

# ANNUAL SURVEY OF CANADIAN LAW

## CONFLICT OF LAWS: PART I

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### I. INTRODUCTION

Since the last survey<sup>1</sup> which examined the cases that were coming before the Canadian courts, there has been a fairly large number of conflicts cases. For the most part, these cases reflect developments that occurred between five and fifteen years ago and which have become accepted as the new orthodoxy. The intensity of the debate, which in Canada was largely confined to a few academics, and which centered on developments in the United States of radically different approaches to the conflict of laws, has largely died down. It can be seen, however, that the concerns which motivated the American developments are as important as they ever were and that the changes made in Canadian conflict doctrine by the series of decisions in the House of Lords have not really begun to deal with the problems that remain. These problems force us to examine the bases for any body of law called the conflict of laws.

The development in the courts has been supplemented by the publication of several books. For the most part, these merely pull together the cases and do not offer any significant ideas for formulating a more satisfactory analysis of conflicts problems. The absence of any satisfactory basis for sorting out such problems has had the precise effect that one would expect: the perpetuation of a large element of uncertainty in the cases and judgments. There are no principles to guide courts or counsel. Results cannot be assessed in any terms that reflect the realization either that law matters to people or that blind adherence to verbal formulae is an impermissible method of legal reasoning. This survey will be divided into two parts. The first part will deal with the problem of the jurisdiction of Canadian courts and the recognition and enforcement of foreign judgments. The second part will deal with problems of choice of law.

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<sup>1</sup> Swan, *Annual Survey of Canadian Law: Part I Conflict of Laws*, 8 OTTAWA L. REV. 182 (1976).

## II. JURISDICTION

The rules governing the judicial jurisdiction of Canadian courts deal with two types of cases. The first kind are those cases that are begun when the defendant is personally served in the jurisdiction of the court before which the action is brought. The second are those where the defendant is served outside the jurisdiction of the court. The problems that have to be resolved focus, in the first situation, on the restrictions that may be imposed on plaintiffs who have made personal service on defendants in the jurisdiction and, in the second, on the application of the rules that permit service to be made out of the jurisdiction. There are common issues in each case and each presents the same overriding need for a principled approach. Recent cases suggest that some of the basic principles are being reconsidered.

A. *Service Within the Jurisdiction*

Apart from divorce, the principal restriction on the courts' jurisdiction is in respect of actions concerning foreign land. Recent cases have followed the rule that a Canadian or English court will not entertain an action concerning foreign land.<sup>2</sup> At the same time, the courts have not been anxious to extend the scope of the rule. For example, an action for arrears of rent under a lease of land outside the jurisdiction has been permitted.<sup>3</sup> It is not necessary to review the unsatisfactory nature of the rule or the criticisms that have been made of it.<sup>4</sup> It is sufficient to notice that there is a need to consider the desirability of the rule in actions brought in one province concerning land in another.<sup>5</sup> It is one thing for the House of Lords to be worried about taking jurisdiction in an action concerning land under Turkish control in Cyprus,<sup>6</sup> but quite another for, say, the courts of Nova Scotia to take the same position concerning land in New Brunswick. One possible justification for the rule is that a court order affecting foreign land may not be enforceable where the land is situated. Another justification might be the possibility of conflicting decisions in two courts. Within Canada, however, these objections

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<sup>2</sup> *Hesperides Hotels Ltd. v. Aegean Turkish Holidays Ltd.*, [1978] Q.B. 205, [1978] 1 All E.R. 277 (C.A. 1977), *aff'd sub nom.* *Hesperides Hotels Ltd. v. Muftizade*, [1979] A.C. 508, [1978] 2 All E.R. 1168 (H.L.).

<sup>3</sup> *Archie Colpitts Ltd. v. Grimmer*, 27 N.S.R. (2d) 341, 83 D.L.R. (3d) 281 (C.A. 1978). *See also* *McDonald v. Marbro Ltd.*, 26 O.R. (2d) 125, 104 D.L.R. (3d) 629 (H.C. 1979).

<sup>4</sup> *See* A. DICEY, *CONFLICT OF LAWS* 517-18 (9th ed. J. Morris 1973); G. CHESHIRE, *PRIVATE INTERNATIONAL LAW* 490-93 (10th ed. P. North 1979) and references therein.

<sup>5</sup> In *Albert v. Fraser Cos.*, 11 M.P.R. 209, [1937] 1 D.L.R. 39 (N.B.C.A. 1936), the New Brunswick Court of Appeal refused to take jurisdiction in an action for damages to land in Quebec caused by a resident of New Brunswick. The result was to leave the plaintiff without a remedy of any kind.

<sup>6</sup> *Supra* note 2.

should carry little weight. The general power of the Supreme Court of Canada to "supervise" each of the provincial courts of appeal ensures that the correctness and appropriateness of any decision by one provincial court concerning land in the jurisdiction of another can be reviewed. The role of the Supreme Court of Canada in controlling the enforcement of the judgments of one province in the courts of another will be examined later, but it is sufficient to note here that this can eliminate all problems of enforcement. The Supreme Court of Canada can authoritatively determine the law of each province and can therefore ensure, for example, that even though it is sitting on appeal from the courts of Nova Scotia, the law of New Brunswick is correctly applied.

As a practical matter, there are now more significant limitations on the plaintiff's right to bring his action in a particular court even though he has obtained personal service on the defendant in the jurisdiction. These arise principally from developments in the notion of *forum non conveniens*. Some of the cases raising this issue were referred to in a previous survey.<sup>7</sup> The power of the court to dismiss or stay an action on the ground that it is an inconvenient forum is undoubted, although the basis for the power has not always been clearly stated.<sup>8</sup> The problems that exist arise in connection with the burden of proof and the standard required to be met. It seems to be clear that the burden of proof is on the defendant: he must show that the court is an inconvenient forum. Some cases have suggested that the defendant must show that the proceedings are vexatious and an abuse of the process of the court, rather than that the balance of convenience is on the side of the defendant.<sup>9</sup>

The previous survey mentioned the trial judgment in *The Atlantic Star*.<sup>10</sup> In that case a relatively narrow view of the grounds upon which a defendant could have an action before the English Court of Admiralty stayed was adopted by both the trial judge and the Court of Appeal.<sup>11</sup> In

<sup>7</sup> *Supra* note 1, at 160-62.

<sup>8</sup> *See, e.g.*, *Van Vogt v. All-Canadian Group Distribs. Ltd.*, 71 W.W.R. 535, 9 D.L.R. (3d) 407 (Man. C.A. 1969); *Sittler v. Conwest Exploration Co.*, [1971] 3 W.W.R. 359, 18 D.L.R. (3d) 631 (N.W.T.C.A.); *Sittler v. Conwest Exploration Co.* (No. 2), [1972] 4 W.W.R. 385, 31 D.L.R. (3d) 201 (Yukon Terr. Ct.); *Moreno v. Norwich Union Fire Ins. Soc'y*, [1971] 1 O.R. 625, 16 D.L.R. (3d) 247 (H.C. 1970).

<sup>9</sup> *Moreno*, *supra* note 8.

<sup>10</sup> [1972] 1 Lloyd's Rep. 534, 116 Sol. J. 237 (Q.B.), *aff'd*, [1973] Q.B. 364, [1972] 3 All E.R. 705 (C.A.), *rev'd* [1974] A.C. 436, [1973] 2 All E.R. 175 (H.L.).

<sup>11</sup> *See, e.g.*, the judgment of Lord Denning M.R. in the Court of Appeal:

No one who comes to these courts asking for justice should come in vain. . . . This right to come here is not confined to Englishmen. It extends to any friendly foreigner. He can seek the aid of our courts if he desires to do so. You may call this "forum-shopping" if you please, but the forum is England, it is a good place to shop in, both for the quality of the goods and the speed of service.

*Id.* at 381-82, [1972] 3 All E.R. at 709. Lord Reid, commenting on this outburst of chauvinism, stated that "[this recalls] the good-old days, the passing of which many may regret, when inhabitants of this island felt an innate superiority over those unfortunate enough to belong to other races". *Id.* at 453, [1973] 2 All E.R. at 181 (H.L.). *See also* Williams, *The English are Best*, 8 V.U.W.L. REV. 358 (1977).

the House of Lords<sup>12</sup> the terms "vexatious and oppressive", which were accepted as the basis for the power of the court, were regarded as broad enough to include grounds of convenience and the fact that there were a number of actions arising out of the same accident already pending before the Belgian Court.<sup>13</sup> The House of Lords refused to adopt expressly the doctrine of *forum non conveniens*,<sup>14</sup> but this would not seem to make much difference to the result that will be reached in any particular case. *The Atlantic Star* indicates that the courts will consider a wide range of factors in determining whether the court should exercise its discretion to refuse to entertain the plaintiff's action.

The later decision of the House of Lords in *MacShannon v. Rockware Glass Ltd.*<sup>15</sup> may represent a further relaxation in the interpretation of the requirement that the plaintiff's conduct be "vexatious or oppressive". The House of Lords expressly accepted the approach of Lord Reid in *The Atlantic Star*:<sup>16</sup> they emphasized that Scotland, and not England, was the "natural forum" for the action.<sup>17</sup> It is not clear if there is a choice of law aspect to the phrase "natural forum" since there were suggestions that one reason for refusing the plaintiffs the right to sue in England was the belief that they would thereby benefit from the substantive law applied to the case.<sup>18</sup>

One other limitation on the right of a plaintiff to bring his action where he has had the defendant served in the jurisdiction arises when the parties have agreed that the courts of one jurisdiction shall have exclusive jurisdiction. Thus, in *E.K. Motors Ltd. v. Volkswagen Canada Ltd.*<sup>19</sup> the Saskatchewan Court of Appeal held that the agreement of the parties to give the Ontario courts exclusive jurisdiction must be upheld. This kind

<sup>12</sup> *Supra* note 10. See also *MacShannon v. Rockware Glass Ltd.*, [1978] A.C. 795, [1978] 1 All E.R. 625 (H.L.).

<sup>13</sup> The power to grant a stay on the grounds of *lis alibi pendens* was based on the discretionary power to prevent vexatious conduct. See *St. Pierre v. South Am. Stores (Gath & Chaves) Ltd.*, [1936] 1 K.B. 382, [1935] All E.R. Rep. 408 (C.A.).

<sup>14</sup> See, e.g., *supra* note 10, at 464, [1973] 2 All E.R. at 190 (H.L.) (Lord Wilberforce).

<sup>15</sup> *Supra* note 12. This was an action brought by workers injured in an industrial accident in Scotland. The defendant has a registered office in England, but no other connection with that jurisdiction.

<sup>16</sup> See, e.g., *id.* at 825-26, [1978] 1 All E.R. at 642 (Lord Keith).

<sup>17</sup> *Id.* at 812, [1978] 1 All E.R. at 631 (Lord Diplock).

<sup>18</sup> The relationship between jurisdiction and choice of law will be explored later. It is interesting that the House of Lords, as the final court of appeal for both Scotland and England, can take judicial notice of the laws of both jurisdictions and can examine the plaintiff's claim that significant advantages will be gained in an action brought in England. See, e.g., *id.* at 815, [1978] 1 All E.R. at 633 (Lord Diplock). This fact illustrates one of the significant differences between the conflicts problems within a federal (or like England and Scotland, quasi-federal) state, and those arising between independent sovereign states. It would, of course, be possible to argue in a case like *MacShannon* that it would not matter where the action was brought since the House of Lords could ultimately deal with the case whether the action has begun in England or Scotland.

<sup>19</sup> [1973] 1 W.W.R. 466 (Sask. C.A. 1972).

of result should be expected but it is important to realize that a clause conferring jurisdiction or exclusive jurisdiction on a court is only a clause in a contract and is entitled to no more effect than should, in the particular circumstances of the case, be given to any other clause in the contract.

The position that the courts have accepted in cases like *E.K. Motors Ltd.* has not been regarded as the general rule for very long. There are a number of English decisions that have given inconsistent treatment to forum selection clauses.<sup>20</sup> It is not unreasonable or unfair to suggest that it appears to be relevant to consider whether the forum selection clause chose the court that is considering the clause or some other court. In the former case, the court may be more likely to uphold the clause. Courts sometimes emphasize that the clause providing that a certain court shall have jurisdiction did not provide for *exclusive* jurisdiction by that court.<sup>21</sup> Such a conclusion may be a perfectly unexceptional interpretation of the contractual provision, but whether the courts should strain to reach such an interpretation or not raises the whole issue of the proper approach to contracts and their interpretation.

The United States Supreme Court in *M/S Bremen v. Zapata Off-Shore Co.*<sup>22</sup> upheld a forum selection clause that excluded recourse to the American courts by an American plaintiff. Mr. Chief Justice Burger, delivering the judgment of the court, stated:

Forum selection clauses have historically not been favored by American courts. Many courts . . . have declined to enforce such clauses on the ground that they were "contrary to public policy", or that their effect was to "oust the jurisdiction" of the court.

. . . . .  
There are compelling reasons why a freely negotiated private international agreement, unaffected by fraud, undue influence, or overweening bargaining power, such as that involved here, should be given full effect. . . . The elimination of all such uncertainties by agreeing in advance on a forum acceptable to both parties is an indispensable element in international trade, commerce, and contracting. There is strong evidence that the forum clause was a vital part of the agreement, and it would be unrealistic to think that the parties did not conduct their negotiations, including fixing the monetary terms, with the consequences of the forum clause figuring prominently in their calculations.<sup>23</sup>

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<sup>20</sup> See, e.g., *Evans Marshall Ltd. v. Bertola S.A.*, [1973] 1 All E.R. 992, [1973] 1 W.L.R. 349 (C.A. 1972); *The Fehmarn*, [1958] 1 All E.R. 333, [1958] 1 W.L.R. 159 (C.A. 1957); *The Eleftheria*, [1970] P. 94, [1969] 2 All E.R. 641. These cases are collected and discussed in Bissett-Johnson, *The Efficacy of Choice of Jurisdiction Clauses in International Contracts in English and Australian Law*, 19 INT. & COMP. L.Q. 541 (1970); Collins, *Forum Selection and an Anglo-American Conflict — The Sad Case of The Chaparral*, 20 INT. & COMP. L.Q. 550 (1971); Becker & Collins, *The Chaparral/Bremen Litigation: Two Commentaries*, 22 INT. & COMP. L.Q. 329 (1973).

<sup>21</sup> See, e.g., *Harrington v. Industrial Sales Ltd.*, [1973] 5 W.W.R. 577 (Sask. C.A.), *aff'd* [1973] 2 W.W.R. 330 (Sask. Q.B.).

<sup>22</sup> 92 S. Ct. 1907 (1972).

<sup>23</sup> *Id.* at 1913-15.

The importance of the viewpoint expressed by the Chief Justice is that the issue is seen as one of the effect to be given to a particular clause in a contract.

Most commentators on the Canadian and English cases regard forum selection clauses, and indeed choice of law clauses, as somehow special.<sup>24</sup> For example, regarding an application for a stay brought by a defendant who had been sued in England in breach of a forum selection clause, it has been said:

The plaintiff must show "some good cause" why the English proceedings should continue, or "a strong case" why the proceedings should not be stayed. It is not merely a matter of the "balance of convenience", but if the plaintiff is to be allowed to continue his proceedings in England one of the factors will be whether the essential issue between the parties is one of fact and all, or almost all, of the evidence is situate in England. In such cases the inconvenience and expense of a trial abroad may be so great as to cause real and avoidable hardship to the plaintiff in the English proceedings.

The overriding point is that, in all such cases, the English court has a discretion, and matters of discretion are not really suitable for hard and fast rules.<sup>25</sup>

What is noteworthy about this statement is the idea that the court has a discretion, when faced with a forum selection clause, to disregard the allocation of risk arrived at by the parties and to re-allocate the risk of litigation. However, the determination of the effect to be given to a forum selection clause requires exactly the same approach and skill by the court as the determination of the effect of any other contractual term. What is referred to as a "discretion" is simply the normal process of determining the effect of a contractual stipulation. Such "discretion" is, or should be, subject to analysis, prediction and criticism to the same extent as the process of interpretation or construction of contracts of all kinds. As Chief Justice Burger makes clear,<sup>26</sup> it is important that the contract be fairly made and that enforcement of the clause defeats no one's reasonable expectations. Anything that would affect the enforceability of any other contractual allocation of risk can affect a forum selection clause. One is, of course, far away from the feelings of outrage that motivated the courts in their original hostility to arbitration clauses, but the sentiment expressed by Lord Denning M.R. in *The Atlantic Star*<sup>27</sup> is one that many judges seem to share: how can any reasonable person possibly object if these courts hear this case? Are we not as fair and as committed to the goal of justice as any court in the world?

### B. *Service Out of the Jurisdiction*

The problems that arise when a plaintiff seeks to bring a defendant who is outside the jurisdiction before a Canadian court add one more

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<sup>24</sup> See, e.g., the references in note 20 *supra*.

