FOREIGN JUDGMENTS IN QUEBEC

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Article 210 of the Quebec Code of Civil Procedure states what defences may be set up to an action taken in Quebec to declare a foreign judgment executory. It reads:

> Any defence which was or might have been set up to the original action, may be pleaded to an action brought upon a judgment rendered out of Canada.

The article has not so far been the subject of a formal discussion, though it raises many difficult and interesting problems now reflected in a substantial jurisprudence. It comes to us from the old French law—our common law which, as will later appear, is less influential than it perhaps should be in practice. The point of difference is briefly this: under the old French law a foreign judgment was in no sense *chose jugée*, the foreign plaintiff had to sue again on the merits; but pursuant to the codes the courts have provided an *exequatur* proceeding under which the foreign judgment, still not *chose jugée*, may or may not be made executory in France. Our Quebec article 210 C.C.P. reproduces in codal form the old law, with this difference—that while a new action on the debt is not necessary, an action on the foreign judgment, asking that it be made executory, must be instituted and may be contested as the article provides. But under the jurisprudence, article 210 C.C.P. is to be read with article 1220 C.C.[1] which has been applied to mean that a properly sealed and certified copy of

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[1] 1220. C.C. (Am. 1944, c. 44, s. 5.) The certificate of the secretary of any foreign state or of the executive government thereof, and the original documents and copies of documents hereinafter enumerated, executed out of Lower Canada, make *prima facie* proof of the contents thereof without any evidence being necessary of the seal or signature affixed to such original or copy, or of the authority of the officer granting the same, namely:

1. Exemplifications of any judgment or other judicial proceeding of any court out of Lower Canada, under the seal of such court, or under the signature of the officer having the legal custody of the record of such judgment or other judicial proceeding.

the foreign judgment sued upon makes *prima facie* proof of its "contents"—that is, that the foreign court had jurisdiction, that it decided in accordance with the relevant foreign law, and that it came to a proper conclusion on the merits. The burden is on the Quebec defendant to allege and prove the contrary.

In the English law, a foreign judgment, if there was notice and no fraud, is *chose jugée-res judicata*. That may be a better system, but that is not our point here. One can readily see that our *prima facie* doctrine has obscured the intent of our own old common-law principle clearly expressed in article 210 C.C.P. and has all but sanctified the English system. That being so, at least as it appears to me, I have tried to give as complete a report as possible on article 210, while at the same time offering some help in its use. And as so often is the case, the historical background aids understanding and a true perspective. I have therefore traced the source of article 210 C.C.P. in the old French law, indicated the fate of the old in the codified French law, explained the reception of the old law in Quebec, and reviewed its application by our jurisprudence—a fusion of history, theory, and practice.

I. *Source of Article 210 C.C.P.*

The Ordonnance of 1629

The source of article 210 is found in the famous *Ordonnance* of January, 1629, often called the *Code Marillac* after the Chancellor Marillac, its sponsor, or the *Code Michaud*, the derisive name given it at the time by its critics.[2] It was one of the longest ordinances of the *ancien régime*, a response to many old grievances. Its 461 articles covered a multitude of subjects—clerical matters and ecclesiastical jurisdictions, universities, printing, administration of justice, donations, successions, substitutions, insolvency, tutorships, maritime law, and many more. The editorial rubric in the cited edition says that it was registered (that is, accepted as law), with some modifications, by the *Parlements* of Paris, Bordeaux, Toulouse and Dijon, within the year 1629. Then, until toward the end of the century, it fell into disfavour, though less so at Dijon, because the *Parlements*, finding it rather an indigestible mass, a shock to many of their settled ideas and interests, refused to accept it, with such vigour that lawyers were afraid to cite it for fear of antagonizing the courts. It came back into favour when

[2] The text is reproduced in vol. 16, Recueil Général des Anciennes Lois Francaises, p. 223.

toward the end of the century D'Aguesseau, then *avocat-général*, himself cited it before the *Parlement de Paris* as a law that should be followed, and thus gave it a new prestige.[3] The article in the *Encyclopédie*, written by Planiol, adds that many provisions of the *Ordonnance* are still often used in juridical discussions, for example, article 121 on the effect of foreign judgments.

It was a grievance of long standing that there was no fixed rule governing the force of a judgment rendered in one jurisdiction in France when it was sought to enforce it in another French jurisdiction, or the force in France of a judgment of another country.

Article 120 of the *Ordonnance* settled the first doubt. Judgments of one jurisdiction in France were to be treated as *res judicata* and as such to be made executory in another by simple *pareatis*;[4] judges were not to refuse enforcement orders to judgments of other French jurisdictions but were to give them without charge, without re-examination of the issue, and without hearing the parties:

> 120. Nos juges ne refuseront pareatis aux officiers des seigneurs, pour ce qui dépend des justices desdits seigneurs, et les donneront gratuitement et sans prendre connaissance de cause ni oüir les parties contre lesquelles l'exécution devra être faite.

Article 121 dealt with foreign judgments—rendered, that is, in a country outside France. Prior to the *Ordonnance* of 1629, foreign judgments were a *rien* in France, there being no procedure for giving them effect, and a new action was necessary. There was no connection between the new action in France and the foreign action. This was the settled common-law rule among the various *Parlements*.[5] So that the reluctance of the lawyers and *Parlements* to accept the *Ordonnance* did not centre around article 121.

Intention and Effect of Article 121

What was the intention and effect of article 121? It read:

> 121. Les jugements rendus, contrats ou obligations reçûes ès royaumes et souverainetez étrangères pour quelque cause que ce soit, n'auront aucune hypothèque ni exécution en notre dit royaume, ainsi tiendront

[3] La Grande Encyclopédie, vbs. Code Marillac.

[4] *Pareatis*-Latin, *pareatis*: *que vous obéissiez*! A permission given by the *Chancellerie* of a French province authorizing execution of a judgment rendered in another province.

[5] Niboyet, Manuel de droit international privé (1928), No. 838, citing Lainé, Considerations sur l'exécution forcée des jugements étrangers en France, Revue Critique (1902), at p. 612; (1903), at pp. 86, 230, 491; (1904), at pp. 88, 547; Pothier, Œuvres complétes, X, No. 441; Boullenois, Traité de la personalité et de la réalité des lois ou coutumes, ou statut, par forme d'observation (1766), I, p. 633.

> les contrats lieu de simples promesses, et nonobstant les jugements, nos sujets contre lesquels ils auront été rendus pourront de nouveau débattre leurs droits comme entiers pardevant nos officiers.

This was a restatement of the old common-law rule —that the foreign judgment was valueless, the foreign plaintiff entitled to sue a principal action in France, and the defendant in France entitled to defend in full anew, *de novo*.[6] The foreign judgment was definitely not *res judicata*.

