

JURISDICTION AND MONEY JUDGMENTS RENDERED ABROAD. ANGLO-AMERICAN AND FRENCH PRACTICE COMPARED

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I. GENERAL PRINCIPLES

One of the fundamental principles of private international law is that to give foreign effect to a domestic money judgment, the court rendering such judgment must have had jurisdiction.¹ The practical difficulty lies in the determination of such jurisdiction, What rules must the court of the forum apply to decide whether the original court had jurisdiction to render the judgment?

The term "jurisdiction" has been used in many different ways: it has been employed with reference to the jurisdiction of the courts of one state in general or to one of the courts of a particular state, and also in discussing the subject matter and the locality. These two concepts are present in the terms "competent jurisdiction" and "proper court." A court of competent jurisdiction is a court which, in accordance with the principles maintained by Anglo-American jurisprudence, has the right to adjudicate upon a given matter. A proper court is a court which is authorized by the law of the country to which it belongs, or under whose authority it acts, to adjudicate upon a given matter.²

In France a similar distinction exists between "compétence générale" and "compétence spéciale."³ A foreign court has "compétence générale" if according to the principles maintained by French jurisprudence, it has the right to adjudicate upon a given matter; and "compétence spéciale" if it is competent according to its own law, to adjudicate upon a given matter.

The diversity among the systems arises in part from the fact that each country evaluates the jurisdiction of a foreign court according to its own standards. As was said in the case of *Sirdar Gurdyal Singh v. Rajah of Faridkote*,⁴ the law of a foreign country cannot bind the whole world, it is strictly territorial in its operation.

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¹*Reed v. Allen*, 38 N.Y.S. 2nd 970; *Schibsby v. Westenholz* (1870), L.R. 6 Q.B. 155; *Belly Enright Lumber Co. v. Gardner et al*, 14 Ind. 385, 7 N.E. 523.

²Dicey, *Conflict of Laws* (6th ed.) rule 64.

³Bartin, *De la compétence des tribunaux étrangers comme condition de l'exécution d'un jugement étranger*. Journal du droit international hereafter cited Clunet, (1904), 5, 902; (1905), 59, 815; (1906), 27, 995: *Etudes sur les effets internationaux des jugements*, Paris, (1907); *Principes de droit international privé*, I, s. 206, p. 550; Pillet, *Principes de droit international privé* (1903), II, 694.

⁴[1894] A.C. 670; *Buchanan v. Rucker* (1808), 9 East 192.

Many points of view are involved in any analysis of this problem of jurisdiction. The enforcing court may determine the question of jurisdiction according to its own law, (this is an application *stricto sensu* of the *lex fori* doctrine) or according to the law of the country where the judgment was rendered, or consider both.⁵

The common law followed in the Anglo-American countries requires, to establish jurisdiction in personam, that there be a direct relationship between the municipal law of the foreign court, whose money judgment is put in question, and the person against whom it was rendered. In other words, there must be a close connection between the court and the parties, and it must exist at the time the action is commenced.⁶ Sometimes, however, the issue is complicated by particular statutes concerning jurisdiction, which have enlarged the authority of the court. At common law, the courts have often assumed that the rules of jurisdiction concerning internal and external purposes 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 an English or American court is enlarged by some statutory enactment, there has been a reluctance to apply such a rule on a reciprocal basis and extend by analogy the jurisdiction of the foreign court.⁷ However in *Travers v. Holley* the English courts have abandoned this view and held that a foreign judgment granted on a jurisdictional basis similar to that on which the forum will act will be enforced in England.⁸

In the United States a statute enlarging the jurisdiction of a court will be invalid if it fails to conform to constitutional limitations on the scope of its jurisdiction. If, however, the statute has been held valid under the due process clause, a judgment rendered by a sister state in accordance with such statute will be given full faith and credit in another state of the Union. Although the tendency has been constantly to narrow the differences between the effectiveness of judgments of sister states and judgments of foreign countries, it is doubtful that in such instance effect would be given to a foreign judgment handed down under similar foreign statutes, and it is better to consider that the former point of view still represents the state of the law where foreign judgments are concerned.

In France the principle that the jurisdiction is properly territorial has been carried to an extreme through the attribution of exclusive jurisdiction, in certain instances, to the French courts. *Bartin* has been the leader of this

⁵For a general survey of the different systems followed in the world see Lorenzen, *Enforcement of American Judgments Abroad* (1919-20), 29 Yale L.J., 269.

⁶*Sirdar Gurdial Singh v. Rajah of Faridkote*, [1894] A.C. 670; *Hess v. Pawloski* (1927), 274 U.S. 352; *Restatement, Conflict of Laws*, s. 84; *Doherty & Co. v. Goodman* (1935), 294 U.S. 623.

⁷*Schibsby v. Westenholz* (1870), L.R. 6 Q.B. 155, *Emanuel v. Symon*, [1908] 1 K.B. 302; *Murray v. Strong*, 2 Alaska 517; *McEwan v. Zimmer*, 38 Mich. 765.

⁸[1953] 2 All. E.R. 794 (C.A.)

method of analyzing the concept of jurisdiction and has introduced a further distinction between "compétence générale" and "compétence spéciale." He added to these two terms the words direct and indirect. His idea finds a parallel in the distinction between the internal and the external rules of jurisdiction. Bartin noted that the Civil Code states clearly when the French tribunals are directly competent and that these rules are exclusive of any foreign court; this he terms "compétence générale directe".⁹ On the other hand, where the Code does not give direct compétence to the French tribunals, indirectly a foreign court will be competent and this is the "compétence générale indirecte". This would be a logical system respecting French sovereignty when a French tribunal is directly competent according to the *lex fori*.

Instead of ascertaining the competence of the foreign court (when the French courts are not competent) in the light of the conflict rules of the country whose courts rendered the decision, the French courts supported by legal doctrine have undertaken to determine this question by applying the domestic French rules of civil procedure and characterization. For instance, a United States citizen requests the enforcement in France of a judgment obtained in Canada against a British defendant. No problem of "compétence générale directe" of the French court is involved, rather a problem of "compétence générale indirecte". In other words, was the Canadian court competent? How can that be decided? Will the Canadian conflict rules be considered? The French courts will apply to the Canadian court the French domestic law of internal jurisdiction and, if by application of these rules the Canadian court is considered competent, then the requirement of jurisdiction will be fulfilled. This brings into the picture the distinction between conflict of laws and conflict of jurisdictions, with the result that when different foreign courts may be competent, the French rule of conflict of jurisdictions, i.e., domestic procedural rules, will control and determine the issue.

This interpretation of private international law has its origin in articles 14 and 15 of the Civil Code giving French courts jurisdiction where a French citizen is involved. These articles are true conflict rules and cannot be internationalized like the Anglo-American rules; they can only be compared with the German conception of "exclusivsätze" or "statut d'autonomie".¹⁰ Here lies the essential distinction between conflict of laws and conflict of jurisdictions. As the competence of the foreign tribunal is determined by the domestic rules of jurisdiction, the legislative competence and the jurisdictional competence have the same structure and have resulted in splitting private international

⁹See note 3. In the U.S.A. see sec. 45 of the N.Y. Surrogate's Court Act which reserves exclusive competence for the local court where the decedent was a resident of the county. A foreign decree violative of this exclusive competence will not be recognized. *Matter of Lamborn*, 168 Misc. 504, 6 NYS 2d 192 (1938) affd. 280 N.Y. 504, 19 N.E. 2d 917 (1939). The common law concept of "local" as distinguished from "transitory" actions is very similar to Bartin's competence "générale directe et indirecte".

¹⁰Riezler, *Internationales Zivilprozessrecht*, (1949).

law into conflict of laws and conflict of jurisdictions. This division is adopted by Professor Niboyet in his treatise and recognized by Professor Batiffol and Professor Lerebours Pigeonnière.¹¹

Assuming that the administration of justice is a public service, it seems that the French legislator should not make laws for matters which do not come within the scope of his powers. Consequently, he should not attempt to determine directly the competence of the foreign court. For instance in the field of criminal law, the French legislator does not make laws punishing acts which are not recognized as unlawful in France. However, in the field of private international law and more specially in the case of the recognition and enforcement of foreign money judgments, it becomes necessary to have guiding principles or rules, in order to determine the competence of the foreign court. These rules are unilateral conflict rules, because each country determines for itself the effect to be given in its territory to foreign money judgments, but fails to provide for the effect to be given to its judgments abroad. The unilateral rule is the technique of the Civil Code and advocated by Westlake in his treatise. It seems to me that this approach does not differ from that followed in the case of true conflict of laws rules. Furthermore, it is difficult to imagine how the French legislator could object to the effect given to French judgments in foreign countries, or to the effect given to foreign judgments in the place where they are rendered.

Professor Batiffol in his treatise points out that rules of conflict of jurisdictions are material and in opposition to true conflict of law rules. They do not designate which laws will apply in determining the competence of the foreign court; on the contrary, they directly ascertain the competence of the foreign court which rendered the judgment. There is, thus, a strong similarity in the techniques followed by both the Anglo-American and the French courts.

Two further reasons support, in France, the distinction made between conflict of laws rules and conflict of jurisdictions rules: First, the hybrid character of French rules of jurisdiction. This is evidenced by a combination of an international criterion found in the citizenship of one of the parties, a criterion which is incapable of creating bilateral conflict rules, and a municipal criterion, the domestic rules of jurisdiction. Secondly, the fact that rules of conflict of jurisdictions may be superseded by the will of the parties which can always renounce the privileges of nationality. This treatment of the rules of conflict of jurisdictions in the French system leads to the conclusion that, contrary to conflict of laws rules which are imperative and of public policy, conflict of jurisdictions rules are essentially supplementary.¹² However, once

¹¹Niboyet, *Traité de droit international privé français*, (1938-50), vol. VI; Lerebours Pigeonnière, *Précis de droit international privé* (5th ed., 1952); Batiffol, *Traité élémentaire de droit international privé* (1949), s. 681.

¹²"Supplétoires"; see Francescakis, *Travaux du comité français de droit international privé* (1946), p. 144.

it is admitted that there is a basic similarity of structure between the rules of conflict of laws and the rules of conflict of jurisdictions, it is easy to understand that rules for the determination of competent jurisdiction are also conflict rules.

As a consequence of the parallelism between "compétence directe" and "indirecte", and considering that a country cannot apply any other conflict rules than its own, it is logical to hold that a foreign money judgment will be recognized in France only if the foreign court was competent according to the French rules of conflict, even where a French tribunal was not competent.

This doctrine has been rejected by Professors Niboyet and Batiffol as being too narrow and extreme.¹³ They take the position that only the "compétence générale directe" should be respected, because there the power in the French court to consider the case stems directly from French legislation. In the case where there is no grant of jurisdiction to a French court, the jurisdiction of a foreign court should be determined according to the principles of private international law in force in the country where the decision was rendered.

It should be noted that the distinction between conflict of laws and conflict of jurisdictions renders them independent of each other, and therefore the fact that the law of X country is applicable does not mean that the tribunal of X country is competent, and *vice-versa*. It will always be necessary for the French Court to determine whether the foreign court, considered to be competent, applied the proper law.

The Anglo-American system is more realistic, as it is based primarily on the physical power theory rather than on sovereignty.¹⁴ The international jurisdiction is the only one recognized by Anglo-American courts and it is irrelevant whether or not the foreign court is entitled, under its municipal law of procedure or conflict of laws rules, to adjudicate upon the issue. Professor Schmitthoff¹⁵ points out that as the recognition of a foreign judgment in England depends upon the international and not the local competence of the foreign court, the task of the English court is greatly simplified when it has to decide whether the judgment should be recognized or not. The English court will decide the question of jurisdiction exclusively on the basis of settled rules of English private international law. It results that a foreign judgment

¹³Niboyet, *op. cit.*, VI, s. 1956; Batiffol, *op. cit.*, s. 755.

¹⁴Re *Indiana Transport Co.*, 244 U.S. 456 per Holmes 457 (1917).

¹⁵*English Conflict of Laws*, 2d. ed., p. 421. In the U.S.A. California courts for instance, test the jurisdiction of the foreign court only from the viewpoint of American law, *DuQuesnay v. Henderson*, 24 Cal. App. (2d) 11, 74 P. 2d 294 (1938); *Kegley v. Kegley*, 16 Cal. App. 2d 216, 60 P. 2d 482; *People v. Harlow*, 9 Cal. App. 2d 643, 50 P. 2d 1052 (1935); *Ryder v. Ryder*, 2 Cal. App. 2d 426, 37 P. 2d 1069 (1937). This in spite of C.C.P. 1915 which provides that the court of the foreign country must have jurisdiction according to the laws of such country.

may have a wider effect internationally than locally.¹⁶ If the theory of physical power does not explain the whole subject matter of jurisdiction, yet it is clear, and produces results which are consistent with public policy and the protection of the parties.

The direct determination of the jurisdiction of foreign courts by application of domestic rules of private international law is similar to the French approach in technique and in opposition to Niboyet's views. Both systems apply their own rules in order to determine the jurisdiction of the foreign court. The English court will say that if the defendant was a resident of X country, the court of X country was competent, while a French court will reach the same result (assuming that it is not directly competent) by application of its domestic rules of procedure.

The essence of the distinction between the Anglo-American and the French doctrine of jurisdiction lies in the fact that, in the French system due to a lack of true rules of conflicts, there has been a projection of the domestic law in the field of private international law, thereby creating a difficult question of interpretation and characterization; whereas, in the Anglo-American system the enforcing courts do not try to impose upon foreign courts their own internal rules, but directly determine in which cases the foreign court is competent without any reference to the internal rules. The Anglo-American courts do not necessarily test the jurisdiction of the foreign courts by standards set up for themselves in similar circumstances, for sometimes they will not enforce a foreign judgment based on the same rule of jurisdiction.¹⁷

To conclude, it must be emphasized that where recognition or enforcement of a foreign money judgment is sought, it is not the jurisdiction of the foreign courts which has to be determined by the forum. The forum can never confer jurisdiction upon or take it away from a foreign court. The 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.

II. THE COMPETENCE OF FOREIGN COURTS TO RENDER A MONEY JUDGMENT IN ACTIONS IN PERSONAM

THE ANGLO-AMERICAN LAW.

Every enforcing court may be asked to determine whether or not the original court had the right to summon the defendant and thus bind him by its judgment. It must be clear that the jurisdiction of the foreign court extends over the parties,¹⁸ although in the case of a decree or judgment rendered by a court

¹⁶*Pemberton v. Hughes*, [1899] C.A. 1 Ch. 781; Nussbaum, *Jurisdiction and Foreign Judgments* (1941), 41 Col. L. Rev. 221.

¹⁷Lindley M.R. in *Pemberton v. Hughes*, [1899] C.A. 1 Ch. 781.

¹⁸*DuQuesnay v. Henderson*, 74 P. 2d, 294, 24 Cal. App. 2d 11 (1938); *Romanchick v. Howard Saving Inst.*, 194 A. 185, 118 N.J. Law 606; *Martens v. Martens*, 31 N.E. 2d

of general jurisdiction, no inquiry will be made as to the correctness of the venue.¹⁹

The international jurisdiction of foreign courts in actions in personam is based, in the Anglo-American system, on the principles of presence and submission. A foreign money judgment which is void for want of jurisdiction will not be given effect at all.²⁰

English and American courts do not generally inquire into the local jurisdiction of the court under municipal law, although in certain cases they have examined the pertinent statutes setting up the foreign court to determine whether it had jurisdiction over the general subject matter, but have not pursued the investigation further.²¹ The general attitude is that when the foreign court took jurisdiction over the subject matter and the parties, the court knew its own jurisdiction and properly assumed it.²² As English courts do not sit as courts of appeal in respect to foreign judgments, the local competence of the foreign court to deal with the subject matter before it, is determined by the rules prevailing in the foreign country.²³ Thus 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.

Most legal writers have been accustomed to cite the dicta of Lord Justice Buckley in *Emanuel v. Symon*²⁴ as representing the Anglo-American²⁵ rules concerning jurisdiction in actions in personam. These dicta are a revision of the earlier doctrine expressed by Justice Fry in *Roussillon v. Roussillon*,²⁶ and will be followed in this article.

489, 284 N.Y. 363 reversing 20 N.Y.S. 2d 206, 260 App. Div. 300, rearg. den. 33 N.E. 2d 542, 285 N.Y. 607; *People v. Harlow*, 50 P. 2d 1052, 9 Cal. App. 2d 643; In *Thorn v. Salmonson*, 137 Kan. 441, it was held that a judgment rendered in a foreign court without jurisdiction could be attacked in either a direct or collateral proceedings; *Bissel v. Briggs*, 9 Mass. 562 (1813); *Baio v. Mangano*, 9 N.Y.S. 2d 276, 256 App. Div. 831, reversing 6 N.Y.S. 2d 763, 169 Misc. 1555 rearg. den. 10 N.Y.S. 2d 276, 256 App. Div. 930 (1939).

