is of major importance. For example, in some countries the law provides that in the case of a judgment rendered by default the defendant has six months before execution, in which he may enter an opposition before the same court that rendered it. If such opposition is entered, the judgment is entirely superseded. Fresh proceedings are instituted, and a complete rehearing takes place on the merits. Whatever judgment results becomes the final decision in the case.

Thus, as long as the defendant is entitled to enter an opposition, the default judgment can only be considered provisional. As soon as the prescribed period has expired without the party having taken the necessary steps to reopen the litigation, the heretofore provisional default judgment becomes final.¹⁷⁰ In *Boyle v. Victoria Yukon Trading Co.*, however, the British Columbia Court held that a default judgment may be final and conclusive even though it is liable to be set aside in the very court which rendered it. Hunter C.J. said:¹⁷¹

In fact, if we were to say merely because a default judgment may be set aside by the Court in which it was taken that therefore it is of not final legal validity for the purpose of international suit, we would, in effect, be saying that the clearer the plaintiff's case the more useless his judgment would be.

Of course the mere fact that the judgment was obtained on default of the defendant does not prevent it from being final and conclusive.¹⁷² A judgment conditional upon an act to be done or an event to occur will not be enforced while the condition remains unperformed.¹⁷³ If the foreign judgment orders that the defendant do something or if he does not, that he pay a stated sum of money and the time for the performance of the act is limited, it will be final only after that time has passed and it becomes a judgment for the payment of a fixed sum of money. Of course a valid foreign judgment will be enforced only to the extent to which it is enforceable in the foreign country. It cannot be enforced if the

¹⁷⁰ *Jeannot v. Fuerst* (1909), 100 L.T. 816.

¹⁷¹ (1902), 9 B.C.R. 213, at p. 223.

¹⁷² *Bank of Bermuda Ltd. v. Stutz*, [1965] 2 O.R. 121; *Boyle v. Victoria Yukon Trading Co.*, *ibid.*

¹⁷³ *Patrick v. Shedden* (1853), 2 E. & B. 14; see also *Gauthier v. Routh* (1843), 6 O.S. 602, and *Hutton v. Dent* (1922), 53 O.L.R. 105, 70 D.L.R. 582, *aff'd*, [1923] S.C.R. 716, [1924] 1 D.L.R. 401.

creditor has been permanently enjoined from enforcing his judgment. In other words, the foreign judgment must be one which is still valid and capable of enforcement in the country where it was rendered.

A more serious problem arises in regard to the enforcement of foreign alimony decrees or orders. Can they be considered as final when they are subject to change by the issuing court? Should an exception to the general rules be made in their favour in view of the special human interests involved? Canadian courts have applied to them the same principles as in the case of other foreign judgments.

It has been held that a valid foreign judgment which grants a lump sum in full and in lieu of alimony is final if not subject to change.¹⁷⁴ On the other hand an order or decree for alimony or maintenance which can be varied or modified by the court that made it including amounts past due is not a final judgment.¹⁷⁵ However, if no power to modify the decree is reserved, or if only future instalments may be modified by the original court, the decree is final to the extent that it will support an action for the amount accrued and unpaid.¹⁷⁶

This is a sound approach as in many countries a decree awarding future alimony or maintenance payments, which may not be final when rendered, becomes final for each instalment when it falls due, in the absence of a contrary intent on the part of the court which rendered the decree.

¹⁷⁴ *Swaizie v. Swaizie* (1899), 31 O.R. 324. The finality was not affected by the fact that the judgment provided that upon neglect or refusal of the husband to pay that sum the ex-wife could apply to the original court for an order for enforcement.

¹⁷⁵ *MacFarlan v. Macartney*, [1921] 1 Ch. 522; *Harrop v. Harrop*, [1920] 3 K.B. 386; *Smith v. Smith*, [1923] 2 W.W.R. 389 (Sask. C.A.); *Smith v. Smith* (1954), 13 W.W.R. (N.S.) 207, [1955] 1 D.L.R. 229 (B.C.); *Maguire v. Maguire* (1921), 50 O.L.R. 100, at p. 105; *Ashley v. Gladden*, [1954] 4 D.L.R. 848 (Ont. C.A.); *Martin v. Trofimuk* (1960), 32 W.W.R. 520 (Alta). A California divorce decree making allowance for support, maintenance and education of the children of the marriage was not a final judgment as it was not capable of execution without a court order in California. See also *Perry v. Perry* (1924), 54 O.L.R. 613, [1924] 4 D.L.R. 1177 (C.A.) reversing 53 O.L.R. 502, [1924] 1 D.L.R. 665

¹⁷⁶ *Beatty v. Beatty*, [1924] 1 K.B. 807; *Swaizie v. Swaizie* (1899), 31 O.R. 324, at p. 327; *Hadden v. Hadden* (1898), 6 B.C.R. 340: the judgment was on consent and this consent gave a degree of finality to it. *Robertson v. Robertson* (1908), 16 O.L.R. 170; *Wood v. Wood* (1916), 37 O.L.R. 428; *Meyers v. Meyers*, [1935] O.W.N. 547; cf. *Maguire v. Maguire* (1921), 50 O.L.R. 100.

No action can be maintained on a mere order for interim alimony *pendente lite*.¹⁷⁷

To avoid hardship it would seem that even if the original court retains the power to modify accrued instalments, the judgment should be regarded as final with respect to them so long as an application for their modification has not been made. Thus the wife would not be forced to bring a new action on the foreign decree for each instalment past due.

Many proposals have been made in order to overcome the difficulties standing in the way of enforcing foreign alimony decrees. Several provinces in Canada have adopted uniform statutes¹⁷⁸ which provide that orders subject to variation and orders for periodic payments are enforceable with respect to accrued and future instalments as if they had been originally pronounced by the forum.

Remedy given by a different court than that which rendered the judgment

What is the effect of the pendency or possibility of an appeal to some court other than the one which rendered the decision? The general rule in Canada is that a foreign judgment is final and conclusive even though it is subject to appeal or an appeal is actually pending.¹⁷⁹

In *Nouvion v. Freeman*¹⁸⁰ it was stated that:

The fact that a judgment or order may be appealed from, or that it is made in a summary proceeding, does not prevent it from being *res judicata* and actionable in this country.

If the court that handed down the decision cannot revise it, the judgment is final in that court and *res judicata* between the parties. It is immaterial that it is capable of being rescinded or varied by some other court invested with competent appellate jurisdiction.¹⁸¹ Actually, whether or not the pendency of an appeal affects the right to maintain an action upon the foreign judgment depends upon the law of the state in which it was rendered and

¹⁷⁷ *McIntosh v. McIntosh*, [1942] O.R. 574, [1942] 4 D.L.R. 70 (C.A.).

¹⁷⁸ See *infra* section V.

¹⁷⁹ *Barned's Banking Co., Ltd. v. Reynolds* (1875), 36 U.C.Q.B. 256, at p. 274; *Davis v. Williams*, [1938] O.W.N. 504; *Maguire v. Maguire* (1921), 50 O.L.R. 100, at p. 103; *Campbell v. Morgan* (No. 2) (1918), 29 Man. R. 20 and cases cited therein; *Howland v. Codd* (1894), 9 Man. R. 435, at p. 437; *Wilcox v. Wilcox* (1914), 27 W.L.R. 359, at p. 363, 6 W.W.R. 213, 16 D.L.R. 491; *Eastern Trust Co. v. MacKenzie Mann & Co.* (1916), 10 O.W.N. 445; *Solmes v. Stafford* (1894), 16 P.R. 78, 264; *Turcotte v. Dawson* (1879), 30 U.C.C.P. 23.

¹⁸⁰ (1887), 37 Ch. D. 244, at p. 255 per Lindley, L.J.

¹⁸¹ *Nouvion v. Freeman* (1889), 15 App. Cas. 1, at p. 13, per Lord Watson.

where the appeal is pending.¹⁸² The law of the forum is resorted to only in the absence of proof of the foreign law, on the assumption that it is the same as the foreign law.

Logically, a judgment which is subject to reversal on appeal should not be regarded as final. Historically, at common law the procedure of writ of error acts merely as supersedeas to the execution, it does not vacate the judgment, while a review, which results in a trial *de novo* in the appellate court, entirely vacates the original judgment.¹⁸³ In equity an appeal completely supersedes the judgment of the court below which is nullified.

Under modern statutes the defendant is frequently required to give bond to stay execution on a money judgment, and therefore no uniform practice prevails.¹⁸⁴

If a pending appeal does not, by the law of the country in which the judgment was rendered, vacate the judgment, an action may be brought upon it here.¹⁸⁵ If the effect, under foreign law, of a pending appeal is to stay execution of the judgment, it cannot be enforced.

To say that an appeal pending abroad does not affect the finality of the foreign judgment irrespective of the effect this appeal has in the country where the judgment was rendered disregards first the fact that in some countries the pendency of an appeal will defeat the right of action regardless of its effect as a supersedeas; and second, the fact that the pendency of an appeal may cause some unjust results if the enforcing court permits the action on the judgment to be continued while the foreign court of appeal is considering it.¹⁸⁶ For these reasons, in cases where the foreign

¹⁸² *Barned's Banking Co. Ltd. v. Reynolds* (1875), 36 U.C.Q.B. 256, at p. 274; *Turcotte v. Dawson* (1879), 30 U.C.C.P. 23 (C.A.): evidence needed as to the effect of an appeal pending.

¹⁸³ 2 Ency. of Pl. & Pr. (1897), p. 323; *Campbell v. Morgan* (No. 2) (1918), 29 Man. R. 20, at p. 21: "If execution has been stayed pending the appeal, or if by the foreign law the entry of the appeal itself operates as a stay, the defendant would be entitled as of right to have execution stayed here but the foreign stay of execution would constitute no bar to the plaintiff's right to sue here."

¹⁸⁴ Black, *Judgments* (2d ed., 1902), Vol. 2, p. 774.

¹⁸⁵ *Scott v. Pilkington* (1862), 2 B. & S. 11, 121 E.R. 978.

¹⁸⁶ In *Campbell v. Morgan* (No. 2) (1918), 29 Man. R. 20, the court said, at p. 21: "By our law neither the finality nor the conclusiveness of a foreign judgment is affected by the fact that an appeal is pending in the foreign country. The farthest our courts have ever gone in favour of the defendant is to interpose the equitable jurisdiction of the court and on proper terms stay execution until the appeal is disposed of. They have never allowed a foreign appeal to operate as a bar to the action."

appeal neither vacates the foreign judgment nor suspends its execution, Canadian courts have, on proper terms, stayed the local proceedings to prevent any possible abuse of process.¹⁸⁷

On the other hand, when the judgment is of no force in the country where it was rendered, because the effect of the appeal is to vacate it or to prevent its execution, no action should be allowed to be maintained on the foreign judgment. If the foreign judgment is varied on appeal it will be recognized only as varied.¹⁸⁸ In other words no greater effect should be given to a foreign judgment in the enforcing court than it has where it was rendered. In a case where the proceedings in the enforcing court were stayed and in the foreign country the original judgment was reversed on appeal and restored by the court of last resort, the foreign judgment will take its force from the decision of that court. The date of the final decision will determine when the statute of limitations begins to run.

From a practical point of view the first thing to do in every case involving a foreign judgment that is under appeal, is to determine the effect of such appeal under the foreign law. If the enforcing court decides that the foreign judgment is not final, a new action on the original cause can be brought in the forum involving the same issues and a new judgment conflicting with the foreign one may be rendered.¹⁸⁹ The same conflict may arise should the foreign judgment be held final and it is reversed after a domestic judgment has been rendered upon it.

In order to avoid any possible embarrassment, the best solution is to grant a stay of execution or a stay of proceedings as soon as the question of appeal is raised, provided the human and social interests involved are given full consideration by the court before issuing its order. This is very important in alimony cases. The stay of proceedings could also be granted at the point where a possible modification or reversal of the foreign judgment could cause injustice or hardship to the party relying upon the judgment.

Where a judgment is given in the forum while an appeal is pending in the foreign country and the foreign court reverses the

¹⁸⁷ *Scott v. Pilkinton* (1862), 2 B. & S. 11, 121 E.R. 978; *Nouvion v. Freeman* (1889), 15 App. Cas. 1, 37 Ch. D. 244. See especially *Huntington v. Attrill* (1887), 12 P.R. 36; *Campbell v. Morgan*, [1919] 1 W.W.R. 644 (Man.); B.C. Order 58, rule 2; *Howland v. Codd* (1894), 9 Man. R. 435; *Campbell v. Morgan* (No. 2) (1918), 29 Man. R. 20.

¹⁸⁸ *Solmes v. Stafford* (1894), 16 P.R. 78, 264.

¹⁸⁹ By virtue of the non merger rule the judgment creditor may always do the same thing even when the foreign judgment is final.

original judgment, the judgment in the forum will not be superseded by this reversal. It cannot be vacated except upon direct application, because the obligation created by the second judgment exists independently of the obligation on which it was based. Depending upon the law of the forum, the judgment debtor may also have the enforcement of the judgment in the forum enjoined. Where the second judgment is sought to be enforced as a cause of action or as a bar in the courts of a third state and while the proceedings are pending, the first judgment is reversed, the second judgment might still be enforced, although it is assumed that the third state would disregard a judgment which is based on a void judgment on the ground of denial of natural justice or public policy. Of course if on account of the reversal of the original judgment, the second judgment could be reversed in the rendering state, it would not be final in the third state. As to the method of attack, the procedure of the third state would prevail.

Actually the best solution is to hold a foreign judgment final and conclusive notwithstanding that an appeal may be pending against it, or that it may still be subject to appeal, in the country of the original court, provided it can still be executed in that country.

3) *A foreign judgment if in personam must be for a debt or a definite sum of money*

A foreign judgment *in personam* must be for a definite and actually ascertained sum of money¹⁹⁰ and not for a sum to be determined, assessed, or computed at a later stage by the tribunal itself or some officer or person acting under the authority of that tribunal or for a specific sum to be paid after deduction therefrom of an unspecified amount of costs thereafter to be ascertained.¹⁹¹ If the costs are to be added to the amount of the foreign judgment and have been taxed, their amount may be included and the foreign judgment is for a specific sum.¹⁹² In other words where a foreign

¹⁹⁰ *Sadler v. Robins* (1808), 1 Camp. 253, 170 E.R. 948; *Bonn v. National Trust Co.*, [1930] 4 D.L.R. 820 (Ont.); *Barned's Banking Co. v. Reynolds* (1875), 36 U.C.Q.B. 256, at p. 280.

¹⁹¹ *Sadler v. Robins* (1808), 1 Camp. 253, 170 E.R. 948; see also *Hutton v. Dent* (1922), 52 O.L.R. 378, at p. 382, aff'd 53 O.L.R. 105, 70 D.L.R. 582, aff'd [1923] S.C.R. 716, [1924] 1 D.L.R. 401.

¹⁹² Interest given by the law of the country whence the judgment came is an integral part thereof and may be recovered, see *Solmes v. Stafford* (1893), 16 P.R. 78, at p. 82, aff'd in part at p. 264; *Livesley v. Horst Co.*, [1924] S.C.R. 605, at p. 610, per Duff, J.; Cf. *Martel v. Dubord* (1885), 3 Man. R. 598.

judgment awards a certain debt and costs to be taxed, such costs are recoverable in an action on the judgment on proving the amount for which they have been taxed.¹⁹³ Final foreign orders for costs are enforceable in most provinces.¹⁹⁴

The rule that a foreign judgment must be for a definite sum of money is based on the fact that historically the form of action for the enforcement of a foreign judgment was debt, although in some cases assumpsit was used.

It is not necessary that the foreign judgment should give rise to a debt in the technical sense. Any kind of obligation which is definitely fixed in money by the foreign judgment would make that judgment recognizable and enforceable in Canadian courts. The sum is specific when it is fixed and unalterable on the face of the record,¹⁹⁵ or when the balance due upon a dissolution of partnership is definitely fixed according to the decision.¹⁹⁶ A sum is sufficiently certain if it can be ascertained by a simple arithmetical process.¹⁹⁷

An action will not lie on a foreign judgment to do an act. Only foreign judgments awarding money to be paid upon a cause of action that is ascertained and past can be enforced.¹⁹⁸

¹⁹³ *Hall v. Armour* (1836), 5 O.S. 3 (C.A.).

¹⁹⁴ *Russell v. Smyth* (1842), 9 M. & W. 810; *Cavanagh v. Lisogar* (1956), 19 W.W.R. 230 (Alta); *McPherson v. McMillan* (1846), 3 U.C.Q.B. 34, at p. 38; *Maguire v. Maguire* (1921), 50 O.L.R. 100, 64 D.L.R. 180 (C.A.); *Corse et al v. Moon* (1889), 22 N.S.R. 191 (C.A.); as to the recovery in Ontario of costs incurred in a Quebec judgment see s. 54 of the Ontario Judicature Act, R.S.O., 1960, c. 197 as am, *Contra: Re Reciprocal Enforcement of Judgments Act; Re Paslowski v. Paslowski* (1957), 22 W.W.R. 584, 65 Man. R. 206, 11 D.L.R. (2d) 180; *Koven v. Toole* (1954), 13 W.W.R. 444, [1954] 4 D.L.R. 856; When a claim is made on a specially endorsed writ for the taxed costs of a foreign judgment, the date of taxation must be stated: *Macaulay Bros. v. Victoria Yukon Trading Co.* (1902), 9 B.C.R. 136 reversing 9 B.C.R. 27; in *Harris v. Garson* (1921), 49 N.B.R. 91, 67 D.L.R. 682 (C.A.) it was held that when a defendant who is sued in New Brunswick on a foreign judgment defends on the merits and succeeds, he is not liable for the costs of the action in the foreign court. A plaintiff who sues on the foreign judgment cannot sever such judgment into damages and costs of suit.

¹⁹⁵ *Henderson v. Henderson* (1884), 6 Q.B. 288.

¹⁹⁶ *Henley v. Soper* (1928), 8 B. & C. 16.

¹⁹⁷ *Beatty v. Beatty*, [1924] 1 K.B. 807 per Scrutton, J., at p. 816.

¹⁹⁸ *Gauthier v. Routh* (1843), 6 O.S. 602 (C.A.); *Duke v. Andler*, [1932] 4 D.L.R. 529 (S.C.C.).

Foreign judgments for ordering the payment of taxes¹⁹⁹ fines or penalties²⁰⁰ are not recognized and enforced in Canada.²⁰¹

4) *Conclusiveness of foreign judgments*

Is a foreign judgment *in personam* or *in rem* conclusive as to any matter adjudicated upon? Is it possible to impeach such a judgment for error either in fact or in law? The foreign court may have taken a wrong view of the facts as presented to it or it may have misinterpreted its own law, or the law of some other country, which it professed to declare and upon which the judgment is founded.

a) *Common Law*

The early English and Canadian cases held that while a foreign judgment in an action *in personam* constitutes a good cause of action and amounts to *prima facie* evidence of a debt, it is not conclusive and the merits of the case may be re-examined.²⁰² This view was based upon the fact that the very technical qualities of a court of record were not attributable to foreign courts. It also followed that there was no merger of the original cause of action in the judgment. Therefore it was open to the party who had recovered the judgment either to bring an action upon the judgment or to sue on the original cause. A further distinction was made between the position of a plaintiff who seeks to enforce a judgment which he has obtained in his favour in a foreign country and the position of a defendant who claims the protection of a foreign judgment given in his favour when the plaintiff sues him on the original cause of action. It was held that when the defendant pleads the foreign judgment in his favour as a bar it is conclusive as to the facts involved in it and the grounds on which it rests.

In 1851 in *Bank of Australasia v. Nias*²⁰³ Lord Campbell C.J. said:

It does not appear, however, that the question has ever been solemnly decided, whether, in an action on a foreign judgment, the merits of the case upon which the foreign court has regularly adjudicated between the parties may again be put in issue and retried... It seems contrary

¹⁹⁹ *U.S.A. v. Harden* (1963), 44 W.W.R. 630.

²⁰⁰ *Huntington v. Attrill*, [1893] A.C. 150; in *Wood v. Wood* (1916), 37 O.L.R. 428, 28 D.L.R. 367, 31 D.L.R. 765 (C.A.), it was held that a judgment for alimony is not penal.

²⁰¹ See Castel, *Conflict of Laws* (2nd ed., 1968), p. 168.

²⁰² Eg. *Walker v. Witter* (1778), 1 Doug. 1, at p. 5.

²⁰³ (1851), 16 Q.B. 717, at p. 735.

to principle and expediency for the same questions to be again submitted to a jury in this country.

This view was reaffirmed by Blackburn J. in *Godard v. Gray*:²⁰⁴

...the decisions... seem to us to leave it no longer open to contend, unless in a court of error, that a foreign judgment can be impeached on the ground that it was erroneous on the merits; or to set up as a defense to an action on it; that the tribunal mistook either the facts or the law ...the defendant can no more set up as an excuse... that the judgment proceeded on a mistake as to English law, than he could set up as an excuse that there had been a mistake as to the law of some third country incidentally involved, or as to any other question of fact.

The merits of a foreign judgment, *in rem* or *in personam*, are not examinable at all whether the judgment is relied upon by the plaintiff as a cause of action or pleaded by the defendant as a bar to an action instituted against him. The rule that the courts will not permit a retrial of the issues which have already been decided by the foreign court is now well settled in England.

Conclusiveness is the logical consequence of the fact that a foreign judgment imposes an obligation on the defendant to obey the judgment and the successful plaintiff has the corresponding right to demand satisfaction.²⁰⁵

Actually, as pointed out in *Bank of Bermuda Ltd. v. Stutz*²⁰⁶ conclusiveness is closely related to *res judicata* although it did not originate from it.

Once a foreign court of competent jurisdiction, before which according to its procedure the whole merits of the case were open to the parties, had given a final judgment that a debt existed, the only remedy was an appeal to a higher tribunal, however much the parties might have failed to take advantage of their rights. Until such an appeal was taken, the existence of the debt was *res judicata* as between the parties.

The English rule also prevails in Canada, at common law: a final judgment, if rendered by a court of competent jurisdiction and if free from fraud, is conclusive on the merits and not open to

²⁰⁴ (1870), L.R. 6 Q.B. 139, at p. 150.

²⁰⁵ Borm-Reid, *Recognition and Enforcement of Foreign Judgments* (1954), 3 *Int. & Comp. L.Q.* 49, at p. 52.

²⁰⁶ [1965] 2 O.R. 121.

²⁰⁷ *Senkiw et al. v. Muzyka et al.* (1967), 61 W.W.R. 58, 65 D.L.R. (2d) 622 (Sask.), *aff'd* (1969), 68 W.W.R. 515 (C.A.) (1970), 72 W.W.R. 314 (S.C.C.); *Jones v. Smith* (1925), 56 O.L.R. 550, 27 O.W.N. 447, [1925] 2 D.L.R. 790 (C.A.); *Law v. Hansen* (1895), 25 S.C.R. 69, at p. 73: "Judgments *in rem* are conclusive against all the world, not only as to the *rem* itself, but also as to the ground on which the tribunal professes to decide or may be presumed to have decided." *Meagher v. Aetna Insurance Co. et al.* (1873), 20 Gr. 354; *Michado v. The Ship "Hattie & Lottie"* (1904), 9 Ex. C.R. 11.

reexamination. This rule applies to foreign judgments *in rem*²⁰⁷ and *in personam*.²⁰⁸

From a practical point of view, the doctrine that a valid foreign judgment is conclusive as to any matter thereby adjudicated upon, makes it impossible to impeach the judgment for any error of fact even if such error is manifest on the face of the foreign proceedings.²⁰⁹ Canadian courts do not sit as courts of appeal from the foreign courts. As Lord Campbell stated in *Bank of Australasia v. Nias*:²¹⁰

The pleas demurred to, might have been pleaded, and if there be any foundation for them, they ought to have been pleaded in the original action.

A valid foreign judgment creates a new right in the judgment plaintiff and imposes a new duty on the judgment defendant, these rights being independent of and distinct from the cause of action alleged in the suit wherein the judgment was rendered. A suit on this judgment being one on a new right, it is immaterial whether or not a valid cause of action existed prior to the judgment.²¹¹

²⁰⁸ *Hutton v. Dent* (1922), 53 O.L.R. 105, 70 D.L.R. 582, affirming 52 O.L.R. 378, aff'd [1923] S.C.R. 716, [1924] 1 D.L.R. 401; *Bank of Bermuda Ltd. v. Stutz*, *ibid.*; *Page v. Phelan* (1844), 1 U.C.Q.B. 254, at p. 255; *Kingsmill & Davis v. Warrenger & Wheeler* (1852), 13 U.C.Q.B. 18, at p. 78; *Metropolitan Trust & Savings Bank v. Osborne* (1910), 1 O.W.N. 785, at p. 786; *Paisley v. Brody* (1885), 11 P.R. 202 (C.A.); *Moritz v. Canada Wood Specialty Co.* (1907), 17 O.L.R. 53, at p. 62 (C.A.); *Fowler v. Vail* (1879), 4 O.A.R. 267 (C.A.); *Hickey v. Legresley* (1905), 15 Man. R. 304, at p. 307; *Hutton v. Dent* (1922), 70 D.L.R. 582 (Ont. C.A.); *Law v. Hansen* (1895), 25 S.C.R. 69, at pp. 72-73; *Meagher v. Aetna Insurance Co. et al.* (1873), 20 Gr. 354, at p. 372; *Quickstad v. McNeill et al.*, [1932] 4 D.L.R. 427 (B.C.); *Shklov v. Flaman*, [1949] 1 W.W.R. 255 (Sask.); *McPhedran v. Lusher* (1835), 3 O.S. 602 (C.A.).

²⁰⁹ *Barned's Banking Co. Ltd. v. Reynolds* (1875), 36 U.C.Q.B. 256, at pp. 273-274; *Robertson v. Robertson* (1875), 22 Gr. 449, at p. 454; *Contra: Boyle v. Victoria Yukon Trading Co.* (1902), 9 B.C.R. 213.

²¹⁰ (1851), 20 L.J.Q.B. 284, at p. 292.

²¹¹ *Godard v. Gray* (1870), 6 Q.B. 139. In this case an action was brought in England on a French judgment ordering the defendants to pay a certain sum of money. The defense was that the judgment was erroneous and ought to have been pronounced in favour of the defendants. The French judgment awarded damages against the defendants for breach of an English charter-party which contained a clause that the penalty for the breach was the estimated amount of freight. According to English law this clause does not absolutely limit the damages, but a party is entitled to claim damages in excess, if the claim can be founded on grounds other than the penal clause. The French court, however, which intended to interpret the charter-party according to English law, erroneously came to the conclusion that the penal

This view could also be based on the doctrine of *res judicata*. There can be no retrial of the issues which have already been finally settled by a competent foreign tribunal.

Since proper procedure is provided in all countries for an appeal from erroneous decisions, no hardship can result by requiring defendants to follow such a procedure.

Errors of law (*e.g.* mistakes made by the foreign court as to its own law or the law of some other country) cannot be questioned in the courts of Canada as the courts will assume that the foreign judgment has been rendered in accordance with the foreign law,²¹² because the foreign court is the tribunal best qualified to interpret its own law.

If the foreign court intentionally and knowingly disregarded the law of the enforcing court, but has nevertheless considered judicially the question, no impeachment of the judgment will occur. On the other hand, if perversely the court disregarded that law, the judgment may be set aside on the ground of fraud, denial of justice or violation of international law, but not on the ground of error.²¹³

clause conclusively limited the damages, and assessed the damages on that basis. The contention of the defence, that the French judgment showed on the face of it, an erroneous interpretation of English law, was therefore correct. However the court rejected it. Blackburn, J. said: "We enforce a legal obligation, and we admit any defence which shews that there is no legal obligation or a legal excuse for not fulfilling it; but in no case that we know of is it ever said that a defense shall be admitted if it is easily proved, and rejected if it would give the court much trouble to investigate it. Yet on what other principle can we admit as a defence that there is a mistake of English law on the face of the proceeding and reject a defence that there is a mistake of Spanish or even Scotch law apparent in the proceedings, or that there was a mistake of English law not apparent on the proceedings, but which the defendant avers that he can shew did exist?", at p. 152.

See also *Castrique v. Imrie* (1870), L.R. 4 H.L. 414, judgment *in rem*; *Senkiw et al. v. Muzyka et al.* (1967), 61 W.W.R. 58, 65 D.L.R. (2d) 622 (Sask.), *aff'd* (1969), 68 W.W.R. 515 (C.A.) *aff'd* (1970), 72 W.W.R. 314 (S.C.C.), judgment *in rem*.

²¹² In *Meyer v. Ralli* (1876), 1 C.P.D. 358 the Court held that there is one case where an error in law committed by a foreign court may be corrected, *i.e.* where both parties admitted that the foreign court had wrongly interpreted its own law. Where such an admission is made, no effect will be given to the foreign judgment. This decision does not seem to change the rule concerning error, since the decision was rendered under the special circumstance where it was admitted that the foreign judgment was erroneous at law and there was no examination of such error by the Court of Common Pleas.

²¹³ See section III (5)(b).

In general, it is not open to inquiry whether the foreign court had correct information as to the method of applying Canadian or foreign law, because the responsibility rests on the defendant to adduce evidence with regard to that law and its proper application.

The same rules apply where the foreign court has purported to apply the law of a third country and has made an error in its interpretation.²¹⁴ In *Barned's Banking Co. Ltd. v. Reynolds*,²¹⁵ Wilson J. said:

The fact that the foreign Court has mistaken the law of another country in the judgment pronounced will not necessarily affect the judgment when sued upon in the country whose law has been mistaken, because the law of that other country is a matter of fact, and has to be proved as a fact in the country where the original proceedings were being carried on. And if the defendant in that suit did not bring to the Court the knowledge of what the foreign law was, he has omitted a matter which, like any other fact not proved which he might have proved in his defence, he cannot complain of; and such judgment rightly given upon the facts which were before the Court is a valid and binding judgment, although there might have been a wholly different judgment pronounced if the full and correct state of the foreign law had been duly proved.

Canadian courts will refuse a retrial even if the error in the foreign judgment appears on the face of it, as they assume that this error would not have occurred if the parties had presented their case properly. Any such error must be corrected on appeal to the superior courts in the foreign country concerned. The foreign court is required only to receive and consider all available evidence and then in good faith try to determine, as well as it can, what the law of the other country is.²¹⁶ However, in British Columbia, in *Boyle v. Victoria Yukon Trading Co.*²¹⁷ the court said:

The first question then to be determined is, can the defendants allege that the judgment is void as being based on a manifestly *ultra vires* contract, or, in other words, can it be impeached for manifest error? No doubt we must be careful not to infringe the doctrine that we are not to act as a Court of Appeal to review a foreign judgment, but I think that neither the comity of the Provinces, or the canons of international law, require us to blindly enforce a default judgment obtained in a sister jurisdiction. I think, on the contrary, that we are entitled to scrutinize all the proceedings . . . , and if manifest error going to the root of the judgment appears, that we may, and should, decline

²¹⁴ *Godard v. Gray* (1870), 6 Q.B. 139.

²¹⁵ (1875), 36 U.C.Q.B. 256, at pp. 273-274 (C.A.).

²¹⁶ *Castrique v. Imrie* (1870), L.R. 4 H.L. 414.

²¹⁷ (1902), 9 B.C.R. 213, at p. 217 (C.A.).

to perpetuate and enforce the error... No doubt a judgment may be got on a contract as to which there may be doubt as to whether it is void or not, yet so long as such judgment stood it would ordinarily be presumed that the judgment was valid; but I think this presumption cannot apply to a default judgment which purports to enforce a contract *ex facie* void by the paramount law of the land.²¹⁸

And he added:

The case in hand is not that of a decision *in rem* emanating from the Courts of another nation after real litigation, but is a judgment taken by default in another Canadian jurisdiction in disregard, as it is alleged, of the paramount law of the land, which both the Yukon and British Columbia Courts are bound to obey and properly administer. Moreover, it does not require argument to shew that there is a radical distinction between a judgment thus obtained and one which is the result of real litigation. In the case of a default judgment, the judicial mind is not necessarily applied to the matters in issue, but the machinery of the Court is employed at the will of the plaintiff to record a judgment in his favour which may or may not be null and void.

It is submitted that this decision is erroneous as it contradicts the long line of decisions that hold foreign judgments conclusive on the merits. British Columbia is the only province where it is held that a judgment taken by default will not be recognized and enforced where manifest error in the judgment is shown.

Anglo-Canadian courts will not deny recognition or enforcement to foreign money judgments solely because the procedural laws of the foreign court were violated. For example, a defect in the pleadings before the court which rendered the judgment is no defense to an action on the judgment in another state.²¹⁹ Again the basis of this rule is the belief that the foreign court has the best knowledge of its own procedure.

If the foreign court had jurisdiction in the international sense, lack of competence according to the law where the judgment was rendered is not a ground for setting it aside.²²⁰

²¹⁸ The court distinguished, *Castrique v. Imrie*; see also *Re Gacs* and *Meierovitz* (1968), 68 D.L.R. (2d) 345 (B.C.), at p. 351, *Re House of Colour Ltd. v. Expert Decorators Ltd. et al* (1968), 70 D.L.R. (2d) 527.

²¹⁹ *Pemberton v. Hughes*, [1899] 1 Ch. 781.

²²⁰ The following cases are usually cited in support of this rule: *Vanquelin v. Bouard* (1863), 15 C.B.N.S. 341, where the court had competence over the subject matter, bills of exchange, the error being as to the class of persons; *Pemberton v. Hughes*, [1899] 1 Ch. 781; *C. v. C.* (1917), 39 O.L.R. 571. Here the court had competence in the class of case, divorce, the defect being irregularity of procedure; discussed *supra*: jurisdiction; *Prentiss v. Beemer* (1847), 3 U.C.Q.B. 270; *Meagher v. Aetna Insurance Co. et al* (1873), 20 Gr. 354.

Dean Read, on the other hand, believes that a foreign judgment rendered by a court which has no competence is a nullity although its law district may have jurisdiction.²²¹ He points out that this view is not in conflict with the conclusiveness doctrine because the jurisdiction of the foreign law district to create a right of the sort in question has not been examined.

Canadian courts, ought not refuse to give effect to a foreign judgment based on an erroneous choice of law.

It must be noted that in Canadian courts a foreign judgment *in personam* is only conclusive as between the parties and privies, and on the material point or points actually decided. The conclusiveness rule applies to the points of facts and law which directly form the subject matter of the decision, but not to other questions which are merely collateral and incidental in character. Thus, if the issues in the foreign and Canadian proceedings are not identical, the rule as to the conclusive effect of the foreign judgment does not apply. The foreign judgment operates as *res judicata* with respect to any point which concerns the subject matter of the foreign suit, and which should have been raised in the foreign court but was not in fact pleaded. This view is prompted by the desire to avoid multiplicity of actions and to protect the defendant from vexatious litigation. A foreign judgment *in rem* is conclusive against the entire world.²²²

Statutory Reopening of the Merits

The common law rule that foreign judgments are conclusive on the merits has been modified by statute in several provinces.

Ontario

In 1860 a statute was passed in the Province of Canada which contained three provisions: one for foreign judgments generally and the other two for judgments as between the two parts of the Province (Upper and Lower Canada).

Section 1 read as follows:²²³

²²¹ *Op. cit.*, p. 100.

²²² *Castrique v. Imrie* (1870), L.R. 4 H.L. 414; also *Senkiw et al. v. Muzyka et al.* (1967), 61 W.W.R. 58, 65 D.L.R. (2d) 622, aff'd (1969), 4 D.L.R. (3d) 708 (C.A.), aff'd (1970), 72 W.W.R. 314 (S.C.C.); *Law v. Hansen* (1895), 25 S.C.R. 69, at p. 72.

²²³ (1860), 23 Vict., c. 24; *Manning v. Thompson* (1867), 17 U.C.C.P. 606 (C.A.); *Barned's Banking Co. Ltd. v. Reynolds* (1875), 36 U.C.Q.B. 256, at p. 290; *Waydell et al v. Provincial Insurance Co.* (1862), 21 U.C.Q.B. 612.

In any suit brought in either section of the Province upon a Foreign Judgment or Decree (that is to say, upon any Judgment or Decree not obtained in either of the said sections, except as hereinafter mentioned) any defence set up or that might have been set up to the original suit may be pleaded to the suit on the Judgment or Decree.

This was a reversal of the common law rule of conclusiveness since all judgments rendered outside the Province of Canada could have their merits re-examined.

Section 4 provided that:

In any suit brought in either section on a judgment or decree obtained in the other section in a suit in which personal service was not obtained and in which no defence was made, any defence that might have been set up to the original suit may be made to the suit on such judgment or decree.

The merits of judgments rendered in either part of the Province of Canada could be reopened only if in the original action service was not personal and no defence was made.

According to section 2:

In any suit brought in either section on a judgment or decree obtained in the other section in a suit in which the service of process on the defendant or party sued has been personal, no defence that might have been set up to the original suit can be pleaded to that brought on the judgment or decree.²²⁴

The judgment also was conclusive on the merits as between the two parts of the Province of Canada where the service was not personal but a defence was entered.

Section 1 was repealed in 1876²²⁵ and today the common law rule applies to all judgments with the exception of those rendered in the Province of Quebec.

Thus, sections 52 and 53 of the Ontario Judicative Act²²⁶ reproduce sections 2 and 4 of the 1860 legislation.

52. Where an action is brought on a judgment obtained in the Province of Quebec in an action in which the service on the defendant or party sued was personal, no defence that might have been set up to the original action may be made to the action on the judgment.

53. Where an action is brought on a judgment obtained in the Province of Quebec in an action in which the service was not personal and in which no defence was made, any defence that might have been set up to the original action may be made to the action on the judgment.

In order to make a Quebec judgment binding on a defendant not otherwise subject to the international jurisdiction of the Quebec

²²⁴ Section 2.

²²⁵ 39 Vict., c. 7, s. 1 and Sch. A. (Ont.).

