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## Procedure and The Conflict of Laws

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### Introduction

The enforcement of a validly acquired foreign or domestic right is a matter of procedure governed by the *lex fori*.

A Canadian court always applies its own procedural rules to a case involving a foreign element pending before it even though the merits of the controversy are governed by some foreign law. Never will the court apply a foreign rule that is procedural.

The court in which the action is pending cannot be expected to submit to foreign procedural rules. It must conduct the proceedings according to its own rules. Although it may be bound to apply foreign law, this does not mean that the court must apply *all* the relevant rules of the *lex causae*. In other words, there is no vested right in procedure.<sup>1</sup> A person invoking the jurisdiction of the court must take its procedure as he finds it. There ought to be no difference between the position of a foreign and a local litigant.

Thus, in *De la Vega v. Vianna*,<sup>2</sup> Lord Tenterden, C.J. said:

A person suing in this country must take the law as he finds it; he cannot, by virtue of any regulation in his own country, enjoy greater advantages than other suitors here, and he ought not therefore to be deprived of any superior advantage which the law of this country may confer. He is to have the same rights which all the subjects of this kingdom are entitled to.<sup>3</sup>

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<sup>1</sup> *Northern Trusts Co. v. McLean*, (1926), 58 O.L.R. 683, 30 O.W.N. 153, [1926] 3 D.L.R. 93 (C.A.), citing *Livesley v. Horst Co.*, [1925] 1 D.L.R. 159.

<sup>2</sup> (1830), 1 B. & Ad. 284, at p. 288, 109 E.R. 792. Approved in *Baxter v. Jacobs*, (1889), 1 B.C.R. (part 2) 373; arrest of defendant governed by *lex fori*. See also *Brown v. Hudson*, (1826), Taylor 390 (C.A.): mode of recovery of debt governed by *lex fori*.

<sup>3</sup> See also *Bondholders Securities Corporation v. Manville*, [1933] 3 W.W.R. 1, at p. 6, [1933] 4 D.L.R. 699 (Sask. C.A.); *Colonial Investment & Loan Co. v. Martin*, [1928] 1 W.W.R. 245, at p. 247, 37 Man. R. 215.

## I. General

### a) *Nature of procedure*

The concept of procedure refers to the "mode of proceeding by which a legal right is enforced, as distinguished from the law which gives or defines the right, and which by means of the proceeding the Court is to administer the machinery as distinguished from the product".<sup>4</sup> In other words, procedure pertains to the methods of presenting to a court the operative facts upon which legal relations depend. It is primarily concerned with the machinery for enforcing a right by action in the courts and includes *inter alia*, the forms of action, the parties to the action, the determination of the proper court, the time within which the action must be brought, the nature and extent of the remedy, rules of practice and pleadings, questions of evidence and the execution of judgments.

This article will be limited to a study of some matters of procedure that have been before Canadian courts and are of particular importance in the conflict of laws.

### b) *Characterization*

The question whether or not a particular rule of the *lex fori* or of the *lex causae* is one of substance or procedure is not easy to answer. The difficulty, as so often, is not the statement but the application of the principle. What test should be used by the court to distinguish between substance and procedure?

The distinction between substance and procedure, or right and remedy, is an important subject of characterization. If as a result of characterization of the factual situation, the proper law selected is the *lex fori*, the court will apply all the rules of the law of the forum, whether substantive or procedural. In such a case there is no need to distinguish between substance and procedure. If the result is that the proper law is a foreign law, the court will have to enquire whether the action must nevertheless be dismissed on the ground of non-compliance with some procedural rule of the *lex fori*. If the answer to this enquiry is in the affirmative, there will be no need to resort to any foreign law, but if the answer is in the negative, the court will have to be informed about the foreign law, and will then have to characterize the provisions of

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<sup>4</sup> *Poyser v. Minors*, (1881), 7 Q.B.D. 329, *per Lush*, L.J. at p. 333; also *Livesley v. Horst Co.*, [1925] 1 D.L.R. 159, at p. 161, [1924] S.C.R. 605, at p. 608, *per Duff*, J.

that law, disregarding those provisions that are procedural, and applying only those that are substantive.

The characterization of a particular rule whether foreign or domestic, as substantive or procedural, cannot be done *in vacuo*. The solution depends upon the objectives to be achieved by the court in the case that is pending before it. The general objectives of conflict of laws must also be taken into consideration. Procedure and substance are not clear cut and inalterable categories. Their contents may vary from case to case. The line that may be drawn between substance and procedure is not the same for all times and for all purposes. Logical analysis is of little help here. Practical and policy considerations seem to be paramount.

Depending upon the nature of the problem and the relevant circumstances, the court may have some good reasons to characterize a foreign rule as procedural although it is not so according to the concepts of the foreign legal system. This is better than resorting to public policy. However, the concepts of the *lex fori* applicable to purely domestic situations should not necessarily be used in order to characterize the foreign rule. A domestic rule may never have been designed to deal with international situations. The fact that a particular local rule is procedural by the *lex fori* does not always mean that a similar foreign rule should receive the same characterization.

It seems to be more practical for the court faced with the characterization of a foreign rule of law to refer to the concepts of that law in order to ascertain the nature of the rule, provided that the result is not incompatible with the purpose of the conflict rules of the forum and provided that the foreign rule is not characterized in the foreign law for some domestic purpose of that law.

Thus Falconbridge states:

If the foreign rule is characterized in the foreign law for some domestic purpose of the foreign law, the characterization is obviously immaterial. Even if the foreign rule is characterized in the foreign law for some purpose of the conflict rules of that law, it does not follow that the court must characterize the rule in the same way for some purpose of a conflict rule of the law of the forum; a different characterization may be required so as to give effect to the purpose of the conflict rule of the law of the forum.<sup>5</sup>

Of course, when characterizing a domestic rule, the court will apply the concepts of the *lex fori*. Yet it is submitted that in doing

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<sup>5</sup> J.D. Falconbridge, *Essays on the Conflict of Laws*, (1954), 2nd ed., p. 304.

so, the court should keep in mind that it is dealing with a case involving foreign elements. The forum should not always try to extend the application of the *lex fori* to such a case. As Falconbridge points out:

...a court should not, without due consideration of the consequences, characterize a rule of law of the forum as procedural in the conflict of laws, even though the rule may be characterized as procedural for some domestic purpose.<sup>6</sup>

As a matter of policy it would seem desirable to restrict the scope of the procedural definition so as not to frustrate the fundamental purposes of conflict of laws. The test should be: is the foreign rule too inconvenient to apply?<sup>7</sup> If the answer is negative the foreign rule is substantive.

In general, Canadian courts have held that whatever relates to the remedy employed is procedural, and whatever relates to the rights of the parties is substantive. This distinction is inadequate and not helpful as it is still necessary to determine whether the foreign or domestic rule relates to the right or to the remedy. Actually, in order to decide whether a rule is substantive or procedural one must analyse the specific questions calling for decision as well as their legal background and factual context.

In Canada, the courts have often had to determine (a) whether the relevant foreign rule or statute is substantive or procedural, (b) whether the relevant domestic rule or statute is procedural or substantive. In case (a) characterization should be by the *lex causae* whereas in case (b) it should be by the *lex fori*. However, as mentioned above, these solutions should be tempered by policy considerations.

## II. Contents of Procedure

### 1) *The Existence and Enforcement of the Right of Action*

In *German Savings Bank v. Tétrault*<sup>8</sup> which involved a loan upon the security of two mortgages on properties located in New York, the plaintiff issued foreclosure actions in that State upon these mortgages.

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<sup>6</sup> *Ibid.*, at p. 304.

<sup>7</sup> See W.W. Cook, *The Logical and Legal Bases of the Conflict of Laws*, (1942), p. 166: "How far can the court of the forum go in applying the rules taken from the foreign system of law without unduly hindering or inconveniencing itself?"

<sup>8</sup> (1904), 27 C.S. 447 (Que.).

The price realized by the sale of the properties being insufficient to pay the whole of the indebtedness, the plaintiff sued the defendant in Quebec for the deficiency. The defence was based on Article 1628 of the New York Code of Civil Procedure which read as follows:

While an action to foreclose a mortgage upon real property is pending, or after final judgment for the plaintiff therein, no other action shall be commenced or maintained to recover any part of the mortgage debt, without leave of the court in which the former action was brought.

Since no leave had been obtained in New York when the plaintiff brought his action in Quebec, the defendant claimed that the plaintiff's right of action could not be exercised. The plaintiff's reply to this plea was that the provision in question was a mere matter of procedure applicable in the New York courts but not in Quebec.

In dismissing the plaintiff's action, the Quebec court came to the conclusion that the New York provision was substantive even though it was to be found in the Code of Civil Procedure. The court said:

There is as little doubt that the court here must apply the law of the State of New-York to a contract made there between persons domiciled there, in any matter which concerns the nature, substance or effect of the obligation contracted, as there is that it must apply our own law to any matter which exclusively concerns the manner of enforcing the remedy.<sup>9</sup>

The New York provision, which was imperative, affected the existence of the right and not the remedy. Since in that State no action could be commenced against the defendant to recover the sum demanded by the plaintiff without the leave of the court in which the foreclosure actions were prosecuted, the obligation of the defendant had become only conditionally valid. Leave could be granted or refused by the New York court and therefore it became a substantive part of the right of action, an indirect effect of the obligation.

