THE CANADIAN BAR REVIEW

VOL. XXXV FEBRUARY 1957 NO. 2

RECOGNITION OF JUDGMENTS IN PERSONAM: THE MEANING OF RECIPROCITY

Archambault v. *Solloway*

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I

So much has been written[1] upon the English Court of Appeal's decision in *Travers* v. *Holley*,[2] and its basic premise that we recognize in others what we ourselves are prepared to do in comparable circumstances, that I should normally hesitate to write further at this time. Readers will recall the facts of the *Travers* case: a divorce granted to a wife by a court in New South Wales, where the husband was not domiciled, was recognized as valid in England because the basis of *jurisdiction* used by the Australian court was comparable to a basis of *jurisdiction* available in England had the facts arisen there. Each country had by legislation given its own court jurisdiction to dissolve the marriage of a deserted wife, notwithstanding the husband's domicile elsewhere. Domicile had been the basis of jurisdiction at common law. The legislation in the two countries was not identical, but similar in substance, and the English court unanimously, on this point, held that, as the foreign court was exercising a jurisdiction comparable to that ex-

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[1] Cf. Russell (1952), 1 Int'l & Comp. L. Quart. 181, 345; Griswold (1954), 67 Harv. L. Rev. 823; Kennedy (1954), 32 Can. Bar Rev. 359 (and letters (1955), 33 *ibid.* 509, 514, 516); Ziegel (1955), 33 *ibid.* 475.

[2] [1953] 2 All E.R. 794; [1953] P. 246 (C.A.).

ercised by an English court, the foreign court had, in English eyes, jurisdiction to dissolve the marriage. The English court therefore recognized as valid the divorce granted in New South Wales.

One of the important things about the decision was the absence in the legislation in each country of any provision for *recognition* of each other's divorces. The legislation dealt solely with domestic jurisdiction. The court's approach to the problem was not whether New South Wales would recognize English divorces granted upon this special statutory basis, a point upon which the case is completely silent, but whether the New South Wales court, in the eyes of an English court, had jurisdiction to grant the divorce. Territory *A* may give its courts jurisdiction over a long list of matters and persons, but territory *B* will not necessarily recognize judgments from the courts of the former unless, in the view of the courts of the latter, *A*'s courts had jurisdiction. Our conflict of laws rules tell us the basis upon which *we* consider that a foreign court has jurisdiction for the purposes of recognition of the foreign court's judgment. *Travers* v. *Holley* ruled that one of the bases for holding that a foreign court had, in our view, jurisdiction in a particular matrimonial cause was to find that the foreign court was exercising a jurisdiction comparable to one which we have conferred upon our own courts.

The language of each of the three judges in the *Travers* case is clearly directed to the jurisdiction of the foreign court, not to any question of recognition by it of English divorces. When, therefore, one of the three judges, as well as the writers both before and after the famous decision, speak of "reciprocity", they refer to reciprocity in domestic jurisdiction, not reciprocity in recognition. There is no suggestion in the *Travers* case that the Australian divorce will only be recognized in England if Australia would recognize an English divorce granted upon comparable grounds. In fact, the only judicial dicta in Australia up to that date would have indicated that such an English divorce would not have been recognized in Australia.[3] The use of the term "reciprocity" is therefore unfortunate unless understood in the context in which it was used. At the beginning of an article published shortly after the decision in the *Travers* case, I said:[4]

> Hodson L. J. has recently used the word 'reciprocity' in a new sense. His lordship referred to a foreign judgment which was founded upon a jurisdictional basis similar to a jurisdictional basis we give to our

[3] *Chia* v. *Chia*, [1921] V.L.R. 566, at p. 575 (F.C.).
[4] (1954), 32 Can. Bar Rev. 359, at pp. 359-360.

own courts, and declares that where 'there is in substance *reciprocity*, it would be contrary to principle and inconsistent with comity if the courts of this country were to refuse to recognize a jurisdiction which mutatis mutandis they claim for themselves'. 'It must surely be that what entitles an English court to assume jurisdiction must be equally effective in the case of a foreign court.' This is not reciprocity in the ordinary sense in respect to foreign judgments. There is no suggestion that we will only recognize foreign judgments if the foreign court will recognize ours. There *is* reciprocity in a sense with respect to *jurisdiction*. But even here it is more a question of equality or similarity of jurisdictional rules, than reciprocity as such. However, the word as used by Hodson L. J. and his colleagues in *Travers* v. *Holley* has been accepted in the comments on the case, and in that sense will be used in this article.

In the present article, I propose to discuss fully the distinction just made between reciprocity in recognition, which is alien to the common law, and "reciprocity" in jurisdiction as illustrated by the *Travers* case.

The English Court of Appeal in that case was reframing our conflict rules for recognition of foreign judgments along lines suggested by earlier writings of Cheshire, Falconbridge and others.[5] The former specific rules for recognition were based upon what we considered, for each type of problem, to be validly exercised jurisdiction in a foreign court. We now consider, additionally, that a foreign court has jurisdiction if it is acting upon a basis comparable to one which we use. Under neither the old specific bases nor the new one does the question of reciprocity of *recognition* enter. We are moving not to reciprocity of *recognition*, but toward a rule under which domestic jurisdiction and that foreign jurisdiction which we recognize correspond. At the moment that rule may be an ideal seldom reached.

Almost every territory has statutory rules defining the jurisdiction of its courts, usually without reference to its own conflict recognition rules, and very often defined in terms of situations permitting the issue of a writ for service out of the jurisdiction. Thus the well-known Order 11 of the English supreme court rules defines some of the situations where a writ may be issued for service out of the jurisdiction. Included in that order are actions in respect "of the breach of a contract made within the jurisdiction" or "of a breach committed within the jurisdiction of a contract wherever made". Also included are actions on torts committed "within the jurisdiction". ("Jurisdiction" has been used in statutes in two senses: here it means, roughly, "territorial

[5] See Russell, *ante*, footnote 1, at pp. 186-190.

limits of the court".) These actions are personal actions in which the presence, residence or domicile of the proposed defendant within the territory is immaterial. Yet the conflict rule for recognition of foreign judgments in personal actions enunciated in a number of earlier cases refused recognition unless the defendant was within[6] the territory of the foreign court at the commencement of proceedings or had in one way or another submitted to its jurisdiction.[7] Here is a very fertile area for supplementing our specific bases of recognition by using the principles set out in *Travers* v. *Holley*. If we entertain contract actions, even where the defendant is absent, in cases where the contract was made or broken in our own country, should we not recognize judgments obtained abroad in a country where the contract was made or broken, assuming, of course, proper notice to the defendant?[8] And if in these circumstances we give judgment by default, should we not equally recognize default judgments obtained in comparable circumstances abroad?

II. *Archambault* v. *Solloway*

The opportunity to apply *Travers* v. *Holley* to a personal action arose recently in the British Columbia case of *Archambault* v. *Solloway*.[9] The plaintiff had sued the defendant in Quebec upon a contract made and to be performed in Quebec. The defendant, who resided in British Columbia at the time of the Quebec proceedings, was served in British Columbia in accordance with a Quebec order obtained under article 137 of the Code of Civil Procedure, which authorized personal service out of the jurisdiction upon defendants in other parts of Canada. An earlier section of the Code provided that a defendant may be summoned "before the court of the place where the contract was made".[10] The defendant entered no appearance "and thereafter a default

[6] By way of presence, residence or nationality.

[7] *E.g.*, *Emanuel* v. *Symon*, [1908] 1 K.B. 302, at p. 309 (C.A.).