Modern jurists, I might say here in parenthesis, seek international recognition of foreign judgments, rendered upon proper notice and without fraud, as being *res judicata* and entitled to prompt enforcement in the interest of international business and at least greater comity. The common law has made greater advances toward this goal than has the civil law. The whole subject has been admirably presented by outstanding students of the problem.[7] Professor Nadelmann remarks in his paper first below listed, that "The consequences of article 121 of the Code of 1629 have been felt for more than three centuries all over the globe, the common law not excluded."

The consequences are still felt in France. French doctrine still debates the meaning of article 121 and its present relevance. Lainé says that the article expressed the common law of the time. Writing in 1904, he reviews the old disputes about its meaning; for example, whether the words *nos sujets* meant that only subjects of the king, as distinct from non-subjects, could invoke the article.[8] Aubry et Rau are of opinion that article 121 was not expressly abrogated at the Revolution by article 7 of the law 30 ventose an XII, and contend that:

> De la seule circonstance que les rédacteurs du Code civil et du Code de procédure n'ont pas reproduit textuellement et en entier les dispositions de l'ordonnance de 1629, on ne saurait pas non plus inférer que, rompant avec toutes les traditions de notre ancienne jurisprudence, ils aient voulu tacitement déroger aux règles de tout temps suivies en France.[9]

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[6] The meaning and effect of the article has been greatly discussed, Niboyet, *op. cit.*, *ante*, footnote 5, No. 838.

[7] Nadelmann, Non-Recognition of American Money Judgments Abroad and What to Do About It (1957), 42 Iowa L. Rev. 236; Unification of Private Law (1955), 29 Tulane L. Rev. 328; Recognition of Foreign Money Judgments in France (1956), 5 Am. J. of Comp. L. 248; Kennedy, Reciprocity in the Recognition of Foreign Judgments: The Implications of Travers v. Holley (1954), 32 Can. Bar Rev. 359; Recognition of Judgments in Personam: The Meaning of Reciprocity (1957), 35 Can. Bar Rev. 123.

[8] (1904), Revue Critique 147.

[9] Aubry et Rau, Droit civil français (6th ed., 1949), VIII, No. 769 ter, note 4, p. 414; Niboyet, *op. cit.*, *ante.*, footnote 5, No. 840.

Code Napoléon —Code de Procédure

What did the new *Code Napoléon*, 1803, and the new *Code de Procédure*, 1807, in that quotation referred to, actually reproduce? True, they did not reproduce textually article 121 of the *Ordonnance* of 1629. But was it at least implicit in what they did provide? Thus article 546 of the *Code de Procédure* read that:

> Les jugements étrangers, et les actes reçus par les officiers étrangers, ne seront susceptibles d'exécution en France, que de la manière et dans les cas prévus par les articles 2123 et 2128 du Code civil.[10]

Article 2123 C.N., dealing with judicial hypothec, in its fourth and last paragraph, read (and still reads):

> L'hypothèque ne peut pareillement résulter des jugements rendus en pays étranger, qu'autant qu'ils ont été déclarés exécutoires par un tribunal français; sans préjudice des dispositions contraires qui peuvent être dans les lois politiques ou dans les traités.

Conditions of the Exequatur[11]*: Holker* v. *Parker*

Express mention in those articles of the right of the defendant, as under article 121 of the *Ordonnance*, to a re-hearing, *in toto* and *de novo*, was omitted. The reasonable inference would be that such a right was felt to be implicit in the express need for an *exequatur*; in the sense that the foreign plaintiff, coming into the French court, could be required by the defendant to show cause why his judgment should be enforced in France, so that the defendant's right was to have the case heard in full again.[12] If that was the meaning, then article 121 of the *Ordonnance* was carried over into the new articles, in spirit if not textually. It is a striking fact that when in 1819 the *Cour de cassation* was called on to decide what were the defendant's right and the foreign plaintiff's obligation on an *exequatur* proceeding in France, it found the answer in the old common law of article 121 of the *Ordonnance* of 1629,

[10] Text as in the "édition originale et seule officielle", 1810. It is unchanged in the latest edition now in force.

[11] The word *exequatur*, used in both French and English, is the Latin third person singular present subjunctive of *exequi, exsequi*, to perform, execute, let it be executed!

[12] As Niboyet says, *op. cit., ante.*, footnote 5, No. 839, the articles effect a *véritable revirement*, by providing for an *exequatur*. Art. 2128 C.N. says contracts made abroad cannot, apart from political laws or treaties, effect hypothec on property in France. Batiffol, Traité élémentaire de droit international privé (1949), No. 740, on the contrary, does not see a *revirement*, but rather that the codifiers were not conscious of innovating when drafting arts. 546 C.P. and 2123 C.N. The rigidity of the rule of art. 121 of the *Ordonnance*, he says, favoured the development of the *exequatur* for foreign judgments, for reasons similar to those justifying the *pareatis* for provincial judgments.

but ruled that the right to renew the defence was open to both French nationals and foreigners. The precise question, in a word, was whether the foreign plaintiff had to begin again and make his case anew, or whether the granting of an exequatur was more or less a mere formality. *Holker* v. *Parker* is a famous case.[13]

Holker and Parker were both "*citoyens des Etats-Unis d'Amérique*". Holker was the first French consul in Philadelphia after the Revolution. He operated a partnership with Parker whom he sued in Massachusetts for an accounting and against whom he obtained a judgment there for some $547,225 U.S.[14] After the dissolution of the partnership, Parker retired to France and there, after some preliminary proceedings, Holker, who went to France to push his claim, sued him in Paris for an exequatur order on the Boston judgment.

The judgment of the Paris court of first instance is interesting. In principle, it was held, a foreign judgment regularly rendered by competent authority establishes the relations of the parties. The judgment is not *de plano* executory in France, for the foreign judge is without authority beyond his own jurisdiction; article 121 of the *Ordonnance* of 1629, providing that foreign judgments are not to be executed in France, and that French nationals "pourront débattre leurs droits comme entiers devant les tribunaux français", is not in conflict with those principles but exists only in favour of French nationals by way of an exception, and not in favour of foreigners; Parker is a foreigner, but he has declined the jurisdiction of this court and alleges that he has attacked the Boston judgment by legal means of which he has not made proof, and asks that the whole matter be referred back to the Boston courts; but the distances are great, said the court, and Holker is allowed a partial *exequatur*—purely conservatory in nature, such as the registering of a judicial hypothec, but suspending any execution or any *saisie-arrêt*, for a period of four months during which Parker will satisfy us as to the steps he has taken to attack the judgment and the effect thereof as staying execution under the foreign law and jurisprudence, and with costs against him. A pretty circuitous judgment, but the court was straining to be fair. Parker appealed to the *Cour royale de Paris* which reversed the judgment. I translate it:

> Seeing that judgments of foreign courts have no effect or authority in France; that this rule is doubtless more especially applicable in favour

[13] (1819), Sirey Jurisprudence, 1st series, vol. 6, p. 62. Batiffol, *op. cit.*, *ante*, footnote 12, p. 772, Note (1).
[14] (1813), 11 U.S. (7 Cranch) 436.