The court did not characterize the New York provision by reference to the *lex fori*. The decision was based upon an analysis of this provision in the context of New York law and policy which was to protect debtors in foreclosure actions.

Where in an action brought in Ontario respecting chattels removed from land in Quebec it appeared that, according to Quebec law, the plaintiff was the owner of the land in question but would not have been allowed to bring an action until after he had first

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<sup>9</sup> *Ibid.*, at p. 450.

established his title to the land by a special petitory action, the court held that he could sue in Ontario without having brought the petitory action. The Quebec requirement was procedural and could not be relied upon in Ontario.<sup>10</sup>

In *Valentine v. Hazelton*,<sup>11</sup> the plaintiff, who was the surety on an administration bond, was able to sue the former administrator of the estate for money he had used without actually having to pay the money into the estate under the bond since he had himself become the administrator and payment was not necessary under the law of Massachusetts which governed the succession.<sup>12</sup>

On two occasions the courts have had to characterize section 18 of the *Limitation of Civil Rights Act* of Saskatchewan<sup>13</sup> which provides that when an article is sold, the price of which exceeds \$100, and the vendor, after delivery, has a lien thereon for all or part of the purchase price, "... the vendor's right to recover the unpaid purchase money shall be restricted to his lien upon the article sold, and his right to repossession and sale thereof".

This section changes the common law rule which enables the vendor to forfeit the cash payment, sell the article and thereafter recover from the debtor the balance of the purchase price remaining due. It may therefore be considered as falling within the class of remedial statutes. There is nothing in the *Limitation of Civil Rights Act* which purports to make the contract entered into between the parties void.<sup>14</sup> The *obligatio* remains, the *actio* is postponed. Section 18 makes the right of the plaintiff to recover judgment on the contract unenforceable in Saskatchewan provided it is pleaded by

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<sup>10</sup> *Stuart v. Baldwin*, (1877), 41 U.C.Q.B. 446.

<sup>11</sup> (1868), 12 N.B.R. 110 (C.A.).

<sup>12</sup> The question whether the personal representatives of a deceased are discharged by the death of a joint contractor was erroneously held to be governed by the *lex fori* in *Gilmour v. Crooks*, (1843), 2 Ont. Case Law Dig. 2840. As to whether article 1489 of the Quebec Civil Code — which prevents an owner from reclaiming his stolen property if it is in possession of a person who bought it in good faith from a trader in similar goods or in a market overt, until he reimburses to him the price he has paid for it — is a provision which affects substantive rights or merely prevents recovery and therefore is procedural, see *McKenna v. Prieur & Hope*, (1924), 56 O.L.R. 389, 27 O.W.N. 344 (C.A.), rev'g 26 O.W.N. 474.

<sup>13</sup> R.S.S. 1965, c. 103.

<sup>14</sup> However, section 27 provides that "... every agreement or bargain, verbal or written, express or implied, that this Act or any provision thereof shall not apply or that any benefit or remedy provided by it shall not be available, or which in any way limits, modifies or abrogates or in effect limits, modifies or abrogates any such benefit or remedy, is null, void and of no effect..."

the defendant. Yet this interpretation was rejected in *Canadian Acceptance Corporation Ltd. v. Matte and Matte*<sup>15</sup> and *Traders' Finance Corporation Limited v. I. G. Casselman*.<sup>16</sup>

In the *Matte* case, the plaintiff sued in the Saskatchewan courts on a promissory note for the balance remaining under a conditional sale contract governed by the law of Manitoba after the seizure and resale of the article sold for default in payment by the defendants. Section 18 was pleaded as a defence on the ground that it was a procedural rule of the forum. The Court of Appeal rejected this defence and held that section 18 is substantive as it only affects the nature of the right itself. Thus it had no application to the Manitoba contract under litigation.

Here the court characterized its own statute. There was no need to resort to the *lex causae*. In a dissenting opinion, Procter, J. A. found it impossible to distinguish the right conferred by section 18 from the right conferred by the *Statute of Limitations*. Statutes that curtail the enforcement of a right must be considered as relating to matters of procedure and not matters relating to substantive rights. The *Statute of Limitations*, if pleaded, operates as a bar to the plaintiff's claim for judgment but does not extinguish the debt. The plaintiff's substantive right to recover the debt remains and is available to him in another jurisdiction having a longer period of prescription. So also the substantive right of the plaintiff to recover his debt remains in those jurisdictions where there is no legislation similar to the *Limitation of Civil Rights Act*. Thus section 18 is procedural and the plaintiff's rights are governed by the *lex fori*.<sup>17</sup>

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<sup>15</sup> (1957), 9 D.L.R. (2d) 304 (Sask. C.A.).

<sup>16</sup> [1960] S.C.R. 242, aff'g (1959), 16 D.L.R. (2d) 183 (Man. C.A.), rev'g (1958), 11 D.L.R. (2d) 622.

<sup>17</sup> Note that in *Merchants Bank of Canada v. Elliot*, [1918] 1 W.W.R. 698 (U.K.K.B.) McCardie, J. interpreted the prohibition of action under the British Columbia *War Relief Act Amendment Act*, S.B.C. 1917, c. 74, against an army volunteer as procedural. The Act, which provided that during the continuance of the war and for six months thereafter, it should not be right to bring any action in or out of British Columbia against a person who was, or had been at any time since August 1914, resident of the Province and who had enlisted in the Army, did not invalidate any bargain, it did not limit any contractual rights or affect the substance of any agreement; it merely precluded the creditor from commencing legal proceedings. See also *Commercial Corp. Securities Ltd. v. Nichols*, [1933] 3 D.L.R. 56 (Sask.), at p. 63, *per* MacKenzie, J.A.: "Had the plaintiff found it incumbent to bring this action to recover such deficiency in Alberta, my view might have been otherwise; since then it could better have been urged that before the plaintiff could sell it should have complied in all matters of procedure with the Alberta law."

The *Matte* case was approved by the Supreme Court of Canada in *Traders' Finance Corporation Limited v. I. G. Casselman*.<sup>18</sup>

The action was brought in Manitoba on a Saskatchewan contract. Judson, J. said:

The appellant, in my opinion, has set itself an impossible task in seeking to have this legislation characterized as procedural. The section takes away a personal right of action for the balance of the unpaid purchase price if a lien is reserved. It is in no way concerned with procedural rules for the enforcement of a right. Therefore, the fact that there is no equivalent legislation in the Province of Manitoba does not help the appellant. This was undoubtedly a Saskatchewan cause of action, without a single element which might connect it with the Province of Manitoba. Even in the absence of persuasive authority it is difficult to see how the Manitoba Court could have done other than characterize the matter as one of substantive law. While it is true that the Manitoba Court must characterize this legislation by its own tests of what is procedure and what is substantive law and is not bound by what another jurisdiction may have done, there is no problem of conflicting characterization here because the Manitoba Court took the same view as that of the Saskatchewan Court of Appeal in *Canadian Acceptance Corporation Limited v. Matte* (1957), 22 W.W.R. 97, 9 D.L.R. (2d) 304, where this very section was characterized as a matter of substantive law and not procedure.<sup>19</sup>

The Manitoba court had to characterize section 18 of the Saskatchewan *Limitation of Civil Rights Act*. In doing so, Judson, J. pointed out that characterization should be by the *lex fori* and not by the *lex causae*. This is erroneous because the Manitoba court was not characterizing its own statutory rule, unless we interpret Judson, J.'s words to mean that local concepts or categories must be kept in mind when characterizing a foreign rule so as not to hold substantive a rule that would be too inconvenient to apply in the forum.

In *Scandinavian American National Bank of Minneapolis v. Kneeland*,<sup>20</sup> it was said that the right of a creditor to hold one of several joint sureties, notwithstanding the discharge of another, is a matter affecting the obligation of the contract, altering it in one of its essential elements, and such right must therefore be ascertained and determined in accordance with the laws of the place of contracting. The non-discharge of one joint surety by reason of the discharge of another is not a matter relating to the remedy, but is a part of the law relating to the substance of the contract.

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<sup>18</sup> *Supra*, n. 16.

<sup>19</sup> *Ibid.*, at pp. 247-248 (S.C.R.).

<sup>20</sup> (1914), 16 D.L.R. 565 (Man. C.A.), rev'g (1913), 12 D.L.R. 202.



In *Bateman & Litman Real Estate Ltd. v. Big T. Motel Ltd. et al.*,<sup>21</sup> it was held that section 28 of the *Real Estate Agents Licensing Act*<sup>22</sup> which provides that “[n]o action shall be brought for commission . . . in connection with a trade in real estate unless at the time of rendering the services the person bringing the action was licensed as an agent or was not required to be licensed . . .” is substantive and not procedural and consequently is no bar to an action in Saskatchewan for commission for the sale of Saskatchewan land brought by an unlicensed real estate agent carrying on business in Alberta provided the *lex causae* is that of Alberta. Statutory provisions containing the words “no action shall be brought”, or for that matter any rule that denies the right of action, should not necessarily be characterized as procedural for conflict of laws purposes.<sup>23</sup>

The Supreme Court of Canada has held<sup>24</sup> that an agreement to arbitrate any dispute that may arise between the parties, as well as an agreement to arbitrate a pending or impending dispute pertains to the law of remedies or procedure. The Court pointed out that the object of an arbitration clause is not to modify the rights of the parties but to enforce them, and how a right is enforced is a matter of procedure. It is submitted that the question whether effect should be given to an arbitration clause contained in a contract is one of substance and not of procedure.<sup>25</sup>

## 2) *Limitation of actions*

Provisions in statutes of limitations that merely specify a certain time after which rights cannot be enforced by action are procedural, they bar the remedy. Such provisions, if part of the *lex fori*, may be pleaded in any action brought before the courts, even if the merits of the case are governed by some foreign law.<sup>26</sup> On the other hand, provisions that create or extinguish the right of action are

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<sup>21</sup> (1964), 44 D.L.R. (2d) 474, 46 W.W.R. 604, aff'd (1964), 51 W.W.R. 127, 49 D.L.R. (2d) 480 (Sask. C.A.).