[8] See more fully, Kennedy, "Reciprocity" in the Recognition of Foreign Judgments: The Implications of Travers v. Holley (1954), 32 Can. Bar Rev. 359, at pp. 373-383.

[9] April 18th, 1956 (B.C., Wilson J.); No. 850/54, Vancouver Registry. Noted (1956), 14 The Advocate 121, 123. The date of the case given in The Advocate is inaccurate. In *Sharps Commercials* v. *Gas Turbines*, [1956] N.Z.L.R. 819, McGregor J. refused to give effect to the same argument on reciprocity put forward in the *Archambault* case, but for a different reason. His lordship held that *Re Dulles*, *post* footnote 13, could not stand in the light of the Privy Council's decision in the *Sirdar Gurdyal* case, *post* footnote 12.

[10] Art. 94(5) C.C.P.

judgment was entered". After reciting these facts, Wilson J. continued:

> The plaintiff now seeks, by an action in the [British Columbia] court to recover on that judgment. Faced with such long and accepted authorities as *Emanuel* v. *Symon*[11] and *Sirdar Gurdyal Singh* v. *Rajah of Faridkote*,[12] which firmly declare that the jurisdiction of foreign courts, in actions in personam, depends upon either the residence of the defendant in the foreign jurisdiction or his submission to it, the plaintiff cites *Travers* v. *Holley*. . . . The judgment held that comity required that the English courts should recognize a basis of jurisdiction in a foreign court which English courts themselves utilized and accepted.
>
> The plaintiff here says that Order 11 of our Supreme Court Rules would permit service *ex juris* of a writ on a defendant resident in Quebec in respect of a contract made and to be performed here. The Quebec law, it is argued, is the same. Therefore we should, following *Travers* v. *Holley* enforce the Quebec judgment here. The plaintiff also relies on some obiter dicta of Denning L. J. in *Re Dulles*.[13] . . . The problem would be a hard one to decide because, despite my initial reaction against the plaintiff's contentions, I found an article, 'Reciprocity in the Recognition of Foreign Judgments' in the Canadian Bar Review for April 1954[14] highly persuasive.

His lordship, however, does not decide the point because he finds that, while Quebec permits actions upon foreign judgments, it allows an inquiry into the merits in cases of default judgments. Thus Quebec would not have given the same effect to a British Columbia judgment obtained in circumstances comparable to those in the *Archambault* case as is given in most common-law countries.

His lordship proceeds:

> I think sections 211 and 212 of the Code of Civil Procedure, which I must confess, I stumbled upon more by good fortune than through any familiarity with that formidable enactment, solve my difficulties. I cite them:
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> > 211. Any defence which might have been set up to the original action, may be pleaded to an action brought upon a judgment rendered in any other Province of Canada, provided that the defendant was not personally served with the action within such other Province or did not appear in such action.
> >
> > 212. Any such defence cannot be pleaded if the defendant was personally served in such Province, or appeared in the original action, except in any case involving the decision of a right affecting immoveables in this Province, or the jurisdiction of a foreign court concerning such right.
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> These sections make it clear that the plaintiff must fail by the force

[11] *Ante*, footnote 7.
[12] [1894] A.C. 670 (J.C.P.C.).
[13] [1951] Ch. 842, at p. 851 (C.A.).
[14] *Ante*, footnote 8.

> of his own argument. If, as section 211 says in effect, a defendant in Quebec may have a trial on the merits where the foreign judgment sought to be enforced is the result of service *ex juris* without submission, then the plaintiff cannot, in the name of reciprocity, ask for anything more here.

It may be true that in the name of "reciprocity", in one usage of the word, the plaintiff was seeking something in British Columbia which his counterpart could not have secured in Quebec, but it is equally true that this is not the meaning ascribed to "reciprocity" today when applied to questions of recognizing foreign judgments at common law. The plaintiff had secured a judgment in Quebec against an absent defendant, after personal service *ex juris*, in circumstances identical to those which he could have used in British Columbia had the action been in that province upon a contract made and to be performed there and the defendant resident in Quebec. This was the perfect situation for the application of the jurisdictional reciprocity dealt with in *Travers* v. *Holley*. Foreign judgments are recognized where the foreign court had jurisdiction in English eyes[15]—what some writers and judges have called jurisdiction in the "international" sense.[16] The *Travers* case has said that a foreign court has jurisdiction in cases where it exercised its jurisdiction in circumstances comparable to those where we should have exercised a like jurisdiction. No question of reciprocity of *recognition* has hitherto been involved.

III. *Should We Accept Reciprocity in Recognition?*

The *Archambault* decision raises two questions. Has reciprocity in recognition anything to do with the problem? And, if it has not, should the application of jurisdictional reciprocity to foreign judgments in personal actions be allowed to follow logically now that it has been applied to judgments declaring status? First, any connection between reciprocity in recognition and our acceptance of foreign judgments seems to have been curtly severed in the English Court of Appeal, if it ever existed. Writing in 1938, Read says:[17]

> Indeed, the only English case in which the court has used language that might be interpreted as placing the *ratio decidendi* for refusal to recognize a foreign judgment upon a reciprocity basis has been adversely criticized by the Court of Appeal because it appeared to coun-

[15] An early expression of this view is found in Pollock's comment (1887), 3 L. Q. Rev. 484, at pp. 484-485.

[16] H. E. Read, Recognition and Enforcement of Foreign Judgments (1938) pp. 52-53, 125ff.

[17] *Ibid.*, pp. 52-53.

> tenance a doctrine of 'retaliation by English Courts on foreign states whose tribunals refuse to recognize rights acquired by English law' [quoting from Scrutton L.J. in *Luther* v. *Sagor*[18]].

And, as Read further notes, the judge in *Simpson* v. *Fogo*, the case which Scrutton L.J. was criticizing, had repudiated any suggestion that his judgment was founded upon reciprocity:[19]

> In one case I remember to have seen at common law, since my decision in *Simpson* v. *Fogo*, I think I was misunderstood in one respect, because, in that subsequent case it was supposed that I had acted in *Simpson* v. *Fogo* on a sort of *lex talionis*, namely, that if they would not recognise our law we would not recognise theirs. It was nothing of the sort, but it was simply this: finding that the other court would not recognise the title of the mortgagee to the ship, which was property in this country, and with which I had to deal, I said I could not hold that right to be displaced by a judgment which says, 'We will not recognise the existence of this title, because it is not a title which exists according to our notions of what law ought to be'.

It is thus clear that recognition of the Louisiana judgment in *Simpson* v. *Fogo* was not refused because Louisiana refused recognition to English judgments. As his lordship makes clear in subsequent passages, the Louisiana judgment was founded upon a rule of Louisiana law under which the apparent owner who brings a chattel into Louisiana is deemed to be the true owner. Any decision founded upon such a rule was, in his lordship's view, "a decision of the judicature contrary to the principles established by the courts of every other country in the world".[20] *Simpson* v. *Fogo* is far from suggesting a retaliation against Louisiana for its treatment of English judgments or even of English titles.

On the other hand, in 1895 in *Hilton* v. *Guyot*,[21] the Supreme Court of the United States refused by a majority of five to four to recognize a French judgment because France would not give equal effect to American or other foreign judgments. Today there is some doubt whether the decision affects the state courts, in view

[18] [1921] 3 K.B. 532, at p. 558 (C.A.), criticizing *Simpson* v. *Fogo* (1863), 1 H. & M. 195, at p. 247 (Wood V.C.).

[19] Wood V.C. in *Liverpool Marine* v. *Hunter* (1867), 16 T.L.R. 447, at p. 448. The report in The Law Reports is to the same effect but the pertinent remarks are spread throughout the judgment: L.R. 4 Eq. 62.