²²⁶ R.S.O., 1960, c. 197, as am.

courts, the defendant must have been personally served in the Province of Quebec. Personal service in Ontario or elsewhere is not sufficient.²²⁷ It would seem that the place of service whether within or without the territory of the original Court should be irrelevant.²²⁸

Section 52 does not change the common law rules. On the other hand, section 53 modifies the rules since it allows a defendant against whom a judgment has been recovered in Quebec and who is subject to the jurisdiction of the Quebec courts on a ground other than that of personal service in Quebec to set up, when sued in Ontario on such a judgment, any defence which he could have set up in the Quebec action, provided he made no defence to that action.²²⁹

Manitoba

In Manitoba, according to section 83 of the Queen's Bench Act:²³⁰ Subject to The Reciprocal Enforcement of Judgments Act, a defendant in an action upon a foreign judgment may plead to the action on the merits, or set up any defence that might have been pleaded to the original cause of action for which the judgment was recovered; but the plaintiff may apply to the court to strike out any such pleading or defence upon the ground of embarrassment or delay.²³¹

In *Marshall v. Houghton*²³² Dysart J. pointed out that section 82: ... was apparently introduced to afford a sanctuary for debtors who cared to resort hither, by placing at their disposal, for the determination of

²²⁷ *Weshler Sales Promotions Ltd. v. Koltz*, [1969] 2 O.R. 134; *Lung v. Lee* (1928), 63 O.L.R. 194, [1929] 1 D.L.R. 130; approving *Vézina v. Will H. New-some Co.* (1907), 14 O.L.R. 658 and overruling *Court v. Scott* (1881), 32 U.C.C.P. 148 (C.A.); *Eiler v. Kerterz*, [1960] O.R. 672 (C.A.), [1960] O.W.N. 545.

²²⁸ See Riddell, J.A. dissenting in *Lung v. Lee*, [1929] 1 D.L.R. 130, at p. 131, see also Falconbridge, (1929), 7 Can. Bar Rev. 131; *Beloff Roofing Co. v. Jelinek*, [1953] O.W.N. 390: in his writ of summons specially endorsed the plaintiff need not state particulars of service on the defendant nor whether he defended the action in Quebec. These are matters to be raised by the defendant.

²²⁹ *Lung v. Lee* (1928), 63 O.L.R. 194, at p. 199; *Plymouth Import Co. Ltd. v. Keanerman*, [1947] O.W.N. 301; *Beloff Roofing Co. v. Jelinek*, [1953] O.W.N. 390. See also *Turcotte v. Dawson* (1879), 30 U.C.C.P. 23 (C.A.) and *Curtis v. Curtis*, [1943] O.W.N. 382.

²³⁰ R.S.M. 1970, c. 280. This provision was introduced in 1876, 39 Vict., c. 2, s. 8 (Man.).

²³¹ For a history of the section see *Hickey v. Legresley* (1905), 15 Man. R. 304, at pp. 313-315; *Lesperance v. Leistikow*, [1935] 3 W.W.R. 1, 43 Man. R. 322.

²³² [1922] 3 W.W.R. 65 at 70, 68 D.L.R. 308, at p. 312, affirmed [1923] 2 W.W.R. 553, 33 Man. R. 166 (C.A.).

their rights, the laws, Courts and juries of [Manitoba]. But does this right to have their claims litigated afresh in this jurisdiction deprive the plaintiff of all evidential value of the judgment obtained by him in a foreign jurisdiction on that original cause of action? In my opinion it does not. In this case the plaintiff might have pleaded the foreign judgment without setting up his alternative and allowed the defendant to plead the original cause of action, after which the plaintiff might have replied. That would be the logical course. The plaintiff, however, in his statement of claim, has pleaded both foreign judgment and the original cause of action. This removed the necessity of the defendant invoking section [83]. The situation, therefore, is, that if the plaintiff at the trial after proving his foreign judgment had rested his case, he would without more be entitled to judgment, unless defendant came forward and either disproved or overcame the strength of the *prima facie* case. While the general onus of proving his case is always on the plaintiff, there are times at certain stages of a trial when the duty of coming forward may be shifted to the defendant, and this is so after the plaintiff has established a *prima facie* case. The foreign judgment, therefore, having once been proved, casts upon the defendant the onus of impeaching the judgment or breaking it down.²³³

In *Hickey v. Legresley*²³⁴ Richards J. explains the purpose of section 83 as follows:

It seems to me that the Legislature manifestly intended to give to any one coming here from another province or country, who should be sued here on a judgment of any Court of such other province, or country, the benefit of all defences which he could have set up, if sued here on the original cause of action, and at the same time thought it would be inequitable, when so enacting, to deprive him of any defences not available under the law of Manitoba but which he could have set up in the original jurisdiction where the liability, if any, has been incurred. I am of opinion that, in order to carry out such intention, the words 'plead to the action on the merits' were enacted to cover the former object, and the words which follow 'merits' were enacted for the latter purpose. The method of pleading a defence, which is available because of its being good under foreign law, is to set out the facts, and to state, as has been done in this case, that they constitute a defence under such foreign law.

In an action in Manitoba on a foreign judgment the fact that defenses to the original cause of action have been raised and tried in the foreign court does not prevent their being raised and tried again. However there is discretion in the Manitoba court to allow

²³³ In *Lesperance v. Leistikow*, [1935] 3 W.W.R. 1, at p. 7, 43 Man. R. 322 (C.A.), the court said that the section must be read in its full and literal sense but that it must be sparingly used as it is a survival of a doctrine that has now been discarded by most courts.

²³⁴ (1905), 1 W.L.R. 546, 15 Man. R. 304, at p. 310 (C.A.) and (1906), 4 W.L.R. 46 (Man.).

the defenses or strike them out on the ground of embarrassment or delay. The defenses which may be invoked under section 83 are governed by the law of the foreign court that rendered the judgment sought to be enforced in Manitoba.²³⁵

Furthermore the defendant may set up only those defenses which might have been set up to the original cause of action in the foreign court.²³⁶ "In enabling the court to determine how to exercise properly its judicial discretion and correctly ascertain the real intention of the defendant, the fact that the case has been tried out in a foreign court, that an unsuccessful appeal has been taken, or that a consent judgment has been entered will have a very strong bearing, but in each case the discretion must be exercised upon the merits of that case alone, and the fact that the case has been tried out under a foreign jurisdiction will not constitute an absolute bar."²³⁷

If the defendant sets up defences that have already been pleaded and fought out in the foreign court they may be struck out by the court on the ground of embarrassment or delay.²³⁸ The plaintiff can-

²³⁵ *Harbican v. Kennedy*, [1937] 2 D.L.R. 541.

²³⁶ *Bank of Montreal v. Cornish* (1879), Man. R. Temp Wood 272, at p. 279: "...under our own local Act on this subject, there may be pleaded any plea on the merits, or any plea setting up any defence which might have been pleaded in the original action in which such judgment was recovered." *Hickey v. Legresley* (1905), 1 W.L.R. 546, 15 Man. R. 304; *Int. etc. Corporation v. G.N.W. Central Railway* (1893), 9 Man. R. 147; *New Hamburg Mfg. Co. v. Shields* (1906), 4 W.L.R. 307, 16 Man. R. 212; *Harbican v. Kennedy*, [1937] 2 D.L.R. 541 (Man.); *British Linen Co. v. McEwan* (1892), 8 Man. R. 99, per Taylor, C.J., at p. 110: "Under the statute the defendant may plead to the action on its merits and set up any defence to the action as brought on the judgment or he may set up a defence which he might have pleaded to the original cause of action for which the judgment was recovered in the court in which it was recovered. I cannot see how it can be held that a defendant can plead in an action on a judgment, a defence which he ought have set up to the original cause of action, had it been sued upon in this court, so long as the words "which ought have been pleaded" stand as they do in the statute."

²³⁷ *Callaghan v. Nicholls*, [1921] 3 W.W.R. 476, at p. 478. See also *Moore v. International Securities* (1916), 10 W.W.R. 378, 34 W.L.R. 219; *Gault v. McNabb* (1886), 1 Man. R. 35; *British Linen Co. v. McEwan* (1892), 8 Man. R. 99; *Hickey v. Legresley* (1905), 15 Man. R. 304; *Sloman v. Brenton*, [1916] 9 W.W.R. 1466; *Lange v. Manitoba Western Colonization Co. Ltd.*, [1921] 3 W.W.R. 877; *Wright v. Narovlansky*, [1920] 1 W.W.R. 680.

²³⁸ *Moore v. Int. Securities Ltd.* (1916), 10 W.W.R. 378, 34 W.L.R. 219 (C.A.); *Sloman v. Brenton* (1916), 9 W.W.R. 1466, 33 W.L.R. 818, 29 D.L.R. 387 (Man.); *Gault v. McNabb* (1884), 1 Man. R. 35; *Meyers v. Prittie* (1884), 1 Man. R. 27. Cf. *Hickey v. Legresley* (1905), 1 W.L.R. 546, 15 Man. R. 304: the mere fact

not set up embarrassment because he is required to litigate again issues that have already been tried by the foreign court. Nor can the pleading or defence for the like reason be called vexatious or dilatory. The court must be convinced that the pleading or defence is without merit, or has an ulterior purpose before it can exercise in the plaintiff's favour the discretion given by section 83. If the pleas are untrue in fact and the defence is not a *bona fide* one, the proviso applies.²³⁹

The right of a defendant to plead the merits of the case is subject to the discretionary power of the court.²⁴⁰

In pleading a defence good under the foreign law, the facts constituting such defence must be set out.²⁴¹ If the defendant pleads the statute of limitations, the question whether that would have been a defence in the foreign jurisdiction is a question of foreign law that must be set up.²⁴² Section 83 is made subject to the Reciprocal Enforcement of Judgments Act.²⁴³ This does not seem to prevent the reopening of the merits if the law of the Province allows it since section 3(6)(g) of the Act states that no order for registration shall be made if the court to which application for registration is made is satisfied that the judgment debtor would have a good defence if an action were brought on the judgment.

Nova Scotia

In Nova Scotia, according to Order XXXV, rule 38 of the Rules of Practice:²⁴⁴

In any action brought in this province against any person domiciled therein, on a judgment obtained in an action in any other province or country to which no defence was made, any defence which might have been made to the original action may be made to the action on the judgment.

that the defences raised were put on the record in the foreign action is not a sufficient ground for striking them out as having been pleaded to embarrass or delay when the defendant had intended to defend the foreign action, but owing to some misunderstanding was unable to be present at trial and the judgment went against him by default.

²³⁹ *Lesperance v. Leistikow*, [1935] 3 W.W.R. 1, at p. 6, 43 Man. R. 322, [1935] 4 D.L.R. 125 reversing [1935] 2 W.W.R. 110 (C.A.).

²⁴⁰ *Callaghan v. Nicholls*, [1921] 3 W.W.R. 476, 31 Man. R. 331; *Lange v. Man. West Colonization Co.*, [1921] 3 W.W.R. 877.

²⁴¹ *Hickey v. Legresley* (1905), 1 W.L.R. 546, 15 Man. R. 304.

²⁴² *British Linen Co. v. McEwan* (1892), 8 Man. R. 99.

²⁴³ R.S.M., 1970, c. J20.

²⁴⁴ For an early statute, see S.N.S., 1880, c. 13, s. 27.

This rule applies to actions on foreign judgments obtained by default and when the defendant is domiciled in Nova Scotia at the time the action is commenced in that province on the foreign judgment. Domicile of the defendant in Nova Scotia at the time of the original action is not necessary.²⁴⁵ In *Law v. Hansen*, the Supreme Court of Canada²⁴⁶ refused to allow a Nova Scotia domiciliary to rely on rule 38 to impeach a New York judgment on the merits rendered against him when he was the one who brought the action abroad.

Thus in spite of this statutory enactment a foreign judgment in favour of the defendant is conclusive and may be used as a bar.

Prince Edward Island

In Prince Edward Island, Order 35 of the Rules of Court provides that:²⁴⁷

1. In any action against any person domiciled in this Province, on a judgment obtained in an action in any other province or country to which no defence was made, or to which a defence was made where the original cause of action arose in this Province, any defence which might have been made to the original action may be made to the action on the judgment.²⁴⁸

Saskatchewan — New Brunswick

In Saskatchewan²⁴⁹ and in New Brunswick,²⁵⁰ the Foreign Judgments Act declares that "Subject to the other provisions of this Act, and for the purposes of this Act, a foreign judgment is conclusive as to any matter adjudicated upon and shall not be impeached for any error of fact or law".²⁵¹ It must be noted however that the New Brunswick Act contains a section which provides that a judgment does not of itself bar, in actions in the province,

²⁴⁵ *Laird v. McGuire* (1890), 40 N.S.R. 129.

²⁴⁶ (1896), 25 S.C.R. 69.

²⁴⁷ For an early statute see S.P.E.I. 1869, c. 15, s. 5.

²⁴⁸ See *Mayhew v. Registrar of Motor Vehicles and Provincial Secretary of Prince Edward Island* (1964), 42 D.L.R. (2d) 477.

²⁴⁹ R.S.S. 1965, c. 95, s. 5.

²⁵⁰ R.S.N.B., 1952, c. 90, s. 4.

²⁵¹ In New Brunswick until 1950 when the Foreign Judgments Act was adopted, S.N.B. 1950, c. 156, s. 6, it was provided by legislation that any foreign judgment could be reopened if the defendant had not been personally served within the territory of the original court; 1864, 27 Vict. c. 41, later C.S.N.B. 1877, c. 48, R.S.N.B. 1903, c. 137, R.S.N.B. 1927, c. 140; *Shearer & Co. v. McLean* (1903), 36 N.B.R. 284 (C.A.); *Star Kidney Pad Co. v. McCarthy* (1880), 26 N.B.R. 107 (C.A.); *Int. Jobbers Ltd. v. Imperial Clothing Co.* (1923), 50 N.B.R. 336, [1923] 3 D.L.R. 601 (C.A.).

a "right or defence based on either law or fact which has accrued . . . subsequent to the entering of such judgment".²⁵²

Federal Legislation

It should also be noted that under the Foreign Aircraft Third Party Damage Act²⁵³ the merits of the foreign judgment may not be reopened for execution.

The rejection of the conclusiveness rule by statute can no longer be justified today. The Ontario statutory provisions are the most offensive since they discriminate against Quebec judgments only. They should all be repealed as historically they were intended to favour Quebec judgments in specific situations at a time when foreign judgments were not conclusive on the merits. Now that at common law foreign judgments are conclusive, the Ontario rules can no longer achieve their original objective.

Merger

In Canada a valid and final personal domestic judgment will have one or more of the following effects of *res judicata*: If in favour of the plaintiff it merges the original cause of action, thereby extinguishing the claim and substituting for it a new claim on the judgment obtained. If on the merits and in favour of the defendant, it bars a subsequent action on the claim. Regardless of whom the judgment is in favour, it is conclusive as collateral estoppel in a subsequent action between the parties on a different claim as to issues actually litigated and determined in the former action, and as direct estoppel in a subsequent action between the parties on the same claim. These are some of the basic effects of domestic judgments.

To what extent if at all do these effects differ when foreign judgments are placed in issue in the forum?

i) Judgment in favour of the plaintiff

Where the plaintiff has secured a judgment in his favour in the court of a foreign state or sister province, is he able to disregard the decision and sue again on the original cause of action?

In contrast to the well-settled rule concerning judgments of local origin, the prevailing view in the Anglo-Canadian system is

²⁵² S. 8.

²⁵³ S.C., 1955, c. 15, s. 6.

that the original cause of action is not merged in a judgment or decree rendered in a foreign state or sister province in favour of the plaintiff. The judgment creditor has thus the option of suing either on the judgment itself or on the original cause of action²⁵⁴ or on both, alternatively in the same action, until the foreign judgment is satisfied. This has been called the non-merger rule. In *Smith v. Nichols*²⁵⁵ it was observed by Tindal C.J.:

If, then, the judgment has not altered the nature of the rights between the parties, we want some authority to see that the plaintiff is to be deprived of the remedy which every subject has of bringing his actions in the courts here for the damages he has sustained. It appears to me he has his option, either to resort to the original ground of action or to bring an assumpsit on the judgment recovered.

The non-merger rule has been justified on the ground that a foreign judgment is not technically a record and, therefore, not a security of higher nature than the original claim.²⁵⁶ Piggott disagreed with this view. He said that the term "court of record" has no other significance than that the acts and judicial proceedings of the courts are retained for a perpetual record of their transactions, and that any court with such characteristics is the equivalent of a court of law. As courts of law of foreign states also have their acts and judicial proceedings retained, the term "court of record" should disappear.²⁵⁷ He cites *Houlditch v. Donegal*²⁵⁸ where Lord Brougham expressly made use of the phrase "foreign court of record" as an authority to sustain his point of view. For Piggott

²⁵⁴ *Clergue v. Humphrey* (1900), 31 S.C.R. 66, affirming 27 O.A.R. 96 *sub nom Bugbee v. Clergue*; *Moritz v. Canada Wood Specialty Co.* (1908, 17 O.L.R. 53, at p. 62 (C.A.), aff'd 42 Can. S.C.R. 237; *Metropolitan Trust and Savings Co. v. Osborne* (1909), 14 O.W.R. 135, aff'd 1 O.W.N. 785, 16 O.W.R. 226; *Trevelyan v. Myers* (1895), 26 O.R. 430; *Hutton v. Dent* (1922), 52 O.L.R. 378, aff'd 53 O.L.R.105, 70 D.L.R. 582, aff'd [1923] S.C.R. 716, [1924] 1 D.L.R. 401; *Barned's Banking Co. Ltd. v. Reynolds* (1875), 36 U.C.Q.B. 256, at p. 289; *Re McMillan v. Fortier* (1901), 2 O.L.R. 231; *Monast v. Provincial Ins. Co.*, [1939] O.W.N. 113; *Fergus v. Wardlaw* (1848), 5 N.B.R. 665 (C.A.); *Prudential Securities Ltd. v. Sweitzer* (1916), [ord. 10 O.W.N. 297 (C.A.)], 10 O.W.N. 200, 28 D.L.R. 361; *State Bank v. Benzanson* (1914), 27 W.L.R. 812, 16 D.L.R. 848 (Alta); *Grobe v. Buffalo & Fort Erie Ferry and Railway* (1916), 38 O.L.R. 272; *U.S.A. v. Harden* (1962), 36 D.L.R. (2d) 602, at p. 607 (B.C. C.A.), aff'd [1963] S.C.R. 366; *Industrial Acceptance Corp. Ltd. v. Stevenson* (1963), 43 W.W.R. 126 (Sask.); *Davidson v. Sharpe*, [1920] 1 W.W.R. 888, 60 S.C.R. 72, 52 D.L.R. 186, affirming [1919] 2 W.W.R. 76, 12 Sask. L.R. 183, 46 D.L.R. 256, which affirmed [1919] 1 W.W.R. 469.

²⁵⁵ (1835), 5 Bing (N.C.) 208, at p. 221.

²⁵⁶ For instance in *Hall v. Obder* (1809), 11 East 118.

²⁵⁷ *Op. cit.*, 2d ed., p. 29.

²⁵⁸ (1834), 2 Cl. & Fin. 470.

the non-merger rule is based on the distinction between *prima facie* evidence and conclusiveness. As originally foreign judgments were only *prima facie* evidence of the debt, it was always possible for the plaintiff to sue again on the original cause of action. Now that they are held to be conclusive on the merits the non-merger rule should be abandoned.

The reason why in *Hall v. Obder*²⁵⁹ it was said that a foreign judgment is not a record and therefore not pleadable as a bar to a new action, comes from the fact that early in the history of English law a foreign judgment was treated as giving rise to a simple contract debt from the defendant to the plaintiff. The liability of the defendant arose upon an implied contract to pay the amount of the foreign judgment. This approach was derived from the distinction introduced by the *Slade* case in 1602, between the action of assumpsit, a derivation of trespass on the case, and the action of debt.²⁶⁰

It was held that an agreement to pay might be implied from the existence of a debt, and assumpsit brought on this implied agreement. Assumpsit by then had become very common in cases where it was not an action on specialty or an action on a record. To use the action of assumpsit as a remedy to enforce a foreign judgment for a sum of money, it was necessary to find that the defendant owed a debt to the plaintiff, that there was an implied undertaking to pay the sum, and that the debt was a simple contract debt. To meet these requirements, the courts used the analogy of domestic judgments which were enforced by means of an action of debt. The courts then ruled that in a foreign judgment there was an implied contract to pay the amount of the judgment, and that foreign courts were not courts of record for the purpose of meeting the requirements of a simple contract debt.

This fiction that foreign judgments were implied contracts of debt was used to facilitate their enforcement by the convenient action of assumpsit. No substantive law was involved. It was purely a procedural method that had developed from the *Slade* case and concerned foreign judgments only.

The consequences were very important. As Dr. Read wrote:²⁶¹

From the rule that a foreign judgment is not a judgment of a court of record there logically followed two otherwise unexplainable rules. The

²⁵⁹ (1809), 11 East 118.

²⁶⁰ (1602), 4 Co. Rep. 91a, 92b, 76 E.R. 1072, 1074.

²⁶¹ *Op. cit.*, p. 116.

first of these, as stated by Lord Mansfield in *Walker v. Witter*²⁶² was that the money judgments of foreign courts, like courts in England not of record, were examinable on the merits, being merely "*prima facie*" evidence of the foreign cause of actions. . . . The second rule that followed from the premise that a foreign judgment is not of record was one that became firmly established in English law before the decision of *Godard v. Gray* in 1870: A foreign judgment does not merge the original cause of action.

Therefore, the non-merger rule did not originate as a corollary of the *prima facie* rule, but as the direct consequence of the fact that for purposes of procedure the foreign judgment was not considered as proceeding from a court of record.

The non-merger rule has been uniformly followed in Canada in spite of its inconsistency with the *res judicata* principle.²⁶³

There is one definite exception to the non-merger rule. If it can be shown that the judgment in favour of the plaintiff has been satisfied, no suit will lie for the recovery of any balance alleged to be due by the plaintiff upon the original cause of action.²⁶⁴

ii) Judgment in favour of the defendant: Judgment as a bar

Where the foreign judgment is in favour of the defendant, the plaintiff cannot sue again on the original cause of action. In such a case if it is final and conclusive on the merits, the foreign judgment is a complete answer to any proceedings in the domestic courts by the plaintiff. It precludes him from further attempting to recover on the original cause of action elsewhere.²⁶⁵ However a foreign judgment in favour of the defendant is not a bar to a subsequent action by the plaintiff on a cause of action which although it arose out of the same transaction was not litigated in the action in which such judgment was rendered.

The plaintiff having chosen the tribunal, he must be bound by its decision, and the defendant must not lose the protection given to him by the foreign court. This is a sound rule and has its source in the *res judicata* principle. Yet it is highly inconsistent with the non-merger rule.

²⁶² (1778), 1 Doug 1, 6b.

²⁶³ See *supra*, footnote 46.

²⁶⁴ *Barber v. Lamb* (1860), 8 C.B. (N.S.) 95; *Taylor v. Holland*, [1902] 1 K.B. 676; see also *Turcotte v. Dawson* (1879), 30 U.C.C.P. 23 (C.A.).

²⁶⁵ *Manolopoulos v. Paniffe* (1930), 1 M.P.R. 366, [1930] 2 D.L.R. 169 (N.S.C.A.) reversing [1929] 4 D.L.R. 48; *McMillan v. Ritchie* (1851), 7 N.B.R. 242 (C.A.) see also *Law v. Hansen* (1895), 25 S.C.R. 69.

The non-merger rule is a vestige of the common law procedure and does not appear now to be logically necessary in view of the obsolescence of the forms of action, nor is it defensible from the point of view of economy of litigation and justice.

To support the non-merger rule it is said that by bringing an action upon the original cause of action, the plaintiff waives the advantage of a foreign judgment in his favour, and he might lose everything without the power in certain cases to prove a larger claim. On the other hand, on principle, it is difficult to justify the non-merger rule. The plaintiff has submitted his claim to a court of competent jurisdiction and that court has passed on the claim. There seems no occasion for him to be allowed to have the advantage of another attempt and to take up the time of the court and compel the defendant again to prepare his defense. As Dr. Read wrote:²⁶⁶

The appropriate method of determining the desirability of the rule is to weigh the considerations of general policy and logical consistency on the one hand against the undoubted advantage which accrues to the plaintiff on the other.

The non-merger rule is an anomaly which can only delay the liberal evolution which is taking place in this field of conflict of laws. The rule cannot be harmonized with the policies underlying the *res judicata* doctrine and should be abandoned by Canadian courts. Public policy dictates that there be an end to litigation and that matters once tried be considered forever settled as between the parties. This doctrine which is a basic tenet of the common law should not suffer an exception in the case of foreign judgments in favour of plaintiffs, especially where this exception is based on obsolete procedural rules. Old common law rules of procedure should give way to broader principles of equity and justice. The application of the non-merger rule affords perhaps a unique example of public policy set at naught by an outmoded procedural rule. It should certainly be eliminated in order to let the merger rule prevail in all situations. This would remove the illogical differences which exist between a judgment for the plaintiff and a judgment for the defendant and restore the principle of *res judicata* as the only true, reasonable and workable theoretical and practical basis for a consistent system of recognition and enforcement of foreign judgments.

²⁶⁶ *Op. cit.*, p. 120.

Res judicata

A problem demanding careful analysis is posed by the *res judicata* principle. Where the plaintiff seeks to enforce a foreign judgment in his favour, is the conclusive nature of this judgment a consequence of the *res judicata*? Does the same principle apply in the case of a plaintiff, unsuccessful before the court of another country, who sues on the original cause of action, and where the prior adjudication in favour of the defendant is raised as a defense to defeat the plaintiff's action?

It is commonly held that *res judicata* operates both as a merger and as an estoppel, and this interpretation covers the two results of the *res judicata* doctrine: The first consequence has been stated in the maxim *nemo debet bis vexari*, which prevents a subsequent attempt to invoke the aid of the courts over the same issue, the judgment having merged the original cause of action. Beale²⁰⁷ rejects this consequence on the ground that it has nothing to do with conflict of laws, while Dr. Read contends that it is irrelevant to the non-merger rule.²⁶⁸

As to the second consequence of *res judicata*, it is held that when a question is litigated, the judgment of the court is the final determination between the parties and their privies and any right, question, or fact once determined by a court of competent jurisdiction cannot be retried in a subsequent suit between the same parties or their privies even though technically for a different cause of action (the enforcement of the foreign judgment); the right, question, or fact is conclusively established so long as the original judgment remains valid in the country where it was first rendered. It is with this corollary of *res judicata* that the theory of the conclusiveness of a foreign judgment is consistent, an interpretation which also applies when the judgment is used as a bar by the successful defendant to an action by the plaintiff on the original cause of action. In other words, in theory, the foundation of the doctrine of estoppel by *res judicata* lies not only where the prior decision is set up as a bar to an action by the unsuccessful plaintiff, but also where an action is brought on the prior decision for the purpose of preventing the unsuccessful defendant from disputing this former decision on the merits. Therefore, it can generally be said that a foreign judgment used to establish the basis of the plaintiff's right is as unimpeachable as a foreign judgment pleaded as a defense.

²⁰⁷ The Conflict of Laws (1935), s. 450. 1.

²⁶⁸ *Op. cit.*, p. 120.

Dr. Read²⁶⁹ does not agree with this conception of *res judicata* and in opposition to Piggott²⁷⁰ maintains that *res judicata* is not the rationale for the recognition of the conclusive nature of foreign judgments. For this author, as it has already been noted, a foreign judgment cannot be recognized as the consequence, in the technical sense, of the *res judicata* doctrine as it applies to judgments of local courts. A foreign judgment merely "proves the fact that a vested right has been created through the judicial process by the law of a foreign law district". It follows that:²⁷¹

This conclusiveness although akin in effect to *res judicata* does not spring from that doctrine but inevitably from the doctrine that the existence of the right created by a foreign judgment is in itself a sufficiently impelling reason for its recognition. The foreign court having jurisdiction, the right created by it should be treated as inviolate elsewhere.

This conclusiveness rule and the *res judicata* doctrine are both consistent with the considerations of policy on which the latter is founded: *Interest reipublicae ut sit finis litium* and *Nemo debet bis vexari eadem cause*. That rule and that doctrine should not, however, for this reason or any other, be confused, although or just because they reach approximately the same result in their several fields of operation.

It seems that the conclusiveness doctrine needs no help from the vested right or legal obligations doctrine. It stems directly from the *res judicata* rule. A foreign judgment will be given either the force of *res judicata* which it possessed in the foreign country or the force of the *res judicata* of the forum.²⁷² It will be *res judicata*, either absolutely or in some modified form as a domestic judgment and therefore conclusive on the merits. The conclusiveness rule appears to be a logical consequence of the fact that the foreign judgment is received by the courts of the forum as *res judicata*, both the plaintiff and the defendant being bound by it. All the forum can do or should do is to examine whether the foreign court had jurisdiction to render the judgment. Once this is done the foreign judgment is *res judicata* and should not be reviewed on the merits. It is recognized and will be ready for enforcement.

Policy considerations dictate that there be an end to litigation, that those who have contested an issue shall be bound by the result of the contest and that matters once tried shall be considered forever settled as between the parties. The policy behind *res judicata* applies to all judgments whether local or not and should apply

²⁶⁹ *Op. cit.*, p. 121.

²⁷⁰ *Op. cit.*, 2d ed., pp. 32, and 36.

²⁷¹ *Op. cit.*, p. 111.

²⁷² See *Law v. Hansen* (1895), 25 S.C.R. 69, at p. 72.

whether such judgments are for the plaintiff or for the defendant. In other words, *res judicata* is the only reasonable principle which can be invoked in order to favour recognition and enforcement of foreign judgments.

In this field of the law of conflict of laws, an historical analysis discloses a steady evolution towards an avowed application of the *res judicata* rule. At first the domestic courts were distrustful of foreign decisions. They expressed this distrust by devising technical as well as theoretical ways for reducing the number of enforceable foreign judgments to a trifling minimum. With the development of international commerce, as well as a better knowledge of foreign legal systems, these doctrines and techniques gave way to more progressive ones such as conclusiveness, and vested rights. Today the trend is toward assimilation of the foreign judgment to the domestic judgment. Once this is fully accomplished, the doctrine of *res judicata* will apply in all its magnitude as it should have right from the beginning. Judges cannot escape applying one of the most fundamental principles of the Roman law: *res judicata pro veritate accipitur*. For the lawyer the most significant aspect of this point lies in its procedural implications. It is safe to say that despite the different and contradictory explanations of these two means of using a foreign judgment, and despite the anomaly of the non-merger rule, when a foreign judgment is held conclusive or when it is used as a bar to a subsequent action, it produces the same results as a domestic judgment under similar circumstances.

Conclusion

The constant tension which exists between the principles of the autonomy and sovereignty of the domestic system and the necessity to recognize the existence of foreign legal systems as an indispensable condition for the expansion of international trade, has greatly influenced the development of the rules concerning the recognition and enforcement of foreign judgments. To give effect to a foreign judgment implies the recognition of a foreign legal system in all its institutional elements. When a creditor secures a judgment abroad, it means that he has successfully invoked the foreign jurisdiction, proven his case, and that the proper law has been applied and the correct procedure followed until a final judgment has been rendered. The foreign legal system has manifested itself in a most complete manner. The creditor should then be able to seek the enforcement of his judgment in any other jurisdiction.

This is so clear that it is difficult to understand why he has not been allowed to do so, since in the Anglo-Canadian system the doctrine and jurisprudence hold that a foreign judgment has no direct operation. It must be declared executory by the courts.

The reasons for this attitude are numerous. The local sheriff cannot enforce a title which he cannot verify or perhaps even understand. Foreign money judgments are usually executed on the property of the debtor which is located within the jurisdiction of the enforcing court and thus they affect the domestic economic order. This cannot be tolerated without some sort of control. The local judge exercises that control and this raises the whole problem of the recognition of the foreign legal system with all its implications.

One can then understand why the enforcing judge is afraid to readily grant an executory character to foreign judgments. Sovereignty forces him to curb down the full operation of foreign legal systems in the forum. He sets up conditions which have to be met before any effect is to be given to foreign judgments, and even may go so far as to reopen the merits of the case, thereby refusing to recognize the existence and validity of foreign legal systems.

The difficulty which confronts the courts is to determine how much control should be exercised over foreign judgments if a balance is to be reached between the dictates of sovereignty and the necessities of international trade. It is also necessary to justify any solution from a theoretical point of view. The recognition and enforcement of foreign judgments cannot be based on pure theory, but rather on a public policy which takes into account not only the fact that there must be an end to litigation, but also the economic and social requirements of the forum. Rules of law must be in harmony with economic and social factors if they are to operate successfully. To deny effect to a foreign judgment destroys security in international transactions, as private relations generally ignore national boundaries. Also in certain cases the enforcing court may not have jurisdiction over the original cause of action or the parties. On the other hand, to directly enforce foreign judgments is dangerous in a world where concepts of justice are by no means uniform and where jurisdiction may have been acquired over an absent defendant who has never had any notice or knowledge of the suit against him.

5) Defences available to the defendant

a) Fraud in procuring the foreign judgment

It is well established that *fraus omnia corrumpit*. Any judgment domestic or foreign obtained by fraud can be impeached.²⁷³ This was emphasized by Chief Justice de Grey in the *Duchess of Kingston's* case in the following words:²⁷⁴

Fraud is an extrinsic collateral attack which vitiates the most solemn proceedings of courts of justice. Lord Coke says it avoids all judicial acts, ecclesiastical or temporal.

The law of the forum will determine whether there has been fraud which will vitiate a foreign judgment.

The fraud which vitiates a foreign judgment may proceed either from the conduct of the party in whose favour it is obtained or from the actions of the foreign court.

a) Fraud on the part of the party in whose favour the foreign judgment was obtained

Canadian and English courts recognize that a foreign judgment can be impeached for fraud perpetrated upon the court which rendered it. The difficulty lies in defining the extent to which the fraud does not defeat the rule that foreign judgments are conclusive on the merits. There is no accord as to what kind of fraud is sufficient to vitiate a foreign judgment: what sort of evidence is admissible to invalidate a foreign judgment.

Dr. Read clearly states the problem: "Are both the policy in favour of *res judicata* and the policy against fraud to be given due effect or is the latter to be allowed to prevail? Must the fraud be limited to those aspects of foreign judgments which are in no wise *res judicata* such as the international jurisdiction of the foreign court and facts extrinsic to the record of that court, or may the forum in the action where fraudulent procurement of a foreign judgment is alleged, go so far in its search for such fraud

²⁷³ *Ochsenbein v. Papierer* (1873), L.R. 8 Ch. 695; *Abouloff v. Oppenheimer* (1882), 10 Q.B.D. 295 (C.A.); *McLean v. Shields* (1885), 9 O.R. 699 (C.A.); *Woodruff v. McLennan* (1887), 14 O.A.R. 242 (C.A.); *Vadala v. Lavves* (1890), 25 Q.B.D. 310 (C.A.); *Jacobs v. Beaver* (1908), 17 O.L.R. 496 (C.A.); *Nevay v. Gillis* (1910), 8 E.L.R. 273 (N.S.); *Manopoulos v. Paniffe* (1930), 1 M.P.R. 366; *Syal v. Heyward*, [1948] 2 K.B. 443, Cowan (1949), 65 L.Q. Rev. 82, Graveson (1949), 12 Mod. L. Rev. 105.

²⁷⁴ (1776), 2 Sm. L.C. 644 (13th ed.).

as to retry the merits of the original action upon exclusively the same evidence as was before the foreign court?"²⁷⁵

A distinction has been drawn between extrinsic and intrinsic fraud. Intrinsic fraud which involves matters going to the existence of the cause of action is not a defense to the judgment. To allow it would infringe the principle of *res judicata*. For example, a foreign judgment based on a contract obtained by fraud will not be impeached on this ground. On the other hand, fraud extrinsic to the matter tried will vitiate a foreign judgment. If the acts or facts that mislead the foreign court as to the merits are extrinsic to the record, that is form no part of the record, the judgment can be set aside. Extrinsic fraud must have deprived the aggrieved party of an adequate opportunity to present his case to the court.

In England the courts have been very liberal. They have reopened the case whether the alleged fraud was extrinsic or intrinsic, and despite the fact that the fraud was or might have been alleged in the foreign proceedings, or in fact was investigated in the foreign court and dismissed, or that the evidence on which the allegation of fraud is based was available before the date of rendition of the foreign judgment. A judgment may be attacked for fraud, if it was rendered upon false testimony or false evidence given by the plaintiff in the original court, though this involves a reexamination of the merits of the case.

In *Abouloff v. Oppenheimer*²⁷⁶ the foreign court was held to have been misled as to the merits of the case, because the misleading acts were extrinsic to the record. The plaintiff had obtained in a Russian court, a judgment against the defendants ordering the latter either to deliver to the plaintiff certain goods belonging to him and alleged to be in the possession of the defendants or to pay the plaintiff a certain sum. The judgment, which was affirmed on appeal by the High Court of Tiflis, Russia, was obtained by the fraud of the plaintiff who falsely swore that at the time the action was brought, the goods were in the defendant's possession when in fact they were in his possession. In England, the judgment was held to have been secured by fraud and its enforcement refused. The court said that in an action on a foreign judgment, where the defendant alleges that it was obtained by fraud, even though there was no allegation of any new relevant facts which were not proved in the earlier foreign action, the forum can retry the very question of fact which was the issue in the original action. Apparently, the

²⁷⁵ *Op. cit.*, p. 273.

²⁷⁶ (1882), 10 Q.B.D. 295.

vitiating influence of fraud prevailed over the doctrine of conclusiveness or *res judicata*. In an action on a foreign judgment: "Where the fraud has been successfully perpetrated for the purpose of obtaining the judgment of a Court, it seems to me fallacious to say, that because the foreign court believes what at the moment it has no means of knowing to be false, the court is mistaken and not misled; it is plain that if it had been proved before the foreign court that fraud had been perpetrated with the view of obtaining its decision, the judgment would have been different from what it was."²⁷⁷ Lord Justice Brett declared: "I will assume that... the defendants gave the very same evidence in support of the charge: I will assume even that the defendants gave the very same evidence which they propose to adduce in this action; nevertheless the defendants will not be debarred at the trial of this action from making the same charge of fraud and from adducing the same evidence in support of it; and if the High Court of Justice is satisfied that the allegations of the defendants are true, and that the fraud was committed, the defendants will be entitled to succeed in the present action."²⁷⁸

It follows that in England the existence of fraud in the proceedings, against which the injured party might have protected himself at the trial, may be urged successfully to avoid the foreign judgment. There may be a retrial of the merits, not because the foreign court came to a wrong conclusion, but because it was fraudulently misled into coming to a wrong conclusion.

