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I

CONFLICTS of laws are the necessary result of the division of judicial business. There are too many legal actions arising in localities too diffused to be tried in a single court or system of courts; consequently, litigation has to be distributed, and a highly complex body of jurisdictional regulations has been evolved to control the distribution. Once admit the multiplicity of courts, and diversities of law appear. Not only does the procedure in particular courts respond in some degree to the local traditions of the bar and to the specialized needs of the communities served, but indigenous precedents and practices establish themselves, which exercise an inevitable, if subtle, effect upon the conceptions of substantive law locally applied in judicial

[1] This article in part duplicates and to some extent reproduces a general report on the enforcement and recognition of foreign judgments in Anglo-American law which was prepared by the writer for the International Congress of Comparative Law held at the Hague during the summer of 1932. This report, however, which is to appear in the near future in volume 5, pp. 1725 ff. of the *Acta* of the Congress, is considerably more extensive in its scope than the present discussion.

In view of the fact that since 1932 there has been a significant development in the British legislation as to the enforcement of foreign judgments and on account of the practical importance of the question, it seems desirable to draw the attention of the bar in this country to the recent statutory developments in the British Empire. For this purpose, the *Acta* of the Congress do not appear to be an appropriate vehicle on account of their limited circulation. These considerations have prompted the publication of the present article, which has been completely rewritten but in some respects may be said to bring up to date one aspect of the more inclusive survey of the subject mentioned above.

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decision as well as in legislation. In an area so great and populous as the United States, this natural variety in both the administration of justice and formal legislation possesses sinister possibilities, which are, however, largely obviated by a common type of legal training, by a common body of legal doctrine, by the example of the federal courts and the state appellate courts, and by the numerous agencies which promote the interpenetration of legal ideas and practices. But to attain complete standardization appears neither feasible nor desirable. The fact that there will always be a measure of local independence in the development of legal institutions, even in a highly centralized, bureaucratic state, lies at the basis of the conception of judicial jurisdiction.

So far as litigation is localized, the division of judicial business and corresponding diversity in legal practice and interpretation of substantive law do not appear a source of difficulty. The rub comes with transitory litigation. A fundamental idea of justice requires that a foreign cause of action should be adjudicated substantially in accord with the standards prevailing in the community where the events concerned transpired. Equality is equity. It is an easy but apparently metaphorical hypostasis of this *desideratum* to imagine the application of laws in space or the uniform enforcement of vested rights. Obviously, these are abstract and oblique derivatives from the basic notion. Essentially, the law of the conflicts of laws is the law of foreign litigation; it consists of the particular practices, regulations and standards applicable to legal actions or situations which are thought to require differential treatment on account of some alien element in the facts. Perhaps the most obvious and certainly the earliest situation thus to be classified is the case which, prior to action in the local forum, has been litigated in another jurisdiction. Typically, this is the case of the foreign judgment.

From a practical point of view, the importance of the situation presented by the foreign judgment does not need to be emphasized. To the parties who have engaged in litigation in a foreign jurisdiction, the conclusiveness of its result and, if this is in the form of a judgment which remains to be satisfied, the conditions of its enforcement elsewhere, and particularly the factors of time and cost involved, are normally of definite concern. For theoretical purposes, it is possible in a degree to satisfy the practical requirements by a relatively simple concept. The common conception of Anglo-American law is that a foreign judgment constitutes merely a species of private obligation. That there are merits in this conception, which is predicated upon a

strict independence of judicial jurisdictions and, incidentally, has been adopted in the Restatement of the Law of Conflict of Laws, is indicated below. But, as an analysis of the theoretical possibilities, it is oversimplified. The *exequatur* procedure of continental Europe as well as the statutory developments in the United States and the British Empire which are more particularly to be considered in the later discussion, indicate that some modification of this conception is not only possible but practically desirable.

In this connection, it may be suggested that, in one light, the foreign judgment appears the most obvious case to give effect to a foreign claim according to the appropriate foreign law. Economy in the administration of justice and reason as well make a strong presumption in such case in favor of the recognition and enforcement of the foreign judgment as such. In another light, however, owing to the traditional conceptions which have been built up as to judicial jurisdiction and the solution of conflicts of laws, the analysis of the situation represented by the foreign judgment appears less simple. On the one hand, the question of jurisdiction or of the proper distribution of litigation lurks in the situation in a double form: first, as in all litigation, whether the local forum is competent or should entertain the action; second, whether, under the standards applicable to foreign judgments, the foreign court properly assumed jurisdiction in the first instance. As Professor E. M. Dodd has remarked in an illuminating article, the problem whether a foreign "judgment is entitled to extraterritorial recognition as a valid judicial act is not a problem with respect to the requisites of jurisdiction to enforce personal rights but a problem of the requisites of jurisdiction to establish the existence and scope of rights." [2] The criteria of the two aspects of the question are by no means necessarily identical. On the other hand, from the theoretical point of view, the question is also implicit in the situation presented by the foreign judgment whether the foreign court reached a proper result; potentially at least, this question may concern not only the conditions under which the issues in the cause may be reopened to ascertain whether the conclusion of the foreign court is satisfactory but, if so, also the procedure available for and limitations imposed upon, its recognition and enforcement. In other words, if the field of international private law be regarded as divided into two grand parts, relating respectively to the proper distribution of litigation and to the choice of the proper law, it would seem that the foreign judgment straddles the two areas and

[2] Dodd, "Jurisdiction in Personal Actions," 23 ILL. L. REV. 427 at 428 (1929).

forms a mixed and rather individual phenomenon which is not satisfactorily classified in either.

The preceding general observations, however, may be taken to suggest a distinction, in the consideration of the problems connected with foreign judgments, between enforcement and recognition. The distinction is analogous to that between procedure and substance, as applied to law. In other words, in an examination of the effect to be given foreign judgments, on the one hand, there appears a variety of matters focussed upon the methods by which such judgments are to be given effect. On the other hand, an even more extensive body of law will be found concerned with the standards by reference to which the conclusive effect of foreign judgments is to be recognized and qualified. It must not be thought that the distinction is inherent in the subject-matter. Law is a Janus of procedure and substance, and, as Professor W. W. Cook has justly pointed out, the difference between the two is not in the nature of things.[3] The use of the distinction depends upon the particular purpose in hand, and, in the case of conflicts of laws, it is most frequently employed to declare the extent to which a reference to foreign law is permitted. The application of the distinction in the present connection is analytical rather than indicative of an intended result. Although, in particular cases, the enforcement of foreign judgments may well be qualified by local standards for their recognition and, *vice versa*, the recognition of such judgments limited by peculiarities of local practice, nevertheless the question of how foreign judgments are to be enforced is, analytically, substantially distinguishable from the question whether individual foreign judgments are entitled to extraterritorial recognition and to what effect.

There is a further preliminary observation to be made. The Anglo-American law as to foreign judgments has at least a double implication, owing to the composite governmental organization of both the United States and the British Empire. In consequence, questions arise not only in respect of the judgments of courts of foreign states but also in regard to the reciprocal enforcement and recognition of judgments emanating from the independent jurisdictions within the federation or empire. On the one hand, the general principles as to the treatment to be accorded foreign judgments have for the most part been defined by the courts without the aid of legislation. On the other hand, effort has

[3] For a magistral discussion of the fluctuating borderline between substance and procedure in law as purposes vary and of the necessity of relating the distinction in each case to particular purposes, see Cook, " 'Substance' and 'Procedure' in the Conflict of Laws," 42 YALE L. J. 333 (1933).

been made, typically by legislation, to facilitate the mutual recognition and enforcement of judgments as among the several states, dominions, provinces, or other political units, having independent judicial jurisdiction, within the federal or imperial structure. Owing to the great similarity of the problems with which they deal, the two sets of doctrines, relating respectively to foreign judgments generally and to interstate or inter-colonial judgments, have profoundly influenced each other — so much so indeed that the usual definition of a foreign judgment in Anglo-American law comprehends, not only the judgments of courts of internationally independent states, but also, in American law, judgments of the courts of sister states or, for English purposes, judgments from other and judicially separate parts of the Empire. In this common generic sense of the term, a distinguishing feature of a "foreign judgment" is simply that it proceeds from the court of another jurisdiction and, for that reason, cannot as such be presently executed in the state, province, or other political unit within which the court before which it is brought exercises jurisdiction.[4]

The present discussion is concerned with certain of the more general questions involved in the enforcement of foreign judgments. It would be advantageous, if only as a basis for comparison with Anglo-American practices, to refer in this connection to the methods employed in the enforcement of foreign judgments in other legal systems,[5] but space precludes. There is some compensation for this omission in the fact that the laws of the United States and of the British Empire provide in themselves a rich material for the study of the question and can be but summarily treated in an article.[6] As the preceding comment will

[4] Note, for instance, the discussion of the British usage in 1 PIGGOTT, FOREIGN JUDGMENTS AND JURISDICTION 5 ff. (1908).

[5] For a discussion of the procedure employed in European countries to enforce foreign judgments see the instructive article by Lorenzen, "The Enforcement of American Judgments Abroad," 29 YALE. L. J. 188, 268 (1919-1920), reprinted in abridged form in 2 JOURNAL OF COMP. LEGIS., 3rd series, 124 (1920). In a recent article, the procedure employed in the German courts is described. Mowitz, "The Execution of Foreign Judgments in Germany," 81 UNIV. PA. L. REV. 795 (1933).

[6] For a single illustration of the diversity which has been exhibited in the provisions as to foreign judgments in one group of Anglo-American jurisdictions, see the Report of Committee on Defences to Actions on Foreign Judgments, in PROCEEDINGS OF THE CONFERENCE OF COMMISSIONERS ON UNIFORMITY OF LEGISLATION IN CANADA 44 ff. (1925).

From this report, which reproduces the provisions in force in 1925 as to the defenses which might be made in an action on a foreign judgment in the nine provinces of the Dominion of Canada, it appears, for instance, that in six provinces the application of the conflict of laws rules has been conditioned by statutes permitting the defenses available in the original action to be interposed in the action on the foreign judg-

suggest, the Anglo-American law of foreign judgments includes more than the so-called common law doctrines; it can scarcely be properly envisaged without some reference to the statutory developments affecting the interstate or inter-colonial enforcement of judgments. Particularly in the United States, as a natural consequence of the greater frequency of situations involving the judgments of sister states within the Union, the pattern of the prevailing general doctrines as to foreign judgments in the more limited sense of the term has materially reflected the interpretation of the constitutional provisions applying to such situations. In the British Empire, the system of enforcement is even more largely formulated in statutes, applying in part to single provinces, in part to the United Kingdom or one of the dominions or crown colonies, in part to judgments rendered within the Empire, and in part potentially to foreign judgments generally. Reference to these constitutional and statutory provisions is pertinent, not only on account of their intimate relationship with and influence upon, the more general doctrines as to foreign judgments, but also since they exemplify certain of the more interesting and instructive developments in this branch of law.

In conformity with the preceding suggestions, the ensuing discussion of the Anglo-American doctrines as to the enforcement of foreign judgments will relate chiefly to the following topics:

First, the principal common law doctrines as to the enforcement of foreign judgments, summarily considered;

Second, the theories underlying these doctrines;

Third, the effect of the Full Faith and Credit Clause;

Fourth, the system of the British statutes for the extension of judgments; and

Fifth, the extent to which the accepted common law doctrines need to be reconsidered in the light of the statutory modifications.

It seems superfluous to explain in detail that, in the consideration of the above topics, attention is specifically directed to the *enforcement* of unsatisfied foreign money judgments rendered in actions *in personam*. The scope of inquiry does not extend to the many interesting questions relating to the *recognition* of foreign judgments, and, in the

ment, under limitations which vary from a restriction of the statutory rule to cases in which the defendant was not personally served in the first action, to its application in all instances, subject only to a proviso authorizing the court to strike out any such defense on the ground of embarrassment or delay. Roughly speaking, the laws of the nine provinces reproduced in the report exhibited seven different solutions of a primary problem as to the effect to be given foreign judgments!

interest of simplicity, the possibilities of enforcing special types of judgments, such as, for example, decrees other than for money or the judgments of courts not of record, are excluded from this discussion.