<sup>25</sup> Becker & Collins, *supra* note 20, at 335.

<sup>26</sup> *Supra* note 23.

<sup>27</sup> *Supra* note 10.

dimension to the issues that have been discussed. The issues of *forum non conveniens* and the need to articulate the basis upon which the courts will control recourse to themselves remain, but added to these is the need for the plaintiff to satisfy the technical requirements of the Rules of Court governing service *ex juris*. There are three general versions of these rules found in Canada. The first are those rules that are closely modelled on the original English Order 11.<sup>28</sup> The particular feature of this rule is the need for the plaintiff to obtain leave before serving the writ out of the jurisdiction. The court has a discretion as to whether to give leave or not, and the plaintiff must show that the claim fits within one of the categories listed in the rule. The second type maintains the need for the plaintiff to bring his case within one of the listed categories, but removes the need for leave before service is made.<sup>29</sup> The defendant may object after service has been made on him outside the province that the plaintiff's claim does not fit within one of the listed categories. The third type is a general permission to serve the writ anywhere in Canada or the United States.<sup>30</sup> The rules of any one province may combine two versions of these rules.

The important developments in the area of service out of the jurisdiction are twofold. The first is represented by the gradual broadening of the circumstances within which service *ex juris* will be permitted. The development that permits the plaintiff to serve anywhere in Canada or the United States is one example. Another is the broader scope being given to some of the rules. For example, in *Mar v. Block*<sup>31</sup> the Ontario court held that expenses incurred in Ontario as a result of a motor vehicle accident in Saskatchewan did not involve "damages sustained in Ontario" in the sense required by Rule 25(1)(h).<sup>32</sup> This rule provides that a party may be served outside Ontario where the action consists of a claim "in respect of damage sustained in Ontario arising from a tort or breach of contract committed elsewhere". This interpretation of the rule has not been followed. In *Skyrotors Ltd. v. Carriere Technical Industries Ltd.*<sup>33</sup> the same court distinguished *Mar v. Block* and permitted service *ex juris* in an action arising out of the crash of an

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<sup>28</sup> R.S.C. (Eng.). The provinces whose rules fall into this category are Alberta, New Brunswick and Newfoundland. I have made extensive use of the excellent survey of the law by R. J. SHARPE, *INTERPROVINCIAL PRODUCTS LIABILITY LITIGATION: JURISDICTION, ENFORCEMENT AND CHOICE OF LAW* (Federal Dept. of Consumer & Corporate Affairs, forthcoming).

<sup>29</sup> The only province to which this statement is exactly applicable is Ontario. British Columbia, Manitoba and Saskatchewan preserve the "pigeon hole" approach, but significantly reduce its effect by adding broader grounds. Thus, in British Columbia the court may grant leave to serve outside the province in any case not specifically provided for. In Saskatchewan the basis for service outside the province is significantly broader under The Consumer Products Warranties Act, R.S.S. 1978, c. C-30, although, of course, this Act has only a limited application.

<sup>30</sup> The provinces whose rules fall into this category are Nova Scotia and P.E.I.

<sup>31</sup> 13 O.R. (2d) 422, 1 C.P.C. 206 (H.C. 1976).

<sup>32</sup> O.R.P.

<sup>33</sup> 26 O.R. (2d) 207, 102 D.L.R. (3d) 323 (H.C. 1979).

aircraft that caused the Ontario plaintiff loss of profits and use of the machine in Ontario. The court accepted the argument that *Mar v. Block* could be distinguished on the basis that there was, in the application of Rule 25(1)(h), a distinction to be made between commercial disadvantage and personal injury claims.<sup>34</sup> This would appear to be a distinction that would be hard to maintain. *Mar v. Block* was subsequently overruled by the Ontario Division Court in *Vile v. Von Wendt*,<sup>35</sup> and the artificial distinction relied on in *Skyrotors Ltd.* was rejected.

This broadening of the scope of the rules permitting service out of the jurisdiction may be generally regarded as beneficial.<sup>36</sup> If the province where the plaintiff is located offers a convenient forum, then recourse to that forum should not be unnecessarily restricted. In this respect two developments are important. The first is that the courts have generally held that the fact that the plaintiff can now serve *ex juris* without leave does not remove the power of the court to decide whether the action falls within one of the listed categories and also to see that the assertion of jurisdiction is not improper. Thus in *Singh v. Howden Petroleum Ltd.* the Ontario Court of Appeal said:

In my view the Rules Committee did not intend to remove from the Court its discretion to control its own process, and to place that control solely in the hands of the bar. The contrary view . . . is tantamount to saying that if the solicitor drawing the documents uses all the right words, no judicial officer has any right to interfere with service of the process out of the jurisdiction. All of the repeated warnings as to the "great care" which is to be exercised by the Court in permitting its process to be served anywhere else in the world would, on the basis of the judgment of the Divisional Court, become obsolete.<sup>37</sup>

This leaves intact the power of the court to refuse to hear a case in which the defendant has been personally served out of the jurisdiction when the Canadian court is not a convenient forum.<sup>38</sup>

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<sup>34</sup> *Id.* at 209, 102 D.L.R. (3d) at 326.

<sup>35</sup> 26 O.R. (2d) 513, 103 D.L.R. (3d) 356 (Div'l Ct. 1979).

<sup>36</sup> The origin of the rules regarding service *ex juris* are amendments to the rules of court in The Common Law Procedure Act 1852, 15 & 16 Vict., c. 76. At that time there were only rudimentary choice of law rules, but with the development of these rules the need for caution in the assertion of the jurisdiction of the forum decreased. The fact that an Ontario court takes jurisdiction does not mean that it will refuse to apply the law of Quebec or British Columbia. Wider jurisdictional rules may, of course, require considerable caution in the often casually-made assumption that some issues are matters of procedure. The problem of what is a matter of procedure will be discussed further in connection with the enforcement of foreign judgments. See note 87 *infra*.

<sup>37</sup> 24 O.R. (2d) 769, at 779-80, 100 D.L.R. (3d) 121, at 132 (C.A. 1979). See also *Petersen v. Ab Bahco Ventilation*, [1980] 3 W.W.R. 215, 107 D.L.R. (3d) 49 (B.C.S.C. 1979). But see *Jannock Corp. v. R.T. Tamblin & Partners Ltd.*, *infra* note 43, on the justification for the statement that "great care" should be taken in all cases where there is service *ex juris*.

<sup>38</sup> See *Consumers Co-op. Refiners Ltd. v. Taylor Instrument Cos.*, 13 C.P.C. 319, 102 D.L.R. (3d) 337 (Sask. Q.B. 1979) where the plaintiff was refused leave to sue an Ontario defendant in Saskatchewan on the ground that the *forum conveniens* was Ontario.



The most significant aspect of the courts' approach to the problems of service *ex juris* are the changes that may possibly be occurring in the nature of the obligation assumed by the plaintiff who is forced to justify his attempt to bring the foreign defendant before a Canadian court. The original English rule was very limited,<sup>39</sup> and throughout the cases there are, as Arnup J.A. mentioned in *Singh*, examples of the courts' concern that the jurisdiction be exercised with "great care". The assertion of jurisdiction over an absent defendant was seen as a violation of a foreign country's sovereign power.<sup>40</sup> The original assertion of jurisdiction was even moderated out of respect for foreign susceptibilities.<sup>41</sup> It is unnecessary to explore the reasons why foreign countries felt aggrieved by the English courts' assertion of jurisdiction over their residents for, whatever the reasons, it can be argued that they are inapplicable in the Canadian situation. The separate provinces of Canada cannot be regarded as sovereign in the sense that France, Russia, or Prussia regarded themselves as sovereign in the middle of the nineteenth century. Nineteenth century ideas of judicial jurisdiction carried heavy choice of law overtones: the forum applied the *lex fori* because it alone could do so and should do so.<sup>42</sup> There were few well developed choice of law rules. Today, the fact that an action is brought, for example, in British Columbia rather than in Manitoba need have no influence on the rules of law that will be considered by the court. This may be due to the fact that

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<sup>39</sup> Early cases involving discussion of the rule permitting service *ex juris* are full of statements that the English courts should be careful in asserting a jurisdiction that may be offensive to foreign jurisdictions. *See, e.g.*, *Firth & Sons v. De Las Rivas*, [1893] 1 Q.B. 768, 69 L.T. 666 (C.A.); *Hewitson v. Fabre*, 21 Q.B.D. 6, 57 L.J.Q.B. 449 (1888). In *Société Générale de Paris v. Dreyfus Bros.*, 29 Ch. D. 239, at 242-43, 54 L.J. Ch. 893, at 895 (1885), Pearson J. stated:

But, of course, it becomes a very serious question, and ought always to be considered a very serious question, whether or not . . . it is necessary for the jurisdiction of the Court to be invoked, and whether this Court ought to put a foreigner, who owes no allegiance here to the inconvenience and annoyance of being brought to contest his rights in this country, and I for one say, most distinctly, that I think this Court ought to be exceedingly careful before it allows a writ to be served out of the jurisdiction.

<sup>40</sup> *See, e.g.*, note 39 *supra*.

<sup>41</sup> Order 11, a rule of the Supreme Court, was a narrowing of the original assertion of jurisdiction. *See Field v. Bennett*, 56 L.J.Q.B. 89, 3 T.L.R. 239 (1886), and *Société Générale de Paris v. Dreyfus Bros.*, *supra* note 39.

<sup>42</sup> This is particularly striking in cases like *Lc Mesurier v. Le Mesurier*, [1895] A.C. 517, at 540, 64 L.J.P.C. 97, at 107, where Lord Watson cited with approval a passage of Lord Penzance in *Wilson v. Wilson*, L.R. 2 P. & D. 435, at 442 (1872): "It is both just and reasonable, therefore, that the differences of married people should be adjusted in accordance with the laws of the community to which they belong, and dealt with by the tribunals which alone can administer those laws [emphasis added]." Conflicts issues in divorce have, of course, never developed choice of law rules. *See also Phillips v. Eyre*, L.R. 6 Q.B. 1, 40 L.J.Q.B. 28 (1870), where the wide scope for the application of the *lex fori* would support the argument that choice of law rules were quite rudimentary; and some of the marriage cases like *Simonin v. Mallac*, 2 Sw. & Tr. 67, 164 E.R. 917 (D. 1860) and *Ogden v. Ogden*, [1908] P. 46, 77 L.J.P. & M. 34 (C.A. 1907).

the rules are the same or that the rules may come from a statute directly applicable in both provinces, such as a federal statute. There may also exist similar choice of law rules that will result in the law of one jurisdiction being applied by either court.

Courts have begun to suggest that the old concerns for the assertion of jurisdiction against an absent defendant are inapplicable in the Canadian context. Brooke J.A. in *Jannock Corp. v. R.T. Tambllyn & Partners Ltd.* said:

In my view [the trial judge] ought to have distinguished [the cases relied on by her to justify her decision to refuse leave to serve a writ out of Ontario] on the ground that the defendants there in question were residents of far distant places — England in one case and Australia in the other. Here, [the defendant] is a member of the Canadian business community. It seems quite unrealistic to treat as a foreigner one who lives in a Province of this country and does business in his own and other Provinces. Having regard to business by residents of the Provinces with one another, neither the boundaries of the country nor its political divisions or judicial divisions are such as to make the joinder as defendants in an action, as here sought, of parties to a business transaction who do not reside in the same Province oppressive and unfair *per se*.

...In cases such as this one . . . the fact that a defendant resident in another Province is a "foreigner" should not be given any significant weight and I find the error in principle made by [the trial judge] was in giving undue significance to the fact that [the defendant] is a "foreigner". . . .

...[M]ost important she erred in failing to give little weight to the view expressed in the older cases respecting foreigners in their application to persons who live in other Provinces in this country.<sup>43</sup>

The result of such an approach would be the development of separate rules: one rule for those defendants who reside in Canada and one rule for those who do not. Such a development would be very satisfactory, and would seem to be the logical consequence of the fact that the provinces of Canada are part of a federation. To see why this development would be desirable and, in particular, why it should depend on the fact that the provinces are part of a federation, it is necessary to view the assertion of jurisdiction, the recognition and enforcement of foreign judgments, and issues of the choice of law as being intimately connected. It has been traditional to view the issues raised in the assertion of jurisdiction as being quite distinct from those of the other two.<sup>44</sup> For instance, the Ontario court, in exercising its discretion under Rule 25<sup>45</sup> to serve a defendant out of the jurisdiction, will seldom if ever be worried that the province where the defendant resides may not enforce the Ontario judgment. If one stops to consider the issues raised by the three principal problem areas — jurisdiction, recognition and enforce-

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<sup>43</sup> 8 O.R. (2d) 622, at 632, 58 D.L.R. (3d) 678, at 688 (C.A. 1975).

<sup>44</sup> One example of this view is that the reports of cases dealing with service out of the jurisdiction did not even have a conflicts catch-line in the Ontario Reports and Dominion Law Reports until volume 100 (1980).

<sup>45</sup> O.R.P.

ment, and choice of law — without any preconceived ideas, the intimate connection between each will become clear.

One could start an analysis of the problems of the conflict of laws from the position that a court should only hear those cases where both parties are resident within its jurisdiction and where the connections between the dispute, the parties and the jurisdiction are such that courts would be always justified in applying the *lex fori*. Such a rule would, of course, soon become quite unworkable. That this would almost inevitably happen can be seen from the development of the law in regard to divorce. The underlying assumption of the courts in divorce was that the courts of the domicile of *both* parties would hear the petition and those courts could apply the *lex fori*.<sup>46</sup> The old position in divorce on the issue of jurisdiction removed any possible problems of choice of law, at least in theory, and reduced significantly the problems of recognition of judgments. This was because the court that heard the petition was, *ex hypothesi*, the court of the domicile of *both* parties, and since no other court could be competent — each party having, at common law, only one domicile at any time — no other jurisdiction would likely be concerned that the marriage was dissolved.

In fact, of course, the court that took jurisdiction on the basis of the husband's domicile would in many cases be dissolving a marriage when the wife had no real connection with the jurisdiction. These problems were largely hidden in the approach that the English and Canadian courts brought to the issues of divorce. The fact that the parties might "belong" to different communities was ignored so long as the wife was deemed to be domiciled in the same jurisdiction as the husband: she was deemed to "belong" to the husband's community.<sup>47</sup> Under this approach there could only be, from the point of view of the English or Canadian court, one competent court in the world — however unfair or unreasonable this would be to the wife. If only one court were competent, only the decrees of the court of the domicile would be recognized. The recognition rules were, therefore, as restrictive as the jurisdiction rules. This unfairness finally motivated the legislature to change the common law rule found in *Le Mesurier v. Le Mesurier*,<sup>48</sup> and the courts were empowered to expand their jurisdictional grounds. When this occurred the courts were finally forced to accept that there could be more than one competent court. They now had the power to dissolve marriages when the petition was brought by a woman who was not domiciled in the jurisdiction because her

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<sup>46</sup> See, e.g., Lord Watson in *Le Mesurier v. Le Mesurier*, *supra* note 42.

<sup>47</sup> See, e.g., *Attorney-General for Alberta v. Cook*, [1926] A.C. 444, 95 L.J.P.C. 102.

<sup>48</sup> *Supra* note 42. The Divorce Jurisdiction Act, 1930, S.C. 1930, c. 15, conferred jurisdiction on a court that was the domicile of the husband when he deserted his wife. In England the Matrimonial Causes Act, 1937, 1 Edw. 8 & 1 Geo. 6, c. 57, extended the jurisdiction of the English courts in favour of deserted wives. Subsequent developments have considerably expanded these grounds: see Divorce Act, R.S.C. 1970, c. D-8 and Matrimonial Causes Act, 1973, U.K. 1973, c. 18.

husband was not domiciled there.<sup>49</sup> Before there had been any legislative extension of jurisdiction over divorce, the courts had responded by developing the rule, dependent on the converse of *Le Mesurier*, that if the only court that has jurisdiction to dissolve a marriage is the court of the domicile, then only those decrees given by that court (*ex hypothesi*, the court of the domicile of both parties) and any decree recognized by the courts of the husband's domicile will be recognized.<sup>50</sup>

However, the basic common law rule, even as supplemented by the rule in *Armitage v. A.G.*,<sup>51</sup> could not stand once the courts themselves were given a wider jurisdiction because of the manifest practical impossibility of ignoring *faits accomplis*.<sup>52</sup> Thus, in a number of cases culminating in *Indyka v. Indyka*<sup>53</sup> the courts had to expand the circumstances in which they would recognize foreign decrees. Pressure to do so came from the fact that foreign courts had never accepted as restrictive an approach as that of *Le Mesurier*, and people came to England with foreign decrees. But once the restrictive rule based on domicile was relaxed, it became very hard to find a stopping place. The cases are full of examples of decisions that are very difficult to justify.<sup>54</sup>

<sup>49</sup> Divorce Act, R.S.C. 1970, c. D-8, s. 6(1), permits a married woman, for the purpose of that Act only, to acquire a domicile different from that of her husband. The unity of domicile has finally been abolished in Ontario by The Family Law Reform Act, 1978, S.O. 1978, c. 2, s. 65(3)(c). Similar developments occurred in England: Domicile and Matrimonial Proceedings Act, 1973, U.K. 1973, c. 45, s. 1.