[20] *Ibid.*, at p. 448; L.R. 4 Eq. 62, at p. 69. Two recent and thorough discussions of the merits of the problem involved in *Simpson* v. *Fogo* suggest that the decision does not represent English law: Lalive, The Transfer of Chattels in the Conflict of Laws (1955) pp. 160-163; Zaphiriou, The Transfer of Chattels in Private International Law (1956) pp. 178-180.

[21] *Hilton* v. *Guyot* (1895), 159 U.S. 113. Reciprocity of recognition is discussed in the majority judgment (Gray J.) at pp. 210-228 and in the minority judgment (Fuller C.J.) at p. 234.

of the special way in which the case came to the Supreme Court, and New York's highest court has expressly refused to accept the principle of reciprocity upon which the *Hilton* case is said to have been decided.[22] Much of the criticism in the United States of the *Hilton* case points out that the decision is a departure from the English rules for recognition of foreign judgments. More important for our purposes is the note in the Law Quarterly Review for 1896,[23] apparently written by the editor, Sir Frederick Pollock, who, after noting the apparent basis of the *Hilton* decision—reciprocity in recognition—continues:

> . . . an English critic . . . must pronounce the judgment to be erroneous in principle. . . . 1. No English judgment or English writer of authority sanctions the doctrine of reciprocity [in recognition].

The latest edition of Dicey is equally clear that reciprocity in this sense is not part of English law.[24] No more need be said about the absence of any question of reciprocity in recognition in English and Commonwealth jurisprudence. But its absence is not the end of our problem. Should we introduce reciprocity of this type? Was Wilson J. wise in introducing it into British Columbia in the *Archambault* case?

Assuming jurisdiction in the international sense and no fraud or lack of natural justice, the common-law world today accepts a foreign judgment as conclusive on the merits. Why did the majority in the *Hilton* case in the United States decide otherwise? It is true that they referred to the lack of reciprocity on France's part as one of the bases upon which they acted. There were, however, other considerations at the root of the decision. Under the modern English rule, the fraud alleged to have been present in the procurement of the foreign judgment in the *Hilton* case "would be a sufficient ground for disregarding it".[25] Further, English law at the time of the declaration of independence did not treat, in the view of Gray J., foreign judgments as conclusive on the merits, apart from fraud or neglect of natural justice. The same rule was in force in most other countries of the world.[26] Gray J. looked to the law of Egypt and of twenty-three European and American countries, other than England and the United States. All founded their law upon the civil law generally in force in Europe. And,

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[22] See the discussion of the case and its place today in U.S. law in Goodrich, Conflict of Laws (3rd ed., 1949) pp. 605-608; and in (1943), 148 A.L.R. 991, at pp. 998-1001.

[23] (1896), 12 L. Q. Rev. 302.

[24] (6th ed., 1949) p. 403.

[25] See Gray J. in the *Hilton* case, *ante*, footnote 21, at p. 228.

[26] *Ibid.*

today, Nussbaum suggests that nearly all civil-law countries make their recognition of foreign judgments depend upon reciprocity.[27] Should we in the common-law world modify our rule of conclusiveness on the merits?

What one nation or many nations do is an important factor in formulating our own rules for some purposes. The choice of law applicable to a particular set of circumstances should so far as possible be uniform. It helps international commerce if the validity of a transfer of chattels is governed by one law, as it generally is today by the *lex situs*. But the same reasons which apply to choice of law do not apply to our enforcement of foreign judgments. If we in the common-law world wish to give greater or less effect to them than is given elsewhere, no serious results will follow. If we decide to give effect to them, notwithstanding the refusal by the law of the nation where the judgment was obtained to give effect to our judgments, difficulties in international commerce do not arise.

Should we discriminate against judgments obtained in civil-law countries? Should we give effect in this country to a judgment from England or Australia but refuse to give effect to a judgment in identical circumstances from France or another civil-law country merely because the latter group of countries does not give the same effect to our judgments as we do to foreign judgments from, at least, the Commonwealth? Goodrich suggests that a doctrine by which "courts are required to do, not as justice and reason require, but as they are done by"[28] is not only unsound but raises political not legal questions.[29] This approach to the specific problem raises the larger question of the meaning and usefulness of reciprocity today. Before *jurisdictional* reciprocity was advocated in *Travers* v. *Holley*, Graveson was not too favourable to that form of reciprocity, partly because it was not, in his view, part of English law.[30] Now that *Travers* v. *Holley* has recognized jurisdictional reciprocity as part of English law, Graveson very aptly states the place of reciprocity:

> In recent years the ideas of comity and reciprocity have been developed by the courts, not as a negative and restrictive rule on the actual

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[27] A. Nussbaum, Principles of Private International Law (1943) p. 237; See, also, articles by Lorenzen and Nadelmann, referred to in Goodrich, *op. cit.*, p. 606, n. 16.

[28] Quoting from Parsons J. in *MacDonald* v. *Grand Trunk Ry.* (1902), 52 Atl. 982, at p. 986 (N.H.).

[29] *Op. cit.*, at p. 606.

[30] The Recognition of Foreign Divorce Decrees (1951), 37 Transactions of the Grotius Society 149, at pp. 166-168.

> *enforcement* of foreign judgments, but rather as a broader positive and enabling rule relating to the recognition of the *jurisdiction* of foreign courts.[31]

Graveson would use reciprocity, not to prevent recognition and enforcement of otherwise acceptable foreign judgments, but as an enlargement in our eyes of the bases of a foreign court's jurisdiction. Not only is the positive usefulness of jurisdictional reciprocity noted, but indirectly any suggestion that reciprocity in recognition should cut down our recognition or enforcement of judgments is repudiated. These views so conform to my own that it is unnecessary to add more at this point. If, then, the problem were unfettered by authority, I should have come to a conclusion different from that of Wilson J. in the *Archambault* case. And such authority as exists appears to preclude any approach at common law on the basis used by Wilson J. of, in effect, doing as we are done by.

IV. *The Effect of Statutory Provisions: Generally*

Does the presence of some use of reciprocity in recognition in our statutes alter our well-established common-law rules that the absence of this type of reciprocity will not prevent enforcement? Nussbaum refers to the English Foreign Judgments (Reciprocal Enforcement) Act, 1933,[32] as authority for the proposition that "England has adopted the same solution" as the civil law—recognition "should depend upon reciprocity".[33] It is true that section 9 of that statute authorizes orders in council under which judgments of particular foreign countries would be unenforceable in England if reciprocity in the form of recognition and expeditious enforcement are not forthcoming. But no orders have been made under that section; yet orders have been made under other sections of the act and under other acts providing for expeditious methods of enforcing judgments from abroad. Most of these statutes, however, provide either for an enlargement of recognition rules by bringing in judgments given abroad without "jurisdiction" in the English conflict sense, or for the expeditious enforcement of judgments upon which an action at common law could otherwise have been brought. In other words, they extend and simplify our recognition rules in specific cases, and do so on a basis of reciprocity. They do *not* cut down the recognition and enforcement of judgments already provided for by common law,

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[31] The Conflict of Laws (3rd ed., 1955) p. 465.

[32] 23 Geo. 5, c. 13 (U.K.).

[33] *Op. cit.*, pp. 237-238.

whether there exists reciprocity in recognition or not. An exception is section 9 of the English statute of 1933, but, as I have said, it has not been brought into force, perhaps wisely. And in Canada, in a report to the Conference of Commissioners on Uniformity of Legislation, Mr. John E. Read, now a member of the International Court of Justice, declared that he "would strongly urge [the] omission" of the English section 9 in any Canadian uniform act.[34] This remark is particularly important in the light of Mr. Read's instructions from the conference to consider "the desirability of adopting the policy of international reciprocal enforcement of judgments", especially in the light of the English legislation of 1933.