II

As a basis for what is to follow, the so-called common law doctrines as to the enforcement of foreign judgments need first to be summarily outlined. As has already been indicated, the problems involved in dealing with foreign judgments in the strict international sense of the term have in large measure in Anglo-American jurisdictions been left to be developed by judicial decision and are controlled by the common law.[7] In a sense, therefore, the doctrines evolved by the courts have general application, except as they are superseded by specific statutory provisions, and, as such, may be considered peculiarly indicative of the prevailing conceptions with respect to the problem in hand. For the present purpose, it will be sufficient to indicate the more obvious principles.

The Court in Which a Foreign Judgment May Be Enforced. There are, generally speaking, no special rules prescribing the court in which, in Anglo-American jurisdictions, a foreign judgment may be enforced, other than those defining the jurisdiction of the courts for wider purposes. Thus, any court of general jurisdiction having power to entertain an action to recover a money judgment can entertain an action based upon a foreign money judgment, assuming that jurisdiction over the parties has properly been acquired. In the case of a court of special jurisdiction, its competence to entertain such an action will depend upon whether the amount sought to be recovered or the remedy sought in the action is within the statutory limits of the court's jurisdiction.

The Law Controlling the Enforcement of Foreign Judgments. It is a general principle of Anglo-American law that matters of procedure are regulated by the *lex fori*, and this principle conformably determines the procedure to be followed in the enforcement of a foreign judgment. Thus, in an action upon a foreign judgment, the form in which action shall be brought, the character in which the parties may sue or be sued (as distinguished from their transactional capacity), the requirements as to representation in cases of disability, are all governed by the local law of the court in which the judgment is sought to be enforced.[8] The

[7] This statement should be qualified by reference to the recent British legislation referred to below, p. 1160.

[8] See 3 FREEMAN, A TREATISE ON THE LAW OF JUDGMENTS, 5th ed., 3106

same general principle controls the modes of execution which are available in an action upon a foreign judgment; normally, these are the same as those generally provided for the execution of judgments by the *lex fori*. The situation is, in effect, that, if the action on the foreign judgment terminates favorably to the plaintiff, the judgment rendered is in all respects a judgment of the forum.

In view of this situation, it becomes pertinent to indicate the typical procedural provisions in force in Anglo-American jurisdictions as to the enforcement of foreign judgments.

Mode of Enforcement of Foreign Judgments. Under the traditional common law procedure, there is no peculiar machinery provided for the enforcement of foreign judgments. Unless other provision is made by statute, such a judgment can be enforced only by new action brought upon the judgment. The actions available for this purpose under the common law system of pleading are the actions of debt or *indebitatus assumpsit*, and under the more modern systems of procedure recourse is to be had to the derivatives of these forms of action. In contrast to domestic judgments and, in the United States, the judgments of state courts which are entitled to full faith and credit under the constitutional requirement, the judgment of a foreign court is not technically a record in which the original cause of action is merged. Consequently, such a judgment cannot be pleaded as a formal record, but must be alleged as the basis of an action in debt or implied contract. Correspondingly, *nul tiel record* is not an appropriate plea under the common law system to an action upon a foreign judgment, but a plea of *nil debet* or of *non assumpsit* is proper. These pleas will put in issue generally the validity of the judgment and, in the few jurisdictions which still retain the view that such a judgment is merely *prima facie* evidence of the claim, also the existence of the debt itself.[9] The implications of these doctrines are to be more fully considered below.

One important possibility of this system of enforcement, which is to be borne in mind in considering the problem, is that in jurisdictions where summary judgment may be given upon liquidated claims to which no valid defense is interposed, the summary process is applicable

(1925). *Cf.* Ashbury v. Ellis, [1893] A. C. 339 at 344; De la Vega v. Vianna, 1 B. & Ad. 284 at 288, 109 Eng. Rep. 792 (1830).

[9] See Walker v. Witter, 1 Doug. 7 and notes, 99 Eng. Rep. 1 (1778); Mellin v. Horlick, 31 Fed. 865 (1887); and for the practice under the Full Faith and Credit Clause, see Mills v. Duryee, 7 Cranch (11 U. S.) 481 (1813). 1 CHITTY, TREATISE ON PLEADING, 7th ed., 119, 125 (1844); vol. 2, 177-180, may also be consulted for the common law precedents.

to the large proportion of actions upon foreign judgments. This procedure is available in a number of important jurisdictions in the United States and has been highly developed in the English practice.[10] Its employment in connection with foreign judgments is obviously advantageous; as Master Ball has remarked with reference to the situation in England:

> "Probably hundreds of foreign judgments are enforced in this way during the year; and one may be permitted to wonder whether it is as easy to get an English judgment satisfied in any European country as it is to recover on a judgment under our summary procedure.!" [11]

Authentication of Foreign Judgments. Since a foreign judgment is regarded as no more than the basis of a claim asserted in an action in the forum, it falls into the category of evidence and, therefore, must be duly pleaded and proved under the general rules applicable to written evidence. More particularly, it must be properly authenticated. In a number of jurisdictions, this matter is regulated by statute; this is the case in England, where it is so provided that foreign judgments shall be proved by sealed or signed or examined copies thereof.[12] In the United States, the rules as to the proof and authentication of foreign judgments are for the most part defined by state statutes, the federal legislation being restricted to the authentication of judgments of courts within the United States. There remain consequently certain jurisdictions and certain types of cases in which the common law rules as to the authentication of foreign judgments are still in force.

[10] In England, the writ of summons may be specially endorsed in an action upon a foreign judgment for money [Grant v. Easton, 13 Q. B. D. 302 (1883)], and in a proper case summary judgment may be rendered under Orders III and XIV. BALL and WATMOUGH, ANNUAL PRACTICE 19 (1935).

In New York, Rule 113 of the Rules of Civil Practice specifically provides for summary proceedings in an action upon a judgment for a stated sum. CAHILL, NEW YORK CIVIL PRACTICE ACT, 6th ed., 652 ff. (1931). For cases involving the application of the rule to the judgment of a sister state, see Tatum v. Maloney, 226 App. Div. 62, 234 N. Y. S. 614 (1929); Franklin v. Lee, 259 N. Y. 532, 182 N. E. 168 (1932); Morris v. Douglass, 237 App. Div. 747, 262 N. Y. S. 712 (1933), decisions which would undoubtedly form precedents for similar facts involving a foreign judgment. For the similar provision in Supreme Court Rule 80, introduced by the New Jersey Practice Act of 1912, see SHEEN, NEW JERSEY LAW PRACTICE, 2nd ed., 426 (1931).

For the provisions as to summary judgments in the United States generally, see Clark and Samenow, "The Summary Judgment," 38 YALE L. J. 423 (1929).

[11] THE ENFORCEMENT OF FOREIGN JUDGMENTS 7 (1928).

[12] 14 & 15 Vict., c. 99, sec. 7 (1851). See BALL and WATMOUGH, ANNUAL PRACTICE 21 (1935).

In an early case, Chief Justice Marshall summarized these rules, as follows:

"Foreign judgments are authenticated,

1. By an exemplification under the great seal.
2. By a copy proved to be a true copy.
3. By the certificate of an officer authorized by law, which certificate must itself be properly authenticated.

"These are the usual and appear to be the most proper, if not the only modes of verifying foreign judgments. If they be all beyond the reach of the party, other testimony inferior in its nature might be received." [13]

The specific provisions as to proof of foreign judgments vary in the different states of the United States, but for the most part merely in detail and without material departure from the common law. The provisions in the New York Civil Practice Act may be cited by way of illustration: [14]

"§395. Proof of foreign court records and proceedings. A copy of a record, or other judicial proceeding, of a court of a foreign country, is evidence when authenticated as follows:

1. By the attestation of the clerk of the court, with the seal of the court affixed, or of the officer in whose custody the record is legally kept, under the seal of his office.

2. By a certificate of the chief judge or presiding magistrate of the court, to the effect that the person so attesting the record is the clerk of the court; or that he is the officer in whose custody the record is required by law to be kept; and that his signature to the attestation is genuine.

3. By the certificate, under the great or principal seal of the

[13] Church v. Hubbart, 2 Cranch (6 U. S.) 187 at 238 (1804). According to the opinion in Gunn v. Peakes, 36 Minn. 177 at 179 (1886), the rule generally prevailing is that

"A foreign judgment may be proved by a copy thereof, duly authenticated by the duly-authenticated certificate of an officer properly authorized by law to give a copy. . . .

"The clerk or prothonotary of a court is presumed to possess authority to make and certify copies of the records of the court in his keeping, and such copies are duly authenticated by his certificate over his official signature, and by the seal of the court. His official signature and the seal are duly authenticated by the great seal of the state or government in which the court is found, affixed to the certificate of the keeper thereof. The great seal proves itself."

Further discussion will be found in Mahurin v. Bickford, 6 N. H. 567 (1834), and Lincoln v. Battelle, 6 Wend. (N. Y.) 475 (1831). For the question generally, consult 2 FREEMAN ON JUDGMENTS, 5th ed., pp. 2166 ff. (1925).

[14] CAHILL, NEW YORK CIVIL PRACTICE ACT, 6th ed., 184-185 (1931). The majority of the states in the United States have analogous statutory provisions.

government under whose authority the court is held, of the secretary of state, or other officer having the custody of that seal, to the effect that the court is duly constituted, specifying generally the nature of its jurisdiction; and that the signature of the chief-judge or presiding magistrate to the certificate specified in the last subdivision is genuine."

"§396. Testimony of a witness as proof of foreign court record. A copy of a record, or other judicial proceeding, of a court of a foreign country, attested by the seal of the court in which it remains, must also be admitted in evidence upon due proof of the following facts:

1. That the copy offered has been compared by the witness with the original and is an exact transcript of the whole of the original.

2. That the original was, when the copy was made, in the custody of the clerk of the court or other officer legally having charge of it.

3. That the attestation is genuine."

Without going into the question, it may also be noted incidentally that, insofar as it is necessary to prove the effect of a foreign judgment by reference to the law under which it was rendered, the foreign law must be proved as a fact under the usual rules provided by the *lex fori* for the proof of foreign law. And in jurisdictions where the question of reciprocity may be put in issue, it would seem that this will apply not only to the law governing the effect of the foreign judgment but also to determine whether the jurisdiction in which the judgment was rendered recognizes the judgments of the forum.

Doctrine of Non-Merger. Another implication of the common law system of ideas with respect to foreign judgments, which, strictly speaking, is germane, not to the enforcement, but to the recognition thereof, deserves brief mention at this point. It results from the view that the foreign judgment does not constitute a debt of record within the forum, that the original cause of action is not regarded as merged in the judgment for the purposes of the forum. This corollary of the common law conception of the foreign judgment does not appear entirely consistent with the universal admission of foreign judgments as a defense under the plea of *res judicata*, provided, of course, that the other requirements as to their recognition are satisfied. It results:

1. That, if the foreign judgment was for the defendant, and the plaintiff sues on the original cause of action, the foreign judgment is a valid defense;[15]

[15] Ricardo v. Garcias, 12 Cl. & F. 368, 8 Eng. Rep. 1450 (1845).