¹⁹*Duquesnay v. Henderson*, 74 P. 2d 294 Cal. App. 2d 11; *Reed v. Allen*, 38 N.Y.S. 2d 970; *Caruso v. Caruso*, 148 A. 882, 106 N.J. Eq. 130 (1930).

²⁰*In re Vanderborcht*, 91 N.E. 2d 47 (1954); *Banco Minero v. Ross*, 172 S.W. 711, 106 Tex. 522; *Rankin v. Goddard*, 54 Me. 28; *McEwan v. Zimmer*, 38 Mich. 765; *Smith v. Grady*, 68 Wisc. 215; *Cie Port Rio Jauciro v. Mead Morrison Mfg.*, 19 F. 2d 163 (1927); *Boivin v. Talcott*, 102 F. Supp. 979 (1951).

²¹See *Vanquelin v. Bouard* (1863), 15 C.B.N.S. 341; *Pemberton v. Hughes*, [1899] C.A. 1 Ch. 781; *Bater v. Bater*, [1906] P. 209.

²²*Pemberton v. Hughes*, [1899] C.A. 1 Ch. 781 per Lindley M.R.; *Farrell v. Farrell*, (1911), 127 N.Y.S. 764, 142 App. Div. 605, rev. 98 N.E. 857, 205 N.Y. 450; *Caruso v. Caruso*, 106 N.J. Eq. 130, 148 A. 882 (1930).

²³*Pemberton v. Hughes*, [1899] C.A. 1 Ch. 781.

²⁴[1908] 1 K.B. 302.

²⁵See *Restatement, Conflict of Laws* s. 77, Title B, (Jurisdiction over individuals).

²⁶(1880), 42 L.T. Rep. 679, 14 Ch. Div. 351.

According to Lord Buckley a foreign court is deemed of competent jurisdiction with regard to any action in personam in the following situations:

- (1) Where the defendant at the time of the judgment was a citizen or subject of the foreign country rendering the judgment.
- (2) Where the defendant at the time of the commencement of the action was a resident of, or domiciled in the foreign country rendering the judgment.
- (3) Where the litigant voluntarily has submitted himself to the jurisdiction of the courts of the foreign country rendering the judgment.
 - (a) Where the defendant in the character of a plaintiff or counter-claimant selected the forum wherein he is afterwards sued,
 - (b) Where the defendant voluntarily has appeared,
 - (c) Where the defendant voluntarily has contracted or consented to submit himself to the forum wherein the judgment was obtained.²⁷

In passing, it should be noted that ownership, by the defendant, of real estate within the jurisdiction wherein the cause of action arose is no longer considered by the courts as a basis of personal jurisdiction over him.²⁸

(1) *Allegiance*

Where the defendant was at the time of the judgment a citizen or subject of the foreign country rendering the judgment.

International jurisdiction based on allegiance has been recognized by Anglo-American authorities, but the matter is not yet settled definitely in either England or the United States.²⁹ As was pointed out by Dicey³⁰ and Read³¹ 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 there and never submitted to the jurisdiction. *Douglas v. Forrest*³² is cited as the foundation of the doctrine of jurisdiction based upon citizenship. Later, in *Schibsby v. Westenholz*³³ 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 ter-

²⁷See Dicey, *op. cit.* rule 68; Read, *Recognition and Enforcement of Foreign Judgments in the Common Law Units of the British Commonwealth*, (1938), Ch. V.

²⁸See *Emanuel v. Symon*, [1908] 1 K.B. 302 which represents the correct view in the English courts; *Sirdar Gurdyal Singh v. Rajah of Faridkote*, [1894] A.C. 670; Dicey, *op. cit.*, rule 69; Story, *Commentaries on the Conflict of Laws* (8th ed., 1883), s. 549; Black, *A Treatise on the Law of Judgments* (2d ed., 1902) 837; Piggott, *Foreign Judgments*, (2d ed.) pp. 136 and 145; Read, *op. cit.*, p. 186.

²⁹*Douglas v. Forrest* (1828), 4 Bing. 686; *Hall v. Williams*, 23 Mass. 232; Dicey *op. cit.*, rule 68; Westlake, *A Treatise on Private International Law*, (5th ed.) 401; Piggott, *Foreign Judgment and Jurisdiction* (3rd ed., 1903) pt I, 243; Freeman, *On Judgments* 5th ed. 1925) ss. 1376, 1377 and ss. 1483-1487.

³⁰Dicey uses the word "semble" relating to jurisdiction based on allegiance, *op. cit.*, rule 68.

³¹*Op. cit.*, ch. V, p. 151.

³²(1828), 4 Bing 686.

³³(1870), L.R. 6 Q.B. 155; *Gibson & Co. Ltd. v. Gibson*, [1913] 3 KB 379.

ritory, it does not follow them when they have withdrawn from the territory. 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.³⁴ *Prima facie*, 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, whereas in the French system service upon the defendant is merely a means of informing him that an action is pending. Service is considered in France as a purely procedural matter, and is deemed sufficient if it satisfies the law of the state in which the original action was brought. The question exists, however, whether an English or an American court will 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.

English courts and a few authors appear to favour the view that allegiance is a sufficient ground of jurisdiction, because a subject is bound by the commands of his sovereign, and in consequence thereof by the judgments of his sovereign's courts.³⁵ But, it does not seem that American courts would be disposed to consider as valid, a money judgment rendered in a foreign country, where the jurisdiction of the court was based on allegiance only and service of process was at the time impossible.³⁶ The Restatement³⁷ specifically states that a nation can exercise through its courts jurisdiction over its nationals although neither present nor domiciled within the country, provided that the defendant has a reasonable opportunity to be heard.

In fact American courts often have refused to recognize jurisdiction based on citizenship only. In *Smith v. Grady*,³⁸ a Wisconsin court refused to recognize a judgment recovered in a Canadian court against a Canadian citizen where process was served in accordance with the Canadian rules. In *Grubel v. Nassauer*, a New York court refused to recognize a judgment of a Bavarian

³⁴[1894] A.C. 670; See also *Roussillon v. Roussillon*, (1880), 14 Ch. D 351 per Justice Fry; *Harris v. Taylor*, [1915] 2 K.B. 580; *Emanuel v. Symon*, [1908] 1 K.B. 302; *General Steam Navigation v. Guillon* (1843), 11 M & W 877; *Forsyth v. Forsyth*, [1948] P. 125.

³⁵Dicey, *op. cit.*, pp. 405-406.

³⁶See note 33; "The doctrine of allegiance as basis for jurisdiction is inapplicable to British territory, for allegiance is owed by every subject to the British Crown." The fact that a man was born in the Colony does not make him a subject of the colony so as to make him bound by a judgment given in his absence. Dicey, *op. cit.*, p. 356, *Turnbull v. Walker* (1892), 67 L.T. 767.

³⁷Restatement *Conflict of Laws*, s. 80.

³⁸68 Wis. 215; *Ward v. Boyce* (1897), 152 N.Y. 191; *Shepard v. Wright*, 59 How. Pr. 512 (where a personal judgment rendered in Canada against a resident of New York would not be enforced against him in N.Y. though he was a citizen of Canada unless he had been served with process in Canada or voluntarily appeared.)

³⁹210 N.Y. 149, 103 N.E. 1113; Cf. *Kerr v. Tagliava*, 168 N.Y.S. 697.

court, the jurisdiction of which was based upon citizenship. (The defendant was domiciled in New York but had not lost his Bavarian citizenship.) However, this decision cannot be considered as clearly rejecting citizenship as a basis for jurisdiction as the court refused to recognize the Bavarian decree on the basis of *Pennoyer v. Neff*,⁴⁰ where it was held that process from the tribunal of one state cannot run in another state and summon the parties there domiciled to leave its territory and respond to the proceedings against them. The refusal to recognize the foreign judgment seems to have been made without regard for the citizenship of the defendant. It was based solely upon the absence of personal service, because, as the court pointed out, a judgment for money recovered in one sister-state without personal service of process on the defendant cannot be enforced within another sister-state, and it would be unreasonable to accord greater respect to a foreign judgment than to the judgment of a sister-state. Whether or not full approval can be given to the reasoning of the court, there can be little doubt that the decision is consistent with the common law doctrine conferring jurisdiction over the non-resident defendant only when personally served.

If citizenship is 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. Jurisdiction based upon citizenship alone would offend the Anglo-American views of natural justice.⁴¹ Allegiance⁴² does not appear to be a practical basis for jurisdiction in the British Commonwealth or in the United States, and in other federal states, where so many different systems of law are applied. It is a concept which does not conform with modern life. There are

⁴⁰95 U.S. 714 (there can be no jurisdiction based on allegiance in the national sense by the states of the Union). Some states of the U.S.A. recognize the right of a state to render a personal judgment upon constructive or substituted service of process: see *Freeman, op. cit.*, ss. 1376-1377. In general, public proclamations, posting up notices cannot confer jurisdiction over a foreigner who is not a resident and did not appear whether he has had notice or not. *Story, op. cit.*, p. 546.

⁴¹It seems to me that in *Grubel v. Nassauer*, the court could have refused to recognize the foreign judgment on the ground that it offended substantial justice, because the mode of service did not give the defendant an opportunity to be heard; note that he had repudiated his German citizenship by becoming a U.S. citizen. Corporations also owe allegiance to the foreign country where incorporated. However a shareholder is not automatically, by virtue of such membership, subject to the jurisdiction of that state; *Copin v. Adamson*, [1875] 1 Ex. D. (CA) 17; *Emanuel v. Symon*, [1908] 1 K.B. 302; Service of process outside the jurisdiction of the court over the non-resident stockholder defendant in a corporation of the foreign country rendering the judgment does not confer jurisdiction over him: see *Pope v. Heckscher*, 194 N.E. 53, 226 N.Y. 114, 97 A.L.R. 687; contra: *Clarkson v. Moir*, 201 P 476, 53 Cal. App. 775 (1921).

⁴²See also *Dacey, op. cit.*, p. 357; *Cheshire, Private International Law*, (3d ed.) 789; *Read, op. cit.*, 153.

now in the world so many refugees or displaced persons that it would be a great injustice if the forum were to enforce judgments rendered against these people based solely on citizenship, which in certain countries remains in spite of the acquisition of a new nationality. In view of the poor support given to this principle by the Anglo-American courts, it is submitted that allegiance should not be recognized as sufficient to give jurisdiction to a foreign court to render a foreign money judgment.⁴³

(2) *Presence, Residence, Domicile*

Where the defendant was at the time of the commencement of the action resident or domiciled within the country rendering the judgment.

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. Anglo American courts held that in such a case the foreign court has jurisdiction over him.⁴⁴ It is unnecessary to show that the defendant was ordinarily or even temporarily resident in the foreign country. It is sufficient if it appears that at the commencement of the proceedings, he was physically present therein, whether on a visit or merely in the course of his travels through the country, and it is immaterial to show that very soon afterwards he left the territorial area of the foreign jurisdiction.⁴⁵ Failing such proof, the foreign tribunal has no jurisdiction over any person not a subject of the foreign state.⁴⁶ This 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

⁴³Foreign judgments (Reciprocal Enforcement) Act 1933; contra: Smith, *Personal Jurisdiction* (1953), 2 Int. & Comp. Law Quart., pp. 510 and 531.

⁴⁴It is no defense to an action on a foreign judgment that the defendant was served with process in the action while transiently sojourning in that country and that such service was so made and timed as to embarrass him and to obtain an unjust advantage by preventing him from having a fair opportunity to make his defence except at the cost of prolonging indefinitely his stay abroad, *Fisher Brown Co. v. Fielding*, 67 Conn. 91.

⁴⁵*Carrick v. Hancock* (1895), 12 T.L.R. 59 per Lord Russell C.J. at p. 60 "The jurisdiction of a court was based upon the principle of territorial dominion and that all persons within any territorial dominion owe their allegiance to its sovereign power, and obedience to all its laws and to the lawful jurisdiction of its courts. In his opinion that duty of allegiance was correlative to the protection given by a state to any person within its territory." Schmitthoff, *The English Conflict of Laws*, (3d ed., 1954), p. 422.

⁴⁶*Buchanan v. Rucker* (1808), 9 East 192, per Lord Ellenborough at p. 194; *Cowan v. Stewart* (1816), 1 Stark 525; *Schibsby v. Westenholz* (1870), L.R. 6 Q.B. 155 per Blackburn, J, pp. 160, 163; *Emanuel v. Symon*, [1908] 1 K.B. 302 where the defendant was not resident in the colony at the material date; *Phillips v. Batho*, [1913] 3 K.B. 25 per Scrutton, J. pp. 29-30; *Faridkote* case, [1894] A.C. 670 at p. 683.

and nationality.⁴⁷ It is an allegiance owed to the sovereign by all persons temporarily present in its territory.⁴⁸

If a non-resident is brought into the 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.⁴⁹ Of course the defendant must be personally served within the state or country, but if the statute authorizes a different mode of service it will be recognized if the method is one reasonably calculated to give him knowledge of the action and if he has had an opportunity to be heard.

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 thought insufficient to justify the adoption of rules depriving the defendant of the power to defend on the merits at his own place of residence.⁵⁰ 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 also gives the courts jurisdiction over him,⁵¹ although it is sometimes difficult to distinguish residence from mere presence. For instance, Dicey maintains that residence in the strict meaning of the term is not necessary — mere presence is enough. 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, it seems possible to distinguish the concept of mere physical presence in the country from that of 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.⁵²

⁴⁷Schmitthoff, *op. cit.*, p. 423.

⁴⁸*Forbes v. Simons* (1914), 7 W.W.R., pp. 97, 98.

⁴⁹*Restatement, Conflict of Laws*, s 78 d. and e.

⁵⁰*Proceedings of the 16th Annual Meeting of the Conference of Commissioners on Uniformity of Legislation in Canada* (1933), 83; *Jurisdiction in Personal Actions* (1929), 23 Ill. L. Rev. 427. Cheshire, *op. cit.*, p. 781.

⁵¹*Emanuel v. Symon*, [1908] 1 KB 302, 309; *Schibsby v. Westenholtz* (1870), L.R. 6 Q.B. 155; *General Steam Nav. Co. v. Guillou* (1843), 11 M & W 877, at p. 894.

⁵²Read, *op. cit.*, p. 156; Dicey, *op. cit.*, p. 410; Foote, *A Concise Treatise on Private International Law*, (5th ed. 1925) 367, but see *Buchanan v. Ruckner*, 9 East 192 and *Becquet v. McCarthy*, (1831) 2 B & Ad. 951 (Substituted service) and *Moore v. Phillips*, 10 Pa. Co Ct. R. 552.

In the case of a corporation, residence means the carrying on of some business at a definite place.⁵³ It is enough to show that the defendant maintained a public office in the foreign state, though not physically present, on the theory that such an action constitutes a kind of constructive residence.⁵⁴

In my opinion, residence is certainly the most realistic test of jurisdiction. It meets the criticisms raised against mere physical presence and is easier to ascertain than domicile. However, if residence means mere physical presence, the concept should be revised in order to determine its implications.

⁵³*Littauer Glove Co. v. F. W. Millington*, 44 T.L.R. 746; The Act of 1933 provides that the foreign court shall be deemed to have jurisdiction if the defendant had an office or place of business in the foreign country and the proceedings were in respect of a transaction effected through or at that office or place, Section 4 (2) (a) (v); Dicey, *op. cit.*, p. 355 Jurisdiction of foreign courts in personam concerning corporations: Cahill, *Jurisdiction over Foreign Corporations* (1917), 30 Harv. L. Rev. 676; Fead, *Jurisdiction over Foreign Corporations* (1926), 24 Mich. L. Rev. 633; Scott, *Jurisdiction over Non-Residents Doing Business Within a State* (1919), 32 Harv. L. Rev. 871, 60 Am. L. Rev. 415. *Restatement, Conflicts of Laws* s. 89; Sugden, *The Enforcement of Foreign Judgments against Corporations* (1928), 72 Sol. J. 603. Substantial period of time: *Haggiu v. Comptoir d'Escompte de Paris*, (1889), 23 Q.B.D. 519; at a fixed place of business: *Saccharin Corporation Limited v. Chemische Fabrick von Heyden Atkiengesellschaft*, [1911] 2 K.B. 516; as to agent carrying business see *Allison v. Independent Press Cable Association of Australia Limited* (1911), 28 T.L.R. 128. To carry on business within a state a foreign corporation must perform a series of similar acts for profit (*Restatement*, s. 167). This is as variance with the rule stated in s. 84 which provides that an individual subjects himself to the jurisdiction of a court of the state in which he does a single act — also *Restatement*, s. 92. In all these cases it is a question of fact: *City Finance Co. Ltd. v. Matthew Harvey & Co. Ltd.* (1915), 21 Com. L.R. 55 per J. Isaacs. Generally the fact that a corporation carries on business through its agent in the foreign law district gives jurisdiction in personam (see *Restatement*, s. 91). As to the working out of a satisfactory rule concerning jurisdiction over corporations see: Read, *op. cit.* pp. 177-186; and Scott, *Jurisdiction over non-resident motorists* (1926) 39 Harv. L.R. 563, 60 Am. L. Rev. 403. Beale, *Foreign corporations*; Ferrier, *Jurisdiction over foreign corporations* (1933), 17 Minn. Law Rev. 380. For latest developments see Sobeloff, *Jurisdiction of State Courts over non-residents in our Federal System* (1958) 43 Cornell L.Q. 196 and *Second Restatement of the Law of Conflict of Laws* see 84 (i) (Tent. Draft No. 3, 1956); Piggott, *Foreign Judgments*, (2d ed.), p. 152. As to the effect of the ceasing of doing business, see *Restatement*, s. 93; As to partnerships and other unincorporated associations, see *Restatement*, s. 86; *Australasian Temperance & General Mutual Life Assurance Society v. Howe* (1922), 31 Com. L.R. 290, 334. Service on agent, see Smith, *Personal Jurisdiction* (1953), 2 Int. & Comp. Law. Q. 510, 532.