<sup>50</sup> *Armitage v. A.G.*, [1906] P. 135, 75 L.J.P.D. & A. 42. The court recognized a decree given by a court that was not the court of the husband's domicile if it was recognized by the courts of the husband's domicile as dissolving the marriage. Such a decision represented in one sense a logical application of *Le Mesurier*; the status of the parties was determined by the law of the domicile. In another sense, however, *Armitage* is the thin edge of the wedge; it is a case that, if fully accepted, has the potential to undercut the efforts of courts to maintain standards for divorce. *See, e.g.*, the problem presented by *Rosenstiel v. Rosenstiel*, 16 N.Y. 2d 64, 209 N.E. 2d 709 (1965), where the New York Court of Appeals appeared to give up any control over the standards to be applied to dissolve New York marriages. This has caused the English courts certain problems; *see: Mountbatten v. Mountbatten*, [1959] P. 43, [1959] 1 All E.R. 99; *Messina v. Smith*, [1971] P. 322, [1971] 2 All E.R. 1046; and *Swan, A New Approach to Marriage and Divorce in the Conflict of Laws*, 24 U. Toronto L.J. 17 (1974).

<sup>51</sup> *Supra* note 50.

<sup>52</sup> The significance of *faits accomplis* in the parties' lives and the need to recognize, in general, anything that is a *fait accompli* is explored in *Swan, supra* note 50, at 52.

<sup>53</sup> [1969] 1 A.C. 33, [1967] 2 All E.R. 689 (H.L.). The dilemma of the courts faced, on the one hand, with their own fairly broad jurisdictional grounds and, on the other hand, with wide (or usually wider) grounds applied by foreign courts, all of which generally apply the *lex fori*, is pointed up by the twin goals seen by the House of Lords: first, the need to prevent limping marriages: *see, e.g., id.* at 107-08, [1967] 2 All E.R. at 728 (Pearson L.J.); second, the concern that the divorce be "genuine": *see, e.g., id.* at 88, [1967] 2 All E.R. at 715-16 (Pearson L.J.). These concerns lead to irreconcilable conflicts. A more developed choice of law process would go some way to avoid the problem.

<sup>54</sup> *E.g.*, *Schwebel v. Ungar*, [1964] 1 O.R. 430, 42 D.L.R. (2d) 622 (C.A. 1963), *aff'd* [1965] S.C.R. 148, 48 D.L.R. (2d) 644 (1964); *Padolecchia v. Padolecchia*, [1968] P. 314, [1967] 3 All E.R. 863 (because it was decided *after Indyka v. Indyka*,

Problems of recognition vary directly with the extent of the relaxation of jurisdictional requirements.

This approach was not inevitable: there was an alternative that the courts could have considered. The case of *Le Mesurier* is always regarded as a case dealing with the jurisdiction of English (and, therefore, Canadian) courts in divorce.<sup>55</sup> Lord Watson in *Le Mesurier* could have been regarded as saying something about choice of law when he stated: "[T]he differences of married people should be adjusted in accordance with the laws of the community to which they belong."<sup>56</sup> In principle, there is nothing objectionable about the adoption of choice of law rules in divorce.<sup>57</sup> The results of doing so would probably be no worse than what has happened through the failure of the courts to develop such rules. If they had been adopted, the need for strict jurisdictional controls would have been significantly reduced. If all courts had done likewise, a New York court, for example, might dissolve an English marriage but would not do so in accordance with the requirements of English law. If this happened, there would be less justification for English hostility to New York "interference".<sup>58</sup>

The important point is this: so long as the courts, following *Le Mesurier*, could regard the court of the husband's domicile alone as competent to dissolve the marriage, the issue of jurisdiction (*i.e.*, the conclusion as to the appropriateness, under the rule in *Le Mesurier*, of a particular court to hear the case) determined *automatically* the issue of choice of law. It did not automatically determine the issue of recognition because the jurisdictional "fact", *i.e.*, the conclusion of the foreign court that the husband was domiciled in the foreign jurisdiction, could be challenged when the question of recognition was raised. The assumption underlying *Le Mesurier*, however, was that there would be one concept of domicile and therefore no problem of recognition.<sup>59</sup> It does follow

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*supra* note 53); *Messina v. Smith*, *supra* note 50 (when compared with *Mountbatten v. Mountbatten*, *supra* note 50).

<sup>55</sup> *Indyka v. Indyka*, *supra* note 53, and *Powell v. Cockburn*, [1977] 2 S.C.R. 218, 68 D.L.R. (3d) 700 (1976) are examples of the general acceptance of this effect of *Le Mesurier*, though many more cases could be cited for the proposition.

<sup>56</sup> *Supra* note 42, at 540, 64 L.J.P.C. at 107.

<sup>57</sup> The issue was raised when the jurisdiction of the English courts was broadened in 1937; see note 48 *supra*. The English Court of Appeal in *Zanelli v. Zanelli*, 64 T.L.R. 556, 92 Sol. Jo. 646 (1948), assumed that English law, as the *lex fori*, applied: A. DICEY, *supra* note 4, at 312. The Divorce Act implicitly assumes that the court will apply the *lex fori* and no other law, but that Act requires that the petitioner be domiciled in Canada. The equivalent English legislation, which in the days before a married woman could acquire a separate domicile had a number of extensions in favour of married women who, for example, had resided in England for three years, specifically directed the court to apply English law. The statutory references are found in A. DICEY, *id.* J.-G. CASTEL, 2 CANADIAN CONFLICT OF LAWS (1977) 132, suggests that all that matters is that the "proper law governing the status of the parties is applied".

<sup>58</sup> The fact that Mexico and Nevada apply the *lex fori* to dissolve "Ontario marriages" is what is particularly objectionable to those who believe that the Divorce Act expresses some social or even moral values.

<sup>59</sup> This is discussed, for example, in *Indyka v. Indyka*, *supra* note 53, at 96-97, [1967] 2 All E.R. at 721 (Lord Wilberforce).

more or less automatically that the narrower the grounds upon which a court will take jurisdiction, as, for example, by refusing a separate domicile to a married woman, the fewer the problems of recognition that will arise. In this sense at least, the problems of recognition vary directly with the extent of the jurisdiction asserted by the court. It may be confidently asserted without supporting evidence that there are more cases raising problems of recognition of Mexican and Nevada divorces than there are cases involving Ontario or other Canadian divorces. We have not resolved these problems so far as divorce is concerned. In other areas of the law the problems caused by the assertion of a judicial jurisdiction wider than that which would justify the application of the *lex fori* have been seen as raising the separate issues of recognition (and enforcement) and choice of law.

Once the jurisdictional requirements of the court are relaxed so that disputes can come before it that do not have the kind of connection that would justify the automatic application of the *lex fori*, then choice of law rules are required. As a general rule it can be said that the narrower the grounds upon which the court will take jurisdiction, the less need there is for choice of law rules. The converse is also true. Thus we can say that if courts are going to broaden their jurisdictional grounds, they must consider the need to develop satisfactory choice of law rules. Choice of law rules and jurisdiction are therefore closely related.

If we consider the reasons why a judgment of one court should not be recognized or enforced in the courts of another jurisdiction, we shall find only a few that are valid.<sup>60</sup> These are, first, that the foreign — the original — court failed to give the defendant a reasonable chance to meet the plaintiff's allegations, and second, that the foreign court somehow disposed of the dispute in an improper way. The first objection may arise in a case where the defendant had no notice of the proceedings or where it may have been unreasonable for him to appear to defend himself since that might have induced the enforcing court to regard the original court as an inconvenient forum. The second objection would arise if the enforcing court thought that the original court failed to consider properly, for example, a defence available to the defendant under the law of the enforcing court. There are many examples of just such concerns in the law: the common law rules requiring that the defendant be served in the jurisdiction of the original court or submit to it (an implicit assumption that the original court is a convenient forum or that the risk of its not being so is on the defendant); the rules permitting the defendant to ignore the foreign proceedings unless he is personally served in the jurisdiction or has contracted to submit to it; and the rules denying recognition to a foreign court that has improperly dissolved a marriage that should (in the

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<sup>60</sup> The kind of reasons found in traditional cases like *Schibsby v. Westenholz*, L.R. 6 Q.B. 155, [1861-73] All E.R. Rep. 988 (1870), which focus on the jurisdiction of the foreign court, may not be responsive to the need to give a justification for the result. The question is: In what respects are we better off because we refuse to enforce a foreign judgment?

view of the enforcing court) be dissolved only by the law of the enforcing court. It is, however, impossible to argue that there is always a good reason for the application of the common law rules. It is, for example, irrelevant that the original court was the convenient forum and that it asserted a jurisdiction no wider than that claimed by the enforcing court. If the defendant was not personally served in the jurisdiction of the foreign court and did not submit, any judgment of the foreign court is unenforceable in Canada.

The common law has not yet developed what may be termed a review of the merits of the foreign court decision and has been content to review only the propriety of the assertion of jurisdiction by the foreign court.<sup>61</sup> Only in the area of divorce does one get the strong impression that the issue of enforcement is intimately bound up with choice of law issues. We dislike Nevada or Mexican divorce decrees because those courts apply their own law, which we regard as inapplicable to dissolve a Canadian marriage.

This digression on issues of enforcement has been long, but the importance for an understanding of the issues involved in the assertion of jurisdiction by a Canadian court is that the issue of *forum non conveniens*, for example, becomes only one aspect of a much more complex inquiry. Fairness to the plaintiff must be balanced against unfairness to the defendant (and *vice versa*). A fairly recent case in the Supreme Court of Canada provides an excellent example of the correct approach to these issues. In *Moran v. Pyle National (Canada) Ltd.*<sup>62</sup> the plaintiff brought an action in Saskatchewan for the wrongful death of her husband. It was alleged that death had been caused by the negligence of the defendant in the manufacture of a light bulb. The plaintiff had to serve the writ outside the jurisdiction, and this required that the action be "founded on a tort committed within the jurisdiction".<sup>63</sup> The issue could have been seen as a narrowly technical one — an issue that in many cases has been determinative. In the Supreme Court Dickson J., giving the judgment of the Court, said:

[T]he following rule can be formulated: where a foreign defendant carelessly manufactures a product in a foreign jurisdiction which enters into the normal channels of trade and he knows or ought to know both that as a result of his carelessness a consumer may well be injured and it is reasonably foreseeable that the product would be used or consumed where the plaintiff used or consumed it, then the forum in which the plaintiff suffered damage is entitled to exercise judicial jurisdiction over that foreign defendant. This rule recognizes the important interest a state has in injuries suffered by persons within its territory.<sup>64</sup>

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<sup>61</sup> An analogy may be drawn with the power of courts to review the decisions of administrative tribunals. The court may determine whether the tribunal exercised the jurisdiction conferred upon it by its enabling act, but it may not review the merits of the decision reached by the tribunal.

<sup>62</sup> [1975] 1 S.C.R. 393, 43 D.L.R. (3d) 239 (1973).

<sup>63</sup> Sask. Rule 27(1)(c).

<sup>64</sup> *Supra* note 62, at 409, 43 D.L.R. (3d) at 250-51.

What is particularly interesting about this approach is the importance attached by the court to the conduct and knowledge of the defendant. The defendant cannot complain if it is subjected to the jurisdiction of the Saskatchewan courts. This is an overt recognition of the need to balance the claims of both parties to fair treatment.

*Moran* is an example also of the proper considerations that underlie choice of law issues,<sup>65</sup> though the Supreme Court did not have to discuss this. The words used by Dickson J. could be applied to justify the application of Saskatchewan law as well as the assertion of jurisdiction by Saskatchewan courts. This is an example of the requirement that the appropriateness of the application of forum law must be considered as well as the issues that can arise with respect to recognition and enforcement. If the area of the law that is involved has well developed and balanced choice of law rules (as, for example, contracts)<sup>66</sup> then the assertion of jurisdiction by any court may be less significant and all that really matters is that the claims of the parties to fair treatment be considered. If the cause of action involves a tort claim, where the choice of law rules are generally unsatisfactory since they are anachronistic and unjustifiably forum-centred, then the risks of unfairness to the parties from an assertion of jurisdiction are significantly increased.<sup>67</sup>

One aspect of the *lex fori* is the fact that it is always assumed that the rules of procedure of the forum will be applied. As has been mentioned, the rules of procedure may have an important impact on substantive issues. The effect of limitation periods will be considered later,<sup>68</sup> but it

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<sup>65</sup> Laskin C.J.C. in *Interprovincial Co-op Ltd. v. The Queen*, [1976] 1 S.C.R. 477, at 501, 53 D.L.R. (3d) 321, at 340 (1975), regarded *Moran* as raising choice of law issues.

<sup>66</sup> I have argued elsewhere, Swan, *Contracts of Life Insurance and the Conflict of Laws*, Proceedings of Sixth International Symposium on Comparative Law 130 (1968); Swan, *Annual Survey of Conflict of Laws*, 6 OTTAWA L. REV. 128 (1973); Swan, *supra* note 1; Swan, *Book Review*, 16 OSGOODE HALL L.J. 800 (1978), that the choice of law rules in contracts are not satisfactory. They are, however, so open-ended that they permit the court to do precisely what it wants. This usually means that the court will make sense of the problem it faces, though the contribution of the choice of law rule to this result is minimal. The issue of choice of law will be pursued in Part II of this survey.

<sup>67</sup> It is worth noting that if there were, for example, in the case of *Moran v. Pyle Nat'l (Canada) Ltd.*, *supra* note 62, differences between the Saskatchewan torts rules and the Ontario rules, the usually accepted choice of law rules in torts would result in the application of the *lex fori* under the first rule in *Phillips v. Eyre*, *supra* note 42. If Mrs. Moran were forced to sue in Ontario and if that court applied rules that were less favourable to her than the Saskatchewan rules, she would only get what Ontario would give her. This would be so even though, as has been pointed out, what Dickson J. said to justify the assertion of jurisdiction of the Saskatchewan courts could just as easily justify the application of Saskatchewan law. It should follow (if we were not usually blinded by our traditional doctrines) that the view of the Supreme Court (being, in essence, the law of all the provinces of Canada) should govern in both Saskatchewan and Ontario. In other words, the Supreme Court's language, if we can take it as applicable to the choice of law issue, suggests that every court in Canada should apply Saskatchewan law to *Moran* even if the plaintiff should choose to bring her action in another province. This issue will be explored further in Part II of this survey.

<sup>68</sup> See pp. 143-47 *infra*.



should be noted here that the casual assumption that the question as to whether an action is statute-barred is governed by the *lex fori* may be open to question. Similarly, issues of compellability and access to documents may well be matters of procedure in one sense, but have a direct and significant impact on the substantive rights of the parties. Once it is suggested that one aspect of the court's concern in deciding whether or not to take jurisdiction must be the impact of the *lex fori*, then there is a need for a very careful analysis of the scope of that law.

The assertion of an overriding power in the court to supervise any jurisdictional assertion of other courts is, therefore, not only desirable but usually absolutely necessary to prevent quite unjustified unfairness to the defendant. Similarly, the broadening of the factors that the court will consider, such as the developing distinction between cases involving defendants within as opposed to outside Canada, can be justified on the ground that so far as the choice of law is concerned there may be comparatively little difference in the rules among the common law provinces of Canada, and the Supreme Court of Canada can be relied upon to supervise the provincial courts. There are problems in the recognition and enforcement of foreign judgments, as the next section of this survey will disclose, and the relation between a justifiable assertion of jurisdiction and the corresponding need to recognize and enforce the judgment that follows from such an assertion of jurisdiction has not been adequately explored, even with respect to Canadian jurisdictions.

The ultimate question must always be whether or not it is appropriate that a particular court take jurisdiction in a particular case. The removal of artificial and unnecessary barriers to the consideration of the issue of appropriateness is a first step; the development of criteria for determining appropriateness is a necessary second step. Some of the factors that must be considered at the second stage have been mentioned. The cases coming before the courts in the future will provide opportunities to explore further factors.<sup>69</sup> The courts have at least begun the task.