2. That a plaintiff, who has recovered judgment in a foreign court, which judgment has been satisfied, cannot prevail in a second action upon the same cause as against the defense of judgment satisfied;[16]

3. That a plaintiff, having recovered judgment in a foreign court, has an election to sue either upon the judgment or upon the original cause of action, and, if he commences action upon the original cause, the foreign judgment will not be available under the plea of *res judicata* on the ground that there has been no merger of the cause of action.[17]

Presumably, this distinction is attributable to the former and more fundamental distinction which was drawn between the *prima facie* effect of foreign judgments when employed as the basis of an action in another jurisdiction and their conclusive effect when relied upon as a defense. This vestige of the earlier distinction made as to the effect of executory and executed foreign judgments does not appear to be now logically necessary in view of the obsolescence of the distinction from which it was derived, nor is it defensible from the viewpoint of economy in litigation. Its persistence, however, may perhaps be explained by the feeling that it is inequitable to dismiss a plaintiff who has recovered judgment against the defendant in a foreign litigation, in an action upon the original cause, at the instance of the party who is presumably in the wrong and can, if he wishes, avoid the double litigation by satisfying the original judgment. This question, it will be recalled, does not occur in the case of judgments covered by the Full Faith and Credit Clause, as the Clause has been construed to require that the same credit be given to such judgments as in the state in which they are rendered.[18] This fact may also serve somewhat to explain the vestige.

Limitation of Actions. A further application of the principle that the *lex fori* governs questions of procedure, which is pertinent to the enforcement of foreign judgments, remains to be noticed. As a result of doctrines established in the English courts during the seventeenth century, the statutes of limitations, which typically provide that in specified instances no action shall be brought after a prescribed period,

[16] Barber v. Lamb, 29 L. J. C. P. (N. S.) 234 (1860). As Erle, C. J., remarked in this case (at p. 236): "It would be contrary to all principle for the party who has chosen such tribunal, and got what was awarded, to seek a better judgment in respect of the same matter from another tribunal."

[17] Taylor v. Hollard, [1902] 1 K. B. 676.

[18] See 3 FREEMAN, JUDGMENTS, 5th ed., sec. 1394, pp. 2877 ff. (1925), where the authorities are collected and the limitations of the doctrine are indicated.

are considered under the theories of the Anglo-American common law to affect the remedy and not the substantive rights of the parties.[19] In other words, a distinction is introduced between the existence of the legal right, which may be enforced after the period of limitation has run, if, for instance, in an action upon a prior claim, the statute is not affirmatively pleaded as a defense or there has been an acknowledgment of the claim within the period, and the availability of action to enforce the right. The result of this doctrine, in its application to foreign judgments, is that the period within which action may be instituted upon such judgments is determined in the first instance by the law of the forum.

It is especially to be noted, however, that the general theory of the common law as to this question is subject to a variety of significant qualifications introduced by statute. It is an instance in which the exceptions to the general doctrine are probably more important than the doctrine itself. Thus, in the large majority of jurisdictions within the United States, it is variously provided by the state statutes, that action shall not be brought in the courts of the respective states upon causes of action which are barred in the jurisdiction in which they arose, and in certain of these statutes this principle is specifically applied to foreign judgments.[20] In such jurisdictions, it would appear that, in general, an action upon a foreign judgment will be barred if the period of limitations either of the jurisdiction in which it was rendered or of

[19] See, for instance, Dupleix v. De Roven. 2 Vern. 540, 23 Eng. Rep. 950 (1705); M'Elmoyle v. Cohen, 13 Pet. (38 U. S.) 312 (1839). For an application of the equitable doctrine of *laches*, see Reimers v. Druce, 26 L. J. Ch. (N. S.) 196 (1857). For a learned opinion suggesting the background of this theory, see the comment by Lord Sumner in Spencer v. Hemmerde, [1922] 2 A. C. 507 at 519.

In a scholarly, historical comparison of the French and English doctrines as to the law governing the statute of limitations, Mr. Edgar H. Ailes comes to the conclusion that the application of the *lex fori* and the adoption of the distinction indicated produces a simpler result than the treatment of the problem as a conflict of laws, requiring the application of the law normally applicable to the cause of action. Ailes, "Limitation of Actions and the Conflict of Laws," 31 MICH. L. REV. 474-502 (1933). The argument appears to rest chiefly upon the uncertain state of the conflict of laws doctrines as to the law applicable to commercial transactions and, if carried to an extreme conclusion, would counsel reference to the *lex fori* in a variety of situations to avoid the difficulties arising from unsettled rules of the conflicts of laws. That such references actually occur in the administration of these rules, at times without apparent consideration of the merits, and that due account should be taken of tendencies to favor the *lex fori*, has been one of the contentions of the critics of the vested rights theory. It is another matter, however, to urge that such phenomena should be taken to conclude the proper issue of the merits.

[20] For summaries of these statutes and decisions thereunder, see 34 CORPUS JURIS 1108, note 35, and 37 *id.*, p. 734, note 50.

the forum has run. In this summary outline, it is not feasible to examine the details of this statutory evolution, which indicates a tendency, in the United States at least, away from the unsatisfactory older conception that a foreign judgment, not barred in the forum, may be there enforced despite the fact that the period of limitations has run against it in the jurisdiction in which it was rendered and, to a less degree, suggests that the period within which a foreign judgment may be enforced should be determined in principle in accordance with the law under which it was given.[21] That such a conclusion would be desirable is supported by the fact that the considerations which lie at the basis of the common law conception of statutes of limitations do not perspicuously apply to foreign judgments.

III

Before considering the statutory provisions for the enforcement of foreign judgments, it may be useful to indicate the theoretical background of the common law doctrines which have been outlined.

The judgment of a court has double aspect; it can be regarded either as a public act, formally binding by virtue of its judicial source, or as a private transaction which, as such, imposes obligations upon the parties thereto. And it is possible to base the enforcement of foreign judgments upon either theory,— to give them effect, on the one hand, because they are the formal pronouncements of a court of a foreign sovereign which require recognition under the principles of international private law or, on the other hand, because they constitute a settlement of the rights of private parties of a peculiarly solemn nature, by which such parties should be bound, as, for instance, they are bound by their contracts.

Fundamentally, the common law of England and of the United States has come to adopt the latter point of view, despite a few *dicta* in

[21] For instance, by section 5405 of the West Virginia Code of 1932 (Official Code 1931, c. 55, art. 2, sec. 13, p. 1335) it is provided:

"Every action or suit upon a judgment or decree rendered in any other state or country shall be barred, if by the laws of such state or country such action or suit would there be barred, and the judgment or decree be incapable of being otherwise enforced there. And whether so barred or not, no action against a person who shall have resided in this State during the ten years next peceding such action shall be brought upon any such judgment or decree rendered more than ten years before the commencement of such action."

In the case of Watkins v. Wortman, 19 W. Va. 78 at 83 (1881), in which suit was brought upon an Ohio judgment thirteen years after rendition, the period of limitations prescribed for domestic judgments by the Ohio law being twenty-one years and by the West Virginia law ten, it was held that the latter statute did not apply.

early cases.[22] Strictly speaking, a foreign judgment does not speak *proprio vigore* in the sense of the common law; it does not possess the formal character of a judgment without the jurisdiction in which it was

[22] It appears that in the seventeenth century the English courts held the view that foreign judgments were enforceable under the principles of the law of nations. See, for instance, the case of 1 Rolle, Abr. 530, which is reported as follows:

"Si un Frizland home sue Angloies en Frizland devant le Governor la, et la recover vers luy un certen summe sur que l'Angloes naiant sufficient a ceo satisfie vient en Engleterre, sur que le dit Governor maund ses lettres missives en Engleterre, omnes Magistratus infra Regnum Angliae rogans de faire execution del dit judgment: Le Judge del Admiraltie poet executer cest judgment per imprisonment del partie, et il ne serra deliver per le common ley; car ceo est per la ley de Nations que le Justice dun Nation serra aidant al Justice d'auter Nation, et lun d'executer le judgment de l'auter; et la ley d'Engleterre prist notice de cest ley, et le Judge del Admiraltie est le proper Magistrate pur cest purpose, car il solment ad execution del ley Civill deins cest Relme. Pasch. 5 Ja. B. R. Wiers Case resolve sur un Habeas Corpus, et remaund."

This doctrine was accepted by Lord Nottingham in a case after the Revolution, in which he stated:

"I said, the merits of this case, if the petitioner could come at it, were to examine a sentence of the Archbishop of *Turin*, by the laws of *England*; for, as we know not the laws of *Savoy*, so, if we did, we have no power to judge by them; and, *ergo*, it is against the law of nations not to give credit to the judgment and sentences of foreign countries, till they be reversed by the law, and according to the form, of those countries wherein they were given."

Cottington's Case, 2 Swanst. 326, 36 Eng. Rep. 640 (1678). See also the cases of Gold v. Canham, 2 Swanst. 325, 36 Eng. Rep. 640 (1678-9), and Jurado v. Gregory, 2 Keble 511, 84 Eng. Rep. 320 (1669).

In 1698, however, in the case of Cochran v. Earl of Buchan, 2 Dalry. 1 (Scot.), in which an English decree was interposed as a defense to an action on a bond, the doctrine was enunciated by the Scottish court that foreign judgments are reviewable:

"The Lords adhered to their former interlocutor, and found the decree of the Chancery reviewable. In which it is specially to be noticed, that the Complaint before the Chancery was raised at the instance of the Earl, granter of the bond, after the Scots form, and bearing registration here; and it did not appear reasonable that the Earl could deprive Sir John, the creditor of the benefit of the law of this nation, notwithstanding that he did once compear: but, if Sir John, the creditor, had provoked to judgment before the Chancery, it is like the Lords would not have found the decree viewable at his instance, who had made election of the Judicature. And the interlocutor did very well consist; for the residence of both parties in England above a year, did establish a competency; yet the debtor's provoking to judgment in England was not found to exclude the creditor from the benefit of the law of this nation."

This doctrine, commonly described as the *prima facie* theory of foreign judgments, was apparently fixed in the English common law for a period by Lord Mansfield in the case of Walker v. Witte, 1 Dougl. 1, 99 Eng. Rep. 7 (1778). See also PARKER ON MARINE INSURANCE 353 ff. (1800). Despite its rejection by Lord Kenyon in Galbraith v. Neville, 1 Dougl. 6n., 99 Eng. Rep. 5 (1788), the doctrine was not finally explained away by the English courts until 1844, in the case of Henderson v. Henderson, L. J. C. L. (N. S.) 13 Q. B. 274 (1844). For the situation in the United States, see 3 FREEMAN ON JUDGMENTS, 5th ed., 3064 ff. (1925).

rendered and, therefore, cannot as such be enforced in other jurisdictions. It is an obligation, not a debt of record. As Blackburn, J., stated in the well known case of *Schibsby v. Westenholz*:

> "the judgment of a court of competent jurisdiction over the defendant imposes a duty or obligation on the defendant to pay the sum for which judgment is given, which the courts in this country are bound to enforce. . . ." [23]

In other words, the situation in England and the United States is, except as other provision may be made by statute, that execution will not issue immediately upon a foreign judgment in its character as a judgment, but the obligation which it is deemed to impose must be reduced to a judgment in the forum by a new action in order to be executed.

This conception of the foreign judgment, it may be suggested, represents an effort to harmonize certain general principles, which are by no means peculiar to the law of England or the United States, namely, the principle of the independent territorial jurisdiction of courts and the principle of the finality of litigation.