<sup>22</sup> R.S.S. 1953, c. 294.

<sup>23</sup> See *Gaming Act*, R.S.O. 1960, c. 159, s. 4: “...no suit shall be brought...”. Cf. *Medical Act*, R.S.O. 1960, c. 234, s. 54(c).

<sup>24</sup> *National Gypsum Co. Inc. v. Northern Sales Ltd.*, [1964] S.C.R. 144, (1964), 43 D.L.R. (2d) 235.

<sup>25</sup> See dissenting opinion of Cartwright, J. at p. 152; and see *Hamlyn & Co. v. Talisker Distillery*, [1894] A.C. 202.

<sup>26</sup> *Bowes Co. Ltd. v. American Railway Express Co.*, (1924), 26 O.W.N. 290; *Allard v. Charbonneau*, [1953] 2 D.L.R. 442, [1953] O.W.N. 381 (C.A.); *Bondholders Securities Corp. v. Manville*, [1933] 4 D.L.R. 699 (Sask. C.A.).

substantive and can only be invoked in the forum if they are part of the *lex causae*.<sup>27</sup>

No action can be brought where the remedy is barred by the *lex fori*, even though the foreign law under which the cause of action arose provides a longer period within which the remedy must be pursued.<sup>28</sup> If, on the other hand, the remedy is not barred by the *lex fori*, the action will be entertained irrespective of the *lex causae*, provided the right of action has not been extinguished by that law.<sup>29</sup>

Some of the cases seem to indicate that the courts will recognize that a cause of action or debt is extinguished by the *lex causae* only if the debtor resided in the country of the *lex causae* during the whole period of time that the debt was owing and due.<sup>30</sup> This view should be rejected. If the court applies the *lex causae* to the question of the extinction of the debt, the question of residence of the debtor is relevant only if required by the proper law. For all practical purposes the remedy must be pursued within the time fixed by the *lex fori*<sup>31</sup> no matter where the cause of action accrued.

<sup>27</sup> For instance, Ontario *Limitations Act*, R.S.O. 1960, c. 214, ss. 15, 23. S. 15 (real property) extinguishes the right whereas s. 23 (personal actions) fixes the period within which the remedy must be pursued. Most Canadian statutes of limitations destroy sometimes the right, sometimes merely the remedy.

<sup>28</sup> *Allard v. Charbonneau*, [1953] 2 D.L.R. 442, [1953] O.W.N. 381 (C.A.). (Section 61 of the *Ontario Highway Traffic Act*, now s. 147(1) of R.S.O. 1960, c. 172, imposing a limitation period of one year applied in respect of an action brought in Ontario for damages resulting from a motor car collision occurring in Quebec.) *Quaker Oats v. Denis*, (1915), 24 D.L.R. 226, 8 W.W.R. 877, 31 W.L.R. 579, 9 Alta L.R. 62, aff'g 7 W.W.R. 1008, 8 Alta L.R. 31, 19 D.L.R. 327 (C.A.); *Rutledge v. The United States Savings and Loan Co.*, (1906), 37 S.C.R. 546, rev'g (1905), 2 W.L.R. 471 (Yukon).

<sup>29</sup> *Harris v. Quine*, (1869), L.R. 4 Q.B. 653, Blackburn, J. at p. 658; *Bowes Co. v. American Railway Express Co.*, (1924), 26 O.W.N. 290; *Huber v. Steiner*, (1835), 2 Bing N.C. 202; *Bondholders Securities Corp. v. Manville*, [1933] 3 W.W.R. 1, [1933] 4 D.L.R. 699 (Sask. C.A.); *Bryson v. Graham*, (1848), 3 N.S.R. 271, at p. 274

<sup>30</sup> *Huber v Steiner*, *supra*, n. 29; *Bryson v. Graham*, *supra*, n. 29, at p. 275.

<sup>31</sup> *Colonial Investment & Loan Co. v. Martin*, [1928] S.C.R. 440, [1928] 3 D.L.R. 784, aff'g [1928] 1 W.W.R. 245, 37 Man. R. 215, [1928] 1 D.L.R. 791 which affirmed [1927] 2 W.W.R. 94, [1927] 3 D.L.R. 360; *Rutledge v. United States Savings and Loan Co.*, (1906), 37 S.C.R. 546, *per* Girouard, J. dissenting, at p. 548: "...in matters of limitations of personal actions the *lex fori* must prevail, except when the debt has been absolutely extinguished by the Statute of Limitations of the *locus contractus*"; *McPherson v. McBain*, [1932] 3 W.W.R. 617 (Alta.); *McLenaghan v. Hetherington*, (1892), 8 Man. R. 357; *Bondholders Securities Corporation v. Manville*, [1933] 3 W.W.R. 1, [1933] 4 D.L.R. 699 (Sask. C.A.); *British Linen Co. v. McEwan*, (1892), 8 Man. R. 99, at p. 103; *Dakota*

In *Colonial Investment and Loan Co. v. Martin*,<sup>32</sup> it was held that an action brought in Manitoba on a covenant for payment in a mortgage of land situated in Saskatchewan was barred by section 24 of the *Manitoba Real Property Limitation Act*:

No action... shall be brought to recover any sum of money secured by any mortgage... but within ten years...<sup>33</sup>

Section 24 relates to actions to recover money secured by mortgage or otherwise charged upon or payable out of land, and corresponds with section 23 of the Ontario *Limitations Act*,<sup>34</sup> which, however, is confined to actions to recover the money out of the land. An action on the covenant brought in Ontario would come within section 45 of the *Act*.<sup>35</sup>

In general, Canadian courts have had a tendency to characterize foreign as well as domestic statutes of limitations as procedural with the result that the defendant is often deprived of the benefit of the foreign statute in an action upon a foreign cause of action. In characterizing the foreign and domestic statutes of limitations, the courts must avoid coming to the conclusion that the foreign statute is substantive and the domestic statute procedural or that the foreign statute is procedural and the domestic statute substantive, with the result that both are applicable or neither is applicable. Policy considerations will influence the forum in its characterization. Although the forum should characterize the foreign statute in accordance with the *lex causae*, this cannot be done without taking into consideration the nature of the statute in force in the forum. The court must examine the possible consequences of characterizing the foreign statute and the domestic statute by different standards and try to co-ordinate the two characterizations.

Falconbridge submits that the forum should characterize

... both the foreign statute and the domestic statute for the purpose of determining which of them is applicable *within the meaning of the con-*

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*Lumber Co. v. Rinderknecht*, (1905), 1 W.L.R. 481, 6 Terr. L.R. 210, rev'd (1905), 2 W.L.R. 275, 6 Terr. L.R. 219 (N.W.T.); *North v. Fisher*, (1884), 6 O.R. 206; *Martin (otherwise Ellington) v. Trofimuk (Martin Estate)*, (1960), 32 W.W.R. 520 (Alta.); *Quaker Oats Co. v. Denis*, *supra*, n. 28.

<sup>32</sup> [1928] S.C.R. 440, [1928] 3 D.L.R. 784.

<sup>33</sup> R.S.M. 1913, c. 116, s. 24(1).

<sup>34</sup> *Supra*, n. 27.

<sup>35</sup> See *McLenaghan v. Hetherington*, (1892), 8 Man. R. 357. In an action in Manitoba on the personal covenant in a mortgage of Ontario land, the court held that the *Manitoba Real Property Limitation Act* was applicable. It did not matter where the land was situate.

For a case involving a federal-provincial situation, see *Oliver v. The King*, (1921), 21 Ex. C.R. 49, 59 D.L.R. 211.

*flict rule of the law of the forum relating to limitation of actions.* In an action upon a foreign cause of action the forum should compare the two statutes and if it comes to the conclusion that, notwithstanding differences in wording, the two statutes are intended to perform eventually the same function, it should decide which of the two statutes is subsumed under the conflict rule of the forum.<sup>36</sup>

*Causes of Action accruing while the defendant is out of the Province or "beyond the Seas": Tolling provisions*

Section 19 of the English statute of 1705,<sup>37</sup> preserving the right of the plaintiff to bring an action within the statutory period after the defendant's return when the latter was beyond the seas at the time the cause of action accrued, as well as section 7 of the Statute of 1623<sup>38</sup> which preserves the right of the plaintiff, if he was beyond the seas when his cause of action accrued, to bring an action within the statutory period after his return still appear in the statutes of limitations of some of the provinces although in England these statutory provisions have been repealed. Thus, in Ontario, section 48 of *The Limitations Act*<sup>39</sup> states that in personal actions

[i]f a person against whom a cause of action... accrues is at such time out of Ontario, the person entitled to the cause of action may bring the action within such times as are before limited after the return of the absent person to Ontario.<sup>40</sup>

<sup>36</sup> *Op. cit.*, n. 5, pp. 292-293.