### 3. Recognition and Enforcement of Foreign Judgments

#### (a) *Judgments in personam*

It has already been suggested that what is involved in the recognition and enforcement of foreign judgments is intimately connected with the

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<sup>69</sup> There are interesting explorations of some of these issues in M. HERZ, INTRODUCTION TO THE CONFLICT OF LAWS (1978) and Herz, *The Constitution and the Conflict of Laws: Approaches in Canadian and American Law*, 27 U.T.L.J. 1 (1977). It is likely that Canadian courts could find much help in an examination of the treatment of similar federal problems in the United States. Professor Herz's publications provide a useful introduction to the American solutions and problems.

issues raised in the assertion of jurisdiction and choice of law.<sup>70</sup> In regard to the issue of recognition and enforcement of foreign judgments the common law as applied in Canada exhibits a curious schizophrenia where one might have expected cohesion and consistency. The fact is that the rules governing the enforcement of judgments (apart from judgments in matrimonial causes) have nothing whatsoever to do with those governing the assertion of jurisdiction. Any Canadian court will blithely refuse to recognize a foreign judgment (*i.e.*, a judgment given by any court of another province or territory and *a fortiori* a judgment given by a court of another country) that resulted from the identical assertion of jurisdiction over an absent defendant that the Canadian court itself would have made. When this is carried to its extreme, an Ontario court will refuse to enforce a judgment of a court in British Columbia given after the British Columbia court had taken jurisdiction under rules *identical* to those governing the Ontario court. One might have expected the courts to adopt a basic principle of fairness: what is sauce for the goose is sauce for the gander.

It has already been suggested that there may be good reasons why a foreign judgment should not be enforced.<sup>71</sup> So far as I am aware, no court has given any good reason why, for example, a British Columbia judgment should be refused enforcement in Ontario in the circumstances that have been outlined. The impossibility of finding any rational reasons for the assertion of a wider jurisdiction than one is prepared to concede will become glaringly obvious when the Supreme Court of Canada is asked to enforce in Ontario, for example, a judgment of the Saskatchewan courts given against an absent defendant after the Supreme Court has expressly approved the assertion of jurisdiction by the Saskatchewan courts.<sup>72</sup> Traditional conflicts rules could easily result in a refusal by the Ontario courts to enforce the Saskatchewan judgment.<sup>73</sup> The factors that are sufficient to justify the assertion of jurisdiction must surely justify the enforcement of the resulting judgment.<sup>74</sup>

Underlying the argument that the Canadian courts should recognize and enforce judgments of other provinces given in circumstances where

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<sup>70</sup> See p. 136 *supra*.

<sup>71</sup> See note 60 *supra*.

<sup>72</sup> As happened in *Moran v. Pyle Nat'l (Canada) Ltd.*, *supra* note 62.

<sup>73</sup> It is, for example, perfectly possible that the submission of the Ontario defendant to the jurisdiction of the Saskatchewan courts for the purpose of determining the validity of the plaintiff's attempt to serve the defendant *ex juris* would not be such a submission as would make the Saskatchewan judgment enforceable at common law. In other similar cases where leave to serve out of the jurisdiction may be required, the case could with leave go all the way to the Supreme Court on an *ex parte* application by the plaintiff. It is only important to note that the mere fact that it is the Supreme Court of Canada that has determined the appropriateness of the Saskatchewan court says nothing about the attitude of the Ontario courts in a subsequent action for enforcement in that province.

<sup>74</sup> For the moment it is reasonable to limit the scope of this claim to the enforcement in one province of the judgments of another. Such a limitation permits the development of arguments based on *Moran v. Pyle Nat'l (Canada) Ltd.*, *supra* note 62.

the enforcing court would itself have assumed jurisdiction is a notion that the assertion of jurisdiction by the original court respects the limits that must be placed on any assertion of jurisdiction. In other words, a consideration of the reasons why a judgment should not be enforced — unfairness, lack of notice, unreasonable assertion of jurisdiction — provides a list of the factors that are important in deciding whether or not jurisdiction should be asserted in the first place. Since both sides of the equation — the assertion of jurisdiction and the enforcement of the resulting judgment — can be supervised by the Supreme Court, there need be no concern that in regard to interprovincial judgments any incongruities will long survive.<sup>75</sup>

The fact remains of course that, as has been said, the recognition rules applied by Canadian courts bear absolutely no relation to the jurisdictional rules. The recognition rules that govern the extraprovincial effect to be given to any judgment have been hallowed by long usage. Legislation like The Reciprocal Enforcement of Judgments Acts of all the common law provinces<sup>76</sup> has not changed the basic common law rules.<sup>77</sup> These acts merely offer a summary procedure for enforcing a judgment; they do not provide a wider basis for enforcement.

Recent cases have raised a number of issues that require comment. First, the issue as to what amounts to submission to the jurisdiction of the foreign court has arisen fairly frequently for decision. The law has always been clear that a submission to the jurisdiction of the foreign court will make any resulting judgment enforceable in Canada. The problems arise over what amounts to a submission. It has generally been accepted that a defendant who has been served *ex juris* can appear for the limited purpose of challenging the jurisdiction of the court. The cases suggest, however, that this is a risky procedure and that the line between a qualified submission and an unqualified submission is hard to draw. A

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<sup>75</sup> This is where the decision in *Moran v. Pyle Nat'l (Canada) Ltd.*, *supra* note 62, is so useful. It is easy to imagine that the Supreme Court, having supervised the assertion of jurisdiction by the Saskatchewan courts (in fact, having told these courts that they should take jurisdiction), could be asked to review the refusal of the Ontario courts to enforce. The assertion of jurisdiction by any provincial court can be reviewed by the Supreme Court whenever the resulting judgment comes for enforcement in another province. There would appear to be no difficulties in developing what amounts to a principle of reciprocity.

<sup>76</sup> The Reciprocal Enforcement of Judgments Act, R.S.A. 1970, c. 312; Court Order Enforcement Act, R.S.B.C. 1979, c. 75; The Reciprocal Enforcement of Judgments Act, R.S.M. 1970, c. J20; Reciprocal Enforcement of Judgments Act, R.S.N.B. 1973, c. R-3; Reciprocal Enforcement of Judgments Act, S.N.S. 1973, c. 13; The Reciprocal Enforcement of Judgments Act, R.S.O. 1970, c. 402; Reciprocal Enforcement of Judgments Act, R.S.P.E.I. 1974, c. R-7; The Reciprocal Enforcement of Judgments Act, R.S.S. 1978, c. R-3.

The legislation in all the common law provinces is based on recommendations from the Conference of Commissioners on Uniformity of Legislation in Canada. See Nadelman, *Enforcement of Foreign Judgments in Canada*, 38 CAN. B. REV. 68 (1960).

<sup>77</sup> See *Re McCain Foods Ltd.*, 26 O.R. (2d) 758, 103 D.L.R. (3d) 724 (H.C. 1979), *appeal dismissed* 26 O.R. (2d) 768, 103 D.L.R. (3d) 734 (1979); and *First Nat'l Bank of Oregon v. Harris*, 10 O.R. (2d) 516, 63 D.L.R. (3d) 628 (Ct. Ct. 1975).

recent decision of the English Court of Appeal<sup>78</sup> suggests that a judgment may not be enforceable when rendered after the defendant, served *ex juris*, appeared *solely* to protest the jurisdiction of the foreign court. The case holds, however, that

[t]he English courts will enforce the judgment of a foreign court against a defendant over whom that court has jurisdiction by its own local law (even though it does not possess such jurisdiction according to the English rules of conflict of laws) if that defendant voluntarily appears before that foreign court to invite that court in its discretion not to exercise the jurisdiction which it has under its own local law.<sup>79</sup>

The distinction between an appearance *solely* to protest the foreign court's jurisdiction and an appearance to invite a foreign court not to exercise its own jurisdiction is subtle, to say the least, and counsel would have to draft any pleadings or notice of motion and conduct himself before the court with the greatest of care to avoid crossing the line inadvertently.<sup>80</sup> The risks of a false step are so great as to make the exercise of protesting the foreign court's jurisdiction scarcely worthwhile. The rules of court of all the provinces permit a defendant to make a conditional appearance.<sup>81</sup> This is said to involve a submission for the narrow purpose of determining the issue of jurisdiction without the risks attendant on an unconditional appearance (which would constitute submission). Within Canada a conditional appearance may have the effect of protecting the defendant,<sup>82</sup> but whether it has the same effect outside Canada cannot be determined by Canadian courts or Canadian rules. Thus, the English Court of Appeal has said:

[T]he authorities compel this court to say that if such a protest takes the form of or is coupled with what in England would be a conditional appearance and an application to set aside an order for service out of the jurisdiction and that application then fails, the entry of that conditional appearance (which then becomes unconditional) is a voluntary submission to the jurisdiction of the foreign court. The defendant need not appear then, conditionally or unconditionally. He can stay away. But as the cases say, he may prefer to take

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<sup>78</sup> *Henry v. Geoprosco Int'l Ltd.*, [1976] Q.B. 726, [1975] 2 All E.R. 702 (C.A.).

<sup>79</sup> *Id.* at 747, [1975] 2 All E.R. at 718.

<sup>80</sup> The case has not been free of criticism. It was referred to by Cromarty J. in *Re McCain Foods Ltd.*, *supra* note 77, but the Court of Appeal said:

In dismissing this appeal we are not to be taken as approving the view of Cromarty J., that the [defendants] by entering a conditional appearance and applying to set aside the writ voluntarily attorned to the jurisdiction of the New Brunswick Court and, consequently, were bound by that court's decision. This view was founded upon *Harris v. Taylor*, [1915] 2 K.B. 580, and *Henry v. Geoprosco Int'l Ltd.*, [1976] Q.B. 726, which decisions have attracted considerable criticism. There is no need to consider these authorities for the purposes of our decision in the case. We do not consider ourselves bound by them and we reserve our view on them for another day.

*Id.* at 769, 103 D.L.R. (3d) at 734 (Blair J.A.).

<sup>81</sup> See O.R.P. 38.

<sup>82</sup> This may be a reasonable inference from what Blair J.A. said in *Re McCain Foods Ltd.*, *supra* note 80.

his chance upon a decision in his favour. If he does so, he must also accept the consequences of a decision against him.<sup>83</sup>

It is important to remember, whatever purpose a conditional appearance may have in the jurisdiction that permits it, that this purpose may not be given the same effect in any other jurisdiction. As the decision in *Henry v. Geoprosco International Ltd.*<sup>84</sup> makes clear, the risks of any kind of appearance in the foreign jurisdiction are high.

The interpretation given to any appearance or participation by the defendant in the foreign proceedings will generally be in favour of the plaintiff. Thus, a defendant who retains counsel to respond to the merits of the case will be held to have submitted even though the defendant himself could not appear in the foreign jurisdiction without subjecting himself to criminal liability.<sup>85</sup>

An issue of recognition or enforcement always involves two separate inquiries. The first is as to whether the foreign court had jurisdiction to make the judgment upon which the plaintiff is suing. This issue has just been examined. The second is as to whether there are any defences to the action — or to any of the more summary proceedings such as an action on a special endorsed writ or those under The Reciprocal Enforcement of Judgments Act<sup>86</sup> — on the foreign judgment. Once again the general rules are quite clear. The defendant will not be permitted to relitigate the matters that have been disposed of by the foreign court which *ex hypothesi* had jurisdiction — that is, a jurisdiction recognized by the enforcing court — to dispose of the case.

The effect of a foreign judgment was considered by the House of Lords in *Black-Clawson International Ltd. v. Papierwerke Waldhof-Aschaffenburg A.G.*<sup>87</sup> An action had been started in Germany by the plaintiff-appellant for the amount of certain bills of exchange on which the defendants were claimed to be liable. That action had been dismissed by the German court at trial on the ground that the action was statute-barred in Germany. An action was subsequently started in England and the question was whether or not the German judgment prevented the plaintiff from suing in England. The judgments in the House of Lords are taken up to a considerable extent with a discussion of the provisions of the English legislation, which is inapplicable in

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<sup>83</sup> *Henry v. Geoprosco Int'l Ltd.*, *supra* note 78, at 748, [1975] 2 All E.R. at 719-20.

<sup>84</sup> *Supra* note 78.

<sup>85</sup> *United States v. Cassidy*, 79 D.L.R. (3d) 635 (B.C.S.C. 1977).

<sup>86</sup> The Reciprocal Enforcement of Judgments Act, R.S.A. 1970, c. 312; Court Order Enforcement Act, R.S.B.C. 1979, c. 75; The Reciprocal Enforcement of Judgments Act, R.S.M. 1970, c. J20; Reciprocal Enforcement of Judgments Act, R.S.N.B. 1973, c. R-3; Reciprocal Enforcement of Judgments Act, S.N.S. 1973, c. 13; The Reciprocal Enforcement of Judgments Act, R.S.O. 1970, c. 402, Reciprocal Enforcement of Judgments Act, R.S.P.E.I. 1974, c. R-7; The Reciprocal Enforcement of Judgments Act, R.S.S. 1978, c. R-3.

<sup>87</sup> [1975] A.C. 591, [1975] 1 All E.R. 810 (H.L.).

Canada. The decision reached, however, was that the judgment in Germany was not conclusive on the merits and did not therefore bar the plaintiff's action in England. The decision affirmed the case of *Harris v. Quine*<sup>88</sup> and may be regarded as stating the common law position. The decision was based, in part, on the assumption (proved by expert evidence) that the effect in Germany of the running of the limitation period is to bar the remedy but not to destroy the cause of action. The existence of the German judgment was then said not to have affected the cause of action in England.

The existence of limitation periods has caused courts extraordinary problems over the years.<sup>89</sup> Almost all of these problems are of the courts' own making, though they have been ably assisted in their efforts by commentators. If we were to examine the problem without any preconceptions, we would find a number of factors that would be relevant in any proceedings to determine whether or not an action was statute-barred, and how that problem should be handled in the context of the conflict of laws. The purpose of a limitations act is, presumably, to protect the defendant from having to meet stale claims.<sup>90</sup> Such an act can hardly be said to protect the courts' own process directly. That this is so can be seen from the fact that certain claims are treated in ways that permit them to be litigated at a time that may be many years after a limitation period would normally have run. In these cases the court may have a discretion to prevent embarrassment and what may be, in an extreme case, an abuse of its process. In such a case the court may decide to protect the defendant, or the circumstances may be such that the defendant is not entitled to protection: for example, he may have tried to conceal that the plaintiff had a claim or, as between the plaintiff and defendant, the balance of fairness, convenience or justice may lie on the plaintiff.<sup>91</sup>

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<sup>88</sup> L.R. 4 Q.B. 653, 38 L.J.Q.B. 331 (1869).

<sup>89</sup> For a comprehensive discussion of these problems, see C. PRESTON AND G. NEWSON, *LIMITATION OF ACTIONS* (3d ed. 1953); F. WEAVER, *LIMITATIONS* (1939); and ONTARIO LAW REFORM COMMISSION, *REPORT ON LIMITATION OF ACTIONS* (1969) [hereinafter cited as OLRC REPORT].

<sup>90</sup> The purpose of a statute of limitations is stated by the Ontario Law Reform Commission:

Lawsuits should be brought within a reasonable time. This is the policy behind limitation statutes. These laws are designed to prevent persons from beginning actions once that reasonable time has passed. Underlying the policy is a recognition that it is not fair that an individual should be subject indefinitely to the threat of being sued over a particular matter. Nor is it in the interests of the community that disputes should be capable of dragging on interminably. Furthermore, evidentiary problems are likely to arise as time passes. Witnesses become forgetful or die; documents may be lost or destroyed. Certainly, it is desirable that, at some point, there should be an end to the possibility of litigation in any dispute. A statute of limitation is sometimes referred to as an "Act of peace".

OLRC REPORT, *supra* note 89, at 9.

<sup>91</sup> Examples of this are the rules regarding the periods against minors, the rule in regard to equitable claims (where the fixed period has been replaced by the much more

In a conflicts case it may be assumed that exactly the same factors would be relevant. Here the problem would be to decide which of two limitations periods should be chosen. Thus, in *Black-Clawson* the German court had to decide whether the German period was applicable. In so far as any limitation period exists to protect the defendant, the inquiry will ascertain the legal background against which the parties may be regarded as having acted and the appropriate choice can be made on this basis. In so far as any limitation period exists for the direct protection of the court and its process (though this is, as has been said, probably an unlikely purpose for the fixing of a limitation period), the court hearing the case is the only one concerned. A limitation period cannot, therefore, be classified as either "procedural" or "substantive" in the abstract;<sup>92</sup> it either is or is not applicable to a particular case, according to the particular issue involved. If it exists to protect a defendant, then the court must determine if *this* defendant should be protected by *this* statute so that the action is held to be statute-barred. If the statute exists to protect the court, it will be applied as part of the *lex fori*. If one follows this approach, the first inquiry would result in a "substantive" issue, and the second in a "procedural" one, but there would be no point in making this classification since it is unnecessary. Where it is made now, it is more likely to be a conclusion than a premise. Of course, there may be hard cases and cases where some unsuspecting plaintiff may find that the period has run, but these cases will be rare. No argument can be made that, in a conflicts case, the existing rules provide certainty.

In *Black-Clawson* the process of reasoning that led the German court to apply the limitation period that it did, three years as opposed to six, was stated by Lord Wilberforce:

[L]imitation [of actions] is, under German law, classified as a matter of substance, not of procedure . . . as the proper law of the bills is English law.