The principle of the independent territorial jurisdiction of courts is apparently a fundamental jurisdictional conception of the Anglo-American common law. It is undoubtedly a heritage from that system of legal ideas which has had so profound an influence upon Western civilization, the Roman Law; the classic formula of Paulus may be recalled,—"*Extra territorium ius dicenti impune non paretur. Idem*

[23] L. R. 6 Q. B. 155, 159 (1870). See also Godard v. Gray, L. R. 6 Q. B. 139 at 148 (1870). The doctrine that the judgment of a competent court gives rise to a legal obligation to pay the sum adjudicated to be due, on which an action of debt to enforce the judgment may be maintained, was enunciated by Parke, B., in the cases of Russell v. Smyth, 9 M. & W. 810 at 819, 152 Eng. Rep. 343 (1842), and Williams v. Jones, 13 M. & W. 628 at 633, 153 Eng. Rep. 262 at 265 (1845), involving the question whether action would lie, in the first case, upon a foreign judgment for costs in a divorce action and, in the second case, upon a judgment of a county court not of record. As Parke, B., stated in the latter case:

> "The principle on which this action is founded is, that, where a court of competent jurisdiction has adjudicated a certain sum to be due from one person to another, a legal obligation arises to pay that sum, on which an action of debt to enforce the judgment may be maintained. It is in this way that the judgments of foreign and colonial courts are supported and enforced, and the same rule applies to inferior courts in this country, and applies equally whether they be courts of record or not."

For discussion of theories as to the effect of a foreign judgment pleaded as a defense, see Gutteridge, "Reciprocity in Regard to Foreign Judgments," British Yearbook of International Law 49 at 60 (1932).

est, et si supra iurisdictionem suam velit ius dicere." [24] This principle defines the judge as a public officer, an administrative official whose authority derives by delegation from the sovereign, rather than as the arbitrator of a dispute, chosen by the private parties litigant. The logical consequence is that the authority of a judge's sentence cannot extend beyond the territory of the state to which he owes his competence or even beyond the territory within which he has been granted jurisdiction. It is to be noted, indeed, that this principle of the oriental bureaucracy which has been transmitted to us through the vehicle of the Roman Law does not peculiarly apply to the judgments of foreign courts; under the territorial principle, the formal authority of a judgment is limited to the territory over which authority has been lawfully delegated to the court, whether such territory be a city, a county, a state or province or dominion, or a national federation or empire.

It follows that writs of execution, such as may be employed to enforce a judgment,— being in effect orders, issued by the court in the name of or by the authority of the state, to an official of the court at the request of a party litigant and directing such official to arrest a person, levy upon property, garnish wages, or otherwise place a judgment in execution,— can be lawfully executed only within the territorial jurisdiction of the court from which they issue and only upon its decree. The consequence of the fundamental adherence of the Anglo-American common law to the principle of independent territorial jurisdiction is that the enforcement of a judgment without the territory of the court by which it was rendered must be placed upon some other basis than that the judgment is effective by virtue of the authority officially delegated to the judge. Geographically speaking, under the territorial principle, the authority ceases at the jurisdictional limits.

The second of the principles mentioned, the principle of the finality of litigation, which is also traceable in the English as well as the continental common law to doctrines developed in the law of Rome, in this case in connection with the *exceptio rei iudicatæ*, tends to a contrasting conclusion. In its application to foreign judgments, the principle requires that, generally speaking, there should be no distinction between foreign and domestic judgments so far as their conclusiveness in terminating litigation is concerned; that, in principle, a party in whose favor a judgment has been rendered by a competent tribunal should not be compelled to relitigate the merits of the cause of action in order to procure execution, whether in the courts of the state in which the

[24] D. 2. 1. 20.

judgment was originally given or in the courts of any other state; and that, *pari passu*, a defendant who has been successful in a prior litigation, domestic or foreign, should be able to rest upon the judgment in his favor as a valid defense to any subsequent action upon the same cause. It is apparent that the application of this principle to foreign judgments involves an antinomy to the tendency of the territorial principle.

It would seem that, while the latter principle is supported by a species of logic and by considerations of simplicity in administration, the principle of finality of litigation rests upon the requirements of justice and economy in its administration. It is based upon the conception that the reasonable expectations and just claims arising from the judgment of a tribunal, duly constituted and competent, should be recognized and enforced. It is a peculiarly appropriate application of the notion that vested rights should be respected. In the last analysis, it involves the legal order and, more particularly, that aspect thereof which Dean Roscoe Pound has made familiar as the security of transactions. As applied to foreign judgments, the principle of the finality of litigation emphasizes their character as transactions rather than as formal acts of government.

The acceptance of the two somewhat incongruous principles which have been indicated lies at the root of the common law conception of the foreign judgment. Their combined effect has been recognized, if not quite sublimated, in the principal doctrines of Anglo-American law formulating the conception, namely, the doctrine of "comity" and the doctrine of the "legal obligation of foreign judgments." Both doctrines express the need of recognizing, and providing means for the enforcement of, foreign judgments, and both doctrines deny the international effect of such judgments. The doctrine of "comity" presents, however, an additional internal inconsistency, in that, while it denies the intrinsic force of foreign judgments from the point of view of international law, it nevertheless endeavors to provide an international basis for their recognition and enforcement. This difficulty the alternative doctrine avoids by presupposing that the treatment of foreign judgments is a problem, not of international, but of private law. The doctrine of "comity," however, has lost its vogue; in part, because of the tenuous and arbitrary basis upon which it seems to rest the rights of those claiming under foreign judgments and its inability to explain the recognized exceptions to actions to enforce such claims; and in part, because it has not proved congenial to the positivistic tendencies of Anglo-American

law which envisage the enforcement of the foreign judgment from the point of view of the enforcing court rather than of international law.

On the other hand, the doctrine that a foreign judgment gives rise to a legal obligation, although it does no more than state the effect of the decisions as to how a foreign judgment may be pleaded,[25] has at least the virtue of recognizing that the *res litigiosa* before the enforcing court is typically not an international *casus belli* but a private dispute. It may be suspected that the background of this doctrine, as of so many fundamental notions as to law, is to be found in the legal mother-culture of Rome,— in the conception of the *lis* as a contractual or quasi-contractual transaction by which the parties by their consent are bound. This conception, it may be remarked, is one which has had frequent application in the English common law, as judgments have been for centuries employed in England as the most formal and conclusive type of record, whether of debt or grant. It is this conception

[25] BOWER, THE DOCTRINE OF RES JUDICATA 39 (1924), refers to this as a "jejune" doctrine, on the ground that it merely states but does not explain the results of the cases. He therefore inclines to the "comity" theory. Without endeavoring to analyze at length the theoretical problem, it would seem that, while the feeling of international obligation combined with commercial necessity has motivated the recognition of foreign judgments, the "legal obligation" theory aptly expresses the immediate legal ground for such recognition, as developed in Anglo-American jurisprudence. And as Blackburn, J., indicated in Schibsby v. Westenholz, L. R. 6 Q. B. 155 (1870), it avoids the inference that the enforcement and recognition of foreign judgments should be measured in each instance by reciprocity.

The technical procedural background of the Anglo-American theory was summarized by Lord Hardwicke in the case of Gage v. Bulkeley, Ridg. *temp.* H. 263, 264, 27 Eng. Rep. 824 (1744), as follows:

> "Can a sentence or judgment pronounced by a foreign jurisdiction be pleaded in this kingdom to a demand for the same thing in any court of justice here? I always thought it could not, because every sentence, having its authority from the sovereign in whose dominions it is given, cannot bind the jurisdiction of foreign courts, who own not the same authority, and have a different sovereign, and are only bound by judicial sentence given under the same sovereign power by which they themselves act: As if judgment be obtained in one court in this kingdom, and an action is brought in another court, here the judgment may be pleaded in bar, if it is for the same demand, because such judgment binds both the courts, and the party.
>
> ". . . But though a foreign sentence cannot be used by way of plea in the courts here, yet it may be taken advantage of in the way of evidence. . . . For though it does not bind the court as a judgment, yet it may and does the justice of the case between the parties themselves. You cannot in this kingdom maintain debt upon judgment obtained for money in a foreign jurisdiction; but you may an *assumpsit* in nature of debt upon a simple contract, and give the judgment in evidence, and have a verdict. So that the distinction seems to be, where such foreign sentence is used as a plea to bind the courts here as a judgment, and when it is made use of in evidence as binding the justice of the case only."

which by analogy has been adopted in England and the United States to form the basis of the recognition and enforcement of foreign judgments. In connection with the present inquiry, the principal effect of this conception is that, to enforce a foreign judgment, action must be commenced *de novo* in the ordinary course. It is now in point to refer to the modifications of this situation by statute.

IV

The Constitution of the United States contains what appears to be a pioneer effort to deal with the problems arising in connection with the reciprocal recognition and enforcement of judgments within a federal system. For many purposes, the system established by the Constitution contrived to leave the courts of the several states independent of each other and of the federal courts, but it was specifically recognized, to quote the words of Mr. Justice Wayne in *M'Elmoyle v. Cohen*, "that, for the prosecution of rights in Courts, it was proper to put an end to the uncertainty upon the subject of the effect of judgments obtained in the different states." [26] To this end chiefly, Article IV, section 1, of the Constitution, the so-called Full Faith and Credit Clause, provides as follows:

> "Full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other State. And the Congress may by general laws prescribe the manner in which such acts, records, and proceedings shall be proved, and the effect thereof."

The corresponding clause in the Articles of Confederation limited the powers of Congress to prescribing the mode of proving judgments,[27] but since 1813 the Full Faith and Credit Clause has been construed in conformity with the more liberal principle laid down in the Act of May 26, 1790. By this Act the first Congress of the United States provided for the authentication of state legislative acts and judicial records and further enacted that such records and proceedings duly authenticated should "have such faith and credit given them in every court within the United States, as they have by law or usage in the

[26] 13 Pet. (38 U. S.) 312 at 325 (1839).

[27] Article 4 provided: "Full faith and credit shall be given, in each of these States, to the records, acts, and judicial proceedings of the courts and magistrates of every other State." For discussion of the effect of this article, see Cook, "The Powers of Congress under the Full Faith and Credit Clause," 28 YALE L. J. 421 at 423 ff. (1919). See also, Corwin, "The 'Full Faith and Credit' Clause," 81 UNIV. PA. L. REV. 371 at 373 (1933).

courts of the state from whence the said records are or shall be taken." [28]

It will be obvious that this principle of construction relates primarily to the conclusive effect of the judgment of a sister state in other states and does not, except in providing for the authentication of such judgment, affect its enforcement or derogate from the general doctrine of the common law that the enforcement of a foreign judgment requires a new action brought in the forum. As Mr. Justice Story indicated in discussing the effect of the Clause:

> "It did not make the judgments of other states domestic judgments to all intents and purposes; but only gave a general validity, faith, and credit to them, as evidence. No execution can issue upon such judgments without a new suit in the tribunals of other states. And they enjoy not the right of priority, or privilege, or lien, which they have in the state, where they are pronounced, but that only, which the *Lex fori* gives to them by its own laws in their character of foreign judgments." [29]

In the absence of further legislation, it is difficult to define precisely the powers of Congress under the Full Faith and Credit Clause in relation to the reciprocal enforcement of state judgments, but it can scarcely be doubted that they are extensive. In the proceedings in the Federal Convention, Madison suggested that "the Legislature might be authorized to provide for the *execution* of Judgments in other States, under such regulations as might be expedient," and the Clause was apparently drafted so as to incorporate this among other proposals.[30] In view of the detailed discussions of the powers of Congress under the Clause by Professor W. W. Cook [31] and, more recently, by Professor E. S. Corwin, [32] this question need not here be further examined. For the present purpose, it is sufficient to point out that, restricted as has been the effect of the Full Faith and Credit Clause with respect to the recognition of state judgments, the extent to which the powers conferred have been employed to facilitate the interstate enforcement of judg-

[28] Acts of First Congress, 2nd Sess., c. 11, May 26, 1790, 1 Stat. 122.

[29] STORY, COMMENTARIES ON THE CONFLICT OF LAWS, 3d ed., sec. 609, p. 1005 (1846).

[30] 2 FARRAND, THE RECORDS OF THE FEDERAL CONVENTION 448 (1911). See the exhaustive discussion of the question in the article by Cook, "The Powers of Congress under the Full Faith and Credit Clause," 28 YALE L. J. 421 (1919).

[31] Cook, "The Powers of Congress under the Full Faith and Credit Clause," 28 YALE L. J. 421 (1919).