<sup>37</sup> 4 & 5 Anne, c. 16.

<sup>38</sup> 21 Jac. 1, c. 16.

<sup>39</sup> R.S.O. 1960, c. 214.

<sup>40</sup> See *Stewart v. Guibord et al.*, (1903), 6 O.L.R. 262; *Clemens v. Brown and International Nickel Co. of Canada Ltd.*, (1958), 13 D.L.R. (2d) 488 (Ont. C.A.); *Bugbee v. Clergue*, (1900), 27 O.A.R. 96, at p. 106, *aff'd sub nom. Clergue v. Humphrey*, (1900), 31 S.C.R. 66: "It matters not that both parties were foreigners, residents of the same State where the cause of action arose, and that plaintiff might have sued, or did sue, the defendant there before he left it to reside in this country. So far as regards our statute the time runs against the plaintiff only from the time when the defendant came within the jurisdiction of our own Courts"; *Boulton v. Langmuir*, (1897), 24 O.A.R. 618; *Statute of Limitations*, R.S.B.C. 1960, c. 370, s. 9 (beyond the seas); *Commercial Securities Corporation Limited v. Davies*, [1937] 2 W.W.R. 25, 51 B.C.R. 481 (B.C.); *Limitation of Action Act*, R.S.N.B. 1952, c. 133, ss. 1(c), 20(1); *Limitation of Actions (Personal) Act*, R.S. Nfld. 1952, c. 146, ss. 4 & 7; *Limitation of Actions Act*, R.S.N.S. 1967, c. 168, ss. 3 & 4. The statute deals with the situation where the plaintiff is absent from the province (s. 3) and the case where the defendant is absent from the province (s. 4); *Carvell et al. v. Wallace*, (1873), 9 N.S.R. 165 (S.C.). This six-year Nova Scotia period of limitations began to run after the defendant moved to the province even though the cause of action had arisen in Prince Edward Island and was barred there; see also *Bryson v. Graham*, (1848), 3 N.S.R. 271 where Bliss, J. at p.

It would seem that the words "after the return of the absent person to Ontario" suggest that this section is not applicable to a defendant who was not ordinarily resident in Ontario when the cause of action arose.<sup>41</sup>

Falconbridge points out that:

It is at least open to question whether it is just, in the case of a defendant in whose favour the foreign statute has run during his residence in the foreign country, to deprive him of the benefit of the domestic statute merely because he has come to the country of the forum less than the statutory period before action... On the other hand, if the period of limitation has not yet run under the foreign statute, it would not appear to be unjust to deprive the nomadic defendant of the benefit of the domestic statute in his new residence by virtue of a tolling provision of that statute. This situation might arise in the case of an action upon a foreign judgment normally barred after six years, although an action upon the judgment in the foreign country might not be barred because the period of limitation there might be twenty years.<sup>42</sup>

The *Uniform Limitation of Actions Act* prepared by the Conference of Commissioners on Uniformity of Legislation in Canada<sup>43</sup> modifies the old rule to the extent that the cause of action against the absent defendant must arise within the province. This provision has been adopted by Alberta,<sup>44</sup> Manitoba,<sup>45</sup> Prince Edward Island,<sup>46</sup> Saskatchewan,<sup>47</sup> the Northwest Territories<sup>48</sup> and the Yukon.<sup>49</sup>

Thus, in Prince Edward Island, section 50 of the *Limitation of Actions Act* provides that:

In respect of a cause of action as to which the time for taking proceedings is limited by this Act, other than those mentioned in paragraphs

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273 cited *Marsh v. Hoyne* to the effect that: "A debt contracted in England between parties there residing was not prescribed in Nova Scotia, provided the action was brought within six years after the plaintiff's first coming into this Province; that the plaintiff's remedy only was barred in England; but the debt was still subsisting and recoverable in Nova Scotia". Cf. *Johnston v. Johnston*, (1875), 10 N.S.R. 128 (C.A.).

<sup>41</sup> *Clemens v. Brown International Nickel Co. of Canada Ltd.*, (1958), 13 D.L.R. (2d) 488 (Ont. C.A.).

<sup>42</sup> *Op. cit.*, n. 5, p. 297, and see *Rutledge v. United States Savings and Loan Co.*, (1906), 37 S.C.R. 546.

<sup>43</sup> (1931), 16 Proceedings of Can. Bar Assoc. 284; (1932), 17 Proceedings 197; (1944), 27 Proceedings 433.

<sup>44</sup> *Limitation of Actions*, R.S.A. 1955, c. 177, s. 47.

<sup>45</sup> *Limitation of Actions Act*, R.S.M. 1970, c. L150, s. 57.

<sup>46</sup> *Statute of Limitations*, R.S.P.E.I. 1951, c. 87, s. 50.

<sup>47</sup> *Limitation of Actions Act*, R.S.S. 1965, c. 84, s. 49.

<sup>48</sup> *Limitation of Actions Ordinance*, R.O.N.W.T. 1956, c. 59, s. 46.

<sup>49</sup> *Limitation of Actions Ordinance*, Y.R.O. 1958, c. 66, s. 46.

(a) and (b) of sub-section 1 of section 2, if a person is out of the province at the time a cause of action against him *arises within the Province*, the person entitled to the action may bring the same within two years after the return of the first mentioned person to the province or within the time otherwise limited by this Act for bringing the action.<sup>50</sup>

### *Joint debtors*

According to section 49 of the *Limitations Act* of Ontario:<sup>51</sup>

(1) Where a person has any such cause of action against joint debtors or joint contractors, he is not entitled to any time within which to commence such action against any one of them who was in Ontario at the time the cause of action accrued, by reason only that some other of them was, at the time the cause of action accrued, out of Ontario.

(2) The person having such cause of action shall not be barred from commencing an action against a joint debtor or joint contractor who was out of Ontario at the time the cause of action accrued, after his return to Ontario, by reason only that judgment has been already recovered against a joint debtor or joint contractor who was at such time in Ontario.<sup>52</sup>

### *Borrowing statutes*

In British Columbia, the *Statute of Limitations Act* deals with the limitation of causes of action that have arisen abroad:

55. In case any action shall be instituted in this Province against any person here resident, in respect of a cause of action or suit which has arisen between such person and some other person in a foreign country, wherein the person so sued shall have been resident at the time when such cause of action or suit shall have first arisen, such action shall not be maintained in any Court of civil jurisdiction in the Province if the remedy thereon in such foreign country is barred by any statute or enactment for the limitation of actions existing in such foreign country.<sup>53</sup>

The British Columbia statute does not adopt the rule generally prevalent in Continental Europe that prescription is substantive, but it recognizes, to some extent, the application of foreign statutes of limitation to foreign causes of action, even if that statute might be characterized as procedural by the forum.

Falconbridge is of the opinion that this statute deals perhaps too generously with the defendant as it is probable that he still has the benefit of the domestic statute "...in the event of the plaintiff's remedy not being barred by the foreign statute — for

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<sup>50</sup> Emphasis added.

<sup>51</sup> *Supra*, n. 27.

<sup>52</sup> The statutes of all provinces contain substantially similar provisions, see e.g., R.S.P.E.I. 1951, c. 87, s. 51 (1) and (2), R.S.S. 1965, c. 84, s. 50.

<sup>53</sup> R.S.B.C. 1960, c. 370, s. 55.

example, if the period of limitation of the domestic statute is shorter than that of the foreign statute".<sup>54</sup>

### 3) Parties

Assuming that a right of action exists according to the *lex causae*, the court must determine whether or not the plaintiff is entitled to bring the action. This question should be solved by applying the *lex causae*. If the plaintiff is an infant or a married woman, his or her capacity to sue will be governed by the personal law. Thus, in *Lucas v. Coupal*,<sup>55</sup> an action was brought in Ontario by four infants resident and domiciled in Quebec, who sued by their mother, also domiciled in Quebec as their next friend, for damages arising from a collision of two automobiles on a highway in Quebec. The defendant, who resided in Ontario, argued that the infant plaintiffs had no status to enforce, either in their own names or through the medium of a next friend, a right of action that depended wholly upon Quebec law and which, by that law, could only be enforced by a tutor, duly appointed under that law, suing in his own name in that capacity. The court found for the defendant on the ground that the infant plaintiffs could not seek to enforce in Ontario, in their own name, a right which by the *lex causae* was vested in their tutor. The decision is sound although it would have been better to say that, according to the law of their domicile, these infants had no capacity to sue.<sup>56</sup>

In *Sanderson v. Halstead*,<sup>57</sup> a question arose as to the plaintiff's status to sue in Ontario. The defendant submitted that since the plaintiff was suing as the personal representative of the deceased, he had to obtain an Ontario grant of letters probate or administration. The plaintiff replied that this was not necessary because he had become the successor of the deceased in accordance with the law of the deceased's domicile and thereby acquired a personal and individual right to maintain the action. In finding that the plaintiff possessed the status to maintain the action the court said:

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<sup>54</sup> *Op. cit.*, n. 5, at p. 299.