⁵⁴*Don v. Lippman* (1837), 5 Cl. & Fin. 1 per Lord Brougham; The doing of certain acts within the territory of a court may be the basis of personal jurisdiction: *Hess v. Pawloski*, 274 U.S. 352 (1927); *Hood v. Guaranty Trust Co.*, 270 N.Y. 17. (1936); *Doherty & Co. v. Goodman*, 294 U.S. 623; *Wuchter v. Pizzutti*, 276 U.S. 13 (1928). But the making of isolated contracts does not create constructive residence and therefore does not justify assumption of personal jurisdiction: *Ross v. Ostrander*, 79 N.Y.S. 2d 206; *Flexner v. Farson*, 248 U.S. 289 (1919).

Domicile

English and American courts assert jurisdiction in personam over a defendant domiciled within the country.⁵⁵ Dicey believed that domicile was not a sufficient ground for the jurisdiction of a foreign court,⁵⁶ because only *dicta* supported this theory.⁵⁷ Dean Read, however, disagrees with Dicey on the ground that *Douglas v. Forrest* upheld domicile rather than nationality as a basis for jurisdiction.⁵⁸

In the United States, the predominant view is that domicile within a state or country is a sufficient basis for jurisdiction over an individual.⁵⁹ The Restatement states that "a state can exercise through its courts jurisdiction over an individual domiciled within the state although he is not present within the state".⁶⁰ This domiciliary doctrine of jurisdiction seems satisfactory since everyone must have a domicile. There will always be one country where a debtor may be sued.

Although domicile, as a ground for jurisdiction is superior to allegiance, it is not fully adequate due to the great difficulty of ascertaining its existence. Dean Read⁶¹ 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 residence the sole test of compelled submission to the jurisdiction of the foreign court?

To sum up, a foreign money judgment will be enforceable in the Anglo-American courts only if it was pronounced against a resident or person domiciled in the foreign state at the time the writ of summons was served there. Recently a somewhat broader interpretation has been given to this rule, where a statute permits the courts to summon residents or domiciliaries beyond its territorial jurisdiction by extraterritorial service.⁶² This type of service has been held valid, where it gave the defendant a reasonable opportunity to be

⁵⁵Order XI r 1 (c); Dicey, *op. cit.*, rule 68; *Restatement*, s. 79.

⁵⁶3d ed. p. 401.

⁵⁷*Jaffer v. Williams* (1908), 25 T.L.R. 12; *Gibson & Co. v. Gibson*, [1913] 3 K.B. 379; *Emanuel v. Symon*, [1908] 1 K.B. (C.A.) 302; *Turnbull v. Walker* (1892), 67 L.T. 767.

⁵⁸4 Bing. 686 (1828), Beale, *The Jurisdiction of Courts over Foreigners* (1913), 26 Harv. Law Rev. 283, 296.

⁵⁹*Henderson v. Staniford*, (1870) 105 Mass. 504; *Hunt v. Hunt*, 72 N.Y. 217.

⁶⁰*Restatement, Conflict of Laws*, s. 79.

⁶¹*Op. cit.*, 160; *The Foreign Judgments (Reciprocal Enforcement) Act*, (1933), does not mention domicile as basis for jurisdiction.

⁶²In England, Order XI r 1 provides that leave for service will be given whenever any relief is sought against any person domiciled or ordinary resident within the jurisdiction. This includes residents of England, aliens as well as British, and all subjects who are not domiciled or ordinary residents in any other part of the world. Some states of the U.S.A. have statutes permitting service out of the jurisdiction. N.Y. C.P. s 438

heard.⁶³ On the other hand extraterritorial service of process on a non-resident or one without domicile within the jurisdiction of the foreign court is not recognized by Anglo-American courts.⁶⁴ This applies to public proclamations and the posting up of notices.⁶⁵

As was said by Mr. Justice Blackburn in *Schibsby v. Westenholz*,⁶⁶ a foreign country having exclusive jurisdiction within the limits of its own territory, is restricted only by considerations of suitability in setting up its regulations concerning the presence or absence of any circumstances or preliminary requirements in the definition of the terms on which its courts may assume jurisdiction. The general principle that no country can pass laws to bind another country renders inoperative any laws providing for constructive service of process emanating from the tribunal of one state upon persons domiciled in the territory of another state, unless such persons are bound to the enacting country by domicile or by residence.

Service by publication has been held good upon a showing that the defendant had elected domicile,⁶⁷ or that he had a business agent⁶⁸ in the country where the judgment was rendered. If, however, the judgment was obtained through fraudulent representation as to residence, or domicile, it may be attacked by any person whose material interests are affected.⁶⁹

It is submitted that a foreign judgment should be binding upon the defendant if at the time of the suit, 1) he was freely present within the law district of the court or he resided within the law district; and in the case of a corporation, it was at that time engaged in substantial business in that law district, 2) and the defendant was personally served with process.

- (3) *Where the litigant voluntarily has submitted himself to the jurisdiction of the courts.*
- a) *Where the defendant in the character of a plaintiff counterclaimant has selected the forum in which he is afterwards sued.*

⁶³A default judgment entered in Great Britain against defendants who were personally served in New York pursuant to rules of English courts was held good because the defendants were domiciled and resident in England: *Rhodesian General Finance Trading Trust v. MacQuisten*, 11 N.Y. 2d 476, 170 Misc. 996 (1939).

⁶⁴*McEvan v. Zimmer*, 38 Mich. 765; *Murray v. Strong*, 2 Alaska 517; *Wilson v. Gibson*, 259 SW 491, 214 Mo. App. (1924).

⁶⁵*Ross v. Ostrander*, 79 N.Y.S. 2d 706; 192 Misc. 149 (1948); Story, *op. cit.*, s. 546; *Buchanan v. Rucker* (1808), 9 East 192; *Pope v. Heckecher*, 194 N.E. 53, 226 N.Y. 114, 97 A.L.R. 687; *Schneider v. Woodworth*, 1 Mass. 41.

⁶⁶(1870), L.R. 6 Q.B. 155, 160.

⁶⁷*Vallee v. Dumergue* (1849), 4 Exch. 290; *Traders Trust Co. v. Davidson*, 146 Minn. 224; *Copin v. Adamson* (1875), 1 Ex. D. 17; *Bank of Australasia v. Nias* (1851), 16 Q.B. 717; *Bank of Australasia v. Harding*, (1850), 9 C.B. 661; *Feyerick v. Hubbard* (1902), 71 L.J. K.B. 509.

⁶⁸*Hilton v. Guyot*, 159 U.S. 113 (1895).

⁶⁹*Christopher v. Christopher*, 31 S.E. 2d 818.

If in the capacity of plaintiff, a person selected the tribunal of a foreign country as the one where he would bring suit, he cannot afterwards complain that such forum had no jurisdiction to pronounce the judgment against him.⁷⁰ He is deemed to have submitted to its jurisdiction⁷¹ and decision or 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,⁷² was resident in the country where as plaintiff he originally brought 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.⁷³

b) *Voluntary appearance*

It is also well established that a person who voluntarily appears as a defendant submits himself to the judgment of the foreign court.⁷⁴ 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;⁷⁵ or 3) he may appear for the sole purpose of contesting jurisdiction.⁷⁶ Having in mind these different situations, it is necessary to determine what type of acts amount to a voluntary appearance.

⁷⁰Dictum in *Schibbsby v. Westenholz*, Blackburn J., (1870), L.R. 6 Q.B. 155, 161; *General Steam Navigation Co. v. Guillou*, (1843), 11 M. & W. 877, 894; Any other rule would be contrary to the principle of *res judicata*. A plaintiff who has chosen his court cannot say that a judgment on appeal from that court was rendered without jurisdiction, *Sultan of Johore v. Abubaken*, [1952] A.C. 318; Similarly a submission taking the form of an application by the defendant to set aside an *ex parte* judgment gives jurisdiction to an appellate court to restore that judgment after it has been set aside, thought the judgment restored would not, for the defendant's intervention, have had any international force. *Guiard v. deClermont*, [1914] 3 K.B. 145.

⁷¹See Dicey, *op. cit.*, rule 68 comment; In the United States, see *Restatement*, s. 83 a, b and c. A foreign court may have jurisdiction in personam over a foreign corporation when it has brought an action as plaintiff; *Henriques v. Dutch West India Co.*, 2 Ld. Raym. 1532, 1 Str. 612 (1729).

⁷²*Eschger Co. v. Morrison Kekeovich & Co.* (1890), 6 T.L.R. 145.

⁷³*Restatement*, s. 83, d.

⁷⁴*Ibid.* s. 82; *Harris v. Taylor*, [1915] 2 K.B. 580.

⁷⁵*Richardson v. Allen* (1916), 28 D.L.R. 134.

⁷⁶*Harris v. Taylor*, [1915] 2 K.B. 580 (C.A.) per Buckley L.J. pp. 587, 588; *Boissiere Co. v. Brockner Co.* (1889), 6 T.L.R. 85 per Cave J. at pp. 85, 86; A similar rule as to the prevalence of conduct over accompanying protests or reservation in words attains in the law of estoppel by representation; Bower, *Law of Estoppel by Representation* (1923), ss. 132, 135 and s. 145 where no estoppel can be founded on involuntary statements or acts.

In *Voinet v. Barrett*⁷⁷ 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 been issued and constitutes voluntary appearance. Some decisions have gone to the extent of holding that where the defendant appears only to protest against the jurisdiction, his appearance is deemed voluntary.⁷⁸ In other words, if the defendant takes the chance of a judgment in his favour, he is bound.⁷⁹ Statutes may permit protest to the jurisdiction without making such protest a general appearance,⁸⁰ a proceeding sometimes known as a special appearance. The Restatement says "By the law of most states an appearance entered by the defendant solely for the purpose of objecting that the court has no jurisdiction over him does not subject him to the jurisdiction of the court."⁸¹ A special appearance and motion appear to constitute a request that the court advise whether the defendant must answer or suffer a valid default judgment; it is a submission to the issue of ultimate jurisdiction which will enable the court to give a valid judgment on the merits.

The court has, by the special appearance, limited jurisdiction to determine the ultimate jurisdiction, and its determination becomes *res judicata* between the parties. Therefore, where the ultimate jurisdiction is in dispute, the limited jurisdiction to try this issue will be based solely on the special appearance, and the court may render the original judgment with a motion to dismiss or to vacate a judgment for lack of jurisdiction. The motion to vacate having received a full hearing, the decision should be binding on the parties⁸² in the

⁷⁷(1885), 55 Q.B. 39.

⁷⁸*Boissiere v. Brockner* (1889), 6 T.L.R. 85; *Harris v. Taylor*, [1915] 2 K.B. 580; *Guiard v. de Clermont*, [1914] 3 K.B. 145; *Molony v. Gibbons* (1810), 2 Camp 502.

⁷⁹*Schibsby v. Westenholz* (1870), L.R. 6 Q.B. 155, per Blackburn J. at p. 162. See *Banco Minero v. Ross*, Tex. Civ. App., (1911), 138 S.W. 224, 106 Tex. 522; *Cruz v. O'Boyle*, 197 Fed. 824; *Gilbert v. Burstine*, 255 N.Y. 348.

⁸⁰*The Foreign Judgments (Reciprocal Enforcement) Act*, (1933), does not permit registration of a foreign judgment in England if the defendant appeared in the original foreign court under protest.

⁸¹S. 82 comment a; special appearance to deny jurisdiction not amounting to a consent to jurisdiction: *German Bank v. American Fire Ins. Co.*, 83 Ia 491 (1891); *Gray v. Hawes*, 8 Cal. 562 (1857). The same rules apply in the case of a foreign corporation: see *Restatement*, s. 88 — England: *De Dulles' Settlement*, [1951] 1 Ch. 842.

⁸²(1927-28), 41 Harv. L. Rev. 1055; *Thomas v. Virden*, 160 Fed. 418; *Hope v. Shevill*, 137 App. Div. 86, 122 N.Y.S. 127 (1910) *affd sub nom*, *Hope v. Seaman*, 204 N.Y. 563 (1912); *Freeman, op. cit.*, s. 667; In *Baldwin v. Iowa State Traveling Men's Assoc.*, 238 U.S. 522 (1931) a voluntary appearance in the original suit to litigate the question of jurisdiction was taken as a submission to the jurisdiction of the court for this purpose and the determination was held *res judicata*. If in an action on a judgment, there is a finding by the second court of the first court's jurisdiction, it is *res judicata* so long as the defendant appeared voluntarily in the second suit: *Dogge v. Baxter*, 69 Colo. 122 (1917); an extension of this principle to judgments of foreign countries would have desirable effects. See re the *St. Nazaire Co. Ltd. ex parte European*, 36 L.T. 358 37 L.T. 52.

second state and relieve its courts from the burden of inquiring into the jurisdiction of the original court. Having passed upon the question of jurisdiction and having decided the case upon the merits, the defendant not satisfied with the adjudication of such defence 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. The only difficulty with this solution would arise where different systems of law are involved with each system having its own conception of competent jurisdiction.⁸³ This view also fails to distinguish between international jurisdiction and local jurisdiction, which is often wider.

Where a court is bound by its own law to uphold its jurisdiction it should be open to a defendant to enter a protest to its jurisdiction internationally, and defend on the merits, without being bound in other countries by an adverse decision (unless his protest was unjustified) though the plaintiff, having chosen his court, should be bound even internationally by failing on the merits. This seems to be the best approach.

Some states have statutes providing that an appearance by a defendant for the sole purpose of objecting to the jurisdiction of the court shall subject him to its jurisdiction for all purposes. This solution has also been followed by some courts in the absence of such statutes.⁸⁴ Other courts have held that, in the absence of a statute making the filing of an answer an appearance, a party not properly served with process, so as to give jurisdiction over his person, does not waive the obligation or confer jurisdiction on the foreign court by answering over and going to trial on the merits after his objection to the jurisdiction has been overruled.⁸⁵

In a case where a statute does not recognize the special appearance and gives to any appearance the full effect of a general appearance, it may be questioned whether a special appearance, after the judgment has been rendered, could operate retroactively so as to validate a judgment void for want of jurisdiction. According to one opinion, a judgment is a procedural abstract which can be ratified by the subsequent appearance of the defendant, but a completely divergent view holds that a void judgment is no judgment at all, and therefore it is impossible to validate something which does not exist. Some

⁸³Piggott, *op. cit.*, (2nd ed.), p. 160. But it has been held that an adjudication of a foreign court on the question of its jurisdiction is not conclusive: *Hyde v. Scott*, 133 N.Y.S. 904 (1912).

⁸⁴Restatement, s. 82a; *Jones v. Jones*; 108 N.Y. 415 (1888); *Harris v. Taylor*, [1915] 2 K.B. 580 which is a very good illustration of the proposition that where by statute the appearance is only general and the defendant knowing it deliberately entered an appearance, he cannot be deemed to have entered special appearance only; *Boissiere Co. v. Brockner Co.* (1889), 6 T.L.R. 85.