[32] Corwin, "The 'Full Faith and Credit' Clause," 81 UNIV. PA. L. REV. 371 (1933).

ments has been negligible.[33] Aside from the provision for the authentication of state judgments, its chief effect has been to assimilate state to domestic judgments, so far as the merger of the cause of action is concerned. As Professor Cook pertinently remarks:

> "It is obvious, that down to the present time Congress has hardly begun to exercise the powers of legislation thus conferred upon it. It has attempted to prescribe the effect of records and judicial proceedings only, and as to those has contented itself with repeating the language of the constitution about 'full faith and credit'— language the meaning of which we are still litigating at the end of one hundred and thirty years." [34]

V

It is instructive to compare the situation in the United States with the provisions for the extension or, in other words, the registration of foreign judgments within the British Empire. These have been introduced by a series of enactments, necessarily more specialized in scope than the relatively inoperative constitutional provision adopted in the United States. Admittedly, the difficulties in accepting a general principle as to the enforcement of foreign judgments are magnified, "where to distance is added the distinctions which arise from difference of history, of race, of institutions, or of traditions." [35] Despite this handicap, the British legislation exhibits a steady evolution during the better

[33] But compare the article by Costigan, "How Judgments are Affected by the 'Full Faith and Credit' Section of the United States Constitution and the Acts of Congress of May 26, 1790, and March 27, 1804," 38 AM. L. REV. 350 (1904), in which the differences in the treatment of foreign and sister state judgments are summarized with full citation of authorities.

For general discussion of the enforcement and recognition of judgments under the Full Faith and Credit Clause, see Cook, "The Powers of Congress under the Full Faith and Credit Clause," 38 YALE L. J. 421 (1919); Corwin, "The 'Full Faith and Credit' Clause," 81 UNIV. PA. L. REV. 371 at 387 ff. (1933); Costigan, "The History of the Adoption of Section I of Article IV of the United States Constitution," 4 COL. L. REV. 470 at 476 (1904); Wald, "Judgments of Sister States," 7 CENT. L. J. 3 (1878); 3 FREEMAN ON JUDGMENTS, 5th ed., c. 26, p. 2793 (1925); 1 WILLOUGHBY, THE CONSTITUTIONAL LAW OF THE UNITED STATES, 2nd ed., c. 12 (1929); 2 WHARTON, A TREATISE ON THE CONFLICT OF LAWS, 3d ed., 1411 (1905); Merriman, "Judgments of the Courts of Sister States—'Full Faith and Credit,'" 12 CENT. L. J. 482 (1881); Wade, "Actions on Judgments," 17 AM. L. REV. 411 (1883); article *sub voce* "Full Faith and Credit Clause" in 6 ENCYCLOPEDIA OF THE SOCIAL SCIENCES 515 (1931) by the writer.

[34] Cook, "The Powers of Congress under the Full Faith and Credit Clause," 28 YALE L. J. 421 at 426 (1919).

[35] BRITISH AND FOREIGN LEGAL PROCEDURE, Report of the Committee appointed by the Lord Chancellor to consider the conduct of legal proceedings between parties in

part of a century, in which the emphasis has been laid, not upon the standards for the recognition of foreign judgments, but upon the very practical questions connected with their enforcement. In these statutes, the effort has not been to define the credit to be accorded foreign judgments, but instead the policy of what is termed "judgments extension" has been adopted, i.e., of providing for the reciprocal registration of certificates of foreign money judgments under appropriate limitations and of providing that such judgments duly registered shall have the effect of judgments of the court of registration. This policy has found readiest application to the more or less homogeneous units within the Empire, but recently provision has also been made for the extension of judgments more generally within the Empire and even in the case of judgments rendered in foreign countries. The various stages in this development may be briefly considered in turn.

In the first instance, the adoption of the principle of judgments extension in the British Empire appears to have been stimulated by the general interest in procedural reform in England during the middle of the nineteenth century. In the United Kingdom prior to 1850, for instance, except for an isolated act of 1801, limited to the reciprocal enrolment of decrees for the payment or accounting of money in the British and Irish courts of chancery,[86] "if a plaintiff obtained a judgment in the common-law courts of England, Scotland, or Ireland, he could not obtain the benefit of that judgment in either of the two other countries without bringing an action upon the judgment and finding security for costs." [87] This situation was remedied in part by the Judgments Extension Act of 1868, applying only to the United Kingdom.[88] By its provisions, a judgment of a Superior Court in any

this country and parties abroad and the enforcement of judgments and awards. 1919 London (Stationery Office, Cmd. 251) at p. 10.

This report contains a valuable summary as to the situation with respect to the enforcement of judgments in the British Empire as of 1919.

[86] An act of 1801, 41 Geo. 3, c. 90, provided that in any suit in an English court of exchequer or of chancery or in any proceeding in cases of minors, bankrupts, idiots or lunatics in chancery, upon application, a copy of a decree for payment or accounting of money shall be enrolled in the Irish court of exchequer or chancery, and *vice versa*, and shall be enforced as if originally pronounced in such court. This act, it will be noted, does not apply as respects proceedings in Scotland. In re Dundee etc. Ry. Co., 58 L. J. Ch. 5 (1889).

[87] HANSARD'S PARLIAMENTARY DEBATES, 3d series, vol. 131, p. 583 (Mr. Craufurd).

[88] 31 & 32. Vict., c. 54 (1868). The measure was first broached in the House of Commons in 1854 at the instigation of the Scottish Trade Protection Society in Edinburgh (see Mr. Craufurd's comment referred to in the preceding note).

For the legislative history of the measure, see HANSARD'S PARLIAMENTARY

part of the United Kingdom for "any debt, damages, or costs," upon the registration of a certificate thereof in a Superior Court of any other part of the United Kingdom, will have the same force and effect and can be executed in the same manner as a judgment of the court in which the certificate is registered. The scope of the Act, however, is specially limited so as not to "apply to any Decreet pronounced in absence in an Action proceeding on an Arrestment used to found Jurisdiction in Scotland," [39] nor to admit of registration without leave more than a year after the date of judgment.[40] In 1882, by the Inferior Courts Judgments Extension Act,[41] analogous provisions were made for the registration of the money judgments of inferior courts of England, Scotland and Ireland, without, however, limiting the time for

DEBATES, 3d series, vol. 131, pp. 583, 1466 (1854); vol. 137, p. 221 (1855); vol. 140, p. 182 (1856); vol. 143, pp. 206, 537, 1002 (1856); vol. 144, pp. 503, 763, 1303 (1857); vol. 145, pp. 98, 224, 626 (1857); vol. 146, pp. 305, 1511 (1857); vol. 193, p. 367 (1857).

[39] 31 & 32. Vict., c. 54, sec. 8 (1868). This was due to objections to the Scotch procedure by "edictal citation"; see 144 HANSARD, 3d series, pp. 504, 766, 770 (1857); vol. 145, p. 230 (1857); vol. 146, p. 309 (1857).

[40] It has been held that as a result of the Irish Free State (Consequential Provisions) Act, 1922 (13 Geo. 5, Sess. 2, c. 2), the Judgments Extension Act, 1868, ceased to apply as respects the Irish Free State. Wakely v. Triumph Cycle Co., [1923] 1 K. B. 214 (C. A.). Accordingly, application for a certificate of an English judgment under the act was refused by an English court in Banfield v. Chester, [1925] WEEKLY NOTES 167, despite the decision of the Irish court in Gieves v. O'Conor, [1924] 2 I. R. 182, that the certificate of an English judgment could be registered under the Act in the Irish Free State. Consequently, for English, if not for Irish, purposes the Act of 1868 does not apply with respect to southern Ireland.

In addition to the statutory provisions referred to in the text, various other provisions, providing for the reciprocal enforcement of particular types of judgments in the United Kingdom, may be noticed:

(a) By section 121 of the Bankruptcy Act, 1914, (4 & 5 Geo. 5, c. 59) any order made by a bankruptcy court in England, Scotland, or Ireland is enforceable throughout the United Kingdom in other courts of bankruptcy "in the same manner in all respects as if the order had been made by the court required to enforce it in a case of bankruptcy within its own jurisdiction."

(b) An analogous provision is made as to orders made for or in the course of winding up a company in the English, Scotch, or North Irish courts, by sec. 223 of the Companies (Consolidation) Act, 1929.

For further discussion as to the judgments extension acts operative within the United Kingdom, see BALL and WATMOUGH, THE ANNUAL PRACTICE 786 ff. (1935); DUNCAN and DYKES, THE PRINCIPLES OF CIVIL JURISDICTION AS APPLIED IN THE LAW OF SCOTLAND, c. xxi, p. 308 (1911), and the general references in note 59, below.

See also the article, "The Working of the Judgments Extension Acts in Scotland," 17 SCOT. L. REV. 319 (1901), from which it would appear that surprisingly little advantage has been taken of the Act of 1868, while the Act of 1882 is practically a dead letter, so far as transfer of judgments between England and Scotland is concerned.

[41] 45 & 46 Vict., c. 31 (1882).

registration and with exception of judgments pronounced by English courts of inferior jurisdiction against persons domiciled in Scotland or Ireland, and *vice versa*, "unless the whole cause of action shall have arisen, or the obligation to which the judgment relates ought to have been fulfilled, within the district of such inferior court, and the summons was served upon the defendant personally within the said district. . . ." [42]

Of the analogous provisions applying within the respective Dominions, the Australian Service and Execution of Process Act, which provides for service of process throughout the Commonwealth [43] and defines the effect of judgments rendered therein, is of particular interest. As originally enacted in 1886,[44] its application was limited to the judgments of the Supreme Courts of the then colonies in the Federation, but, as re-enacted in 1901 and amended in 1912,[45] it applies generally to the judgments of any description of any courts of record within the Commonwealth. The Act provides for the automatic registration of any such judgment upon production of a certificate thereof within a year after the date of its rendition or later by leave, whereby such certificate shall take effect as a judgment of the court in which it is registered. Execution shall not issue thereon, however, unless an affidavit is first filed that the amount for which execution is to issue is due and unpaid or that an act ordered remains undone or that an injunction has been disobeyed, and, in appropriate cases, the proceedings may be stayed and generally regulated by the court. A provision,

[42] 45 & 46 Vict., c. 31, sec. 10 (1882).

[43] The article by W. W. Cook, "The Powers of Congress under the Full Faith and Credit Clause," 28 YALE L. J. 421 (1919), referred to above in note 31, reproduces at page 441 the Australian Service and Execution of Process Act, as amended in 1912, and is primarily concerned with the constitutionality of legislation by the Congress of the United States to provide for service of process throughout the United States, analogous to the provisions in the Australian Act. For further discussion from the point of view of Australian law, see the series of articles entitled, "Inter-state Service of Process," by: D. G. Ferguson, 1 COMMONWEALTH L. REV. 18 (1903); P. Nesbitt, 1 *id.*, 203 (1904); and T. R. Bavin, 2 *id.*, 61 (1904).

[44] An Act to make provision for the enforcement within the Federation of Judgments of the Supreme Courts of the Colonies of the Federation. 49 Vict., No. 4 (7 Victorian Statutes, Melbourne, 1890, 1012; or 4 Statutes of Tasmania, 7 Geo. 4 (1826) to 64 Vict. (1901). Arranged by Frederick Stops. Hobart, 1904, p. 3018.

[45] Commonwealth Acts, 1901, no. 11; *id.*, 1912, no. 18.