<sup>55</sup> [1931] 1 D.L.R. 391, (1930), 66 O.L.R. 141, (1930), 38 O.W.N. 479.

<sup>56</sup> See *Kelly v. O'Brian*, (1916), 37 O.L.R. 326, 10 O.W.N. 330, 31 D.L.R. 770: a tutor duly appointed by a Quebec court was entitled to recover from the executors the amount of a legacy payable under the will of a deceased who had resided and died in Ontario to infants domiciled and residing in Quebec whom he represented under his appointment; see also *Re Burnett*, [1936] O.R. 506. For a critical analysis of *Lucas v. Coupal* see Falconbridge, *op. cit.*, n. 5, pp. 121-122. Note that a duly appointed foreign guardian can always apply for maintenance of an infant out of a fund in court in Ontario if such infant is not domiciled in this province: *Re Gripton*, (1930), 38 O.W.N. 281.

<sup>57</sup> [1968] 1 O.R. 749.

In order for the plaintiff to sue in Ontario there are two issues to be resolved. The first one is whether he falls within the category of persons or bodies that can be made a party to litigation. This question must be determined by the *lex fori* and I am satisfied that the plaintiff is capable of suit. The next issue is whether he is the proper plaintiff in the particular action before the Court. If by the *lex causae*, the law of Quebec, the right which he was seeking to enforce did not vest in him but in someone else, then he was not. Since Quebec law, in particular art. 607 of the Civil Code provides *inter alia*, that the plaintiff is seized by law alone of the property rights and actions of the deceased, I find that the plaintiff possesses the status to maintain the action.<sup>58</sup>

In *George C. Anspach Co. v. C.N.R. Co.*,<sup>59</sup> Wilson, J. said:

This leaves for consideration the plaintiff's status to sue. Its right to bring this action in Ontario comes under the heading of procedure, and procedure is governed exclusively by the law of the State or Province in which the action is brought.<sup>60</sup>

As a result, the plaintiff's right to sue was settled by section 2 of the *Bills of Lading Act*<sup>61</sup> which provided that every consignee of goods named in a bill of lading and every endorsee of a bill of lading to whom the property in the goods therein mentioned passed upon it by reason of such consignment or endorsement, shall have and be vested with all such rights of action and be subject to all such liability in respect of such goods as if the contract contained in the bill of lading had been made with himself. It is suggested that in this case the *lex causae* should have determined the plaintiff's right to sue in Ontario.

Some matters however, are governed by the *lex fori*. Thus the question whether an alien can sue in the forum is a matter of procedure.

The question of the name in which an action may be brought is also a matter of procedure as it is related to the method of enforcement of the right in the forum rather than its existence. For instance, the *lex fori* will determine whether the assignee of a debt may sue in his own name or in the name of, or together with, the assignor<sup>62</sup> or whether the action by a partnership may be brought in the firm's name.<sup>63</sup>

<sup>58</sup> *Ibid.*, at p. 752.

<sup>59</sup> [1950] O.R. 317, [1950] 3 D.L.R. 26.

<sup>60</sup> *Ibid.*, at p. 332 (O.R.).

<sup>61</sup> R.S.C. 1927, c. 17, s. 2.

<sup>62</sup> *Regas Ltd. v. Leon Louis Plotkins*, [1961] S.C.R. 566, 36 W.W.R. 481, 29 D.L.R. (2d) 282, aff'g 30 W.W.R. 14, 22 D.L.R. (2d) 169.

<sup>63</sup> *Knauth Nachod et al. v. Stern*, (1897), 30 N.S.R. 251 (C.A.). Foreign companies may sue in provincial courts but they must prove that they are incorporated in the foreign country and that they can sue by the name they are



In *Samson v. Holden*,<sup>64</sup> the widow and adult sons of the victim of an automobile accident which occurred in the State of Maine and was caused by a person domiciled in Quebec brought an action in that province to recover damages. According to the law of Maine such an action, when the victim dies intestate, must be brought by and in the name of the administrator appointed by the court. Although one of the sons had been appointed administrator, he brought the action with the other plaintiffs as beneficiary and not as administrator. The Supreme Court of Canada did not consider that lack of compliance with the laws of Maine deprived the plaintiffs of their right to bring an action in Quebec. The law of Maine was procedural. It did not affect the right of action. The characterization of the Maine statute was done by the *lex causae* and by the *lex fori*.

The question as to whether a partnership can be sued under the name of its firm or whether the names of the partners have to be declared, or whether an alien or a citizen can be sued, is one that solely concerns procedure. On the other hand, the determination of who may represent an incapable defendant is a matter of substance to be determined by the personal law of the incapable.

#### 4) Priorities

In *The Ship "Strandhill" v. Hodder Co.*,<sup>65</sup> the Supreme Court of Canada held that although under the *lex fori* the plaintiff-respondent had no maritime lien for necessities supplied to the defendant-appellant ship, the Exchequer Court of Canada, in Admiralty, could entertain an action *in rem* for the recovery of the price where a maritime lien therefor was created under foreign law.

In other words, the *lex causae*, that is the proper law of the contract, and not the *lex fori* governs the question whether a maritime lien for necessities will be recognized. However, where, in addition to the claims of master and crew, claims are put forward for temporary repairs and for sums due under a duly registered

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using in the action. *Alexander Hamilton Institutes v. Chambers*, [1921] 3 W.W.R. 520, 14 Sask. L.R. 489, 65 D.L.R. 226 (C.A.); *Avon Stone Co. v. Dunham*, (1879), 18 N.B.R. 460 (C.A.); *Bondholders Securities Corporation v. Manville*, [1933] 3 W.W.R. 1, [1933] 4 D.L.R. 699 (Sask. C.A.); see also *Creamette Co. v. Famous Foods Ltd.*, [1933] Ex. C.R. 200. (A foreign company may sue in Canada).

<sup>64</sup> [1963] S.C.R. 373, aff'g [1961] B.R. 239 (Que.).

<sup>65</sup> [1926] S.C.R. 680, [1926] 4 D.L.R. 801.

mortgage, the priority of payment is governed by the *lex fori*.<sup>66</sup> It seems well established that the priority which will be given in the distribution of proceeds is adjusted by the law of the forum.

### 5) Execution

Judgments and their execution are always governed by the *lex fori*.

In an action brought in Ontario against a mortgagor resident in Ontario upon a covenant to pay contained in a mortgage of land in Alberta, the remedy by way of personal order against the defendant for payment was governed by Ontario law, the *lex fori*, and not by the Alberta statute prescribing the remedy in an action brought upon a mortgage of land and settling the form of judgment for the realization of the mortgage debt out of the land.<sup>67</sup>

Where a judgment was obtained in Saskatchewan on a contract made in Alberta for the sale of land in that province, it was held that the procedure for enforcing it must be governed by the *lex fori*. An application for a charging order was granted even though an Alberta statute restricted the rights of a vendor of land or his assignee to realize on a judgment based on the personal covenant. Whatever restrictions the statutes of Alberta may place upon the enforcement of a judgment in that province, such restrictions can have no application in Saskatchewan.<sup>68</sup>

### 6) Damages

The law relating to damages is in part substantive and in part procedural.<sup>69</sup>

Cheshire<sup>70</sup> distinguishes between remoteness of liability or remoteness of damage which is a question of substance and the measure or quantification of damages which is a question of procedure. This distinction has now been widely accepted:

The rules relating to remoteness indicate which kind of loss actually resulting from the commission of a tort or from a breach of contract

<sup>66</sup> *Harney et al. v. M. V. "Terry"*, [1948] 1 D.L.R. 728 (Ex. C.); see also *Marquis v. The Ship "Astoria"*, [1931] Ex. C.R. 195, at p. 200, *per Hazen, L.J.A.*: "... the question of priority of liens is treated as relating only to the remedy determined by the law of the forum."

<sup>67</sup> *Northern Trusts Co. v. McLean*, [1926] 3 D.L.R. 93, 58 O.L.R. 683, 30 O.W.N. 153 (Ont. C.A.).

<sup>68</sup> *Royal Trust Company v. Kritzwiser*, [1924] 3 D.L.R. 596 (Sask. C.A.).

<sup>69</sup> *Boys v. Chaplin*, [1969] 3 W.L.R. 32, at p. 332, *per Lord Hodson*, (H.L.), [1968] 1 All E.R. 283.

<sup>70</sup> *Private International Law*, (1965), 7th ed.

is actionable; the rules for the measure of damages show the method by which compensation for an actionable loss is calculated... A rule as to the measure of damages in the narrow sense is a mere rule of calculation that operates only after the injury or loss in question has been found to be free from the vice of remoteness. Its function is to quantify in terms of money the sum payable by the defendant in respect of the injury, whether it be a tort or a breach of contract, for which his liability has already been determined by the proper law.<sup>71</sup>

In considering the cases, however, one must carefully analyse the language used by the judges, as often they speak of measure of damages when they have in mind what Cheshire calls remoteness of liability or of damage. What emerges is that the kind of damage is a matter of substantive law and the method of compensating the plaintiff for his loss is for the *lex fori*.