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flexible notion of laches), the possibility of the revival of a claim that is statute barred: *Spencer v. Hemmerde*, [1922] 2 A.C. 507, 91 L.J.K.B. 941 (H.L.); *The Limitations Act*, R.S.O. 1970, c. 246, s. 51; and OLRC REPORT, *supra* note 89, at 20-22.

<sup>92</sup> This is of course what is usually done. See G. CHESHIRE, *supra* note 4, at 695-98; A. DICEY, *supra* note 4, at 1103-06. See also J.-G. CASTEL, 1 CANADIAN CONFLICTS OF LAWS 608-09 (1975). The last-mentioned work contains a standard statement of the common law position:

Provisions in statutes of limitations that merely specify a certain time after which rights cannot be enforced by action are procedural, as 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. On the other hand, provisions that create or extinguish the right of action are substantive and can only be invoked in the forum if they are part of the *lex causae* [footnotes omitted].

*Id.* Any process of characterization or classification in the conflict of laws must be automatically suspect. Dicey states: "It is eminently desirable that the process of characterisation should be kept as flexible as possible." *Supra* note 4, at 32. It is sometimes difficult for a court to know when to be flexible and when not to be unless the purpose of the rules in question is considered. See the OLRC REPORT which recommends that any limitation period be regarded as substantive. *Supra* note 89, at 186.

this involves the application by a German court of English law; . . . under English law limitation is regarded as a matter of procedure; . . . applying the doctrine of renvoi (accepted by the German court), reference back has to be made to the *lex fori*, i.e. German law, so that the proceedings were barred.<sup>93</sup>

The only way to avoid such absurdities as characterization and renvoi is to focus on the only issue that requires consideration: Is the purpose of the German rule, that an action must be brought within three years, forwarded in the case? If so, the action is statute-barred. If not, the action is not.

If this is the focus of the inquiry, then whether any resulting judgment in favour of the defendant should be recognized or not depends, not on whether the effect is to bar the remedy or destroy the cause of action, but whether the basis for the German court's conclusion is that the action is an abuse of the court's process or that the defendant would be unfairly treated by being subjected to a stale claim. Whether the defendant would be so treated is, of course, an issue that raises questions of choice of law. For example, what is the legal background against which these parties were organizing their affairs? The plaintiff who has, after all, chosen the foreign forum cannot complain if the German court concludes that the defendant is being unfairly treated, even though an English court might have reached a different conclusion. Such a judgment should be recognized in England. The plaintiff has had his chance to convince the court that he should win and has lost. This is precisely why the defences that can be raised in any proceedings brought on the foreign judgment are limited. It is likely, on the facts of *Black-Clawson*, that the German court could conclude that the background legal system was English so that to subject the German defendant to the longer English limitation period would not be unfair. Subsequent proceedings in Germany may indicate that this conclusion (though probably not for the reasons outlined here) may represent German law. An appeal by the plaintiff from the German judgment relied on by the defendant in *Black-Clawson* was, apparently, allowed, but at the time of the decision in the House of Lords, an appeal to the West German Federal Supreme Court was pending.<sup>94</sup>

The conclusion of the House of Lords may be said to be that the German court, in dismissing the plaintiff's case, was not adjudicating on the "merits". Certainly if the summary of the reasoning offered by Lord Wilberforce is an accurate account of the attitude of the German court, there was no adjudication on the "merits". This method of dealing with similar issues in foreign litigation is, as has been suggested, suspect. It

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<sup>93</sup> *Supra* note 87, at 628, [1975] 1 All E.R. at 827.

<sup>94</sup> If we are to make any sense of Lord Wilberforce's statement that the German court regarded the "proper law of the bills" as English law, we must assume that for the German court the issue of fairness to the defendant must be tested by reference to English law. There is no reason to regard the issue of fairness arising under a Limitations Act as being any different from the issue of fairness in unconscionability or remoteness of damage situations. Both of these would presumably be regarded by the German court as being determined by English law.



suggests that there is no rational purpose to a Limitations Act and that the process of reasoning can be conducted at a level that sees the only questions as ones which ask if the provisions bar the cause of action or only the remedy.<sup>95</sup> The truth is that none of these categories are exclusive and the process of characterization cannot be allowed to govern the final conclusion. Any conclusion must be based on a purposive application of the rules in each jurisdiction. In other words, whether a limitation is regarded as procedural or substantive or as removing only the remedy or destroying the cause of action depends entirely on the reason why the court concluded that the action was barred.<sup>96</sup>

The result of this analysis is to suggest that a judgment in favour of a defendant may prevent the plaintiff from suing again and involves very complex issues. This is, however, only to be expected. A judgment in favour of a plaintiff must necessarily have disposed of all the defences raised by the defendant. A judgment in favour of the defendant may leave a number of issues unresolved. The problems in a domestic case in determining the proper scope of a judgment in favour of a defendant are far more than can arise in a judgment in favour of the plaintiff.<sup>97</sup> There is no reason to assume that the issues in a conflicts case will be any less complex.

In *N.M. Paterson & Sons Ltd. v. St. Lawrence Corp.*<sup>98</sup> the Supreme Court of Canada had to determine the effect of a judgment in a United States District Court. The action before the Canadian courts involved a claim for an indemnity brought by the owner against the charterer of a ship. An injured stevedore had successfully sued the owner in the United States. The action was brought in Quebec and was considered by the court to be governed by the Civil Code. However, the case can usefully be analyzed as a problem that could easily arise in any part of Canada. The basis of the owner's claim against the charterer was "an undertaking [by the charterer] to load, stow and discharge the cargo free of risk and expense to the vessel", and there is nothing to suggest that his undertaking would only be found in charter-parties negotiated against the background of Quebec law.

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<sup>95</sup> See text accompanying note 92 *supra*.

<sup>96</sup> As the decision of the German court in *Black-Clawson*, *supra* note 87, indicates, it may not be easy to determine what purpose the German court had in mind, since no attempt at a rational application of the Limitations Act appears to have been made. The job of the enforcing court must then be to re-create as best it can what the foreign court would have done had it seen the need to develop a functional analysis. The operative word in this process will be "re-create" with emphasis on the creative aspect. The need for such a re-creation arises from the justifiable expectations of the defendant. The defendant has already been subjected to one trial and if it can reasonably be inferred from the judgment of the trial court that its conclusion was based on the unfairness of subjecting this defendant to a stale claim, then the plaintiff should be held to the consequences of its choice of forum. There is as much need to balance the claims of both parties to fair treatment in this kind of case as anywhere else in the law.

<sup>97</sup> Consider for example, the problems raised by the issue of *res judicata* in *Town of Grandview v. Doering*, [1976] 2 S.C.R. 621, 61 D.L.R. (3d) 455 (1975).

<sup>98</sup> [1974] S.C.R. 31, 34 D.L.R. (3d) 751 (1973).

The Supreme Court of Canada refused to regard the judgment of the United States Federal Court as conclusive of the amount of the liability of the charterer to the owner. The Court accepted the conclusions of the lower courts that the injured stevedore had been contributorily negligent and that the amount recoverable by the owners should be reduced by half. Such a conclusion is very odd and illustrates the very confused approach of the Court to the issues raised by the case. The basis for the owner's claim is the obligation incurred by the charterer under the charter-party. The effect of the clause in the charter-party is to transfer the risk of loss to the charterers. We may assume that the cost of the transfer of the risk was reflected in the amount paid as hire by the charterer for the vessel. The only question before the court is whether or not the amount paid by the owners in settlement of the United States action was within the ambit of the risk transferred. The determination of that issue requires an examination of the factors that are relevant in deciding what was the nature of the risk transferred and what were the respective obligations of the parties. The most significant limitation on the amount recoverable by the owner from the charterer is the requirement that the payment made by the owner be reasonable. In addition, the charterer is entitled to receive notice, first of the claim made by the injured stevedore, and second, of the fact that a settlement was proposed. Beyond that, it is hard to see what basis there is for a review by the Quebec courts of the amount paid by the owner.

The case was regarded by the Supreme Court as raising the following issue: What recognition is to be given to the judgment of the United States court? Pigeon J. referred to article 178 of the Quebec Code of Civil Procedure which provides that "any defence which might have been set up to the original action may be pleaded to an action brought upon a judgment rendered out of Canada".<sup>99</sup> However, this article must be irrelevant because the judgment could not have been enforced against the defendant since he was not a party to it.<sup>100</sup> The importance of the fact

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<sup>99</sup> The power conferred by this article is an objectionable example of the discretionary power of the court. It is unfortunately not unique in Canada. See the similar wording of s. 83 of The Queen's Bench Act, R.S.M. 1970, c. C280, and how Manitoba courts have limited the effect of this section in cases such as *Marshall v. Houghton*, [1922] 3 W.W.R. 65, 68 D.L.R. 308 (Man. K.B.), *aff'd* [1923] 2 W.W.R. 65, 33 Man. R. 166 (C.A.); and *Re Aero Trades Western Ltd.*, [1975] 4 W.W.R. 412, 51 D.L.R. (3d) 617 (Man. Ct. Ct. 1974).

<sup>100</sup> Commenting on art. 178, Pigeon J. said: "This being so in a case in which the person condemned was a party to the proceedings, *a fortiori* must it be so towards a person who was not impleaded in the Foreign Court." *Supra* note 98, at 38, 34 D.L.R. (3d) at 755. This is difficult to understand. The usual effect of a foreign judgment between the parties to it is to provide a new cause of action. But the effect of art. 178 is to reduce significantly the benefits that would otherwise be available to the plaintiff who sues on the foreign judgment. As between the parties in this case, the owners could only have sued on the charter-party, not on the judgment. The latter could never have provided an alternative cause of action; so, art. 178 cannot have an effect on an action brought by the owners against the charterers. It is not possible for a Quebec court to use this article and support a conclusion that the settlement in this case was unreasonable.

that the amount paid by the owner was determined by a judgment is that it supports the argument that the amount was reasonable. If the amount recoverable in a foreign court is more than could be recovered in a Quebec court, it is either part of the risk run by the charterer who takes the vessel into a foreign jurisdiction and, therefore, is recoverable, or it is not part of the risk and is unrecoverable. Whether the owners can recover depends solely on the interpretation of the charter-party.<sup>101</sup> For the Quebec courts to limit the amount recoverable to what the injured stevedore could recover in Quebec if he were to sue there, is to alter what would appear to be the ordinary purpose of the indemnity clause in the charter-party. The owner says to the charterer: "You can use my ship, but if your use costs me anything, I want you to pay for it." The owner would reasonably have expected the amount to be determined by the circumstances of each case, including the geographical location of any accident that gave rise to a claim.

The case illustrates the "knee-jerk" reaction of courts to conflicts cases. Counsel and courts see a foreign judgment and they tend to classify it automatically as a conflicts case. The fact is, of course, that this is not always so: here, for example, it was a contracts case. Foreign facts such as the amount paid by the owner of the vessel may have to be considered but their relevance is only in the determination of whether or not the amount paid was reasonable and whether it was within the scope of the risk assumed by the charterer when the deal was made. If the answer to the inquiry is that the loss was within the risk transferred, then the charterer is liable; if not, the charterer is not liable.

The effect of the decision is the introduction of an unacceptable level of uncertainty into what is probably a standard charter-party in extensive use on the Great Lakes. This will result in the imposition of additional costs on everyone involved in the business. Owners who are sued may now try to join charterers as third parties to ensure that there is a judgment between them. But this may not avoid the problem caused by the Supreme Court, for even then the judgment may not be fully enforceable. Courts in common law Canada will presumably ignore the decision and put it down to some civil law aberration. The real tragedy of the judgment lies in this: The Supreme Court had an opportunity to make sense of what must be a standard clause in a charter-party; it could have set out the circumstances in which owners could take advantage of the

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<sup>101</sup> The only relevant clause from the charter-party is the obligation of the charterer to operate "free of risk and expense to the vessel". There is nothing in the judgment to indicate that the effect of this clause was not understood by both parties to be a transfer of the risk of loss arising from the successful claim by the stevedore against the charterer. Given the power of a party to arrest a ship, and given the possibility that the charterers have a very large measure of control over the ship, the allocation of risk is perfectly reasonable and sensible and should be upheld by any court. The charterers never suggested that the risk was not transferred. They objected that the owners waited too long to inform them of the stevedore's claim. There is no examination of this in the judgment, though it would clearly have been an issue relevant to an action based on the charter-party.

transfer of the risk to charterers and provide useful guidance for the conduct of litigation and the negotiation of settlements. Instead we have a decision which appears to give charterers a quite unjustifiable basis for avoiding the risk they willingly accepted. Owners cannot safely settle in any foreign jurisdiction because some Canadian court may review the settlement and decide that it was too generous. The Supreme Court has said that it can do this regardless of the fact that the question under the terms of the charter-party can only be whether the payment made, as a settlement or after judgment, was reasonable or not. The other side of the coin is the danger, at least in theory, that a court that does not have anything equivalent to article 178 will enforce without thought a foreign judgment in a situation similar to that in *N.M. Paterson & Sons Ltd. v. St. Lawrence Corp.*<sup>102</sup> and ignore the argument that it may not be within the risk assigned. This danger is probably quite insignificant for no court is likely to enforce a judgment that does not bind both parties.

One of the most extraordinary cases ever decided by a Canadian judge on the issue of recognition of a foreign judgment must be the case of *Ling v. Yip*.<sup>103</sup> The facts were that the parties had been involved in gambling in Victoria. The plaintiff advanced money to the defendant for the purposes of gambling and the defendant gave the plaintiff cheques for the amounts advanced. The defendant stopped payment on the cheques. He was subsequently prosecuted under the Criminal Code on an information laid by the plaintiff, and was convicted by a British Columbia court. The court made an order under the Criminal Code that the defendant repay the amount he had obtained from the plaintiff. The pertinent provisions of the Criminal Code are:

653(1) A court that convicts an accused of an indictable offence may, upon the application of a person aggrieved, at the time sentence is imposed, order the accused to pay to that person an amount by way of satisfaction or compensation for loss of or damage to property suffered by the applicant as a result of the commission of the offence of which the accused is convicted.

(2) Where an amount that is ordered to be paid under subsection (1) is not paid forthwith the applicant may, by filing the order, enter as a judgment, in the superior court of the province in which the trial was held, the amount ordered to be paid, and that judgment is enforceable against the accused in the same manner as if it were a judgment rendered against the accused in that court in civil proceedings.<sup>104</sup>

The amount was not paid and the order was filed in the British Columbia Supreme Court. The order (the court refers to it as a "judgment") was registered under The Reciprocal Enforcement of Judgments Act<sup>105</sup> of Alberta and the issue of its enforceability was raised in proceedings brought by the defendant to have the registration set aside. The judge made reference to a case decided by the Appellate

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<sup>102</sup> *Supra* note 98.

<sup>103</sup> 54 D.L.R. (3d) 317 (Alta. S.C.) (MacDonald J.).

<sup>104</sup> R.S.C. 1970, c. C-34.

<sup>105</sup> R.S.A. 1970, c. 312, s. 3(6)(a).

Division of the Supreme Court of Alberta where an action brought on cheques issued by the defendant and cashed by the plaintiff so that the defendant could continue gambling was dismissed.<sup>106</sup> This case was taken as the authority for the statement made by the judge in *Ling v. Yip*: "I have no hesitation in finding that the cheques were given for an illegal consideration."<sup>107</sup> The judge then referred to The Reciprocal Enforcement of Judgments Act, section 3(6)(g) which provides that no order for registration shall be made if "the judgment debtor would have a good defence if an action were brought on the original judgment", and concluded: "The registration of the judgment in Alberta is therefore set aside on the ground that the judgment debtor would have a good defence if action were brought against him in Alberta."<sup>108</sup>

The conclusion does not follow from the premise. The fact that the Alberta courts might not allow an action on cheques issued in the circumstances of the case is irrelevant. The action is not on a cheque: it is an action (or the equivalent of an action) *on a judgment*. The Act provides that the judgment debtor must have a defence if an action were brought on the judgment.<sup>109</sup> The Act does not provide that the judgment debtor may have a defence to registration if he has a defence on the *original cause of action*. The conclusion involves a complete misreading of the Act.<sup>110</sup>

However, the disturbing aspect of this case is the court's failure to realize that the plaintiff's use of the Alberta Reciprocal Enforcement of Judgments Act was not for the purposes of enforcing a British Columbia judgment in a civil action on a cheque but for the enforcement of a claim based on the Criminal Code. The result of *Ling v. Yip* is that an Alberta court is refusing to enforce an order made under a federal statute. To understand why this is extraordinary, it is necessary to note the following facts. The Supreme Court of Canada has held that the power to impose an order of restitution on a person convicted of a criminal offence is a valid exercise of the power of Parliament.<sup>111</sup> The Alberta courts must be assumed to apply the Criminal Code in the same way and to have the same powers, as the British Columbia courts. It is implicit in the allocation of the criminal law power to Parliament<sup>112</sup> that the criminal

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<sup>106</sup> *Kadiuk v. Pawliuk*, 25 W.W.R. 321, 14 D.L.R. (2d) 409 (Alta. S.C. 1958). The decision was based on the Gaming Act 1710, 9 Anne, c. 19, *as amended by* 5 & 6 Wm. 4, c. 41, which was held to be in force in Alberta. The cheques given by the defendant in *Ling v. Yip* were held to be subject to these acts.