> of nationals [*régnicoles*] to whom the king and his officers owe a special protection, but the principle is absolute, and may be invoked by every person without distinction, being founded on the independence of states; that the Ordonnance of 1629, in the opening words of its article 121, lays down a general principle when it says that judgments rendered in foreign kingdoms and sovereignties will have no execution in the kingdom of France; that article 2123 C.N. gives the principle the same latitude when it declares that hypothec can result from foreign judgments to the extent only that they have been declared executory by a French tribunal—a matter not of pure form as was once the grant of *pareatis* from one court to another of judgments rendered within the kingdom, but such inquiry by the French court as involves a real knowledge of the case and such serious examination of the justice of the judgment involved as reason demands, and as has always been practised in France according to our old authors; that possibly inconvenience may result when the debtor (as it is pretended is the case here) transfers his person and his wealth to France though retaining his foreign domicile; that it is of course for the creditor to protect his interests, but no consideration whatever can be brought to weaken a principle upon which rests the sovereignty of governments and which, in whatever circumstances, must without limitation be enforced.

Holker appealed to the *Cour de cassation*, on grounds of error in interpretation of article 121 of the *Ordonnance*, of article 546 C.P., and of article 2123 C.N. He contended that article 121 gave only to a French defendant the right to reopen the case; that actually he, Holker, was a French plaintiff pursuing a foreign defendant who had not the right to reopen the case, so that only a *pareatis* was needed to authorize execution of the foreign judgment. The appeal was rejected by the *Cour de cassation.*

I translate the decision, in part:

> A court can adjudicate only after deliberation, and must not allow, even upon default, claims made before it unless these are found to be just and duly verified; and seeing that the Civil Code and the Code of Procedure make no distinctions between various judgments rendered abroad, and allow judges to declare them all executory, and hence that while foreign judgments against Frenchmen are under the Civil Code incontestably subject to examination as always heretofore, it cannot possibly be contended that all other judgments must be declared executory without examination [*autrement qu'en connaissance de cause*], without adding to the law and introducing into it a distinction as little founded in reason as in principle;[15] whence it follows that in rejecting Holker's contention that the foreign judgment was *res judicata* and ordering Holker to make good his action subject to con-

[15] Referring to Holker's contention that while a French defendant could force the reopening of plaintiff's case, a foreigner could not, so that an *exequatur* as against him was to be granted as a matter of course —as simply *chose jugée* and final.

testation by Parker, the whole to be adjudicated upon "*en connaissance de cause*", the *Cour royale* has properly applied articles 2123 and 2128 C.N. and 546 C.P.

As indicated in the note below,[16] the *Cour de cassation* decision became generally followed in France, and Professor Nadelmann, writing in 1957 of *Holker* v. *Parker*, says that:

> Since then the Court of Cassation has consistently held that foreign judgments have no conclusive effect, that, in the French terminology, they are subject to *revision au fond* by the French courts.[17]

A Commission working since World War II on a revision of the Code Napoléon, Professor Nadelmann remarks, has produced a draft of a law on private international law, in which the rule of *revision au fond* is codified, with also a provision as to reciprocity. The draft, he says, was debated in May, 1955, by a meeting of the French Association of conflicts specialists, and the draft rules as to revision and reciprocity were unanimously voted against:

> In October of the same year, the Court of Appeals of Paris in *Charr* v. *Hassim Ulashimm*[18] denied the right of *revision au fond* in a case involving enforcement of a Turkish judgment. The court declared the doctrine basically faulty and outdated, abandoned for matters of status even in France, and not applied by France in the relations with the many countries with which France has treaties on reciprocal recognition and enforcement of judgments. Whether the *Charr* decision means the end of the *revision au fond* remains to be seen. The draft law on private international law, in any event, is unlikely to become law in its present form.

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[16] In a note to the report of *Holker* v. *Parker*, the Sirey editor says that in 1806 the *Cour de cassation* had decided the same question in a contrary sense, influenced by an opinion of Merlin who held that foreign judgments against a foreigner could in France be declared executory without being reconsidered by a French court. But Merlin, after *Holker* v. *Parker*, changed his opinion, admitting that in 1806 he "*n'avait que légèrement effleuré la question*", and other cited authors agreed with him. And "today", the editor says, "the doctrine consecrated by the above decision is almost generally followed."

[17] Non-recognition of American money judgments abroad and what to do about it, *ante*, footnote 7, at p. 243, citing Delaume, American-French Private International Law (1953), p. 60; Batiffol, Traité élémentaire de Droit International Privé (2nd ed., 1955), p. 849.

[18] Paris, (1re Ch.), 21 oct. 1955, [1956] Recueils Dalloz & Sirey, Jurisprudence 61; (1955), 44 Revue Critique de Droit International Privé, 769. French jurisprudence has been of extreme importance in moulding the rules. Niboyet, *op cit.*, *ante*, footnote 5, No. 815, speaking of foreign judgments says: "Sur cette matière, comme sur presque toutes celles du droit international, il n'existe, pour ainsi dire, aucune disposition écrite. Le législateur ne lui a consacré que deux articles: les articles 546 C.P. et 2123 al. final, C.C. . . . Ces textes sont tout à fait insuffisants. La jurisprudence a du résoudre presque toutes les difficultés qui se présentaient dans une matière très délicate."

The Role of the Judge in France

When an action for an *exequatur* order comes before a French court, what is the court's right and duty? Apart from treaty to the contrary, the court, before granting an *exequatur*, will base its consent or its refusal on its estimate of the justice of the foreign judgment: the question being whether the foreign court has in the circumstances properly, or reasonably, assessed the facts and applied the law. That conclusion seems justified by several decisions of the *Cour de cassation*. Thus, in *Slawouski* v. *Soc. la Pelleterie de Roubaix*,[19] the *Cour de cassation*, rejecting an appeal from the *Cour d'appel de Douai*, held that the latter court —

> . . . n'a fait qu'user à la fois de son pouvoir souverain d'appréciation et du droit qui appartient aux tribunaux français, sous réserve de conventions diplomatiques contraires inexistantes en l'espèce, d'accorder ou de refuser l'exequatur en se fondant sur des motifs tirés soit du fait, soit du droit, aux sentences étrangères qui leur sont soumises; que, par suite, elle a légalement justifié sa décision, sans excéder ses pouvoirs et sans violer aucun des textes visés au moyen (c.a.d. arts. 546 C.P. and 2123, 2128 C.N.).