In *Livesley et al. v. Horst Co.*,<sup>72</sup> the Supreme Court of Canada held that the right to damages for breach of a contract is a substantive right governed by the proper law of the contract and not by the *lex fori*. Damages were claimed in respect of contracts for hops grown in California and to be delivered in California. The hops tendered by the plaintiff in execution of the contracts were rejected as not answering in point of quality the description of the contracts. The defendants argued that the right to damages is a question of procedure which was governed by the *Sales of Goods Act* <sup>72a</sup> of the Province of British Columbia where the action had been brought. On the other hand, the plaintiff contended that the court should apply the California Civil Code which provides that the seller acquires a lien upon the subject-matter of the sale as soon as it is identified, for a sum equivalent to the purchase price and that accessory to this lien there is given a power of sale by auction on default of payment. If a sum equal to the amount of the purchase money is not realized from the sale, the vendor also becomes entitled to require from the purchaser payment of the difference between the amount so realized and the sum due to the vendor under the contract of sale. The trial judge found in favour of the plaintiff and his decision was affirmed by the Court of Appeal <sup>73</sup> and by the Supreme Court of Canada.

Duff, J. said:

In principle, it is difficult to discover a solid ground for refusing to classify the right to damages for breach of contract with other rights

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<sup>71</sup> *Ibid.*, pp. 600, 603.

<sup>72</sup> [1924] S.C.R. 605, [1925] 1 D.L.R. 159.

<sup>72a</sup> R.S.B.C. 1911, c. 203.

<sup>73</sup> (1924), 34 B.C.R. 19.

arising under the proper law of the contract, and recognizable and enforceable as such.

"Where rights are acquired under the laws of foreign states, the law of this country recognizes and gives effect to those rights, unless it is contrary to the law and policy of this country to do so". The exception embraces a very wide field, and among other things excludes procedure, because the policy of English law recognizes no vested rights in procedure, and a party invoking the jurisdiction of the courts must take procedure as he finds it.

The concept of procedure, too, is, in this connection, a comprehensive one, including process and evidence, methods of execution, rules of limitation affecting the remedy and the course of the court with regard to the kind of relief that can be granted to a suitor. But it does not, of course, extend to substantive rights; and here questions as to substantive rights include all questions as to the nature and extent of the obligation, under the foreign contract...

Applying the principle to the circumstances of the case before us, the lien given to the vendor, and the accessory right of sale, are obviously substantive rights given by the law of California to the vendor as such; in his capacity, that is to say as seller under a contract of sale.<sup>74</sup>

The substance of the contractual obligation includes the consequences that result from a breach of the contract as the kind of loss meriting reparation must not vary with the forum. What kind of loss actually resulting from a breach of contract is actionable is a question of law. In reaching this conclusion, the Supreme Court cited and relied upon a passage from the judgment of Turner, L. J. in *Hooper v. Gumm*, which reads:

... where rights are acquired under the laws of foreign states, the law of this country recognises and gives effect to those rights unless it is contrary to the law and policy of this country to do so.<sup>75</sup>

This statement excluded procedure, for the party invoking the *lex fori* must take procedure as he finds it.

The court also pointed out that the rule that contractual stipulations as to the "measure" of damages embodied in the agreement itself are governed as to validity and effect by the proper law of the contract follows as a corollary from the principle that the cause of action rests upon the rights given by that law.

In *Rosencrantz v. Union Contractors Ltd. and Thornton*,<sup>76</sup> the right given to the borrower by the usury laws of the *lex causae*

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<sup>74</sup> *Supra*, n. 72, at pp. 607-608 (S.C.R.).

<sup>75</sup> (1867), 2 Ch. App. 282, at p. 289.

<sup>76</sup> (1960), 23 D.L.R. (2d) 473, (1960), 31 W.W.R. 597 (B.C.); see also *Canadian General Electric Co. v. Canadian Rubber Co.*, (1915), 52 S.C.R. 349 (sum of indemnity as liquidated damages for delay in execution of the contract stipulated therein).

to recover a penalty upon a suit on the contract by the lender was held to be substantive and not procedural.

The Supreme Court of Canada did not discuss the argument that the right to recover damages as well as the "measure" of damages in the case of an action upon a tort committed abroad is a matter for the *lex fori*.<sup>77</sup> Duff, J. merely stated that:

There is authority, both unmistakable in effect, and of high order, for the proposition that the measure of damages in an action for reparation in respect of a tort in a foreign country is not matter of procedure, but matter of the substance of liability.<sup>78</sup>

However, in *Story v. Stratford Mill Building Co.*,<sup>79</sup> which involved an action brought in Ontario for a tort committed in Quebec, the Court held that although in the Province of Quebec no damages could be recovered in excess of the amount of compensation given by local legislation, which would be much less than the amount assessed by the jury in Ontario, nevertheless the action being properly maintainable in the forum, the court must apply its own rule in assessing damages. Riddell, J. did not share this view. He stated that:

Were the matter *res integra*, it might not unreasonably be held that the plaintiff, by suing in another jurisdiction, cannot put himself in a better position than if he had sued in the country *delicti commissi*.

Speaking for myself, I should have hesitated to hold that a man injured in Quebec could put himself in better position by coming to Ontario, and suing in our Courts, than if he had sued where he received his injury.<sup>80</sup>

However, he felt bound by *Machado v. Fontes*,<sup>81</sup> to apply the *lex fori*.<sup>82</sup>

Thus, in the field of foreign torts, all questions of remedy, both as to its nature and kinds or heads of assessment of pecuniary damage, are determined by the *lex fori*.

Recently, in *Boys v. Chaplin*<sup>82a</sup> the issue before the courts was which law is to be applied in determining the heads or measure of

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<sup>77</sup> *Machado v. Fontes*, [1897] 2 Q.B. 231.

<sup>78</sup> *Livesley et al v. Horst Co.*, *supra*, n. 72, at p. 611. The court cited Turner, L.J. in *Cope v. Doherty* (1858), 2 De G. & J. 614, at p. 623 and Wood, V.C. in the same case, 4 K. & J., at p. 384.

<sup>79</sup> (1913), 30 O.L.R. 271 (C.A.).

<sup>80</sup> *Ibid.*, at pp. 285-286.

<sup>81</sup> *Supra*, n. 77. In that case damages were awarded for a foreign tort even though the *lex causae* did not provide for them.

<sup>82</sup> See also *Young v. Industrial Chemicals Co. Ltd.*, [1939] 4 D.L.R. 392 (B.C.): *lex fori* applies.

<sup>82a</sup> *Supra*, n. 69.

damage to be awarded to the plaintiff where an action is brought in England in respect of a tort committed abroad. Under the *lex loci delicti*, the plaintiff could only recover special damages and in addition certain, as distinct from problematical, future financial loss. In other words, he had a right of action for what was in effect only reimbursement or indemnity or compensation for pecuniary expense or loss. By English law he had a right of action for damages for all the relevant consequences of the accident including pain and suffering, as well as pecuniary expenses and loss. In the court of first instance,<sup>83</sup> the judge considered himself bound by *Machado v. Fontes*.<sup>84</sup> He applied the law of England as the *lex fori* and awarded damages accordingly. In the Court of Appeal, Lord Denning, applying English law as the proper law of tort, reached the same result by a different route.<sup>85</sup> He was of the opinion that the law governing substantive liability should be applied

...not only to ascertaining whether there is a cause of action, but also to ascertaining the heads of damage that are recoverable and also the measure of damages: for these are matters of substantive law. They are quite distinct from the mere quantification of damages, which is a matter of procedure for the *lex fori*.<sup>85a</sup>

Lord Upjohn held that English law was applicable *qua lex fori*. Diplock, L. J. dissented on the ground that the English court in assessing the heads of damage must apply the *lex loci delicti*.

In the House of Lords,<sup>86</sup> three of the five Law Lords who heard the case overruled *Machado v. Fontes* and held that *Phillips v. Eyre*<sup>87</sup> laid down a double actionability rule. Four of them were of the opinion that the question of heads or measure of damage was one of substance and not of procedure governed by the proper law of tort which in this case was the law of England, which also happened to be the *lex fori*.

Lord Hodson was of the opinion that questions such as whether loss of earning capacity or pain and suffering are admissible heads of damage must be questions of substantive law. Thus, English law, which was the proper law, was applicable.

Lord Pearson also believed that damages for pain and suffering was a question of substantive law.

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<sup>83</sup> [1968] 2 Q.B. 1, [1967] 3 W.L.R. 266, [1967] 2 A11 E.R. 665.

<sup>84</sup> *Supra*, n. 77.

<sup>85</sup> [1968] 2 Q.B. 11, [1968] 2 W.L.R. 328, [1968] 1 A11 E.R. 283.

<sup>85a</sup> *Ibid.*, at p. 337 (W.L.R.).

<sup>86</sup> [1969] 3 W.L.R. 322, [1969] 2 A11 E.R. 1085.

<sup>87</sup> (1870), L.R. 6 Q.B. 1.

On the other hand, Lord Guest was of the opinion that compensation for pain and suffering was not a head of damage apart from patrimonial loss but was merely an element in the quantification of the total compensation which was a question for the *lex fori*.