⁸⁵*Harkness v. Hyde*, 98 U.S. 476 (1878); *Steamship v. Tuginam*, 106 U.S. 118 (1882), contra *McCullough v. Railway Mail Assoc.*, 225 Pa. 118 (1909); *Tallack v Tallack*, [1927] P. 211; *Re Dulles Settlement Trust*, [1951] 2 All E.R. 72.

courts have recognized the possibility of conferring back jurisdiction,⁸⁶ whereas other courts have rejected it.⁸⁷

Where the defendant appears, motivated by a desire to protect his property within the dominion of the foreign court, and challenges the jurisdiction of the foreign court to seize or attach it, it has been held that this was not a voluntary appearance,⁸⁸ because it occurred under what amounted to duress and compulsion. The defendant is compelled to appear in an effort to prevent the sale of his property already seized, when at international law the foreign court could not have had jurisdiction in personam over him by the mere fact that his property lay within the territory of the foreign country.⁸⁹

On the other hand, it has been held that the appearance is voluntary where the defendant, animated by fear, appears for the purpose of protecting property on which execution may be levied or seized pursuant to an action in personam pending against him, and the property is actually within the territory of the foreign country.⁹⁰ 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, carries on business there and 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.⁹¹

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 Dean 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, 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

⁸⁶*Barnett v. Holyoke Mutual Fire Ins. Co.*, 78 Kan. 630 (1808): *Guiard v. De Clermont*, [1914] 3 K.B. 145.

⁸⁷*Godfrey v. Valentine*, 39 Minn. 336 (1888); Read, *op. cit.*, pp. 169-170.

⁸⁸*De Cosse Brissac v. Rathbone* (1861), 6 M & W 301; *Voinet v. Barrett* (1885), 55 L.J. Q.B. 39; *Duflos v. Burlingham* (1876), 34 L.T. 688; *Schibsby v. Wesenholz* (1870), L.R. Q.B. 155, per Blackburn, J. at p. 162; *Guiard v. De Clermont*, [1914] 3 K.B. 145.

⁸⁹Read, *op. cit.*, p. 163.

⁹⁰*Voinet v. Barrett* (1885), 55 L.J. Q.B. 39, *De Cosse Brissac v. Rathbone* (1861), 6 M. & W. 301; *Hilton v. Guyot*, 159 U.S. 113, (1895), contra, *Duflos v. Burlingham* (1876), 34 L.T. 688.

⁹¹*Voinet v. Barrett* (1885), 55 L.J. Q.B. (C.A.) 39. As to the distinction between *Voinet v. Barrett* and *De Cosse Brissac v. Rathbone*, see Read, *op. cit.*, p. 163.

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.⁹²

I fully agree with this statement. 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.

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.⁹³

As respects the form of appearance, it need not be made in person; it can be made by an attorney, counsellor, or solicitor, and will be considered valid⁹⁴ if the person actually appearing has been properly and duly authorized.⁹⁵

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.⁹⁶

In general, a defendant who cannot be harmed by the foreign court, submits by merely contesting the jurisdiction. A defendant whose property is in jeopardy may contest the jurisdiction, but submits if he does any more, while a defendant whose property has already been seized may, without submitting, contest on the merits, but not counterclaim.

It is proposed that the following persons be bound by the foreign decision: the plaintiff and the defendant who counterclaimed under any circumstances or defended on the merits (unless to protect property already seized). In all these situations, it is clear that the parties intended to submit the merits of the case to the foreign jurisdiction.⁹⁷

(c) *Where the defendant has voluntarily contracted and consented to submit himself to the forum wherein the judgment was obtained.*

⁹²Read, *op. cit.*, p. 170, Westlake, *op. cit.* (7th ed.), p. 404.

⁹³Restatement, s. 82 d.

⁹⁴*Cruz v. O'Boyle*, 197 F 824 (Pa. 1912); A statement in a record that a party appeared by attorney is prima facie evidence of that fact and of his authority to act: *Capling v. Herman*, 17 Mich. 524.

⁹⁵*Molony v. Gibbons*, 2 Camp 502; *Bergerem v. Marsh* (1921), 91 L.J. K.B. 80; *McMullen v. Ritchie* (C.C.) 41 Fed. 502. Effect of appearance of unauthorized attorney: *Restatement*, s. 82 e;

⁹⁶Presumption of jurisdiction: *Ritchie v. McMullen*, 159 U.S. 235; *Thorn v. Salmonson*, 37 Kan 441; *Wilson v. Gibson*, 259 S.W. 491, 214 Mo. App. 219 (1924). As to proof of appearance: *Russell v. Smith* (1842), 9 M & W 810 per Lord Abinger at pp. 817-818; Parke B. at p. 819; Alderson B at 820; where the fact of appearance is not established the foreign judgment is held not to operate as res judicata: *Schibsby v. Westenholz* (1870), L.R. 6 Q.B. 115 where the non-appearance of the defendant was admitted (per Blackburn, J. at pp. 156, 162); *Rousillon v. Rousillon* (1880), 14 Ch. D. 351; *Turnbull v. Walker* (1892), 67 L.T. 767 per Wright, J. at p. 769.

⁹⁷A person cannot fight the issue and at the same time preserve the right to say, if the worst comes to the worst, that the court has no jurisdiction to decide against him. *Re Dulle's Settlement*, [1951] 1 Ch. 842.

When a contract is entered into a foreign country, it is generally assumed that the law of the foreign country will apply to its validity and interpretation but this does not necessarily mean that the parties intended that disputes arising under such contract are to be litigated in the courts of that country,⁹⁸ even where it is to be performed there.⁹⁹ On the other hand, a person's corporation or partnership, though not otherwise subject to the jurisdiction of the foreign court, may contract beforehand to be bound by the decision of the foreign tribunal or by the doing of certain acts or words give consent to such an exercise of jurisdiction with respect to a particular action, or generally, with respect to actions afterwards brought.¹⁰⁰

The contract in respect to which the jurisdiction of the foreign court is asserted may be express or implied.¹⁰¹ For example, where the articles of association or statute of incorporation of a foreign corporation expressly provide that a shareholder is amenable to the jurisdiction of the courts of the country where the corporation was created in any action concerning the rights or obligations of such shareholder, the fact that he becomes a shareholder in the foreign corporation and subscribed to the articles of incorporation has been held to amount to a submission to such jurisdiction.¹⁰² Merely becoming a shareholder in a foreign corporation, however, does not amount to a contract to

⁹⁸*Sirdar Gurdayal Singh v. Rajah of Faridkote*, [1894] A.C. 670.

⁹⁹*Ibid.*, refuting *Schibsby v. Westenholz*; Lord Alverston concurs in *Emanuel v. Symon* [1908] 1 K.B. 302 in the critique of Lord Blackburn: "When *Copin v. Adamson* was heard on appeal in the Court of Appeals, Lord Cairns decided the case upon the first point, namely, that there had been an express contract to submit to the foreign jurisdiction . . . to make a person who is not subject of nor domiciled nor resident in the foreign country amenable to the jurisdiction of that country there must be something more than a mere contract made or mere possession of property in the foreign country."

¹⁰⁰*Copin v. Adamson* (1875), 1 Ex. D. (C.A.) 17; *Law v. Garrett* (1878), 8 Ch. D. (C.A.) 26; *Restatement*, s. 81, comment b; *Freyerick v. Hubbard* (1902), 71 L.J. (K.B.), 509 per Walton at pp. 510-512.

¹⁰¹*Express, Hart & Son Ltd. v. Furness Withy & Co. Ltd* (1904), 37 N.S.R. 74; *Feyerick v. Hubbard* (1902), 71 L.J. (K.B.) 509; *Grover Baker Sewing Mach. Co. v. Radcliffe*, 137 U.S. 287; *Law v. Garrett* (1878), 8 Ch. D. (C.A.) 26; Implied: *Bank of Australasia v. Harding* (1850), 9 C.B. 661; *Bank of Australasia v. Nias* (1851), 16 Q.B. 717; *Allen v. Standard Trust Co.*, [1920] 3 W.W.R. 990; *Meeus v. Thellusson* (1853), 8 Ex. 638; *Ridson Iron & Locomotive Works v. Furness*, [1906] 1 K.B. (C.A.) 49; *Vallé v. Dumergue* (1849), 4 Ex. 290; Jurisdiction on basis of contract. *Egley v. T. B. Bennet & Co.*, 196 Ind. 50, 139 N.E. 385. It was held in *Dacey, op. cit.*, p. 360, that under the lead "contract to submit" may be brought cases in which from the nature of the contract, e.g., possibly under peculiar circumstances an agreement with regard to foreign land, it may be presumed that the parties intended to submit to the jurisdiction of the particular courts, viz., the courts of the country where the land is situated."

¹⁰²*Copin v. Adamson* (1875), 1 Ex. D. (C.A.) 17; *Jones v. Turner*, 248 Mich. 403.

submit to the jurisdiction of the foreign court¹⁰³ where the constitution of such corporation or partnership does not provide expressly for such a submission.¹⁰⁴ It should be noted that the contract in itself, or consent to the exercise of jurisdiction by the foreign court, does not cause the foreign court automatically to apply the foreign law.¹⁰⁵

Sometimes statutes provide for the submission of the shareholders to the jurisdiction of the courts where the corporation was created, and this has been held to be a sufficient justification even if there is nothing in the articles of incorporation or the subscription agreement.¹⁰⁶ 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.¹⁰⁷

Dean Read comments as follows upon the problem of consent:

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

¹⁰³*Emanuel v. Symon*, [1908] 1 K.B. 302, where it was held that in a partnership, membership alone was not an implied contract to submit to the jurisdiction of the courts of the colony in which the first carried on business (per Lord Alverstone C.J. pp. 307, 309 and Kennedy L.J. at pp. 313-314); In *Copin v. Adamson* (court below) (1874) L.R. 9 Ex. 345 pp. 355-356. A second replication which did not set up the agreement but relied solely on the fact that the defendant was a member of the "société" was held bad on a demurrer; there being no cross appeal on this point, the C.A. did not deal with it; the mere fact that a defendant is a shareholder in the foreign company is not necessarily a decisive argument for submitting him to the jurisdiction of the foreign state. There must be evidence to show that he expressly contracted to submit to the jurisdiction of the foreign court;

¹⁰⁴*Bank of China, Japan & The Straits v. Morse*, 168 N.Y. 458, 56 L.R.A. 139, 85 Am. St. Rep. 676.

¹⁰⁵*Copin v. Adamson* (1874), L.R. 9 Ex. 345 affirmed (1875), 1 Ex. D 17, But see *Empire Universal Films Ltd., v. Rank*, [1947] O.R. 775 (Can.).

¹⁰⁶Scott, *Jurisdiction over Non-resident Motorists* (1926), 60 Am. L. Rev. 415; *Boivin v. Talcott*, 102 F Supp. 979 (1951); *Bank of Australasia v. Harding* (1850), 9 C.B. 661; *Bank of Australasia v. Nias* (1851), 16 Q.B. 717; *Copin v. Adamson*, (1875), 1 Ex. D (C.A.) 17; Also there exist some statutes which create a contractual relationship between certain persons within the boundaries of the state; *Risdon Iron & Locomotive Works v. Furness*, [1905] 1 K.B. 304, [1906] 1 K.B. 49.

¹⁰⁷*Tharsis Sulphur Co. v. La Société des Métaux* (1889), 58 L.J. Q.B. 435; *Bank of Australasia v. Harding* (1850) 9 Q.B. 661: The defendant, an Englishman residing in England, was a member of an Australian company. An Australian Act enabled the chairman of the company to sue and be sued for the company and provided that he was to be taken as an agent for the members of the company. A judgment against the chairman was held good against the defendant, the Australian court having jurisdiction even if the defendant did not have notice of the proceedings against the chairman; *Bank of Australasia v. Nias* (1851), 16 Q.B. 717; *Restatement*, s. 91 c, Smith, *Personal Jurisdiction* (1953), 2 Int. & Comp. L.Q. 510, 532.

of law. Consent must be actual; it is not sufficient to attribute a fictitious consent to a person based on the general provisions of a foreign system of law.¹⁰⁸

It is also possible to have conditional consent under certain circumstances.¹⁰⁹

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 construed as an express consent to the exercise of jurisdiction of the foreign court.¹¹⁰

If there is a contract not to revoke, consent is irrevocable; whereas in the case of a gratuitous consent, it may be revoked at any time before action is brought.¹¹¹ A contract to waive the natural right to notification of the court's intention to try the dispute will be valid, provided that specified means are employed to bring it to the party's notice.¹¹² It is also valid to contract to be bound by substituted service. 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 the defendant.

A foreign court should be deemed of competent jurisdiction only if the defendant specifically agreed to submit to it and he has had actual notice of the suit by personal or substituted service of process. Under no circumstances should such an agreement be implied. Once the court has jurisdiction over a party, the jurisdiction will continue throughout the proceedings.

III. RECIPROCITY IN JURISDICTION

The great principle which emerges from the analysis of the problem of jurisdiction in the Anglo-American system, is that the enforcing court tests the power of a foreign court according to its own conflict rules. It results that the forum may, and often does, discriminate against a foreign court, by assuming jurisdiction on a larger scale than is conceded to it.

¹⁰⁸Read, *op. cit.*, p. 176; Beale, *The Jurisdiction of Courts over Foreigners* (1913), 26 Harv. L. Rev. 283; See notes, Read, *Consent as a Basis of Jurisdiction in Personam of a Foreign Court*, [1931] 1 D.L.R. 1; *Restatement*, s. 81, comment a, and s. 90; The principle of consent has been carried to the extent of recognizing as valid a foreign judgment rendered upon service by registered mail, *Feyerick v. Hubbard*, (1902), 71 L.J. (K.B.) 509; In the absence of any contract, a non-resident stockholder not a party to the proceedings is not bound by an order for the payment of the amount due on his stock: *Bank of China & Japan & The Straits v. Morse*, 169 N.Y. 458; but see *Clarkson v. Moir*, 201 P 476, 53 Cal. App. 775 (1921). 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, *Vallé v. Dumergue*, (1849), 4 Exc. 290.

¹⁰⁹*Restatement*, s. 81, comment d.

¹¹⁰*Ibid.*, s. 81, comment c.

¹¹¹*Ibid.*, s. 81, comment e, f and g.

¹¹²Selection of an address from which process served there is forwarded; *Vallé v. Dumergue* (1849), 4 Ex. 290.

A comparative examination of the rules determining the competence of Anglo-American and foreign courts to entertain actions in personam illustrates the validity of this statement. Does this mean that the forum should extend the jurisdictional basis of foreign courts? In other words, should Anglo-American courts recognize a foreign money judgment which is founded upon a jurisdictional basis similar to that exercised by them.

Let us take the case of England and compare the competence of the English courts and that of foreign courts as recognized by the forum.

COMPETENCE OF THE ENGLISH COURTS

- 1—Where the defendant was present in the jurisdiction when the action began.
- 2—Where the defendant voluntarily submitted to the jurisdiction of the court.
- 3—Where the court is empowered to order the service of the writ (or of notice thereof) out of the jurisdiction. (Order 11, Rules of the Supreme Court)
- 4—Special statutory grounds.
- 5—In certain instances where the defendant was domiciled in the jurisdiction when the action began.

COMPETENCE OF FOREIGN COURTS

- A) Where the defendant is a subject of the foreign country in which the judgment was obtained.
- B) Where he was resident or present in the foreign country where the action began.
- C) Where the defendant in the character of plaintiff has selected the forum in which he is afterwards sued.
- D) Where he has voluntarily appeared.
- E) Where he has contracted to submit himself to the forum in which the judgment was obtained.

It appears that nos. 3, 4 and 5 are instances of assumed jurisdiction of the English courts which do not find their equivalent on the foreign side. With regard to nos. 3 and 4, is it possible to say that the statutory jurisdiction of the English courts is of purely local character and cannot claim international recognition on a reciprocal basis?

There does not seem to be any compelling reason against recognizing a jurisdiction which the forum itself claims. In *Travers v. Holley*¹¹³ 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. Here the court 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 now 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. It may thus

¹¹³[1953] P. 246; [1953] 2 All E.R. 794 (CA), (1954), 17 M.L.R. 79, 471. See also *Dunne v. Saban*, [1954] 3 W.L.R. 980, (1955), 18 M.L.R. 177.

happen that the English courts will concede to the foreign courts a wider jurisdiction than they themselves claim. For instance, in the synopsis (a) "allegiance", although not a domestic jurisdictional basis, will be left untouched. Of course in all these cases there may be concurrent jurisdiction. For instance, X, a national of state A, may be domiciled in state B and resident in state C. A decision of the courts of any of these states A B, or C, will be entitled to recognition in England. No particular grounds of jurisdiction has precedence over the other. This avoids possible clashes among the recognized grounds of jurisdiction.