Actually, the Douai court refused an *exequatur*, because, exercising its "sovereign power" to examine the facts and law, it disagreed with the conclusions of the English High Court of Justice whose judgment it was sought to enforce. The English judgment was based largely on reasoning upon circumstantial indices, and the French court was entitled to its own view thereof.

The next decision[20] is of extreme importance. As Professor Savatier says in a remarkable discussion following the report, it was the first time that the *Cour de cassation* had been called on to decide the role of the French judge on a demand for an *exequatur*.

An English judgment condemned a Russian firm, the *Société russe Dobroflott*, to pay Hertzfeldt some £9,140 and £1,276 for interest. Meanwhile, the Soviet Union completely absorbed the assets of the firm. Hertzfeldt sued both in France, praying an *exequatur* as well against the Soviet Union[21] (which was not a party to the English action) on the ground that as it had absorbed the assets it should assume or be made to assume the debts. An *exequatur* was granted against Dobroflott, refused as against the

[19] Req. 29 juin 1933, D.H. 1933. 444. Cited under art. 546, Code de Procéd., Dalloz, 1957. And also by Batiffol, *op. cit.*, *ante*, footnote 12, No. 750, *et seq.*

[20] *Hertzfeldt* v. *Union des Républiques socialistes soviétiques*, Req. 11 avr. 1933, D.P. 1933. 1. 161.

[21] "En qualité d'ayant cause à titre universel de la société Dobroflott . . .".

Soviet Union because Hertzfeldt's pretention as against it, susceptible of an independent action, could not be embraced in an *exequatur* upon a judgment to which it was not a party. There was an appeal to the *Cour de cassation* on the ruling as to the Soviet Union, where it was held:

> . . . qu'en effet, les juges français, à qui est demandé l'exequatur d'un jugement étranger, n'ont à trancher aucun litige entre les parties, qu'il ont seulement à donner au jugement étranger la force exécutoire qui lui manque en France; que si l'on admet qu'ils ont le droit d'examiner le jugement au fond, cet examen ne leur permet que d'accorder ou de refuser l'exequatur; qu'ils n'ont pas le pouvoir d'ajouter une condamnation à celle qui a été prononcée, ni de décider que la personne condamnée a été absorbée par une autre qui serait tenue d'exécuter la condamnation.

Though the precise question was whether the *exequatur* could be extended to the Soviet Union and the reasoning on that seems unanswerable, the *Cour de cassation* went further to lay down a rule applicable generally, a phase of the decision which Savatier criticizes, saying that it is contrary to the court's own earlier decisions, and

> qu'un tel raisonnement, à nos yeux très solide, comporte un tournant dans la jurisprudence antérieure de la Cour de cassation. . . . Mais il faut aller plus loin: ce sont toutes les décisions permettant au juge de l'exequatur de prendre, sur un point quelconque, figure de juge d'appel qui sont condamnées par l'arrêt rapporté;

and he fears that the foreign judgment,

> au lieu d'être sauvegardé par les limites apportées aux pouvoirs du juge de l'exequatur, risque de les voir paralyser son application.

As Savatier explains, there were varying lines of decisions and doctrine. The *Cour de cassation* had several times consistently held that a French court must examine the foreign judgment as to its law and its facts, and if it concluded that the judgment was wrong, refuse the *exequatur*—and this without benefit of any presumption of the judgment's correctness and justice, since it could be entirely reviewed. Today, he says, that is the view of the *ensemble* of the doctrine. There was another trend, capped by the *Cour de cassation* in the judgment in the *Dobroflott* case—that the French court could grant or refuse the *exequatur*, but it could not modify the judgment, a too rigid system. He then cites a current of decisions and doctrine[22] which in his opinion helps to ease the rigidity of such a system:

[22] And decisions and doctrine in a contrary sense. It seems reasonable that a foreign judgment that, if enforced, would shock the court's sense

> Il n'est pas impossible d'en assouplir les effets et de les accommoder, dans une certaine mesure, aux nécessités pratiques. En particulier, tout en admettant que le juge français n'a que le choix entre l'exequatur et le refus d'exequatur, on peut lui permettre de distinguer entre les chefs de condamnation, et de n'accorder l'exequatur qu'à certains d'entre eux. Peut-être même, poussant plus loin la même idée, le juge se croira-t-il autorisé à n'accorder l'exequatur à une condamnation étrangère que dans la limite d'un chiffre moins élevé que celui admis par le tribunal étranger.

II. *The Ordonnance in Quebec*

Part of Quebec Common Law

The *Ordonnance* of 1629, became law in what was then New France, in virtue of the "*Edit de création du Conseil Supérieur*" of 1663 which directed the Sovereign Council to judge:[23]

> . . . selon les loix et ordonnances de notre royaume, et y procéder autant qu'il se pourra en la forme et manière qui se pratique et se garde dans le ressort de notre cour de parlement de Paris. . . .

So that, besides the Custom of Paris, the *lois et ordonnances* which, prior to 1663, had modified or supplemented the Custom, were in force here.[24] The later *Grandes Ordonnances* beginning with the *Ordonnance de Procédure*, 1667, were subject to registration by the Sovereign Council.

The *Ordonnance de Procédure*, 1667, was registered and became law in New France, but it did not mention foreign judgments. Article 121 of the *Ordonnance* of 1629 was our effective rule for a very long time, even after the Constitutional Act of 1791 which divided the colony into Upper and Lower Canada with separate judicial systems and laws. The Act of Union, 1840, united Upper and Lower Canada under one Legislature, but the judicial systems and laws of each remained separate and distinct. It was a relic of the conditions between 1791 and 1840, that judgments in Upper Canada were "foreign" judgments in Lower Canada, and *vice versa*, and uncertainty lingered until 1860 when the Union Provincial Parliament passed a law "to assimilate the law in Upper

of justice should be refused an *exequatur* or be allowed only in part. If the whole can be allowed or refused, cannot the part, and the judgment be saved for so much?

[23] Edits, et Ordonnances Royaux, Declarations et Arrêts du Conseil d'État du Roi concernant le Canada (1854), 37, at p. 38.

[24] Walton, Scope and Interpretation of the Civil Code, (1907), pp. 1-2. Nadelmann, in note 78 of his article, *ante*, footnote 7, says: "No trace has been found of an application of the rule in Louisiana. The Louisiana Practice Code of 1825 until 1846 especially provided in art. 746 for proceedings by executory process on judgments obtained in another state of the Union, or in a foreign country."

and Lower Canada on judgments rendered by foreign tribunals" —to get rid of the conflict of principles previously existing.[25] In Upper Canada the common-law principle of the conclusiveness on the merits in actions upon foreign judgments was the rule, providing there was jurisdiction, notice to the defendant, and absence of fraud. In Lower Canada there was the rule of article 121 of the *Code Michaud*. Professor Gilbert Kennedy, in his recent helpful analysis of the matter, remarks that the act of 1860 initiated "a change not just in procedure but in the substantive common-law rules".[26]

The Act of 1860 made three rules, one for foreign judgments (that is, judgments rendered outside what was then Canada), the other two for judgments as between the two judicial and law sections or parts of the united colony. The rule as to foreign judgments read:

> 1. 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)[27] 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.[28]

As to that, Professor Kennedy rightly says:

> 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 effect was that the merits could be reopened for all such foreign judgments, as under article 121 of the *Code Michaud*.