These acts were presumably enacted under the powers conferred upon the Australian Parliament in section 77 of the Commonwealth of Australia Constitution Act, under which it may make laws, "(iii) Investing any court of a State with federal jurisdiction."

similar in effect but less detailed, was made for the provincial divisions of South Africa in 1909 by the act constituting the Union.[46]

Relatively speaking, the situation in the Dominion of Canada is somewhat anomalous. In the British North America Act of 1867, no provision was made for the interprovincial enforcement of judgments, and control over this subject-matter was vested in the provinces by the exclusive powers over property, civil rights, and the administration of justice reserved to the provincial legislatures by section 92 of the Act.[47] Recently, efforts have been made by proposed uniform legislation to remedy the situation created by the peculiarities in the provincial laws. In 1924, the Conference of Commissioners on Uniformity of Legislation in Canada approved a Reciprocal Enforcement of Judgments Act,[48] providing for the reciprocal registration of Canadian judgments, which has thus far been adopted by five of the nine provinces.[49] In 1927, the

[46] Act to Constitute the Union of South Africa (1909). Section 112 provides:

"The registrar of every provincial division of the Supreme Court of South Africa, if thereto requested by any party in whose favor any judgment or order has been given or made by any other division, shall, upon the deposit with him of an authenticated copy of such judgment or order and on proof that the same remains unsatisfied, issue a writ or other process for the execution of such judgment or order, and thereupon such writ or other process shall be executed in like manner as if it had been originally issued from the division of which he is registrar."

For the provisions as to service of process throughout the Union, analogous to those in the Australian acts referred to in the preceding note, see Statutes of the Union of South Africa, 1912, No. 27, c. 1. And for the extension of these provisions as to enforcement of judgments and service of process to South-West Africa, see *id.*, 1922, No. 24, sec. 5 (1).

[47] 30 & 31 Vict., c. 3 (1867).

[48] Proceedings of the Conference of Commissioners on Uniformity of Legislation in Canada 14, 60 (1924), amended in 1925, p. 13.

[49] The provinces in which this act has been adopted in substantially identical form are: Saskatchewan (Statutes, 1924-1925, c. 14; amended, 1925-1926, c. 14); Alberta, (Statutes, 1925, c. 5); British Columbia (Statutes, 1925, c. 44); New Brunswick (Acts, 1925, c. 40); Ontario (Statutes, 1929, c. 29).

In an unpublished special report which was prepared by John J. Robinette of the Osgoode Hall Law School, Toronto, for the International Congress of Comparative Law, 1932, "The Enforcement of Foreign Judgments in Canada," the status of this uniform act is thus described:

"When the Administration of Justice Act 1920 was brought to the attention of the Conference of Commissioners, and its terms were critically examined, it appeared that some revision of its language was necessary in order to afford adequate safeguards to a person against whom it was sought to make a foreign judgment enforceable on registration. Moreover, there was no existing legislation in Canada which enabled a judgment obtained in one province to be enforced in another province in any way except by the bringing of a new action upon it, and it seemed to the Conference desirable to confine its efforts in the first place to preparing a uniform statute providing for reciprocal enforcement of judgments as

province of Saskatchewan adopted a Judgments Extension Act, providing, on a reciprocal basis, for the registration of judgments of superior courts in any part of the British Empire;[50] this appears to be the

between the several provinces of Canada. A statute of this limited scope was accordingly prepared by the Conference in 1924. By this proposed statute a person who has obtained a judgment in one province may apply to a court in another province for leave to register the judgment in the latter province, provided, of course, that the provinces in question have already both adopted the uniform statute and brought into effect a reciprocal arrangement. If the judgment debtor was not personally served with process in the original action or did not appear or defend or otherwise submit to the jurisdiction of the original court, he must be served with notice of the application for an order for registration of the judgment. In other cases the order for registration may be made *ex parte*, but the judgment debtor may subsequently apply to the registering court for an order setting aside the registration. In any event the judgment creditor is not obliged to take advantage of the statute, and he may, if he prefers, bring an action upon the judgment or upon the original cause of action in accordance with the old practice.

"The statute provides that it shall apply to the judgments of the courts of other provinces when the Lieutenant-Governor of a province which has adopted the Act is satisfied that the reciprocal provision has been or will be made by such other province or provinces. Although the Act has been passed by the legislatures of several provinces, as far as can be determined in no province has the Lieutenant-Governor by order in Council directed that the Act be made applicable to the judgment of the courts of any other province."

In general, the Canadian Reciprocal Enforcement of Judgments Acts, *mutatis mutandis*, (since they apply only to Canadian judgments) follow the model of Part II of the Administration of Justice Act, 1920, which is referred to below. The more important modifications are:

(1) Special provision is made for reasonable notice, if the judgment debtor was not personally served or did not appear or otherwise submit to the jurisdiction in the original action and, in other cases, for registration upon *ex parte* order, notice whereof is to be given the debtor within one month thereafter.

(b) Application for registration may be made within six years instead of twelve months or by leave.

(c) Registration shall not be allowed, in addition to the instances specified in the Administration of Justice Act, in case the judgment debtor would have a good defense if an action were brought on the original judgment.

For further discussion of the matter, see the Presidential Address by J. D. Falconbridge, Proceedings of Conference of Commissioners on Uniformity of Legislation in Canada 21 (1931) (16 Proc. Can. Bar Ass'n 267), in which reference is made to antecedent legislation; J. D. Falconbridge, "Die Arbeiten der Konferenz für eine einheitliche kanadische Gesetzgebung," 6 ZEITSCHRIFT FÜR AUSL. UND INT. PRIVATRECHT 104 at 116 (1932). For references to the subject in the Proceedings of the Conference of Commissioners on Uniformity of Legislation in Canada, which are published separately as well as in the annual Proceedings of the Canadian Bar Association, see the Table of Model Uniform Statutes in the volume for 1929, p. 339 at 341.

[50] Statutes of Saskatchewan, 1927, c. 12. Correspondingly Saskatchewan is apparently the only one of the Canadian provinces to which Part II of the Administration of Justice Act has been extended. See BALL and WATMOUGH, ANNUAL PRACTICE 740-741 (1935).

only instance of Canadian legislation responding reciprocally to the British Administration of Justice Act, 1920, to which reference is made below. In this connection, mention should incidentally also be made of the Uniform Foreign Judgments Act, intended to define the effect of all types of foreign judgments, which was approved by the Conference in 1933.[51] This Act has been adopted by the Saskatchewan provincial legislature;[52] it does not, however, primarily relate to the enforcement of judgments, but to the conditions of their recognition.

Connected with the developments outlined is the conception of extending judgments throughout the British Empire. In 1856, an act of South Australia provided that an authenticated copy of a judgment for money obtained in the supreme court of any of the Australasian colonies could lawfully be filed in the Supreme Court at Adelaide and, upon application for summons to show cause why execution should not issue upon such judgment, if sufficient cause were not shown or upon affidavit in default of appearance by the judgment debtor, execution should issue as for the like purpose for a judgment of the South Australian court.[53] In 1880, this act was amended and made applicable to judgments from Canada, the various colonies of Australia, New Zea-

[51] Proceedings of the Conference of Commissioners on Uniformity of Legislation in Canada 15, 82 (1933) (18 Proc. Can. Bar. Ass'n 239, 306). This uniform act is the result of the consideration which has been given by the Conference to the problems connected with defenses to actions on foreign judgments, and one of its chief purposes appears to be to define the clause in the Uniform Reciprocal Enforcement of Judgments Act providing that a judgment of a provincial court should not be registered, if there would be a good defense to action brought on the original judgment. The principal provisions in this act relate to the requisites of jurisdiction in actions *in personam* for the purposes of the recognition of foreign judgments and the defenses to actions on foreign judgments. The brief history of this legislation will be found in the Proceedings of the Conference for 1929, p. 55 (14 Proc. Can. Bar Ass'n 293-4); 1930, pp. 19, 111 (15 Proc. Can. Bar Ass'n 277-8, 381); 1931, pp. 19, 71 (16 Proc. Can. Bar Ass'n 253-4, 317); 1932, pp. 14-16, 40 (17 Proc. Can. Bar Ass'n 175-7, 208). The nature of the situation in Canada to which this legislation is directed will be indicated by the report referred to above in note 6, "Report of Committee on Defenses to Actions on Foreign Judgments," in PROCEEDINGS OF THE CONFERENCE OF COMMISSIONERS ON UNIFORMITY OF LEGISLATION IN CANADA, 1925, 44 ff. As to the situation in the law of Quebec, see Surveyer, "Demande Reconventionnelle," 4 CANADIAN BAR REV. 191 (1926); de la Durantaye, "Jugements des autres Provinces dans la Province de Quebec," 4 CANADIAN BAR REV. 238 (1926).

[52] Statutes of Saskatchewan, 1934, c. 13.

[53] An Act to give further remedies to creditors against persons removing from one Australasian Colony to another. Acts of South Australia, 1855-6, No. 9. Professor J. H. Beale suggests that Sir Richard Torrens, the author of the "Torrens Act," who was prominent in South Australia at the time, and became its first premier in 1857, may well have been responsible for this development. Unfortunately, I have not been able to verify this plausible suggestion.

land, and Fiji, and the British possessions in South Africa and any other part of the British Empire to which its provisions might be extended by proclamation.[54] In 1882, substantially similar provisions, applying to any judgment for a sum of money "obtained in any Court of Her Majesty's dominions," were incorporated in the act constituting the supreme court of New Zealand.[55] In the Colonial Conference of 1887, the subject was considered, and "after three days discussion the general principle was adopted that it was desirable in the interests of the commerce of the Empire that the procedure for obtaining execution of British and colonial judgments in the Dominions should be simplified." [56] In 1908, at the instance of the Colonial Office, a series of ordinances modeled after the Judgments Extension Act, 1868, was put into effect in all the West African and various of the East and Central African colonies and protectorates of Great Britain, providing for the reciprocal enforcement of judgments.[57] At the Imperial Conference of 1911, a resolution favoring the consideration of the reciprocal enforcement of judgments and awards was agreed to, and, in 1914, in pursuance of this resolution, a bill was drafted,[58] which, subject to modifications suggested in the interim, became the basis of Part II of the Administration of Justice Act, 1920, which has been in force in a large part of the British Empire for over a decade.[59]

[54] The Creditors Remedies Act, 1880. Acts of South Australia, 1880, No. 181. [Repealed by 12 Geo. 5, no. 1461 (1921)].

[55] Statutes of New Zealand, 45 Vict. (1882), c. 29, sections 27-29: Consolidated Statutes of the Dominion of New Zealand, (1908) No. 89, sec. 56.

[56] Piggott, "The Execution of British and Colonial Judgments within the Dominions," 38 L. Q. REV. 339 (1922). See also the report of the committee referred to above in note 35 at p. 10.

Reference should also be made to the ordinance which Sir Francis Piggott drafted in 1899 for the Colony of Mauritius, since it contains instructively detailed provisions for the execution and recognition of foreign judgments. See Piggott, "The Execution of British and Colonial Judgments within the Dominions," 38 L. Q. REV. 339 at 340 (1922); and for the text, 3 PIGGOTT, FOREIGN JUDGMENTS AND JURISDICTION, appendix, p. 35 (1910).

[57] Report of the committee referred to above in note 35 at p. 10.

[58] *Ibid.* This bill was circulated in 1916, and in 1917 an abortive act was passed by the General Assembly of Newfoundland to put it into effect as the Judgments Extension Act, 1916 (Acts of Newfoundland 1917, c. 23); this was repealed in 1922 by the act providing for reciprocity under Part II of the Administration of Justice Act, 1920. *Id.* 1922, c. 14.

[59] 10 & 11 Geo. 5, c. 81 (1920). For a list of British dominions or colonies to which the Act has been applied, see BALL and WATMOUGH, ANNUAL PRACTICE 740-741 (1935); from this it would appear that the most important parts of the Empire to which the Act did not apply in August 1932, were Canada, India, and the Union of South Africa.