V. *Expeditious Enforcement Provisions*

To a large extent English legislation has not attempted to change the substantive common-law rules of recognition. England's statutes are directed to the provision of expeditious methods of enforcement. The Judgments Extension Act, 1868,[35] provided for direct enforcement by registration of a money judgment from one part of the United Kingdom in any other part (other than the Isle of Man or the Channel Islands). Within the limited area of the United Kingdom, a change in the common-law rules of recognition appears, in that the statute apparently permits enforcement of judgments without inquiry into the "international" jurisdiction of the original court.[36] But there is no cutting down of the common-law rules of conclusiveness on the merits.[37] In 1920, the Administration of Justice Act[38] provided a somewhat comparable provision for the direct enforcement in England of judgments from any British territory outside the United Kingdom to which the act was extended by order in council. Roughly, only those Empire judgments which would have been enforceable by common-law action may be registered under the expeditious procedure of the statute. But there is one departure:[39]

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[34] Proceedings, 1939, at p. 54. [35] 31 & 32 Vict., c. 54 (U.K.).

[36] And see Dicey (6th ed., 1949) pp. 416-417.

[37] Section 8 does prevent the statute's expeditious registration being used for certain Scottish judgments pronounced "in absence", but the common-law action is not altered.

[38] 1920, 10 & 11 Geo. 5, c. 81, Part II (U.K.). A Newfoundland statute of 1917 (c. 23) refers to the "Imperial Act, the Judgments Extension Act, 1916". I have been unable to locate this statute.

[39] Section 9(2)(b). The clause illustrates the double use of the word "jurisdiction", first as having a territorial meaning, and secondly as defining a court's power over a person and subject-matter. The regular use of this word in both senses without any adjectival qualification is a feature

> No judgment shall be ordered to be registered under this section if . . .
> (b) the judgment debtor, being a person who was neither carrying on business nor ordinarily resident within the jurisdiction of the original court, did not voluntarily appear or otherwise submit or agree to submit to the jurisdiction of that court;

In effect, a default judgment against a non-resident, even though personally served in the territory of his normal residence, is excluded from the "direct" enforcement procedure. However, as the statute did not remove the common-law action on the foreign judgment, there is no cutting down of recognition or enforcement rules. The statute merely provides an expeditious method of enforcing some foreign judgments recognizable at common law. Because the act is reciprocal in nature, and because Canada has very little direct enforcement legislation for judgments outside Canada, the statute has been extended so far as Canada is concerned to judgments from Newfoundland and Saskatchewan only.

In 1933, by the Foreign Judgments (Reciprocal Enforcement) Act,[40] the principle of direct enforcement was extended to judgments from countries outside Her Majesty's dominions. In addition statutory provision was made for recognition of judgments, other than money judgments, if, had they been money judgments, they would have been registrable under the act. Power was given to extend the act to any part of the British Commonwealth, in which case the 1920 act would cease to have effect *pro tanto*. Reciprocity of treatment was also a basis of this statute. Very few orders have been made under it. No Canadian judgments are yet included. But one major change appears. The common-law action on the judgment (but not, it would seem, the common-law right to sue on the original cause of action) is abolished for any judgment to which the act applies, whether registrable or not.[41] This might appear to be a serious change in the law if the rule as to default judgments introduced in 1920 had been carried forward into 1933. It was not. Thus a default judgment against a non-resident, if jurisdiction otherwise exists on the basis of, for example, *Travers* v. *Holley*, may be registered under the act. If the act had been extended to Quebec, the judgment in *Archambault* v. *Solloway* could have been registered in England. In the absence of any ex-

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of statutes dealing with foreign judgments. For criticism of the merits of this clause, see F. T. Piggott (1922), 38 L. Q. Rev. 339, at pp. 344-349.

[40] 1933, 23 Geo. 5, c. 13 (U.K.).

[41] There is a possible conflict between the text of section 6, which bars proceedings (other than registration proceedings) on judgments "to which this . . . Act applies", and the marginal note which refers to "Foreign judgments which can be registered . . .". Judgments "to which this . . . Act

tension of the act to Canadian judgments,[42] the common-law action on the judgment would be available to the judgment creditor in the *Archambault* case.

The legislative patterns in Canada have been somewhat different. Earlier enactments, to be discussed in the next part of this article, dealt with the *substantive* rule that a foreign judgment, if granted in circumstances of international validity, is conclusive upon the merits.[43] More recently we find simplifications in the *procedural* rules for enforcing foreign judgments somewhat comparable to those just described for England.

Newfoundland appears to have avoided any of the Canadian experiments in modification of the substantive rules governing the common-law action on foreign judgments. It does have the English enforcement legislation of 1933,[44] and it is true that that legislation bars actions on foreign judgments to which the act applies. But it is probable that the substitute procedure by direct enforcement (registration) covers all actions upon which action could have been brought successfully at common law.[45] The act applies to judgments from the United Kingdom but not elsewhere unless brought into force for any particular territory by order in council on a basis of reciprocal provisions for direct enforcement.

Elsewhere in Canada there is the uniform Reciprocal Enforcement of Foreign Judgments Act of 1924 drafted by the Conference of Commissioners on Uniformity of Legislation in Canada.[46] The uniform act has been enacted in the Northwest Territories

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applies" are clearly and carefully defined in an earlier section: s. 1(2). By definition, a judgment from a foreign country to which the act has been applied "shall be a judgment to which this . . . Act applies", provided it is final, is not a judgment for taxes or for a penal sum, and is rendered after the act comes into force for the foreign country involved. A judgment is thus included, if the act extends to the country granting it, *whether or not* it may be registered, or, if registered, the registration may be set aside. Thus if the 1920 provision barring registration of default judgments had been continued, the common-law action would have disappeared under section 6, yet the default judgments could not have been registered under the act.

[42] Other than Newfoundland? That province has since 1938 had an act almost identical to the U.K. act of 1933, but specifically including U.K. judgments. See footnote 44, and text.

[43] For a summary of the legislation in force in 1925, see Dr. Falconbridge's report to the Conference on Uniformity of Legislation, Proceedings, 1925, pp. 44-48.

[44] R.S.N., 1952, c. 130, enacted by 1938, No. 20, which repealed 1922, c. 14, which repealed 1917, c. 24.

[45] See, *ante*, footnote 41.

[46] Conference Proceedings, 1924. Earlier drafts appeared, *ibid.*, 1921, p. 46; 1922, p. 78. A revised version, extending the statute's potential operation to judgments from outside Canada was tentatively approved by the 1956 Conference.

and in all provinces[47] except Quebec, Nova Scotia, Prince Edward Island and Newfoundland. The statute provides for speedy enforcement by registration of judgments from other Canadian provinces or territories, or, in the case of Alberta, from anywhere. But its application to any province, territory or country depends, as its name indicates, upon an order in council to be made only if the place in respect of which the order is made has "reciprocal provisions . . . for the enforcement within that province or territory of judgments obtained in . . . this province". The statute is largely similar to the English act of 1933, but in Canada we expressly preserve the common-law action upon a foreign judgment and there is no power to deny enforcement or the registration procedure to judgments from countries which do not offer equal treatment to our judgments.