Briefly, we may note the later history of the rule as to foreign judgments. Our first Code of Procedure appeared in 1867. It contained no provision regarding foreign judgments—article 121, *Code Michaud*, existed as common law; the rule of the statute of 1860 remained in separate statutory form. The codifiers said in their Report that the new code has borrowed from many different sources, and "for its groundwork we have the old French law and the *Ordonnance* of 1667, with the few modifications received here under the French Government". By R.S.Q. 1888, section 5862 subparagraphs a-d, being the rules of the 1860 statute, were added to

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[25] (1860), 23 Vict., c. 24 (Can.). The course of the Bill can be traced in (1864), 23 Journaux de l'Assemblée Législative de la province du Canada, 304, 393, 436 (6th Prov. Parl., 3rd Sess.).

[26] "Recognition of Judgments in Personam: The Meaning of Reciprocity" (1957), 35 Can. Bar Rev. 123.

[27] That is, in the two further rules as to judgments in "either of the said sections."

[28] This is our present article 210 (since the 1897 revision).

article 42 of the then Code of Procedure. In the revised Code of 1897 the rule as to foreign judgments became our present article 210.[29]

The Foreign Judgment not Chose Jugée in Quebec

We assert that a foreign judgment is not *chose jugée* in Quebec though, as already suggested, our jurisprudential doctrine of the *prima facie* conclusiveness of the exemplified judgment narrows the value of the assertion.[30]

Chief Justice Lafontaine, in *Knox Bros.* v. *Lingle et al.*,[31] stated the general principle applicable to any judgment rendered outside Canada. This was an action on exemplification of a British Columbia judgment for the price of lumber sold. The action was held to be:

> . . . d'un caractère tout particulier, savoir, l'action dite sur exemplification d'un jugement prononcée par le tribunal d'une province étrangère. Pour donner force exécutoire dans notre Province à un tel jugement, il est nécessaire qu'il soit prononcé de nouveau par un tribunal de cette Province, ayant juridiction sur la matière et, comme le jugement d'un tribunal étranger, ne comporte pas chose jugée, le défendeur pourrait ignorer ce jugement, plaider de nouveau à l'action et recommencer tout le débat, s'il n'existait pas au Code de procédure une disposition qui l'en empêche, l'article 212.

In the recent case of *Ryan* v. *Pardo*[32] Brossard J. held:

> It is now well settled that, in view of article 210, a foreign judgment . . ., however final it may be [in the foreign jurisdiction] does not constitute

[29] By the statute (1876), 39 Vict., c. 7, sec. 1 and Sch. A. (Ont), the provision of the statute of 1860 denying conclusive effect to foreign judgment was repealed in Ontario. So that, as Professor Kennedy says, Ontario reverted to the position at common law, except for judgments from Quebec.

[30] However, under arts. 211 and 212 C.C.P. the judgment of a court of another province will be *res judicata* in Quebec if the defendant was personally served in the other province or appeared to the action; such a judgment, if regularly rendered, our courts must recognize—it is not the judgment of a foreign court. *Blackwood* v. *Percival* (1902), 23 S.C. 5, 5 P.R. 110; *Binns* v. *Jekill*, [1957] S.C. 49, at p. 52. Johnson, *The Conflict of Laws with special reference to the Law of the Province of Quebec*, vol. II (1934), p. 427.

[31] (1925), 38 K.B. 325, at p. 326; [1925] S.C.R. 659. Held, also the foreign judgment does not operate novation. J.L. De la Durantaye, Jugements des autres Provinces dans la Province de Québec (1926), 4 Can. Bar Rev. 238; "En principe, le jugement étranger, dans la Province de Québec, n'a aucune autorité. Le défendeur peut plaider toutes les défenses que la loi permet, et qui sont soumises aux règles du droit international privé".

[32] Nov. 27th 1953, S.C.M. No. 299676. The case was inscribed in appeal but settled before filing of factums. Unreported, citing *The Howard Guernsey Co.* v. *King* (1894), 5 S.C. 182, at p. 184; *Rice* v. *Holmes* (1905), 16 S.C. 492; *Monette* v. *Larivière* (1926), 40 K.B. at 385; Johnson, *op. cit., ante.*, footnote 30, II, 368-375.

> [in Quebec] *res judicata* or *chose jugée*. The "full faith and credit" doctrine, as known and applied in the United States between states and as applied in another form in Canada between Provinces, does not apply between the Province of Quebec, and the State of New York under any text of our law, nor for that matter is there, in this Province, any text of law giving general and formal recognition to the doctrine of 'Comity of Nations' or '*Comitas gentium*'.

But, tempering that positive statement, the judgment proceeds:

> Must, however, a foreign judgment be considered as valueless in this province, as has been occasionally suggested (*Guernsey* v. *King*, 5 S.C. 182, 184)? This court is of a contrary opinion.[33] . . . 1220 C.C. and 210 C.P. read together clearly affirm that such right must be presumed to have been validly recognized and established by the foreign court . . . unless the party against which it is sought to be endorsed deems it advisable [*may* be pleaded] to contest the action instituted here.

That proviso suggests the possibility that if the action is contested the presumption does not apply. But *Ryan* v. *Pardo* was contested and the presumption was invoked.

III. *The Action Upon Exemplification*

What is an Exemplification

Negatively, first, what is not an exemplification of judgment? A mere certificate by the clerk of an Ontario court that a judgment had been rendered and was unsatisfied, was not an exemplification. "I come to the conclusion", it was held, "after reviewing various authorities, that an exemplification is a transcript or certified copy, not a certificate, and that the objection to the mere production of a certificate of judgment was well founded."[34]

The word "exemplify", defined by Webster, means to set an example, to use as an example; from the Latin *exemplum*, example, the old French *exemplifier*, from the low Latin *exemplificare*, to copy, to serve as an attested copy or transcript, under seal, as of a record. It is odd to find the French version of article 1220 C.C. uses the word *copies*, and the English version the word *exemplifications*. In *Beare* v. *Schram*, Surveyer J. notes that the Consolidated Statutes of Lower Canada (1861), chapter 90, article 5, uses, in French, the word *expédition*; and further that in *The*

[33] It was not in the *Guernsey* case held to be valueless, but "comparatively valueless". Andrews J. was making the point that the foreign judgment was comparatively valueless because it was not *chose jugée*, and that the defendant could contest and thus reopen the case on the merits.