Lord Donovan agreed with Lord Upjohn in the Court of Appeal. Lord Wilberforce said that there seemed

... to be some artifice in regarding a man's right to recover damages for pain and suffering as a matter of procedure. To do so, at any rate, goes well beyond the principle which I entirely accept, that matters of assessment or quantification, including no doubt the manner in which provision is made for future or prospective losses, are for the *lex fori* to determine.<sup>88</sup>

An interesting problem came before the Supreme Court of Canada in *Lister v. McAnulty*,<sup>89</sup> on appeal from Quebec. A husband acting as head of the community property brought an action in Quebec for damages resulting from bodily injuries suffered by his wife following an automobile accident in that Province. The consorts, though married in Quebec without a marriage contract, had their domicile in the State of Massachusetts at all relevant times, where separation as to property is the rule in such a case.

The defendant argued that since the husband's domicile at the time of the marriage was in Massachusetts, under the law of that State he had no right or title to assert or recover any damages which were personal to his wife. He could only recover the damages actually and directly suffered by him from the accident. The defendant also denied the plaintiff any right to claim damages for loss of *consortium* and *servicium* because they were not recoverable under the laws of Massachusetts. Thus the issue before the court was the damage to the husband, and only such damage as arose by reason of his relationship with his wife who was the immediate victim of the accident.

The court was of the opinion that the status and the rights and obligations of the husband towards his wife were governed by the law of Massachusetts under which there was no right to *consortium* and *servicium*. What he claimed he had lost was not due to him under the laws of his domicile as naturally attaching to his status. He had suffered no invasion of his rights, which is a fundamental condition to give rise to an action in damages. However, with respect to his right to damages for future expenses, which were not recoverable under the law of Massachusetts, the

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<sup>88</sup> *Supra*, n. 86, at p. 344 (W.L.R.).

<sup>89</sup> [1944] S.C.R. 317, [1944] 3 D.L.R. 673.

law of Quebec applied as the *lex loci delicti*. Hudson, J. was of the opinion that the question of the remoteness of damages was not a question of status. He said:

When the husband proved a valid subsisting marriage and a right to *consortium* by the laws of Massachusetts he established his status. It then remains for the Court to decide what remedy should be awarded for a wrongful interference with this right by a third party. This should in my opinion, be decided by a Quebec Court in accordance with Quebec Laws.<sup>90</sup>

His Lordship seemed to suggest that the Quebec rule fixing the measure of damages ought to be applied because Quebec was the forum. However, this would be an erroneous interpretation of the law.<sup>91</sup>

The law of Massachusetts determined the incidents of the marriage status that were relevant to the tort action, in other words, the rights which had been violated by the tortfeasor. The legal consequences from these acts were governed by the law of Quebec *qua lex loci delicti*. Since the tort was committed in Quebec, the law of the province should determine the measure of the plaintiff's recovery provided he had a right according to the law of Massachusetts which governed his status. As Taschereau, J. said, speaking for the majority:

What the appellant [husband] claims he has lost, is not due him under the laws of his domicile as naturally attaching to his status. He has suffered no invasion of his rights, which is a fundamental condition to give rise to an action in damages.<sup>92</sup>

This was emphasized by Rand, J.:

Under that language [of art. 1053 C.C.] not only the immediate victim of a wrongful act, but third persons whose legal rights that act, through the direct injury, has trespassed, are entitled to redress. The claim here is by a third party and in order to bring himself within the article he must show that some right of his has been invaded and that damage has resulted. He is the husband and whatever primary rights he has in relation to his wife are those which arise from the marriage status; and to ascertain them we must go to the law of the domicile. Once they are ascertained there has been presented the jural material on which the law of the place must operate to create or withhold a right of action against the person whose act has brought about the damaging consequences.<sup>93</sup>

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<sup>90</sup> *Ibid.*, at p. 333 (S.C.R.).

<sup>91</sup> For a criticism of this passage, see M. Hancock, *A Problem in Damages for Tort in the Conflict of Laws*, (1944), 22 Can. Bar Rev. 843, esp. at pp. 850 *et seq.*

<sup>92</sup> *Supra*, n. 89, at p. 325 (S.C.R.).

<sup>93</sup> *Ibid.*, at p. 335 (S.C.R.).



## 7) Evidence

What are the facts in issue is a matter for the *lex causae* whereas the *lex fori* determines how they must be proved.

The law of evidence is the *lex fori* which governs the Courts. Whether a witness is competent or not: whether a certain matter requires to be proved by writing or not: whether a certain evidence proves a certain fact or not: that is to be determined by the law of the country where the question arises, where the remedy is sought to be enforced, and where the Court sits to enforce it.<sup>94</sup>

However,

... it is not everything that appears in a treatise on the law of evidence that is to be classified internationally as adjective law, but only provisions of a technical or procedural character — for instance, rules as to the admissibility of hearsay evidence or what matters may be noticed judicially.<sup>95</sup>

### *Presumptions and burden of proof*

Are presumptions of law and fact, and burden of proof,<sup>96</sup> matters of procedure or of substance? The answer to this question is not free from controversy, but ordinarily presumptions of law and fact and the burden of proof, are deemed to be regulated by the *lex fori*. However, when they are closely connected with the rights of the parties they should be regarded as substance.

Thus, a distinction should be made between rebuttable presumptions of law, such as presumptions of fault or negligence, which merely shift the burden of proof from the defendant to the plaintiff, and rebuttable presumptions of fact, such as presumptions of death, where the plaintiff's right depends entirely upon the application of the presumption. In the former case, the presumption is procedural, while in the latter, it is substantive. Thus, *In re Cohn*, Uthwatt, J. said:

The mode of proving any fact bearing on survivorship is determined by the *lex fori*. The effect of any fact so proved is for the purpose in hand determined by the law of the domicile. The fact proved in this case is that it is impossible to say whether or not Mrs. Oppenheimer survived Mrs. Cohn. Proof stops there. Section 184 of the *Law of Property Act, 1925*, does not come into the picture at all. It is not part of the law of evidence of the *lex fori*, for the section is not directed to helping in the ascertaining of any fact but contains a rule of substantive law directing

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<sup>94</sup> *Bain v. Whitehaven and Furness Railway Co.*, (1850), 3 H. L. Cas. 1, at p. 19; *Waydell v. Provincial Ins. Co.*, (1862), 21 U.C.Q.B. 612, at p. 622 (C.A.): whether the defendant had waived its right to proof of loss was a question for the *lex fori*; *Daye v. H. W. McNeill Co.*, (1904), 6 Terr. L.R. 23 (C.A.).

<sup>95</sup> *Mahadervan v. Mahadervan*, [1964] P. 233, at p. 243.

<sup>96</sup> *E.g.*, rule *actor incumbit probatio*.

a certain presumption to be made in all cases affecting the title to property. As a rule of substantive law the section is relevant where the title is governed by the law of England. It has no application where title is determined by the law of any other country.<sup>97</sup>

*In re Cohn* was cited with approval by Scarman, J. in *The Estate of Fuld, deceased*.<sup>98</sup> In this case, the requirement of knowledge and approval for the validity of a testamentary instrument was held to be a rule evidential in character and to be applied by the English court as part of its *lex fori* if the facts of the case are such as to call for its application. His Lordship said:

To conclude, a comparative examination of the two systems of law reveals, as one would expect, that each requires of a valid will that it be the true will of a free and capable testator. The systems differ as to the incidence of proof — notably in their respective approaches to the problem of burden of proof in regard to testamentary capacity. Which approach is the English court to adopt?

I have no hesitation in saying, as I have already mentioned that it must follow the *lex fori*, its own law. The English court is being asked to grant probate in solemn form. Upon it falls the responsibility of deciding whether the instruments propounded express the real intentions of the testator. In my judgment this discharge of this responsibility is a matter for the judicial conscience of the court, guided in the business of investigation and proof by its own *lex fori*.

The court is not being asked to give effect to a "foreign probate". Indeed, it is conceded that no order equivalent to probate in solemn form has yet been made by a German court, and I have not been asked to adjourn until a German court of appropriate jurisdiction pronounces an order equivalent to probate. On the contrary, the parties, as is their right, have required the English court to conduct its own protracted inquiry into the facts. The court must conduct such an inquiry in accordance with its own "*lex*": and in cases where suspicion arises the requirements of this "*lex*" are strict indeed.<sup>99</sup>

The presumption of the due celebration of a marriage is a rebuttable presumption of law which also relates to the proof of facts, as distinguished from the question of what facts must be proved. Such a presumption is procedural.<sup>100</sup>

<sup>97</sup> [1945] 1 Ch. 5, *per* Uthwatt, J., at pp. 7-8; discussed by Falconbridge, *op. cit.*, n. 5, pp. 313-314.

<sup>98</sup> (No. 3), [1966] 2 W.L.R. 717 (P.), at p. 734 *et seq.*

<sup>99</sup> *Ibid.*, at p. 737.

<sup>100</sup> *Contra: Leong Sow Nom v. Chin Yee You et al.*, (1934), 49 B.C.R. 244, [1934] 3 W.W.R. 686 (S.C.) and Falconbridge, *Case and Comment*, (1935), 13 Can. Bar Rev. 317. As to presumptions in favour of validity of marriage, see also *Robb v. Robb*, (1891), 20 O.R. 591; *In re Tiernay*, (1885), 25 N.B.R. 286 (C.A.), and *Meszaros v. Meszaros*, (1969), 5 D.L.R. (3d) 294 (Ont. H.C.); *Baran v. Wilensky*, (1959), 20 D.L.R. (2d) 440 (Ont. H. C.); *Middlemiss v. Middlemiss*, (1955), 15 W.W.R. 641 (B.C.C.A.); In Nova Scotia, "Wherever in any cause or

Conclusive or irrebuttable presumptions of law are rules of substance because they do not relate to the manner of proving facts but prevail without regard to the facts.