This theory contradicts a previous line of decisions. Piggott²⁷⁹ points out that the rule laid down in *Abouloff v. Oppenheimer* is opposed to Lord Campbell's opinion in *Bank of Australasia v. Nias*²⁸⁰ to the effect that where fraud was involved in the issue before the foreign court, a defense setting up this fraud in an action on the judgment is bad because it would amount to reopening the merits of the case. However it was reaffirmed in *Vadala v. Lawes*.²⁸¹ In this case the plaintiff brought an action in Sicily against the defendant to recover money alleged to be due on certain bills of exchange. The plaintiff obtained a judgment against the defendant by fraudulently representing in the Italian court that the bills of exchange were given under the authority of the defendant and

²⁷⁷ Per Lord Coleridge, at p. 303.

²⁷⁸ *Ibid.*, at p. 306.

²⁷⁹ *Op. cit.*, 3rd ed., Pt 1, pp. 387, 395.

²⁸⁰ (1851), 20 L.J. Q.B. 284.

²⁸¹ (1890), 25 Q.B.D. (C.A.) 310.

for mercantile transactions whereas they were given without the defendant's authority for gambling debts. The judgment was declared invalid in England. The defense of fraud had been tried on its merits by the Italian court and a judgment for the plaintiff had been entered; yet the English court reopened the entire case. Lord Justice Lindley said:

If the fraud upon the foreign court consists in the fact that the plaintiff has induced that Court by fraud to come to a wrong conclusion, you can re-open the whole case even although you will have in this Court to go into the very facts which were investigated, and which were in issue in the foreign Court. The technical objection that the issue is the same is technically answered by the technical reply that the issue is not the same because in this Court you have to consider whether the foreign Court has been imposed upon. That, to my mind, is only meeting a technical argument by a technical answer, and I do not attach much importance to it; but in that case the Court faced the difficulty that you could not give effect to the defence without re-trying the merits. The fraud practised on the Court, or alleged to have been practised on the Court, was the misleading of the Court by evidence known by the plaintiff to be false.²⁸²

Read²⁸³ points out that "That is true, narrowly speaking, but it is also axiomatic that the question of credibility of witnesses, whether they are misleading the court by false testimony, has to be determined by the tribunal in every trial as an essential issue, decision of which is a prerequisite to the decision of the main issue upon the merits. A judgment on the merits necessarily, therefore, involves *res judicata* of the credibility of the witnesses in so far as the evidence which was before the tribunal is concerned. Thus, when the allegation is made that a foreign judgment is vitiated because the court was fraudulently misled by a perjury, and issue is taken with that allegation, if the only evidence available to support the allegation is that which was before the foreign court, to hear it will amount simply to a retrial... in *Abouloff v. Oppenheimer* no such issue was taken; the party alleged to have misled the foreign court by false evidence admitted the allegation by his demurrer. The fact so admitted to be true was material to the question of fraud, and extrinsic to the facts which were proved and adjudicated upon in the foreign court."

An attempt was made to reconcile *Abouloff* and *Vadala* on the grounds that the question whether the foreign court was misled, was not as to the facts in the record, in issue, and was not decided upon by the foreign court. The only issue before the court is

²⁸² Pp. 316-317.

²⁸³ *Op. cit.*, p. 278, note 32.

whether or not the foreign judgment was fraudulently obtained. However, this kind of reasoning was termed by Dr. Read a resort to a narrowly technical *hocus pocus* to enable Lord Brett to pretend that he was not violating the *res judicata* doctrine.

Again in *Ellerman Lines v. Read*²⁸⁴ the court approved a retrial on the merits. In *Syal v. Heyward*²⁸⁵ renewed strength was given to the doctrine of *Abouloff v. Oppenheimer* by permitting the allegation of fraud discovered by the defendant at the time of the trial and not then objected to by him. The plaintiff obtained a judgment in undefended proceedings in an Indian court in 1947 on a complaint in which he alleged that he had lent the defendant 20,000 roupies. Later in 1949 the judgment was registered under the English Act of 1933²⁸⁶ as a judgment in the King's Bench Division. The defendant applied to have the registration set aside under section 4(1) (a) (IV) on the ground that the plaintiff deceived the court of India since the amount was in fact 10,800 roupies, the total of 20,000 having been obtained by addition of commissions and interests that the defendants alleged to have paid in advance. The Master dismissed the application because all the facts on which the defendants relied could have been raised by way of defense in the Indian proceedings. On appeal, the judge directed an issue of fraud to be tried on condition that the defendant paid into the court the amount of the judgment debt. On further appeal, the Court of Appeal held that the defendants were entitled to have an issue of fraud tried and that the judge had no power to impose the condition of payment into the court. The plaintiff argued that where it was sought to have a judgment set aside on the ground of fraud, the fraud must have been discovered by the applicants since the date of the judgment and that it was clear that the defendants knew that they were being sued in respect to the loan of a sum considerably greater than that which they alleged had been lent. However, the court held that it was immaterial whether or not the facts relied on to establish a *prima facie* case of fraud were known to the party relying on them at all material times and could therefore have been raised by way of defense in the foreign proceedings.

Dean Read considers that there is no justification for reopening the merits and that the plea of fraud should be available only to a defendant in cases where the court is induced by fraud to assume

²⁸⁴ [1928] 2 K.B. (C.A.) 144.

²⁸⁵ [1948] 2 K.B. 443 (C.A.); [1948] 2 All E.R. 576.

²⁸⁶ 23 & 24 Geo. 5, c. 13.

jurisdiction, or where the foreign court was misled as to the merits if the misleading acts or facts were *extrinsic* to the record.²⁸⁷

Not all Canadian courts have followed the English cases. Some courts have held that a foreign judgment can only be impeached for fraud if new evidence of a decisive character has been discovered since the trial. Where fraud is raised as a defence and there is no allegation of relevant facts which were not proven in the foreign action, the enforcing court cannot try over again the very question of fact which was in issue in the original action.

In *Woodruff v. McLennan*²⁸⁸ which involved an action upon a Michigan judgment in a suit brought in that State to recover payment for certain services under a logging contract, the defence was that the plaintiff fraudulently misled the foreign court by perjury, and it was sought to show the falsity of the plaintiff's statements by the evidence of certain witnesses. The Court of Appeal of Ontario held that this evidence was properly rejected. The whole evidence on the original trial was fully before the attention of the Michigan court, and what the defendants were proposing was to try over again the question which was in issue in the original action. The charge of fraud was superadded.

Patterson J. said:

It seems to me impossible to deny that what the defendants propose to do is to try over the very question which was in issue in the original action.²⁸⁹

With respect to Lord Brett's dicta in the *Abouloff* case, he remarked:

It is not said that even a charge of fraud will warrant the Court in trying over again the same issue that was tried in the original action; but it is said that the question whether the original court was or was not misled cannot have been an issue there. I confess my inability to follow this distinction without understanding the word 'issue' in what seems to me too narrow or technical a sense. Take the extreme case of alleged perjury committed by the plaintiff in giving his evidence upon the material question in controversy between him and his adversary. The *issue*, in substance and reality, though perhaps not in technical form — if, indeed, technical forms can now be said to exist in our procedure — is the truth or falsehood of what the plaintiff swears to.²⁹⁰

The court held that *Abouloff v. Oppenheimer* was inapplicable. If the defendant had sought to introduce evidence discovered after the Michigan trial to prove that the plaintiff's testimony in the

²⁸⁷ *Op. cit.*, p. 273.

²⁸⁸ (1887), 14 O.A.R. 242 (C.A.).

²⁸⁹ P. 249.

²⁹⁰ P. 252. See also per Duff, J. in *MacDonald v. Pier*, [1923] S.C.R. 107, at p. 121.

original action was false it would have been admitted in the Ontario action. In the light of the new evidence the court could, if necessary reexamine the merits of the case. This decision was not followed in the Queen's Bench Division of the High Court of Ontario in *Hollender v. Ffoulkes*.²⁹¹ The court preferred the reasoning of *Vadala v. Lawes* decided after the *Woodruff* case. Armour C.J. quoted Lindley L.J. in *Vadala v. Lawes* who referred to *Abouloff v. Oppenheimer*, as follows:

I cannot fritter away that judgment, and I cannot read the judgments without seeing that they amount to this: that if the fraud upon the foreign Court consists in the fact that the plaintiff has induced that Court by fraud to come to a wrong conclusion you can reopen the whole case even although you will have in this Court to go into the very facts which were investigated, and which were in issue in the foreign Court... Not only where there has been a fraud on the Court by what is called extrinsic circumstances, ...but where the plaintiff has obtained judgment by the use of perjured evidence, that is such a fraud as would enable the defendant to impeach the foreign judgment.

He then decided that it was a good defence to an action on a foreign judgment that the order for judgment was obtained upon a false affidavit, the plaintiffs fraudulently concealing from the court the true nature of the transactions between them and the defendant.

Street J. in *Johnston v. Barkley*²⁹² was of the same opinion and refused to draw a distinction between the fraud which consists in presenting perjured evidence to the court and that which is collateral to the merits of the case. However he recognized that the wide doctrine followed by the English courts impairs to a considerable extent the finality of all foreign judgments.²⁹³

In *Anderson Produce Co. v. Nesbitt*,²⁹⁴ the court cited *Hollender v. Ffoulkes*, and said that the evidence of fraud must be of such clear and convincing character that the conclusion from it is irresistible that the foreign court was not merely mistaken, but was actually misled by the fraud practised upon it, into pronouncing a judgment. In this case the evidence adduced fell short of this. Clear and convincing evidence of fraud is required.²⁹⁵

²⁹¹ (1895), 26 O.R. 61 (C.A.). See also (1895), 16 P.R. 175.

²⁹² (1905), 10 O.L.R. 724 (domestic case).

²⁹³ See also *obiter dictum* in *May v. Roberts*, [1929] 2 W.W.R. 449, 41 B.C.R. 185, [1929] 3 D.L.R. 370, at pp. 371-372; *Locke v. Hulett*, [1929] 3 D.L.R. 572, at p. 575, [1929] 2 W.W.R. 558 (Alta).

²⁹⁴ (1903), 2 O.W.R. 430, 1 O.W.R. 818.

²⁹⁵ See also *MacDonald v. Pier*, [1922] 1 W.W.R. 1208, 17 Alta L.R. 401, 63 D.L.R. 577, aff'd, [1923] 1 W.W.R. 376, [1923] S.C.R. 107, [1923] 1 D.L.R. 670. And *Boga v. Chamberlen* (1936), 9 M.P.R. 565 (N.S.), [1936] 1 D.L.R. 660 where it was held that a strong case must be made out.

However in *Jacobs v. Beaver*,²⁹⁶ the Ontario Court of Appeal, explained and approved *Woodruff v. McLennan*. Garrow J.²⁹⁷ distinguished between evidence discovered after the trial of the original action, and evidence which could have been properly introduced in defense in that action. He said:

The fraud relied upon must be something collateral or extraneous and not merely the fraud which is imputed from alleged false statements made at the trial which were met by counter statements by the other side and the whole adjudicated upon by the court and so passed on into the limbo of estoppel by the judgment; this estoppel cannot be disturbed except upon the allegation and proof of new and material facts which were not before the former court and from which is to be declared the new proposition that a former judgment was obtained by fraud.

In *Johnston v. Occidental Syndicate Limited*,²⁹⁸ it appeared that the plaintiff in the original action had a claim for services and advances made and that there was some doubt whether it was against the defendants or against another affiliated company. Judgment was obtained in summary proceedings in the foreign court. The defendants contended that the foreign judgment was obtained by fraud. Applying the principles stated by Garrow J. in *Jacobs v. Beaver*, the court held that since the foreign court had passed on the question of the identity of the debtor it could not be tried again. Whether its judgment should be reopened was for the foreign court to decide.²⁹⁹

Thus, in Ontario *Jacobs v. Beaver* seems to represent the correct approach to the problem of fraud. Despite the abhorrence with which the common law regards fraud, the courts will not relitigate the issues disposed of in the foreign suit. As Duff J. pointed out in *MacDonald v. Pier*:³⁰⁰

...one is constrained to the conclusion upon an examination of the authorities that there is jurisdiction in the court to entertain an action to set aside a judgment on the ground that it has been obtained through perjury. The principle I conceive to be this; such jurisdiction exists but in the exercise of it the court will not permit its process to be made use of and will exert the utmost care and caution to prevent its process being used for the purpose of obtaining a re-trial of an issue already determined, of an issue which *transivit in rem judicatum*, under the guise of impugning

²⁹⁶ (1908), 17 O.L.R. 496, 12 O.W.R. 803 (C.A.).

²⁹⁷ P. 506.

²⁹⁸ (1911), 20 O.W.R. 67, 3 O.W.N. 60 aff'd *sub nom* *McDougall v. Occidental Syndicate Ltd.*, 22 O.W.R. 478, 3 O.W.N. 1384, 4 D.L.R. 727 (C.A.).

²⁹⁹ See also *Manolopoulos v. Paniffe* (1930), 1 M.P.R. 366, noted H. E. Read (1930), 8 Can. Bar Rev. 23 (judgment relied upon by the defendant and attacked by the plaintiff).

³⁰⁰ [1923] S.C.R. 107, domestic case, at pp. 120-121.

a judgment as procured by fraud. Therefore the perjury must be in a material matter and therefore it must be established by evidence not known to the parties at the time of the former trial.

Where a foreign judgment is set up by way of defence, the issue of fraud may equally be raised by the plaintiff.³⁰¹

The approach taken by the Ontario Court of Appeal which limits the defense of fraud to cases where the defendant was deprived of an adequate opportunity to present his case to the foreign court, and when the facts which constituted the fraud came to his knowledge after the original proceedings so that he had no possibility of reopening the case abroad is consistent with the doctrine of obligation and the rule of conclusiveness of foreign judgments.

There must be no retrial of an issue already determined under the guise of impugning a judgment for fraud. Actually the best justification for the English approach is that the defense of fraud is based on the broad principle that no person should be able to take advantage of his own wrong.³⁰²

Fraud in obtaining jurisdiction over the defendant is a good ground of defense against the enforcement of the foreign judgment. The courts believe that facts which relate to jurisdiction are so important that they should always be open to attack on the ground of their falsity. This rule applies even if the foreign court has declared itself competent upon trial of this issue. This attitude has been influenced by the theory that the validity of a foreign judgment can always be questioned for lack of jurisdiction in the foreign court.

³⁰¹ *Miller v. Purdon* (1923), 24 O.W.N. 328. And see *Manolopoulos v. Paniffe* (1930), 1 M.P.R. 366 (N.S.), where the plaintiff in the foreign action attacked the validity of a judgment rendered in favour of the defendant.

³⁰² In *Turcotte v. Dawson* (1879), 30 U.C.C.P. 23 (C.A.), Wilson, C.J. said, at p. 28: "The defendant is... precluded from going into the merits of the original action by reason of the appearance which he made in that action; but, if after that appearance, he gave the mortgage he has pleaded in satisfaction and discharge of that action and of all damages and costs in respect thereof, either in payment or in satisfaction and discharge, which the plaintiff accepted, and the plaintiff after that payment or satisfaction proceeded with the action without notice to the defendant or knowledge by him, and contrary to good faith, and in fraud of the defendant, it may be that the judgment so recovered would be contrary to natural justice, or a fraud, and the defendant should be allowed to plead such fact."

Thus in *Biggar v. Biggar*³⁰³ it was held that where a party has adduced false evidence to show that the court had jurisdiction over him this will invalidate the foreign judgment.³⁰⁴

Fraud on the part of the foreign court giving the judgment

When the foreign court acted in a fraudulent manner, for instance, if the foreign judges were interested in the property in dispute or were bribed, the decision will be disregarded.³⁰⁵

The allegation and proof of fraud must be specific and precise, and a mere allegation of notorious corruption in all the courts of the foreign country is ineffective.³⁰⁶

According to Piggott the kind of fraud Martin B. had in mind, when he stated in *Cammell v. Sewell*³⁰⁷ that a foreign judgment could be avoided for fraud on the part of the foreign court in giving the judgment, was a "wilful error in facts, law or procedure", including wilful disregard of English law as well as wilful disregard of any other important element in the consideration of the case.³⁰⁸

In other words, a violation of the general principles of natural justice may constitute fraud, bearing in mind that error is not fraud unless it is wilful. Therefore, "the weight of authority is in favour of refusing to acknowledge the foreign judgment when there has been a wilful disregard of either law or procedure, such disregard being held to be tantamount to fraud on the part of the court".³⁰⁹ The party setting up the wilful error must show that the applicable law was clearly put before the foreign court which rejected it with the intent of doing wrong.

Conclusion

It is submitted that the plea of fraud should only be available to the defendant when, as a result of the fraud, he was deprived of an

³⁰³ [1930] 2 D.L.R. 940, 42 B.C.R. 329.

³⁰⁴ The husband who was anxious to obtain a decree of divorce in Oregon had pretended that he was domiciled in that State when he was in fact domiciled in British Columbia. See also *R. v. Wright* (1877), 17 N.B.R. 363 (C.A.); *Delaporte v. Delaporte* (1927), 61 O.L.R. 302, [1927] 4 D.L.R. 933; *Bavin v. Bavin*, [1939] O.R. 385 (C.A.); *Rothwell v. Rothwell* (1942), 50 Man. R. 249, [1942] 4 D.L.R. 767.

³⁰⁵ *Price v. Dewhurst* (1837), 8 Sim. 279.

³⁰⁶ *Abouloff v. Oppenheimer* (1882), 10 Q.B.D. 295; *Price v. Dewhurst* (1837), 8 Sim. 279.

³⁰⁷ (1858), 27 L.J. Ex. 447.

³⁰⁸ Piggott, *op. cit.*, 3rd ed., p. 113. See section on natural justice.

³⁰⁹ P. 115.

adequate opportunity to present his case to the foreign court, and the facts which constituted the fraud came to his knowledge after the proceedings and he could no longer appeal the foreign decision. *Res judicata* should not prevail under all circumstances. If the question of fraud were raised before the foreign court or on appeal in the foreign country, and it was decided that no fraud had been committed, or if it could have been pleaded in the foreign court, the unsuccessful party should not be able to raise the question again in the forum.

b) Natural justice

Canadian courts generally state that a foreign judgment may be impeached if the proceedings in which it was obtained were contrary to the principles of natural justice.³¹⁰ In spite of the fact that the expression "contrary to natural justice" has frequently been before the courts, it is still sadly lacking in precision. At one time it was regarded as setting up for foreign jurisdictions a standard of judicial correctness upon the pattern of the enforcing court.³¹¹

Later on it was thought that the expression, when applied to the procedure of foreign courts, was regarded as being no more than a test by which to decide whether the foreign court was a court of competent jurisdiction or not, whether it had so sum-

³¹⁰ *Shearer & Co. v. McLean* (1903), 36 N.B.R. 284 (C.A.); *Frederick A. Jones, Inc. v. Toronto General Ins. Co.*, [1933] O.R. 428, [1933] 2 D.L.R. 660 (C.A.); *Barned's Banking Co. Limited v. Reynolds* (1875), 36 U.C.Q.B. 256, at p. 273; *Re Reciprocal Enforcement of Judgments Act*; *Wigston v. Chowen* (1964), 49 W.W.R. 543 (Sask.); *McLean v. Shields and Leacock* (1885), 9 O.R. 699; *Bugbee v. Clergue* (1900), 27 O.A.R. 96, 20 C.L.T. 57 aff'd *sub nom.*, *Clergue v. Humphrey* 31 S.C.R. 66, 21(B) C.L.T. 136; *Hughes v. Sharp* (1969), 68 W.W.R. 706 (B.C.C.A.), revising 66 W.W.R. 103, 70 D.L.R. (2d) 298; *Romano v. Maggiora*, [1935] 2 W.W.R. 524, 50 B.C.R. 66; *Wanderers' Hockey Club v. Johnson* (1913), 5 W.W.R. 117, 25 W.L.R. 434, 18 B.C.R. 367, 14 D.L.R. 42; *British Linen Co. v. McEwan* (1892), 8 Man. R. 99 (C.A.); *Delaporte v. Delaporte* (1927), 61 O.L.R. 302; *Rothwell v. Rothwell*, [1942] 3 W.W.R. 442, 50 Man. R. 249; *Beaty v. Cromwell* (1883), 9 P.R. 547; *Bavin v. Bavin et al.* [1939] O.R. 385, varied at p. 390; *Turcotte v. Dawson* (1879), 30 U.C.C.P. 23, at p. 28; *Burchell v. Burchell* (1926), 58 O.L.R. 515, at p. 523. In England see *Pemberton v. Hughes*, [1899] 1 Ch. 781 (C.A.), per Lindley, M.R., at p. 790; *Scarpetta v. Lowenfeld* (1911), 27 T.L.R. 509, per Lawrence, J., at p. 510; *Bater v. Bater otherwise Lowe*, [1906] P. 209 (C.A.), per Romer, L.J., at p. 237; or "universal justice" *Douglas v. Forrest* (1828), 4 Bing 686, per Best, C.J., at pp. 700-1; "or substantial justice" *Formosa v. Formosa*, [1963] P. 259; *Lepre v. Lepre*, [1965] P. 52 and *Middleton v. Middleton*, [1966] 2 W.L.R. 512 and (1966), 82 L.Q. Rev. 314, at p. 315.

³¹¹ *Buchanan v. Rucker* (1807), 1 Camp. 63, at p. 66; see also *Simpson v. Fogo* (1863), 1 H. & M. 195, at p. 225.

moned the defendant before it as to give it the right, in the eyes of the enforcing court, to proceed in its own way to pass subsequent judgment upon him. The defense that the foreign judgment was obtained in a manner contrary to natural justice was narrowed down to the question of wrongful assumption of jurisdiction over absent defendants.³¹²

In other words, had the foreign tribunal personally summoned the defendant to appear before it? This does not seem to be tenable today. Even in the absence of personal service, the foreign court may have had jurisdiction over the parties in the international sense on some other basis. Lack of personal service does not necessarily invalidate a foreign judgment.

Today natural justice seems to refer to alleged irregularities in the procedure of the foreign court of a very serious nature. A foreign judgment can be impeached as contrary to natural justice if the defendant had no notice of the foreign action or had never been summoned before the foreign court. Of course the expression "natural justice" refers to the form of the procedure not the merits of the particular case. If the foreign proceedings are in accordance with the practice of the foreign court but that practice is not in accordance with "natural justice" as conceived by the enforcing court, the foreign judgment will not be enforced. Actually it is with great reserve that English and Canadian courts affix this censure to foreign procedure.

Where the foreign procedure was irregular but not contrary to the enforcing court's notions of natural justice, the defendant can always apply to the original court to have the judgment set aside. If, on the other hand, the procedure was in accordance with the practice of the original court but contrary to the enforcing court's notions of natural justice, the enforcing court will intervene.

Lack of natural justice is never presumed.³¹³ The onus is on the defendant to prove that he was not served and did not receive any notice of the foreign suit as *prima facie* it must be taken that the proceedings of the foreign court were regular.³¹⁴

The fact that the foreign law on which the judgment is based or the foreign procedure followed is peculiar, or exceptional or simply different from that of the enforcing court, does not invalidate the judgment. Mere irregularity of procedure, and nothing

³¹² Piggott, *Foreign Judgments* (2nd ed., 1908), p. 171. *Schibsby v. Westenholz and others* (1870), L.R. 6 Q.B. 155, at p. 160.

³¹³ *Henderson v. Henderson* (1844), 6 Q.B. 288.

³¹⁴ *Romano v. Maggiora* (1936), 50 B.C.R. 362.

more, will not be regarded as contrary to natural justice.³¹⁵ An erroneous application of foreign law resulting in an obviously wrong decision, though undoubtedly contrary to justice, is not contrary to natural justice unless some legal principle, common to almost all nations, has been infringed.³¹⁶

Although the method for conducting the trial or the rules of evidence applied may differ from those of the forum, it does not follow that they are necessarily contrary to natural justice. Methods of investigation in each country are adjusted to the conceptions of expediency and convenience which prevail there. In *Re Hughes v. Sharp*³¹⁷ a judgment taken on a cognovit was enforced in British Columbia where it appeared that the defendant had authorized his agent in Ohio to execute a contract of guarantee in the transaction. Differences between the procedure of Ohio and that of British Columbia did not make the judgment contrary to natural justice.

In the leading English case of *Pemberton v. Hughes*³¹⁸ it was said that: "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".³¹⁹ This statement is *prima facie* in accordance with the rule that matters relating to procedure must be controlled by the law of the court which rendered the judgment. It is only for a very good reason that the foreign judgment will be denied effect on the ground that it was obtained in a manner contrary to natural justice.

Essentially the defence of lack of natural justice pertains to a situation in which the defendant in the original proceedings did not receive any notice at all or received inadequate notice of the trial, so that the decision was reached without his being heard or having had an opportunity to present his case. In other words, we

³¹⁵ *Pemberton v. Hughes*, [1899] 1 Ch. 781 (C.A.). Irregularities of procedure in the foreign court are not a bar if the court had jurisdiction: *Re Traders Group Ltd. v. Hopkins et al.* (1969), 1 D.L.R. (3d) 416 affirming (1968), 64 W.W.R. 698, 69 D.L.R. (2d) 250.

³¹⁶ *Robinson v. Fenner*, [1913] 3 K.B. 835, at p. 843. See also *Simpson v. Fogo* (1863), 32 L.J. Ch. 249; *Liverpool Marine Credit Co. v. Hunter* (1868), L.R. 3 Ch. App. 479; *Lesperance v. Leistikow*, [1935] 3 W.W.R. 1, at p. 7 (Man.).
³¹⁷ (1968), 70 D.L.R. (2d) 298 (B.C.).

³¹⁸ [1899] 1 Ch. 781 (C.A.), per Lindley, M.R., at p. 790.

³¹⁹ See also *Salvesen v. Administrator of Austrian Property*, [1927] A.C. 641, at p. 659.

are concerned here with a situation where the judgment debtor did not have his day in the foreign court.³²⁰

The judgment debtor may not have had an opportunity to be heard in the foreign action either because he had no sufficient notice or no notice at all of the proceedings abroad or because he may have been unfairly prevented from presenting his case before the foreign court. Thus, to be enforced in Canada a foreign judgment must have been rendered upon regular proceedings after due citation or voluntary appearance, and under a system of jurisprudence likely to secure an impartial administration of justice. This is an application of the rule *audi alteram partem*. Where the defendant in the original suit was not properly notified, the judgment obtained will not be enforced.

The defence of natural justice involves the *question of notice* which is often closely related to that of jurisdiction. However, jurisdiction must be distinguished from natural justice, for if the defendant were not subject to the jurisdiction of the foreign court when the action was commenced, the judgment is invalid regardless of lack of notice.³²¹

Where the foreign court had jurisdiction according to the law of the forum, the defendant, in an action on the foreign judgment, may still rely on a lack of notice of the foreign suit. The material question here is whether the defendant had notice or knowledge of the proceedings and an opportunity to be heard.³²² If he had no knowledge of the original proceedings and had no opportunity

³²⁰ *Delaporte v. Delaporte* (1927), 61 O.L.R. 302, [1927] 4 D.L.R. 933 ("no one should be condemned unheard"); *McLean v. Shields* (1885), 9 O.R. 699 (C.A.); *Rothwell v. Rothwell*, [1942] 3 W.W.R. 442, 50 Man. R. 249; *Bugbee v. Clergue* (1900), 27 O.A.R. 96, 20 C.L.T. 57 aff'd 31 S.C.R. 66, 21(B) C.L.T. 136; see also *Turcotte v. Dawson* (1879), 30 U.C.C.P. 23 (C.A.) at p. 28.

³²¹ *British Linen Co. v. McEwan* (1892), 8 Man. R. 99 (C.A.); *Schneider v. Woodworth* (1884), 1 Man. R. 41; *McLean v. Shields* (1885), 9 O.R. 699 (C.A.); see also *Delaporte v. Delaporte*, [1927] 4 D.L.R. 933; *Bavin v. Bavin*, [1939] O.R. 385, [1939] 2 D.L.R. 278, varied [1939] O.R. 390, [1939] 3 D.L.R. 328, applied in *Rothwell v. Rothwell*, [1942] 3 W.W.R. 442, [1942] 4 D.L.R. 767, 50 Man. R. 249; in *Frederick A. Jones, Inc. v. Toronto General Insurance Co.*, [1933] O.R. 428, a Florida judgment was held to be a nullity on the ground that the original court lacked jurisdiction over the judgment debtor and that he had received no actual notice or knowledge of the action; see also *Beaty v. Cromwell* (1883), 9 P.R. 547 and *Deacon v. Chadwick* (1901), 1 O.L.R. 346, at p. 351.

³²² *Wanderers' Hockey Club v. Johnson* (1913), 5 W.W.R. 117, 18 B.C.R. 367, 25 W.L.R. 434, 14 D.L.R. 42 (no service and no knowledge); *Maday v. Maday* (1911), 4 Sask. L.R. 18 (no notice); cf. *Fields v. Fields*, [1925] 2 D.L.R. 256 (N.S.) (some sort of notice).

to defend himself, the foreign judgment will not be enforced. When the defendant had some form of notice it would be difficult to attack the judgment. As a resident in the foreign country he is subject to the procedural laws of that country.³²³ However, although notice was given in accordance with the law of the original court it should not prevent the forum from questioning its sufficiency because natural justice is essentially a question to be decided by the enforcing court applying its own standards. It is not a question of procedure to be determined by the law of the foreign court.³²⁴ This does not mean that the foreign rules of procedure must be the same as those of the enforcing court.

The judgment debtor will state that at the time of the commencement of the suit, and until judgment was rendered, he was absent from the country, was not summoned to appear in, nor had any notice or knowledge of the proceedings. This illustrates well the two problems involved in the notion of "absence from the country", namely want of jurisdiction based on such absence, and want of notice, also on account of absence. The defendant must deny notice or knowledge of the proceedings.³²⁵ Natural justice does not involve jurisdiction as such, but the methods by which jurisdiction is exercised. As Piggott pointed out³²⁶ if on the prin-

³²³ Thus in *Romano v. Maggiora*, [1937] 1 W.W.R. 490, 51 B.C.R. 352, the defendant was resident of the foreign state where the judgment was rendered; the court said that handing the defendant the suit papers enclosed in an envelope was a service that was not against natural justice.

³²⁴ See *Frederick A. Jones, Inc. v. Toronto General Insurance Co.* [1933] O.R. 428 (C.A.), but see *Stolp and Co. v. Browne and Co.*, [1930] 4 D.L.R. 703 (Ont.). The action was on a Dutch judgment based on an award rendered in accord with the rules of procedure of an arbitration tribunal. These rules did not make it necessary to give a notice of the award before proceeding to judgment. In an Ontario action to enforce the judgment the defendant argued that the lack of notice invalidated it. The court rejected this argument and held that the requirement of notice or no notice is a matter of procedure governed by the *lex fori*. Since the defendant had agreed in advance that any disputes with the plaintiff arising out of the subject matter of the action were to be settled by arbitration according to the rules of the tribunal, he was bound by the judgment: "And so a judgment obtained in a Court of Holland according to the practice of that Court is valid in Holland as far as practice is concerned, irrespective of the practice which obtains in Canada..." The lack of notice did not affect the validity of the judgment in Holland. Consequently it would be enforced in Ontario. This approach is erroneous as sufficiency of notice in relation to natural justice is a question governed by the law of the enforcing court and not by the foreign procedural law.

³²⁵ *Montreal Mining Co. v. Cuthbertson* (1852), 9 U.C.Q.B. (C.A.).

³²⁶ Piggott, *Foreign Judgments* (Part I, 3d ed., 1908), p. 406.

ciples already established the foreign court had no jurisdiction over the defendant, the courts of the forum will disregard the judgment, regardless of how much notice the defendant had, as long as there was no voluntary appearance. The converse is not true; if the court had jurisdiction over the defendant, the courts of the forum still will be able to inquire into the sufficiency of the method by which the jurisdiction was exercised.³²⁷ Thus, if a defendant is not resident in or subject of a foreign country nor present within its territorial limits and has no notice of any action brought against him in its tribunals, it is plain that the absence of notice is merged so to speak in the absence of jurisdiction which would be amply sufficient to invalidate the judgment even if notice was in fact given; but if the defendant is subject to the foreign jurisdiction either by domicile, or submission or nationality, he is of course subject to its laws and though he has no actual notice of an action commenced against him in its tribunals and may not have been served with any writ or process, he may have had constructive notice which will satisfy those laws and be accepted by Anglo-Canadian courts as sufficient.

On the other hand, it is well-established that a want of *personal* service or notice is not a ground for refusal to enforce a judgment *in personam* recovered in an action in which the foreign court was a court of competent jurisdiction, and the defendant had notice of the proceedings and an opportunity to be heard. Thus in *Shearer & Co. v. McLean*,³²⁸ Barker J. said "I have consulted very many of the numerous cases to be found in the books on this subject, and neither in them, nor in any book of precedents, have I been able to find any plea putting forward as a ground why a foreign judgment in a personal action should not be enforced by the courts of another jurisdiction, the want of a personal service unless it was accompanied with an averment that the party had no notice of the proceedings or had no opportunity of defending himself . . . British Courts will not enforce the judgment of foreign tribunals in personal actions where the original process has not been personally served within the territorial jurisdiction of the foreign Court, nor where there has been an artificial or substituted service, as provided for by the procedure of the foreign Court, unless such service has been made while the defendant was

³²⁷ In England in divorce cases mere want of notice does not appear to be a ground on which a foreign divorce can be attacked if the foreign court had jurisdiction, see *e.g. Boettcher v. Boettcher*, [1949] W.N. 83.

³²⁸ (1903), 36 N.B.R. 284 (C.A.), at p. 291.

permanently or temporarily resident within the territorial jurisdiction of the foreign tribunal, and unless such process came to his notice, so that he had an opportunity of defending himself. If, however, in either of these cases the defendant voluntarily appeared in the action and defended himself to the jurisdiction of the foreign Court the judgment would be enforceable".³²⁹

Lack of or insufficient notice is no defense to an action on a foreign judgment when the defendant subjected himself to the jurisdiction of the foreign court and expressly or impliedly agreed to waive notice and was, in accordance with such agreement, not served with notice of the proceedings.³³⁰

...it is not contrary to natural justice that a man who has agreed to receive a particular mode of notification of legal proceedings should be bound by a judgment in which that particular mode of notification has been followed, even though he may not have had actual notice of them.³³¹

By expressly or tacitly agreeing to be governed by a law which does not require actual notice to be given, the defendant will be held to have waived notice provided he was subject to the jurisdiction of the foreign court.³³² It is also sufficient if the defendant had some knowledge of the proceedings, but a copy nailed on the door of the tribunal is insufficient notice.³³³ A verbal notice or proclamation may fulfill the requirement;³³⁴ or a summons served by registered post.³³⁵

The courts look with suspicion upon judgments given in undefended suits. They will make sure that the failure to make a defense was not due to any unfairness in the procedure of the court, but was a voluntary default by the defendant. Where the defendant had an absolute right to appear and defend at any time before execution, or after, he will not be considered to have been denied natural justice even if the action were commenced without the defendant's knowledge, and notice of the proceedings were sent to him too late for effective action.³³⁶

³²⁹ See also *Romano v. Maggiora* (1936), 50 B.C.R. 362; *British Linen Co. v. McEwan* (1892), 8 Man. R. 99 (C.A.). The fact that one of two co-defendants was not served in the foreign action is no defence to the other who was properly served: *Bacon v. McBean* (1847), 3 U.C.Q.B. 305.

³³⁰ *Ritter v. Fairfield* (1900), 32 O.R. 350 (C.A.); *Vallée v. Dumergue* (1849), 4 Ex. 290; *Copin v. Adamson* (1875), L.R. 1 Ex. D. 17.

³³¹ At p. 303 of *Vallée v. Dumergue*, *ibid.*

³³² See *Jamieson v. Robb* (1881), 7 Vict. L.R. 170; *Stolp and Co. v. Browne and Co.*, [1930] 4 D.L.R. 703 (Ont.) could be explained on that basis.

³³³ *Buchanan v. Rucker* (1808), 9 East 192.

³³⁴ *Reynolds and others v. Fenton* (1846), 16 L.J. C.P. 15.

³³⁵ *Feyerick v. Hubbard* (1902), 86 L.T. 829.

³³⁶ *Jeannot v. Fuerst* (1909), 25 T.L.R. 424.

A judgment may be invalid if, despite notice, the defendant was not given adequate opportunity and sufficient time to present his case to the court or has not been provided with full knowledge of the charge against him. The foreign court must not depart from the ordinary course of judicial procedure and the defendant must not be prevented from adequately presenting his case to the foreign court by some peculiarity of the foreign judicial machinery. In other words if the judgment debtor can prove that he was prevented by improper means from presenting his defence, there was a violation of natural justice.³³⁷

There can also be a lack of natural justice where the defendant, being an enemy alien, was prevented from appearing and defending the suit because of absence of transportation or communications in time of war. To sum up, any situation where the defendant was unfairly deprived of an opportunity to defend himself is open to attack on the ground of a denial of natural justice.

Where a defendant who is aware that an action to recover a debt has been commenced against him chooses to ignore his own solicitor's advice, fails to give any instructions and leaves the jurisdiction in which the action is pending without notifying his solicitor of his whereabouts, it cannot be said that a default judgment obtained by the plaintiff in a court of competent jurisdiction was contrary to natural justice.³³⁸

There is every reason why the courts should not enforce judgments rendered under a form of procedure which according to prevailing Canadian notions of what is right and fair would result in substantial injustice. However it would be unfortunate if a court were to reach such a decision merely because the foreign procedure seems unusual in its eyes. Of course it is extremely difficult to ascertain the degree of fairness of foreign rules, especially where local standards are applied. A strict application of these standards to judgments rendered in non-common-law jurisdictions would render their enforcement difficult if not often impossible.