The Canadian uniform statute of 1924 does contain a provision which to some extent negatives the statute's use for those judgments which we are prepared to recognize and enforce upon the basis, *inter alia*, of *Travers* v. *Holley*. Section 4 reads in part:

> No judgment shall be ordered to be registered under this Act if it is shown to the registering court that
> (a) The original court acted without jurisdiction, or
> (b) The judgment debtor, being a person who was neither carrying on business nor ordinarily resident within the jurisdiction of the original court, did not voluntarily appear or otherwise submit during the proceedings to the jurisdiction of that court; or . . .

On the basis of clause (b) the judgment in *Archambault* v. *Solloway* would not be registrable in British Columbia under the uniform enforcement act of 1924, assuming that that act, when enacted in British Columbia, had subsequently been made applicable to judgments from Quebec.[48] Clause (b) introduces a restriction upon the use of speedy enforcement procedures not found at common law. The clause is in addition to clause (a), which rules out registration of judgments where in our opinion the foreign court lacked jurisdiction "internationally". Clause (b) prevents the enforcement, in effect, of those foreign judgments which may in our view have been granted by a court with jurisdiction, as in the *Archambault* case, but which were default judgments. Speedy en-

[47] R.O.N.W.T., 1956, c. 82; R.S.B.C., 1948, c. 286; R.S.A., 1942, c. 140; R.S.S., 1953, c. 84; R.S.M., 1954, c. 221; R.S.O., 1950, c. 333; R.S.N.B., 1952, c. 192.

[48] It has not been applied by B.C. to Quebec judgments because, by its terms, it may be applied only to places which have reciprocal legislation. Quebec has not adopted the uniform act. The B.C. act has been applied, as of October 1st, 1956, only to the one territory and five provinces which have adopted the uniform act.

forcement is denied, but not the common-law action on the judgment. Should we allow a special or exceptional rule in cases where the defendant defaulted? For debtors it puts a premium upon allowing judgment to go by default. Mr. John Read, in presenting a new draft of the 1924 act to the Conference in 1939, noted specifically that the Canadian uniform Foreign Judgments Act of 1933, the English enforcement statute of 1933, and the new draft Canadian enforcement statute which he presented to the Conference in 1939 did not contain anything comparable to clause (b) of the act of 1924, which protected debtors where they allowed judgment to go by default.[49] Unfortunately this point seems to have been lost somewhere between the Conference's consideration of Mr. John Read's draft new uniform enforcement statute and the draft presented to the 1953 conference,[50] and clause (b) has reappeared in the draft tentatively approved at the 1956 conference. Should it be in the statute at all?

Apart from a tendency to refuse expeditious enforcement procedure to default judgments, the English and Canadian statutory provisions for expeditious enforcement proceedings do not seriously affect our common-law rules. The new procedure is, it is true, based upon reciprocal treatment of our judgments in the country whose judgment is presented to us for enforcement. But the statutes do not apply unless reciprocal treatment is forthcoming and, where they do not apply, the common-law action on the judgment continues. Further, in Canada, the common-law action continues in any event. It is difficult to see how, then, Nussbaum is able to say that England has adopted the civil-law principle of reciprocity, unless, in a strained context, it is suggested that in its supplementary provisions reciprocity is a feature. Reciprocity of treatment is not a condition of enforcement in England today. It may be one of the bases for selecting a newer and simplified proceeding. Nothing more.

In addition to the provision of a simplified procedure for foreign money judgments, both England and Canada,[51] as well as a large number of other countries, have enacted reciprocal

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[49] Conference Proceedings, 1939, p. 51.

[50] *Ibid.*, 1953, p. 54. Clause (c) should also be reconsidered.

[51] *E.g.*, Maintenance Orders (Facilities for Enforcement) Act, 1920, c. 33 (U.K.); the Canadian uniform Reciprocal Enforcement of Maintenance Orders Act, Conference Proceedings, 1946, p. 69, adopted (occasionally with slight modification) in all provinces except Saskatchewan and Quebec and in the Northwest Territories. Comparable provisions exist in Saskatchewan and Quebec. A revised version of the Canadian uniform act was tentatively approved at the 1956 Conference.

legislation for the enforcement of each other's maintenance or alimony awards. The common-law rules did not include these awards where they were not final—that is, where they were subject to revision from time to time. We have reciprocity of treatment as a condition of the operation of the new statute, but, here again, reciprocity in this sense is being applied to something new and supplementary to the common-law. Its use does not subtract from existing rules, or prevent the continued enforcement of judgments which at common-law are already enforceable, whether there is reciprocity or not.

VI. *Statutory Reopening of the Merits*

Reciprocity of treatment and reopening the merits

Emphasis has been placed upon the common law's disposition to accept as conclusive on the merits those foreign judgments where, in the opinion of the common law, the foreign court had jurisdiction. If we accepted reciprocity in recognition, the most noticeable effect would be to reopen the merits when action is brought upon a foreign judgment. When a foreign country whose judgment it is sought to enforce does not give comparable treatment to our judgments, it is probable that if we insisted upon reciprocity we should not refuse to enforce the judgment, but would merely enforce it in the same manner as the foreign country enforces our judgments. In most countries which do not accept the English rules, this simply means that the merits may be reopened. In other words, by accepting reciprocity we should in practice to a large extent be reopening the merits.

Under the English rule, the merits are closed, assuming jurisdiction, notice to the defendant, and no fraud. And a foreign judgment is not defective or of any less value because it was obtained by default.[52] The judgment in *Archambault* v. *Solloway* was a default judgment, rendered in the absence of either appearance or defence, but after personal service upon the defendant. The judgment creditor in seeking recovery from the debtor in British Columbia had three potential methods of approach. He could have sued in British Columbia upon the original cause of action, which was not, at common law, merged in the Quebec judgment. But this approach reopened for the defendant all defences available in the original action. The merits would be retried. A better approach was the common-law action upon the Quebec judgment

[52] Discussed fully by the old full court in British Columbia in *Boyle* v. *Victoria Yukon* (1902), 9 B.C.R. 213, at pp. 222-224.

which, in the absence of fraud, was conclusive on the merits. I have already attempted to show that Quebec had jurisdiction in the international sense over the defendant. Thirdly, there is the use, when available, of the Canadian statutory experiment in expeditious enforcement by a simple motion for registration in the case of judgments from another province. For reasons already noted in part V, the third method was not available to Archambault,[53] and he chose the second. I have already suggested why he should have succeeded in British Columbia in his common-law action on the Quebec judgment.

Canadian statute of 1860

Some Canadian provinces, however, have changed the common-law rule of conclusiveness on the merits in actions upon foreign judgments. In other words, there has been a change not just in procedure but in the substantive common-law rules. These changes appear first in 1860 in legislation of the old colony or province of Canada, and consist of three provisions, one for foreign judgments generally, the other two for judgments as between the two parts of the old colony. Section 1 reads:[54]

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

Here is a direct reversal of the common-law rule of conclusiveness in actions in the old colony or province of Canada upon a judgment obtained outside Canada. The new principle was extended in certain cases to judgments obtained within either part of Canada, whose judicial systems and laws had, notwithstanding the union in 1840, continued separate and apart. Section 4 reads:

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

The third provision, found in section 2, was merely the corollary of section 4, and provided a statutory continuance of the common-law rule of conclusiveness on the merits where the judgment from the other part of the colony arose out of an action "in which the service of process on the defendant or party sued has been per-

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[53] See, *ante*, footnote 48 and text.

[54] 1860, 23 Vict., c. 24 (Can.).

sonal".[55] In such cases "no defence that might have been set up to the original suit can be pleaded". There may be some doubt whether section 2 goes further than the common law and excludes the defence of fraud, either as to jurisdiction or the merits. The common law continued, as between the two parts of Canada in one small area not covered by sections 4 and 2—judgments from the other part in which service was not personal but in which a defence was entered. In those cases, the defendant's submission to the jurisdiction provides a basis for international recognition in which the common-law rule of conclusiveness will operate.