In the article referred to in note 56, above, the provisions of Part II of the

Under the Administration of Justice Act, 1920, it is provided that when Part II thereof has been applied by order in council to any part of the British Dominions outside the United Kingdom, a judgment creditor, who has obtained a judgment under which a *sum of money* is payable, may within twelve months after the date of the judgment (or such longer period as is allowed by the court), apply to a Superior Court in the United Kingdom to have the judgment registered, such judgment to have the same force and effect as a judgment of the court of registration. The Act specifically includes such arbitral awards as are enforceable in the same manner as a judgment rendered by a court of the place where the award was given. Under the Act, registration is not compulsory, but it is provided that, if a judgment in a proper case is not registered as therein provided, the plaintiff shall not be

Administration of Justice Act, 1920, are adversely criticized by Sir Francis Piggott on grounds which deserve notice, viz.:

(a) That the motion for registration may be made *ex parte*, a provision which it is suggested is defective, since the judgment debtor will normally be the one person to raise the objections to registration.

(b) That no provision is made against the possibilities of double execution, by requiring a showing that the judgment could not be executed, in whole or in part, in the former jurisdiction.

(c) That by limiting the registration of judgments against absent defendants to the cases in which they carry on business or are resident within the jurisdiction—except of course where there is appearance or submission—the recent policy of English law as to service out of the jurisdiction (e.g., under Order XI) has been stultified, particularly so in instances where the contract is to be performed in the jurisdiction.

Without endeavoring to give a comprehensive account of the British statutes, it should be noted that there are further specialized acts, providing for the reciprocal enforcement and recognition of judgments or other judicial acts throughout the Empire, e.g., the Colonial Probates Act, 1892 (55 & 56 Vict., c. 6), which appears to have been a result of the Colonial Conference of 1887 [Piggott, "The Execution of British and Colonial Judgments within the Dominions," 38 L. Q. REV. 339 at 340 (1922)]; and the Maintenance Orders (Facilities for Enforcement) Act of 1920 (10 & 11 Geo. 5, c. 33). Mention should also be made of the Arbitration (Foreign Awards) Act of 1930 (20 Geo. 5, c. 15), which is referred to in note 64 below. Notice also the statutes of more limited application, enumerated in note 40 above.

That reciprocal arrangements of less extensive scope may exist is suggested by the report cited in note 35 above, at p. 6, where it is indicated that such arrangements for the mutual enforcement of judgments apply to New Zealand by acts of Queensland and Western Australia, which are not available to the writer.

For further reference as to the extension of judgments in the British Empire, see DICEY, A DIGEST OF THE LAW OF ENGLAND WITH REFERENCE TO THE CONFLICT OF LAWS, 4th ed., 462 ff. (1927); HIBBERT, INTERNATIONAL PRIVATE LAW OR THE CONFLICT OF LAWS 100 ff. (1927); GIBB, THE INTERNATIONAL LAW OF JURISDICTION IN ENGLAND AND SCOTLAND 256 ff. (1926); BALL, THE ENFORCEMENT OF FOREIGN JUDGMENTS 19 ff. (1928); Keith, "Inter-Imperial Enforcement of Judgments," 3 J. COMP. LEG., 3d series, 310 (1921).

entitled to costs in an action on the judgment, unless it appears that there has been a refusal of an application made to register the judgment under the Act or the court otherwise orders.

The exceptions to the application of Part II of the Act of 1920 are of interest. Briefly, these are that no judgment shall be ordered to be registered if: (a) the court rendering the judgment acted without jurisdiction; or (b) the judgment debtor, not being resident or engaged in business within the jurisdiction, did not submit to the jurisdiction; or (c) the judgment debtor was not duly served with process and did not appear, even though resident or engaged in business within the jurisdiction or consenting thereto; or (d) the judgment was obtained by fraud; or (e) the judgment debtor satisfies the court of registration that an appeal is pending or that he intends to appeal against the judgment; or (f), finally, the judgment is based upon a cause of action which could not have been entertained on grounds of public policy by the court in which registration is sought.

The status of the provisions made in Part II of the Administration of Justice Act, 1920, for the reciprocal extension of judgments within the British Empire, has been materially affected by the recent Foreign Judgments (Reciprocal Enforcement) Act, 1933.[60] As indicated in the report of the distinguished Committee which prepared the latter Act, its object is to secure the recognition and enforcement of English judgments in foreign countries upon a reciprocal basis, and the general program followed is that "the existing principles of the common law should be followed in matters of substance, and, in matters of procedure, the procedure adopted in The Administration of Justice Act 1920 (Part II) in the case of the judgments of countries within the British Empire."[61] Although the arrangements in the two Acts, the one relating to judgments within the British Empire and the other intended

[60] 23 Geo. 5, c. 13 (1933). This Act was prepared by a Committee constituted in 1931 of which Lord Justice Greer was chairman, and the report of the Committee, Foreign Judgments (Reciprocal Enforcement) Committee Report, Cmd. 4213 (1932), contains an illuminating discussion of the purposes and detailed provisions of the Act. The report also contains draft rules of court, which have gone into effect as Order XLI B of the Supreme Court, draft conventions with Belgium, Germany, and France, with accompanying draft orders in Council. As noted below, however, these conventions do not appear as yet to have come into effect.

See also Renton, "Reciprocal Execution of Foreign Judgments," 45 JURID. REV. 25 (1933); "The Reciprocal Enforcement of Judgments," 175 LAW TIMES 29, 53 (1933); Dobson, "The Foreign Judgments (Reciprocal Enforcement) Act, 1933," 75 LAW J. 413 (1933); "The Romance of the Foreign Judgment," 67 IRISH LAW TIMES 193, 199, 205 (1933).

[61] At p. 17.

to extend the system of the Act of 1920 reciprocally to the judgments of courts of foreign countries, are similar, there are differences in detail, the provisions in the later Act being on the whole distinctly more specific and complete. In view of this situation, in order to avoid the inconveniences of having two systems of judgments registration in force side by side, the one for British and colonial judgments and the other for foreign judgments, clause 7 of the Act of 1933 authorizes the Crown, by order in council, to direct that Part I of the Act shall apply to the British dominions outside the United Kingdom, and, in such event, provides that Part II of the Administration of Justice Act, 1920, "shall cease to have effect except in relation to those parts of the said dominions to which it extends at the date of the Order." As such an order in council has issued,[62] and as further provision is made in the clause referred to, terminating the application of the Act of 1920 upon the application of Part I of the Act of 1933 to those parts of the dominions in which the former is now in force, it is to be anticipated that in due course the provisions of the Act of 1920 relating to the reciprocal enforcement of judgments within the Empire will be superseded by the later Act.

The provisions of the Act of 1933 have been very carefully drafted, as the report of the Committee which prepared the Act will indicate. Although it is not the object here to analyze the detailed provisions requisite in a statute for the registration of foreign judgments, the main features of the system contemplated by the Act of 1933 and the chief respects in which it differs from the prior Act, deserve brief attention. In general, the Act of 1933 may be said to cover three principal situations. First, in Part I, provision is made, upon condition that substantial reciprocity of treatment will be assured as respects the enforcement of British judgments in a foreign country, for the extension of the system of judgments registration defined in detail by this Part of the Act, to the judgments of such country. Second, clause 8 of the Act provides that, with appropriate exceptions, the conclusive effect of a foreign judgment to which the provisions of the Act are applicable shall not depend upon whether or not it is or can be registered, and this clause also expressly saves the prior law as to the recognition of judgments. Third, the following clause authorizes the British Government, by order in council, broadly speaking to exclude or limit the enforcement of the judgments of a foreign country in the courts of the United Kingdom, whenever it appears that the courts of such country do not

[62] Statutory Rules and Orders, 1933, p. 953.

accord substantial reciprocity to British judgments. These provisions are supplemented by a rule of court, Order XLI B of the Supreme Court, indicating the details of the procedure to be followed in the registration of a foreign judgment under the Act,[63] and, in the Committee's report, by draft conventions with Belgium, Germany and France for the reciprocal enforcement of judgments. The available sources of information do not, however, indicate that any of these conventions, which were the product of preliminary conversations between the technical experts of the respective countries, have as yet been concluded.

The chief innovations upon the Act of 1920 which are incorporated in the Foreign Judgments (Reciprocal Enforcement) Act, 1933, may be outlined as follows. First, as has been indicated, the later Act is extensible to all foreign judgments and is not limited, as is the earlier Act, to judgments of courts within the British Empire. Second, as has also been intimated, the Act of 1933 authorizes an almost unqualified resort to the principle of reciprocity as a basis for the enforcement of the judgments of courts of foreign countries within the United Kingdom, and even perhaps in some measure within the British Empire itself. Third, the Act of 1933 does not include arbitral awards, which were comprehended in the Act of 1920, on the ground that the enforcement of such awards is sufficiently provided for by the Arbitration (Foreign Awards) Act, 1930.[64] Fourth, the Act of 1933 also specifically excludes from its purview matrimonial actions and proceedings in connection with administration of decedents' estates, bankruptcy, winding up of companies, lunacy, or guardianship of infants.[65] Fifth, the registration proceedings under Part I of the Act of 1933 are obligatory, and not optional as under the prior Act, to secure the enforcement of a judgment which can be so registered. Sixth, the period within which a judgment under Part I of the Act of 1933 is registrable is six years after the date of original judgment or final proceeding had thereon, instead of the twelve months normally contemplated by the Act of 1920. Seventh, to satisfy the requirements of certain other legal systems as to the enforcement of foreign judgments, the Act of 1933 requires the court, on application by a judgment creditor who desires

[63] Statutory Rules and Orders, 1933, p. 1814; also in BALL and WATMOUGH, ANNUAL PRACTICE 745 (1935).

[64] 20 Geo. 5, c. 15. In connection with this statute see the unsigned articles in the LAW TIMES: "Enforcement of Foreign Awards," vol. 169, p. 302 (1930); "Conflict of Laws and Arbitration," vol. 171, p. 472 (1931).

[65] 20 Geo. 5, c. 15, sec. 11 (2).

to secure execution of a British judgment in a foreign country, to issue a certified copy of the judgment, together with a certificate "containing such particulars with respect to the action, including the causes of action, and the rate of interest, if any, payable on the sum payable under the judgment, as may be prescribed." [66] Eighth, under the Act of 1920, the pendency of an appeal precludes an order for registration, while, in such case under the Act of 1933, the court has power either to set aside the registration or to adjourn the application to set it aside, on such terms as it may deem just. Ninth, specific provision is made in the Act of 1933 that a judgment stated in foreign currency shall be registered for the amount in British money represented by the rate of exchange of the time when the judgment was rendered.[67] Tenth and finally, the Act of 1933 includes a more detailed statement of the jurisdictional requirements for the registration of a judgment, involving certain suggestive changes, as compared with the provisions of the Act of 1920.

Although the interesting questions as to the jurisdictional and like requirements for the registration of foreign judgments, indicated by a comparison of the two Acts, cannot be subjected to analysis here, these being more immediately pertinent to the recognition of foreign judgments, it will be of interest to American readers to note that, in the Act of 1933 as contrasted with its predecessor, the jurisdiction of the foreign court is expressly declared in instances where, in an action *in personam*, the judgment debtor, being a defendant in the action, was resident in or, if a corporation, had its principal place of business in, the country of the foreign court, or where a judgment debtor, being a defendant in the action, had an office or place of business in the country of the foreign court and the foreign proceedings were in respect of "a transaction effected through or at that office or place." [68] It will be of equal interest to observe that, on the other hand, the Act of 1933 expressly excepts from the rule that voluntary appearance confers jurisdiction upon the original court, cases in which the appearance is made to protect or release from seizure property seized or threatened with seizure and cases in which a special appearance is made to contest the jurisdiction of the court.[68] Furthermore, the Act also expressly declares the original court without jurisdiction for its purposes (unless

[66] 20 Geo. 5, c. 15, sec. 10. The purpose of this useful provision is to enable the judgment creditor to satisfy the requirements of certain foreign legal systems.

[67] 20 Geo. 5, c. 15, sec. 2 (3).