Perhaps the principles expounded in *Travers v. Holley*³³⁹ with regard to jurisdiction could help solve this aspect of the enforce-

³³⁷ In *Scarpetta v. Lowenfeld* (1911), 27 T.L.R. 509 and *Jacobson v. Frachon* (1928), 138 L.T. 386, the plea that the defendant, although he was properly notified of the proceeding and attended the court, was prejudiced in presenting his case did not succeed.

³³⁸ *Re Reciprocal Enforcement of Judgments Act; Wigston v. Chowen* (1964), 49 W.W.R. 543 (Sask).

³³⁹ [1953] P. 246; see also Kennedy, "Reciprocity" in the Recognition of Foreign Judgments (1954), 32 Can. Bar Rev. 359, at p. 383.

ment of foreign judgments. Where the foreign court had jurisdiction over the defendant, the judgment should not be invalid on the ground of lack of natural justice, for the sole reason that the defendant did not receive actual notice, as long as he received from the foreign court such notice by constructive or substituted service as the enforcing court would have allowed under its rules to be given to a foreign defendant in a similar action.

The foreign procedure could not therefore be condemned by the enforcing court as contrary to its own notions of natural justice. "As there is a discretion in our own court to dispense with service, we should be slow to brand a foreign decree as contrary to natural justice . . . merely because notice did not in fact reach the applicant."³⁴⁰ This approach to the problem would result in procedural reciprocity.

Similarly, dispensation with service by a foreign court, if on principles similar to those which the forum applies to local litigation, would not amount to a lack of natural or substantial justice. Of course the court must have been internationally competent according to the conflict rules of the enforcing court. How could Canadian courts refuse to recognize a method of service which they themselves use. Since the courts of the forum apply their own standards in ascertaining the value of the foreign rules of procedure, it follows that they are bound to recognize foreign rules similar to their own.

In its last analysis the plea of natural justice is only a convenient device used to limit the application of foreign rules of law, or the enforcement of foreign claims. Actually it is part of public policy. Canadian courts, should certainly not refuse to enforce a foreign judgment merely because the foreign court which rendered it followed a procedure which differs widely from their own. The only important criterion in these matters is one of reasonableness. If the judgment debtor had a reasonable opportunity to appear and to defend himself, he should be bound.

From a practical point of view, one way to liberalize the present rules would be through the adoption of procedural reciprocity. The forum would recognize the foreign rules of procedure where they are substantially similar to those of the forum. This, however, should not be interpreted in a restrictive sense so as to prevent the recognition of foreign judgments based on rules of procedures which are unusual in the eyes of the forum. Public policy does not require

³⁴⁰ *Igra v. Igra*, [1951] P. 404, per Pearce, J. at p. 411; see also *Bugbee v. Clergue* (1900), 27 O.A.R. 96, at p. 109 (C.A.).

such a drastic solution. Procedural reciprocity should be used only to extend present common-law rules, in other words, to narrow the gulf between local statutory rules and foreign rules of procedure, especially with respect to service of process.

6) *Public policy*

It is often stated that a foreign judgment will not be recognized or enforced if it is contrary to the public policy of the forum.

The difficulty lies in ascertaining the contents of public policy. In this respect the function of the judge is essentially a creative one. He does not confine himself to applying in detail the heads of policy long since settled and defined by his predecessors. Public policy varies with time. Thus, in the case of a foreign judgment, only the public policy at the time enforcement is sought will be considered. In the course of time, the foundation of a particular rule may be altered in such a way that it loses its initial content. While the rules of public policy have in some instances crystallized into fixed rules of law, there still remains a broad field within which the courts can apply variable notions of policy as a principle of judicial legislation or interpretation founded on the needs of the community. Although in common-law provinces the judge must, to a certain extent, adhere to precedents as to the nature of public policy, he may still adapt the essential elements of public policy to particular cases.

The law does not itself define the contents of public policy and morality, it merely provides a standard, the precise extent and application of which must necessarily be determined by judicial discretion.

In the field of conflict of laws, public policy favours the application of domestic law with reference to interprovincial as well as international transactions, while conflict of laws rules demand the application of the proper foreign law where it is relevant. Public policy tends to exclude the application of foreign law or the recognition of foreign claims and judgments. Although the notion of public policy in this field of the law is not necessarily similar to the ordinary public policy applied to domestic transactions, very little distinction exists between the two. Public policy is no more than a provincial policy operating in an international or interprovincial sphere. Both internal and external public policy stem from the provincial policy of the *lex fori* itself though they may differ in material respects. The question is to distinguish between the policy or morality which will strike at a domestic

transaction and that which will serve to exclude a foreign judgment otherwise perfectly valid.

Although external and internal rules of public policy may be similar, they are by no means identical with those of public law, because they cover a much wider field and because each state not only has its own public policy, but also may attach more importance to certain rules than does another state. The same matter may be considered as pertaining to public policy in one province or country and not in another, or come under public policy in both provinces or countries though subjected to different treatment or classification.

Public policy is a necessary safety valve for every country or province in order to enable its courts to deny effect to those foreign laws and judgments which for one reason or another offend the domestic views of justice. Public interest dictates that the courts should not assist in the enforcement of a judgment based on something illegal or immoral according to the views of the forum.

Public policy has not yet been used in Canada to refuse the enforcement of foreign judgments. This is understandable on the interprovincial level.³⁴¹ On the international level the courts have, by a wise interpretation of conflict rules, been able to avoid resorting to this unruly horse and achieve similar results.

It seems clear that a valid foreign judgment for the payment of money should not be enforced if an action on the original claim could not have been maintained in the forum because of illegality under its law.³⁴²

In other words, it would be intolerable to lend judicial aid to enforce decisions which conflict with the law of the forum, not because the cause of action on which the foreign judgment is based is unknown in the forum, but because it is illegal under such law. The local policy, therefore, would be sufficient to overcome the rule that the foreign judgment is conclusive. Although the obligation arising from the foreign judgment must not be confused with the original cause of action, the illegality of the original cause of action avoids the new obligation. This means that the original claim, the merits of which are determined by the foreign judgment, must not be incompatible with the social or moral institutions of the recognizing or enforcing court.

Canadian courts will not refuse to enforce a foreign judgment, valid according to the law of the foreign state, merely because

³⁴¹ See Castel, *op. cit.*, p. 182.

³⁴² See Read, *op. cit.*, p. 292 *et seq.*

the *lex fori* does not recognize or does not know the cause of action on which the judgment is founded.³⁴³ The doctrine of legal obligation would be reduced to an empty shell if the judiciary of any country were to deny effectiveness to every foreign judgment founded on principles unknown to the forum's jurisprudence. It would contravene the idea that valid foreign judgments must be recognized even if they could not have been rendered in the forum.³⁴⁴ It could even be argued that it is a breach of international law not to give effect to a foreign judgment. The very essence of harmonious international relations and cooperation is the total abstention, by every member of the community of civilized states, from criticizing the wisdom of the judicial officers as well as the laws of another member of the community, unless gross injustice would result to the defendant.

III. Procedural Questions: Methods of Enforcement at Common Law

Introduction

Foreign judgments cannot be directly enforced in Canada. There must always be an authoritative act of the province in the territory of which the enforcement is to take place. For this reason the usual practice is to bring an action on the foreign judgment. In each province a foreign judgment does not enjoy the right of priority, of privilege, or lien, which it may enjoy in the country where it was rendered, but only that which the *lex fori* will give to it in its character as a foreign judgment. In common law Canada, to give any executory effect to a judgment of another jurisdiction, a new judgment must be recovered thereon locally.

Direct enforcement of foreign judgments would be contrary to the principle that an order of a foreign sovereign cannot command obedience outside his own territory. Canadian courts are willing to lend their assistance to a foreign judgment creditor but before doing so they want to be able to examine the defences which may be raised by the other party to the action. By requiring that an action be brought on the foreign judgment, the courts are able

³⁴³ *Burchell v. Burchell* (1926), 58 O.L.R. 515, [1926] 2 D.L.R. 595; *Meyers v. Meyers*, [1935] 44 O.W.N. 547; *Burpee v. Burpee*, [1929] 2 W.W.R. 128, 41 B.C.R. 201, [1929] 3 D.L.R. 18.

³⁴⁴ The question whether an Ontario court would enforce a foreign judgment based on a statute that has no extraterritorial effect was left open in *Assiniboia Land Co. v. Acres* (1916), 10 O.W.N. 328, 28 D.L.R. 364.

to test the plaintiff's claim without seeming to derogate from the high authority of the foreign court which rendered the judgment. Enforcement of the foreign judgment connotes the granting of compulsory execution, it presupposes recognition, which means essentially the extension of the *res judicata* effect of the judgment to the territory of the country applied to. This is why there has always been a certain reluctance to extend that effect without some kind of judicial control, or to have execution left to the discretion of the executive power.

Methods of enforcement

The methods of enforcement of foreign judgments are determined by the *lex fori*. Canadian courts are not bound to give a judgment creditor the remedies which the foreign court would give him.

In the common law provinces a creditor who has obtained a foreign money judgment in his favor may disregard it and bring an action on the original cause,³⁴⁵ or he may bring an action on the foreign judgment,³⁴⁶ or he may try to register it if special local legislation allows this type of procedure.³⁴⁷ It is also possible for a judgment creditor to sue on the original cause of action and the foreign judgment alternatively in the same action.³⁴⁸ If the judgment creditor fails in his action on the judgment he may amend his statement of claim by adding a claim on the original cause of action.³⁴⁹

³⁴⁵ *Trevelyan v. Myers* (1895), 26 O.R. 430; *State Bank of Butler v. Benzanson* (1914), 27 W.L.R. 812, 16 D.L.R. 848; *Monast v. Prov. Ins. Co. Ltd. of England*, [1939] 48 O.W.N. 113; *Lung v. Lee* (1928), 63 O.L.R. 194, [1929] 1 D.L.R. 130 (C.A.).

³⁴⁶ *Bugbee v. Clergue* (1900), 27 O.A.R. 96, at p. 106.

³⁴⁷ See section IV *infra*.

³⁴⁸ *Clergue v. Humphrey* (1900), 31 S.C.R. 66, at p. 69; *Moritz v. Can. Wood Specialty Co.* (1908), 17 O.L.R. 53, at p. 68 *aff'd* 42 S.C.R. 237; *Hutton v. Dent* (1922), 52 O.L.R. 378, at p. 382 *aff'd* 53 O.L.R. 105; [1923] S.C.R. 716; *Trevelyan et al. v. Myers* (1895), 26 O.R. 430; *Industrial Acceptance Corp. Ltd. v. Stevenson* (1963), 43 W.W.R. 126 (Sask.).

³⁴⁹ *Lung v. Lee* (1928), 63 O.L.R. 194 (C.A.), [1929] 1 D.L.R. 130; *Vézina v. Will H. Newsome Co.* (1907), 14 O.L.R. 658 (C.A.), at p. 665; *Webster MacLauchlan Co. Ltd. v. Connors Brothers, Ltd.* (1935), 9 M.P.R. 345 (N.B.), [1935] 2 D.L.R. 483; *Lindsay v. Papassimakis* (1923), 23 O.W.N. 662; *Huntingdon v. Marion* (1925), 28 O.W.N. 221, at p. 223, *aff'd* 29 O.W.N. 187 (C.A.); *Davidson v. Sharpe*, [1920] 1 W.W.R. 888, 60 S.C.R. 72, 52 D.L.R. 186; *Re McMillan v. Fortier* (1901), 2 O.L.R. 231; *Hutton v. Dent* (1922), 52 O.L.R. 378, *aff'd* 53 O.L.R. 105, 70 D.L.R. 582, *aff'd* [1923] S.C.R. 716; *Bond v. Ives* (1865) 6 N.S.R. 167 (C.A.); *Trevelyan et al. v. Myers* (1895), 26 O.R. 430.

Assignability

Parties

A foreign judgment is assignable so that the assignee may sue upon it in his own name.³⁵⁰

Lack of identity of defendant

If the defendant to the action brought in Canada upon a foreign judgment *in personam* was not a party to the foreign suit, the action will be dismissed for lack of identity of the party defendant.³⁵¹ However if evidence is given of the existence of a judgment against someone whose name is identical with that of the defendant, this identity coupled with the fact that the defendant has pleaded in confession and avoidance, is *prima facie* evidence that the judgment produced is against the defendant.³⁵²

Immunities

A foreign judgment will not be enforced against a person who is entitled to sovereign or diplomatic immunity. Immunity from jurisdiction and execution must be waived.

Severability of judgment

If a foreign judgment comprises two or more parts, one of which is enforceable according to the law of the enforcing court, but the other one is not, the judgment is deemed severable and the one part will be acted upon and enforced.³⁵³

³⁵⁰ *Fowler v. Vail* (1877), 27 U.C.C.P. 417, at p. 426, varied 4 O.A.R. 267; *Grobe v. Buffalo & Fort Erie Ferry & Ry. Co.* (1916), 38 O.L.R. 272; *Howland v. Codd* (1894), 9 Man. R. 435; Cf. *Stewart v. Guibord et al.* (1903), 6 O.L.R. 262. The right of action passes to the trustee in bankruptcy: *Moritz v. Can. Wood Specialty Co.* (1907), 17 O.L.R. 53, at p. 63, aff'd 42 S.C.R. 237.

³⁵¹ See *Bonn v. National Trust Co. Ltd.*, [1930] 4 D.L.R. 820 (Ont. S.C.).

³⁵² *Stevens v. Olson* (1904), 6 Terr. L.R. 106 (C.A.) varying *Stephens v. Olson* (1905), 1 W.L.R. 572 (N.W.T.); *Hesketh v. Ward* (1866), 17 U.C.C.P. 190. See also *Dennison v. Taylor* (1856), 8 N.B.R. 313 (C.A.) (lack of evidence to identify the defendant with the defendant in the foreign action. As to whether a person may be sued in a name other than his own see *Mills and Sparrow v. McGrath* (1907), 1 Alta L.R. 32.

³⁵³ *Burchell v. Burchell* (1926), 58 O.L.R. 515, at p. 521, [1926] 2 D.L.R. 595; *Ashley v. Gladden*, [1954] 4 D.L.R. 848 (Ont. C.A.).

Jurisdiction of the court

The law of the forum determines which court, if any, can entertain an action on a foreign judgment. The court enforcing the foreign judgment must have jurisdiction over the subject matter and the parties.

Service out of Ontario of a writ of summons or notice of writ may be allowed in appropriate cases.³⁵⁴

In Nova Scotia, according to Order XI, rule 1(h) service *ex juris* is possible where the "action is on any judgment, foreign or otherwise, obtained against a person who has real or personal property situate within the jurisdiction".³⁵⁵

In British Columbia service of a writ of summons or notice thereof on a defendant out of the province may be allowed in an action on a foreign judgment if it is proved to the satisfaction of the judge that the defendant has assets in British Columbia.³⁵⁶

Form of action

As noted earlier, a foreign judgment imposes an obligation upon the defendant to pay the sum for which it is given.³⁵⁷ Thus a foreign judgment for a sum certain constitutes a simple contract debt for that amount from the judgment debtor to the judgment creditor, upon which an action of debt used to lie.³⁵⁸ The foreign judgment creates a new starting point and from it there is inferred the promise to pay the amount of the debt as adjudged.³⁵⁹ The liability of the defendant arises upon the implied contract to pay the amount of the foreign judgment.

In *Barned's Banking Co. Ltd. v. Reynolds*³⁶⁰ Wilson J. said "Assumpsit, or debt, is the form of action brought upon foreign

³⁵⁴ Ontario rule 25 (k); *Capital National Bank v. Merrifield*, [1968] 1 O.R. 3 and *Lawson v. Lawson*, [1964] 2 O.R. 321. Cf. Ontario rule 25 (m) amended in 1941 to resolve the difference of opinion which arose as to whether the rule covered foreign judgments: *Bedell v. Gefaell*, [1938] 47 O.W.N. 88, [1938] O.R. 718 (C.A.); *Bedell v. Gefaell* (No. 2), [1938] O.R. 726 (C.A.).

³⁵⁵ See also N.B. Rules, O. 11, rule 1 (h).

³⁵⁶ Order 58, rule 1; also Sask., rule 29(a); Man., rule 30.

³⁵⁷ *Fowler v. Vail* (1877), 27 U.C.C.P. 417, varied 4 O.A.R. 267, at p. 270.

³⁵⁸ *Martel v. Dubord* (1885), 3 Man. R. 598; *Kelly v. McDermott* (1861), 10 P.R. 490; *Re McMillan v. Fortier* (1901), 2 O.L.R. 231. Assumpsit had also been used; see *Bond v. Ives* (1865), 6 N.S.R. 167.

³⁵⁹ *Bedell v. Gefaell*, [1938] O.R. 718.

³⁶⁰ (1875), 36 U.C.Q.B. 256, at pp. 288-9; see also *Re Kerr v. Smith* (1894), 24 O.R. 473; *Fowler v. Vail* (1877), 27 U.C.C.P. 417, varied 4 O.A.R. 267.

judgments. They are simple contract debts in this country, whatever force as debts by specialty or record they may have in the country of their recovery; and non-assumpsit or never indebted, may be pleaded to the action upon such judgment”.

Although the forms of actions have been abolished in Canada, the fact that a foreign judgment is a simple contract debt still has important procedural consequences.

Specially endorsed writ and summary judgment

A foreign money judgment may be sued upon by specially endorsed writ of summons with a statement of claim and the plaintiff may obtain an order empowering him to sign a final judgment. This results from the fact that a foreign judgment gives rise to a debt or liquidated demand in money.³⁶¹

The object of the specially endorsed writ is to provide a very prompt and summary procedure in favour of the plaintiff, by entitling him to sign judgment and to give the defendant the opportunity of avoiding further proceedings by payment of the debt. Thus vexatious defenses are discouraged. The plaintiff may obtain a summary judgment without trial if he can prove his claim clearly and if the defendant is unable to set up a *bona fide* defence or raise an issue against the claim which ought to be tried. For instance, in Ontario, rule 33(1) states:

At the opinion of the plaintiff, the writ of summons may be specially endorsed with a statement of claim where the plaintiff seeks to recover a debt or liquidated demand in money (with or without interest and whether the interest be payable by way of damages or otherwise) arising ... (g) upon a judgment.³⁶²

³⁶¹ *Whitla v. McCuaig* (1891), 7 Man. R. 454; *Grant v. Easton* (1883), 13 Q.B.D. 302 at p. 303 (C.A.): “The liability of the defendant arises upon the implied contract to pay the amount of the foreign judgment.”

³⁶² *Capital National Bank v. Merrifield*, [1968] 1 O.R. 3. See *Davis v. Williams*, [1938] 47 O.W.N. 504. In *Robertson v. Robertson* (1908), 16 O.L.R. 170 the rule was extended to an action on a foreign judgment for arrears of alimony although at that time it did not include the words “upon a judgment” but “debt arising upon a contract, express or implied”. (Old rule 33(1)(a)). Also *Solmes v. Stafford* (1893), 16 P.R. 78, aff’d 264; *Eastern Trust Co. v. MacKenzie, Mann & Co.* (1916), 10 O.W.N. 445; see also British Columbia Rules, 1961, Order 3, rule 6(a) “Upon a contract, express or implied...” and Order 14, rule 1(a). *Hughes v. Sharp* (1969), 68 W.W.R. 706 (B.C.); *Superior Spruce Mills Ltd. v. Bodie*, [1950] 2 W.W.R. 384 (B.C.); Prince Edward Island Rules, 1954, Order 3, rule 1(a); New Brunswick Rules, 1956, Order 3, rule 6(a); Nova Scotia Rules, 1950, Order 3, rule 5(A); cf. Saskatchewan Rules, 1961, rule 129; Alberta Rules, 1969, rule 159; Manitoba Rules, 1968, rule 34.

If the special endorsement contains sufficient particulars of the judgment sued upon, the plaintiff need not specify whether leave was obtained to permit service *ex juris* or any particular of service or defence, as this would be anticipating a defence.³⁰³ Of course, where the defendant denies service, it must be proved.³⁰⁴

When the action is not on the judgment alone but on some obligation not set out in the writ, it cannot be specially endorsed.³⁰⁵

The date of taxation must be stated when a claim is made on a specially endorsed writ for the taxed costs of a foreign judgment.³⁰⁶ The statement of claim endorsed on the writ must state against whom the foreign judgment was recovered.³⁰⁷

Interest claimed on a foreign judgment which is not payable by contract or by statute and was not awarded by the judgment as a continuing obligation beyond the date of its entry cannot be the subject of a special endorsement as it is considered unliquidated damages.³⁰⁸

A motion for speedy judgment will be refused where the defendant, by his affidavit alleges that the foreign judgment was recovered by fraud on the foreign court.³⁰⁹

Where a plaintiff sues on a foreign judgment and joins a claim to set aside an alleged fraudulent conveyance, he is not entitled to summary judgment.³⁷⁰ On a motion for judgment on a specially endorsed writ, an order may be made giving the defendant leave to defend either unconditionally or subject to such terms as seem just, or for a speedy trial of the action.³⁷¹

Thus, in *Gonzalez v. Pardo*,³⁷² the court refused to require payment into court of the amount of the foreign judgment as a condition to defending the action to enforce it in Ontario in view of the fact that the plaintiff had seized assets of the defendant in the original

³⁰³ *Beloff Roofing Co. v. Jelinek*, [1953] O.W.N. 390; as to what the affidavit must contain see *Mills and Sparrow v. McGrath* (1907), 1 Alta L.R. 32.

³⁰⁴ *Eitler v. Kertesz*, [1960] O.R. 672 (C.A.).

³⁰⁵ *Thompson v. Donlands Properties Ltd. et al.* (1932), 41 O.W.N. 337, also [1934] O.R. 541.

³⁰⁶ *Macaulay Bros. v. Victoria Yukon Trading Co.* (1902), 9 B.C.R. reversing 9 B.C.R. 27 (C.A.).

³⁰⁷ *Ibid.*

³⁰⁸ *Solmes v. Stafford* (1893), 16 P.R. 78 aff'd (1894), 16 P.R. 264 (C.A.); see also *Hollender v. Ffoulkes* (1894), 16 P.R. 175 (C.A.).

³⁰⁹ *Jacobs v. Beaver* (1908), 17 O.L.R. 496, see Ontario Rules of Practice, rule 57.

³⁷⁰ *Campbell v. Morgan*, [1918] 2 W.W.R. 810, 28 Man. R. 531.

³⁷¹ Ontario rule 60.

³⁷² [1947] O.W.N. 130.

court.³⁷³ The defendant must file an affidavit showing that he has a good defence and the nature of it, or that there is a triable issue.³⁷⁴

The main characteristic of summary procedure is its simplicity. However, it is limited in its application since any *bona fide* defense will bar the recovery of a summary judgment. From a practical point of view this method is widely used by foreign judgment creditors enforcing their claims in Canada. The weakness of the summary judgment procedure is that it is applicable to a great variety of actions. Thus it cannot take into consideration the exact nature of the cause of action. Only a procedure which is specifically intended to apply to foreign judgments can be fully effective, and be responsive to the fact that the issues of the case have already been adjudicated abroad.

Proof of foreign judgments

Each province prescribes by statute how a foreign judgment may be proved.

In some provinces the Evidence Act³⁷⁵ only applies to judgments rendered in Canada and in a specified number of countries.

For instance in Ontario section 38 provides that:³⁷⁶

A judgment, decree or other judicial proceeding recovered, made, had or taken in the Supreme Court of Judicature or in any court of record in England or Ireland or in any of the superior courts of law, equity or bankruptcy in Scotland, or in any court of record in Canada, or in any of the provinces or territories in Canada, or in any British colony or possession, or in any court of record of the United States of America, or of any state of the United States of America, may be proved by an exemplification of the same under the seal of the court without any proof of the authenticity of such seal or other proof whatever, in the same manner as a judgment, decree or other judicial proceeding of

³⁷³ As to whether leave to defend should be given see *Richer v. Borden Farm Products Co. Ltd.* (1921), 49 O.L.R. 172; *Hughes v. Sharp* (1969), 68 W.W.R. 706 (B.C.C.A.).

³⁷⁴ *Thomas v. Zeramba*, [1917] 1 W.W.R. 159 (Sask.); *Johnston v. Occidental Syndicate* (1910), 1 O.W.N. 367: summary judgment refused if facts sufficient to defend action; cf. *Gaetz v. Hall* (1909), 10 W.L.R. 630, 2 Sask. L.R. 184; *Mills v. Magrath* (1907), 1 Alta L.R. 32, at p. 46.

³⁷⁵ R.S.O., 1960, c. 125, s. 38.

³⁷⁶ See *Bedell v. Gefaell*, [1938] O.R. 718; *Tilton v. McKay* (1874), 24 U.C.C.P. 94, at p. 99. It is not an objection that the exemplification is not in accordance with the forms used in Ontario as long as it is under the seal of the foreign court. As to what constitutes a proper exemplification: see *Hesketh v. Ward* (1866), 17 U.C.C.P. 190 (C.A.), *Junkin v. Davis et al.* (1857) 6 U.C.C.P. 408, aff'd 22 U.C.Q.B. 369 (C.A.), *Woodruff v. Walling* (1855), 12 U.C.Q.B. 501 (C.A.).

the Supreme Court in Ontario may be proved by an exemplification thereof.

In other provinces the Evidence Act applies to all foreign judgments wherever rendered. Thus in British Columbia according to section 29 of the Evidence Act.³⁷⁷

Evidence of any proceeding or record whatsoever of, in, or before any Court in the United Kingdom, or the Supreme or Exchequer Courts of Canada, or any Court, or any Justice or any Coroner, in any Province of Canada, or any Court in any British Colony or possession, or any Court of Record of the United States, or of any State of the United States, or of any other foreign country, may be given in any action or proceeding by an exemplification or certified copy thereof, purporting to be under the seal of the Court, or under the hand or seal of the Justice or Coroner, as the case may be, without any proof of the authenticity of the seal or of the signature of the Justice or Coroner, or other proof whatever; and if any such Court, Justice, or Coroner has no seal, and so certifies, then by a copy purporting to be certified under the signature of a Judge or presiding Magistrate of the Court, or of the Justice or Coroner, without any proof of the authenticity of the signature or other proof whatsoever.³⁷⁸

³⁷⁷ R.S.B.C., 1960, c. 134, s. 29.

³⁷⁸ See also Alberta Evidence Act, R.S.A., 1955, c. 102, s. 44; Manitoba Evidence Act, R.S.M., 1970, c. E 150, s. 40(1), Evidence of any proceedings in or before, or of any record of,

- (a) any court within or outside the province, that has a seal; or
- (b) any court without a seal, or person authorized to take evidence in any part of the British Commonwealth or in the United States, or any state, territory or possession thereof;

may be made in any legal proceeding by an exemplification or certified copy thereof.

(2) The identity of any person charged in, or a party to, any such proceeding with the person named in the exemplification or certified copy, if the name is the same, shall until the contrary is shown, be presumed.

(3) The exemplification or certified copy is sufficiently authenticated if it purports to be

- (a) under the seal of the court, where the court has a seal; or
- (b) under the hand of a judge of the court, where the court has no seal; or
- (c) signed by any other person who made it, where that person is authorized to take evidence.

For the proof of official character, seal, or signature, see sec. 34; Saskatchewan Evidence Act, R.S.S., 1965, c. 80, s. 21. In *re Bergman Estate*, [1928] 1 W.W.R. 601 (Sask.); Newfoundland Evidence Act, R.S. Nfld., 1952, c. 120, s. 17; Nova Scotia Evidence Act, R.S.N.S., 1967, c. 94, s. 19; New Brunswick Evidence Act, R.S.N.B., 1952, c. 74, s. 69; *Harris v. Garson* (1921), 49 N.B.R. 91, 67 D.L.R. 682 (C.A.); *R. v. Wright* (1877), 17 N.B.R. 363 (C.A.); also *Champion v. Long* (1834), 1 N.B.R. 426, under 5 Geo. 2, c. 7; Yukon Evidence Ordinance, R.O., 1958, c. 37, s. 40; Northwest Territories Evidence Ordinance, R.O., 1956, c. 31, s. 40.

The Canada Evidence Act³⁷⁹ provides that:

23(1) Evidence of any proceedings or record whatsoever of, in, or before any court in Great Britain... or any court in any province of Canada, or any court in any British colony or possession, or any court of record of the United States of America, or of any state of the United States of America, or of any other foreign country,... may be made in any action or proceeding by an exemplification or certified copy thereof, purporting to be under the seal of such court,... without any proof of the authenticity of such seal... or other proof whatever;

(2) Where any such court,... has no seal, or so certifies, such evidence may be made by a copy purporting to be certified under the signature of a judge or presiding magistrate of such court... without any proof of the authenticity of the signature, or other proof whatsoever.³⁸⁰

At common law proof of a foreign judgment is made by an exemplification under the seal of the foreign court upon proof of that seal.³⁸¹ The authenticity of the seal of the foreign court may be proved by a certificate under the seal of the foreign state.

The exemplification of the judgment must be under the seal of the court in which it was given. The seal of another court is not sufficient.³⁸² The authenticity of the seal may be proved by witness.³⁸³ If in a foreign language, the foreign judgment must be translated into English. The translation must be certified to be a correct one.³⁸⁴

The Hague Convention Abolishing the the Requirement of Legalisation for Foreign Public Documents concluded on October 5, 1961 has not yet been signed by Canada. Under this convention Canada would exempt a foreign judgment from the formality by which a Canadian diplomatic or consular agent would certify the authenticity of the signature, the capacity in which the person

³⁷⁹ R.S.C., 1952, c. 307, as am., s. 23.

³⁸⁰ As to what constitutes a seal, see *Beebe v. Tanner* (1903), 6 Terr. L.R. 13 (C.A.) and *Stephens v. Olson* (1905), 1 W.L.R. 572 (N.W.T.) distinguishing *Junkin v. Davis* (1857), 6 U.C.C.P. 408, 22 U.C.Q.B. 369 and *Woodruff v. Walling* (1855), 12 U.C.Q.B. 501 and varying *Stevens v. Olson et al.* (1904), 6 Terr. L.R. 106.

³⁸¹ *Warener et al. v. Kingsmill and Davis* (1850), 7 U.C.Q.B. 409 (C.A.), at p. 410; "The mere exemplification... would of course be sufficient, if properly proved to be under the seal of the court. That is the common proof given of foreign judgments". For other cases dealing with the proof of the seal and exemplification see *Pool v. Hill* (1843), 4 N.B.R. 184 (C.A.); *Norton v. Post* (1836), 5 O.S. 137; *Hall v. Armour* (1836), 5 O.S. 3 (C.A.).

³⁸² *Junkin v. Davis et al.* (1857), 6 U.C.C.P. 408, 22 U.C.Q.B. 369; cf. *Cyr v. Sanfaçon* (1853), 7 N.B.R. 641.

³⁸³ *Warener et al. v. Kingsmill and Davis* (1850), 7 U.C.Q.B. 409 (C.A.).

³⁸⁴ *In re Bergman Estate*, [1928] 1 W.W.R. 601 (Sask.).

signing the document has acted and, where appropriate, the identity of the seal or stamp which it bears.

The only formality that may be required is the addition to the judgment of a certificate in the form of a model annexed to the Convention, to be issued by the competent authority of the state where the judgment was rendered. This formality cannot be required when the laws or practice in force in the state where the document is produced have abolished or simplified it or exempt the judgment itself from legalisation. This would seem to be the case in Canada.

The certificate will certify the authenticity of the signature, the capacity in which the person signing the document has acted, and where appropriate, the identity of the seal or stamp which the document bears.

The signature, seal and stamp on the certificate are exempt from certification.

The competent authority must also keep a register or card index for the certificates.

Presumption of validity and burden of proof

There is a presumption in favour of the validity of a foreign judgment until the contrary is shown.³⁸⁵ Thus it has been held that the judgment is presumed to be in accordance with the law of the country in which it was pronounced provided the foreign court had jurisdiction³⁸⁶ and also that it is presumed to have been pronounced by a court with jurisdiction. To establish absence of jurisdiction the defendant must negative all of the grounds on which the foreign court may have had jurisdiction.³⁸⁷ In other words lack of jurisdiction must be pleaded as a defence.³⁸⁸ The conclusiveness and finality of a foreign judgment is presumed

³⁸⁵ *McPherson v. McMillan* (1846), 3 U.C.Q.B. 34, at p. 37; *Bonn v. National Trust Co.* (1930), 65 O.L.R. 633, [1930] 4 D.L.R. 820 (C.A.), at p. 638; *Wigston v. Chowen* (1964), 49 W.W.R. 543 (Sask.); *Shearer & Co. v. McLean* (1903), 36 N.B.R. 284 (C.A.).

³⁸⁶ *Shearer & Co. v. McLean* (1903), 36 N.B.R. 284 (C.A.); *The Star Kidney & Pad Co. v. McCartny* (1886), 26 N.B.R. 107.

³⁸⁷ See *Beaty v. Cromwell* (1883), 9 P.R. 547, at p. 549; *McLean v. Shields* (1885), 9 O.R. 699; *Brennan v. Cameron* (1910), 1 O.W.N. 430; *Deacon v. Chadwick* (1901), 1 O.L.R. 346; *Moritz v. Can. Wood Specialty Co.* (1908), 17 O.L.R. 53 aff'd 42 S.C.R. 237.

³⁸⁸ *Kingsmill and Davis v. Warener and Wheeler* (1852), 13 U.C.Q.B. 18, at p. 48; *Manning v. Thompson* (1867), 17 U.C.C.P. 606 *Fowler v. Vail* (1879), 4 O.A.R. 267, at p. 272; *Swaizie v. Swaizie* (1899), 31 O.R. 324, at p. 332; *Shearer & Co. v. McLean* (1903), 36 N.B.R. 284.

in favour of the plaintiff unless it is put in issue by the defendant's pleadings.³⁸⁹

When a plaintiff proves the existence of a foreign judgment in his favour as *prima facie* evidence of the debt, the onus shifts to the defendant to impeach it. If the defendant intends to dispute the judgment he should put it in issue by his pleadings and not rely on his failure to file a defence constituting a denial of all obligations.³⁹⁰

Pleadings — defences: special pleas

The contents and form of the statement of claim must be determined by the *lex fori*. The plaintiff must state that the foreign judgment was duly given or made although he need not set out in full the foreign proceedings so long as his statement contains enough information to enable the enforcing court to know what was decided. Thus the plaintiff must indicate the place where the foreign judgment was rendered, the name of the parties, the date of the judgment and the amount recovered. The plaintiff is not bound to set out the original cause of action.³⁹¹ Also the grounds of the foreign judgment need not be stated, nor is it necessary to state that the cause of action arose within the jurisdiction of the foreign court.³⁹² This is not the case when the judgment is pleaded as a defence.

If the foreign judgment is valid on its face, the defendant must allege and prove any good reasons for which it should not be enforced in the forum. The form of the defendant's pleadings is determined by the law of the forum.

³⁸⁹ *Smith v. Smith*, [1923] 2 W.W.R. 389, at p. 392, 17 Sask. L.R. 203, [1923] 2 D.L.R. 896 (C.A.).

³⁹⁰ *Thibodeau Machinery Co. v. Crown Iron Railing Co.* (1964), 46 W.W.R. 246 (Sask); *Manning v. Thompson* (1867), 17 U.C.C.P. 606 (C.A.); *Marshall v. Houghton*, [1922] 3 W.W.R. 65, at pp. 70-71, 68 D.L.R. 308, aff'd [1923] 2 W.W.R. 553, 33 Man. L.R. 166. If it is alleged that the foreign judgment is invalid according to the law of the country where it was rendered the burden is on the party attacking it to prove the foreign law. In the absence of such proof the courts will presume that the proceedings were regular and valid. *Re Bergman and Waldron*, [1923] 3 W.W.R. 70, 17 Sask. L.R. 497, [1923] 4 D.L.R. 56, at pp. 59-60 (C.A.).

³⁹¹ *Shearer & Co. v. McLean* (1903), 36 N.B.R. 284 (C.A.).

³⁹² *Kingsmill and Davis v. Warener and Wheeler* (1852), 13 U.C.Q.B. 18, affirming 8 U.C.Q.B. 407 (C.A.); *Prentiss v. Beamer* (1847), 3 U.C.Q.B. 270 (C.A.); *Kerby v. Elliott* (1856), 13 U.C.Q.B. 367 (C.A.); *Gauthier v. Blight* (1855), 5 U.C.C.P. 122 (C.A.).

It is generally admitted that in an action on a foreign judgment the answer of the defendant may deny the existence of the judgment or the plaintiff's right to sue on it, or state any other reason why it is not valid. Absence of jurisdiction, fraud, want of finality and lack of natural justice must be raised by affirmative defenses in special pleas. A general demurrer is not sufficient.

No defence may be set up which goes to the merits of the original controversy or which, such as mere irregularities or errors, was or might have been interposed in the original action or on appeal. However in some provinces, as for instance in Manitoba, the defendant has the right to plead afresh to the original cause of action subject to the discretionary power of the court to deprive him of this right in a proper case.³⁰³

In order to avail himself of the defence of payment or satisfaction the judgment debtor must plead it in his defence.³⁰⁴ Partial satisfaction or partial release is also a good defence to the extent of that payment or release.

When a domestic or foreign judgment is rendered upon the original judgment, a payment of either discharges the obligation of the other, even though the satisfaction of the second judgment involves the payment of a smaller sum of money than the sum required to discharge the original judgment. Until one of the judgments is discharged, all remain in force.³⁰⁵ The plea of satisfied judgment means that the plaintiff having elected to have and having taken the foreign judgment in discharge of his whole cause of action, is estopped from being paid over again in the forum.

In an action on a foreign judgment the plea of *nul tiel* record was bad³⁰⁶ but the former plea of never indebted was a good plea of the general issue to a court in debt upon a foreign judgment.³⁰⁷

In *Henebery v. Turner*³⁰⁸ it was held that in an action on a foreign judgment where the only defense was a denial of the

³⁰³ *Lange v. Man. Western Colonization Co.*, [1921] 3 W.W.R. 877 (Man.) and see section II (4), *supra*.