These three sections of the Canadian act of 1860 provided two types of modification of the substantive common-law rule of conclusiveness on the merits. For "section 1 territories" (all outside Canada), the merits might be reopened for all judgments; but for "section 4 territories" (either part of Canada), the merits might be reopened only if in the original action service was not personal *and* no defence was made.

General statutory reopening of the merits

The first type of modification, which would reopen the merits in all cases, survived in Ontario until 1876 when it was repealed.[56] Ontario has now reverted to the position at common law, except for judgments from Quebec. In Quebec, this modification continues today in relation to judgments from outside Canada (in the modern sense of "Canada").[57] It appears today in Manitoba,[58] apparently introduced in 1876, the year in which Ontario removed the change in the common law from its statutes. There is, in the Manitoba provision, power in the court to strike out any "such pleading or defence upon the ground of embarrassment or delay".

The Manitoba provision was applicable originally to any foreign judgment. In 1952,[59] the statutory provision was made subject to the Reciprocal Enforcement of Judgments Act. As has been seen,[60] this statute applies for the moment only to judgments from other parts of Canada, deals only with a speedier method of enforcement and preserves the common-law action upon the foreign judgment. It is fair to say that the enforcement statute[61]

[55] *Ibid.*, s. 2.
[56] 1876, 39 Vict., c. 7, s. 1 and Sch. A (Ont.).
[57] Art. 210 C.C.P.
[58] R.S.M., 1954, c. 52, s. 82. See 1876, 39 Vict., c. 2, s. 8 (Man.).
[59] 1952 (1st sess.), c. 13, s. 4 (Man.); now R.S.M., 1954, c. 52, s. 82.
[60] *Ante*, text following footnote 47. In Alberta, it can apply also to judgments from outside Canada. See footnote 46 for proposed extension.
[61] R.S.M., 1954, c. 221. Section 7(2) does give some judgment debtors a right to have registration set aside for specific listed reasons. The section does not, it would seem, prevent either the setting aside of registra-

does not prevent the reopening of the merits for either the simplified registration or for the common-law action if the merits may in the particular province be reopened. They may in Manitoba. The subjection of Manitoba's merits-provision to the enforcement statute appears to have no effect for our purposes.

Apart from Manitoba and Quebec, no other province in Canada appears to have a general reopening of the merits.

Statutory reopening of the merits in special cases

The second or limited type of reopening "pioneered" by the legislation of 1860 in the old province of Canada has its counterpart in a number of provinces. Section 4, it will be recalled, permitted a reopening of the merits in judgments as between the territories now known as Ontario and Quebec where the defendant was not personally served *and* did not defend. That provision continues as part of the law of Ontario today, together with its counterpart that the merits are not to be reopened where there was personal service.[62] By this strange accident of political history, only judgments from Quebec and its predecessor Lower Canada may be reopened in Ontario in the absence of personal service and defence. Judgments from other parts of Canada and from outside Canada are governed in Ontario by the common-law rule of conclusiveness on the merits. It would seem that, in the cases governed by the old legislation of 1860 or the modern Ontario version, the place of service, whether within or without the territory of the original court, is irrelevant.[63]

Elsewhere, this special provision for reopening the merits has had a varied history. It became part of the law of Quebec at federa-

tion for other reasons or the reopening of the merits if the law of the province so allows. Section 7(2) appears to be a provision listing cases where registration *must* be set aside; section 7(1) provides the general authority in the court to set aside. On the other hand, a court, in order to give some effect to the 1952 amendment to the general reopening of the merits section might construe the court's power to set registration aside as not including power to reopen the merits in cases of registration under the reciprocal enforcement statute. Clarification is badly needed.

[62] R.S.O., 1950, c. 190, ss. 51, 52.

[63] The dissenting judgment of Riddell J.A. appears preferable on this point: *Lung* v. *Lee*, [1929] 1 D.L.R. 130, at p. 131 (Ont. C.A.). The Master treated the matter as still open in *Plymouth* v. *Kernerman*, [1947] O.W.N. 301 (aff'd., Wells J., *ibid.*, at p. 305). In Alberta, Frank Ford J.A. accepted the majority view in the *Lung* case in his interpretation of a different statute, for which there was not any legislative or judicial history comparable to that which the majority in the *Lung* case used as justification for its exceptional interpretation: *Wedlay* v. *Quist*, [1953] 4 D.L.R. 620, at p. 623 (Alta. C.A.). The decision in the *Wedlay case* has been reversed by the Commissioners who are preparing a new uniform enforcement act: see Conference Proceedings, 1954, p. 97; 1956, tentative draft, s. 2(2) (not yet published).

tion in 1867, but was amended in 1876 in three respects. The modern provisions have already been copied as part of the judgment of Wilson J. in the *Archambault* case.[64] It will be seen that the provisions of sections 2 and 4 (now articles 211-212) were extended to judgments from any province[65] of Canada, and not limited to those from Upper Canada, now Ontario.[66] In this respect the number of cases where judgment may be reopened on the merits is thus cut down, in that judgments from the rest of what is now Canada are within the special provision allowing reopening only in certain cases and not within Quebec's general provision allowing a reopening for judgments from outside Canada. A further change limited the reference to personal service to service *within the territory of the original court.*[66]

The third change in Quebec in 1876 made alternative the operation of the conditions for opening up the merits. In 1860 they could be opened up if the defendant was not properly served *and* had made no defence. In 1876 the provision for opening up was amended by changing "and" to "or", and its counterpart where the merits could not be opened up if there had been personal service was amended by adding the alternative "or in which in the absence of such personal service the defendant appeared".[66] In each of the two cases where personal service or appearance was made disjunctive, the legislation of 1876 also made the second alternative conditional upon the absence of personal service. The condition no longer appears[67] and today, in Quebec, judgments from any other province of Canada may not be reopened on the merits if service was personal in the original province or if the defendant appeared (article 212), but may be reopened if service was not personal or if the defendant did not appear (article 211). There is an obvious overlapping in the two articles where either (a) the defendant was personally served but did not appear, or (b) he was not personally served but did appear. I suggest that the sense of the two articles, when we remember their history, is that in either case reopening of the merits is denied.

In the three maritime provinces, the special approach to reopening of the merits in the Canadian legislation of 1860 was

[64] *Ante*, p. 127.

[65] "Province" is not defined in Quebec to include "territory" and a gap may exist between art. 210, which refers to judgments from outside Canada, and arts. 211-212, which refer to judgments from any "province" of Canada.

[66] 1876, 40 Vict., c. 14; now arts. 211-212 C.C.P.

[67] It had been carried forward into R.S.Q., 1888, as part of art. 5862 (arts. 42b and 42d C.C.P.), but does not appear as part of arts. 211-212 today.

given a slight variation. In New Brunswick, *any* foreign judgment was by legislation of 1864 made liable to a reopening of the merits if the defendant had not been personally served within the territory of the original court.[68] The provision of 1864 was repealed in 1950[69] when New Brunswick adopted the uniform Foreign Judgments Act.[70] That act contains no provision allowing judgment debtors to reopen the merits, except for a section peculiar to New Brunswick and of very limited operation, which declares that a judgment does not of itself bar, in actions in the province, a "right or defence based on either law or fact which has accrued . . . *subsequent to* the entering of such judgment".[71] The 1950 statute deals with common-law actions upon foreign judgments and contains some unfortunate provisions. It has been adopted only in New Brunswick and Saskatchewan, but because it is a uniform act recommended for adoption in all provinces I shall deal with it more fully shortly. The common-law principles are largely retained except that in defining what has been called the international jurisdiction of the foreign court, there are severe restrictions with no room for growth.