[34] *Beare* v. *Schram*, [1945] S.C. 181. (Surveyer J.) *Monette* v. *Larivière*, *ante*, footnote 32, at p. 352, as to a clerk's certificate of a divorce decree.

King v. *The Emma K*,[35] Sir Lyman Duff C.J. distinguished an exemplification and a certificate.

Form of the action on exemplification

In France, as we have already seen, the proceeding for an *exequatur* begins with a petition asking that an *exequatur* order be granted. If the *exequatur* is granted, an order issues for execution of the foreign judgment in the name of the President of the Republic.

Our Quebec procedure is different. Article 210 C.C.P. envisages "an *action* brought upon a judgment rendered out of Canada." It asks in effect this: that because the defendant has been condemned by the foreign court, for example, to pay plaintiff $1,000, our Quebec court likewise order him to do so, by a formal judgment declaring the foreign judgment executory.

So that while the end result sought in both France and Quebec is the recovery of the $1,000, our proceeding in Quebec, though sometimes loosely called an *exequatur*, is not an *exequatur* as understood in France. Our procedure is generally referred to as an action upon exemplification.

The Foreign Judgment as an Acquired Right

The foreign judgment brought before a Quebec court for recognition is presented as constituting an acquired right. From our point of view, if it is to be recognized as an acquired, existing right, it must first be clear that it was acquired in virtue of the foreign law competent in the matter, and further that it exists, is an effective judgment, and establishes an effective right, in accordance with that law.

The next question is this: how and under what conditions may the foreign judgment, the foreign-acquired right, be recognized and made effective as an acquired right in Quebec? Actually, we have only two codal articles regulating the question—article 210 C.C.P., and part of article 1220 C.C. as to exemplifications of foreign judgments. The jurisprudence, therefore, finding its way in not wholly charted waters, becomes important.

Niboyet[36] makes a distinction which it is well to bear in mind. The judgment has originated abroad. Admitting that it is there an acquired right, it is not yet an acquired right in Quebec. It must seek in Quebec that executory force essential to it as a judgment

[35] [1936] S.C.R. 256, at p. 262.
[36] *Op. cit.*, *ante*, footnote 5, No. 818.

which the foreign sovereign cannot give it. While article 210 is placed in the Code of Procedure, it seems to be more naturally a rule of substantive law.

What the Exemplification Proves

What article 1220 C.C. says is simply this: that the exemplification, purporting to be a copy of a foreign judgment, if bearing the seal of the court in which it was rendered or the signature of the officer having the custody of the original record, shall be accepted as *prima facie* equal to the original itself, without any further evidence being necessary of the authenticity of the seal or signature; and that what is written, "the contents", or "*le contenu*", in the copy, is *an exact and truthful transcript of what is written in the original.* In a word, such a copy is as useful and credible as the original itself—*prima facie.* It proves *prima facie* that a judgment in the terms of the copy was rendered. But "*la verité des copies*", the "truth of the exemplifications", may be denied and proof thereof be required in the manner provided in the Code of Civil Procedure, the article reads. That is, you can deny that it *is an exact copy or transcript* of an existing original judgment, or that such a judgment was ever rendered, and that denial you must make in the manner directed by the article.[37]

Now though that is the meaning and intention of article 1220 C.C., one is faced with an overwhelming line of decisions, that by the "contents" of the exemplification, is meant that it *prima facie* proves the jurisdiction of the foreign court, the facts related, the foreign law, the rightness in every particular of the judgment; the "authenticity" of the exemplification as a true copy of the original is extended and given that secondary meaning. And that raises the question whether in denying any of those elements of the judgment you must comply with article 209 C.C.P.—though under article 210 C.C.P. you may plead any defence that was or might have been set up to the original action. A distinction seems necessary. To deny the authenticity of the exemplification—that is, that it is a true copy—can be properly done only by complying with article 209 C.C.P. But one must be free to defend, as permitted by article 210, and in so doing is not denying the "authenticity" of the exemplified judgment. The foreign judgment

[37] Art. 1220 C.C.; arts. 209, 225 *et seq.* C.C.P. Article 209 applies only to the "denial of any *document* . . ."; that is, a denial that it is not what it purports to be. See the opinion of Rinfret J. in *Rabinovitch* v. *Chechik*, [1929] S.C.R. 400, at p. 408, when the appellant argued that documents of the Nova Scotia record produced at appellant's request, the *authenticity* of which he urged had not been established.

is not *chose jugée*. If it were, the legal position would be different. Thus, under articles 211 and 212 C.C.P., if the defendant was personally served in the other province or appeared in the action there, he cannot plead defences that he might have set up to the action. The judgment is *chose jugée*—a plea of fraud being possibly the only exception. An Ontario judgment upheld a Quebec contract and awarded damages for its breach. But in his action in Quebec to render the judgment executory, the plaintiff expressly alleged that the defendant was indebted to him in the damages awarded. The defendant was held entitled to plead an express denial to that *allegation* and in so doing was not denying the truth of the exemplification.[38]

The Jurisprudence Extends the Probative Value of the Exemplification

It is useless to argue against the drastic presumption now established by the jurisprudence. In an undefended action on an exemplification that on its face indicates the foreign court's jurisdiction, a presumption as to the law and the merits is not unreasonable. But if it is the defendant's right under article 210 C.C.P. to have the case reheard and debated, and *if he does contest*, should his right be limited by the presumption? And should the exemplification establish even *prima facie* anything not shown on its face? However, the jurisprudence has developed against him. Our early leading decision was *Bauron* v. *Davies*[39] an uncontested action.

The plaintiff, living in France, was bequeathed a legacy under a will made and registered in France. Her husband was an absentee. She was authorized by a court in France to sue and give an acquittance for the amount of the legacy. She sued in Montreal. The defendant appeared and declared himself ready to pay if the plaintiff proved herself legally able to give a valid discharge. The

[38] *Reid* v. *McCurry* (1900), 3 P.R. 165, (1901-02), 4 P.R. 251, appeal reversing Mathieu J. In *Bentley* v. *Stock* (1888), M.L.R. 4 S.C., 383 (Rev.), the defendant denied that he was the defendant named in the case and that the judgment was rendered against him—mistaken identity—no affidavit under article 209 C.C.P. was necessary, and the burden of proof was on plaintiff. *Dunbar* v. *Almour* (1887), M.L.R. 3 S.C. 142, 10 L.N. 301 (Jetté J.).