<sup>107</sup> *Supra* note 103, at 320.

<sup>108</sup> *Id.*

<sup>109</sup> The Reciprocal Enforcement of Judgments Act, R.S.A. 1970, c. 312, s. 3(6)(g).

<sup>110</sup> See *Re Aero Trades Western Ltd.*, *supra* note 99, where the judge noted that s. 83 of The Queen's Bench Act, R.S.M. 1970, c. C280, is expressly made subject to s. 3(6)(g) of The Reciprocal Enforcement of Judgments Act, R.S.M. 1970, c. J-20.

<sup>111</sup> *Regina v. Zelensky*, [1978] 2 S.C.R. 940, 2 C.R. (3d) 107, 86 D.L.R. (3d) 179.

<sup>112</sup> B.N.A. Act, s. 91(27).

law in Canada must be applied in the same way across the whole country. The Alberta courts might, therefore, impose the same penalty on the defendant as did the British Columbia court. The fact that the Alberta courts might not allow a civil cause of action is irrelevant. The provincial courts have under the Criminal Code no choice but to allow an order under section 653 to be filed in the court and to permit execution thereon.

The decision in *Ling v. Yip*, therefore, is wrong in its interpretation of section 3(6)(g) of The Reciprocal Enforcement of Judgments Act<sup>113</sup> and flatly inconsistent with the role of a provincial court in applying a federal statute. It could even be argued that the Alberta courts should enforce a British Columbia judgment given in a civil action on the cheques on the ground that a provincial court should seldom, if ever, characterize a judgment of the court of another province as offensive to public policy. In an action based on a judgment or order arising under a federal statute, there can be no possible basis for a refusal to enforce the judgment of the other province.

#### (b) *Judgments in Matrimonial Causes*

The issues that arise on the recognition and enforcement of judgments *in personam* are paralleled by the issues that arise on the recognition of foreign divorce decrees. The interrelationship between these issues and those arising on the taking of jurisdiction have been mentioned.<sup>114</sup> It will be convenient at this point to deal with a few cases that have involved the recognition of foreign divorce decrees.

One of the more bothersome issues that can arise when discussing the question of recognition is the effect to be given to what may be termed discretionary grounds for refusal to recognize. The Supreme Court of Canada dealt with such an issue in *Powell v. Cockburn*.<sup>115</sup> The case arose out of a petition for nullity by a husband on the grounds that, at the date of his marriage in April 1951, his wife was already married. The issue was whether a divorce which the wife's first husband, Cockburn, had obtained in Michigan in 1947 would be recognized or not. The trial judge<sup>116</sup> made three findings that Dickson J. said were "very significant". These were:

- (i) that at the date of filing his Bill of Complaint for Divorce in the Michigan Court . . . Cockburn was domiciled in Ontario and not in Michigan; (ii) that Cockburn had not satisfied the residence requirements for divorce in the State of Michigan, not having been a *bona fide* resident of the State for one year prior to the filing of his petition; (iii) that Cockburn's case in the Michigan Court was wholly fraudulent.<sup>117</sup>

<sup>113</sup> R.S.A. 1970, c. 312.

<sup>114</sup> See p. 136 *supra*.

<sup>115</sup> *Supra* note 55.

<sup>116</sup> *Powell v. Powell*, [1973] 1 O.R. (2d) 497, 31 D.L.R. (3d) 519 (H.C. 1972) (Cromarty J.), *rev'd sub nom. Powell v. Cockburn*, [1973] 2 O.R. (2d) 188, 33 D.L.R. (3d) 384 (C.A.).

<sup>117</sup> *Supra* note 55, at 220, 68 D.L.R. (3d) at 702.

It is important to disentangle the issues raised by these findings. There are two issues. First, was the Michigan decree entitled to recognition in Ontario, ignoring for the moment the argument that it may have been obtained by fraud? Second, if so, is the fact that it was obtained by fraud practiced on the Michigan court relevant? The Supreme Court of Canada reversed the order of these questions and this led to some problems. The usual approach is to consider the issue of fraud only once it is decided that the foreign decree is entitled to recognition. It will be shown that fraud is irrelevant in determining the first question.

If we focus on the first question, there are two parts to it. The first is whether, under the rules applied by the Ontario court, the Michigan court has jurisdiction or not. The reasons that the Michigan court took jurisdiction are quite irrelevant. The second is whether another jurisdiction, whose decrees would be recognized in Ontario, would itself recognize the Michigan decree.<sup>118</sup> The approach adopted by the House of Lords in *Indyka v. Indyka*<sup>119</sup> has been followed in Canada by courts of some provinces.<sup>120</sup> While discussing the issues involved, the trial judge in *Powell v. Powell* made no reference to *Indyka* or to *Messina v. Smith*.<sup>121</sup> His finding that Cockburn was domiciled in Ontario suggests that this is a sufficient reason for refusing to regard the decree as entitled to recognition. The Supreme Court accepted the trial judge's conclusion in regard to the domicile of Cockburn in 1941,<sup>122</sup> even though this conclusion was based on statements that the Supreme Court of Canada itself had not accepted.

In an earlier survey I referred to the thoroughly unsatisfactory nature of the law of domicile in this country.<sup>123</sup> One might reasonably expect the Supreme Court of Canada to be aware of the conflict in its own decisions. Apart from this, there is surely something anachronistic about statements like the following: "There is always a presumption of law in favour of

<sup>118</sup> See *Messina v. Smith*, *supra* note 50.

<sup>119</sup> *Supra* note 53.

<sup>120</sup> See, e.g., *Keresztessy v. Keresztessy*, 14 O.R. (2d) 255, 30 R.F.L. 194, 73 D.L.R. (3d) 347 (H.C. 1976). See also *Bate v. Bate*, 1 R.F.L. (2d) 298, at 304 (H.C. 1978), where Boland J. held: "The Supreme Court of Canada has not yet adopted the *Indyka* doctrine. Even though that court had an opportunity to deal with the issue in *Powell v. Cockburn*, . . . Dickson J. expressly left open the question whether a real and substantial connection test should be adopted in Canada."

<sup>121</sup> *Supra* note 50. The trial judge referred to the case of *Armitage v. A.G.*, *supra* note 50, as if that case was the last word on the recognition of decrees refused by the court of the husband's domicile.

<sup>122</sup> *Supra* note 55, at 220, 68 D.L.R. (3d) at 702.

<sup>123</sup> Swan, *Annual Survey of Canadian Law: Conflict of Laws*, 6 OTTAWA L. REV. 128, at 128-34 (1973). The problem arises in defining the intention necessary to acquire a domicile. There are two conflicting decisions of the Supreme Court of Canada on the subject. The first, *Trottier v. Rajotte*, [1940] S.C.R. 203, [1940] 1 D.L.R. 433, is based on a restrictive definition of intention while the second, *Osvatch-Latkoczy v. Osvatch-Latkoczy*, [1959] S.C.R. 751, 19 D.L.R. (2d) 495, suggests a broader view. For unknown reasons, the courts of eastern Canada generally adopt the first definition while those of western Canada adopt the second.

the domicile of origin and against a change of domicile which must be proved by strong evidence.”<sup>124</sup> This statement was relied on by the trial judge to support his conclusion that Cockburn was domiciled in Ontario in 1941. Why should there be any such presumption? There are, in fact, very few consequences attached to a change of domicile from one province to another and even from a province of Canada to a state of the United States. Apart from minor details, the laws of all jurisdictions, at least in common law North America, are sufficiently similar that a change of domicile should have little more significance than a change of address. If the Ontario Court of Appeal can regard older cases involving service *ex juris* as inapplicable in the Canadian context,<sup>125</sup> the courts could surely regard the older domicile cases as inapplicable.

If the Canadian court concludes that the Michigan decree should not be recognized because the Michigan court did not have a sufficiently close connection to the parties or, in this case, to the husband, then the decree could still be recognized if some other state had such a connection. The justification for the application of the rule in *Armitage* has never been satisfactorily explained,<sup>126</sup> but, even so, the practical result of the rule is to increase the number of cases in which a foreign decree will be recognized and this will generally forward the basic policy of recognizing *faits accomplis* unless there is a good reason to the contrary. It is only important to notice here that the statement of the trial judge that Cockburn was domiciled in Ontario and not in Michigan does not dispose of the issue of recognition either directly or indirectly through *Armitage v. A.G.*<sup>127</sup>

The second principal issue, the effect of the fraud practised on the Michigan court, was the only issue discussed by the Supreme Court. The Court assumed that the finding of fraud made it unnecessary to examine the first issue. This reversal in the examination of the issues had the effect of letting the Court forget what was its purpose in judging the case. Courts have seldom bothered to articulate the basis for their decisions in cases involving the recognition of foreign decrees of divorce, and when they have it was in order to prevent “limping marriages” or something similar. This can only be a partial explanation. If we expand it, it has to offer both a reason for recognition and an indication of why recognition

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<sup>124</sup> *McGuigan v. McGuigan*, [1954] O.R. 318, at 319, [1954] 3 D.L.R. 127, at 129 (H.C.), *aff'd* [1954] O.W.N. 861, [1955] 1 D.L.R. 92 (C.A.). These words were accepted by the trial judge in *Powell v. Powell*, *supra* note 116, at 507, 31 D.L.R. (3d) at 529. Such statements are echoes of nineteenth century ideas found in such cases as *Moorehouse v. Lord*, 10 H.L.C. 272, 11 E.R. 1030 (1863) and applied in cases like *Trottier v. Rajotte*, *supra* note 123. They are anachronistic because they suggest that a change of domicile is a significant event in a person's life. This is simply not true in North America today, and was not true in 1954. A more realistic approach may be found in *Gunn v. Gunn*, 18 W.W.R. 85, 2 D.L.R. (2d) 351 (Sask. C.A. 1956).

<sup>125</sup> See *Jannock Corp. v. R. T. Tamblin & Partners Ltd.*, *supra* note 43.

<sup>126</sup> *Supra* note 50. See accompanying text.

<sup>127</sup> *Id.* As has been suggested, cases like *Messina v. Smith*, *supra* note 50, support a wider basis for recognition of a foreign decree of divorce.



should be refused. A possible statement of the reason for recognition could be the need to give effect to an event in the lives of the parties that is *fait accompli*.<sup>128</sup> People rely on divorce decrees to rearrange their affairs and such rearrangements should not be lightly upset. We then need a reason for refusing to recognize a foreign decree if we are not to recognize all divorces as *faits accomplis*.<sup>129</sup> Once a jurisdiction has moved to permit divorce, and particularly once it has moved away from the fault concept,<sup>130</sup> it becomes surprisingly hard to come up with good reasons why a foreign decree should not be recognized. There are, in fact, only two reasons. The first is that the foreign court applied the wrong standards. The second is that there will be an unacceptable element of unfairness if the decree is recognized.

If Canada, for example, requires a three year separation before a divorce can be granted to a petitioner with no finding of fault,<sup>131</sup> a court that allows a marriage to be dissolved for any or no reason when the couple have been separated for, say, six months, may be regarded by a Canadian court as improperly invalidating a Canadian marriage. The crucial factor here is that the Canadian court should be justified in regarding the marriage as a "Canadian marriage". This means that both parties must have such a connection with Canada that it is proper to require that they resolve their marital difficulties in accordance with Canadian standards. When both parties are not living in Canada, it becomes much more difficult to justify the imposition of Canadian standards. A similarly strict approach may be justified if one party lives in Canada and the other lives in a jurisdiction that has equivalent standards. The whole impetus for the development of the law culminating (at least for the moment) in *Indyka v. Indyka*<sup>132</sup> was the recognition that it was unreasonable to require the parties to resolve their marital difficulties in that jurisdiction (or those jurisdictions) whose assertion of power to dissolve the marriage was approved under very narrow and rigid standards by the English court.

On the facts of *Powell v. Cockburn*<sup>133</sup> the question then becomes, in effect, whether the application of the standards of Michigan law (there being, as has been mentioned, no independent choice of law rules in divorce) was reasonable in the context of this marriage. Since Cockburn was living in the United States, in either Ohio or Michigan, the chances are good that the state of Ohio would regard the Michigan divorce as effective to re-confer on Cockburn and his wife the capacity to marry. If

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<sup>128</sup> This is explored in more detail in Swan, *supra* note 50.

<sup>129</sup> Where there is no reliance on the foreign decree, and the parties ignore it, there are problems of recognition: *Hornett v. Hornett*, [1971] P. 255, [1971] 1 All E.R. 98 (1970).

<sup>130</sup> Divorce Act, R.S.C. 1970, c. D-8, s. 4; but note that the fault concept has been retained by s. 3 of the Act.

<sup>131</sup> S. 4(1)(c), 4(1)(e)(ii).

<sup>132</sup> *Supra* note 53.

<sup>133</sup> *Supra* note 55.

this is true (it is one of the curious omissions in the case that there is absolutely no evidence of the effect that would be given in Ohio to the Michigan divorce) then there can be no justification for regarding the Michigan court as an inappropriate court to dissolve the marriage. Apart from the unnecessary strictness of the domicile rules applied by the trial judge, it has been accepted, at least since the decision in *Indyka*, that a divorce obtained by either party outside the parties' common domicile will not be automatically refused recognition. If a more realistic approach had been taken to the inquiry into Cockburn's domicile, it may have been that he was domiciled in Ohio.

The result of this analysis is to suggest that the Supreme Court was not justified in regarding the Michigan divorce as not entitled to recognition. It is true that no court has justified the refusal to recognize on the grounds that have been suggested here. There can be disagreement over the validity of the justification, but the absolute necessity to justify the result on some grounds that amount to more than saying, "This is the law", cannot be denied if law is to be something more than mere whim.

The second basis for a refusal to recognize can now be considered, and here the argument that there was fraud practised on the Michigan court is redundant. In many cases courts have refused to recognize foreign decrees because they have seen that recognition may cut off any rights that one party, usually the woman, might have to maintenance or succession.<sup>134</sup> This has always had the effect of making the issues much more complicated than they need be. The solution is, of course, to separate the issues.<sup>135</sup> The only significant legal effect of a decree of divorce is that it re-confers on the parties the capacity to marry. There is no reason why a court could not recognize a foreign decree as dissolving the marriage and simultaneously impose on one party the obligation to

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<sup>134</sup> There are many examples, but the following are illustrative: *MacAlpine v. MacAlpine*, [1958] P. 35, [1957] 3 All E.R. 134; *Middleton v. Middleton*, [1967] P. 62, [1966] 1 All E.R. 168 (1965); *Re Meyer*, [1971] P. 298, *sub nom.* *Meyer v. Meyer*, [1971] 1 All E.R. 378 (1970); and with foreign decrees of nullity, *Gray v. Formosa*, [1963] P. 259, *sub nom.* *Formosa v. Formosa*, [1962] 3 All E.R. 419 (C.A. 1962). In all of these, except *Re Meyer*, the courts could, and did, grant a decree of divorce to the wife. *Re Meyer* involved a claim arising out of the husband's death. There are far fewer Canadian cases because there was far less chance that the "Canadian" wife could either petition for divorce in Canada (or in the province where she was) or could successfully maintain her right to a divorce — the grounds, until 1968, being as restrictive as the jurisdictional basis.

<sup>135</sup> This has been partly achieved by The Family Law Reform Act, 1978, S.O. 1978, c. 2, s. 14(b)(ii) which defines "spouse" (*inter alia*) as "either of a man and woman between whom an order for support has been made under this Part or an order for alimony or maintenance has been made before this Part comes into force".

See also The Succession Law Reform Act, 1977, S.O. 1977, c. 40. According to s. 64(d)(i), "dependant" means "the spouse or common law spouse of the deceased" and in s. 64(g) "spouse" "includes a person whose marriage to the deceased was terminated or declared a nullity". Both these acts require that there be an order for alimony or maintenance in effect at the time that the entitlement of the "spouse" to support or a share in the deceased's estate is considered. See also *Wood v. Wood*, [1957] P. 254, [1957] 2 All E.R. 14 (C.A.).

support the other.<sup>136</sup> For a long time this could not be done by Canadian courts as they regarded the statutory basis for doing so as precluding an award of maintenance after a divorce.<sup>137</sup> Similar problems arose in regard to succession.<sup>138</sup> Modern legislation, not in force at the date of the Supreme Court of Canada decision in *Powell v. Cockburn*,<sup>139</sup> has at least partly removed the problem.<sup>140</sup>

There remains, then, the question raised in *Powell*: On the facts of that case, could Cockburn's fraud be regarded as unfair to his wife? If we assume for the moment that it *was* unfair to her, there are two choices. The first is that the decision is void. It is quite possible that the Michigan court could regard the decision as such. If this is so, then presumably an action by the wife or even proceedings on the court's own motion might result in the decree being set aside. In this event there would be no decree to be recognized. If, however, the Michigan court does not regard the decree as void, it is hard to see on what grounds a Canadian court could do so.