What would be the attitude of the Anglo-American courts, in the field of foreign money judgments where the substantial basis of jurisdiction is the defendant's presence or submission, if under the law of the foreign state, proceedings were brought against the defendant on some other basis? Would an English court for instance recognize a foreign judgment against an absent defendant granted on a basis similar to one of those mentioned in Order 11 of the Rules of the Supreme Court? By this order English courts have as *forum conveniens* a limited discretionary power to allow the service of proceedings instituted in England against a person or company not ordinarily domiciled or resident in the United Kingdom. Thus, English courts are deemed to have jurisdiction wherever: 1—The whole subject matter of the action is land situated within the United Kingdom or is in respect of any act, deed, will, contract, obligation or liability affecting such land or, 2—The action is for the administration of personal estate of any deceased person, who, at the time of his death, was domiciled within the jurisdiction, or for the execution of the trusts of any written instrument of which the person to be served is a trustee, which ought to be executed according to the law of England, or, 3—The action is one brought against a defendant not domiciled or ordinarily resident in Scotland, to enforce, rescind, dissolve, annul or otherwise affect a contract or to recover damages or other relief for, or in respect of the breach of a contract a) made within the jurisdiction or b) made by or through an agent trading or residing out of the jurisdiction or c) by its terms or by implication to be governed by English law, 4—Any person out of the jurisdiction is a necessary or proper party to an action properly brought against some other person duly served within the jurisdiction, 6—The action is brought under the Carriage by Air Act of 1932.

It seems that English courts could concede to the courts of foreign countries the same rights of jurisdiction which they claim for themselves under Order 11 and other statutes so long as the foreign legislation involved does not differ in substance and spirit from its English equivalent.¹¹⁴ This view is supported by the remarks of Denning L.J. in *Re Dulles*¹¹⁵ in his analysis of *Harris v. Taylor*.¹¹⁶ The learned judge said:

¹¹⁴Dicey, *op. cit.*, p. 352.

¹¹⁵[1951] Ch. 842, 851.

¹¹⁶[1915] 2 K.B. 580.

Those rules correspond with the English rules for service out of the jurisdiction contained in Order 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 there.¹¹⁷

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?" 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*.¹¹⁸ 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.¹¹⁹

It has been suggested by Dr. Kennedy¹²⁰ 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.¹²¹

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 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

¹¹⁷See also *Wedley v. Quist*, [1953] 4 D.L.R. 620.

¹¹⁸*Sirdar Gurdayal Singh v. The Rajah of Faridkote*, [1894] AC 670, 683.

¹¹⁹Or based upon a writ served on the registrar or superintendent of motor vehicles or secretary of state. See *Boivin v. Talcott*, 102 F Supp. 979 (1951); Scott, *Jurisdiction over non-resident motorists* (1926), 60 Am. L. Rev. 415.

¹²⁰*Reciprocity in the recognition of foreign judgments* (1954), 32 Can. Bar Rev. 359, 379; also *Recognition of Judgments in personam; The meaning of Reciprocity* (1957), 35 Can. Bar Rev. 123. Reciprocity has been adopted by the Royal Commission on Marriage and Divorce, Cmd 9678. See Mann (1958), 21 Mod L. Rev. 1 *passim*.

¹²¹*Boivin v. Talcott*, 102 F Supp. 979 (1951).

also maintains that in the field of contract the present area of Order 11 is very reasonable and could easily be extended to foreign courts.¹²² It seems that besides statutory grounds of jurisdiction the rule 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 can be an excellent method for facilitating the recognition and enforcement of foreign judgments in the forum. This rule should certainly 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 almost fifty years ago in *Emanuel v. Symon*¹²³ is certainly a sign of backwardness and not in the tradition of the Anglo-American system. Whether the rule should be extended to true foreign judgments is a more delicate question. The writer agrees with Dean Griswold,¹²⁴ that it is not likely that American courts will go so far, when judgments of foreign countries are involved, as rules of fairness to the defendant, natural justice and due process under the constitution are too fundamental tenets of the common law to be displaced by the doctrine of reciprocity, without further safeguard and definition of the principles involved in *Travers v. Holley*. It is submitted, however, that the basic principle is sound and that it may be conducive to a better system of recognition and enforcement of foreign money judgments.

Jurisdiction on the basis of reciprocity should be recognized so long as the defendant has had an opportunity to be heard and defend the suit. With these safeguards a great improvement could take place with no infringement of basic principles of natural justice and due process. It must be noted that Dicey¹²⁵ and Cheshire¹²⁶ had already indirectly advocated the doctrine of reciprocity of jurisdiction. For these authors jurisdiction in personam of the English courts rests on general principles of effectiveness as well as submission. Conversely, they claim that the courts of any country are considered by English law to have jurisdiction over any matter with regard to which they can give effective judgment. Later this theory found support in a dictum of Lord Merrivale in *Tallack v. Tallack*.¹²⁷ The majority of legal authors have, however, rejected

¹²²Contracts made within the jurisdiction; contracts made by or through an agent trading or residing within the jurisdiction on behalf of principal trading or residing out of the jurisdiction; contracts which by their terms or by implication are to be governed by English law; contracts wherever made in respect of which breach is committed within the jurisdiction.

¹²³[1908] 1 K.B. 302.

¹²⁴*The Reciprocal Recognition of Divorce Decrees* (1954), 67 Harv. L. Rev. 823.

¹²⁵*Op. cit.*, p. 22.

¹²⁶4th ed., pp. 101-4.

¹²⁷[1927] P. 211.

this view.¹²⁸ They maintain that the jurisdiction of English courts is not based upon considerations of the actual or probable effect of their decisions. This is shown by the fact that the jurisdiction of English courts has been greatly enlarged without regard to the possibility of enforcing their decisions. Also a judgment may lose its effectiveness during the course of time.

It is interesting to note that reciprocity of jurisdiction is adhered to by the French courts in a very different way. Once a French court has determined that it was not exclusively competent under its rules to deal with the particular case, it will recognize the jurisdiction of the foreign court *only* if it were based on grounds similar to the ones found in the French domestic law. In other words, rules of jurisdiction of the foreign court are deemed similar to those of the French domestic courts. Thus, if personal jurisdiction is based in France on nationality or domicile, a foreign judgment based on domicile or nationality will be recognized there so long as the domicile was not French or the plaintiff or the defendant was not a Frenchman. This is not true reciprocity. Actually the French court does not pay any respect to the foreign rules of jurisdiction. It does not recognize the foreign jurisdiction when similar to the French jurisdiction. The French court directly imposes its jurisdictional rules on the foreign court irrespective of reciprocity. The initiative comes from the French court, while in the *Holley* case it came from the foreign court. Thus, under French rules, jurisdiction may not exist according to the law of the foreign court, while by application of the principles of *Travers v. Holley* the foreign court will always have jurisdiction according to its own law. Here foreign domestic jurisdiction is equivalent to international jurisdiction and English domestic jurisdiction. The French rule, by equaling foreign jurisdiction to domestic jurisdiction may restrict such foreign jurisdiction, while under *Travers v. Holley* it can only be extended. The explanation for the French rule lies in the fact that the French courts have not devised special conflict of jurisdiction rules, they have only applied their domestic rules to foreign courts, so that in certain cases the foreign rules are similar to the domestic ones and reciprocity seems to exist.

IV. COMPETENCE OF THE FOREIGN COURT IN ACTIONS IN PERSONAM: THE FRENCH LAW

In France a foreign money judgment must also have been rendered by a foreign court possessing international jurisdiction determined from the standpoint of French law. The basic French rules of jurisdiction relating to domestic causes of action are found in articles 59 and 420 of the Code of Civil Procedure.¹²⁹ In practice these rules have been extended by the courts to

¹²⁸Schmitthoff, *op. cit.*, p. 425; Smith, *Personal Jurisdiction* (1953), 2 Int. and Comp. L.Q. 510, 523-4; but see Graveson, *The Conflict of Laws*, (3d ed., 1955), p. 465 and Kennedy, note 120.

¹²⁹Code de Procédure Civile, Livre II Tit. II Art. 59 (Des Ajournements) Article 420; Livre II Tit. XXV (Procédure devant les Tribunaux de Commerce).

foreign causes of action,¹³⁰ by establishing a parallelism between domestic and international rules of jurisdiction.¹³¹ It follows that where the French domestic rules of jurisdiction hold that only a French court can be competent, no foreign court is competent.¹³² On the other hand, where the competence of the French court is a facultative one, the problem will relate to the validity of the waiver of such competence.¹³³ Also, where according to French domestic rules of jurisdiction several foreign or French courts could have been competent, the problem is to determine whether the foreign court was one of those designated as a forum by French law.¹³⁴

First to be considered is the case where according to French domestic rules of jurisdiction a French court is competent on an exclusive or non-exclusive basis. A French court has exclusive competence in the following situations:

- a) Cases where a public law of France is involved,¹³⁵
- b) Cases involving a French law of police,¹³⁶
- c) Actions pertaining to immovable property where the immovable property is located in France,¹³⁷
- d) Suits against estates where the immovable property is located in France,¹³⁸
- e) Actions in partition where the property to be divided is in France,¹³⁹
- f) Actions pertaining to movables located in France (i.e., action in recovery of chattels),¹⁴⁰
- g) Certain suits relating to partnerships or corporations must be brought in the country of incorporation,¹⁴¹
- h) Actions where insurance is involved,¹⁴²
- i) Actions involving the carrying of goods by sea under the law of April 2, 1936, Article 10 which declares competent the tribunal of the place of destination,¹⁴³
- j) Suits regarding alimony,¹⁴⁴
- k) Suits involving collision.¹⁴⁵

¹³⁰Pillet, *op. cit.*, t. II, n 694; Niboyet, *op. cit.*, t. VI, vol. 1, n 1804.

¹³¹Bartin, *Etudes sur les effets internationaux des jugements*, (Paris, 1907); *Principes de droit international privé*, I s 206, p. 550 et seq.

¹³²Lyon, 2 juillet 1931, *Clunet* 1932 p. 673 .

¹³³Articles 14 and 15 of the Civil Code.

¹³⁴Article 59 para. 12 of the Code of Civil Procedure. In general see Francescakis, *Compétence étrangère et jugement étranger*, *Revue de droit international privé*, hereafter cited *Revue*, 1953, 1.

¹³⁵See Req. 27 mars 1922, *Revue* 1924, p. 401.

¹³⁶As to article 1382 of the Civil Code see Req. 15 juin 1909, *Revue* 1911 p. 339.

¹³⁷Article 59, para. 5 Code of Civil Procedure.

¹³⁸Article 59, para. 6 Code of Civil Procedure; Art. 59, para. 8 Code of Civil Procedure, and Art. 110 of the Civil Code.

¹³⁹See Niboyet, *op. cit.*, VI, vol. 1 s. 1838.

¹⁴⁰Req. 15 juin 1909, *Revue* 1911 p. 339.

¹⁴¹Art. 59 para. 5: Suits between partners or stockholders, or between them and the manager or directors, winding up proceedings and matters incidental thereto.

¹⁴²Article 3 of the law of 13 juillet 1930.

¹⁴³Law 2 avril 1936 art. 10; the tribunal of the port of destination of the goods is competent.

¹⁴⁴Alimony, art. 59 para. 3 Code of Civil Procedure.

¹⁴⁵Art. 405 in fine, Code of Commerce; The tribunal of the country where the collision took place or the place where the ship came after the collision is competent.

Where according to these rules a French court has exclusive competence, it follows that the foreign court which rendered the money judgment is not competent and therefore the French judge will refuse to enforce it.

The second situation to be considered is where, as a matter of law, a French court is exclusively competent, although this competence may be waived by the parties. The first case for consideration is where the jurisdiction of the French courts is affected by the character of the parties.

- a) The French courts claim jurisdiction in all cases where the plaintiff is a French citizen.

This claim arises from article 14 of the Civil Code which reads as follows:

An alien, even not residing in France, may be summoned before the French courts, for the fulfillment of obligations contracted by him in France with a Frenchman; he may be called before the French courts for obligations contracted by him in a foreign country toward French people.

This rule, contrary to the principle *actor sequitur forum rei*, originated in Roman law where competence was based on the *for originis* for the benefit of the Roman party.¹⁴⁶ The privilege of article 14 belongs exclusively to the Frenchman, but it includes those partnerships and corporations which owe allegiance to France. The mere fact that these corporations or partnerships are incorporated or organized in France does not make them French, but if they are controlled by French citizens, they are entitled to the benefit of article 14.¹⁴⁷ The article applies to every foreigner unless barred from operation by a treaty provision.¹⁴⁸

In spite of the text of the article which mentions "obligations", it applies to any cause of action arising out of any transactions between a Frenchman and a foreigner.¹⁴⁹ However, it does not apply to actions *in rem* where the immovable is located in a foreign country or to actions in partition and in ejectment because, as a judgment rendered in France would be without effect abroad, there is no need to burden the French courts with such unproductive suits.¹⁵⁰

The creation by article 14 of this privilege of jurisdiction in favor of French citizens may be waived either at the time of contracting or subsequently without

¹⁴⁶Savigny, *Traité de droit romain*, VIII, s 352; As to ancient law: Emerigon, C. IV, s VIII: "Le Français peut faire assigner par devant les tribunaux du royaume l'étranger contre qui il veut former quelque action . . . autrement l'étranger pourrait à son avantage sucer le sang et la moelle des Français et puis les payer en monnaie de faillite." Bodin, *République* (1577), I, part I, p. 70.

¹⁴⁷See Niboyet, *Cours de droit international privé français*, (2 ed.) p. 236 s 262, la notion de contrôle. The nationality of stockholders and directors, determines that of the company.

¹⁴⁸See Trib. Seine, 20 avril 1932, *Revue* 1932, p. 680; See treaty with Belgium, 8 juillet 1899.

¹⁴⁹Cass. Req. 13 déc. 1938, *Revue* 1939, p. 299.

¹⁵⁰Cass. Civ. 5 juillet 1933, *Revue* 1934, p. 166.

adherence to any particular formality. This waiver is a pure question of fact, and the court need determine only the intention of the parties.¹⁵¹ The question of intention is important and the courts examine it with much care. For example, an election of domicile in a foreign country by a Frenchman may amount to a waiver.¹⁵² It is implied where the Frenchman submitted to the jurisdiction of the court of another country by instituting suit therein. On the other hand, the Frenchman may have wished to obtain a condemnation in the foreign court, planning to bring a new suit in France to secure another judgment, thus providing him with double security.¹⁵³

It should be noted that the willingness of French courts to admit the legality of a valid waiver of article 14 arises from the fact that the fundamental question is one of venue, the court's authority being determined on a geographic and not on a political basis. In French domestic law venue is facultative, and therefore it is always possible to waive it before trial. In the case of article 14, the exclusive competence of French courts is offered to the Frenchman; if he waived this privilege at any time during the trial in the foreign country, the French courts would only inquire into the validity of the waiver.¹⁵⁴ The proper court in which to bring the action for the party invoking article 14 is the one selected by the plaintiff and not as usual the court of the defendant's domicile.¹⁵⁵

No exequatur will be granted to a foreign money judgment in favour of a French plaintiff unless proof of waiver of article 14 is adduced.¹⁵⁶

b) The French courts also claim jurisdiction in suits against French citizens.

Article 15 of the French Civil Code provides:

A Frenchman may be called before a French court for obligations contracted by him, in a foreign country, even toward an alien.¹⁵⁷

This article completes article 14. It is intended to protect both a French defendant and a foreigner who has a French debtor. It may be invoked by a plaintiff, foreign or French, or by a French defendant.¹⁵⁸ Jurisdiction exists

¹⁵¹See Lachau, *De l'exécution des jugements étrangers* (1889), pp. 50-51; Cass. Req. 13 février 1882 D 1882. 1. 129. Use of the word "pourra": may.

¹⁵²Cass. Civ. 24 août 1869, S. 70. 1. 201.

¹⁵³Rouen 19 juillet 1842, S. 1842. 2. 389; Lyon 1 juin 1872. S. 1872. 2. 174; Batiffol, *op. cit.*, s 754.

¹⁵⁴No necessity to renounce the privilege of art. 14 in *limine litis*.

¹⁵⁵Cass. Req. 4 mars 1924, *Revue* 1924, p. 562.

¹⁵⁶Trib. Lyon 19 janv. 1923, *Revue* 1924, p. 392; Lyon 2 juillet 1931, *Clunet* 1932 p. 673; Cass. Civ. 2 mai 1928, S. 1928. 1. 281, D. 1929. 1. 50; It is to be noted that all questions connected with the principal action are to be considered as covered by the waiver of art. 14. Ex: subsequent action concerning costs and fees, see Paris, 11 mai 1925, *Revue* 1927, p. 256; Aix 18 avril 1955, *Clunet* 1956, 682 restrictive interpretation of article 14).

¹⁵⁷As to ancient law see Guyot, *Répertoire, Souveraineté*, Par Garat, (ed. of 1875, p. 394.