³⁰⁴ *Bank of Ottawa v. Esdale*, [1920] 1 W.W.R. 283, 51 D.L.R. 168, reversed on other grounds [1920] 1 W.W.R. 913, 15 Alta L.R. 269, 51 D.L.R. 485. As to proof of payment see *Fore Street Warehouse Co. v. Vandelinder* (1911), 18 W.L.R. 518 (Alta C.A.).

The defendant may plead that he had obtained a discharge in bankruptcy in the original state, the effect of which was to release him from all claims against his estate including that of the judgment creditor's: *Ohlemacher v. Brown* (1879), 44 U.C.Q.B. 366 (C.A.).

³⁰⁵ *Taylor v. Hollard*, [1902] 1 K.B. 676.

³⁰⁶ *Hill v. Rowe* (1885), 3 Man. R. 247.

³⁰⁷ *Graham v. Harrison* (1889), 6 Man. R. 210 (C.A.).

judgment, the plaintiff was not entitled to judgment upon the pleadings and an exemplification of the judgment, as the plaintiff must give evidence to connect the defendant with it and support its genuineness when the defendant has put the judgment distinctly in issue.

The defendants cannot set up a matter of defence for both which applied only to one of them.³⁹⁹

A plea of never indebted forces the plaintiff to prove the foreign judgment so far as necessary to support the action.⁴⁰⁰

Pleading the statute of limitations

A plea of the statute of limitations may be interposed in a suit on a foreign judgment.

The law as to limitations of actions on foreign judgments is a matter of procedure governed by the *lex fori*.⁴⁰¹

Since a foreign judgment creates a simple contract debt between the parties and not a specialty debt, the liability of the defendant arising on an implied contract to pay the amount of the foreign judgment, the provision of the statute of limitations applicable to a simple contract debt may be set up in answer to any action on such a judgment.⁴⁰²

For instance in Ontario the period of limitations applicable to a foreign judgment is six years.⁴⁰³ It was held that if the defendant was absent from Ontario since the recovery of the judgment, the

³⁹⁸ (1883), 2 O.R. 284.

³⁹⁹ *Bacon v. McBean* (1847), 3 U.C.Q.B. 305 (C.A.).

⁴⁰⁰ *Graham v. Harrison* (1889), 6 Man. R. 210.

⁴⁰¹ *North v. Fisher* (1884), 6 O.R. 206.

⁴⁰² *In re Hamar; ex parte McGuinty & Co.* (1921), 2 C.B.R. 137, 63 D.L.R. 241; *Barned's Banking Co. Ltd. v. Reynolds* (1875), 36 U.C.Q.B. 256, at p. 289; *North v. Fisher* (1884), 6 O.R. 206; *Stewart v. Guibord* (1903), 6 O.L.R. 262; *Rutledge v. U.S. Savings and Loan Co.* (1906), 37 S.C.R. 546; *Brennan v. Cameron* (1910) 1 O.W.N. 430; *Wright v. Narovlansky*, [1920] 1 W.W.R. 680 (Man.); *The Bank of Montreal v. Cornish* (1879), Temp. Wood 272 (Man.).

⁴⁰³ *North v. Fisher* (1884), 6 O.R. 206; see also *Rutledge v. U.S. Savings & Loan Co.* (1906), 37 S.C.R. 546, 26 C.L.T. 852, reversing 2 W.L.R. 47; The Limitations Acts of the various provinces contain provisions dealing with "actions on a judgment" but this must be interpreted as referring to domestic judgments rather than foreign judgments. For instance, Alberta Limitation of Actions Act, R.S.A., 1955, c. 117, s. 5(i) "actions on a judgment or order for the payment of money, within ten years after the cause of action therein arose"; Yukon Limitation of Actions Ordinance, R.O., 1956, c. 66, s. 3(1)(i); Saskatchewan Limitation of Actions Act, R.S.S., 1965, c. 84, s. 1 (i).

plaintiff may sue him in that province any time within six years after he has come within the jurisdiction, provided the judgment has not been barred in the original court.⁴⁰⁴

In *Bedell v. Gefaell*⁴⁰⁵ an action was brought in Ontario on a judgment obtained in the Supreme Court of New Jersey in 1937 which was founded on a judgment of a District Court of that state in 1929. The Ontario court held that the action was barred, like on a simple contract debt, in six years but the time began to run not from the 1929 judgment, but from that in 1937 which revived the earlier one.

In the case of a foreign decree for alimony payable in monthly instalments, the statute of limitations does not run until an action can be brought which is when the money is actually owing. Each monthly instalment becomes a fixed amount payable under the decree at the expiration of the particular month.⁴⁰⁶

It would seem to be more logical to apply to foreign judgments the period of limitations applicable to domestic judgments.

The period of limitations will run from the date of the judgment provided it is final.

The rule applying the limitations of the forum to all cases has certainly the merit of simplicity and convenience. But is it a just rule? After all, statutes of limitations are essentially made in favour of the debtor. They create a presumption of payment. Justice requires that litigation be put to an end once and for all. If the plaintiff can shop around for a more favourable forum, the defendant will be subject to continuous threats. Of course, all he has to do is to pay what, after all, he owes to his creditor. However, it seems that in this particular case, the equities should be in favour of the debtor.

From a legal point of view it appears that, in general, the statute of limitations has been improperly characterized. The law of the country in which the right was created (*e.g.* in which the foreign judgment was rendered) should also govern the existence and the extinction of that right. This is why statutes adopting foreign time limitations should be enacted. (Statute of comity or borrowing statute). This represents a progressive solution. By specifically stating that in an action on a foreign judgment the foreign statute applies, the legislature simplifies the work of the courts, as it

⁴⁰⁴ *Stewart v. Guibord* (1903), 6 O.L.R. 262, 23 C.L.T. 242 (C.A.), applying s. 48 of the Ontario Limitations Act, R.S.O., 1960, c. 214.

⁴⁰⁵ [1938] O.R. 718, *aff'd* at p. 721, [1938] 4 D.L.R. 467.

⁴⁰⁶ *Page v. Page* (1915), 9 W.W.R. 442, 32 W.L.R. 854, 22 B.C.R. 185, 25 D.L.R. 99.

disposes of the difficult problem of characterization and the distinction between a bar to the remedy and the extinction of the right. This solution is more likely to do justice to the litigants.⁴⁰⁷

Judgment not responsive to the pleadings

Where the defendant defaulted in the original action he may try to object to its enforcement, in the forum, on the ground that it is null as not being responsive to the claims which were the basis of the suit. If the defendant was present or represented by counsel at the hearing, it will be presumed, that unless he objected at the time, the foreign judgment is responsive to the pleadings, whether they were oral or written. It is submitted that no such distinction should be made. As long as the foreign court had jurisdiction over the parties and the subject matter, and the defendant had notice of the suit and an opportunity to defend, he must be bound by the decision. To say that the foreign judgment is not responsive to the pleadings would be to reopen the merits of the case.

Conclusion

Since the abolition of the traditional forms of action some of the rules relating to pleadings are no longer applicable.

Stay of proceedings — Lis alibi pendens

In an action on a foreign judgment the defendant, upon proof that he has taken an appeal abroad, will usually be entitled to a stay of proceedings pending the determination of such appeal even if no stay of execution upon the original judgment is imposed by the foreign court.⁴⁰⁸

What is the effect of judicial proceedings instituted abroad to enforce the foreign judgment upon an action on the foreign judgment pending in the forum? Can the judgment debtor resist the action on the ground of *lis alibi pendens*? This question may arise quite frequently, as the judgment creditor will try to enforce the foreign judgment simultaneously in several countries where the

⁴⁰⁷ In B.C. see s. 55 of the Statute of Limitations, R.S.B.C., 1960, c. 370 (Limitation where cause of action arises abroad).

⁴⁰⁸ B.C. Rules of Court, Order 58, rule 2; *May v. Roberts*, [1929] 2 W.W.R. 449, 41 B.C.R. 185, [1929] 3 D.L.R. 370 (C.A.); *Huntingdon v. Attrill* (1887), 12 P.R. 36 (C.A.); *Charlebois v. Great North West Central Railway* (1893), 9 Man. R. 286 (C.A.); *Campbell v. Morgan*, [1919] 1 W.W.R. 644 (Man.); *McKee v. Verner* (1910), 1 O.W.N. 833; *Lindsay v. Papassimakes* (1923), 23 O.W.N. 662.

debtor has some property, but in none of them enough to cover the whole amount of the debt. The defendant will, therefore, be harassed with two or more suits. Since these suits are all based on a *prima facie* cause of action, no court will refuse to entertain them and the defendant has the prospect of two or more domestic judgments being given against him.

The fact that another action *in personam* on the foreign judgment is pending in a foreign country between the same parties should be no bar to the action in the forum so long as it has not been satisfied. To hold otherwise would impair the judgment creditor, who must be able to reach the property of his debtor wherever it is located before he is barred from doing so by the statute of limitations. A multiplicity of actions is not per se vexatious and oppressive. All the judgment debtor need do is to satisfy the judgment.

Right to counterclaim

In an action upon a foreign judgment the defendant may file a counterclaim.⁴⁰⁹

Conflicting or consistent successive judgments

A conflicting or consistent successive judgment may be handed down in a suit brought to enforce the first judgment, or in one based upon the original cause of action, or where the first judgment was for the defendant and constituted a bar to the prosecution of the second action, or where the first judgment has already determined one or more of the relevant issues involved.

It is necessary to consider first the situation where a foreign decision, sought to be enforced, conflicts or is consistent with a former or subsequent domestic decision on the original cause of action. In such a case it is obvious that the foreign decision should have no effect in the forum.

Where there is a valid domestic judgment on the same cause of action, the domestic rules of estoppel or *res judicata* would prevent a foreign judgment from having any effect. Of course the first judgment continues in full force and effect as *res judicata* in the rendering state and can be used, if the judgment creditor so elects, as the basis for a suit in a third state even after it has been reduced to a second judgment in another state. Thus a French

⁴⁰⁹ *Thompson v. Scollard*, [1929] 2 W.W.R. 466, 41 B.C.R. 241, [1929] 3 D.L.R. 857. See also *Phillips v. Can. Polishes Ltd.* (1924), 26 O.W.N. 50: stay of proceedings to deliver a defence and counterclaim.

judgment could still be enforced in Ontario though it has been made the basis of a second judgment in Manitoba; this judgment could also be enforced in Ontario and so on, until one of them is discharged.

This solution is based on the doctrine that the two judgments being of equally high nature there is no merger of one into another. It is consistent with the doctrine of non-merger as applied to foreign judgments, although in that case it could be argued that the French judgment being of an inferior nature to the Manitoba judgment it is merged in it. Of course, on the practical side, preservation of the original judgment may be of great advantage to the plaintiff and the defendant may escape the inconvenience of having several judgments against him by satisfying one of them.

It is also possible that litigation between the same parties or their privies on the same subject matter is started in the competent courts of two countries, and conflicting judgments are rendered. For instance, where the plaintiff sues the defendant in state A and in state B, and the court of A dismisses the action while the court of B renders a judgment in his favour. If the plaintiff tries to enforce B's judgment in state C, can the defendant plead A's judgment in his favour as a bar; or if the courts of state C refuse to enforce B's judgment, will this decision be a bar to an action to enforce it in state D? Although it has been suggested that the earlier decision should prevail while others favoured the later one, the true answer is that neither should be recognized. This could easily be done on the ground of public policy.

Priorities and remedies

May a creditor, when or before he brings an action to enforce a foreign judgment, take conservatory measures by private action or upon court order and attach the property of his debtor, or request the court to execute the foreign money judgment provisionally. This is a matter of procedure to be determined according to the *lex fori*.

Whether a foreign judgment may be used to attach the property of the debtor, or whether a seizure by garnishment is possible, depends upon the local statute or rules of court. A foreign money judgment is generally considered as a debt or evidence of a debt and, therefore, may be a cause of attachment of property or seizure by garnishment. But in marshalling the assets of an insolvent, or paying the debts of a decedent or in any other case in which priority of claims becomes important, a foreign judgment is not entitled to rank with a domestic judgment. It ranks merely as a

simple contract debt, although it may be filed as a claim. The foreign judgment never creates a judicial lien. Similarly, provisional execution is not possible. However, it has been said that a foreign judgment sued on in Ontario is not thereby merged so that the plaintiff would lose any priority to which he may be entitled in respect thereof.⁴¹⁰

A judgment creditor should only be allowed to take the conservatory measures which are available to persons who sue on the original cause of action or on purely domestic causes. Since the procedure followed in the case of enforcement of foreign judgments generally is similar to that of domestic causes, there should be an identity of remedies. In Ontario a person suing on a foreign judgment is entitled only to the remedies available to a simple contract creditor. Therefore, he may not be entitled to garnishee a debt due to the defendant as a judgment creditor would be.⁴¹¹ So long as a foreign judgment is not considered on the same footing as a domestic one, it cannot enjoy, in the forum, the privileges which are granted to domestic judgments, since the very purpose of the action is to extend these privileges to it.

Provisional execution should be rejected. If it were allowed, it would defeat the purpose of the present system of enforcement of foreign money judgments. This view stands, even if it is assumed that provisional execution is subsequently validated or defeated, depending upon the ultimate issue of the action on the foreign judgment. Provisional and conservatory measures should be strictly adapted to the nature of the foreign judgment in the forum.

Interest

Interest may be allowed on a foreign judgment from its date.⁴¹²

In *Bank of Montreal v. Cornish*⁴¹³ it was held that, at common law, interest cannot be recovered on a foreign judgment, because

⁴¹⁰ *Grobe v. Buffalo & Fort Erie Ferry & Ry Co.* (1916), 38 O.L.R. 272, at p. 274. The case involved an action brought to enforce a mortgage made by the defendant to secure bondholders. The plaintiff claimed priority in respect of a foreign judgment.

⁴¹¹ *Stewart v. Guibord* (1903), 6 O.L.R. 262, 2 O.W.R. 554, 2 O.W.R. 168 (D.C.).

⁴¹² Ontario Judicature Act, R.S.O., 1960, c. 197, as am., s. 36(1); *Bedell v. Gefaell* (No. 1), [1938] O.R. 718, [1938] O.W.N. 435, [1938] 4 D.L.R. 467 (C.A.). The interest must be paid as damages for the wrongful withholding of the money, see also *Hollender v. Ffoulkes* (1894), 16 P.R. 175 (C.A.). Cf. *Martel v. Dubord* (1885), 3 Man. R. 598.

⁴¹³ (1879), Temp. Wood (Man.) 272, at p. 283.

although the law implies a promise to pay a sum of money adjudged to be owing from one man to another by judgment of a foreign court, it does not imply a promise to pay interest. Such interest may, however, be allowed *ex debito justitiae*, in the shape of damages for the wrongful detention of the debt created by the foreign judgment.

Where interest is included in the amount of a foreign judgment, it is an integral part thereof and will be included in the amount of a local judgment given in an action on the foreign judgment.⁴¹⁴ However, if the interest claimed on the amount of the foreign judgment from the date of its entry is not payable by contract or by statute and not awarded by the judgment as a continuing obligation beyond the date of its entry, it is recoverable simply as unliquidated damages and cannot be the subject of a special endorsement. It is not a claim for a liquidated demand.

Rate of exchange

Canadian courts cannot order payment of money except in terms of local currency, therefore where the amount of the judgment sought to be enforced is expressed in a foreign currency, they must convert that amount into dollars.⁴¹⁵ This raises the important problem of selecting a proper date of conversion, for the rate of exchange prevailing on that date will be applied.

The enforcing court has the following choice: the date of the breach of the obligation which was the cause of the original action, the date of the foreign judgment, the date of the second judgment, or the date of effective payment.

Under normal economic conditions the selection of any one of these dates would be of little consequence. However, today, it is likely that the rate of exchange between the countries involved in

⁴¹⁴ *Solmes v. Stafford* (1893), 16 P.R. 78, 264; see also *Macaulay Bros. v. Victoria Yukon Trading Co.* (1902), 9 B.C.R. 136, reversing 9 B.C.R. 27 (C.A.). Duff, J. in *Livesley v. Horst Co.*, [1924] S.C.R. 605, at p. 610 "...in an action upon such a judgment in an English court interest, if by the law of the judgment itself it carries interest, is treated as an integral part of the judgment debt, and the rate is accordingly calculated in conformity with the requirements of that law, whatever the rate may be. If no interest is given by the foreign law, none can be recovered in an action on the judgment in an English court unless, of course, interest, being specified in the judgment, is, by the terms of the judgment itself, part of the judgment debt".

⁴¹⁵ The Currency Mint and Exchange Fund Act, R.S.C., 1952, c. 315, as am., s. 11, "...any statement as to money or money value in any indictment or legal proceeding shall be stated in the currency of Canada...".

the suit will vary from day to day, thereby affecting the extent of the respective obligations of the parties.

The measure of the foreign money is its value in domestic currency as of the day when payment should have been made. This is called the breach-day rule. The situation is assimilated to the case of non-delivery of commodities owed. If enforcement of a foreign judgment is applied for, the day when this judgment was given in the original court has been considered as the "breach day".⁴¹⁶

If instead of suing on the foreign judgment the plaintiff sues on the original cause of action, for instance the breach of contract, the damages would be assessed in local currency at the date of that breach.⁴¹⁷ The breach-day rule has been adopted by the Reciprocal Enforcement of Judgments Act in force in most provinces of Canada.⁴¹⁸ Thus the Manitoba Act⁴¹⁹ provides in section 5 as follows:

Conversion to Canadian currency

Where a judgment sought to be registered under this Act makes payable a sum of money expressed in a currency other than the currency of Canada, the registering court, or, where that court is Her Majesty's Court of Queen's Bench for Manitoba, the master of that court, shall determine the equivalent of that sum in the currency of Canada on the basis of the rate of exchange prevailing at the date of the judgment in the original court, as ascertained from any branch of any chartered bank; and the registering court of the master, as the case may be, shall certify on the order for registration the sum so determined expressed in the currency of Canada; and, upon its registration, the judgment shall be deemed to be a judgment for the sum so certified.

The breach-day rule does not take into consideration the instability of modern monetary systems. When the foreign currency has depreciated in terms of the local currency, the breach-day rule favours the plaintiff who will draw a considerable windfall from it. On the other hand where the foreign currency has appreciated after the breach-day in relation to the Canadian dollar, the application of the rule results in a loss to the plaintiff.

⁴¹⁶ *Scott v. Bevan* (1831), 2 B. & Ad. 78, 109 E.R. 1073; *East Trading Co. Inc. v. Carmel Exporters & Importers Ltd.*, [1952] 2 Q.B. 439, [1952] 1 All E.R. 1053, [1952] W.N. 229.

⁴¹⁷ *Di Ferdinando v. Simon, Smits & Co. Ltd.*, [1920] 3 K.B. 409, followed in *Quartier v. Farah* (1921), 49 O.L.R. 187 (C.A.). For an unsatisfactory decision involving a foreign judgment see *Bond v. Ives* (1865), 6 N.S.R. 167.

⁴¹⁸ See section IV.

⁴¹⁹ R.S.M., 1970, C. J 20.

The rate prevailing on the day when the second judgment is rendered is more satisfactory than any earlier dates although it ignores the possibility of a change in value between the date of the second judgment and that of actual payment. Of course the debtor may still discharge his debt by paying the amount of the original judgment in the foreign currency, since the second judgment does not merge the first.

It would be difficult for Canadian courts to adopt the rate of exchange prevailing on the date of effective payment since on the one hand they cannot render a decision expressed in a foreign currency and on the other hand they do not know the rate of exchange which will prevail on that day.

Where the original obligation involves the delivery of foreign currency considered as a merchandise bought for resale in Canada and a foreign judgment is rendered upon breach of that obligation, the rate of exchange prevailing on the day of the original judgment seems to be more equitable than the date of effective payment, since the creditor would be able to recover the profit gained by the defendant for not delivering. However as the courts do not inquire into the merits of the case, the rate of exchange cannot depend upon the probable use which the creditor would have made of the money on the due date.

In general, the payment-day rule avoids the flaws of the breach-day or the second judgment-day rule. It eliminates the unsettling factors of relative purchasing power fluctuations, not accurately reflected in exchange rates or changes in the value of the award between the breach-day or second judgment-day and the payment-day. The converse is equally true, as the debtor may reap windfalls through the breach or second judgment-day conversion when the internal purchasing power decline of the local currency is less than its exchange rate drop.

In view of federal legislation, the adoption of the rate of exchange prevailing at the time of when the second judgment is given, as unsatisfactory as it may be, is certainly a lesser evil, so long as no machinery is found for the adoption of the effective payment-day rule. Where the local currency has depreciated after the day when the original judgment was given, it is unjustifiable to impose upon a creditor a loss through depreciation caused by the debtor's default. The date of second-judgment rule would at least produce the same result as the date of effective payment rule if the judgment is paid at once.

Actually there seems to be no logical reason why a domestic judgment should not be given for a sum of foreign currency or

its equivalent in Canadian dollars, at the time of collection of such a sum.

Quebec judgments in Ontario

According to section 54 of the Ontario Judicature Act⁴²⁰ where an action is brought on a judgment obtained in Quebec, the costs incurred in the judgment in that province are not recoverable without the order of a judge directing their allowance. Such order will not be made unless in the opinion of the judge they were properly incurred nor if it would have been a saving of expense and costs to have first instituted proceedings in Ontario on the original claim.

Conclusion

In the field of procedure, the most difficult problem is to devise rules that will reconcile the conflicting interests of the debtor and the creditor, and thereby promote a type of justice fair to all parties. The debtor wants to delay, and if possible avoid execution of the foreign judgment by raising defenses which have not prevailed abroad, while the creditor wants a quick recovery of a debt to which he is entitled according to this foreign judgment. Today rapidity and fairness have not been attained because basically the procedure followed by the Anglo-Canadian courts is that which applies to ordinary actions. This procedure does not take into consideration the fact that there has already been a complete trial abroad.

Reforms are necessary. The enactment of a completely independent system of enforcement taking into consideration the nature of the cause of action is a better solution.

There is no doubt that the execution of foreign judgments must not be made possible without some kind of control. However, the procedure of enforcement must not be too costly and too long, otherwise, in international commerce, the creditor will tend to sell his goods at a higher price in order to insure himself against the risk of insolvency of his debtor. A simplified procedure for enforcing foreign judgments would certainly be advantageous to creditors and foster international commerce.

From a practical point of view, it seems that, under the present practice, it would be better for the creditor, whenever circumstances permit, to institute proceedings directly in the country where the debtor has some assets. This would save him time and expense. It is useless to start a suit in a country where the debtor

⁴²⁰ R.S.O. 1960, c. 197, as am.

has no assets and then be forced to bring an action on that judgment in another country, or eventually there sue again on the original cause of action.

IV. *Reciprocal Enforcement of Foreign Judgments*

It would be difficult to maintain that the common law conception, that a foreign judgment is enforceable only upon a new action brought in the forum, is devoid of any merits, since this view would amount to a repudiation of the ordinary rules of procedure prevailing in common law Canada. Yet the very fact that the ordinary rules of procedure are followed, shows that this method is inadequate, since the action will be subject to most of the infirmities of the ordinary local practice of the court where the judgment is sought to be enforced. To be adequate the enforcing procedure must take into consideration the very nature of the foreign judgment. As Professor Yntema points out,

The common law method of enforcing foreign judgments enables the courts, without hindrance of political considerations, to develop relatively liberal doctrines as to the recognition (*as distinguished from enforcement*) of foreign judgments and thus to obviate the expense involved in a relitigation of the merits of the ordinary case... And in the second place, the positivistic emphasis, under the prevailing common law theories, upon the private international character of foreign judgments, is commendable in that it avoids the inequity and impropriety of adjudicating what are essentially private claims upon an individual basis of international reciprocity,

but as he further points out these, would exhaust the chief virtues of the common law method.⁴²¹

The conception that the enforcement of a foreign judgment must take the form of an ordinary action *in personam* upon the debt, always results in unnecessary delay and expenses and in the additional difficulty of securing jurisdiction over the person of the judgment debtor. To a certain extent, these defects might possibly be cured by making the procedure of summary judgment widely available for the enforcement of foreign judgments. This method could be combined with the enactment of attachment and garnishment statutes which would do away with the necessity of service upon the person of the debtor, if some property belonging to him can be found within the jurisdiction of the enforcing court. However, these remedies do not dispense with the necessity of bringing an action on the foreign judgment, with the result that a new judgment will be handed down by the enforcing court.

⁴²¹ The Enforcement of Foreign Judgments in Anglo-American Law, 33 Mich. L. Rev. 1166 (1935).

The failure of the common law system to provide for direct enforcement of foreign money judgments, led judgment creditors to believe that the Canadian practice was detrimental to the interests of foreign creditors. They also considered the common law rules indefinite and largely discretionary.

To remedy this situation, the Conference of Commissioners on Uniformity of Legislation in Canada prepared a model Reciprocal Enforcement of Judgments Act which was approved in 1924, amended in 1925, revised in 1956, amended in 1957, revised in 1958 and amended again in 1962 and 1967.⁴²² This model Act unifies the rules of practice relating to foreign money judgments and facilitates their enforcement. Today, this Act has been adopted, in some cases with slight modifications, by Alberta, British Columbia, Manitoba, New Brunswick, Newfoundland, Ontario, Saskatchewan, the Yukon and the North West Territories.⁴²³ This is constitutionally possible since, under section 92(14) of the British North America Act, each Canadian province has exclusive control over the recognition and enforcement of foreign money judgments. Since the Acts in force in the Canadian provinces and Territories are similar in most respects to the Alberta Act it will be used as a model here.

The purpose of the Reciprocal Enforcement of Judgments Act is to create a new method or procedure for the enforcement of foreign money judgments:⁴²⁴

The Act simply provides an inexpensive and simple method of registering and enforcing the judgments to which the Act applies instead of the more lengthy and expensive method of enforcing such judgments by action.⁴²⁵

⁴²² (1925), 10 Proc. Can. Bar Assoc. 327, 351. 1956 Proceedings of Conference of Commissioners on Uniformity of Legislation in Canada, 82; 1957, 25, 26, 111; 1958, 90; 1962, 108; 1967, 22. K. H. Nadelmann, Enforcement of Foreign Judgments in Canada (1960), 38 Can. Bar Rev. 68.

⁴²³ The Reciprocal Enforcement of Judgments Act, S.A. 1958, c. 33; R.S.B.C. 1960, c. 331; I.R. Feltham, Reciprocal Enforcement of Judgments Act (1959-63), 1 U.B.C. L. Rev. 229; R.S.M. 1970, c. J20; R.S.N.B. 1952, c. 192; S. Nfld. 1960, No. 12; R.S.O. 1960, c. 345, as am. 1967, c. 85; R.S.S. 1965, c. 92. The Reciprocal Enforcement of Judgments Ordinance, R.O.Y.T. 1958, c. 95; R.O.N.W.T. 1956, c. 82, as am. 1958, c. 7, 1963, c. 24.

⁴²⁴ The Reciprocal Enforcement of Judgments Acts in force in the provinces of Alberta, British Columbia, Manitoba, and Newfoundland, apply to foreign judgments obtained in a jurisdiction in or outside Canada. The Reciprocal Enforcement of Judgments Acts in force in the provinces of Ontario, New Brunswick, Saskatchewan, the Yukon, and Northwest Territories, apply to foreign judgments obtained in another province or territory of Canada only.

⁴²⁵ *Can. Credit Men's Trust Association v. Ryan et al*, [1930] 1 D.L.R. 280, [1929] 3 W.W.R. 403 (Alta), at p. 281.

However, the Act does not make the foreign judgments to which it applies any less foreign or any more directly enforceable than before the Act was passed. It does not alter the rules of conflict of laws as to the recognition to be given to foreign judgments.⁴²⁶ The Act expressly preserves the judgment creditor's right to bring an action on his judgment, or on the original cause of action, instead of proceeding under the Act, or even after proceedings have already been taken under the Act.⁴²⁷

Before a judgment creditor may avail himself of the provisions of the Reciprocal Enforcement of Judgments Act, the Lieutenant-Governor of the province must by order have declared the jurisdiction, in which the foreign judgment was obtained, to be a reciprocating jurisdiction.⁴²⁸ Reciprocity on the interprovincial or international level is the basis for the application of the Act. To declare the original court a reciprocating jurisdiction, the Lieutenant-Governor in Council must be satisfied that reciprocal provisions exist in that jurisdiction for the enforcement therein of judgments obtained in the registering court.⁴²⁹

The judgment which may be registered is:

... a judgment or order of a court in a civil proceeding, whether given or made before or after the commencement of this Act, whereby a sum of money is made payable, and includes an award in an arbitration proceeding if the award, under the law in force in the jurisdiction where it was made, has become enforceable in the same manner as a judgment given by a court in that jurisdiction, but does not include an order for the payment of money as alimony or as maintenance for a wife or former wife or a child, or an order made against a putative father of an unborn child for the maintenance or support of the mother thereof.⁴³⁰

The statutory definition has been interpreted by the courts in various provinces. In *Re Reciprocal Enforcement of Judgments Act; Re Paslowski v. Paslowski*⁴³¹ the Manitoba Court of Queen's Bench stated that the definition of "judgment" in the Manitoba Act was

⁴²⁶ *Ibid.*, at p. 282.

⁴²⁷ S.A. 1958, c. 33, s. 11.

⁴²⁸ *Ibid.*, s. 10 (1). For instance in Ontario the Act applies to Alberta, British Columbia, Manitoba, New Brunswick (R.R.O. 1960, Reg. 535), Sask. (C.R.O. Reg. 350, s. 1), Northwest Territories (O. Reg. 192/55, s. 1), Newfoundland (O. Reg. 225/61).

⁴²⁹ Under section 10 (2), the Lieutenant-Governor has power to revoke any order made under subsection (1) of section 10.

⁴³⁰ S.A. 1958, c. 33, s. 2(1)(a). In the Acts of Ontario, New Brunswick and Saskatchewan the last part of the definition starting with "but does not include an order for the payment of money as alimony..." is omitted.

⁴³¹ (1957), 22 W.W.R. 584 (Man.).

confined to final judgments for the payment of money only and excluded judgments which gave other additional relief.⁴³² A Saskatchewan order for judicial separation and maintenance that was subject to review was not "final", and could not be registered under the Act.⁴³³

In *Koven v. Toole*⁴³⁴ the Manitoba Court of Appeal held that a judgment for costs is not registrable under the Reciprocal Enforcement of Judgments Act. However, in *Cavanagh v. Lisogar*,⁴³⁵ the Alberta court rejected the reasoning of *Koven v. Toole*,⁴³⁶ and held that an Ontario judgment, which was in part a judgment for costs, could be enforced by registration under the Act. The court was of the opinion that the test of registrability under the Act is whether the foreign judgment sought to be registered was a final judgment abroad, that is, whether it finally disposed of the rights of the parties.⁴³⁷ Once it is determined that the foreign judgment was final and conclusive, and that a debt or obligation existed, the judgment is registrable under the Act; the "debt or obligation" embodied in the foreign judgment can be either exclusively or in part for costs.⁴³⁸

The Reciprocal Enforcement of Judgments Act also defines "judgment creditor", "judgment debtor", "original court", "registering court",⁴³⁹ "state",⁴⁴⁰ and "personal service".⁴⁴¹ In spite of these definitions some differences of interpretation have occurred. For example, the word "person", as used in the definition of "judgment creditor",⁴⁴² and "judgment debtor",⁴⁴³ has a broader mean-

⁴³² *Ibid.*, at p. 587. Now see s. 3(8) of the Manitoba Act which is intended to overcome the effect of this decision. This section was also added to the Uniform Act in 1962, see 1962 Proceedings 108.

⁴³³ *Ibid.*; *Re Fleming and Fleming* (1959), 28 W.W.R. 241, 19 D.L.R. (2d) 417 (Man.).

⁴³⁴ (1954), 13 W.W.R. 444, [1954] 4 D.L.R. 856 (Man. C.A.) noted and criticized by D.M. Gordon (1954), 32 Can. Bar Rev. 1146.

⁴³⁵ (1956), 19 W.W.R. 230 (Alta.).

⁴³⁶ (1954), 13 W.W.R. 444 (Man. C.A.).

⁴³⁷ (1956), 19 W.W.R. 230, at p. 232.

⁴³⁸ *Ibid.*

⁴³⁹ S.A. 1958, c. 33, s. 2(1)(b)(c)(d)(e).

⁴⁴⁰ "State" is defined only in the Reciprocal Enforcement of Judgments Act of Newfoundland, 1960, No. 12, s. 2(1)(f).

⁴⁴¹ "Personal service" is defined only in the Acts of Manitoba, Alberta, British Columbia, and Newfoundland.

⁴⁴² "Judgment creditor means the person by whom the judgment was obtained..." S.A. 1958, c. 33, s. 2(1)(b).

⁴⁴³ "Judgment debtor means the person against whom the judgment was given..." S.A. 1958, c. 33, s. 2(1)(c).

ing in British Columbia than in Alberta. According to the British Columbia Interpretation Act,⁴⁴⁴ a person includes "any corporation, partnership, or party, and the heirs, executors, administrators, or other legal representatives of such person, to whom the context can apply according to law".⁴⁴⁵ On the other hand, according to the Alberta Interpretation Act⁴⁴⁶ "partnership" is not included in the definition of "person".⁴⁴⁷ Due to these differences, in Alberta, a judgment creditor may have difficulties in trying to register a judgment obtained in British Columbia against a partnership. Thus in *Can. Credit Men's Trust Association v. Ryan et al.*⁴⁴⁸ the Alberta Supreme Court, in setting aside an order for registration, under the Alberta Reciprocal Enforcement of Judgments Act, of a default judgment obtained in British Columbia, held that "a partnership firm is not a person within the meaning of this Act even if it can be said to be treated as such for any purpose by the law of the place in which the original judgment was obtained".⁴⁴⁹

One of the grounds why the Alberta court would not allow registration of this judgment was that the defendant in the original action was a partnership firm which is not included in the meaning of "person", as used in the definition of "judgment debtor".⁴⁵⁰ The fact that in British Columbia, a partnership is included in the definition of "person", seems to have been irrelevant. In Ontario, Kerwin, J. expressed a contrary opinion.⁴⁵¹

Registration: Method and Effect

Where a foreign judgment has been given in a court in a reciprocating jurisdiction, the judgment creditor may, within six years after the date of the judgment, apply to the Supreme Court or a district court of the province in which registration is sought, for

⁴⁴⁴ R.S.B.C. 1960, c. 199.

⁴⁴⁵ *Ibid.*, s. 24 (ff).

⁴⁴⁶ S.A. 1958, c. 32.

⁴⁴⁷ *Ibid.*, s. 21(1)(t). In the Alberta Interpretation Act, s. 21(1)(t) defines "person" as: "person" includes a corporation and the heirs, executors, administrators or other legal representatives of a person.

⁴⁴⁸ [1929], 3 W.W.R. 403, [1930] 1 D.L.R. 280 (Alta).

⁴⁴⁹ *Ibid.*, at p. 406.

⁴⁵⁰ S.A. 1958, c. 33, s. 2(1)(c); *supra*, footnote 447.

⁴⁵¹ *Re Tangye and Smith Ltd. v. The Pelican Carbon Company of Canada*, [1935] O.R. 123, at p. 126, [1935] 1 D.L.R. 759, at p. 761, (1935) 44 O.W.N. 83, at p. 86.

an order for registration and the court may order the judgment to be registered accordingly.⁴⁵²

An order for registration may be made *ex parte* "in any case in which the judgment debtor, (a) was personally served with process in the original action, or (b) though not personally served, appeared or defended, or attorned or otherwise submitted to the jurisdiction of the original court".⁴⁵³ Where an application for an order may not be made *ex parte*, reasonable notice of the application by the judgment creditor for the order for registration must be given to the judgment debtor.⁴⁵⁴

It is within the discretion of the judge to grant an order for registration made on an application *ex parte*. He is under no obligation to hear the application and grant the order *ex parte*, simply because the judgment debtor was personally served, or appeared or otherwise submitted to the jurisdiction of the original court.⁴⁵⁵ The order for registration "may be made *ex parte* in any case in which the judgment debtor was personally served with process in the original action".⁴⁵⁶ In *Wedlay v. Quist*⁴⁵⁷ the Alberta Court of Appeal, held that the words "personally served" mean service within the jurisdiction of the original court.⁴⁵⁸ This interpretation was re-

⁴⁵² S.A. 1958, c. 33, s. 3(1); In the provinces of New Brunswick, Newfoundland, and British Columbia, the judgment creditor may apply to the supreme court of that province to have the judgment registered.

In the Yukon and Northwest Territories, the judgment creditor may apply to the Territorial court for registration of the judgment.

In Manitoba and Saskatchewan, the judgment creditor may apply to the "proper court" for registration of the judgment.

In Ontario, the Reciprocal Enforcement of judgments Act was amended in 1967, and the Act now states that a judgment creditor may apply to any court in Ontario having jurisdiction over the subject-matter of the judgment in the place where the debtor resides, or, notwithstanding the subject-matter, to the Supreme Court for registration of the judgment, S.O., 1967, c. 85, s. 1.

⁴⁵³ *Ibid.*, s. 3(2). In the Reciprocal Enforcement of Judgments Acts of Alberta, Manitoba, Newfoundland, and British Columbia, there is also the additional requirement, before an order for registration may be made *ex parte*, that the time for appeal against the judgment has expired, and that no appeal is pending, or that an appeal has been made and has been dismissed.

⁴⁵⁴ *Ibid.*, s. 3(5).

⁴⁵⁵ *Wedlay v. Quist* (1953), 10 W.W.R. 21 (Alta C.A.).

⁴⁵⁶ S.A. 1958, c. 33, s. 3(2)(a).

⁴⁵⁷ (1953), 10 W.W.R. 21 (Alta C.A.).