[39] (1897), 6 Q.B. 547, reversing (1896), 11 S.C. 123 (Curran J.). And see *Carsely* v. *Humphrey & Bacon* (opposant) (1910), 12 P.R. 133, where the presumption was applied, the defendant not having contested the validity of the judgment or the jurisdiction. The opposant had obtained a foreign judgment declaring him owner of shares of a Canadian company. He successfully opposed the seizure in Quebec of the shares by a judgment creditor of the defendant.

French law was not proved as to her married status. It was held in the court below that in such case the foreign law must be presumed to be similar to our common law[40] under which she would be common as to property and the husband alone entitled to bring a community action; it was not shown that the community had been dissolved, or any of the formalities regarding absentees performed as required by our law; the judicial authorization to sue was not *chose jugée* as to the merits—it was merely an authorization which "can only be held to cover such rights as may be determined by the proper court after trial". The action was dismissed, *sauf recours*. In appeal, this judgment was reversed:

> Nous sommes d'avis, 1. que les documents produits, à savoir: le testament et le jugement de la cour de Saumur sont revêtus de toutes les formalités voulues par l'art. 1220 C.C., 2. qu'ils font foi de leur contenu, à savoir que la propriété de la somme d'argent réclamée a dûment été transmise à l'appellante, et qu'en conformité aux lois de la France, l'appellante est dûment autorisée, vu l'absence de son mari, à en poursuivre en son propre nom le recouvrement en justice et à en donner quittance.
>
> Ces deux propositions sont appuyées sur les arts. 6 et 1220 C.C. Celui-ci détermine dans quelles conditions les actes faits en dehors du Bas-Canada font preuve *prima facie* de leur contenu, et le premier quelle est la loi qui s'applique à la personne et aux meubles des étrangers. Le paragraphe trois de l'art. 14 C.P.C. [now article 79 C.P.] ajoute à cela que toute personne autorisée à l'étranger à ester en justice peut exercer cette faculté devant tout tribunal du Bas-Canada.
>
> Nos cours, en ce qui concerne les droits régis par les lois étrangères sont obligées de s'en rapporter au témoignage d'experts *peritis virtute officii*, quant à l'existence et à l'interprétation de ces lois. Ces experts sont ceux qui par leur profession et leur état sont présumés avoir fait de ces lois une étude spéciale comme les avocats et notaires et professeurs de droit. Mais à ces témoignages qui sont susceptibles de divergence et de contradiction, l'on doit préférer celui des tribunaux du pays, quand ce témoignage prend la forme d'adjudication, de jugements réguliers, et sont revêtus de la sanction du pouvoir public dans le pays dans lequel ils exercent leur juridiction. Je trouve dans Bar's *Private International Law*, p. 104, le passage suivant: 'The best evidence of the existence of a particular rule of law, is undoubtedly the testimony of foreign courts.' . . . Nous devons donc décider que l'appellante a dûment établi qu'elle a en vertu du jugement qu'elle produit la capacité voulue pour intenter la présente action. En l'absence de toute contestation de la part de l'intimé quant à l'authenticité du jugement produit et quant à la juridiction du tribunal qui l'a rendu nous n'entreprendrons pas de le réviser.

That was the opinion of Ouimet J., speaking for the court. The formal judgment accepts the exemplification as *prima facie*

[40] Citing *Brodie* v. *Cowan* (1862), 7 L.C.J. 97 (Rev.).

proof of the foreign law and jurisdiction and of the plaintiff's right to recover and give a discharge; the action was uncontested, and article 79 C.C.P. applied, under which foreign corporations or persons, duly authorized under foreign law to appear in judicial proceedings, may do so before any court in Quebec.[41]

A leading decision on the point is *Schatz* v. *McEntyre*.[42] Schatz was appointed by a New York court (of the domicile) guardian of his minor daughter. In that quality he sued in Quebec for damages on her and his own behalf due to a motor accident in Montreal. It was held, reversing the Court of Appeal, which had reversed Frank Curran J., that under New York law he had the necessary quality and capacity to sue, and in virtue of articles 79 C.C.P. and 6 C.C. could exercise that quality and capacity in Quebec:

> There is in the record no evidence of the New York law, in the sense that no witnesses were heard who, on account of their profession or their expert knowledge, are recognized as being in a position to state what the law is; but the appellant alleged that "in his quality of guardian . . . he was well and truly entitled by the laws of the State of New York to institute and carry on the present action" in support of which he filed copies of the decree and the other judicial proceedings had in the New York Court. These documents make *prima facie* proof of the facts therein set forth (Art. 1220-1 C.C.), and they afford the best evidence that the law therein applied is the law in force in the country in which the judgment was rendered.

The formula has been extended and varies slightly, as the decisions show. Thus, in *Haney* v. *Mahaffey*:[43]

> Considering that a foreign judgment duly attested to and certified according to our law is presumed *prima facie* to be within the jurisdiction of the court who has rendered it, *Bauron* v. *Davies*, 6 Q.B. 547, and authorities therein cited.
>
> Considering that this [alleged] want of jurisdiction cannot be inferred from the want of jurisdiction of our own courts under the same circumstances, but that it must be proven by competent witnesses.

In *McDowell* v. *McDowell*:[44]

> The authentic copy of judgment . . . makes *prima facie* proof of its contents and that it was rendered by a court of competent jurisdic-

[41] In France there is authority for the view that foreign judgments as to status and capacity are not subject to *exequatur* — that is, are *chose jugée de plein droit*, lacking only executory force. The *Bauron* report cites in that sense certain French authority. But see Niboyet, *op. cit.*, *ante*, footnote 5, Nos. 849-850, *contra*. Batiffol, *op. cit.*, *ante*, footnote 12, (1949), Nos. 418 and 740.

[42] [1935] S.C.R. 238; reversing (1934), 56 K.B. 520.

[43] (1921), 23 P.R. 225 (Rev.). *Courtney* v. *Laplante* (1932), 53 K.B. 540, rev'g. (1932), 70 S.C. 559 — *Monette* v. *Larivière*, *ante*, footnote 32.

[44] [1954] S.C. 319 (Smith J.).

> tion in accordance with the laws of England and no evidence has been submitted to the contrary.

and in *Ryan* v. *Pardo*:[45]

> The exemplified copies [of the foreign alimony judgments invoked] constitute *prima facie* proof of the facts therein set forth and that the law therein applied purported to be the law in force in the State of New York in which these judgments were rendered.

The formula has become very generalized. In *Spohn* v. *Bellefleur & Vanier*[46] discussed in section V, it has been extended to prove *prima facie* facts and jurisdiction neither set forth in the exemplification nor alleged in the action to enforce.