¹⁵⁸See Niboyet, *Cours de droit international privé français*, (2nd ed.), ss. 685 and 686. See also Cass Civ. 19 Fév. 1952, R. 1953, 806; Seine 13 déc. 1955. *Clunet* 1956, 688.

although only one of the defendants is a French citizen.¹⁵⁹ Article 15 also deals with venue, and a valid waiver may take place.¹⁶⁰ This is a question of fact,¹⁶¹ and as article 15 is in the interest of both the French defendant and the foreign plaintiff, the waiver must be bilateral.¹⁶² However, the parties need not waive together or by a written agreement. If only one party has waived, the other party still has the benefit of the article and will be able to invoke it later.¹⁶³ The waiver may take place at any time during the trial before the foreign court. The mere fact that the plaintiff brought the action in the foreign country does not amount to a presumption of waiver.¹⁶⁴ There must be certainty as to the will of waiving party.¹⁶⁵

This peculiar and unreasonable aspect of French law is of interest only when the foreigner or the Frenchman has some property in France. If the debtor does not own anything in France, it is unproductive to secure a judgment based on either article, as such a ground of jurisdiction never will be recognized abroad, and the French plaintiff will have nothing to show for his expenditure of time and money.

¹⁵⁹Cass Req. 26 déc. 1899, 27 *Clunet* 335; S. 1901. 1. 30.

¹⁶⁰See Niboyet, *Cours de droit international privé français*, (2d ed.), s. 688.

¹⁶¹Cass Civ. 2 mai 1928, S. 1928. 1. 281, D 1929. 1. 50; Cass Civ. 14 mars 1883, S. 83. 1, 259; Cass. Civ. 1 février 1955, *Clunet* 1956, 684; Cass. Req. 28 mars 1922, S. 1924. 1. 75. Cass. 4 Février 1955, *Revue* 1955. 327. Possibility of waiver by contract or agreement or express convention. Its validity will be appreciated according to the law of the place of contracting: Cass. Req. 23 janv. 1923, S. 1924. 1. 73 note Niboyet; also clauses confining jurisdiction to a particular court have been held valid; Cass. Civ. 29 fév. 1888, *Gazette du Palais*. 1888. 1. 470; Cass. Civ. 13 mars 1889, *Gazette du Palais*, 89. I. 581; An election of domicile in case of corporations binds the stockholders but not the bondholders Civ. 24 août 1869, S. 70. 201; except if the election of domicile clause is in the bulletin of subscription to the bonds, Cass. Req. 20 juin 1932, D.P. 1935. I. 25, S. 1932. I. 286. No waiver is held to have taken place by a mere agreement that the law of the contract will be the foreign law: Trib. commerce du Havre 15 avril 1913, *Gazette du Palais* 1913. 2. 208; but it was held in a case, that a tariff of railway charges being the law of the parties, it amounted to a waiver, Civ. 13 août 1879, S. 188. 1. 225.

¹⁶²Niboyet, *Cours de droit international privé français*, (2d ed.), s 688. 1.

¹⁶³Paris 24 mars 1911, S. 1912. 2. 51.

¹⁶⁴No necessity to waive Art. 15 *in limine litis*: Cass. Civ. 2 mai 1928. S. 1928. 1. 281; bringing an action in the foreign country Cass. Civ. 14 février 1837. D.P. 37. 1. 100; rebuttable presumption: Cass. Req. 27 décembre 1852, S. 53. 1. 94; Cass. Req. 1 juillet 1896, D.P. 97. 1. 12; Douai 3 avril 1848. D.P. 1848. 2. 187.

¹⁶⁵The court must find "une intention formelle" to waive, Cass. Req. 9 décembre 1878. S. 1879. 1. 401, no presumption of waiver; But once the waiver is formal, the person cannot invoke art. 15 later. Compare with English and American law: If the French defendant appeared in the foreign country to protect his property there, he is not deemed to have waived the privilege of arts. 15 or 14 because he acted under pressure and necessity, Paris 9 juillet 1884, G.P. 84. 2. 328; The waiver is valid only if the party acted freely and not under the pressure of circumstances; Cass. Req. 24 fév. 1846, D.P. 46. 1. 153; Cass. Req. 11 déc. 1860. S. 61. 1. 331; Cass. Civ. 8 oct. 1940, D.C. 42. 1. 153; S. 1941. 1. 81.

Article 15 has been interpreted with great rigidity. In every case where no valid waiver had taken place, and a decision was rendered against its provisions, the foreign court is considered to have been without jurisdiction.¹⁶⁶

Jurisdiction of French courts is also based on article 59.1 of the Code of Civil Procedure which embodies the old axiom *actor sequitur forum rei*. This article states that the defendant is to be sued at his domicile.¹⁶⁷ This is a fundamental rule in the civil law and if the defendant was domiciled in France at the time the action was brought against him in the foreign country, only a French court could have had jurisdiction and the foreign court lacked it.¹⁶⁸ This rule applies only where according to the French law the competence of the court in the particular action rests upon domicile. Jurisdiction based on the domicile of the defendant is not imperative, and the parties may contract or agree to bring the action in another place.¹⁶⁹ In certain instances, article 59 or article 420 designates several courts which might be competent.¹⁷⁰ If the plaintiff, having the choice between these different courts, selected a foreign court, his selection is completely valid, and the French courts will recognize the foreign decision except in the cases where articles 14 or 15 may apply.¹⁷¹

The following test can be used, within the framework of the French domestic law concerning jurisdiction, when a foreign judgment is sought to be enforced:

- 1) Did the French court have exclusive jurisdiction? If so, then the foreign court did not have jurisdiction.
- 2) Was it a case of exclusive jurisdiction based on either article 14 or article 15? If so, another question arises: Have these articles been waived by the parties? If not, then the foreign court did not have jurisdiction.
- 3) Where either a French or a foreign court could have been competent, the question is whether the foreign court was one of the possible competent tribunals. If not, then the foreign court lacked jurisdiction.

¹⁶⁶Cass. Civ. 2 mai 1928, S. 1928. I. 281; Paris 15 déc. 1948, Revue 1949, p. 113.

¹⁶⁷Art. 59 para. 1: In personal actions the defendant is to be summoned before the court of his domicile; if he does not have one, before the court of his residence.

¹⁶⁸Seine 11 mai 1928, Revue 1929 p. 287; Cass. Req. 5 mai 1937, Revue 1938, p. 91.

¹⁶⁹Paris 24 mai 1939, Gaz. Trib. 11 juillet 1939; as to election of domicile see art. 59 para. 11 of the Code of Civil Procedure; and art. 111 of the Civil Code.

¹⁷⁰Art. 50 para. 12: in the case of tort the plaintiff has the choice between the tribunal of the defendant's domicile or the tribunal of the place where the tort occurred; see also art. 59 para. 3 in the case of alimony and art. 59 para. 5 in the case of *mixed* actions (which are both real and personal) where a choice is left between the domicile of the defendant or the situs of the property: Article 420 of the Code of Civil Procedure: In commercial transactions the plaintiff may bring his suit at the defendant's domicile or before the court of the district in which the promise was made or the goods were to be delivered or before the court of the district where the payment was to be made.

¹⁷¹Montpellier 29 mars 1891, Clunet 1893 p. 404; Paris 1 mars 1917, Clunet 1917 p. 1405; Some decisions have held that art. 420 of the Code of Civil Procedure contains strict rules of domestic jurisdiction and does not apply to international jurisdiction: Paris 27 février 1930, Revue 1930, p. 288.

- 4) Where the domicile of the defendant was in France, the question of the validity of the foreign judgment will depend upon an agreement of the parties to bring the action before the foreign court.¹⁷²

Where, according to French rules of domestic jurisdiction, no French court was directly competent, the doctrine and jurisprudence have still applied them in determining the competence of foreign courts.¹⁷³

Bartin, who favored this view, asserted that the problem of foreign judgments being one of efficacy of rights, the French courts are free to apply the rules they think convenient in determining the competent foreign court. This is a normal consequence of his parallel system expressed by "compétence directe" and "compétence indirecte". He says that in a given country one cannot apply other rules of conflicts than the rules in force therein, because there is no international authority to decide which rules must apply where the French rules do not apply directly.¹⁷⁴ French courts, therefore, will assume that the domestic rules of jurisdiction are applied by foreign courts in determining their jurisdiction. Some decisions have gone so far as to apply articles 14 and 15 to them.¹⁷⁵

Dean Batiffol however, believes that this doctrine is not as inflexible as in the case where a French court is directly competent, and that French rules of jurisdiction should operate only to assist the enforcing judge in the determination of the competence of the foreign court. The French judge could even follow the foreign rules to determine the jurisdiction of the foreign court; but where a conflict arises between two foreign judgments, both valid according to the foreign rules of conflicts, the French judge should decide which

¹⁷²In other words where the French tribunal is not directly competent according to its domestic rules, there must be a foreign court competent. Other cases exist where the French courts will assume jurisdiction: 1) see art. 15 of the loi sur les accidents de travail (industrial accidents), 2) "connexity": if a litigation pending before a foreign court is connex to a trial also pending before a French court, the latter one can take cognizance of the whole: Cass. Req. 15 juin 1909, Revue 1911, p. 339; also in the case of suretyship art. 59 para. 10 and art. 181 of the Code of Civil Procedure. The surety may be called before the tribunal which has cognizance of the action against the principal even if the surety is not domiciled within the jurisdiction of the court: Cass. Civ. 15 janv. 1878, S. 1878. 1. 308; Seine 14 mai 1923, Clunet 1934, p. 1068; Where there are several defendants, art. 59 para. 2 of the Code of Civil Procedure, provides that the tribunal competent towards one of the defendants may take cognizance of the action concerning all of the defendants even not domiciled within the jurisdiction of the court, Cass. Req. 26 déc. 1899, S. 1901. 1. 30. In all these instances the rules of domestic jurisdiction have been applied to foreign courts.

¹⁷³Pillet, *op. cit.*, II, 694 and 698; Lerebours-Pigeonnière, *op. cit.*, (5e ed.), 304; Cass 9 mai 1900, S 1901. 1. 186; Paris 27 Fev. 1930, D. 1930.2.11; Seine 18 dec. 1931, Clunet 1932, p. 680; Paris 29 oct. 1937, *Nouvelle revue de droit int. privé*, (1937), p. 778; Paris 8 janv. 1932, Clunet 1932, p. 948; Cass. Req. 6 janv. 1941, S. 1941. 1. 24.

¹⁷⁴Bartin, *Etudes sur les effets internationaux des jugements* (1907), p. 1 et seq.; Principes I s 208; Robin, *Annuaire de l'institut de droit international*, Vol. 30, p. 182 et seq.

¹⁷⁵Cass. Civ. 9 mai 1900, S 1901, 1, 186; Seine 23 dec. 1924, D.P. 1927. 2. 21.

foreign judgment is valid by application of the French rules of conflict of jurisdictions.¹⁷⁶

Professor Niboyet also disagrees with Bartin and thinks that where the French sovereignty is not directly involved (i.e., where no French court is directly competent), the French judge should not apply the domestic rules of jurisdiction to decide which foreign tribunal is competent. He states that the essential element is for a foreign court to have declared itself competent (according to its own rules of international jurisdiction) to hear the case and enter a decision; there is no need, he feels, to place obstacles in the way of executing the foreign judgment in France so long as there has been no violation of French sovereignty.¹⁷⁷ The best solution would seem to formulate true conflict of jurisdictions rules to be applied by French courts when testing the jurisdiction of the foreign court.

V: THE PROPER COURT IN ANGLO-AMERICAN AND FRENCH LAW.

Is a judgment valid where it is pronounced by a foreign tribunal which is a court of competent jurisdiction but not a proper court? The problem considered here is one of intraterritorial competence. It involves the determination of which foreign court under its own laws has the power to adjudicate in a given matter. This is generally referred to as jurisdiction *ratione materiae* and *ratione loci*.¹⁷⁸ Once it has been established that according to the rules of conflicts of the forum the foreign court had jurisdiction over the parties, should there be an inquiry into the jurisdiction of the foreign court under its municipal law? It seems that the answer should definitely be in the negative. Where the foreign court had international jurisdiction according to the standard set by the enforcing court all the interests of that forum are safeguarded. Also it is assumed that the foreign court knew its own jurisdiction and exercised it properly.

Great confusion exists, however, over this doubtful requirement that the foreign court be a proper court. To clarify this matter it is necessary to inquire into the meaning of the phrase "jurisdiction over the subject matter" which is often found in the decisions. In *Pemberton v. Hughes*¹⁷⁹ it was stated that the significant jurisdiction involves competence over the subject matter *and* over the defendant. What is meant by jurisdiction over the subject matter? Freeman states that if a foreign judgment is to be sustained, it must be rendered by a regularly established tribunal exercising the jurisdiction conferred

¹⁷⁶Batiffol, *op. cit.*, 755; Paris 12 mai 1874, Clunet 1875. 188.

¹⁷⁷Niboyet, *op. cit.*, VI vol. 2 p. 108 s 1956, where he cites in support of his view, art. 134, 1 of the project for remodelling the Civil Code, Revue 1950 p. 124, art. 134 A court may grant an exequatur only after, . . . having verified: . . . whether the foreign court which rendered judgment had jurisdiction under the rules applicable in its own country"

¹⁷⁸Dicey, *op. cit.*, rule 64, comment 1.

¹⁷⁹[1899] C.A. 1 Ch. 781.

upon it by the laws of the creating state.¹⁸⁰ In *Hunt v. Hunt*¹⁸¹ the New York Court of Appeal stated that the foreign court's jurisdiction over the subject matter will be inquired into, and "jurisdiction over the subject matter" was defined as the power lawfully conferred to deal with the general subject involved in the action. Thus, it is generally held that in the case of a divorce, nullity decree, or action in rem the jurisdiction of the foreign court over the subject matter is essential before the foreign judgment can be enforced,¹⁸² but this does not seem to mean that in practice there is any closer examination. This is clearly indicated in *Pemberton v. Hughes* which is generally 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, Master of the Rolls, said:

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 there is no offence to such substantial justice, English courts will simply examine the finality of the judgment and the jurisdiction of the court in this sense and to this extent, namely, its *competence to entertain the type of case which it did deal with and its competence to require the defendant to appear before it*.

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.¹⁸³

These words show that the foreign court must have been competent to entertain the type of action which it dealt with.

On the other hand, we have a statement of Dicey¹⁸⁴ to the effect that the validity of a foreign judgment is not necessarily affected by the fact that the court which pronounces the judgment is not a proper court. This author supports his views on *Vanquelin v. Bouard*.¹⁸⁵ In this case, it was pleaded to a declaration on a judgment proceeding from a French commercial court for

¹⁸⁰Freeman, *op. cit.*, (5th ed. 1925), s. 1500.

¹⁸¹*Hunt v. Hunt*, 28 Am. Rep. 129 (1878), 72 N.Y. 27, error dismissed 24 L. Ed. 1109 (1879); *Bissel v. Briggs*, 9 Mass. 462 (1813); *Farrel v. Farrel*, 127 N.Y.S. 764, 142 App. Div. 605 reversed 98 N.E. 857, 205 N.Y. 450. The Supreme Court has indicated in *Pennoyer v. Neff*, 95 U.S. 717 (1878) that a judgment of a court of a state which is not competent by its law to exercise jurisdiction, violates due process of law and is invalid in the state of rendition; see *Restatement*, s. 429.

¹⁸²Divorce: *Pemberton v. Hughes*, [1899] 1 Ch. 781; *Bater v. Bater*, [1906] P 209; nullity decree: *Papadopoulos v. Papadopoulos*, [1930] P 55; in rem: *Castrique v. Imrie*, (1870), L.R. 4 R.L. 414.

¹⁸³*Pemberton v. Hughes*, [1899] 1 Ch. 781.

¹⁸⁴Dicey, *op. cit.*, p. 389; Westlake, *op. cit.*, p. 398.

¹⁸⁵*Vanquelin v. Bouard* (1863), 15 C.B. (N.S.) 341.

the amount of certain bills, that this court was not a proper 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 Earl said,

I am of the opinion that the judgment of the foreign court is valid if the court has jurisdiction *over the subject matter* of the action and it seems to me upon his plea that the court of the tribunal of commerce had jurisdiction over the person and over the subject matter of the suit in which the judgment was obtained . . . and that if it were a matter of defence that the defendant was not a trader and 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.

Thus, although the court reaffirms the principle that the foreign court must have jurisdiction over the matter (*ratione materiae*), it does not mean that the foreign court must be competent *ratione loci*.

The confusion arises from the fact that the authors have not distinguished between the competence of the foreign court over the subject matter and the characterization of the subject matter. Let us take the case of a decision involving a commercial transaction which was brought before a French court. Under the present rules an English court will determine whether the commercial court of Paris has competence *ratione materiae* over commercial transactions, but it will not inquire into the nature of the particular transaction. Thus, if the French court took cognizance of the case by qualifying it a commercial transaction, the English court will not inquire into the correctness of this qualification. It will only determine whether the commercial court of Paris had jurisdiction over the subject matter, e.g., commercial transactions. If the defendant wanted to raise the question of the nature of the transaction involved it should have done so directly before the French commercial court of Paris or on appeal. This seems to be the correct interpretation of *Vanquelin v. Bouard*, where the allegation that the tribunal of commerce had no proper jurisdiction over commercial transaction was rightly dismissed. The nature of the transaction was a matter to be determined by the French court only. This was pointed out by the court when it said "that if it were a matter of defence that the defendant was not a trader and 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".