[68] 20 Geo. 5, c. 15, sec. 4 (2) (*a*) (v).

there has been submission or the jurisdiction is on other grounds recognized by the law of the registering court), "if the bringing of the proceedings in the original court was contrary to an agreement under which the dispute in question was to be settled otherwise than by proceedings in the courts of the country of that court." [69] It is also suggestive that, because they were deemed to be of doubtful validity, the possible grounds of jurisdiction based upon citizenship or upon personal service within the jurisdiction have not been recognized in the Act of 1933. If admissible at all, judgments in such situations can be registered under the Act of 1933 only under the general provision that the original court shall be deemed to have jurisdiction, if its jurisdiction "is recognized by the law of the registering court." [70]

Despite these interesting and more or less significant variant features, the system of registration of foreign judgments provided for by the Foreign Judgments (Reciprocal Enforcement) Act, 1933, exhibits the same basic character as that of the Administration of Justice Act, 1920, which it is to supersede. Primarily, the system contemplates that foreign judgments of superior courts under which a sum of money is payable, if final and conclusive, shall be registrable in the British superior courts upon *ex parte* application and affidavit of the judgment creditor and order of the court, notified to the judgment debtor, subject to application to set aside the registration of the judgment within the period fixed in the order. The effect of such registration is to place the registered judgment upon the same basis as an original judgment of the registering court in respect of execution, proceedings upon the judgment, the sum for which interest is carried, and judicial control over the execution of the judgment, save only that execution is not to issue until the period set for application to avoid the registration has expired or such application, if made, is finally terminated. The provision for the extension of this effective system of enforcement to the money judgments of foreign courts generally, as contemplated in the Act of 1933, represents the culmination of a statutory development, which not only consolidates a fundamental reform of the common law procedure for the enforcement of foreign judgments in British jurisdictions but, in effect, brings the English practice tolerably close to that of its chief continental neighbors.

[69] 20 Geo. 5, c. 15, sec. 4 (3) (*b*).

[70] 20 Geo. 5, c. 15, sec. 4 (2) (*c*).

VI

The criteria of the enforcement of foreign judgments in any jurisdiction are the same which apply to legal procedure generally. What is requisite is that the enforcement of rights should be certain, prompt, inexpensive and effective. It is from the viewpoint of these criteria and in the light of such experience as is available that the validity of the conceptions which have controlled the enforcement of foreign judgments in common law jurisdictions should be considered.

Indubitably, the common law conception that a foreign judgment is enforceable only upon new action brought has certain definite and obvious merits. In the first place, it has enabled the courts, without hindrance of political considerations, to develop relatively liberal doctrines as to the recognition of foreign judgments and thus to obviate the expense involved in a relitigation of the merits in the ordinary case.[71] The fact that the correlated doctrine of non-merger of the cause of action in the foreign judgment has been engrafted upon the common law conception of the foreign judgment can scarcely be regarded as of high practical significance, nor does it seem to be logically and inevitably required by the conception. And, in the second place, the positivistic emphasis laid under the prevailing common law theories upon the private transactional character of foreign judgments is commendable in that it avoids the inequity and impropriety of adjudicating what are essentially private claims upon an invidious basis of international reciprocity.

In saying this much, however, it would seem that the chief virtues of the common law conception of the foreign judgment as constitutive of a legal obligation are exhausted. And it will be noted that the qualities indicated relate distinctively to the recognition rather than to the practical enforcement of foreign judgments. From the latter point of view, the common law conception submits the procedure to enforce a foreign judgment to most of the infirmities of the ordinary local practice of the court where the judgment is sought to be enforced. In consequence, the conception that the enforcement of a foreign judgment must take the form of an ordinary action *in personam* upon the debt evidenced by the transcript of the judgment appears to confirm three prime defects in the procedure. The first is unnecessary delay. The

[71] See, for example, the remarks of Marshall, C. J., in Rose v. Himely, 4 Cranch (8 U. S.) 241 at 270 (1808), and of Chancellor Kent, 2 COMMENTARIES ON AMERICAN LAW, 2d ed., 119 (1832), as to the liberality of the common law doctrines respecting the recognition of foreign judgments.

second is unnecessary expense. And the third is the additional difficulty created by the necessity of securing jurisdiction over the person of the judgment debtor. The two defects first mentioned are partially, but by no means completely, mitigated in those jurisdictions where a summary judgment procedure is available. The third defect is rendered tolerable in the United States only by the existence of numerous attachment and garnishment statutes, which, under the doctrine of *Pennoyer v. Neff*[72] and its *sequelæ*, in effect do away with the necessity of service upon the person of a judgment debtor, if property can be found.

It may be thought, in view of these considerations, that the relatively minor development of the possibilities of the Full Faith and Credit Clause with respect to the reciprocal enforcement of judgments within the United States, as contrasted with the evolution of the judgments extension acts in the British Empire, presents a somewhat singular phenomenon of retarded legal development, which, like certain other phases of the evolution of legal procedure in this country, is indicative, not of the logical necessity of independence of territorial jurisdictions in a federal system of justice, but rather of reluctance of the bar to alter supposed essential principles of legal procedure, indifference of legal scholarship, and supine tolerance of the creditor class. The situation in the United States is not less singular in that the Full Faith and Credit Clause, literally construed, appears to invite a construction which the more practically minded British genius has now apparently achieved without such suggestion. It is true that, recently at least, the stimulus to the British legislation has come from the complaints of the mercantile classes on account of the difficulty of enforcing British judgments in certain European jurisdictions.[73] In consequence, the latest British legislation exhibits a large concession to the policy of reciprocity, which, in this instance, cannot but be regarded as an unfortunate, even if inevitable, admission of the difficulties occasioned by the existing state of international polity. And, from the viewpoint of this country, it may be permitted to hope that the discriminatory powers conferred by the Foreign Judgments (Reciprocal Enforcement) Act, 1933, will be exercised only in situations where retaliation is quite justified by repeated injury suffered from excessive applications of economic nationalism to the course of justice. There is no reason,

[72] 95 U. S. 714 (1877).

[73] See Foreign Judgments (Reciprocal Enforcement) Committee Report, Cmd. 4213, p. 14 (1932).

indeed, to anticipate that any other policy will be taken, as the chief intendment of the Act is to facilitate rather than to prevent the enforcement of foreign judgments in the British courts.

Apart from this aspect, the evidence of British legislation has two suggestive implications. The first is that an extensive experience with the registration of judgments indicates the superiority of this procedure over the common law action as a method of enforcing foreign judgments. The second is that the procedure by registration can be adopted without seriously compromising the really substantial merits of the common law doctrines as to the conclusiveness of foreign judgments. If these two implications of the British experience be granted as premises, it will follow that the common law conception of the foreign judgment as conclusive evidence of a legal obligation needs to be reformulated.

There is an obvious and familiar category at hand to express the *desiderata*. All that is needed is to emphasize the character of a foreign judgment as a *judgment*, and it will logically appear, by analogy to the domestic judgment, not merely that the foreign judgment is conclusive, assuming a duly constituted and competent court with jurisdiction over the cause and the parties, but also that, under appropriate provision to secure the judgment debtor against double execution, the foreign judgment should be registrable for execution upon transcript filed. It cannot be thought that this simple and realistic conception of the foreign judgment as a *judgment* will disturb the fundamental and useful doctrines evolved by the common law as to the conclusiveness of such judgments. The acceptance of this conception, however, will necessarily qualify the principle of the territorial independence of jurisdictions, as now commonly understood in the United States. But there is no necessity of logic in this principle of administrative expediency. Basically, it is incongruous with the original intendment of the Constitution of the United States, and cannot weigh against the considerations of certainty and economy in the administration of justice which are involved in the registration of foreign judgments.

There is one remaining observation to be made. Symptomatically, the most recent and authoritative survey of the conflicts of laws which has been made in the United States, the Restatement of the Law of the Conflict of Laws, has taken as its point of departure in dealing with questions of jurisdiction the principle of the territorial independence of jurisdictions, even to the end of denying the unity of the federal

system of justice.[74] Accordingly, too, it has accepted without apparent reservation the common law doctrines as to the enforcement of foreign judgments. To the writer's knowledge, this Restatement contains not a single reference to the highly significant course of British legislation roughly portrayed above nor the slightest intimation that the procedure of judgments extension or registration, a procedure by no means unfamiliar in this country in local practice, has been available for foreign judgments in various cases, since 1868, in the principal common law jurisdiction.[75] Doubtless, this elision is attributable to the emphasis of the Restatement of the Law upon the abstract formulation of substantive law without immediate relation to the practical requirements of legal procedure and to the policy of excluding from the Restatement any intimation of any item as to which reform of existing law is expedient.[76] However this may be, the fact remains that the Restatement of the Law of Conflict of Laws has accepted, despite early precedents asserting the international enforceability of foreign judgments, despite the extensive but more recent British statutory experience, and even in the face of the literal intendment of the Full Faith and Credit Clause, a

[74] The RESTATEMENT OF THE LAW OF CONFLICT OF LAWS has accepted in section 2 the definition of a state as "a territorial unit in which the general body of law is separate and distinct from the law of any other territorial unit." RESTATEMENT OF THE LAW OF CONFLICT OF LAWS 4 (1934). A distinction is drawn between the use of the term "state" in a "political" and in a "legal" sense. Accordingly, a state of the United States is stated to be within the definition, while, it is added, "In the legal sense, the United States is not a state because each State, Territory and District and each small portion of federal territory has its own law. The legislation of Congress is a portion of the law of each State, identical in each" (p. 5).

This seems to the writer an *ante-bellum* conception. If logically followed out, it might be thought that every city, town and parish in the United States may be a legal unit for the purposes mentioned, as, in some degree, each such unit may have, and some do have, in fact, separate law. The conception seems to proceed from an ideological difficulty, namely, that of imagining the same territory as a part of two or more mutually related and, yet for legal purposes, separable, legal units at one and the same time. Yet, the actual relations of state and federal jurisdictions in the United States seem to require some such analysis. At any rate, the conception evidences a thorough-going acceptance of the independence of territorial jurisdictions in the RESTATEMENT.

[75] The principal reference to this important procedural problem is in sec. 433, p. 517. This section reads:

"§433 Enforcement by Execution.

A foreign judgment will not be enforced by issuing execution on it.

Comment:

a By the law of some European states an exequatur may be issued on a foreign judgment."

[76] See the discussion by the writer in LEGAL ESSAYS IN TRIBUTE TO ORRIN KIP MCMURRAY 657 at 687, 689, notes 78 and 89 (1935).

conception of the foreign judgment which appears neither logically necessary nor practically expedient. Mr. Justice Holmes once remarked that "it ought always to be remembered that historic continuity with the past is not a duty, it is only a necessity." [77] The common law conception with respect to enforcement of foreign judgments is little more than an expression of the limitations of the now obsolete common law procedure and persists in this country as a stubborn vestige of the discredited theory of the *prima facie* character of foreign judgments. It would be unfortunate, if the formulation, in the Restatement, of this conception of the law as it is, should be taken, as if it were a psychological necessity, to preclude needed reform.[78]

[77] COLLECTED LEGAL PAPERS 139 (1920).

[78] The only legislative proposal, analogous to the British judgments extension acts, to provide for the registration and execution of foreign judgments within the United States, which has come to the writer's attention, is a *Bill to authorize the registration of judgments, decrees, and orders rendered by any court of record, of any State or of the United States, in any other such court of record, and to prescribe the effect thereof*, which was introduced in the 72nd Congress, 1st Session, by Congressman Michener, (H. R. 4620. 72nd Congress, 1st Session). According to information kindly supplied by Congressman Michener, there was considerable favorable sentiment towards the proposal, both among the members of the House interested in such matters and also in certain quarters among the bar. The emphasis upon emergency legislation since the 72nd Congress has apparently caused the matter to drift in the interim.