⁴⁵⁸ *Ibid.*, at p. 24. And see *Re Reciprocal Enforcement of Judgments Act, Hoffman Lbr and Supply Ltd. v. Auld and Davis Lbr Co. Ltd. v. Auld* (1958) 24 W.W.R. 552 (B.C.) no longer applicable in British Columbia.

puddiated by the 1958 Model Act⁴⁵⁹ which states that "service shall not be held not to be personal service merely because the service is effected outside the jurisdiction of the original court".⁴⁶⁰ Since the registration of a foreign judgment under the Reciprocal Enforcement of Judgments Act is an extraordinary remedy, the court should consider the application for an order for registration very carefully and make the order with extreme caution and on very clear facts.⁴⁶¹ Once the court makes the order, "registration may be effected by filing the order and an exemplification or a certified copy of the judgment with the clerk of the court in which the order was made, whereupon the judgment shall be entered as a judgment of that court".⁴⁶²

In all cases where registration is made on an *ex parte* order, notice shall be served upon the judgment debtor within "one month" after the registration or within such time as the registering court may order.⁴⁶³

According to *Re Reciprocal Enforcement of Judgments Act; Wigston v. Chowen*⁴⁶⁴ the "one month" is calculated from the date of filing with the registrar a copy of the judgment and not from the date of the authorizing order for registration. After he has been given notice of the registration, the judgment debtor may apply to the registering court within one month to have the registration set aside, and the court may set it aside upon any of the grounds listed in subsection (6) of section 3 of the Act and upon such terms as the court thinks fit.⁴⁶⁵ In his application for an order

⁴⁵⁹ 1958 Proceeding, p. 90, s. 2(2).

⁴⁶⁰ "Personal service" is thus defined in the Reciprocal Enforcement of Judgments Acts in force in the provinces of Alberta, s. 2(2), Manitoba, s. 2(2), British Columbia, s. 2(2), and Newfoundland, s. 2(2).

⁴⁶¹ *Hausman v. Franchi*, [1949] O.W.N. 695 (Ont.).

⁴⁶² S.A. 1958, c. 33, s. 3(7). Section 4 of the Alberta Reciprocal Enforcement of Judgments Act states that where the judgment sought to be registered makes payable a sum of money expressed in currency which is not Canadian, the registering court or the clerk of the Supreme court, where the Supreme court is the registering court, shall determine the equivalent of that sum in Canadian currency on the basis of the rate of exchange prevailing at the date of the entry of the judgment in the original court.

Section 5 of the same Act states that where a judgment is in a language other than the English language, the judgment shall have attached to it a translation in the English language approved by the court.

⁴⁶³ *Ibid.*, s. 7(1)(a).

⁴⁶⁴ (1964), 49 W.W.R. 543 (Sask.).

⁴⁶⁵ S.A. 1958, c. 33, s. 7(1)(b), (2). Under section 7(2), the court is given wide discretion to permit or refuse registration.

setting aside registration, the judgment debtor must state, in the notice of motion, all the grounds upon which the foreign judgment should not be registered. The judgment debtor is confined to the grounds set out in his application and, he may not be allowed during the hearing of this application to raise grounds or defences not listed therein.⁴⁶⁶

Once the judgment is registered under the Reciprocal Enforcement of Judgments Act, it is, from the date of registration, of the same force and effect as if it had been a judgment given originally in the registering court on the date of the registration.⁴⁶⁷ Proceedings may then be taken thereon accordingly, except in the case of registration pursuant to an *ex parte* order, in which case no sale or other disposition of the judgment debtor's property will be valid if made prior to the expiration of the one month period, or such further period as the court orders, within which the judgment debtor could have moved to set aside the registration.⁴⁶⁸

Although the registering court has the same control and jurisdiction over the registered judgment as it has over judgments given by itself,⁴⁶⁹ this control and jurisdiction is limited to the enforcement of the registered judgment only. As stated in *Lupton v. Lupton*,⁴⁷⁰ the Reciprocal Enforcement of Judgments Act must be confined to the enforcement of judgments only; the registering court has no power to modify or vary or reduce the terms of a registered judgment.

Defences to an Application for Registration

The defences available to a judgment debtor, on which registration of a judgment may be set aside, are listed in a separate section in the Reciprocal Enforcement of Judgments Act in force in each province and territory with the exception of New Brunswick where they are to be found in the Foreign Judgments Act.⁴⁷¹

The first ground listed in the Reciprocal Enforcement of Judgments Act, on which the judgment debtor may attempt to prevent

⁴⁶⁶ *Jackson v. Jackson*, [1950] 1 W.W.R. 900, at p. 903 (B.C.), Sask. Rule of Court 466 and Sask. Act, s. 7.

⁴⁶⁷ S.A. 1958, c. 33, s. 6(a); see also *Oliver & Co. v. Gilroy*, [1959] O.R. 316, 18 D.L.R. (2d) 280.

⁴⁶⁸ *Ibid.*

⁴⁶⁹ *Ibid.*, s. 6(b).

⁴⁷⁰ [1946] O.W.N. 326 (Ont.). In this case, the Ontario court held that it had no power to modify a judgment for alimony obtained in British Columbia, and registered under the Ontario Reciprocal Enforcement of Judgments Act.

⁴⁷¹ R.S.N.B. 1952, c. 90.

registration of a judgment, is lack of jurisdiction by the original court to adjudicate on the subject-matter.

- 3(6) "No order for registration shall be made if it is shown by the judgment debtor⁴⁷² to the court to which application for registration is made that,
- a) the original court acted either
 - (i) without jurisdiction under the conflict of laws rules of the court to which application is made, or
 - (ii) without authority under the law of the original court to adjudicate concerning the cause of action or subject matter that resulted in the alleged judgment or concerning the person of the alleged judgment debtor, or without such jurisdiction and without such authority".⁴⁷³

Do the words "by the judgment debtor" in clause (6) of section 3 of the Alberta Act⁴⁷⁴ mean that the onus lay totally on him to show why the judgment is not registrable, and if he is unable to do so, is the court in which registration is sought under an obligation to make an order for registration of the foreign judgment? This question was considered by the Manitoba Court of Appeal in *Saskatchewan Government Insurance Office v. Anderson*,⁴⁷⁵ which involved an application for registration in Manitoba of a default judgment obtained in Saskatchewan. The court in refusing the application held that the words "by the judgment debtor" are not to be applied literally. The court is not prevented from refusing registration merely because the judgment debtor himself did not point out why the judgment was not to be registered. If, on the face of the judgment itself and from the facts of the case, suffi-

⁴⁷² The words "by the judgment debtor" are omitted in the Reciprocal Enforcement of Judgments Acts in force in the provinces of Saskatchewan, Manitoba, Ontario, the Yukon and the Northwest Territories.

⁴⁷³ S.A. 1958, c. 33, s. 3(6)(a)(i), (ii). In the Reciprocal Enforcement of Judgments Acts in force in the provinces of Saskatchewan, Ontario, the Yukon and the Northwest Territories, the wording of the section is not as long as that of subsection (a) of section 3 of the Alberta Act, and instead, the following words are used: "(a) the original court acted without jurisdiction". (R.S.S. 1965, c. 92, s. 4(a)).

⁴⁷⁴ S.A. 1958, c. 33.

⁴⁷⁵ (1966), 57 W.W.R. 633 aff'd (1967), 59 W.W.R. 313, 61 D.L.R. (2d) 355 (Man. C.A.) approved by *Re Gacs and Maierovitz* (1968), 68 D.L.R. (2d) 345 (B.C.).

cient cause appears why the foreign judgment should not be registered, it is the court's duty to refuse registration.⁴⁷⁶

The court may also refuse to give an order for registration if it is satisfied that:

...the judgment debtor, being a person who was neither carrying on business nor ordinarily resident within the jurisdiction of the original court, did not voluntarily appear or otherwise submit during the proceedings to the jurisdiction of that court.⁴⁷⁷

It was on this ground that registration of the foreign judgment was refused in *Hausman v. Franchi*⁴⁷⁸ and *Re Reciprocal Enforcement of Judgments Ordinance, Traders Group Limited v. Hopkins et al.*⁴⁷⁹

In the latter case, the judgment creditor made an *ex parte* application to the Northwest Territorial court for registration of a default judgment obtained in British Columbia against the defendants at all times resident in the Northwest Territories. The defendants had been served in the Northwest Territories but had not appeared. The plaintiff maintained that the jurisdiction of the British Columbia court was based on consent. The enforcing court, on dismissing the application, held that the onus was on the plaintiff to prove that the defendants had agreed to submit to the jurisdiction of the British Columbia court. The plaintiff could not discharge the burden of proof as the language of the contract entered into between the plaintiff and defendants and offered in evidence was too ambiguous.

In *Re Reciprocal Enforcement of Judgments Act, Re Duncan and Hirsch*,⁴⁸⁰ the meaning of the term "ordinarily resident", as used in section 3 (6) (b) of the Alberta Act,⁴⁸¹ was clarified. The Alberta District Court, on deciding that the judgment debtor was not "ordinarily resident" within the jurisdiction of the original court, held

⁴⁷⁶ See Model Act 1967 Proceedings of Commissioners on Uniformity of Legislation in Canada 22 "No order for registration shall be made if the court to which application for registration is made *is satisfied*...".

⁴⁷⁷ S.A. 1958, c. 33, s. 3(6)(b).

⁴⁷⁸ [1949] O.W.N. 695 (Ont.). In this case, the Ontario court dismissed an application for registration of a judgment rendered in British Columbia because the judgment debtor had a good defence as he was not resident in British Columbia, nor carried on business in that province, and did not voluntarily submit during the proceedings to the jurisdiction of the British Columbia court.

⁴⁷⁹ (1969) 66 W.W.R. 573 (N.W.T. C.A.), (1969) 1 D.L.R. (3d) 416 affirming (1968) 64 W.W.R. 698.

⁴⁸⁰ [1952] 3 D.L.R. 850, (1952) 4 W.W.R. 475 (Alta).

⁴⁸¹ S.A. 1958, c. 33, s. 3(6)(b).

that "the term 'ordinarily resident' . . . simply means that the person so described has his ordinary or usual place of living within that Province, that he lives within that Province more than he does elsewhere . . . If such person departs from [that Province] under circumstances which render it unlikely that he will return he is no longer ordinarily resident within the Province".⁴⁸²

Another ground, listed in the Reciprocal Enforcement of Judgments Act, on which the court may set aside an application for an order for registration of the foreign judgment is that:⁴⁸³

...the judgment debtor, being the defendant in the proceedings, was not duly served with the process of the original court and did not appear, notwithstanding that he was ordinarily resident or was carrying on business within the jurisdiction of that court or agreed to submit to the jurisdiction of that court.

This defence was raised by the judgment debtor in attempting to set aside an application for registration in *Re Reciprocal Enforcement of Judgments Act, Re Hearn v. Kemp and Kemp*,⁴⁸⁴ and *Re Gacs and Maierovitz*.⁴⁸⁵ In the former case, the judgment debtors argued that they had not been duly served with the appointments for examination-for-discovery. The Alberta Supreme Court rejected this argument because, on examining the facts of the case, it appeared that due to the judgment debtors' negligence in failing to notify the registrar of the original court of their change of address, the appointments had been served at their original address and they had never reached them. In the latter case, which was relied upon by the Alberta court, the British Columbia Supreme Court held, on rejecting the defence that the judgment debtors had not been "duly served", that personal service with the process of the original court was not necessary for due service; substituted service was sufficient and amounted to due service. In both cases a distinction was made between personal service and service duly made. Common law authorities, to the effect that a defendant who agrees to submit to the jurisdiction of a foreign court also agrees to waive notice of the proceedings, have no application. The defendant must have been duly served and must have appeared in the foreign proceedings.

There are other grounds on which an order for registration may be refused. For example, where the judgment was obtained by

⁴⁸² *Re Duncan and Hirsch*, [1952] 3 D.L.R. 850, at p. 852 (Alta).

⁴⁸³ S.A. 1958, c. 33, s. 3(6)(c).

⁴⁸⁴ (1969), 70 W.W.R. 609 (Alta).

⁴⁸⁵ (1968), 68 D.L.R. (2d) 345 (B.C.).

fraud;⁴⁸⁶ where an appeal is pending or the time within which an appeal may be taken has not expired;⁴⁸⁷ where the judgment was in respect of a cause of action that for reasons of public policy or for some similar reason would not have been entertained by the registering court.⁴⁸⁸ This last ground was raised by the judgment debtor as a defence to an application for registration in *Re Reciprocal Enforcement of Judgments Act; MacKowey v. MacKowey*.⁴⁸⁹ The British Columbia Supreme Court held that an Alberta judgment, which related to arrears of alimony or maintenance due under a covenant in a separation agreement, was not one "in respect of a cause of action which for reasons of public policy would not have been entertained by the registering court"; on the other hand a judgment which dealt with alimony payable *in futuro* was not enforceable in British Columbia.⁴⁹⁰

In *Pope v. Pope*⁴⁹¹ the judgment debtors applied in British Columbia to have an order for registration of a judgment obtained in Ontario set aside on the grounds that the original cause of action was based on a contract or agreement which was illegal, and for reasons of public policy the judgment should not be registered by the British Columbia court. The contract related to funds to be provided by the defendant's second wife as support for the defendant's first wife after the dissolution of a marriage between the defendant and his first wife, the plaintiff. The plaintiff sued for arrears of payment, due under the contract, and received judgment in Ontario against the defendant and his second wife, the judgment debtors. The British Columbia Court of Appeal rejected the defence of illegality of the contract. That defence had already been pleaded by the judgment debtors in the original action in Ontario and had been rejected by the Ontario court as a defence to the original judgment. The contract was not made illegal simply because the defendant's second wife came forward to supply the money in order to carry out the agreement for support to be given to the defendant's first wife.⁴⁹²

⁴⁸⁶ S.A. 1958, c. 33, s. 3(6)(d).

⁴⁸⁷ *Ibid.*, s. 3(6)(e).

⁴⁸⁸ *Ibid.*, s. 3(6)(f).

⁴⁸⁹ (1955), 14 W.W.R. 190 (B.C.).

⁴⁹⁰ (1955), 14 W.W.R. 190 (B.C.), at p. 191.

⁴⁹¹ [1940] 2 W.W.R. 509, 55 B.C.R. 277, [1940] 3 D.L.R. 454 (B.C.C.A.), affirming [1940] 1 W.W.R. 566, 55 B.C.R. 27, [1940] 2 D.L.R. 661.

⁴⁹² [1940] 2 W.W.R. 509 (B.C.C.A.), at p. 513.

The last ground, listed as clause (g) in section 3(6) of the Reciprocal Enforcement of Judgments Act,⁴⁹³ on which an order for registration may be set aside is that:

...the judgment debtor would have a good defence if an action were brought on the original judgment.⁴⁹⁴

This clause enables a judgment debtor to raise a defence based on any of the common law rules. Unless the foreign judgment is one which would be enforced by action thereon at common law, it cannot be registered under the Act.⁴⁹⁵ Section 3(6)(g) is quite restrictive.

In *Re Tagye and Smith Ltd. v. The Pelican Carbon Company of Canada*,⁴⁹⁶ permission to register in Ontario a default judgment obtained in British Columbia was refused on the ground that the judgment debtor would have a good defence if an action were brought on the original judgment. The "good defence" was that the case did not come under any one of the well-known rules giving jurisdiction to the British Columbia Supreme Court.⁴⁹⁷ The defendant who had been personally served with the British Columbia writ in Ontario had never appeared. He had never resided in British Columbia but had made periodic business trips to that province on behalf of the firm of which he was the owner. This was not carrying on business within section 4(b) of the Act. The court said that even if it were it would not be a valid answer to a

⁴⁹³ S.A. 1958, c. 33.

⁴⁹⁴ In the case of *Re Guildhall Insurance Co. and Jackson et al* (1968), 69 D.L.R. (2d) 137, at p. 139, the Supreme Court of Alberta held that the phrase "original judgment", as used in clause (g) of section 3(6) of the Alberta Reciprocal Enforcement of Judgments Act, S.A. 1958, c. 33, could not be construed to mean "original cause of action". In other words, clause (g) could not be interpreted to mean that there could be no registration if the judgment debtor could show that he would have had a good defence if an action were brought on the original cause of action for such an interpretation would lead to a trial *de novo* of the action. The phrase merely empowered the court to look into the finality of the judgment and the jurisdiction of the court which made it.

⁴⁹⁵ *Can. Credit Men's Trust Association, Ltd. v. Ryan et al.*, [1930] 1 D.L.R. 280, at p. 281 (Alta). The court also stated that the Act did not alter the rules of private national law as to the recognition to be given to foreign judgments (at p. 284).

⁴⁹⁶ [1935] O.R. 123, [1935] 1 D.L.R. 759.

⁴⁹⁷ *Ibid.*, at p. 125. In Saskatchewan and New Brunswick, the question of jurisdiction of the court of a foreign country is governed by the Foreign Judgments Acts in force in those provinces. R.S.S. 1965, c. 95; R.S.N.B. 1952, c. 90.

defence of lack of jurisdiction raised under the terms of section 4(g). As carrying on business is not a basis of jurisdiction *in personam* over an individual at common law, the judgment could not be registered.

In *Re Gacs and Maierovitz*⁴⁹⁸ the judgment debtor had a good defence to an action on the judgment brought in British Columbia as it was perceivable on the face of the writ itself that there was a manifest error in the judgment obtained in Ontario.⁴⁹⁹ The judgment had included sums for interest not chargeable or allowable in law. As a result an application to register in British Columbia the Ontario judgment was dismissed.⁵⁰⁰

In *Re House of Colour Ltd. v. Expert Decorators Ltd. et al.*,⁵⁰¹ the Supreme Court of British Columbia again stated that a foreign default judgment cannot be registered in British Columbia where a manifest error in the judgment is shown. However in this case the court granted an order for registration of the Alberta judgment as the judgment debtor had not sufficiently demonstrated such manifest error by merely alleging in his affidavit that the judgment was obtained against him by reason of the improper or negligent advice of his solicitor.

Other grounds have been raised as a "good defence if an action were brought on the original judgment"⁵⁰² in order to prevent the registration of a foreign judgment under the Act. Thus in *Re Reciprocal Enforcement of Judgments Act; Wigston v. Chowen*,⁵⁰³ the Saskatchewan Court of Queen's Bench, referring to the Foreign Judgments Act,⁵⁰⁴ stated that one such defence was "that the proceedings in which the judgment was obtained were contrary to natural justice".⁵⁰⁵ The judgment debtor pleaded this defence but the facts of the case revealed that the proceedings were not contrary to natural justice, and the application to set aside the registration in Saskatchewan of a foreign judgment, obtained in Ontario, was dismissed. It was on account of the judgment debtor's own negligence that a default judgment had been obtained against him; the judgment debtor knew that an action had been com-

⁴⁹⁸ (1968), 68 D.L.R. (2d) 345 (B.C.).

⁴⁹⁹ *Ibid.*, at p. 351.

⁵⁰⁰ The Court relied on *Boyle v. Victoria Yukon Trading Co.* (1902), 9 B.C.R. 213, at p. 217.

⁵⁰¹ (1968), 70 D.L.R. (2d) 527 (B.C.).

⁵⁰² S.A. 1958, c. 33, s. 3(6)(g).

⁵⁰³ (1964), 49 W.W.R. 543 (Sask.).

⁵⁰⁴ R.S.S., 1953, c. 87.

⁵⁰⁵ *Ibid.*, s. 6(i); (1964), 49 W.W.R. 543, at p. 544 (Sask.).

menced against him in Ontario, but he chose to do nothing and failed to keep his solicitors advised as to his whereabouts.

The Manitoba Court of Queen's Bench, in the case of *Gagnon v. Safety Freight Limited*,⁵⁰⁶ held that a credit in the judgment debtor's favour, arising prior to the Ontario judgment, that reduced the amount of the foreign judgment owing to the judgment creditor, and which was admitted by the judgment creditor, did not constitute a "good defence" within the meaning of clause (g) of the Reciprocal Enforcement of Judgments Act.⁵⁰⁷ Registration of the judgment was ordered accompanied by the filing of a credit note for the amounts paid.

Rules of practice and procedure

The Reciprocal Enforcement of Judgments Act provides that:

Rules of court may be made respecting the practice and procedure, including costs, in proceedings under this Act and, until rules are made under this section, the rules of the registering court, including rules as to costs, *mutatis mutandis*, apply.⁵⁰⁸

Should the rules of the court with respect to the defendant's right to security for costs from a non-resident plaintiff be affected by the Reciprocal Enforcement of Judgments Act? The courts are divided on this question.

In *St. John v. Rath et al.*,⁵⁰⁹ the Alberta Supreme Court held that, until the Rules of Practice are amended, the Reciprocal Enforcement of Judgments Act does not deprive the defendant of his right to security for costs from a non-resident plaintiff.

According to Walsh J. in *Fraser v. Wainwright Dome Oil Co. Ltd.* the effect of the Act is "to substitute for the old method of suing upon the judgment for costs in the jurisdiction in which the judgment debtor lives another and a simpler method of enforcing it",⁵¹⁰ that is, by registration under the Act. "The suggestion that because the procedure under which the judgment creditor's Alberta judgment may become effective in Saskatchewan has been simplified by this legislation a defendant here should be deprived of the right which he has long enjoyed and which is given to him by

⁵⁰⁶ (1959), 27 W.W.R. 678 (Man.).

⁵⁰⁷ R.S.M., 1954, c. 221, s. 4(g). This case was distinguished in *Re Gacs and Maierovitz* (1968), 68 D.L.R. (2d) 345 (B.C.).

⁵⁰⁸ S.A. 1958, c. 33, s. 8; also see Alberta Rules of Court, Part 55, Rules 730-736; Saskatchewan Rule 349; British Columbia, Order XLIA.

⁵⁰⁹ [1926] 3 W.W.R. 726 (Alta).

⁵¹⁰ [1927] 1 W.W.R. 523 (Alta), at p. 524.

our Rules of Court to be secured in the payment of his costs at the suit of a Saskatchewan plaintiff does not appeal to me as being sound in principle."⁵¹¹

In *St. John v. Rath et al* the Alberta Supreme Court, in ordering security for costs, held that it would be inequitable if not unjust to deprive the defendant, resident in Alberta, of the right to security for costs given him under the Rules and to give him instead a right to proceed in the province in which the plaintiff lives, that is, in Saskatchewan, to collect such costs under the process of the courts in that province.⁵¹²

The fact that the Alberta Reciprocal Enforcement of Judgments Act applied to the province where the plaintiff was resident (Saskatchewan), was not a ground for depriving the Alberta defendant of the right to security for costs from a non-resident plaintiff.

The Saskatchewan Court of Appeal agreed with the two previous Alberta cases, and decided in *Jorgenson v. Reid et al*⁵¹³ that the Reciprocal Enforcement of Judgments Act did not affect the defendant's right, given him by the Saskatchewan Rules of the Court to security for costs.

In British Columbia, however, the Supreme Court took a different point of view in *Henry v. Henry*⁵¹⁴ and *Whiting v. Imperial Bank of Canada*⁵¹⁵ and refused to give an order for security for costs against a non-resident plaintiff when the plaintiff resided in a jurisdiction to which the Reciprocal Enforcement of Judgments Act applied. Several years later the British Columbia Court of Appeal, in *Hart v. Arnold and Arnold*,⁵¹⁶ declared that the practice of the Supreme Court of British Columbia, as exemplified in *Henry v. Henry*⁵¹⁷ and *Whiting v. Imperial Bank of Canada*,⁵¹⁸ ought not to be disturbed.

In that province an application for registration may be made by originating notice⁵¹⁹ if the judgment is one which under the Act falls within that class of cases where notice of the application is required to be given to the judgment debtor and, in all other cases, may be made *ex parte*. The application to set aside the

⁵¹¹ *Ibid.*

⁵¹² [1926] 3 W.W.R. 726, at p. 728 (Alta).

⁵¹³ [1932] 3 W.W.R. 250 (Sask. C.A.).

⁵¹⁴ [1926] 3 W.W.R. 250 (B.C.).

⁵¹⁵ [1935] 3 W.W.R. 255 (B.C.).

⁵¹⁶ [1951] 2 W.W.R. 576 (B.C. C.A.).

⁵¹⁷ [1926] 3 W.W.R. 250 (B.C.).

⁵¹⁸ [1935] 3 W.W.R. 255 (B.C.).

⁵¹⁹ O 41A, rule 1.

registration may be made by notice of motion supported by affidavit.⁵²⁰ The application for registration must be supported by an affidavit exhibiting a certified copy of the judgment under the seal of the court where the judgment was obtained and stating that to the best of the information of the deponent the judgment creditor is entitled to enforce the judgment; the judgment does not fall within any of the cases in which it cannot be registered; the full name trade or business, and usual or last known place of abode or business of the judgment creditor and judgment debtor respectively, so far as is known to the deponent and the amount presently owing on the judgment.⁵²¹

Other provisions

Where an application is made for an *ex parte* order for registration, the application shall be accompanied by a certificate, in the form set out in the Schedule or to the like effect issued from the original court and under its seal and signed by a judge or clerk.⁵²²

The reasonable costs of the registration "are recoverable in like manner as if they were sums payable under the judgment if such costs are taxed by the proper officer of the registering court and his certificate thereof is endorsed on the order for registration."⁵²³

Another section of the Reciprocal Enforcement of Judgments Act specifies the judge's powers:

Subject to the Consolidated Rules of the Supreme Court any of the powers conferred by this Act on a court may be exercised by a judge of that court.⁵²⁴

According to the Reciprocal Enforcement of Judgments Acts in force in Manitoba and Newfoundland, a judgment creditor may apply, *ex parte*, to the registering court for a garnishment order, which the judge of the registering court may make.⁵²⁵ The Manitoba

⁵²⁰ *Ibid.*, rule 4.

⁵²¹ *Ibid.*, rule 2.

⁵²² S.A. 1958, c. 33, ss. 3(3) and (4); See B.C. Order XLIA, rule 2. This provision does not exist in the Reciprocal Enforcement of Judgments Acts in force in the provinces of Ontario, Saskatchewan, New Brunswick, the Yukon and Northwest Territories.

⁵²³ S.A. 1958, c. 33, s. 6(c).

⁵²⁴ *Ibid.*, s. 9; This provision does not exist in the Reciprocal Enforcement of Judgments Acts in force in New Brunswick, the Yukon, and Northwest Territories.

⁵²⁵ R.S.M. 1970, c. J 20, s. 9; S. Nfld. 1960, No 12, s. 9.

and Newfoundland Reciprocal Enforcement of Judgments Acts also provide that: "Where the original court is a court in Manitoba (or Newfoundland), that court has jurisdiction to issue a certificate for the purposes of registration of a judgment in a reciprocating state".⁵²⁶

The Manitoba Reciprocal Enforcement of Judgments Act contains a provision which is not found in the Reciprocal Enforcement of Judgments Acts in force in the other provinces, that where a judgment contains registerable and unregisterable provisions, the court will determine which provisions are registerable and only the registerable ones may be registered.⁵²⁷

During the past century the Canadian common law practice and legislation has exhibited a steady evolution in the field of foreign judgments. It is interesting to note that by admitting foreign judgments to execution by registration, the Model Act, adopted in Common Law Canada, follows a practice somewhat similar to what would seem, from the language of Jenkin and Finch, to have been the mode of procedure on a foreign sentence in the ancient forms of the English Court of Admiralty.⁵²⁸

In the Act the emphasis has been laid not so much upon the standards for the recognition of foreign judgments as upon the very practical questions connected with their enforcement. An effort has been made to set a policy of reciprocal registration of foreign money judgments under appropriate limitations. This is why the effect of registration of a foreign money judgment, under the Act, is to render it, for purposes of execution, of the same force and effect as if it were a judgment of the registering court.

The system of registration of judgments is no doubt superior to the ordinary procedure, because it can be adopted without compromising the substantial merits of the common law doctrine as to the conclusiveness of foreign judgments. But it may necessitate a reformulation of the common law conception of the foreign judgment as conclusive evidence of a legal obligation.

Basically the Act follows the principles of the common law, and to a certain extent codifies and simplifies them.

Registration is a very progressive and effective method of enforcement of foreign judgments. Yet this effectiveness has been

⁵²⁶ R.S.M. 1970, c. J 20, s. 4; S. Nfld. 1960, No. 12, s. 4.

⁵²⁷ R.S.M. 1970, c. J 20, s. 3(8); see Model Act s. 3(8), 1962 Proceedings of Commissioners on Uniformity of Legislation in Canada, p. 108.

⁵²⁸ Westlake, *Private Int. Law* (7th ed., 1925), at p. 396.

impaired by the fact that from a substantive point of view, the Act has only codified the common law principles.

The great success of the Act indicates that it was needed, and that it fulfilled the wishes of Canadian and foreign businessmen. Taken in conjunction with the already existing methods of enforcement of foreign money judgments, the Acts provide a new variety of remedy for what is, at best, a complex situation.

The Foreign Judgments Act

In 1933, the Conference of Commissioners on Uniformity of Legislation in Canada approved a Uniform Foreign Judgments Act and recommended that it be adopted by all the Canadian provinces.⁵²⁹ Today, only Saskatchewan and New Brunswick have adopted this Act.⁵³⁰

The Act is limited to the conditions of recognition of foreign judgments. It applies to foreign judgments, "whereby a sum of money is with or without costs made payable or whereby costs only are made payable",⁵³¹ obtained in "any country other than this province, whether, a kingdom, empire, republic, commonwealth, state, dominion, province, territory, colony, possession or protectorate, or a part thereof".⁵³²

Reciprocity in treatment is not taken into consideration.

The Foreign Judgments Act not only applies to an action brought on a foreign judgment, but also to the enforcement of foreign money judgments under the Reciprocal Enforcement of Judgments Act. For example, section 3 of the Reciprocal Enforcement of Judgments Act in New Brunswick⁵³³ states that:

"No judgment shall be ordered to be registered under this Act if it is shown to the registering court that:

a) the judgment debtor has a defence under section 5 of the Foreign Judgments Act . . ."⁵³⁴

Section 5 of the New Brunswick Foreign Judgments Act⁵³⁵ lists

⁵²⁹ [1933] Proceedings of Conference of Commissioners on Uniformity of Legislation in Canada 86. The Act was revised in 1964: [1964] Proceedings 107.

⁵³⁰ The Foreign Judgments Act R.S.S. 1965, c. 95; The Foreign Judgments Act R.S.N.B. 1952, c. 90.

⁵³¹ R.S.S. 1965, c. 95, s. 2(d).

R.S.N.B. 1952, c. 90, s. 1(d).

⁵³² R.S.S. 1965, c. 95, s. 2(c).

R.S.N.B. 1952, c. 90, s. 1(c).

⁵³³ R.S.N.B. 1952, c. 192.

⁵³⁴ *Ibid.*, s. 3(a).

⁵³⁵ R.S.N.B. 1952, c. 90.

all the common law defences available to an action on a foreign judgment. Generally, the various defences listed are the following ones: the original court had no jurisdiction; the defendant in the original action was not duly served and did not appear notwithstanding that he was carrying on business or was ordinarily resident in the foreign country or agreed to submit to the jurisdiction of the court; the judgment was obtained by fraud; the judgment is not a final judgment, or for a sum certain in money; the judgment is for the payment of a penalty or money due under the revenue laws of the foreign country; the judgment has been satisfied or for any other reason is not a subsisting judgment; the judgment is in respect of a cause of action that for reasons of public policy or for some similar reason would not have been entertained by the enforcing courts; or the proceedings in which the judgment was obtained were contrary to natural justice.⁵³⁶

In the case of *Re Reciprocal Enforcement of Judgments Act, Wigston v. Chowen*,⁵³⁷ the defendant claimed that the proceedings in which the default judgment against him was obtained were contrary to natural justice.⁵³⁸ The court, after examining the evidence, held that it was the defendant's fault that, after making an appearance to the action commenced against him, he failed to give his solicitor the necessary instructions. The defendant knew about the action, failed to do something about it, and then moved out of the jurisdiction without notification of his change of address. Therefore, the proceedings in which the default judgment was obtained were not contrary to natural justice.

The Act states when the court of a foreign country has jurisdiction in an action *in personam*:

"For the purposes of this Act, in an action *in personam* a court of a foreign country has jurisdiction in the following cases only:

- (a) where the defendant is, at the time of the commencement of the action, ordinarily resident in that country;
- (b) where the defendant, when the judgment is obtained, is carrying on business in that country and that country is a province or territory of Canada;
- (c) where the defendant has submitted to the jurisdiction of that court:

⁵³⁶ R.S.S. 1965, c. 95, s. 6.

R.S.N.B. 1952, c. 90, s. 5.

⁵³⁷ (1964), 49 W.W.R. 543 (Sask.).

⁵³⁸ The Foreign Judgments Act, R.S.S. 1965, c. 95, s. 6(i).

- (i) by becoming a plaintiff in the action; or
- (ii) by voluntarily appearing as a defendant in the action without protest; or
- (iii) by having expressly or impliedly agreed to submit thereto.⁵³⁹

The word "only" at the beginning of the section clearly prohibits any attempt to go beyond the provisions of the Act. In another section, The Act further provides that no court of a foreign country has jurisdiction:

- "(a) in an action involving adjudication upon the title to, or the right to the possession of, immovable property situate in the Province; or
- (b) in an action for damages for an injury in respect of immovable property situate in the Province."⁵⁴⁰

Subject to the provisions of the Act, and once it is determined that the foreign court had jurisdiction, the foreign judgment is conclusive as to any matter adjudicated upon and shall not be impeached for any error of fact or law.⁵⁴¹

In New Brunswick the Act further provides that:

"No party to any action which may be brought in any Court in this Province upon or with respect to an obligation which has been adjudicated on in or by judgment shall be estopped by reason only of such judgment from availing himself of any right or defence based on either law or fact which has accrued to such party subsequent to the entering of such judgment."⁵⁴²

The Foreign Judgments Act gives the court power to grant a stay of proceedings where it is satisfied that the defendant has taken or is about to take an appeal or other proceeding in respect thereof.⁵⁴³ Finally, the Act expressly preserves the right to bring an action upon the original cause of action in respect of which the foreign judgment was obtained.⁵⁴⁴

⁵³⁹ R.S.N.B. 1952, c. 90, s. 2.

R.S.S. 1965, c. 95, s. 3.

⁵⁴⁰ R.S.N.B. 1952, c. 90, s. 3.

R.S.S. 1965, c. 95, s. 4.

⁵⁴¹ R.S.N.B. 1952, c. 90, s. 4.

R.S.S. 1965, c. 95, s. 5.

⁵⁴² R.S.N.B. 1952, c. 90, s. 8.

This provisions is not found in the Foreign Judgments Act of Saskatchewan.

⁵⁴³ R.S.N.B. 1952, c. 90, s. 6.

R.S.S. 1965, c. 95, s. 7.

⁵⁴⁴ R.S.N.B. 1952, c. 90, s. 7.

R.S.S. 1965, c. 95, s. 8.

Foreign Aircraft Third Party Damage Act

The Foreign Aircraft Third Party Damage Act⁵⁴⁵ implements the Rome Convention of October 7, 1952, which deals with damage caused by foreign aircraft to third parties on the surface. Article 20 of the convention contains provisions for the recognition and enforcement or execution of foreign judgments rendered in accordance with the terms of the convention. The first three paragraphs of Article 20 are concerned with the jurisdiction and obligations of the contracting states with respect to actions brought under the convention, while the remaining paragraphs of Article 20 deal with the enforcement of judgments rendered in accordance with the rules in the first three paragraphs.

Application may be made for the enforcement of any final judgment, including a default judgment, obtained in conformity with the rules of the convention, in any contracting state where the judgment debtor has his residence or principal place of business, or where he has sufficient assets to satisfy the judgment.⁵⁴⁶ Such application must be made within five years from the date the judgment became final.⁵⁴⁷

The laws of the forum, in which application for enforcement is made, will apply to the formalities of enforcement.⁵⁴⁸ Reopening of the merits of the case is prohibited in proceedings for execution.⁵⁴⁹

Enforcement or execution of a judgment is not automatic for a court is entitled to refuse to issue execution on several grounds listed in the convention, namely, where it is proven that the judgment is in respect of a cause of action which had already formed the subject of a judgment or an arbitral award which is recognized as final in the forum, or that the person by whom the application for execution is made has no right to enforce the judgment.

Execution may also be refused on the ground that a judgment was given by default and the defendant did not acquire knowledge of the proceedings in sufficient time to act upon it, or that the defendant was not given a fair and adequate opportunity to defend his interests, or that the judgment has been obtained by fraud of

⁵⁴⁵ S.C. 1955, c. 15, proclaimed in force February 4, 1958, S.O.R. 58-34, Jan. 22, 1958 (p. 102). The Act applies only in respect of damage contemplated by Article 1 of the Convention caused in the territory of Canada by an aircraft registered in the territory of a contracting state other than Canada.

⁵⁴⁶ Article 20, paragraph 4.

⁵⁴⁷ *Ibid.*, paragraph 12.

⁵⁴⁸ *Ibid.*, paragraph 4.

⁵⁴⁹ *Ibid.*, paragraph 6.

any of the parties⁵⁵⁰ or is contrary to the public policy of the state where execution is sought.⁵⁵¹

If execution of a judgment is refused on any of the last four grounds mentioned in the preceding paragraph, the claimant is entitled to bring a new action in the forum where execution was refused, within one year from the date of refusal. When such a new action is brought, the previous judgment becomes unenforceable and is a defence only to the extent to which it was satisfied. In addition, the judgment obtained in such a new action may not allow the total compensation awarded to exceed the limits of liability provided by the convention.⁵⁵²

Conclusion

It is generally agreed that security and simplicity in the relations among individuals across frontiers, require that in the different countries of the world the same solution be given to the same legal problem. This approach would be particularly effective in the field of foreign judgments. At present, claims based on foreign judgments exist in great number, and their enforcement, through appropriate uniform methods, would make international trade much healthier. However, is it possible both from a theoretical and practical point of view to attain a true community of justice in this area of conflict of laws?

Although it is doubtful whether a general international agreement concerning the unification of all the systems of recognition and enforcement of foreign judgments could ever be secured, due to the difficulty in laying down the theoretical foundation of the unified system, there is no reason why bilateral treaties or other kinds of arrangements could not be worked out between countries which have a highly reputable or similar judicial system. This would at least promote limited uniformity. Of course, whether such bilateral treaties are desirable in all instances is a question meriting serious consideration.