In practice, as the editors of Dicey point out, "the confusion of authority on the point is of less importance than would at first appear because it will normally be assumed that a court is a proper court."¹⁸⁶ It can be concluded that in the case of foreign judgments in personam the validity of the judgment depends upon possession by the court pronouncing it not only of international but also of local competence *ratione materiae*. Therefore, the court may examine

¹⁸⁶Dicey, *op. cit.*, p. 389; Cheshire, *op. cit.*, p. 806.

the statutory background of the foreign court in order to determine whether it has been given jurisdiction over the general subject matter of the action, 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 capable of creating rights until set aside, and judgments which are null 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.

So long as the foreign judgment is rendered by a court having jurisdiction over the subject matter it should be recognized by the Anglo-American courts, even if the venue is not correct, because Anglo-American courts are not courts of appeal of foreign decisions. If the foreign judgment had been declared void where it was rendered it should not be recognized. A court cannot recognize that which does not exist at law. This line of reasoning involves the basic distinction between incorrect use of an existing power and the usurpation of a non-existing power.¹⁸⁷

In the United States the situation is complicated by constitutional provisions which may prevent the recognition of a foreign judgment where the lack of intraterritorial jurisdiction, according to the foreign law, rendered the original decision invalid. Collateral attack against judgments because of alleged lack of intraterritorial jurisdiction has been allowed on a large scale where service of process upon the defendant was defective.¹⁸⁸ This view is gradually being abandoned and today, aside from cases of original invalidity of foreign judgments, international jurisdiction and intraterritorial competence under foreign law are deemed irrelevant.¹⁸⁹ Thus the practice is quite similar to that prevailing in England; and the rule seems to be that 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 English or American views of substantial justice.¹⁹⁰ Is this a sound view?

It is submitted that it is sufficient if the foreign court has international jurisdiction according to the standard set by the enforcing court. Jurisdiction over the subject matter or venue are matters to be raised on appeal in the

¹⁸⁷On the general subject of the discussion see: Lush, *Effect of Want of Jurisdiction*, (1936-37), 10 Australian Law J. 10; Westlake, *op. cit.*, pp. 398 and 319; Cheschire, *op. cit.*, p. 806.

¹⁸⁸See note 4. *Pennoyer v. Neff*, 95 U.S. 717 (1878).

¹⁸⁹*Caruso v. Caruso*, 106 N.J. Eq. 130, 148 A. 882 (1930), lack of competence *ratione loci*.

¹⁹⁰*Pemberton v. Hughes*, [1899] 1 Ch. 781; *Vanquelin v. Bouard* (1863), 15 C.B. (N.S.) 341; *Hunt v. Hunt*, 28 Am. Rep. 129 (1878), 24 L. Ed. 1109 (1879); also see *Ellis v. McHenry*, (1871) L.R. 6 C.P. 228.

foreign state. An inquiry into this question would amount to reopening the merits of the case. By what law are the Anglo-American courts to determine the intraterritorial competence of the foreign court? A resort to local law would be unrealistic, while a resort to the foreign law would necessitate the presence of experts to prove the foreign rules of procedure which might in certain cases be extremely intricate. Dean Read does not seem to share this view. In 1956, at the Conference of Commissioners on uniformity of legislation in Canada he 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 it has international jurisdiction. The foreign court must have jurisdiction under its own law and under the conflict rules of the enforcing court. He suggested that section 3 of the Reciprocal Enforcement of Judgments Act be rephrased as follows:

- (3) 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 alleged judgment or concerning the person of the alleged judgment debtor.

This is the solution adopted in France, although it is often held that a competent foreign court, not a proper one under the standards of its domestic jurisprudence, may have its judgments recognized in France, if the parties did not attack the validity of the judgment through an appeal.¹⁹¹ The French court will determine whether, according to the foreign law, there is a valid and enforceable decision in the foreign country.¹⁹² This is quite different from the English view in *Pemberton v. Hughes*, where the court assuming the divorce to be void under Florida law, held that it should be treated as valid under English law since the tests applied to foreign judgments under that law were satisfied in this case. When a problem of characterization appears in the determination of the proper court, the French judge will apply the foreign rule of solution of conflicts.¹⁹³

¹⁹¹Cass. Req. 27 avril 1870, S. 1871.1.91; Cass. Req. 20 nov. 1894, S. 1894.1.445; Chambery 13 août 1900, S. 1903. 2. 305; Cass. Civ. 4 avril 1906, S. 1907. 1. 341; Seine 26 fév. 1919, Revue 1921 p. 68; Seine 11 mai 1928, Revue 1929 p. 267; Cass. Civ. 1931 19 janv. Revue 1931 p. 517; Cass. Civ. 20 Déc. 1937, S. 1938, 1, 126; Trib. Besançon 23 juillet 1937, Revue 1939 p. 149; Cass. Req. 27 avril 1810, S. 71. 1. 91; Cass. Civ. 20 dec. 1937, S. 1937. 1. 126; compétence *ratione materiae*: Cass. Civ. 4 avril 1906, Clunet 1906, 791; *ratione loci*: Besançon, 20 nov. 1889, G.P. 89, 2, 665; Cass. Req. 16 mars 1932, S. 33. 1. 33.

¹⁹²Cass. Req. 16 mars 1932, S. 1933. 1. 33.

¹⁹³See Niboyet, *op. cit.*, III, s. 967.

The determination by the French courts of the proper foreign court has been challenged by some French writers.¹⁹⁴ Res judicata is advanced by these authors as the basis for refusing the right to make such an inquiry, thus approving the Anglo-American doctrine that the enforcing court is not a court of appeal of the foreign country. This view has been rejected by Perroud¹⁹⁵ who observes that it would disregard the French doctrine which does not consider the foreign judgment as res judicata until it has been made executory by the courts. It is submitted, however, that if it is an admitted principle that the judge has a duty to inquire into the competence of the foreign court, in order to protect French sovereignty, he should leave to the defendant in the foreign country the question of challenging the proper court by way of appeal. If the foreign judgment were final and rendered by a court of competent jurisdiction, according to French rules it should be recognized and enforced. The requirement of finality will insure that the parties had ample opportunity to challenge the intraterritorial competence of the foreign court.

CONCLUSIONS

a) *Comparison of the Legal Systems.*

It is now possible to define jurisdiction as the power of the state to create interests which under the principles of Anglo-American or French law will be recognized as valid in other states.¹⁹⁶ In spite of this agreement on the essential nature of jurisdiction, there is a profound variance between the Anglo-American and French systems, which is expressed in the particular theories concerning the jurisdiction of their respective courts.

In the Anglo-American system, the doctrine relating to the jurisdiction of foreign courts limit the exercise of their power to those persons physically present within their dominion. The ability of the foreign law to create rights through judicial process is generally considered to coincide in extent with the territorial application of such law. The doctrine that the law is territorial is fundamental in the Anglo-American system, and from this principle the concept has evolved that if a foreign judgment has been granted in a foreign country according to the *lex fori*, it will be recognized in England or in the United States. This differs from the French approach in the sense that the foreign judgment is not reified to the extent that its recognition amounts to giving effect to it *proprio vigore*, as it is when an exequatur is granted. It only amounts to assisting the successful party in the foreign country, by allowing him to use the judicial machinery of the forum to revidicate a foreign judgment which under the territoriality doctrine was designed to have effect only

¹⁹⁴Bartin, *Principes*, I, s. 209; Pillet, *op. cit.*, II pp. 649 and 656.

¹⁹⁵Perroud, *Rep. de droit int., Décisions judiciaires étrangères*, s. 111; agree Batiffol, *op. cit.*, (1954), s. 756.

¹⁹⁶Jurisdiction in the international sense can also be defined as the extent to which foreign countries may create rights through their courts and have those rights recognized abroad.

where it was rendered. The recognition of foreign judgments is necessary from an economic point of view, but too wide a recognition would be dangerous and leave the door open to decisions emanating from unreliable foreign tribunals; therefore, the territoriality doctrine acts as a limiting force, by prescribing the conditions upon which a foreign judgment will be recognized as an operative fact.

Conditions of recognition are embodied in the rules of law which determine when foreign courts have jurisdiction. 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-American 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,¹⁹⁷ which has been, as in the case of the French law of jurisdiction, projected into the international field. The early cases concerning international jurisdiction have been decided on the basis of the common law rules of procedure.¹⁹⁸

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 Anglo-American and French courts. Voluntary appearance does not necessarily involve any physical power or relationship between the defendant and the foreign forum.¹⁹⁹ 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 durable²⁰⁰ and direct.²⁰¹ Furthermore it is difficult to maintain that domicile and nationality are purely physical relations.²⁰²

¹⁹⁷Holmes: "The Foundation of Jurisdiction is Physical power." *McDonald v. Mabee*, 243 U.S. 90 (1916); *Hess v. Pawloski*, 274 U.S. 352 (1927); Procedural due process and jurisdiction: See opinion of Stone, C.J. as to what constitutes physical power: *International Shoe Co. v. State of Washington*, 326 U.S. 310, 66 S. Ct. 154, 90 L. Ed. 95 (1945); see also *Tallack v. Tallack*, [1927] P. 211.

¹⁹⁸As to the physical power theory, see Dodd, *Jurisdiction in Personal Actions*, (1929), 23 III. L. Rev. p. 427.

¹⁹⁹*Doherty v. Goodman*, 294 U.S. 623 (1935).

²⁰⁰Dodd, *Jurisdiction in personal actions* (1929), 23 III. L. Rev. 427-441; Carrying on business must be for a reasonable period of time.

²⁰¹Ownership of property within the territory of the foreign state is insufficient for jurisdiction in personam over the owner; and a foreign corporation must be directly carrying on business in the foreign country to found jurisdiction in personam over it: see *The Holstein* (1936), 155 L.T. 466; see also *Pennoyer v. Neff*, 95 U.S. 714 (1878).

²⁰²*Grubel v. Nassauer*, 210 N.Y. 149, 103, N.E. 1113; Dicey, *op. cit.*, p. 362.

On the basis of these considerations, it has been asserted that there has been some shifting of the basis of jurisdiction recognized in the Anglo-American system. Evolving from the physical power theory based on the common law, decisions have been rendered recognizing jurisdiction, which by virtue of a statute was assumed over persons who were abroad and thus not within the power of the court, as in the case of extraterritorial service of process over residents.²⁰³ This culminated in *Travers v. Holley*²⁰⁴ where the English courts conceded to the foreign courts the same rights of jurisdiction which they claimed for themselves by virtue of local statutes. As a result, 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 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 Dean Read that if the primary basis of jurisdiction is physical power there are also secondary considerations of reason, expediency, and fairness involved in it. This author 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."²⁰⁵

French rules of jurisdiction laid down for domestic causes of action, and extended by the courts to foreign causes of action, emphasize the domicile of the defendant or of the plaintiff as a proper forum, without considering any aspect of the physical power theory, except as a matter of convenience in order to avoid costs of litigation. However, this aspect of the French rules of jurisdiction is secondary because French legal theorists have elaborated a group of exceptional rules within a frame of reference which conceives jurisdiction as an exclusive national system. Thus, in most instances, the jurisdiction of French courts is vitally affected by the nationality of the parties to the suit, and the legal as well as political relations are the dominant factors to the detriment of either the physical relation or the reasonableness or effectiveness doctrines. The French approach to the problem of jurisdiction should certainly not be commended. As has been demonstrated earlier, it is the logical consequence of the application of the principle of sovereignty which in the French system is not equivalent to territoriality. Sovereignty does not stop at the boundary.

²⁰³Ross, *The Shifting Basis of Jurisdiction*, (1933), 17 Minn. L. Rev. 146.

²⁰⁴[1953] P. 246.

²⁰⁵Read, *op. cit.*, Ch. VII.

Another fundamental difference between the rules prevailing in France and in Anglo-American countries arises from the fact that under Anglo-American law, personal service within the state will confer jurisdiction, although the defendant is not domiciled within the state and the cause of action did not arise there and has no connection therewith; whereas under French law mere personal service of process within the state does not confer jurisdiction.²⁰⁶

To a certain extent these differences are immaterial because the function of the courts in each country is to protect and to give effect to rights which by operation of law have become settled. If, therefore, each country through its own system of procedure strives to put into practice such principles and achieves the same results, the methods by which they are reached are less important than the results achieved.

On the other hand, a lawyer wants to have a full knowledge of the precise methods to be used to give effect to foreign judgments, because each case depends, to a great extent, upon the ability to employ the legal system of a particular state to achieve justice within the existing patterns of procedure. No legal right exists by nature. In the field of private international law, especially with regard to the jurisdiction of foreign courts, the forum should apply its own conflict rules, or as in France, whatever law is considered proper to give effect to what it believes socially and economically desirable, without regard to the attitude of the foreign courts. In other words, jurisdiction should be tested exclusively according to the principles in force in the forum. Both the Anglo-American and the civil law systems agree on this point. It is in the application of this rule that they differ.

b) *Possible solutions*

(i) *At the international level*

Attempts to elaborate an internationally satisfactory system of jurisdiction have never met with success. The continental internationalist school of the 19th century thought that international law could compulsorily regulate judicial jurisdiction among the states.²⁰⁷ This theory never had any following in common law countries and has been gradually abandoned. Of course international law imposes upon municipal jurisdiction well-known limitations in respect to foreign states; but beyond this it would be difficult to find in international law further limitations upon jurisdictional sovereignty. Perhaps the recognition of a foreign judgment would be granted more readily where the assumption of judicial power by the foreign tribunal is in accord with inter-

²⁰⁶Jurisdiction of the French courts even in personal action is never based upon personal service on the defendant; but for the validity of a judgment it is necessary that the defendant should have been properly cited. De Lapradelle et Niboyet, *Répertoire de Droit International*, (1929), vol. 5, *Décisions judiciaires étrangères*, pp. 404 et seq.

²⁰⁷(1889), 2 von Bar, *Theorie und Praxis des Int. Privatrechts*, s. 416.

national equity. This, however, is a matter of sentiment rather than law and cannot be seriously considered.

Private unification or bilateral treaties may be a good device to bring about a better system of international jurisdiction. Many attempts have been made in that direction, the most noteworthy being the Bustamente Code.²⁰⁸ This code, which was adopted by numerous South American civil law countries, provides in article 423 that every civil or commercial judgment rendered in one of the contracting states shall have force and may be executed in the others if, among other conditions, the judge or the court which rendered it had competence to take cognizance of the matter and to pass judgment upon it in accordance with the following rules:

318—The judge competent in the first place to take cognizance of suits arising from the exercise of civil and commercial actions of all kinds shall be the one to whom the litigants expressly or impliedly submit themselves, provided that one of them at least is a national of the contracting state to which the judge belongs or has his domicile therein. . . .

319—The submission can be made only to a judge having ordinary jurisdiction to take cognizance of a similar class of cases in the same degree.

320—In no case shall the parties be able to submit themselves expressly or impliedly for relief to any judge or court other than that to whom is subordinated according to local laws the one who took cognizance of the suit in the first instance.

321—By express submission shall be understood the submission made by the interested parties in clearly and conclusively renouncing their own courts and unmistakably designating the judge to whom they submit themselves.

322—Implied submission shall be understood to have been made by the plaintiff from the fact of applying to the judge in filing the complaint and by the defendant from the fact of his having, after entering his appearance in the suit, filed any plea, unless it is for the purpose of denying jurisdiction. No submission can be implied when the suit is proceeded with as in default.

These articles are substantially in agreement with Anglo-American practice, and their adoption by civil-law countries shows that the principle of submission is as strong in that system as in the common-law system. On the other hand, resort to physical presence, domicile or allegiance is only treated in the Code as a subsidiary rule. Articles 323, 330, 331 and 332 provide that:

323—Outside the cases of express or implied submission without prejudice to local laws to the contrary the judge competent for hearing personal causes shall be the one of the place where the obligation is to be performed and in the absence thereof the one of the domicile or nationality of the defendants and subsidiarily that of their residence.

330—In respect to acts of voluntary jurisdiction, saving also the case of submission without prejudice to local laws to the contrary, the competent judge shall be the one of the place where the person instituting it has or has had his domicile or, if none, his residence.

331—Respecting acts of voluntary jurisdiction in commercial matters, apart from the case of submission without prejudice to local laws to the contrary, the competent judge shall be the one of the place where the obligation should be performed or in the absence thereof the one of the place where the event giving rise to them occurred.