In Nova Scotia and Prince Edward Island, the early legislation allowed the merits to be reopened only in cases of local defendants. In 1869, for example, Prince Edward Island altered the common-law rules in cases where the defendant in the *original* action was domiciled in the Island and served in the Island.[72] Nova Scotia reopened the merits by legislation in 1880 in favour of a judgment debtor domiciled in Nova Scotia, presumably at the time of the action on the foreign judgment.[73] Neither province used lack of personal service or absence of defence as a basis for altering the common law. Today, both provinces follow the Nova Scotia rule, but apply it only in cases where no defence was made, or alternatively in the Island, "where the original cause of action arose in this Province".[74]

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[68] 1864, 27 Vict., c. 41; later C.S.N.B., 1877, c. 48; R.S.N.B., 1903, c. 137; R.S.N.B., 1927, c. 140.

[69] Foreign Judgments Act, 1950, c. 156; now R.S.N.B., 1952, c. 90. The old law was repealed by section 9 of the 1950 act.

[70] Prepared by the Conference of Commissioners on Uniformity of Legislation, and recommended in 1933 to the provinces for adoption. See Proceedings, 1933, pp. 86-89. The act is discussed, *post*, in the text to footnote 81.

[71] Inserted in the New Brunswick statutes in 1937 (c. 25), and continued as part of the present Foreign Judgments Act, s. 8. The section does not form part of the uniform act recommended in 1933. The italics are mine.

[72] 1869, c. 15, s. 5 (P.E.I.).

[73] 1880, c. 13, s. 27 (N.S.).

[74] P.E.I. Rules of Court, 1954, Order 35, rule 1; N.S. Rules of the

Saskatchewan has a wealth of legislation upon foreign judgments. Apart from reciprocal *enforcement* legislation for maintenance orders and for other judgments from Canadian provinces, already discussed,[75] there are the Judgments Extension Act of 1927[76] and the Foreign Judgments Act of 1934.[77] The act of 1927 is a copy of the English *enforcement* legislation of 1920 for Commonwealth judgments noted earlier.[78] As it expressly preserves the common-law right of action, the provision which refuses the speedy enforcement procedure for judgments against debtors who did not submit to the original court's jurisdiction is not serious.[79] The Foreign Judgments Act, however, does legislate upon the common-law action. It is the uniform act recommended for adoption in Canadian provinces, introduced only into New Brunswick and Saskatchewan. Its provisions and defects will be noted shortly.

No alteration of the common law appears to have been made in Alberta or British Columbia or in either of the territories. Both provinces and the Northwest Territories have direct enforcement legislation which preserves in each case the common-law action on the judgment. Newfoundland has no alteration in the substantive common-law rules other than, as we have seen,[80] those consequent upon the adoption in 1938 of the English enforcement statute of 1933. That statute removed the common-law action upon a foreign judgment where it is a judgment to which the registration statute applied.

Canadian uniform Foreign Judgments Act

The only other Canadian legislation which affects, by way of a substantive amendment, the action at common law upon a foreign judgment is the Foreign Judgments Act recommended for adoption as a uniform act by the Conference of Commissioners on Uniformity of Legislation in Canada in 1933,[81] and adopted in New Brunswick and Saskatchewan. The draftsmen have attempted to put into statutory form many of the substantive rules of the

Supreme Court, 1950, Order 35, rule 38. I have not been able to ascertain when the condition about the absence of any defence was added in either province. In Nova Scotia, it was somewhere between the Rules of 1884, as they appeared in the Revised Statutes of that year (see c. 104), and the Rules of 1900. The removal of the whole provision from statute to rules occurred when the Rules of 1884, as set out in the *annual* statutes of that year, were revised for inclusion in the *revised* statutes of the same year.

[75] *Ante*, text to footnotes 51 and 46.

[76] Now R.S.S., 1953, c. 86.

[77] Now R.S.S., 1953, c. 87.

[78] *Ante*, text to footnote 38.

[79] See, *ante*, text to footnote 39 for the comparable provision of the English statute.

[80] See, *ante*, text to footnotes 44-45.

[81] Proceedings, 1933, pp. 86-89.

common law for actions upon foreign judgments. The uniform act expressly preserves proceedings upon the original *cause of action* which was the subject of the foreign proceedings. But it does not preserve the common-law action on the judgment unless the foreign court had jurisdiction as defined in a rather inelastic code.

The statute embodies the common-law rule that a foreign judgment is conclusive and not subject to reopening on the merits in law or fact if the foreign court had jurisdiction. But we no longer look, under the uniform act, to the common law to determine the "international" jurisdiction of a foreign court. Section 3 defines the *only* cases in which a foreign court has jurisdiction *in personam*, and by section 6 "it shall be a sufficient defence" to an action on a foreign judgment to show, *inter alia*, that the original court did not have jurisdiction as defined in section 3. And that jurisdiction is limited to the orthodox bases set out in such cases as *Emanuel* v. *Symon*:[82] ordinary residence in the foreign country, or submission to its courts by being plaintiff in the action, voluntary appearance or agreement to submit. To these four bases, one is added for judgments from other parts of Canada—that the defendant was carrying on business in the territory of the original court when the judgment was obtained.

Historically, the uniform act of 1933 dates back to the Conference's discussions of a direct enforcement statute in 1923 and 1924. The uniform enforcement act, adopted in 1924,[83] provided a simple registration procedure for enforcing Canadian money judgments, but it excluded registration where "the judgment debtor would have a good defence if an action were brought on the original judgment" (section 4). When did the debtor have a good defence in an action upon the original judgment? The Conference undertook to discuss "Defences to Actions upon Foreign Judgments" and, in 1925, Dr. Falconbridge reported fully[84] upon the legislation in some of the provinces which allowed a defendant to reopen the merits. As we have just seen in this part, that legislation allowed a general reopening of the merits in certain listed cases, varying from province to province. The report recommended a change—that the Commissioners define the defences themselves—and raised the possibility of a supplementary provision setting out the situations in which a foreign court should be con-

[82] See, *ante*, footnote 7.
[83] Discussed, *ante*, text to footnotes 46 to 50.
[84] Conference Proceedings, 1925, pp. 44-52.

sidered to have jurisdiction. From this beginning as a statute dealing with defences there developed the uniform Foreign Judgments Act of 1933, which embodies in principle both Dr. Falconbridge's suggestions.

At least four drafts of the uniform act were prepared.[85] In the third, we find for the first time the insertion of the word "only" in section 3, which lists the only cases in which a foreign court has jurisdiction for the purposes of an action upon a foreign judgment. Perhaps it was an accident of fate which led Professor Horace Read to object to the insertion of the word "only":[86]

> It is always a mistake to introduce premature rigidity into the law, however philanthropic the immediate motive may be.