Agreements with countries whose judiciary has not attained the political independence or economic freedom that would enable it to render decisions entitled to respect abroad should be avoided.

⁵⁵⁰ *Ibid.*, paragraph 5.

⁵⁵¹ *Ibid.*, paragraph 7.

⁵⁵² *Ibid.*, paragraph 8. The right to bring a new action is subject to a period of limitation of one year from the date on which the claimant has received notification of the refusal to execute the judgment.

A choice must be made among the different countries of the world, based on the certainty that their courts adhere to the common standards of natural justice and due process of the Western world, if Canadian courts are to execute foreign judgments against local citizens or residents.

Actually the extent to which reliance ought to be given to the judgments of foreign countries must ultimately rest upon the views of legal public opinion in the nation involved. This is particularly true in a federal state like Canada, due to the fact that within the country's legal structure different conflicting ways of enforcing foreign judgments exist side by side. Internal unification through the process of codification by the different legal units of the federal state is the first step to be taken before successful results can be achieved on the international level. This has now largely been achieved. The conclusion of a bilateral agreement by a federal state ought not to be complicated by constitutional problems.

In order to reach a practical solution by way of international convention or by Model Act, it will be necessary for the countries involved to assent to a number of common legal principles, and to be prepared to modify their substantive and procedural law.

The most important object of any system of execution of foreign judgments is to insure that the enforcing court is not a court of appeal from the foreign judgment. In other words, the foreign judgment must always be conclusive. This is also a question of confidence. If the nations of the world do not possess complete confidence in one another's legal systems, they will be reluctant to adopt a method which may render their courts mechanical agents for enforcing uncontrolled decisions of foreign courts. This does not mean that foreign judgments should not be subjected to a certain amount of scrutiny by the enforcing court.

A foreign judgment is the end product of the application of the domestic legal order. It is a fact which cannot be ignored, and should at least receive the same consideration that is given to foreign law. Yet there is a common agreement that a certain amount of control must be exercised over the recognition and enforcement of foreign money judgments, in order to protect the domestic legal order.

Although, on the national and international levels, the drafting of a statute or uniform law must be made in the light of political, economic and social factors so as to give weight to dynamic rather than static or doctrinal factors, some common principles should be stated as constituting the foundations of a system of recognition

and enforcement of foreign money judgments. This would be relatively simple, since in Canada the general policy is that the recognition and enforcement of foreign judgments should be prompt, inexpensive and effective. These requisites could constitute the foundation of any world wide system of recognition and enforcement of foreign judgments. Embodied in the law, they would do much to promote the development of international commerce by insuring security of transactions, regularity in the application of the law, and uniformity of result.

Equitable principles, as well as economic considerations, must govern this field of private international law since the law is not an end in itself, but the instrument of a social and economic policy. Although the enforcement of a foreign money judgment appears to be the most obvious case in which effect should be given to a foreign claim according to the appropriate foreign law, this has never been fully recognized. The solution, however, is well within reach, since it is sufficient to emphasize the character of a foreign judgment as a judgment, "and it will logically appear by analogy to the domestic judgment, not merely that the foreign judgment is conclusive, assuming a duly constituted court with jurisdiction over the cause and the parties, but also that under appropriate provision to secure the judgment debtor against double execution, the foreign judgment should be registrable for execution upon transcript filed."⁵⁵³ Canadian courts must not forget that they are dealing with rights that have already been adjudicated. They must have confidence in the judicial system of foreign nations.

With the improvement of the calibre of the judiciary throughout the world, and the proclamation of the Universal Declaration of Human Rights by the United Nations, and the adherence, by many states, to the Convention on Human Rights, there is no doubt that a day will come when the rights of creditors will be adequately enforced in every country of the world without fear of injustice. A foreign judgment may then be given full credit in another country and be considered there as a domestic judgment with or without registration.

In order to solve the existing conflict of interests between the judgment debtor, who wants to delay execution, and the judgment creditor, who wants a quick execution, a procedure must be found which provides for speedy enforcement, without endangering the rights of the judgment debtor. Some judicial control must be exercised over the execution of foreign money judgments but it

⁵⁵³ Yntema, *op. cit.*, p. 1166.

need not be too stringent. A slight improvement of the traditional procedures or the extension of an improved system of registration is the most that is required to insure the security of international transactions and make possible actual uniformity of solutions.

The Hague Convention and Protocol on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters seems to have achieved this aim and it is hoped that it will be adopted in Canada.

The convention applies to all decisions rendered in civil and commercial matters by the courts of a contracting state, irrespective of the name given by that state to the proceedings giving rise to the decision or to the decision itself.⁵⁵⁴ The convention does not apply to decisions the main object of which is to determine the status or capacity of persons, questions of family law including personal or financial rights and obligations between family members, maintenance obligations, the existence or constitution of legal persons and their officers' powers, questions of successions, questions of social security, questions of bankruptcy or compositions or analogous proceedings, questions relating to damage or injury in nuclear matters, and decisions for the payment of any customs duty, tax, or penalty.⁵⁵⁵ Nor does the convention apply to decisions ordering provisional or protective measures or rendered by administrative tribunals.⁵⁵⁶

The parties' nationality does not affect the application of the convention.⁵⁵⁷

Conditions of recognition and enforcement

A decision rendered in one of the contracting states is entitled to recognition and enforcement in another contracting state if it was enforceable in the state of origin itself, if it was given by a court having jurisdiction within the meaning of the convention, and if it is no longer subject to review in the state of origin.⁵⁵⁸

According to Article 10, the jurisdiction of the court of the state of origin is recognized in the following cases:

- (1) if the defendant had, at the time when the proceedings were instituted, his habitual residence in the State of origin, or, if the defendant if not a natural person, its seat, its place of incorporation or its principal place of business in that State;

⁵⁵⁴ Article 2.

⁵⁵⁵ Article 1.

⁵⁵⁶ Article 2.

⁵⁵⁷ Article 3.

⁵⁵⁸ Article 4.

- (2) if the defendant had, in the State of origin, at the time when the proceedings were instituted, a commercial, industrial or other business establishment, or a branch office, and was cited there in proceedings arising from business transacted by such establishment or branch office;
- (3) if the action had as its object the determination of an issue relating to immovable property situated in the State of origin;
- (4) in the case of injuries to the person or damage to tangible property, if the facts which occasioned the damage occurred in the territory of the State of origin, and if the author of the injury or damage was present in that territory at the time when those facts occurred;
- (5) if, by a written agreement or by an oral agreement confirmed in writing within a reasonable time, the parties agreed to submit to the jurisdiction of the court of origin disputes which have arisen or which may arise in respect of a specific legal relationship, unless the law of the State addressed would not permit such an agreement because of the subject-matter of the dispute;
- (6) if the defendant has argued the merits without challenging the jurisdiction of the court or making reservations thereon; nevertheless such jurisdiction shall not be recognized if the defendant has argued the merits in order to resist the seizure of property or to obtain its release, or if the recognition of this jurisdiction would be contrary to the law of the State addressed because of the subject-matter of the dispute;
- (7) if the person against whom recognition or enforcement is sought was the plaintiff in the proceedings in the court of origin and was unsuccessful in those proceedings, unless the recognition of this jurisdiction would be contrary to the law of the State addressed because of the subject-matter of the dispute.⁵⁵⁹

The court of the state of origin is considered to have jurisdiction to try a counterclaim if that court would have had jurisdiction to try the action as a principal claim under the first six provisions of Article 10, or if the court did have jurisdiction under Article 10 to try the principal claim and the counterclaim arose out of the contract or facts on which the principal claim was based.⁵⁶⁰ Unless the decision was rendered by default, the authority addressed shall be bound by the findings of fact on which the court of the state of origin based its jurisdiction.⁵⁶¹

The jurisdiction of the court of the State of origin need not be recognized by the authority addressed in the following cases:

- (1) if the law of the State addressed confers upon its courts exclusive jurisdiction, either by reason of the subject-matter of the action or by virtue of an agreement between the parties as to the determination of the claim which gave rise to the foreign decision;

⁵⁵⁹ Article 10.

⁵⁶⁰ Article 11.

⁵⁶¹ Article 9.

- (2) if the law of the State addressed recognizes a different exclusive jurisdiction by reason of the subject-matter of the action, or if the authority addressed considers itself bound to recognize such an exclusive jurisdiction by reason of an agreement between the parties;
- (3) if the authority addressed considers itself bound to recognize an agreement by which exclusive jurisdiction is conferred upon arbitrators.⁵⁶²

A decision rendered by default shall not be recognized or enforced unless the defaulting party received notice of the institution of the proceedings in accordance with the law of the State of origin in sufficient time to enable him to defend the proceedings.⁵⁶³ In addition, recognition or enforcement may be refused if the decision was obtained by fraud, in the procedural sense; if recognition or enforcement would be contrary to the public policy of the state addressed; if the decision was the result of proceedings contrary to the requirements of due process of law; if, in the circumstances, either party did not have an opportunity fairly to present his case; or if proceedings between the same parties, based on the same facts and having the same purpose, were first to be instituted in and are pending before a court of the state addressed or have resulted in a decision by a court of the state addressed or by a court of another state which would be recognized by the state addressed.⁵⁶⁴

Article 7 states that recognition or enforcement may not be refused for the sole reason that the court of the state of origin applied a law other than that which would have been applicable according to the rules of private international law of the state addressed. However recognition may be refused if the state of origin had to decide a question on matters excluded by the convention by the first four subparagraphs of the second paragraph of Article 1⁵⁶⁵ and reached a result different from that which would

⁵⁶² Article 12.

⁵⁶³ Article 6.

⁵⁶⁴ Article 5.

⁵⁶⁵ According to the first four subparagraphs of the second paragraph of Article 1, the convention shall not apply to decisions the main object of which is to determine —

- (1) the status or capacity of persons or questions of family law, including personal or financial rights and obligations between parents and children or between spouses;
- (2) the existence or constitution of legal persons or the powers of their officers;
- (3) maintenance obligations, so far as not included in subparagraph (1) of this article;
- (4) questions of succession.

have followed had the rules of private international law of the state addressed been applied to that question.

Article 8 of the convention prohibits the review of the merits of a decision rendered by the court of origin, unless review is required by other Articles of the convention.

Recognition and enforcement procedures

The law of the state addressed governs procedure so far as the convention does not provide otherwise.⁵⁶⁶ The person seeking recognition or applying for enforcement must furnish a complete and authenticated copy of the decision, and in the case of a default judgment, the originals or certified true copies of the documents establishing that the summons was duly served on the defaulting party.

In addition, he must furnish all the documents establishing that the decision is final in the state of origin and where appropriate that it is enforceable there. Unless not required, certified translations of the documents shall be provided by the party seeking recognition.⁵⁶⁷

No legalisation or other like formality may be required. Where a decision contains provisions capable of being dissociated, any one or more of these may be separately recognized or enforced.⁵⁶⁸

An award or decision for costs or expenses, even if it does not proceed from a court, may be recognized or enforced provided the convention is applicable to the decision on the merits, and provided the decision derives from a decision which may be recognized or enforced under the convention, and that the decision relating to costs could have been subject to judicial review.⁵⁶⁹ A judgment for costs given in connection with the granting or refusal of recognition or enforcement of a decision may be enforced under the convention only if the applicant in the proceedings for recognition or enforcement relied on the convention.⁵⁷⁰

Settlements made in court in the course of a pending proceeding which are enforceable in the state of origin shall be enforceable in the state addressed.⁵⁷¹ Where legal aid was granted in the state

⁵⁶⁶ Article 14.

⁵⁶⁷ Article 13.

⁵⁶⁸ Article 14.

⁵⁶⁹ Article 15.

⁵⁷⁰ Article 16.

⁵⁷¹ Article 19.

of origin, the state addressed shall also extend such aid in proceedings for recognition or enforcement of a foreign decision.⁵⁷²

Where the applicant has his habitual residence in, or in the case of a non-natural person has a place of business in a state which has concluded a supplementary agreement⁵⁷³ with the state addressed, that state shall not demand a security, bond or deposit to guarantee the payment of judicial costs.⁵⁷⁴

Supplementary Agreements

Unless states have concluded supplementary agreements, decisions rendered in one contracting state shall not be recognized or enforced in another contracting state under the provisions of the convention.⁵⁷⁵ Article 23 of the convention lists the various provisions which may be agreed upon by the contracting states in their supplementary agreements. For example, the contracting states may clarify the meaning of various expressions such as "civil and commercial matters", "habitual residence" or "law" in federal states; they may specify the type of decisions to which the convention will apply; they may regulate the procedure for obtaining recognition or enforcement; they may define the bases of jurisdiction; they may also specify a limitation period, or fix the rate of interest payable from the date of the judgment in the state of origin.

Where two states have concluded a supplementary agreement, the judicial authorities of either state may dismiss or stay an action brought before them when other proceedings between the same parties, based on the same facts and having the same purpose are pending in a court of another state, and these proceedings may result in a decision which the state in which the first mentioned action was brought would be bound to recognize under the provisions of the convention.⁵⁷⁶

Supplementary Protocol

The Protocol applies to all foreign decisions, regardless of their state of origin, rendered on matters to which the Convention

⁵⁷² Article 18.

⁵⁷³ Supplementary agreements shall be discussed in the following paragraphs.

⁵⁷⁴ Article 17.

⁵⁷⁵ Article 21.

⁵⁷⁶ Article 30. The authorities of these states may nevertheless order provisional or protective measures regardless of proceedings elsewhere.

extends and directed against a person domiciled or resident in a Contracting state.⁵⁷⁷

Recognition and enforcement of such decisions shall be refused where they were based only on one or more of the following grounds of jurisdiction:⁵⁷⁸ the presence of the defendant's property in the state of origin or the seizure by the plaintiff of property situated there, unless the action is brought to assert proprietary or possessory rights in that property or arises from another issue relating to such property, or the property constitutes a security for a debt which is the subject-matter of the action; the plaintiff's nationality; the domicile or habitual or ordinary residence of the plaintiff in the state of origin unless permitted by way of exception made on account of the subject-matter of a class of contracts; the fact that the defendant carried on business within the state of origin, unless the action arises from that business; service of writ upon the defendant within the state of origin during his temporary presence there; a unilateral specification of the forum by the plaintiff, particularly in an invoice.⁵⁷⁹

Recognition and enforcement need not be refused where the jurisdiction of the court of the state of origin could also have been based upon another ground of jurisdiction which as between the state of origin and the state of recognition is sufficient to justify recognition and enforcement.⁵⁸⁰

V. *Reciprocal Enforcement of Maintenance Orders*

Introduction

At common law, a final judgment or order for maintenance or alimony rendered or made by a competent foreign court is enforceable in all the Canadian provinces.⁵⁸¹ However as noted previously, the procedure for the enforcement of foreign judgments is lengthy and often costly thus causing a great deal of hardship

⁵⁷⁷ Article 1 of Protocol.

⁵⁷⁸ Article 2 of Protocol.

⁵⁷⁹ Article 4. of Protocol. It is worth mentioning that Article 5 of the Protocol states that the domicile or habitual residence of a legal person is where it has its seat, its place of incorporation or its principal place of business.

⁵⁸⁰ Article 2 of Protocol.

⁵⁸¹ See *e.g.* *Swaizie v. Swaizie* (1900), 31 O.R. 324; *Robertson v. Robertson* (1908), 16 O.L.R. 170 (arrears of alimony); *Wood v. Wood* (1916), 37 O.L.R. 428, 31 D.L.R. 765 (C.A.) (arrears of alimony); *Burchell v. Burchell* (1926), 58 O.L.R. 515, [1926] 2 D.L.R. 595; *Meyers v. Meyers*, [1935] O.W.N. 547 (arrears of alimony); *Hadden v. Hadden* (1899), 6 B.C.R. 340 (C.A.); *Burpee v. Burpee*, [1929] 3 D.L.R. 18, [1929] 2 W.W.R. 128, 41 B.C.R. 201.

to deserted wives or abandoned children. Furthermore, at common law, judgments that may be modified by the courts that rendered them are not final and cannot be enforced.⁵⁸²

These difficulties prompted the Commissioners on Uniformity of Legislation in Canada to prepare a model Uniform Reciprocal Enforcement of Maintenance Orders Act which was approved in 1946,⁵⁸³ revised in 1953,⁵⁸⁴ 1956⁵⁸⁵ and 1958⁵⁸⁶ and amended in 1963 and 1970.⁵⁸⁷

The model Uniform Act which has been adopted with slight modifications by all common law provinces and territories⁵⁸⁸ is designed to facilitate the enforcement of the obligations of parents and spouses when they are resident in one state, province or territory and their dependants are resident in another.

Several situations are contemplated by the Act. First it provides for the registration of maintenance orders made against persons by courts in reciprocating states.⁵⁸⁹ Secondly copies of maintenance orders made at the request of local residents against persons resident in reciprocating states must be transmitted to the proper authorities of these reciprocating states.⁵⁹⁰ Thirdly provisional orders may also be made against non-resident persons for confirmation by the competent courts in reciprocating states.⁵⁹¹ This is designed to enable a deserted wife, resident in a state or province the courts of which have no jurisdiction over the husband who has deserted her and is residing in a reciprocating state or province, to initiate proceedings in the province where she is and thus to

⁵⁸² See *supra*, s. 2 and e.g. *McIntosh v. McIntosh*, [1942] O.R. 574, [1942] O.W.N. 509, [1942] 4 D.L.R. 70; *Ashley v. Gladden*, [1954] 4 D.L.R. 848, [1954] O.W.N. 255, aff'd 558; *Smith v. Smith*, [1923] 2 W.W.R. 389, 17 Sask. L.R. 203, [1923] 2 D.L.R. 896 (C.A.); *Smith v. Smith* (1954), 13 W.W.R. (N.S.) 207, [1955] 1 D.L.R. (2d) 229 (B.C.).

⁵⁸³ 1946 Proceedings 69.

⁵⁸⁴ 1953 Proceedings 96.

⁵⁸⁵ 1956 Proceedings 89.

⁵⁸⁶ 1958 Proceedings 97.

⁵⁸⁷ 1963 Proceedings 127; 1970 Proceedings 340.

⁵⁸⁸ S.A., 1958, c. 42, as amended 1960, c. 88; R.S.B.C., 1960, c. 332, as amended 1961, c. 59, s. 27, 1968, c. 12, s. 29; R.S.M., 1970, c. M20; R.S.N.B., 1952, c. 193, as amended 1952, c. 25, 1954, c. 72, 1970, c. 43; R.S. Nfld., 1952, c. 127, as amended 1961, no. 34; R.S.N.S., 1967, c. 173, as amended 1968, c. 37, 1970, c. 50; R.O.N.W.T., 1956, c. 63, as amended 1963, c. 17; R.S.O., 1960, c. 346, as amended 1961-62, c. 123, 1964, c. 100, 1967, c. 86; R.S.P.E.I., 1951, c. 139; S.S. 1968, c. 59; R.O.Y.T., 1958, c. 96; In Quebec, see R.S.Q., 1964, c. 23.

⁵⁸⁹ Uniform Act, s. 3.

⁵⁹⁰ *Ibid.*, s. 4.

⁵⁹¹ *Ibid.*, s. 5.

avoid the necessity of travelling to the state or province where the husband resides.

Finally the Act provides for the confirmation of maintenance orders made in reciprocating states.⁵⁹²

I. Analysis of the Uniform Act

a) Definitions

A maintenance order is "an order, judgment, decree or other adjudication of a court that orders or directs, or contains provisions that order or direct, the periodical payment of money as alimony, or maintenance, or support for a dependent of that person against whom the order, judgment, decree or adjudication was made".⁵⁹³

*In Re Fleming and Fleming*⁵⁹⁴ the Manitoba Court of Queen's Bench held that the definition of maintenance order in the Maintenance Orders (Facilities for Enforcement) Act⁵⁹⁵ was confined to orders for the payment of money only and excluded orders which give other relief. In other words, an alimony decree granted ancillary to a divorce decree is not a maintenance order within the meaning of the Act.⁵⁹⁶

A judgment or decree for divorce containing maintenance provisions could not be registered under this Manitoba Act nor under the Manitoba Reciprocal Enforcement of Judgments Act⁵⁹⁷ nor

⁵⁹² *Ibid.*, s. 6.

⁵⁹³ S. 2(d) Several provinces expressly exclude an order of affiliation from this definition: New Brunswick, Newfoundland, Prince Edward Island, Yukon, North West Territories. In British Columbia, it was held that the definition of "maintenance order" is wide enough to cover an order made for the support of an illegitimate child: *Re Todesco v. Zabkar* (1965), 53 W.W.R. 589.

⁵⁹⁴ (1959), 19 D.L.R. (2d) 417, (1959), 28 W.W.R. (N.S.) 241.

⁵⁹⁵ R.S.M., 1954, c. 151, s. 2(e), based on the 1946 Uniform Act.

⁵⁹⁶ See also *Wilson v. Wilson* (1966), 58 D.L.R. (2d) 191 (Sask.).

⁵⁹⁷ R.S.M., 1954, c. 221. As to the registration of foreign decrees for divorce and maintenance under the British Columbia Reciprocal Enforcement of Judgments Act, R.S.B.C., 1948, c. 286, see *in re Wilson* (1952), 7 W.W.R. (N.S.) 524 (B.C.); *Jackson v. Jackson*, [1950] 1 W.W.R. 900 (B.C.); *Mackowey v. Mackowey* (1954), 14 W.W.R. 190 (B.C.). Now see R.S.B.C., 1960, c. 331, s. 2(1)(a) which excludes "an order for the periodical payment of money as alimony or as maintenance for a wife or former wife or reputed wife or a child or any other dependent of the person against whom the order was made". As to the enforcement of such orders under the Ontario Reciprocal Enforcement of Judgments Act, R.S.O., 1937, c. 124 see *Lupton v. Lupton*, [1946] O.W.N. 326, [1946] 2 D.L.R. 286. Now see R.S.O., 1960, c. 345, as amended. Thus it would seem that in some provinces, maintenance orders may be registered under either statute while in other provinces this is not possible.

could a part of any such judgment or decree be registered thereunder. Both statutes were held to be mutually exclusive.

In *Re Paslowski v. Paslowski*⁵⁹⁸ the Manitoba Court of Queen's Bench also held that orders that could be varied by the court which made them were not final and thus were unenforceable in this province.

On principle, there appears to be no valid reason why a directive to pay alimony or maintenance made by a court of divorce should not be registered under the Act while such a directive in the form of an order could be so registered. Furthermore, why should registration be exclusively limited to an order or decree in a divorce court or other court directing periodical payments of maintenance only? Thus, in 1961, the legislature of the province of Manitoba which by then had adopted the 1958 revised model Uniform Act, amended it by adding some provisions to take care of the difficulties that arose in *Paslowski* and *Fleming*. Today "a maintenance order, or that part of a judgment that relates solely to a maintenance order, does not fail to be a maintenance order within the meaning of clause (d) of subsection (1) solely by reason of the fact that the amount payable thereunder may be varied from time to time by the court in the reciprocating state by which the order was made or the judgment given".⁵⁹⁹

The model Uniform Act was also amended in 1963 along the same lines⁶⁰⁰ and now makes the definition of "maintenance order" explicit with reference to alimony and maintenance orders rendered incidental or ancillary to divorce and judicial separation decrees.

Also in Manitoba, where, in proceedings to enforce against any person a maintenance order registered under the Act or at any

⁵⁹⁸ (1957), 22 W.W.R. 584, 65 Man. R. 206, 11 D.L.R. (2d) 180. The court also held that the definition of "judgment" contained in the Reciprocal Enforcement of Judgments Act, *supra*, did not include within its meanings a maintenance order issued incidental to a decree of judicial separation.

⁵⁹⁹ See R.S.M., 1970, c. M20, s. 2(2) and 1961 Proceedings 58. In Ontario, a divorce judgment granted by a Saskatchewan court was held to fall within the definition of maintenance order: *Omeljanow v. Omeljanow*, [1958] O.W.N. 13. See also *Summers v. Summers* (1958), 13 D.L.R. (2d) 454 (Ont.) where the court took it for granted that a maintenance order issued as part of a divorce proceedings in England was within the meaning of the definition of "maintenance order" in the Ontario Act. Now see s. 5A Ontario Act.

⁶⁰⁰ S. 2A, 1963 Proceedings 127. See also s. 6A (1) added in 1963: "If a maintenance order contains provisions with respect to matters other than periodical payments of money as alimony, maintenance, or support, the order may be registered or confirmed under this Act in respect of those provisions thereof that order or direct such periodical payment of money, but may not be so registered or confirmed in respect of any other provisions therein contained.

other time, it is shown to the court in which the order is registered, or to which a certified copy thereof is sent for registration, that the order has been varied by the court that made it, such order will be deemed to be varied accordingly and may be enforced only in accordance with the variation.⁶⁰¹ This provision does not apply to a provisional order that may be varied by the confirming court.⁶⁰²

A “‘dependent’ means a person that a person against whom a maintenance order is sought or has been made is liable to maintain according to the law in force in the state where the maintenance is sought or was made”.⁶⁰³

It has been held that where a *provisional* order for maintenance is made in a reciprocating state, it does not become a “maintenance order” in Saskatchewan until it has been confirmed by the court having jurisdiction over the person liable to pay. This court must apply its own law in considering whether the provisional order ought to be confirmed. Thus in *Re Morrissey and Morrissey*,⁶⁰⁴ the father’s liability to support his daughter was determined not according to the law of British Columbia where she resided but according to the law of Saskatchewan where her father had his residence. The Saskatchewan Court was also of the opinion that the definition of “maintenance order” applies only where the order has been made by a court that has jurisdiction over the person liable to maintain the dependent according to the law in force in the state where such an order is made.⁶⁰⁵

The Uniform Act only applies to states which the Lieutenant-Governor in Council declares to be reciprocating states, if he is satisfied that reciprocal provisions will be made by them for the enforcement therein of maintenance orders made within the province.⁶⁰⁶ Whereas the New Brunswick Act limits “reciprocating states” to members of “Her Majesty’s Dominions and the Republic of Ireland”,⁶⁰⁷ other provinces such as Ontario have declared various foreign states as “reciprocating states”.⁶⁰⁸

⁶⁰¹ Man., s. 2(3). Uniform Act, s. 6A (2), added in 1963.

⁶⁰² Man., s. 2(4). Uniform Act, s. 6A (3), added in 1963.

⁶⁰³ S. 2(c). See *Ross v. Polak*, [1971] 2 W.W.R. 241 (Alta. C.A.).

⁶⁰⁴ (1969), 70 W.W.R. 140, 7 D.L.R. (3rd) 174 (Sask. D.C.). *Contra: Ross v. Polak, ibid.*

⁶⁰⁵ *Ibid.*

⁶⁰⁶ Uniform Act, ss. 2(e) and 15(1). S. 15(2) also gives the Lieutenant-Governor in Council the power to revoke such a declaration. For a list of reciprocating states see the regulations in each of the provinces.

⁶⁰⁷ S. 1(g), R.S.N.B., 1952, c. 193, as amended.

⁶⁰⁸ *E.g.* Michigan, Union of South Africa.

In *A.G. for Ontario v. Scott*,⁶⁰⁹ the constitutional validity of such reciprocal legislation under section 92(13) and (16) of the B.N.A. Act was upheld by the Supreme Court of Canada.

It should also be pointed out that the Uniform Act does not change the ordinary rules of conflict of laws as to the recognition of foreign maintenance orders; it simply facilitates their enforcement.⁶¹⁰

b) Enforcement of Maintenance Orders Made in Reciprocating States

This part of the Act deals with the registration and enforcement of a final order made elsewhere by a court then having jurisdiction over the person against whom the order was made. There is only one order which draws its substantive effectiveness from the law of the state where it was made. Thus, where a maintenance order has been made against a person by a court in a reciprocating state and a certified copy of the order has been transmitted by the proper officer of that state to the Attorney General of the enforcing state, the Attorney General must send a certified copy of the order for registration to the proper court, where on receipt thereof the order will be registered.⁶¹¹

In British Columbia it was held that the Attorney General is not restricted by section 3(1) to registering an order made outside the province in a court of equivalent jurisdiction to the court which made it, *provided* the British Columbia court has statutory authority to make such maintenance order. For instance, a foreign order made ancillary to a decree in a matrimonial cause could not be enforced in British Columbia in the Family and Children's court as it has no original jurisdiction in matrimonial causes.⁶¹² This view was followed by the Supreme Court of Alberta⁶¹³ where Riley J. in Chambers held that in reciprocal enforcement proceedings, a family court could only make an order which it could itself have made in the exercise of its own original jurisdiction. His decision

⁶⁰⁹ [1956] S.C.R. 137, 114 C.C.C. 224, [1956] 1 D.L.R. (2d) 433, reversing [1954] O.R. 676, 109 C.C.C. 235 [1954] 4 D.L.R. (2d) 546 which reversed [1954] O.R. 246, 108 C.C.C. 393, [1954] 4 D.L.R. (2d) 465.

⁶¹⁰ *Re Paslowski v. Paslowski* (1957), 22 W.W.R. 584, 65 Man. R. 206; See also *Can. Credit Men's Trust Association v. Ryan*, [1929] 3 W.W.R. 403, [1930] 1 D.L.R. 280 (Alta), which involved the Reciprocal Enforcement of Judgments Act, S.A., 1925, c. 5; Except perhaps for ss. 2A and 3A (3) of the Uniform Act.

⁶¹¹ S. 3(1).

⁶¹² *Re Todesco v. Zabkar* (1965), 53 W.W.R. 589 (B.C.).

⁶¹³ *Strauch v. Strauch* (1966), 56 W.W.R. 242, 57 D.L.R. (2d) 233 (Alta).

was reversed by the Appellate Division.⁶¹⁴ The Ontario decree of divorce could be registered in Alberta, not because it was a decree in divorce proceedings but because it contained an order for maintenance so that upon registration, all the provisions relating to maintenance become effective under section 3(2) and all proceedings may be taken as if that part of the decree had been originally obtained in the family court. Section 3(2) provides for the consequences of registration and does not lay down as a condition precedent to registration that the family court must have had original jurisdiction to make a similar order.

Section 3(2) provides that the order once registered has from the date of its registration, the same force and effect, and subject to the Act, all proceedings may be taken thereon, as if it had been an order originally obtained in the registering court.

In *Short v. Short*⁶¹⁵ section 3(2) of the Alberta Act⁶¹⁶ was given a twofold effect. Mr. Justice Kirby held that a maintenance order of a court in a reciprocating state against a husband who had submitted to its jurisdiction was enforceable in Alberta upon registration despite the order's lack of finality and conclusiveness owing to the court which issued the order having power to rescind and vary it⁶¹⁷ and that the Alberta court has the same powers with respect to such a registered judgment as it would have had if it had made the order itself. Thus it may vary the order.⁶¹⁸ On the other hand in *Pasowysty v. Foreman*⁶¹⁹ it was held by the British Columbia Supreme Court that where an order for the payment of maintenance is made in a reciprocating state and registered pursuant to section 3 of the Act, the jurisdiction of the Family and Children's court in which the order is registered in British Columbia is limited to enforcing the order and there is no power to vary or discharge it.⁶²⁰ In coming to this conclusion, the court pointed out that if the legislature of British Columbia saw fit to set out in specific terms the power to vary an order made under section 6, it would have done so where the order to be varied is one made under section 3.

⁶¹⁴ (1967), 60 D.L.R. (2d) 538, 58 W.W.R. 683.

⁶¹⁵ (1963), 40 W.W.R. 592.

⁶¹⁶ *Supra*, footnote 588.

⁶¹⁷ Now see s. 2A Uniform Act, *supra*.

⁶¹⁸ See also *Fleming v. Fleming* (1959), 28 W.W.R. 241, at p. 253 (Man.).

⁶¹⁹ (1969), 69 W.W.R. 99, 5 D.L.R. (3d) 427.

⁶²⁰ See also *Lupton v. Lupton*, [1946] O.W.N. 326, [1946] 2 D.L.R. 286 under the Ontario Reciprocal Enforcement of Judgments Act, R.S.O., 1937, c. 124, s. 4(b).

In 1968, in British Columbia, section 3(2) of the Act was amended⁶²¹ to the effect that the court in which the order is registered has the power to enforce it notwithstanding that it is an order in proceedings in which the court has no original jurisdiction or it is an order which the court has no power to make in the exercise of its original jurisdiction.⁶²² The reason for the enactment of this amendment was in response to some decisions of the British Columbia courts in which doubt was cast upon the jurisdiction of the court under the Reciprocal Enforcement of Maintenance Orders Act to register an order which contained matter over which the court had no jurisdiction⁶²³ or the enforcement of such an order where the enforcing court would have no original jurisdiction to make the order.⁶²⁴

Where the sums of money made payable by the order are expressed in a foreign currency, the order will not be registered until the enforcing court has determined the equivalent of these sums in the currency of Canada on the basis of the rate of exchange prevailing at the date of the order of the court in the reciprocating state.⁶²⁵

⁶²¹ S.B.C., 1968, c. 12, s. 29(2).

⁶²² See also s. 1(a), S.B.C., 1968, c. 12, s. 29(1) adopted by the Conference in 1970, Uniform Act, ss. 3(1)(1.1) and 3(2)(2.1), 1970 Proceedings 340.

⁶²³ E.g. a divorce decree providing for maintenance.

⁶²⁴ *Re Todesco v. Zabcar* (1965), 53 W.W.R. 589 (B.C.); *Overton v. Overton* (1966), 56 W.W.R. 447 (B.C.); *Re Schmidt* (1967), 61 W.W.R. 124, 64 D.L.R. (2d) 90 (B.C.); Cf. *Re Broatch and Broatch* (1968), 67 D.L.R. (2d) 333, 63 W.W.R. 467 (B.C.) where it was held that while the judges of the family court did not possess jurisdiction to enforce a maintenance order ancillary to a decree in a matrimonial cause made in British Columbia, there was such jurisdiction when the maintenance order ancillary to a decree in a matrimonial cause was made by a court in a reciprocating state. The court applied *Strauch v. Strauch* (1967), 60 D.L.R. (2d) 538, 58 W.W.R. 683. See also MacDougall, *The Enforcement of Maintenance Orders in British Columbia* (1968), 26 *The Advocate* 43. See also s. 15 of the Divorce Act, S.C. 1968, c. 24 which provides for the registration of maintenance orders granted as a corollary relief to a divorce decree under section 10 or 11 of the Act:

"An order made under section 10 or 11 [corollary relief: maintenance] by any court may be registered in any other superior court in Canada and may be enforced in like manner as an order of that superior court or in such other manner as is provided for by any rules of court or regulations made under section 19."

⁶²⁵ S. 3(3). See *Re Ducharme v. Ducharme* (1963), 39 D.L.R. (2d) 1, [1963] 2 O.R. 204 (C.A.). Registration is a nullity where there is non compliance with the imperative requirements of this subsection although it would seem that such non compliance might be cured by re-registration.

According to section 3A added in 1963, once the order has been registered, the person against whom it was made may, within one month after he has had notice of registration or within such further time as the justice of the case requires, apply to the registering court to have the registration set aside.⁶²⁶

On such application, the court must set aside the registration of the maintenance order if the court in the reciprocating state acted without jurisdiction over the person against whom the order was made under the conflict of laws rules of the forum or the order was obtained by fraud.⁶²⁷ If it is shown to the court that an appeal is pending in the original court, the enforcing court may make such order as it sees fit.⁶²⁸ Section 3A clarifies the interpretation to be given to section 3. It was adopted to overcome the result reached in *Coopey v. Coopey*⁶²⁹ where the court held that section 3 was mandatory and did not give consideration to whether the English order sought to be registered was a nullity because of lack of jurisdiction in the English court.

Under the conflict of law rules of Alberta, the English court lacked jurisdiction over the defendant because he was not resident or present in England at any material time, nor did he submit to the jurisdiction of the English court. Section 3, as interpreted in that case, would enable a person to register a maintenance order which is not "provisional only" *ex parte* and as of right, without any confirmation, and without the party against whom it is made having any right of appeal, or any right to apply to have it set aside. Such a situation is not a proper one; it could cause great injustice. Under the authority of *Summers v. Summers*⁶³⁰ the wife would be entitled to have a divorce court order registered as of right in Ontario. In that case, the Ontario High Court upheld registration of a maintenance order that had been issued in the High Court of Justice in England in a case where at the time the action was begun there was no jurisdiction *in personam* over the defendant. The English order was made as part of divorce proceedings taken by a wife against her husband. The Ontario court held that the order was not a judgment *in personam*, but was ancillary to the divorce decree, and since there was divorce jurisdiction over the husband in England *according to English law*, there was also jurisdiction to issue the ancillary order. The court distinguished

⁶²⁶ 1963 Proceedings, p. 127, s. 3A (1) and (2).

⁶²⁷ S. 3A (3), Uniform Act.

⁶²⁸ S. 3A (4), Uniform Act.

⁶²⁹ (1961), 36 W.W.R. 332 (Alta).

*Re Kenny*⁶³¹ where the order which was refused registration in Ontario had been issued in British Columbia and there was no basis of jurisdiction *in personam* in the conflict of laws sense in British Columbia when the action was commenced there. In *Summers v. Summers* the court recognized the statutory divorce jurisdiction of the English court even though the husband was not domiciled in England when the divorce action was commenced there against him. Thus under Canadian conflict of laws rules prevailing at that time the English court did not possess international jurisdiction.

Section 3 does not prevent the registering court from questioning the jurisdiction of the foreign court.⁶³² To grant a valid final maintenance order that is not ancillary to a divorce decree, a foreign reciprocating state must have had jurisdiction *in personam* in the enforcing court conflict of laws sense over the respondent.

Section 3A provides a procedure and specifies the grounds for setting aside maintenance orders registered under section 3. If such section had been before the Alberta Court in *Coopey v. Coopey* a different result would have been reached.