332—Within each contracting state the preferable competence of several judges shall be in conformity with their national law.

²⁰⁸(1928), 86 *League of Nations Treaty Series* p. 111.

It seems that the provisions of this Code blend harmoniously the jurisdictional principles of the common law and civil law. However, they are not sufficiently clear or progressive to attract world-wide acceptance.

Recently the United Nations produced a draft convention on the recovery abroad of claims for maintenance.²⁰⁹ In article 3 of this draft it is provided that the courts competent to issue maintenance orders for the purpose of this convention shall be:

- a—The courts of the country in which the obligor was resident when the proceedings were instituted,
- b—The court to the jurisdiction of which the obligor submitted, either by agreement or by voluntarily appearing in the proceedings, except where such appearance was solely for the purpose of contesting the jurisdiction of the court.

This draft is in conformity with Anglo-American practice and represents what would term the minimum requirements of jurisdiction. It must be noted that there is no reference to the principles of allegiance or domicile.

If we turn our attention towards bilateral treaties which are at the present time in force between civil-law and common-law countries, we find the very successful English Foreign Judgment (Reciprocal Enforcement) Act, 1933,²¹⁰ which has been applied to France and Belgium. Section 4 of this Act provides that on an application made by any party against whom a registered judgment may be enforced, the registration of the judgment shall be set aside if the registering court is satisfied that the courts of the country of the original court had not jurisdiction in the circumstances of the case. This is the reaffirmance of the basic principle that jurisdiction is to be determined by the law of the forum.

Section 4 (2) states that, for the purpose of the Act, the courts of the country of the original court shall be deemed to have had jurisdiction in the case of a judgment given in an action in personam:

- (i) if the judgment debtor being a defendant in the original court submitted to the jurisdiction of that court by voluntarily appearing in the proceedings otherwise than for the purpose of protecting, or obtaining the release of property seized or of contesting the jurisdiction of that court; or
- (ii) if the judgment debtor was plaintiff in, or counterclaimed in the proceedings in the original court; or
- (iii) if the judgment debtor, being a defendant in the original court had before the commencement of the proceedings agreed in respect of the subject matter of the proceedings, to submit to the jurisdiction of that court or of the country of that court; or
- (iv) if the judgment debtor, being a defendant in the original court was at the time when the proceedings were instituted resident in, or being a body corporate had its principal place of business in the country of that court; or
- (v) if the judgment debtor, being a defendant in the original court, had an office or place of business in the country of that court and the proceedings in that court where in respect of a transaction effected through or at that office or place;

It is significant that for the purpose of this Act a foreign court is deemed to have had jurisdiction if the defendant was resident in the country of that

²⁰⁹E/AC 39/1 (1952).

²¹⁰23 & 24 Geo. V c. 13.

court at the time when the action began, while domicile or allegiance is not mentioned at all. On the other hand, mere presence of the defendant in the foreign country when the obligation, in respect of which the action is brought, was incurred in that country, is not sufficient to give jurisdiction to the courts of that country. Submission is the second great principle adhered to by the Act: Submission of the plaintiff if he selected the foreign court, or submission of the defendant if he voluntarily appeared otherwise than for the purpose of contesting jurisdiction or to save property threatened by seizure or already seized. The Act also recognizes the validity of a contract to submit to the jurisdiction of the foreign court. So far this Act contains the most reasonable approach to the problem of jurisdiction.

(ii)—*Unification in federal states.*

In the United States there have been some attempts to unify the various practices for enforcing foreign judgments in the different states of the Union. We find the Uniform Support of Dependents Act and also the most important Uniform Enforcement of Foreign Judgments Act.²¹¹ In the latter Act no attempt is made to lay down the rules for the determination of the competence of the foreign court. It is merely stated in article 8 that any defence which under the law of the enforcing state may be asserted by the defendant in an action on the foreign judgment may be presented by appropriate pleadings. The common-law rules thus remain in full force and may vary from state to state.

In Canada the Reciprocal Enforcement of Judgments Act is a duplicate of the English Foreign Judgments (Reciprocal Enforcement) Act 1933, while the Uniform Foreign Judgments Act contains only a codification of the rules found in *Emanuel v. Symon* by listing the cases in which a foreign court has jurisdiction.

(iii)—*Projects in France*

In France there has also been an attempt to codify the rules of jurisdiction recognized by French courts.²¹² Article 136 of the draft of the Commission for the Reform of the Civil Code provides that a court may enforce a foreign judgment only after, either on its own motion or upon the request of the defendant, it has verified that:

Jurisdiction over the litigation did not belong to a French court.

²¹¹(1948), *Handbook of the National Conference of Comm. on Uniform State Law*, 78.

²¹²[1949-50] *Travaux de la Commission de Réforme du Code Civil* (1951), 801; *La Codification du Droit International Privé* (1956), p. 19 et seq. and p. 224 et seq.; Nadelman & von Mehren, *Codification of French Conflicts Law* (1952), 1 Am. J. of Comp. Law 404 at 426.

This paragraph seems to be improperly drafted as it would prevent the enforcement of a judgment where the international competence of the French courts exists on a non-exclusive basis. For instance, where there are two defendants to the original action, one domiciled in France and one abroad, the courts of the domicile of each party are competent to decide the controversy. However, according to article 136 a judgment rendered by the court of the foreign domicile of one of the defendants could not be recognized in France since a French court was also competent by virtue of the French domicile of the other defendant. This is reinforced by the last paragraph of article 136.1, which provides that:

The jurisdiction of a foreign court over a person secondarily obligated based solely on jurisdiction over the principal debtor, as well as jurisdiction of a foreign court over a defendant based solely on jurisdiction over one of the other defendants, and jurisdiction of a foreign court based solely upon the connection of the proceeding with other litigation, does not deprive the French court of jurisdiction over those parties as to which they would otherwise have jurisdiction.

In other words, there is an exclusive competence for some parties and not for others, a situation which calls for redrafting, as it does not represent the present status of French law.

Article 136 also provides that where no French court was competent the foreign courts which rendered the judgment "must have jurisdiction under the rules applicable in its own country". This rule, introduced by Niboyet and approved by Batiffol, is contrary to the present jurisprudence which tests the international competence of the foreign court according to French rules of conflicts. It is supposed to facilitate the enforcement of foreign judgments in France without endangering French sovereignty, since no domestic court is exclusively competent. I find this innovation unrealistic as, *a priori*, the foreign court must have had jurisdiction according to its own law. An inquiry into that jurisdiction appears to me superfluous especially if French courts interpret the foreign law according to their own views. The enforcing court must not act as a court of appeal for the foreign decision. As I have stated before, the best solution is to apply the conflict rules of the enforcing court to the determination of the international competence of the foreign court. This requires the formulation of true conflict of jurisdictions rules and not a mere extension of the French domestic rules.

An inquiry as to whether the foreign court is a proper one (internal or special competence) should also be rejected.

The solution proposed by the draft presents some difficulties where a French court is requested to enforce two conflicting foreign money judgments rendered by courts competent under their own law. What criterium will the French court adopt in selecting one of the judgments? To solve this problem it would seem necessary to include a subsidiary rule in article 136 providing for the application of French rules of conflict of jurisdictions in the case of conflicting judgments. Article 136, paragraph two, would then read as follows:

The court must verify: Whether the foreign court which rendered judgment had jurisdiction under the rules applicable in its own country except in the case where two conflicting judgments are sought to be enforced.

Actually I would prefer to see article 136 drafted in the following manner:

The court must verify: Whether the foreign court which rendered the judgment had international jurisdiction under French rules of private international law.

Chapter V of the draft (articles 114-132) enumerates the cases in which French courts are directly competent on an exclusive or non-exclusive basis.

Section I deals with jurisdiction on the subject matter of the litigation. Articles 114 to 116 which restate the present law enumerate the cases in which French courts have jurisdiction on a non-exclusive basis. The text of article 114 is not clear when it states that:

French courts have jurisdiction: In proceedings involving rights in personam, if the domicile or, in the absence of domicile in France, the residence of the defendant is in France, or if the plaintiff proves either that no foreign court has jurisdiction or that none is accessible.

Jurisdiction is given to French courts where a defendant is resident in France. Does this mean that jurisdiction can exist only in the absence of domicile in France or abroad? It seems that the drafters intended to adopt the latter solution which is that followed by the courts. Therefore it would be better to eliminate the words "in the absence of a domicile in France".

Article 115 also needs to be clarified when it states that:

Unless there has been an election of domicile in favor of another French or foreign court, the following proceedings may be brought by the plaintiff before the French courts.

This provision deals with the waiver of permissive competence of French courts when there has been an election of domicile. Strictly speaking there cannot be an election of domicile in favor of another court, especially a French one since this article refers to international jurisdiction only. The article should read as follows:

Unless there has been an election of domicile in a foreign country

Where French courts have jurisdiction pursuant to the provisions of article 115, venue is determined by the rules of domestic law. Domicile is also determined by French law.

Article 117 deals with the exclusive jurisdiction of French courts. To a certain extent the draft goes too far. Exclusive jurisdiction is justified in the case of rights in rem and *fonds de commerce* located in France, but it is abusive in the case of moveable property. Jurisdiction in the case of moveables located in France should be permissive only, by virtue of the rule *mobilia sequitur personam*. This is the present French jurisprudence. In the case of corporations, it is possible to argue that French courts should have exclusive jurisdiction if the transaction which is the subject of the litigation was concluded in France.

As for insurance it is reasonable to grant French courts exclusive jurisdiction if the damaged immovable which is insured is located in France. On the other hand, the jurisdiction of French courts should be permissive in the case of personal injuries, if the injury occurred in France. Why force two American tourists to sue in France for damages occurring out of an accident which has taken place there; or if a Frenchman has been hurt, why should the French courts refuse to recognize a judgment rendered in the United States against an American insurance company?

The last paragraph of article 117 provides that French courts have exclusive jurisdiction whenever a French police law or a French rule of public policy is to be applied. The drafters should specify whether this means any action based on a French law of police or an action based on French law, where the proper foreign law has been set aside by the application of French notions of public policy. Article 118 deals with venue in the case where a French court has exclusive jurisdiction.

It must be noted here that the distinction between the exclusive and non-exclusive jurisdiction of French courts is only of interest in the case of recognition and enforcement of foreign judgments; yet article 136 is silent on this point, a defect which should be remedied.

Sections II and III of the draft show the impact of political considerations on conflict problems. Section II (Articles 121-126) develops the rules already stated in articles 14 and 15 of the Civil Code which give a French citizen the privilege of pleading before a French court either as a plaintiff or as a defendant. These rules, which are also extended to corporations controlled by French citizens, seems to be completely useless since in all cases they can be set aside by the parties.

Article 126 states that the fact that all parties are of foreign nationality is not alone sufficient for a refusal by the French courts to take jurisdiction. This provision is out of place here as it is implied in article 34 which provides that:

An alien has in France the same rights as French nationals with the exception of political rights and rights which are expressly withheld by law.

The whole impression given by the draft is that it is a consolidation of the already existing law as expounded by the courts. One finds here a common-law process which has ultimately resulted in codification. The only innovation, and one must admit that it is of importance, is that the "compétence générale indirecte" must be tested by the law of the foreign court rather than by that of the forum.

c)—*Proposals*

There is no doubt that the establishment of a general principle for determining the cases in which the court of the forum must regard the foreign court as having jurisdiction over the person of the defendant is the most important

and the most difficult element in the whole problem of foreign judgments. There is no international rule of jurisdiction. Each system has developed its own rules for the jurisdiction of its courts and does not want to modify them, as they are deemed to be best adapted to the needs of the nation. The result is that the courts of one system frequently claim jurisdiction over persons whom the courts of a second system consider to be within their jurisdiction. For instance, the courts of country A claim jurisdiction over a person who is primarily within the jurisdiction of country B on the ground of nationality or domicile which the courts of country B do not consider sufficient to create jurisdiction. In such cases it is equally difficult for the courts of the first system to abandon the jurisdiction based on nationality as for the courts of the second system to agree to enforce judgments based on such jurisdiction.

At the present time, in view of the great diversity of legal systems, it does not seem possible to establish universal rules of jurisdiction. However, progress is not impossible, and the Foreign Judgments (Reciprocal Enforcement) Act 1933, stands as a proof of the great results which can be achieved through the use of bilateral treaties. In such treaties it is possible to define the minimum of grounds on which a court's jurisdiction must be based in order to give its judgments claim to recognition abroad. The introduction of a provision for reciprocal recognition of jurisdiction would also greatly facilitate the recognition of foreign judgments. To alter the jurisdictional principles in force in one country may produce great disturbance, as it is difficult to separate one legal institution from another or one rule of procedure from another, without endangering the whole structure. Changes in this field may cause internal conflicts which may outweigh in importance the comparatively small advantages which most countries would secure from obtaining execution of the judgments of their courts in foreign countries. Thus a positive enumeration of the circumstances in which a foreign court is deemed competent according to the law of the forum appears to be the best solution. It still preserves the French distinction between "*compétence directe*" and "*indirecte*", since all the French courts need to determine are the cases in which a foreign court is competent, impliedly reserving for themselves competence in other cases.

The only obstacle to unification in this field between the French and the Anglo-American systems is the preeminence given to nationality in the civil law. However, if nationality is treated on an equal basis with domicile, residence etc., possibilities of agreement are numerous. The fact that allegiance, as a ground of jurisdiction, can be waived is another proof that this is not really an insuperable obstacle. Presence and submission are still today the two basic principles which should be resorted to in any logical unified jurisdictional system. Perhaps submission could be the common denominator for the French and Anglo-American rules of jurisdiction, since even under the strict French system, jurisdiction based on nationality can be waived by the parties who can select the forum which they want. Of course there is still the problem of the

exclusive jurisdiction of the French courts, but after all this is not different from the Anglo-American system. In both systems the national courts have exclusive jurisdiction in certain cases, as for instance in the case of land situated within their territory or patents delivered by the state.

To sum up, there appear to be, as far as principles are concerned, several different possibilities:

- 1—The forum may test the jurisdiction of the foreign court according to the conflict rules of the forum.
- 2—The forum may test the jurisdiction of the foreign court according to the rules in force in the foreign law district.
- 3—There may be a double examination: the foreign court must have jurisdiction according to the conflict rules of the forum and according to its own rules.
- 4—The forum may apply its own domestic rules of procedure to determine whether it were directly and exclusively competent to deal with the original cause of action. If the answer be positive, then the foreign court did not have jurisdiction. If on the other hand the forum were not directly and exclusively competent, it may apply tests 1, 2 or 3, or apply the domestic rules of the forum in order to determine the competence of the foreign court.
- 5—Finally in cases 1, 2, 3 & 4, the forum may determine which foreign court was competent *ratione materiae* and *ratione loci* (e.g. whether the foreign court were the proper court).

In my opinion solution 1 is the best one.

Once it is admitted that the enforcing court will test the jurisdiction of the foreign court exclusively on the basis of its settled conflict rules, it still remains to be determined what these rules should be. It seems to me that they should be based on physical power, submission and reciprocity. As to the latter principle there is no reason why the forum should not recognize a jurisdiction which it itself claims. However, this principle should be accompanied by the rule that the defendant be given notice of the suit and have an opportunity to be heard.

As far as a concrete proposal is concerned, serious consideration has been given to the Foreign Judgments (Reciprocal Enforcement) Act 1933, as a model draft, especially in view of the fact that it has operated satisfactorily between civil law and common law countries. However, in view of the changing conditions in this world, certain modifications of its rules have been deemed necessary. These modifications are the result of the discussion which has taken place in this article.

PROPOSAL

It is proposed that the courts of a foreign state acquire jurisdiction to deliver judgment against a party in actions in personam:

I—

- 1—Where he was present within the foreign state at the time when the proceedings were instituted, otherwise than by force or by fraud; or
- 2—Where he resided in the foreign state at the time when the proceedings were instituted; or
- 3—In the case of a corporation where it has its principal place of business in the foreign state or is engaged in substantial business in its dominions and the proceedings in that court were in respect of a transaction effected there; or

- 4—Where he expressly contracted to submit to the particular foreign court; or
- 5—Where he was the plaintiff in the foreign suit; or
- 6—Where as a defendant he counterclaimed in any circumstances; or
- 7—Where he voluntarily appeared in the proceedings otherwise than for the purpose of protecting property already seized; or
- 8—Where the foreign court exercised jurisdiction under circumstances similar to those in which the courts of the forum assume jurisdiction; or
- 9—Where the original jurisdiction of the foreign court is for some other reason recognized by the law of the forum.

And: II

- 1—The courts of the forum will not inquire whether the foreign court is the proper court under its own law.
- 2—Jurisdiction once acquired will persist until the final decision of the dispute is reached.