The burden of proving contributory negligence would seem to be a question of substantive law,<sup>101</sup> as this question is intimately connected with the existence of the right of action.

### *Admissibility of evidence*

The *lex fori* will determine whether evidence is admissible or not. Thus, in an action upon a covenant in a Quebec lease against the nominal owner for damages resulting from collapse of the building, it was held that evidence will be admitted in accordance with the *lex fori* showing that the defendant was holding title only by way of security, in spite of the fact that in the Province of Quebec such evidence would not have been admissible and the defendant would therefore have been held liable as owner.<sup>102</sup>

To be admissible in Canadian courts, a foreign document must comply with the rules of the *lex fori* even though it will be interpreted by the *lex causae*.

### *Requirement of written evidence*

Certain contracts are required to be in writing by the *Statute of Frauds* as evidence of their existence. Thus, in Ontario, section 4 of the *Statute of Frauds*<sup>103</sup> provides that "no action shall be brought" on a number of contracts unless the agreement, or a note or memorandum thereof was in writing, signed by the person who is obliged by the contract to do something or his authorized agent.<sup>104</sup>

If the relevant provision of the *Statute of Frauds* is characterized as substantive, a contract governed by a law that does not require

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matter in any court in the Province it is necessary to prove a foreign marriage and the fact of the solemnization of such foreign marriage is proved, there shall thereupon arise a *prima facie* presumption that such foreign marriage was duly solemnized in accordance with the foreign law." (*Evidence Act*, R.S.N.S. 1967, c. 94, s. 40(2)).

<sup>101</sup> M. Hancock, *Torts in the Conflict of Laws*, (1942), pp. 159 *et seq.*

<sup>102</sup> *Malo and Bertrand v. Clement*, [1943] O.W.N. 555, [1943] 4 D.L.R. 773.

<sup>103</sup> In Saskatchewan, verbal contracts of employment for a period of more than a year are void and of no effect unless they are in writing and signed by the contracting parties: *The Wages Recovery Act*, R.S.S. 1965, c. 296, s. 4. This section would appear to be substantive. Other statutes similarly require that agreements to pay commissions to real estate agents be in writing: *Real Estate Brokers Act*, S.S. 1968, c. 58, ss. 28-30.

<sup>104</sup> R.S.O. 1960, c. 381.

it to be in writing could be made the subject of an action in the courts of any of the Canadian provinces where such a statute is in force whereas this would not be possible if the provision were characterized as procedural.

In *Leroux v. Brown*,<sup>105</sup> the English Court of Common Pleas held that section 4 of the English *Statute of Frauds, 1677*, was procedural and that an oral contract made in France, and governed by French law was not enforceable in England. The court emphasized the difference which existed between the wording of section 4 "no action shall be brought" and that of section 17 "no contract . . . shall be allowed to be good".

Falconbridge<sup>106</sup> points out that a statute ought not to be characterized as procedural merely by reason of the use of the words "no action shall be brought".

Since the note or memorandum "must be in existence before the commencement of the action, it is therefore an essential part of the cause of action and not merely a matter of procedure in the sense of a curial rule of the forum with regard to the enforcement of a cause of action". Therefore, section 4 cannot be construed as exclusively relating to evidence or the mode of proof of a contract.

In *Green et al v. Lewis*,<sup>107</sup> *Leroux v. Brown* was distinguished on the ground that section 17 of the English *Statute of Frauds* related to "solemnities" of the contract and not to the procedure for its enforcement. Thus, an oral contract for the sale of goods made in Illinois and valid and enforceable there in the absence of any statutory provision requiring a writing, was valid and enforceable in Ontario.

Some time prior to the passing of the *Sale of Goods Act, (1893)*, however, it had become the generally accepted view in England that the words "no contract . . . shall be allowed to be good" in section 17 of the *Statute of Frauds* were equivalent to "a contract . . . shall not be enforceable by action", as now expressed in section 4 of the *Sale of Goods Act*.<sup>108</sup> If *Leroux v. Brown* is good law, then it would appear that *Green v. Lewis* is no longer good law, whatever

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<sup>105</sup> (1852), 12 C.B. 801, 138 E.R. 1119.

<sup>106</sup> For a discussion and criticism of this case, see Falconbridge, *op. cit.*, n. 5, pp. 98 *et seq.*, esp. at pp. 99-100.

<sup>107</sup> (1867), 26 U.C.Q.B. 618.

<sup>108</sup> (1893), 56 & 57 Vict., c. 71. See, however, the dissenting view stated by Lord Finlay L.C., in *Morris v. Baron*, [1918] A.C. 1, at p. 11, a view for which there is much to be said! Holdsworth, *History of English Law*, vol. 6, (1924), p. 386, note 4.

it was when it was decided. On the other hand, the very thing which renders the two cases indistinguishable, namely, that there was, or is, no difference in substance between the wording of section 4 of the *Statute of Frauds* ("no action shall be brought"), and that of section 17 ("no contract . . . shall be allowed to be good") impairs part of the reasoning upon which the judgment in *Leroux v. Brown* was based. *Leroux v. Brown* was adversely commented on in *Williams v. Wheeler*<sup>109</sup> and in *Gibson v. Holland*<sup>110</sup> and it may be open to question whether the court in *Leroux v. Brown* correctly characterized the question as one of procedure.

In *Williams v. Wheeler*, Willes, J. said:

I also am of opinion that this appeal must be dismissed on the ground stated by my Lord. The point of law sought to be raised upon the *Statute of Frauds* is an extremely nice one; but it is one upon which it is not necessary on the present occasion to offer any opinion, though I cannot help observing that I should require much more argument to satisfy me that a contract made in France without writing, which is valid by the French law, is incapable of being enforced in an English court, by reason of the requirements of the English law as to formalities of contracts made in England. The general rule is that *locus regit actum*. And, though I fully recognize the principle upon which the judgment of this court in *Leroux v. Brown* professes to be found, *viz.* that the procedure is regulated by the *lex fori*, I am not satisfied that either of the sections of the *Statute of Frauds* to which reference has been made warrants the decision. We must, however, act upon *Leroux v. Brown* until it is overruled by a court of error.<sup>111</sup>

Falconbridge points out that

[t]he principle of the decision in *Leroux v. Brown* would seem to be equally applicable, under another clause of s. 4 of the *Statute of Frauds*, to a 'contract or sale of lands, tenements and hereditaments, or any interest in or concerning them', so as to render unenforceable in . . . Ontario . . . a contract to sell, charge or mortgage land, notwithstanding that the land is situated in another country by the law of which the contract is valid and enforceable.<sup>112</sup>

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<sup>109</sup> (1860), 8 C.B.N.S. 299, 141 E.R. 1181.

<sup>110</sup> (1865), L.R. 1 C.P. 1.

<sup>111</sup> *Supra*, n. 109, at p. 316 (C.B.N.S.).

<sup>112</sup> *Op. cit.*, n. 5, p. 100. As to questions raised by *Leroux v. Brown*, and generally as to the *Statute of Frauds*, see Lorenzen, *The Statute of Frauds and the Conflict of Laws*, (1923), 32 Yale L.J. 311, reprinted in his *Selected Articles on the Conflict of Laws*, (1947); Beckett, *The Question of Classification ("Qualification") in Private International Law*, (1934), 15 Brit. Y. B. Int. L. 46, at pp. 66-71; Goodrich, *Handbook of the Conflict of Laws*, (1949), 3rd. ed., pp. 245 *et seq.*; Cook, *The Logical and Legal Bases of the Conflict of Laws*, (1942), pp. 156, 170, 225.

In *John Morrow Screw and Nut Co. v. Francis Hankin*,<sup>113</sup> decided by the Supreme Court of Canada, Mr. Justice Anglin said:

While the proof of a contract within Art. 1235 C.C.<sup>114</sup> must as a matter of procedure be made according to the *lex fori*, its validity depends upon the *lex loci contractus*, which in this case is Ontario.<sup>115</sup>

and Mr. Justice Mignault added:

I do not care to lay down any general rule on the question whether the proof of a foreign contract is, as a matter of procedure, governed by the *lex fori*, or by the *lex loci contractus*. But I do think that such a provision as article 1235 is one which a Quebec court must follow when it is sought to make evidence of any of the matters mentioned by it, quite irrespective of the locality where the contract, warranty, promise or acknowledgement was made. In this sense, and I do not wish to be understood as otherwise dealing with the subject of conflict of laws, the *lex fori* prevails over the *lex loci contractus*.<sup>116</sup>

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<sup>113</sup> (1918), 58 S.C.R. 74, 45 D.L.R. 685, on appeal from Quebec.

<sup>114</sup> Article 1235 of the Quebec Civil Code provides that: "In commercial matters in which the sum of money or value in question exceeds fifty dollars, no action or exception can be maintained against any party or his representatives unless there is a writing signed by the former, in the following cases: ..."

<sup>115</sup> *Supra*, n. 113, at p. 86 (S.C.R.).

<sup>116</sup> *Ibid.*, at p. 94 (S.C.R.).