His objection was before the Saskatchewan commissioners who prepared the final draft, but they rejected it and the word appears in the uniform act adopted by the Conference:

> We think, however, 'premature rigidity' is rather begging the question. The whole idea of our considering the Act was to introduce uniformity. If the Commission [*sic*] merely collects some principles of the law, leaving it to the industrious practitioner and the courts to bring up further principles, it would seem to us that we are shirking the very thing that we are supposed to do, namely, wherever we see a point, to try to adopt the best practice and suggest it as the uniform practice. We therefore recommend the retention of the word 'only'.[87]

The very point which Dean Read raised in 1933 is now before the courts in cases like *Archambault* v. *Solloway*. In that case the defendant was neither resident nor doing business in Quebec at the commencement of the proceedings, and he had not submitted to the jurisdiction of the Quebec courts. Yet the Quebec proceedings against him on a contract made and to be performed in Quebec were quite proper and, as we have seen, had the situation been reversed, a British Columbia court would have permitted service upon the defendant in Quebec and given judgment in identical circumstances to those in which judgment was given against Solloway in the Quebec proceedings. And on the common-law basis for "international" jurisdiction in a foreign court now pro-

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[85] Proceedings, 1930, p. 111; 1931, p. 71; 1932, p. 40; 1933, p. 86.
[86] *Ibid.*, 1933, p. 82.
[87] *Ibid.*, pp. 82-83. This reasoning is all the more surprising when the Conference had before it on another point the reasoning of Dr. Falconbridge that the uniform act should "restrict severely the bases of jurisdiction" if the act was to be adopted in all the provinces (*ibid.*, p. 83). If the bases were to be restricted severely, there is all the more reason for removing the "only" to allow for reasonable growth. There is no suggestion that Dr. Falconbridge concurred in the retention of the word "only".

pounded in *Travers* v. *Holley* in the English Court of Appeal, that we should recognize in others what we are prepared to do ourselves, the Quebec judgment would be enforced in British Columbia and other provinces where the common law has not been altered. But it could not be enforced in Saskatchewan or New Brunswick where the uniform Foreign Judgments Act of 1933 is law because, with the "rigidity" of that statute, the Quebec court did not have "jurisdiction". There is, in that statute, no room for growth—no room for decisions such as *Travers* v. *Holley* in the area of personal judgments. Perhaps that is one reason why the uniform act of 1933 has not met with approval in any other provinces.

The two most important things that do come out of the 1933 uniform act are (1) the rejection of a general reopening of the merits in special cases, and (2) the rejection of reciprocity of recognition or enforcement as a basis for enforcement. The former had, as we have seen, been introduced in one form or another into the statutes of Manitoba and all provinces east of it (except Newfoundland which was not then a province). The Conference was invited by Mr. Read to introduce the form then in use in Nova Scotia, but fortunately rejected it:

> This point was discussed very fully and it was decided—we think wisely—not to introduce this defence. It would largely neutralize the value of a foreign judgment.[88]

Presumably those provinces which adopted the uniform act were expected to repeal the earlier statutory modifications of the common-law rule against reopening the merits. New Brunswick is the only province adopting the uniform act which had modified the common law, and those modifications were repealed when the uniform act was adopted.[89]

The second important point to notice in the uniform act of 1933 is that, while it grew out of the uniform *enforcement* act of 1924, which used reciprocity in treatment as a basis for extending a simplified procedure to judgments from any particular foreign province, the act of 1933 does *not* provide for any difference in application based on reciprocal treatment. A foreign judgment may be sued on, and without reopening the merits, in New Brunswick or Saskatchewan, whether or not the original country permits actions on New Brunswick or Saskatchewan judgments at all or only upon a reopening of the merits. The opportunity was before the Conference to make this statute reciprocal in the sense

[88] *Ibid.*, p. 85.

[89] See, *ante*, footnote 69.

of equality of recognition and enforcement, especially in the light of the uniform Reciprocal Enforcement of Foreign Judgments Act of 1924 and the uniform Reciprocal Enforcement of Maintenance Orders Act of 1946, which had been under discussion in the Conference as far back as 1921. In this respect, the act of 1933 preserves the common law, and, as I have suggested earlier,[90] wisely so.

VII. *Conclusions*

In result, it would seem that there is nothing at common law or in statute to have prevented the recognition or enforcement in British Columbia of the Quebec decision in *Archambault* v. *Solloway*. The method chosen by the judgment creditor was sound— an action at common law on the foreign judgment. The Quebec judgment was not enforceable at all in New Brunswick or Saskatchewan by reason of the uniform Foreign Judgments Act. But in the other provinces it was enforceable at common law, except that in Manitoba, Nova Scotia and Prince Edward Island the merits would be reopened, assuming in the case of the two eastern provinces that Solloway was domiciled in the enforcing province.[91]

The particular fact which put Archambault, the judgment creditor, out of court in two provinces and at a disadvantage in others was the default nature of the judgment against a non-resident who was not carrying on business in Quebec when the judgment was obtained against him there. On the basis of *Travers* v. *Holley* this fact is not a defence at common law. And it was not the basis of the refusal to enforce the judgment against Solloway. Wilson J. seized upon a lack of reciprocity in enforcement in Quebec.[92] Equally, I have shown, this basis is not a defence at common law, which, on this point, remains unaltered throughout Canada. Legally, socially and commercially reciprocity of treatment is unsound.

It is an entirely different question whether those of us who have retained the common-law rules on default judgments should, by statute, prevent enforcement unless the merits are reopened. Before we rush into a change of this sort, we should carefully consider our own domestic rules, which presently allow actions to be taken against absent defendants who are not resident or carrying

[90] See, *ante*, text following footnote 31.

[91] Ontario should be included with Manitoba if the majority judgment in the *Lung* case, *ante*, footnote 63, is sound.

[92] But in Quebec there is not a general refusal to recognize at all judgments of this sort; there is merely permission to reopen the merits.

on business here at the time of action. Equally those provinces where enforcement of "default" judgments is refused should consider alteration of their existing rules, which permit their own courts to give the very type of judgment against absent defendants they refuse to accept from other jurisdictions. The type of reciprocity that is important, legally as well as otherwise, is not that we do unto others as they are prepared to do unto us (Wilson J.), but that we accept as valid in others what we are prepared to do ourselves (*Travers* v. *Holley*). Amen.

The Good Craftsman

We are left with a picture of the good craftsman which embodies the highest traditions of the legal profession and should be a spur to the noblest professional ambition. Good craftsmanship presupposes sound scholarship, and a scholarship of a range and grasp commensurate with the order of magnitude and urgency of the problems involved in the creation of an effectively organized world community. A truly universal outlook, an acute sense of the interdependence of different branches of thought, and a profound intellectual humility, are essential elements in such scholarship. To this foundation of sound scholarship the good craftsman must add a reasonable proficiency in handling the tools of his craft. As international law has now developed, this implies that he must have acquired by necessarily long experience practical skill in interpreting, applying and developing a complex and growing body of precedent and experience. In so doing the good craftsman, whether he be serving as legal adviser, advocate or judge, will be confronted in an acute form with the problem of the relationship of law and policy at a time when the law is passing through a decisive phase of evolution. He will be able to resolve the problem as it affects him only by owning an unswerving allegiance to the law, but to the law in process of development rather than to the law in a particular stage of development. In whatever capacity he may serve, the good craftsman will be guided by the principle that his part is not to 'deliver occasional and shifting opinions to serve present purposes of particular national interest', but to build a solid foundation for 'the universal law upon the question'. . . . As legislative draftsman he has a major responsibility for the improvement of international legislative technique and the coherence of the international statute book. As advocate he has a special responsibility for synthesizing different legal traditions for the guidance of courts and tribunals which administer a law which 'has no locality'. As judge he can make what may well be a decisive contribution to the authoritative formulation of the common law of mankind. Opportunities so far-reaching imply a responsibility of the first order to develop a craftsmanship which can grasp such opportunities fully. The responsibility is one which only 'the tranquil and steady dedication of a lifetime' can fulfill. To that responsibility the international lawyers of the twentieth century must be collectively and individually dedicated. (C. Wilfred Jenks, Craftsmanship in International Law (1956), 50 Am. J. Int'l L. 32, at p. 60)