The Canadian court has concluded *ex hypothesi*, for what may be termed substantive reasons, that the Michigan decree should be recognized.<sup>141</sup> It cannot be too strongly emphasized that the fact that the Michigan court was induced by fraud to assert a jurisdiction that was beyond its own powers is irrelevant to the Canadian courts. They do not ask if the foreign court had jurisdiction under its own law — only whether it had jurisdiction under Canadian rules. Fraud that induces the foreign court to take jurisdiction that is beyond the limits that the Canadian courts are prepared to allow merely means that the foreign court never had jurisdiction from the Canadian point of view. If the foreign court *had* jurisdiction under Canadian law, the fact that it was induced by fraud to believe that it had jurisdiction *under its own law*<sup>142</sup> is irrelevant.

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<sup>136</sup> The liberating effect of this power can be seen in *Wood v. Wood*, *supra* note 135, though there it was important that there was an English maintenance order in effect *before* the foreign divorce.

<sup>137</sup> See, e.g., MacDougall, *Alimony and Maintenance*, in 1 *STUDIES IN CANADIAN FAMILY LAW* 283, at 314-20 (D. Mendes da Costa ed. 1972).

<sup>138</sup> See, e.g., The Dependents' Relief Act, R.S.O. 1970, c. 126, s. 1(b); The Devolution of Estates Act, R.S.O. 1970, c. 129, s. 11. Both of these have been repealed by The Succession Law Reform Act, 1977, S.O. 1977, c. 40, s. 87(1) save in respect of applications where the deceased died before 31 Mar. 1978 (s. 87(2)).

<sup>139</sup> *Supra* note 55.

<sup>140</sup> See note 135 *supra*.

<sup>141</sup> This explains why it is important to consider the questions raised in the case in one order rather than in another. The relevance of any fraud is only established once the recognizing court has determined that the foreign decree would be entitled to recognition (were there no fraud).

<sup>142</sup> This would follow from the fact that the jurisdiction of the foreign court must be tested by Canadian law. Thus, for example, if a foreign court, under its own rules, requires that one of the parties be a national of the jurisdiction, and is induced by fraud to believe that one of the parties is such a national, the resulting decree could well be recognized under the common law rule of *Indyka v. Indyka*, *supra* note 53. The fact of fraud has not in any way compromised the Canadian court's judgment of the

The judgment of the Supreme Court of Canada in *Powell* suggests that the refusal to recognize the foreign judgment was based on the public policy of the forum.<sup>143</sup> This is hard to accept. The evidence established that the Michigan court expressly refused to reopen the case on the application of the woman's second husband, Powell. Why should the Canadian courts care if the Michigan court does not?

The significance of the Supreme Court's decision can be seen from a comparison of the usual attitude of the courts towards fraud more generally. The Supreme Court accepts certain very generous statements about the effect of fraud such as:

It is well established that *fraus omnia corrumpit*. This was emphasized by Chief Justice de Grey in the *Duchess of Kingston's Case* (1776), 2 Smith L.C. 644 (13th ed.) in the following words:

"Fraud is an extrinsic collateral attack which vitiates the most solemn proceedings of courts of justice. . . ."<sup>144</sup>

Another example:

Fraud in obtaining jurisdiction over the defendant is a good ground of defence against the enforcement of the foreign judgment. The courts believe that facts which relate to jurisdiction are so important that they should always be open to attack on the ground of their falsity. This rule applies even if the foreign court has declared itself competent upon trial of this issue. This attitude has been influenced by the theory that the validity of a foreign judgment can always be questioned for lack of jurisdiction in the foreign court.<sup>145</sup>

These quotations do not justify the decision of the Court. It is clear beyond doubt that, for all that might have been said in 1776, fraud does *not* vitiate everything. First, a court has no basis for refusing to enforce a contract that is affected by fraud if the innocent party does not seek to have the contract set aside. The innocent party may seek rescission, but even that in some circumstances might be unavailable and he may be left to his remedy in damages for deceit. Fraud makes a contract voidable but not void.<sup>146</sup> Second, and more to the point here, a judgment of a

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appropriateness of the foreign court's assertion of jurisdiction. Recognition under s. 6(2) of the Divorce Act, R.S.C. 1970, c. D-8 may require that the divorce be properly granted under the law of the foreign court: Mendes da Costa, *Divorce and the Conflict of Laws*, in 2 STUDIES IN CANADIAN FAMILY LAW 975-76 (D. Mendes da Costa ed. 1972).

<sup>143</sup> *Supra* note 55, at 234, 68 D.L.R. (3d) at 713, where Dickson J. says:

The aim of the Courts, in refusing recognition because of fraud, is to prevent abuse of the judicial process. I will not deal with the Courts' competence to look into fraud going to the merits, as that is not an issue here. In inquiring into fraud which touches the domestic jurisdiction of the decree-granting Court, the Courts are enforcing the public policy of the forum [emphasis added].

The judgment suggests that evidence of fraud touching the jurisdiction of the foreign court is conclusive of the issue of recognition.

<sup>144</sup> *Id.* at 228, 68 D.L.R. (3d) at 708, citing J.-G. CASTEL, *supra* note 92, at 488 (1975).

<sup>145</sup> *Id.*, citing J.-G. CASTEL, *supra* note 92, at 498.

<sup>146</sup> This conclusion follows from the equitable origin of the remedy of rescission.

Canadian court obtained by fraud is not void: the party injured by the fraud has to complain and, even then, the judgment will only be set aside on very limited grounds. The party seeking to have the decree set aside will usually have to produce evidence that was not available or known to the parties at the trial. A party cannot have a new trial simply by alleging fraud.<sup>147</sup>

A decree nisi of divorce granted by a Canadian court may be challenged by the respondent or even by persons who are not parties to the petition.<sup>148</sup> Thus Her Majesty's proctor may intervene to show cause why a decree nisi should not be made absolute.

It is much more difficult to set aside a decree absolute. First, there is the effect of section 16 of the Divorce Act, which states that "[w]here a decree of divorce has been made absolute under this Act, either party to the former marriage may marry again".<sup>149</sup> There are suggestions in the cases, admittedly based on a differently worded section of the Divorce and Matrimonial Causes Act, 1857,<sup>150</sup> that after remarriage of the parties to a divorce, the decree is unimpeachable.<sup>151</sup> At worst, and this is of crucial importance in the context of *Powell v. Cockburn*,<sup>152</sup> the decree is voidable only.<sup>153</sup> It is true that the cases, where fraud on the court has been alleged as a ground for impeaching a decree absolute which that court granted, have usually involved fraud on the merits or a fraudulent suppression of evidence of collusion.<sup>154</sup> A case might possibly be made for treating fraud going to jurisdiction in a different way, yet it is hard to see why this should be done. The Divorce Act makes no distinction between the kind of matters that appear to be unimpeachable by virtue of section 16,<sup>155</sup> and the need for finality would be as strong in one case as in the other. At the very least, the Canadian courts' treatment of fraud makes it clear that it is wrong to start from the proposition set out by Professor Castel.<sup>156</sup>

<sup>147</sup> See *MacDonald v. Pier*, [1923] S.C.R. 107, at 120-21, [1923] 1 W.W.R. 376, at 387 (1922) (Duff J.). Though Duff J. dissented in the result there was no difference on this point. He was quoted in *Evans v. Evans*, 61 Man. R. 41, at 48, 8 W.W.R. (N.S.) 295, at 302 (Q.B. 1953).

<sup>148</sup> Divorce Act, R.S.C. 1970, c. D-8, s. 13(3).

<sup>149</sup> R.S.C. 1970, c. D-8.

<sup>150</sup> 20 & 21 Vict., c. 85, s. 57.

<sup>151</sup> *McPherson v. McPherson*, [1936] A.C. 177, [1936] 1 W.W.R. 33 (P.C. 1935). This case was referred to in *Evans v. Evans*, *supra* note 147, at 50-53, 8 W.W.R. (N.S.) at 304-07.

<sup>152</sup> *Supra* note 55.

<sup>153</sup> This was the assumption made in *Evans v. Evans*, *supra* note 147, at 52-53, 8 W.W.R. (N.S.) at 306.

<sup>154</sup> The cases are conveniently collected in *Evans v. Evans*, *supra* note 147. *Neery v. Neery*, 12 W.W.R. (N.S.) 506, [1954] 1 D.L.R. 609 (B.C.C.A. 1953), raises the same issues.

<sup>155</sup> R.S.C. 1970, c. D-8.

<sup>156</sup> *Supra* notes 144-45. It is only fair to point out that the subsequent discussion by Professor Castel suggests that the defence of fraud is far narrower than the simple quotation from Chief Justice de Grey would indicate.

The purpose of investigating the Canadian courts' own approach to the issue of fraud on the court is to suggest that great caution must be exercised before setting any judgment aside on the ground of fraud. It is impossible to avoid meeting the issue of fraud head on when the issue is raised before the same court as granted the decree, for then the decree must be set aside. In proceedings on a foreign judgment, the issue raised in domestic proceedings *can* be sidestepped: the foreign decree does not have to be set aside but can simply be refused recognition. Yet this conclusion, on the facts of *Powell v. Cockburn*,<sup>157</sup> can have as devastating effects on the lives of the parties as any decision to set aside a judgment in domestic proceedings. It is one thing to have rules, however unsatisfactory they may be, that determine when a foreign court will be regarded as appropriate to dissolve a marriage, and to deny recognition to foreign decrees because of these rules. It is another thing altogether to confuse a number of separate concerns. In other words, the determination of the appropriateness of the foreign court's assertion of jurisdiction (either directly through *Indyka v. Indyka*<sup>158</sup> or indirectly by some development of *Armitage v. A.G.*<sup>159</sup>) raises one set of concerns. Issues of fraud raise quite another. Both the Supreme Court of Canada and Professor Castel mix these two issues. As has been said, fraud that induces the foreign court to take jurisdiction is irrelevant.<sup>160</sup> The presence or absence of fraud changes nothing in the inquiry made by a Canadian court to determine whether the foreign court had jurisdiction.

The importance of this lies in this consideration. Short of a radical restatement of the law, a decree given by a court whose jurisdiction is not recognized by a Canadian court is void. Any marriage dependent on the decree can, in general, be challenged before any Canadian court. A decree obtained by fraud, where the allegation of fraud is the *sine qua non* of the proceedings is, at worst, only voidable. It is not void. There is no case that was referred to by the Supreme Court of Canada,<sup>161</sup> by either

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<sup>157</sup> *Supra* note 55.

<sup>158</sup> *Supra* note 53.

<sup>159</sup> *Supra* note 50.

<sup>160</sup> Fraud may not be irrelevant if the foreign court will set aside its own decree. If this happens, there is nothing left to enforce.

<sup>161</sup> The Supreme Court referred to the following cases to support the view it took of the effect of fraud. Each reference will be followed by a brief statement of the issues raised by the case.

*Biggar v. Biggar*, 42 B.C.R. 329, 2 D.L.R. 940 (S.C. 1929). Petition by the wife for divorce in B.C. Husband had obtained foreign divorce but foreign court had no jurisdiction under B.C. rules. Petition granted to wife. This case was referred to by J.-G. CASTEL, *supra* note 145.

*Bonaparte v. Bonaparte*, [1892] P. 402, 62 L.J.P.D. & A. 1. Petition by second husband of wife for nullity. Petition granted but foreign court never had jurisdiction under English law, though it was induced by fraud to take jurisdiction.

*Pemberton v. Hughes*, [1899] 1 Ch. 781, 68 L.J. Ch. 281 (C.A.). Only the international competence of a foreign court will be examined where judgment is pronounced over persons within its jurisdiction.

of the two leading English cases referred to by that Court,<sup>162</sup> or that I

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*Bater v. Bater*, [1906] P. 209, 75 L.J.P.D. & A. 60 (C.A.). English court refused to regard foreign divorce as ineffective when it was the court of the domicile, even though there may have been fraud on the merits. Petition was brought by the wife's second husband. The result would have been otherwise if the foreign court had not been the court of the domicile.

*MacAlpine v. MacAlpine*, *supra* note 134. Decree of court of domicile of husband was refused recognition by the English courts on the ground of fraud. Petition brought by wife for divorce in England granted.

*Middleton v. Middleton*, *supra* note 134. Decree of foreign court recognized as valid by law of husband's domicile and, therefore, would have been recognized as valid in England were it not for fraud by husband in inducing foreign court to take jurisdiction. Petition by wife for divorce granted.

In these cases, either the foreign court had no jurisdiction: *Biggar, Bonaparte*; or the attack was made by a wife who was herself seeking a divorce: *MacAlpine, Middleton*; or there was no relief: *Bater, Pemberton*.

<sup>162</sup> The cases principally relied on by the Supreme Court were *MacAlpine v. MacAlpine* and *Middleton v. Middleton*, *supra* note 134.

*MacAlpine*. The cases relied on by Sachs J. in that case included *Bater, Bonaparte, Pemberton*, *supra* note 161 and the following.

*Robinson v. Fenner*, [1913] 3 K.B. 835, 106 L.T. 542. A judgment of the courts of Quebec was held to be effective even though the foreign court had refused to hear evidence of fraud. This was not a matrimonial cause.

*Rudd v. Rudd*, [1924] P. 72, 130 L.T. 575 (1923). Husband had obtained a decree of divorce in the U.S. without notice to the wife. She was held to be entitled to attack the decree, but the court held that the husband was not domiciled in the U.S. so the decree was, in any case, ineffective.

*Jacobson v. Frachon*, 138 L.T. 386, 44 T.L.R. 103 (C.A. 1927). A foreign judgment in favour of the defendant was recognized as a bar to an action by the plaintiff even though there were irregularities in the foreign proceedings that may have involved a breach of natural justice. This was not a matrimonial cause.

*Boettcher v. Boettcher*, [1949] W.N. 83, 93 Sol. J. 237 (P.D.A.). The fact that under the rules of the foreign court, proceedings for divorce were commenced by substituted service provides no ground for attack.

*Maher v. Maher*, [1951] P. 342, [1951] 2 All E.R. 37. Unilateral, Moslem divorce would not be recognized as effective to dissolve marriage of Moslem man with English woman. This was an application of the rule in *Rex v. Hammersmith Supt. Registrar of Marriages*, [1917] 1 K.B. 634, [1916-17] All E.R. Rep. 464, and did not depend on the lack of notice to the wife. The latter case was overruled or "distinguished out of existence" (A. DICEY, *supra* note 4, at 327) by *Russ v. Russ*, [1964] P. 315, [1962] 3 All E.R. 193 (C.A.), where the unilateral nature of a Moslem divorce was not considered as a ground for attack.

*Igra v. Igra*, [1951] P. 404, 95 Sol. J. 563. A divorce obtained by the wife in Germany in 1942 at the "suggestion" of the Gestapo and without notice to the husband, a Jew living in England, was held to have been effective to dissolve the marriage.

*Wood v. Wood*, *supra* note 135. Nevada divorce recognized even though the wife had no notice of the proceedings (being served substitutionally), as Nevada was the domicile of the husband.

There is support for the *MacAlpine* conclusion in *dicta* in these and other cases, but the results contradict the *dicta*. There is no case that offers direct support for the judgment of Sachs J. and each case cited above is either, in its result, contrary to it, or explicable on a perfectly sensible ground, *viz.* the lack of jurisdiction in the foreign court.

have found<sup>163</sup> that has allowed an attack to be mounted on a foreign decree on the ground of fraud by anyone other than a party to the foreign decree. Yet the judgment of the Supreme Court can only be read as saying that anyone can raise the ground of fraud. This is tantamount to saying that the sub-purchaser of goods that the original purchaser was

*Middleton*. The principal authority relied on by Cairns J. in this case was, of course, *MacAlpine*. Apart from that case and some of the cases mentioned there, the court relied on the following.

*Ochsenbein v. Papelier*, 42 L.J. Ch. 861, 28 L.T. 459 (1873) supports, in *dicta*, the proposition that at common law (before the Supreme Court of Judicature Act, 1873, 36 & 37 Vict., c. 66) fraud could be a defence to an action on a foreign judgment.

*Mountbatten v. Mountbatten*, *supra* note 50. A Mexican divorce obtained by the wife who was living in New York in circumstances that, had she obtained a New York divorce, it would have been entitled to recognition, was refused recognition. This case has been regarded as a refusal to combine *Armitage v. A.G.*, *supra* note 50, and *Travers v. Holly*, [1953] P. 246, [1953] 2 All E.R. 794 (C.A.). It was approved in *Indyka v. Indyka*, *supra* note 53, but it is hard to reconcile with *Messina v. Smith*, *supra* note 50.