In *Re Ducharme v. Ducharme*⁶³³ the Ontario Court of Appeal distinguished between the jurisdictional requirement for registration of a final maintenance order⁶³⁴ issued by a reciprocating state and that for registration of a provisional order.⁶³⁵ The applicant wife of the defendant husband had been granted a divorce decree in the State of Michigan with an ancillary order for payment of weekly alimony. The Michigan court did not have jurisdiction in divorce because the husband was domiciled in Ontario or *in personam* because he did not attend to the foreign jurisdiction. Without making any reference to *Summers v. Summers*⁶³⁶ the Court of Appeal relying on *Re Kenny*⁶³⁷ and *A. G. v. Scott*⁶³⁸ was of the

⁶³⁰ (1958), 13 D.L.R. (2d) 454.

⁶³¹ [1951] 2 D.L.R. 98, [1951] O.R. 133.

⁶³² *Re Kenny*, *ibid.* See also *Wegner (Graves) v. Fenn* (1969), 71 W.W.R. 76 (B.C.) where it was held that the domestic jurisdiction of the Saskatchewan court that made the final order for maintenance was not apparent. *Attorney-General of B.C. v. Busch Kewitz*, [1971] 3 W.W.R. 17 (B.C. Co. Ct.).

⁶³³ (1963), 39 D.L.R. (2d) 1.

⁶³⁴ S. 3, Uniform Act, Ont. Act, s. 2.

⁶³⁵ S. 6, Uniform Act, Ont. Act, s. 5.

⁶³⁶ (1958), 13 D.L.R. (2d) 454.

⁶³⁷ [1951] 2 D.L.R. 98, [1951] O.R. 153; [1951] O.W.N. 157, 100 Can. C.C. 70 (C.A.), *rev'g* [1950] O.W.N. 339, [1950] 3 D.L.R. 858.

⁶³⁸ [1956] 1 D.L.R. 423.

opinion that registration of a final order of a reciprocating state requires the order to have been given by a court having jurisdiction over the person against whom an award is made.

In the case of a provisional order it is always possible for the husband to raise any defence that he might have raised in the proceedings in the court of the reciprocating state. Thus such an order may be granted by a court in a foreign reciprocating state without jurisdiction over the respondent.

In *Needham v. Needham*⁶³⁰ a maintenance order was issued ancillary to a divorce decree granted to a wife in England against her husband who at all times was domiciled in Ontario. The husband appeared in the action, intending not to defend the divorce case but wishing to be heard on the question of maintenance of his children and alimony. However the order was made before he had had an opportunity to be heard. The English court assumed divorce jurisdiction on the basis of the residence of the wife in England. The Ontario court expunged the registration of the order for maintenance on the ground that according to Ontario conflicts rules the English court lacked jurisdiction to grant the divorce decree to which the maintenance order was merely ancillary. In the light of this case *Summers v. Summers* was wrongly decided.

Furthermore in *Needham* the husband's appearance in the English court could not confer a jurisdiction beyond the competence of the court. Also the English order was final while under section 4(1) of the Ontario Act, it should have been provisional. Thus the Ontario statute had not been complied with. Finally, the fact that the husband had not been heard on the making of the order was in itself enough to vitiate it.

In both, *Re Ducharme v. Ducharme* and *Needham v. Needham*, the alimony order was held invalid because the divorce decree to which it was ancillary was granted without jurisdiction owing to the lack of domicile of the respondent husband. It should be noted that in *Needham v. Needham* the court set aside the maintenance order that had been registered without express power in the Ontario Act to do so.

Today, in Ontario, section 5A adopted in 1967, seems to deal with this problem, although *prima facie*, it is difficult to reconcile it with section 6A (1) of the Uniform Act. As noted previously, section 6A (1) speaks of the registration of a maintenance order containing provisions with respect to matters other than periodical

⁶³⁰ [1964] 1 O.R. 645, 43 D.L.R. (2d) 405.

payments of money as alimony, maintenance, or support, whereas section 5A refers to an order or judgment including provisions for maintenance in the determination of any other question. For instance, under section 6A (1), one could envisage a maintenance order that also contains provisions dealing with the ownership of the matrimonial home; while section 5A would, for instance, cover a divorce decree containing an order for the payment of maintenance. Is the difference in wording material? Not really.

The net effect of these provisions appears to be that it is possible to separate maintenance provisions from other matters or from the divorce.

Furthermore, if the foreign court had jurisdiction *in rem* to decree the divorce, it may not have had jurisdiction *in personam* to order the husband to pay maintenance.

If the foreign court had no jurisdiction *in rem* to grant the divorce, it could still have had jurisdiction *in personam* to order the payment of maintenance.⁶⁴⁰ The enforcing court is only concerned with the maintenance provisions of the foreign order and the defendant is allowed to attack that order on the ground that the court that made it did not have jurisdiction *in personam* over him. In other words, in Ontario, under section 5A, a foreign maintenance order stands by itself and not as part of the larger question such as divorce or custody.

If the foreign maintenance order contains provisions with respect to matters other than the periodical payment of money as maintenance, only that part of the order dealing with maintenance may be registered providing of course that the foreign court had jurisdiction over the person of the defendant.⁶⁴¹

Submission to the foreign court will not give that court competence to grant a divorce but should give it competence *in personam* to make a maintenance order. Even though the result may seem odd, there is no reason why an order for maintenance that is ancillary to a divorce decree should fall with it if it is an invalid decree so long as the court had jurisdiction *in personam* over the defendant to make the order.

The foreign court operates on two levels: it must have jurisdiction *in rem* to grant the divorce decree and jurisdiction *in personam* over the defendant to make the maintenance order. Some clarification is still needed.

⁶⁴⁰ S. 3A (3)(a), Uniform Act, s. 5A Ont.

⁶⁴¹ S. 3A (3)(a), Uniform Act, S. 5A, Ont. Act.

In Manitoba, where, on receipt by the court of a certified copy of a maintenance order for registration, it appears to the court that the order is in respect of different matters or forms part of a judgment that deals with matters other than the maintenance order, and that part of the order or judgment that relates solely to the maintenance order, if it had been contained in a separate order, could properly be registered under the Manitoba Act, the order or judgment may be registered in respect of that part thereof that relates solely to the maintenance order.⁶⁴² This provision is also intended to overcome *Re Fleming v. Fleming* and *Re Paslowski*.

c) *Maintenance Orders Against Non Residents*

i) *Transmission of maintenance orders made locally*

Where a court in one of the Canadian provinces or territories has on the application of a dependant who is resident within the jurisdiction made a maintenance order against a person who is resident in a reciprocating state, the court shall, on the request of the person in whose favour the order was made, send a certified copy of the order to the Attorney-General for transmission to the proper officer of the reciprocating state.⁶⁴³

ii) *Provisional maintenance orders against persons residing outside the jurisdiction*

Where an application is made by a dependant within the jurisdiction for a maintenance order against a person resident in a reciprocating state, the court may, in the absence of that person and without service of notice on him, if after hearing the evidence it is satisfied of the justice of the application, make a provisional order which has no effect until it is confirmed by a competent court in the reciprocating state.⁶⁴⁴

In the case of a provisional order made under this part of the Act the substantive order is not that order but the confirmation order made in the reciprocating state.

⁶⁴² S. 3(4) of the Manitoba Reciprocal Enforcement of Maintenance Orders Act R.S.M., 1970 c. M20. As to the Enforcement of Maintenance Orders under the Imperial Maintenance Orders (Facilities for Enforcement) Act, 1920, c. 33, see *Burak v. Burak* (1949), 1 W.W.R. 300 (Sask.).

⁶⁴³ S. 4 Uniform Act. This section completes section 3.

⁶⁴⁴ *Ibid.*, s. 5. *Andrie v. Andrie* (1967), 60 W.W.R. 53 (Sask.): The application for a provisional order is simply the initiation of proceedings to be concluded in the reciprocating state where the husband resides.

The Act contains various provisions dealing with the evidence of the witnesses who are examined on an application for a provisional order,⁶⁴⁵ the preparation of statements, showing, for instance, the grounds on which the making of the order might have been opposed if the person against whom the order was made had been duly served with a statement of claim or writ of summons and had appeared at the hearing, and the transmission of documents to the Attorney General.⁶⁴⁶

The court of the reciprocating state, where the provisional order has come for confirmation, may ask it to be remitted to the original court for the purpose of taking further evidence.⁶⁴⁷ If upon the hearing of such evidence it appears to the original court that the order ought not to have been made, that court may rescind it. In any other case the evidence will be sent to the enforcing court.⁶⁴⁸

The confirmation of an order does not affect any power of the original court to vary or rescind it, but an order varying an original order has no effect until it is confirmed in like manner as the original order.⁶⁴⁹

Varying or rescinding orders must be transmitted to the proper officer of the reciprocating state in which the original order was confirmed.⁶⁵⁰

An applicant for a provisional order has the same right of appeal if any, against a refusal to make the order as he would have had against a refusal to make a maintenance order if a statement of claim or writ of summons had been duly served on the person against whom the order is sought to be made.⁶⁵¹

d) Confirmation of Maintenance Orders Made in Reciprocating States

A provisional maintenance order made in a reciprocating state has no effect until confirmed by the proper court in the state where it is sought to be enforced against a local resident.

Upon receipt of the copy of the order together with the depositions of witnesses and a statement of the grounds on which the

⁶⁴⁵ S. 5(2), Uniform Act.

⁶⁴⁶ *Ibid.*, s. 5(3).

⁶⁴⁷ *Ibid.*, s. 5(4).

⁶⁴⁸ *Ibid.*, s. 5(5).

⁶⁴⁹ *Ibid.*, s. 5(6).

⁶⁵⁰ *Ibid.*, s. 5(7).

⁶⁵¹ *Ibid.*, s. 5(8).

order might have been opposed if the person against whom the order was made had been a party to the proceedings, the confirming court will issue a summons calling upon the person against whom the order was made to show cause why the order should not be confirmed, and cause it to be served upon such person.⁶⁵² At a hearing this person may only raise the defences that he might have raised in the original proceedings if he had been a party thereto.^{652a} The statement from the court that made the provisional order, stating the grounds on which the making of the order might have been opposed if the person against whom the order was made had been a party to the proceedings, is conclusive evidence that those grounds are grounds on which objection may be taken.⁶⁵³

In *Bailey v. Bailey*⁶⁵⁴ a wife living in Manitoba with her husband left the matrimonial home and established her residence in Ontario, where she obtained a provisional order which was sent to Manitoba for enforcement. The Manitoba court refused to confirm or enforce the order on the ground that the Ontario court had no jurisdiction. On appeal the Supreme Court of Canada held that this was wrong. "To hold that a provisional order can be made only by a Court which has jurisdiction to make a final and binding order of maintenance against the husband would be to defeat the whole purpose of this part of the legislative scheme." Thus on an application in Manitoba to confirm a provisional order made in Ontario, it is not a valid objection to the application that the Ontario court had no jurisdiction to make the provisional order on the ground that the husband's desertion occurred not in Ontario but in Manitoba.

In *Hawryluk v. Hawryluk*⁶⁵⁵ a deserted wife sought confirmation in Saskatchewan of a provisional order for maintenance made in British Columbia under the Wives' and Children's Maintenance Act⁶⁵⁶ and the Reciprocal Enforcement of Maintenance Orders Act.⁶⁵⁷ She was deserted by her husband while both were residing

⁶⁵² *Ibid.*, s. 6(1).

^{652a} See *Ross v. Polak*, [1971] 2 W.W.R. 241 (Alta. C.A.) relying upon *Attorney-General for Ontario v. Scott*, [1956] S.C.R. 137, per Locke, J., at p. 151 and *Bailey v. Bailey* (1968), 64 W.W.R. 502, 68 D.L.R. (2d) 537, at p. 543. *Contra: Morrissey v. Morrissey* (1969), 70 W.W.R. 140, 7 D.L.R. (3d) 174 (Sask. D.C.).

⁶⁵³ *Ibid.*, s. 6(2) and *Storms v. Storms* (1953), 8 W.W.R. (N.S.) 458 (Alta.).

⁶⁵⁴ (1968), 64 W.W.R. 502, 68 D.L.R. (2d) 537 (S.C.C.) per Certwright, C.J., at p. 545 (D.L.R.).

⁶⁵⁵ (1966), 54 W.W.R. 661 (Sask.).

⁶⁵⁶ R.S.B.C., 1960, c. 409 as amended by S.B.C., 1963, c. 53, S.B.C., 1965, c. 58, S.B.C., 1966, c. 56 and S.B.C., 1968, c. 12.

⁶⁵⁷ R.S.B.C., 1960, c. 332 as amended by S.B.C., 1961, c. 59 and S.B.C., 1968, c. 12.

in Saskatchewan and he was still residing there when she obtained her order in British Columbia. The Saskatchewan District Court judge refused to confirm the provisional order on the ground that the British Columbia court had no jurisdiction as there was no evidence that the wife was residing in that province when she laid her complaint and the husband was not residing in British Columbia when he deserted her. Subsequently in *Douglas v. Douglas*⁶⁵⁸ the same District Court judge again refused to confirm a provisional order made in British Columbia under the same Acts. In that case the wife was residing in British Columbia when she laid her complaint but the husband resided in Saskatchewan at all material times. It would seem that the wife could only bring a maintenance claim where the desertion was alleged to have taken place, or where the husband was resident. The wife cannot pick at will a jurisdiction which she might find favourable for the bringing of her claim. However, in *Andrie v. Andrie*⁶⁵⁹ another Saskatchewan District Court judge disagreed with *Douglas* and granted a provisional order under the relevant Saskatchewan Acts where the wife laid her complaint while residing in Saskatchewan and the husband deserted her while both were residing in Alberta. The application for a provisional order is simply the initiation of proceedings under the Act to be concluded in the jurisdiction where the defendant resides. The Act protects local residents whether they are deserted within or without the jurisdiction. However, ultimately, the provisional order must derive its legal force and effect entirely from the statute where it is sought to be confirmed. The confirming court is not completing an operative foreign order whether in relation to a province or to another country. It is making an original order of its own, the preliminary grounds and condition of which is a step taken elsewhere. That step has no substantive efficacy until by acceptance it is adopted and incorporated in the action of the confirming court.⁶⁶⁰

Under sections 5 and 6 of the Uniform Act:

...the liability upon the husband to pay maintenance is created solely by the law of the province where the confirming order is made against him. The only judicial jurisdiction exercised over him is that of the province where he resides at the time the confirming order is made. Since a provisional order as such in no way imposes liability upon the husband, it appears to follow that the issuing province or country does

⁶⁵⁸ (1967), 58 W.W.R. 42 (Sask.).

⁶⁵⁹ (1967), 60 W.W.R. 53 (Sask.).

⁶⁶⁰ *A.G. for Ontario v. Scott et al.*, [1956] S.C.R. 137, (1956), 1 D.L.R. (2d) 433, at pp. 438-439, per Rand, J.

not need to have jurisdiction in personam in order to make a valid provisional order against a non resident husband. Should it be necessary that the court granting the provisional order have local jurisdiction when the order has no operative effect against the husband but is only evidentiary?⁶⁶¹

In *Meyers v. Meyers*⁶⁶² the Ontario court refused to confirm a provisional order made in Manitoba on the ground that the Manitoba court had no jurisdiction to make the order as the desertion of the wife took place in Ontario where the parties were resident.

The court may confirm the order, either without modification or with such modifications as it considers just.⁶⁶³ There is only one substantive effective order which is the one made under and which draws its substantive effectiveness from the law of the confirming court. The provisional order made in the reciprocating state has no force or effect of itself; the rights are effectively dealt with, and the issues settled, by the confirmation order.

Actually, this part of the Act is designed to follow the husband by reaching him in a reciprocal jurisdiction where the wife is residing in the jurisdiction from which the husband has fled.⁶⁶⁴

If the person against whom the provisional order has been made satisfies the court that, for the purpose of any defence, it is necessary to remit the case to the court that made the order for the taking of any further evidence, the confirming court may so remit the case to the original court and adjourn the proceedings for the purpose.⁶⁶⁵

A provisional order that has been confirmed may be varied and rescinded in like manner as if it had originally been made by the

⁶⁶¹ 1967 Proceedings 100.

⁶⁶² [1953] 2 D.L.R. 255 (Ont.). In *Holland v. Holland* [1950] 1 W.W.R. 286, 96 C.C.C. 138 (B.C.), the court held that the domicile of the parties does not affect the jurisdiction of a judge in Manitoba to make a provisional order under the Wives' and Children's Maintenance Act, R.S.M., 1940, c. 235 on the complaint of a wife residing therein, even though the husband is residing and domiciled in another province.

⁶⁶³ 1961 S.M., c. 36 s. 6(3).

⁶⁶⁴ As to confirmation of a provisional order under the Imperial Maintenance Orders (Facilities or Enforcement) Act 1920, c. 33, see *Stevenson v. Stevenson*, [1947] 2 W.W.R. 962 (Sask.). *Burak v. Burak*, [1949] 1 W.W.R. 300 (Sask.). In the latter case, the court rejected the view that the object of the Imperial Act is to enforce orders for maintenance only against persons domiciled in England who have emigrated to other parts of Her Majesty's Dominions to which the Act extends. With respect to the burden of proof in the case of an application for confirmation, see *Shaw v. Shaw*, [1948] 1 W.W.R. 395 (Alta).

⁶⁶⁵ Uniform Act, s. 6(4).

confirming court. For this purpose the court may remit the case to the original court for the taking of evidence.⁶⁶⁶

The person bound by the confirming order may appeal it.⁶⁶⁷ Where the court has declined to confirm the order or has varied or rescinded it, the person in whose favour it was made has a like right of appeal.⁶⁶⁸ Once confirmed the order has the same force and effect as if it had originally been obtained in the court in which it is so confirmed and that court has the power to enforce the order accordingly.⁶⁶⁹

Finally, the Act provides for the conversion to Canadian currency of orders expressed in foreign currency. The rate of exchange applicable is that prevailing at the date of the provisional order of the court in the reciprocating state.⁶⁷⁰

e) General

The court in which an order has been registered or confirmed under the Act, and the officers of the court, must take all proper steps for enforcing this order.⁶⁷¹

In British Columbia, security for costs will not be ordered where the plaintiff resides in a state or province to which the Act applies.⁶⁷²

In Ontario, in an action for recovery of arrears of maintenance and costs awarded by a foreign judgment, it was held that it would not be a proper exercise of the discretion under the rules of practice to order a wife resident abroad and who has been deprived of means of support to give security.⁶⁷³

⁶⁶⁶ *Ibid.*, s. 6(5) and see *Re Ready* (1968), 67 D.L.R. (2d) 513, 63 W.W.R. 306 (B.C.).

⁶⁶⁷ *Ibid.*, s. 6(6).

⁶⁶⁸ *Ibid.*, s. 6(a).

⁶⁶⁹ *Ibid.*, s. 6(7).

⁶⁷⁰ *Ibid.*, s. 6(8).

⁶⁷¹ *Ibid.*, s. 7. In British Columbia see *Re Ready* (1968), 63 W.W.R. 306, 67 D.L.R. (2d) 513. Where the maintenance order has been registered or the court has by its order, confirmed, or varied or varied and confirmed a provisional order made in a court of a reciprocating state or officers of the court have taken, or are about to take, steps to enforce the order so registered or a provisional order so confirmed, any party to the matter may appeal against the registration or the confirming order, or against the enforcement thereof. See R.S.M., 1970 c. M20, ss. 7(1) and (2). Uniform Act, s. 7.1, 1970 Proceedings 340.

⁶⁷² *Edgar v. Erickson* (1969), 69 W.W.R. 551 (B.C.); see also *Schmidt and Schmidt v. Schmidt* (1964), 43 D.L.R. (2d) 61, 44 W.W.R. 613

⁶⁷³ Rule 373 *et seq.*, *Gamble v. Gamble*, [1952] O.W.N. 173, [1952] 4 D.L.R. 525 reversing [1951] O.W.N. 886; *Henshaw v. Henshaw*, [1938] O.W.N. 29.

A document purporting to be signed by a judge or officer of a court in a reciprocating state shall, until the contrary is proved, be deemed to have been so signed without proof of the signature or judicial or official character of the person appearing to have signed it, and the officer of a court by whom a document is signed shall, until the contrary is proved, be deemed to have been the proper officer of the court to sign the document.⁶⁷⁴

Depositions or transcripts from shorthand of evidence taken in a reciprocating state, for the purpose of the Act, may be received in evidence before the enforcing court.⁶⁷⁵

Where the order is in a foreign language it must be translated into the English Language.⁶⁷⁶

The fact that the order to be registered or confirmed or any accompanying document uses terminology different from that used in the enforcing court does not vitiate any proceedings under the Act.⁶⁷⁷

Nothing in the Act deprives a person of the right to obtain a maintenance order instead of proceeding under the Act.⁶⁷⁸

Finally the Lieutenant-Governor in Council may make regulations for the purpose of giving effect to the provisions of the Act.⁶⁷⁹

The procedures provided by the Uniform Act have been very beneficial and have fulfilled most of the expectations of those who drafted it. However, there are still some difficulties to be ironed out due to the fact that some sections of the Act have been interpreted differently by the courts of some provinces in spite of the fact that section 16 of the Uniform Act declares that "This Act shall be so interpreted as to effect its general purpose of making uniform the law of the provinces that enact it".⁶⁸⁰

*United Nations Convention on the Recovery Abroad of Maintenance, 1956*⁶⁸¹

The purpose of this convention is to facilitate the recovery of maintenance to which a "claimant" who is in the territory of one

⁶⁷⁴ Uniform Act, s. 11.

⁶⁷⁵ *Ibid.*, s. 12.

⁶⁷⁶ *Ibid.*, s. 13.

⁶⁷⁷ *Ibid.*, s. 14.

⁶⁷⁸ *Ibid.*, s. 15.

⁶⁷⁹ *Ibid.*, s. 10.

⁶⁸⁰ See also *Bailey v. Bailey* (1968), 64 W.W.R. 502, 68 D.L.R. (2d) 537 (S.C.C.), at p. 543, per Cartwright, C.J.

⁶⁸¹ The convention is not in force in Canada. It can be found in 1957, vol. 268 of United Nations Treaty Series at p. 32.

of the contracting states, claims to be entitled from a "respondent" who is subject of another contracting state.⁶⁸² To effect this purpose, each contracting state must designate the authorities which shall act, in its territory as Transmitting Agencies and as Receiving Agency.⁶⁸³

The claimant may make application to a Transmitting Agency in his state for the recovery of maintenance from the respondent. The application must be accompanied by all relevant documents and the Transmitting Agency must take all reasonable steps to ensure that the requirements of the law of the state of the Receiving Agency are complied with. In this connection each contracting state shall inform the Secretary-General of the United Nations as to the evidence normally required under the law of the state of the Receiving Agency for the proof of maintenance claims, of the manner in which such evidence should be submitted, and of other requirements to be complied with under such law.⁶⁸⁴

The Transmitting Agency will then transmit the documents to the Receiving Agency of the state of the respondent, unless satisfied that the application is not made in good faith. However, before transmitting such documents, the Agency must be satisfied that they are regular as to form in accordance with the law of the state of the claimant. The Transmitting Agency may also express to the Receiving Agency an opinion as to the merits of the case and recommend that free legal aid and exemption from costs be given to the claimant.⁶⁸⁵

The Transmitting Agency shall, at the request of the claimant, transmit any order, final or provisional, and any other judicial act, obtained by the claimant for the payment of maintenance in a competent tribunal of any of the contracting states. These orders and judicial acts may be transmitted in substitution for or in addition to the documents which must accompany the application to the Transmitting Agency.⁶⁸⁶

The Receiving Agency shall take, on behalf of the claimant, all appropriate steps for the recovery of maintenance, including the settlement of the claim, and where necessary, the institution and prosecution of an action for maintenance and the execution of any order or other judicial act for the payment of maintenance.⁶⁸⁷ This

⁶⁸² Art. 1.

⁶⁸³ Art. 2.

⁶⁸⁴ Art. 3.

⁶⁸⁵ Art. 4.

⁶⁸⁶ Art. 5.

⁶⁸⁷ Art. 6.

includes exequatur or registration proceedings or an action based upon the act transmitted.⁶⁸⁸

The law applicable in the determination of all questions arising in any such action or proceedings is the law of the state of the respondent, including its private international law.⁶⁸⁹

If provision is made for letters of request in the laws of the two contracting states concerned, a tribunal hearing the action for maintenance may address letters of request for further evidence either to the competent tribunal of the other contracting state or to any other authority or institution designated by the other contracting state in whose territory the request is to be executed. In order that the parties may attend or be represented, the requested authority must give notice of the date on which and the place at which the proceedings are to take place to the Receiving Agency and the Transmitting Agency concerned, and to the respondent.⁶⁹⁰

The provisions of the convention apply also to applications for the variation of maintenance orders.⁶⁹¹

Finally the convention deals with security for costs and the transfer of funds.⁶⁹²

It must be noted that the remedies provided by the convention are in addition to, and not in substitution for, any remedies available under municipal or international law.⁶⁹³

In many respects the United Nations convention is substantially similar to the model Uniform Act. However, the convention does not modify any of the rules of conflict of laws in force in the contracting states; it merely sets up new administrative procedures designed to accelerate the recovery of maintenance claims.

Hague Convention on the recognition and enforcement of maintenance orders, 1958

The convention provides for the recognition and the reciprocal enforcement by contracting states, of maintenance orders made in favour of unmarried, legitimate, illegitimate and adopted children under twenty-one years of age.⁶⁹⁴

⁶⁸⁸ Art. 5(3).

⁶⁸⁹ Art. 6(3).

⁶⁹⁰ Art. 7.

⁶⁹¹ Art. 8.

⁶⁹² Arts. 9 & 10.

⁶⁹³ Art. 1(2).

⁶⁹⁴ It can be found in 1965, vol. 539 of United Nations Treaty Series at p. 27. Art. 1. The convention applies only to that part of the foreign order that deals with maintenance.

In order to be recognized and enforced the maintenance order must have been made by a competent court. The defendant must have received proper notice of the action according to the law of the state where it was brought. Where the order was rendered by default, recognition and enforcement may be refused, if, in view of the surrounding circumstances, it is without his fault that the debtor did not know of the pendency of the action against him, or did not defend himself. The order must be *res judicata* where it was made. However a provisional order or one that may be varied by the court which made it, is enforceable if it can be enforced where it was made. The order must not be contrary to an order made in the enforcing state which refers to the same object and involves the same parties. Finally, the order must not be "manifestly incompatible" with the public policy of the enforcing state.⁶⁹⁵

No examination of the merits of the order is to take place.⁶⁹⁶

According to article 3 of the convention, the only courts or authorities that are competent to render a maintenance order are those of the state where the debtor or creditor was habitually resident at the beginning of the action or to which the debtor submitted himself either expressly or by defending on the merits without raising the question of jurisdiction.

The convention also indicates what documents the judgment creditor must produce.⁶⁹⁷

The procedure of enforcement is governed by the *lex fori*. Once declared executory, the foreign order has the same force and effect as if it had been an order originally made by the enforcing court.⁶⁹⁸ If the foreign order contains provisions that order the periodical payment of money, enforcement will be granted for the amount of arrears as well as with respect to future payments.⁶⁹⁹ The provisions of the convention apply also to orders that modify a previous order.⁷⁰⁰ Finally the convention deals with legal aid, security for costs, legalisation of documents, and the transfer of money.

The convention does not exclude other methods of enforcement of maintenance orders under the *lex fori* or by virtue of other international conventions.⁷⁰¹

⁶⁹⁵ Art. 2.

⁶⁹⁶ Art. 5, by implication.

⁶⁹⁷ Art. 4.

⁶⁹⁸ Art. 6.

⁶⁹⁹ Art. 7.

⁷⁰⁰ Art. 8.

⁷⁰¹ Art. 11.

The Hague Convention contains some of the features of that part of the model Uniform Act which deals with the enforcement of maintenance orders made in reciprocating states. It does not provide any administrative machinery for the enforcement of maintenance orders but unifies the conflict of laws rules governing their recognition. Furthermore, the Hague Convention is quite restrictive since it does not cover maintenance orders in favour of spouses. Of particular interest are the provisions dealing with the jurisdiction of the original court. The adoption of the habitual residence of the claimant as a ground of international jurisdiction is a very progressive step. Basically the Hague Convention is a conflict of laws convention while the United Nations Convention is an administrative convention. Our model Uniform Act is both. This is its strength and its weakness.

VI. Foreign Arbitration Awards

Arbitration avoids the delay, uncertainty and expense which is often associated with litigation before foreign courts. Privacy and usually a decision given by an expert in the trade concerned are also very attractive in international trade.

So far not much use has been made in Canada of the various methods of enforcement available to foreign award creditors. This is not surprising as most businessmen comply with adverse awards. Against the occasional defaulter private sanctions are usually more effective than formal proceedings for enforcement.

In the common law provinces of Canada there are several methods to enforce a foreign arbitration award, all of which require the assistance of a court.

1) Action on a judgment or action at common law

An arbitration award that has been made enforceable by a foreign judgment may be enforced in Canada as a judgment. Thus in *Stolp & Co. v. Browne & Co.*,⁷⁰² the Ontario Supreme Court held that when an arbitration award is presented to a foreign court of competent jurisdiction in the manner prescribed by the foreign rules of procedure and thereupon becomes effective as a judgment it may be sued upon as a foreign judgment in Ontario.

It was also held that the absence of notice of the proceedings in the foreign court as would be required in a like case in Ontario

⁷⁰² (1930), 66 O.L.R. 73, 38 O.W.N. 400, [1930] 4 D.L.R. 703. Noted H.E. Read (1934), 12 Can. Bar Rev. 259.

was immaterial where such notice was not required by the foreign law. The court relied on *Piggott's*⁷⁰³ view that the award of an arbitrator abroad does not come within the definition of a foreign judgment until it is made an order of court. It is then merged in that order which is in effect the judgment of the court in the matter.

This view does not seem to be tenable today. As pointed out by the editors of Dicey⁷⁰⁴ a foreign arbitration award will be enforced whether or not the law governing the arbitration proceedings requires a judgment or order of a court to make the award enforceable. The reason given for this view is that the enforcement of foreign awards is a matter of procedure governed by the *lex fori*. The same local procedure should apply to all awards whether they are local or foreign.⁷⁰⁵

Furthermore, if the award is made enforceable by a foreign judgment, it would seem that the cause of action does not merge in the foreign judgment. The judgment creditor can still sue on the original cause of action. He may either seek to enforce the award or the judgment. If on the other hand an action is brought to enforce the award itself the non-merger rule should not apply. These views have not yet been accepted in Canada. However a single reported decision is not sufficient to fix the law. It is suggested that Canadian courts should follow recent English practice in this field.

In the *Stolp* case, the court also pointed out that an arbitration award that has been reduced to a judgment in the country where it was rendered may be sued upon, subject to such defences as are available, as a foreign judgment.

In addition to the grounds on which a foreign judgment can be impeached at common law the agreement to arbitrate must be valid by its proper law and the award must be valid and final according to the law governing the arbitration proceedings. These

⁷⁰³ Foreign Judgments and Jurisdiction (3rd ed., 1908), p. 95.

⁷⁰⁴ *Op. cit.*, rule 177.

⁷⁰⁵ In England, see *Union Nationale des Co-opératives Agricoles de Céréales v. Robert Catterall & Co. Ltd.*, [1959] 2 Q.B. 44, cited by Dicey where it is pointed out that although the case was decided under Part II of the Arbitration Act 1950, 14 Geo. 6, c. 27, the principles applied by the Court apply with equal force to cases arising at common law (*op. cit.*, p. 1054). The editors of Dicey reject *Merrifield Ziegler & Co. v. Liverpool Cotton Association* (1911), 105 L.T. 97 where the court refused to enforce a foreign award as such. This case was approved in *Stolp & Co. v. Browne & Co.*, although the court distinguished it from the case at bar.

rules should also apply to a foreign award that has not been reduced to judgment. There is no reason why foreign arbitration awards should be treated differently than foreign judgments. In all cases the arbitrators must have acted within the terms of the authority which was given to them by the agreement to arbitrate.

2) *Registration*

The Reciprocal Enforcement of Judgments Act of each of the provinces and territories applies to an award in an arbitration proceeding if the award under the law in force in the jurisdiction where it was made has become enforceable in the same manner as a judgment given by a court in that jurisdiction.⁷⁰⁶ In some provinces the Act is restricted to awards made in other provinces or territories.⁷⁰⁷

Such awards can be registered in like manner as if they were judgments. However the plaintiff may still bring an action on his award or on the original cause of action provided it has not become merged in the award by the law of the arbitration proceedings.⁷⁰⁸

All the provisions of the Act apply to awards registrable as judgments thereunder.⁷⁰⁹ The registering court must also make sure that the agreement to arbitrate was valid by its proper law and that the arbitration tribunal acted within the terms of the agreement.

2) *Newfoundland*

In Newfoundland, The Arbitration (Foreign Awards) Act⁷¹⁰ gives effect to a Protocol on Arbitration Clauses which provides for the recognition by Contracting States of the validity of arbitral agreements and to a Convention on the Execution of Arbitral Awards. Both conventions were signed at Geneva by the United Kingdom, the former on September 24th, 1923 and the latter on September 26th, 1927.

Arbitration in international trade can be impeded if national courts are free to ignore arbitral agreements and awards and to assume jurisdiction over matters covered by arbitral agreements.

⁷⁰⁶ *E.g.* S.A., 1958, c. 33, s. 2(1)(a); R.S.M., 1970, c. J20, s. 2(1)(a); R.S.B.C., 1960, c. 331, s. 2(1).

⁷⁰⁷ *E.g.* R.S.S., 1965, c. 92, s. 92, s. 2(1)(a); R.S.O., 1960, c. 345, as am., s. 1(1)(a).

⁷⁰⁸ See *e.g.* S.A., 1958, c. 33, s. 11.

⁷⁰⁹ See preceding section.

⁷¹⁰ (1931), 22 Geo. V, c. 2.

The 1923 Protocol binds Contracting States to recognise international arbitral agreements in commercial matters and to remove disputes covered by such agreements from the jurisdiction of the courts. The Convention of 1927 follows as a necessary corollary. The Contracting States undertake to provide the same facilities for the enforcement of foreign awards as are provided for the enforcement of awards made within their own jurisdiction.

In 1958 a Convention on the Recognition and Enforcement of Foreign Arbitral Awards was signed in New York. It was intended to improve the existing system of international recognition and enforcement of foreign awards. The Convention is not in force in any of the Canadian provinces or territories.

Under The Arbitration (Foreign Awards) Act, a foreign award made in pursuance of an agreement not governed by the law of Newfoundland, to which the Protocol applies, between parties who are subject to the jurisdiction of States which are declared by the Governor in Council to be parties to the Convention, in a territory to which the convention is declared to apply by the Governor in Council is enforceable in Newfoundland either by action or under the provisions of Part VI of the Judicature Act. The award must be treated as binding for all purposes on the persons as between whom it was made, and may be relied on by any of those persons by way of defence, set off or otherwise in any legal proceedings in Newfoundland.

According to section 4(1): "In order that a foreign award may be enforceable under this Act it must have —

- (a) been made in pursuance of an agreement for arbitration which was valid under the law by which it was governed;
- (b) been made by the tribunal provided for in the agreement or constituted in manner agreed upon by the parties;
- (c) been made in conformity with the law governing the arbitration procedure;
- (d) become final in the country in which it was made;
- (e) been in respect of a matter which may lawfully be referred to arbitration under the law of Newfoundland;

and the enforcement thereof must not be contrary to the public policy or the law of Newfoundland.

(2) Subject to the provisions of this sub-section, a foreign award shall not be enforceable under this Act if the court dealing with the case is satisfied that —

- (a) the award has been annulled in the country in which it was made; or
- (b) the party against whom it is sought to enforce the award was not given notice of the arbitration proceedings in sufficient time to enable him to present his case, or was under some legal incapacity and was not properly represented; or
- (c) the award does not deal with all the questions referred or contains decisions on matters beyond the scope of the agreement for arbitration:

Provided that, if the award does not deal with all questions referred, the court may, if it thinks fit, either postpone the enforcement of the award or order its enforcement subject to the giving of such security by the person seeking to enforce it as the court may think fit.

(3) If a party seeking to resist the enforcement of a foreign award proves that there is any ground other than the non-existence of the conditions specified in paragraphs (a), (b) and (c) of sub-section (1) of this section or the existence of the conditions specified in paragraphs (b) and (c) of subsection (2) of this section, entitling him to contest the validity of the award, the court may, if it thinks fit, either refuse to enforce the award or adjourn the hearing until after the expiration of such period as appears to the court to be reasonably sufficient to enable that party to take the necessary steps to have the award annulled by the competent tribunal."

Section 5(1) states that: "The party seeking to enforce a foreign award must produce —

- (a) the original award or a copy thereof duly authenticated in manner required by the law of the country in which it was made; and
- (b) evidence proving that the award has become final; and
- (c) such evidence as may be necessary to prove that the award is a foreign award and that the conditions mentioned in paragraphs (a), (b) and (c) of sub-section (1) of section [4] are satisfied."

Provision is also made for the translation of the award into the English language. The translation must be certified as correct by a diplomatic or consular agent of the country to which that party belongs, or certified as correct in such other manner as may be sufficient according to the law of Newfoundland.

An award is not final if any proceedings for the purpose of contesting the validity of the award are pending in the country in which it was made.

Finally the Act does not deprive any interested party of the right of availing himself of an arbitral award in the manner and to the extent allowed by the law of Newfoundland. Thus the common law methods of enforcement are retained as well as registration. In view of the fact that the Newfoundland Reciprocal Enforcement of Judgments Act⁷¹¹ applies to awards wherever made, it would seem that the Arbitration (Foreign Awards) Act is of little practical use.

The Act maintains the principle that arbitration is a legal process subject to control by the appropriate legal authorities of the countries in which it is carried out. It does not substantially change the ordinary practice of the courts. Only with respect to stay of proceedings does the Act involve an important change of legal policy since the Newfoundland courts no longer enjoy a discretionary power to stay proceedings in any matter covered by an arbitral award to which the Protocol applies. Now they must stay such proceedings.

⁷¹¹ S. Nfld. 1960, No. 12, s.2(1)(a).