*Gray v. Formosa*, *supra* note 134. The English Court of Appeal refused to recognize a Maltese decree of nullity of an English marriage on the ground that the Maltese courts, though the courts of the domicile of the husband, had by their decree held a marriage invalid though celebrated in England and valid by English law. The refusal to recognize the marriage enabled the English court to grant an English decree of divorce to the English wife. This is a classic example of indefensible English chauvinism by Lord Denning M.R.

*Lepre v. Lepre*, [1965] P. 52, [1963] 2 All E.R. 49 (1962), followed *Gray*, though reluctantly, and again allowed the English wife to obtain an English divorce.

Admittedly *Gray* offers some support for the decision in *Middleton*, but that case seems hardly applicable in divorce since what principally offended the Court of Appeal was the temerity of the Maltese court in holding the marriage *invalid*. A decree *dissolving* the marriage could hardly be so treated after cases like *Igra* and *Wood*, to say nothing of *Russ*, where a divorce by "Talak", the traditional unilateral divorce of the Moslem husband, was recognized. Such a divorce required no evidence of any fact other than the husband's determination to divorce his wife. See also *Schwebel v. Ungar*, *supra* note 54, and *Har-Shefi v. Har-Shefi* (No. 2), [1953] P. 220, [1953] 2 All E.R. 373: divorces by Jewish Gett. Nothing that was said in *Indyka* suggested that a case like *Russ*, for example, was wrong.

<sup>163</sup> In *Mitford v. Mitford*, [1923] P. 130, 92 L.J.P.D. & A. 90, a German decree of nullity was recognized even though the respondent could not be heard because of war conditions.

In *Kendall v. Kendall*, [1977] Fam. 208, [1977] 3 All E.R. 471, a Bolivian decree of divorce was refused recognition on grounds similar to those in *Gray v. Formosa*, *supra* note 162, which were now covered by the Recognition of Divorces and Legal Separations Act 1971, U.K. 1971, c. 53. Section 8 of that act provides:

The validity of a divorce . . . obtained outside the British Isles may be refused if, and only if —

(a) it was obtained by one spouse —

(i) without such steps having been taken for giving notice of the proceedings to the other spouse as, having regard to the nature of the proceedings and all the circumstances, should reasonably have been taken; or

(ii) without the other spouse having been given (for any reason other than lack of notice) such opportunity to take part in the proceedings as, having regard to the matters aforesaid, he should reasonably have been given; or



fraudulently induced to buy from the vendor can sue the purchaser to have the deal set aside. Such a proposition must be nonsense.

The two cases<sup>164</sup> that have allowed the argument of fraud to succeed both involved petitions by English women protesting the decree that dissolved their marriages. Neither woman had married again and in both cases the purposes of the complaint was the chance to get a maintenance order in England. At best these suggest that the foreign decree is only voidable. The cases do not support the proposition that there is any public policy for the forum involved.<sup>165</sup> Even the statements in *MacAlpine v. MacAlpine*<sup>166</sup> that a foreign divorce can be set aside on the ground of the foreign court's breach of the obligations of natural justice are not regarded as making the decree void. The judge says that it is not necessary to decide if the decree is void or voidable. In proceedings brought by the victim of fraud, the question whether a decree is void or voidable has no meaning. A claim by the victim that the decree be set aside is, as in the analogous contracts case, simply a claim that the decree is void. The distinction only has meaning when the decree or contract is attacked by a third party, or possibly by the guilty party. As has been mentioned, Cockburn's fraud did not have the effect of making the Michigan decree open to attack by Powell.<sup>167</sup> It might have been different if the attack had been brought by the wife, but even then the chances of any court setting aside a divorce decree nearly thirty years after it had been given are remote.<sup>168</sup> There is a very good reason for this. People

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(b) its recognition would manifestly be contrary to public policy.

In *Kendall* the result of the refusal to recognize the foreign decree was to permit the wife to petition for divorce in England. Such discussion as there has been on the proper approach to this section suggests that the discretion is to be sparingly exercised and that the focus of the court's concern under subsection (b) is the effect of recognition on the rights of the spouse and children. See *Newmarch v. Newmarch*, [1978] Fam. 79, [1978] 1 All E.R. 1 (1977). The same caution in regard to the discretion at common law was urged in *Varanand v. Varanand*, 108 Sol. J. 693 (1964), and *Qureshi v. Qureshi*, [1972] Fam. 173, at 198-99, 201, [1971] 1 All E.R. 325, at 344-46 (1970). The Supreme Court could not have known about either *Kendall* or *Newmarch*, though *Qureshi* would have been available to it. *Qureshi* is an example of the length to which the courts will go to uphold a divorce decree even though it may be objectionable. English courts will no longer recognize "Talak" divorces given in England. See Recognition of Divorces and Legal Separations Act 1971, U.K. 1971, c. 53, ss. 1, 2-6; *Radwan v. Radwan*, [1973] Fam. 24, [1972] 3 All E.R. 967.

<sup>164</sup> *MacAlpine v. MacAlpine* and *Middleton v. Middleton*, *supra* note 134.

<sup>165</sup> Such a conclusion is supported by *Gray v. Formosa*, *supra* note 134, but the objection there is based either on some sense of *lèse majesté* or on choice of law grounds: "How dare the Maltese courts declare a valid English marriage to be void!" One wonders if Lord Denning's outburst would have occurred if the wife had remarried in reliance on the Maltese decree and her second husband were now seeking an annulment in the English courts.

<sup>166</sup> *Supra* note 134, at 45, [1957] 3 All E.R. at 140.

<sup>167</sup> See note 143 *supra*.

<sup>168</sup> There was expert evidence, accepted by the courts in both *MacAlpine v. MacAlpine* and *Middleton v. Middleton*, *supra* note 134, that even an attack by the wife on the ground of fraud would not succeed.

rely on divorce decrees to remarry. A decision that holds that a divorce decree is for any reason ineffective to dissolve a marriage can have a potentially devastating effect on the lives of the parties and their after-acquired spouses.

It is one thing to feel sorry for a wife and to refuse, on the ground of fraud, to recognize a decree otherwise entitled to recognition in order to preserve her rights to maintenance or succession. It is another thing altogether to do the same at the request of her second husband or some other third party. Suppose that Powell and his wife lived happily together until his death, believing that they were validly married. The judgment of the Supreme Court, expressly based on the *public policy* of Canada, would suggest that her right to succeed as Powell's widow could be challenged by anyone, and that her claim to succeed to his estate would be at the discretion of the court under Part V of The Succession Law Reform Act, 1977, based on her status as his "common law spouse".<sup>169</sup> This would be a monstrous injustice. In short, the judgment of the Supreme Court of Canada is completely unprecedented.

The English cases relied on by the Supreme Court do not support the conclusion of the Court. These cases establish several propositions. First, the foreign court's assertion of jurisdiction can always be tested in accordance with English rules. Second, evidence of fraud involving the grounds for divorce or the foreign court's own competence is irrelevant if the foreign court will not reopen the case and if the foreign judgment or decree is otherwise entitled to recognition. Third, a foreign decree may be successfully attacked on the ground of fraud that induces the foreign court to take jurisdiction or to proceed without hearing one party when that court was otherwise competent. Only the party harmed by the fraud may undertake such an attack.

This last point is crucial. There is no case mentioned in *MacAlpine v. MacAlpine*,<sup>170</sup> *Middleton v. Middleton*,<sup>171</sup> or *Powell v. Cockburn*<sup>172</sup> where a third party has been allowed to attack a foreign decree given by a court of competent jurisdiction, that is, with jurisdiction recognized either directly or indirectly, to dissolve the marriage. There is certainly loose language suggesting, as the quotations from each of the cases do, that there is a wide power to review foreign decrees which offend the English courts' susceptibilities. When the foreign decree has been refused recognition, it has always been at the request of a person who would thereby be entitled to claim maintenance or to avoid the stigma of being the respondent in a divorce action.

At best then, the cases support an argument that the foreign decree may be voidable but not void in the sense that only the person harmed by the fraud may have any standing to attack it and may do so only if the

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<sup>169</sup> S.O. 1977, c. 40, s. 64(d)(i).

<sup>170</sup> *Supra* note 162.

<sup>171</sup> *Supra* note 162.

<sup>172</sup> *Supra* note 161.

decree has not been "affirmed" by either a subsequent marriage or something equivalent to laches. The need to treat the foreign decree as voidable, *i.e.*, as open to attack at all, arises from the fact that either the foreign court has refused to reopen the case or it is unreasonable to require the innocent party to go there to reopen it,<sup>173</sup> and from the feeling on the part of the court that the party seeking relief before it has been unfairly treated. It has been shown that this feeling should be carefully analysed, since modern legislation in Canada can often allow the court to recognize the foreign decree and award maintenance or allow a claim against a deceased former spouse. Nothing can be said in favour of allowing a third party like Powell to escape a marriage on the ground that his wife was harmed by the decree obtained by her former husband.

It can be argued that the courts should take a position, in regard to fraud on a foreign court with jurisdiction to dissolve a marriage, that ignores fraud completely. It was suggested above that the inconvenience caused by the innocent party having to go to a foreign court might be sufficient to move the court to allow fraud to prevent recognition. But if the foreign court is conceded to be a court that has jurisdiction to dissolve the marriage, the respondent will likely have to go there in any case to get any effective economic relief. There is unlikely to be a significant added burden in going there to get the decree set aside. If the argument for giving effect to fraud is removed, there is no reason for refusing to recognize the decree. Recognition does not necessarily cut off rights of support on succession. Hurt feelings and the emotional upset caused by finding oneself in the position of respondent are not really entitled to much consideration now, since the grounds for divorce are moving away from the concept of fault to a neutral idea of marriage breakdown. This means that if the foreign court will not set aside its own decree, there can be no justification for a Canadian court ever doing so. Every reason that we might have for refusing to recognize does not require us to take that step. A refusal to recognize is simply too dangerous. A divorce is a *fait accompli*; an event in the lives of the parties that leads to other commitments and arrangements. The consequences of denying juridical effect to such an event are serious and, unless there are compelling reasons for doing so, full effect should be given to every decree made by, or recognized by, a foreign court having jurisdiction to dissolve the marriage.

One final point in *Powell* requires comment. The Supreme Court referred to certain presumptions that operate in the area of marriage and divorce. Dickson J. said:

The factums in this case make frequent reference to "presumptions", each side seeking to throw the burden of adducing evidence upon the other. There would seem to be some confusion as to the legal effect of presumptions. In the case before us, there are three presumptions which may

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<sup>173</sup> See, *e.g.*, the comments of Sachs J. in *MacAlpine v. MacAlpine*, *supra* note 134, at 46, [1957] 3 All E.R. at 141.

be relevant: (i) the presumption of validity of marriage (Powell and the wife; Cockburn and the wife); (ii) the presumption of validity of a foreign divorce decree (Cockburn and the wife); and (iii) the presumption in favour of the domicile of origin (Cockburn). Strictly speaking, they do not conflict nor [*sic*] cancel each other out, nor do they give added probative value. Their only effect is to impose a duty on the party against whom they operate to adduce some evidence: see 9 *Wigmore on Evidence*, §2487, p. 281. They may, as in the present case, impose an alternating duty to produce evidence which shifts from one party to the other, a process which Wigmore describes as "successive presumptions": §2493, p. 292. . . . Evidence having been led on each issue the presumptions disappeared. It fell then to the trier of fact to decide the issues upon all of the evidence adduced.<sup>174</sup>

In a sense, the statement that something is a presumption is a starting point for reasoning about it. It is, therefore, very important that any such beginning be one that helps the court, or anyone else for that matter, to reach results which are satisfactory. The treatment of the presumptions discussed by Dickson J. certainly offers a starting point for reasoning about the problems faced by the case, but one that is neither inevitable nor very helpful. First, the view of Wigmore that the existence of a presumption imposes only the duty of adducing evidence is but one view of the effect of a presumption. There are a number of different opinions.<sup>175</sup> Thus, it has been pointed out that a presumption may impose a duty to adduce evidence in the same way as one may talk of the burden of evidence, while at the same time, nothing may be said about the burden of persuasion.<sup>176</sup> The problems with the approach of Dickson J. arise when there are, for example, two successive marriages of a person and no intervening divorce. It is certainly possible to regard the effect of the two presumptions as cancelling each other out. If they do not do this, the effect might be to leave a trial judge or any other trier of fact without guidance as to how the presumptions are to be weighed once evidence to negative the presumption in favour of the second marriage, that is, evidence of the first marriage, has been adduced. This would, however, be an unsatisfactory state of affairs. The social value that underlies or justifies the presumption in favour of marriage cannot treat the two marriages equally. It has therefore been suggested that the presumption of the validity of the *second* marriage should control unless there is evidence sufficient to persuade the trier of fact to the contrary beyond a reasonable doubt. McCormick summarizes this view by saying:

Where a person has been shown to have been married successively to different spouses, there is a presumption that the earlier marriage was dissolved by death or divorce before the later one was contracted. While of course the presumption is rebuttable, many courts place a special burden of persuasion upon the party attacking the validity of the second marriage by

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<sup>174</sup> *Supra* note 55, at 225, 68 D.L.R. (3d) at 706.

<sup>175</sup> These are mentioned in S. SCHIFF, 2 EVIDENCE IN THE LITIGATION PROCESS, 1136-44 (1978).

<sup>176</sup> *Id.*

declaring that the presumption can only be overcome by clear, cogent and convincing evidence.<sup>177</sup>

This suggests that on facts like those presented in *Powell* the court should have required "clear, cogent and convincing evidence" that the second marriage was invalid. Similarly, the policy reasons behind the rules for recognition of divorce decrees, however seldom the courts may state them, would require the same kind of evidence before refusing to recognize the foreign divorce decree as effective to dissolve the marriage of the wife and Cockburn. The conclusion that there should be a presumption of the validity of a marriage and that it requires more than the mere introduction of evidence to rebut it can only be justified on the ground that such a presumption forwards some social value. Thus, in regard to the presumption of a grant after a number of years' adverse possession of land, the effect of the presumption is

another way of saying that as a matter of substantive law such adverse possession creates a title to the parcel in the possessor. When it creates or preserves such a rule, it does so on the same sort of ground which causes a court to create or preserve any rule of the substantive common law.<sup>178</sup>

This means that, in the context of marriage and divorce, it is important to remember that there must be a very careful determination of what kind of evidence will be sufficient to rebut the presumption. It is satisfactory to have the Supreme Court of Canada consider the need to articulate both the presumption in favour of marriage — a presumption that is often stated — and the presumption in favour of the validity of a divorce — a presumption that is seldom stated. It is unfortunate that the very simple approach of Wigmore ignores the social values that are bound up with the questions of evidence.

It is, once again, possible to go further and to argue that the issues raised by the presumptions referred to are much more than issues of evidence. The statement from McCormick does not go so far as to say that any marriage — and, one may add, any divorce — should be held to be valid unless there are shown to be good reasons for holding it to be invalid, but the satisfactory resolution of many conflicts cases requires this kind of approach.<sup>179</sup> The problem of the proper approach to take in reasoning about conflicts issues is difficult. This can be illustrated by examining the three presumptions mentioned by Dickson J. The presumption in favour of the domicile of origin is one that appears to be fundamentally opposed to the social value of holding that foreign

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<sup>177</sup> C. MCCORMICK, *LAW OF EVIDENCE* 654 (1954). Even Wigmore, supporting as he does the view that a presumption only requires the introduction of evidence, admits that the cases do not all support this and that the resolution of the competing presumptions "is a knotty question". J. WIGMORE, 9 *A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW* 371 § 2506 (3d ed. 1940).

<sup>178</sup> S. SCHIFF, *supra* note 175, at 1140.

<sup>179</sup> I have attempted to develop this kind of approach: Swan, *A New Approach to Marriage and Divorce in the Conflict of Laws*, 24 U. TORONTO L.J. 17 (1974).

divorces should be recognized unless there is a good reason to the contrary. This conflict arises because I have stated the “presumption” in favour of a divorce more strongly than Dickson J. and because a presumption in favour of the continuance of a state of affairs conflicts with a presumption in favour of recognizing *faits accomplis* — a change in the state of affairs.

In short, even on an evidentiary analysis, the presumptions can be more strongly stated and, when this is done, there will be more likelihood that the social value in marriage or in divorce will be forwarded. Yet behind even this is the need for the law to spell out very carefully what facts — the facts that may have to be proved by “clear, cogent and convincing” evidence — will be required before a marriage or divorce will be held to be invalid. It is surprising how few good reasons there are for holding either a marriage or a divorce invalid. This is especially the case in regard to conflicts problems. Many very awkward decisions would be much easier to understand if more care were given to the need to have satisfactory starting points for legal reasoning.

It is interesting that the realization that presumptions in the law of evidence conceal or incorporate choices based on social policy is generally found in works on the law of evidence. On the other hand, those who discuss, for example, the problems of either marriage or divorce in the conflict of laws suggest that there are no considerations of social policy involved and that the results of the cases are matters of indifference to the law.