IV. *Defences*

We should not fail to see article 210 C.C.P. in its context of the old law which was its source. The more modern French law, as was earlier shown, still insists on the right of a French court to review the foreign judgment on the law and the merits, not that it may render a new judgment, but that it may grant or refuse an *exequatur*. It is in the spirit of the old law to say that article 210 C.C.P. is intended to help the defendant, not the plaintiff. It entitles him to have the original action heard again—to raise any defence that was or might have been set up to that action.[47]

Under Article 210

In *Ryan* v. *Pardo* Brossard J. held that, seeing the language of the article, the defence set up in Quebec:[48]

> . . . must necessarily be one which *should or could* have been successful in that foreign jurisdiction, under the law of that jurisdiction . . . the only grounds of contestation which defendant can raise in the present action, *under 210 C.P.*, against the four exemplified judgments are grounds which he could successfully and validly have raised against the original action upon which they were rendered, whether he did raise them before the foreign jurisdiction or not.

The challenging words there are "successful" and "successfully", and "should or could". The particular plea under consideration was that the New York court was without jurisdiction to award alimony or to decide the separation action, because when

[45] *Ante*, footnote 32. [46] [1956] Q.B. 608.

[47] *Rabinovitch* v. *Chechik*, *ante*, footnote 37, at p. 404. Rinfret J. held it was not essential to determine whether a certain defence was set up; it is enough to know it could have been. *Binns* v. *Jekill*, *ante*, footnote 30: the fact that defendant may have appeared and contested before the foreign court does not bar his right to contest under art. 210 C.C.P.

[48] *Ante*, footnote 32, italics added.

she married Pardo the plaintiff was already married, a divorce from her previous husband in Nevada having been obtained by fraud. I summarize the court's reasoning:

There was neither allegation nor proof, it was held, that the plaintiff's first husband, divorced by her in Nevada, was still alive —a condition precedent, as the judgment says, to the alleged incapacity of plaintiff to contract a valid marriage with defendant Pardo. Uncontradicted proof by an expert was that by Nevada law the first husband could not have attacked the decree, because it was granted in a bipartite action duly served in accordance with Nevada law, and he had appeared; and by the same law Pardo could not attack it. Under the "full faith and credit" doctrine, accepted in New York, the Nevada divorce could not be attacked in New York—unless it could have been set aside in Nevada for extrinsic fraud, and no evidence of such fraud was made before the New York court or before our Quebec court. Hence, the New York court would not have set aside the Nevada divorce. The New York court had jurisdiction under express state law, as was proved, in a separation action if the parties were married within the state or the defendant was a resident when the action was commenced. Pardo was a resident, he had been served and had appeared and contested. A defence to the effect that the New York court was without jurisdiction "could" not there be "successful". It would be a useless defence here, for if our court was satisfied that it would not be successful in New York, it was impossible to hold that it "should" have been successful.

That decision was expressly followed in *McDowell* v. *McDowell*.[49] The action was for accumulated arrears of alimony awarded on an English divorce decree. Before the divorce action began the defendant had left England and come to Quebec, though he had been served and appeared by counsel in that action. One of his pleas to the action in Quebec was that the alimony award was excessive, and beyond his means or his wife's needs, and that his circumstances had since the judgment so changed that he was unable to pay alimony. The plea of inability to pay was set aside as unfounded. The record showed, it was held, that the defendant was duly served and appeared by counsel:

> In such circumstances the only grounds of defence which were available to the defendant in the present case were those which he might have raised in answer to the proceedings taken in England, art. 210 C.P. While therefore the defendant might possibly attack the said

[49] *Ante*, footnote 44.

> judgment by direct action or other proceeding with a view to having it set aside or modified, he cannot plead by way of defence to the present action his allegedly altered circumstances or inability to pay the alimony to the amount to which he was condemned.

Naturally, he could not in 1951, the date of the foreign action, set up as a defence a change in circumstances which had occurred *since* that date—which is logical enough if, as held, his only possible defences were those he set up or could have set up in 1951. The judgment does not indicate whether proof of changed circumstances since 1951, or of a change of domicile to Quebec since 1947, was made or attempted. But our courts may have to relieve a defendant whose circumstances have so changed that to enforce such an order would be a serious and manifest injustice. I refer the reader again to Mr. Savatier's opinion, that the granting of an *exequatur* may be rendered more flexible by granting the *exequatur* only as to part.[50]

The question of excessive award occurred in *Ryan* v. *Pardo*. The original order was for $3,000 monthly, which was not paid. Four subsequent judgments accumulated the arrears, and it was on these that the action in Quebec was brought. Near the end of the hearing, the defendant moved to amend his plea to allege that the *original order* was excessive.

Admittedly, this was a defence that could have been raised before the New York court. But Brossard J. rejected the motion and ruled against a decrease. He did not take the position that he could not decrease the amount, but rather that the New York court had taken great trouble to arrive at a decision and that a referee had been specially appointed to investigate all the circumstances. He had presented a report of some ninety seven pages, objectively motivated in the light of the court's discretion in the matter, and:

> . . . the [N.Y.] court's findings were based both on legal concepts as understood by the New York jurisdiction and on the appreciation of the means of defendant and needs of plaintiff in accordance with general standards of living in the New York territorial jurisdiction.

The ruling made a further interesting point in this connection which it is important to note here. The defendant, said the court, does not by his motion to amend allege that he intends to support

[50] *Ante*, footnote 20. And see the Cour de cassation's judgment in the *Slawouski* case, *ante*, footnote 19, upholding the Douai court's exercise of its sovereign power of appreciation. Of course, if the defendant, sued for alimony ordered by a foreign divorce court, pleads and proves his domicile in Quebec at the time of the decree, both the decree and the alimony are unenforceable in Quebec: *Binns* v. *Jekill*. *ante*, footnote 30.

it by any proof other than that produced before the New York court. The present action is neither fundamentally nor primarily based on the original judgment ordering the alimony of $3,000 monthly, but on four exemplified judgments which from time to time consolidated the arrears. On each consolidation occasion, Pardo could under New York law have pleaded changed circumstances and might have obtained on that ground solely that the arrears be not consolidated for the whole amount accumulated due. But defendant does not by his motion propose to bring further evidence of changed circumstances, but to plead only that the *original order* was excessive:

> . . . the situation would be different if defendant had proposed to amend his plea to allege that *at the time* of the four consolidation judgments, the circumstances had been changed, for while these judgments are final in the New York jurisdiction, *they remain, within this jurisdiction, subject to revision, under article 210 C.P.*[51]

However, it was held, and I summarize, there is evidence in the record of changed circumstances existing at the time of the last of the four consolidation judgments on December 3rd, 1951. On August 11th, 1951, the plaintiff had started divorce proceedings against the defendant in Nevada, the decree being granted on October 11th, 1951. The record does not show that at the last consolidation the New York court knew of the divorce proceedings or what would have been its discretionary power had it known. Hence its discretionary power should be presumed to be that which in similar circumstances the Quebec court would have and exercise; and the Superior Court would deem it contrary to good morals that a wife who had secured judgments already for $138,715 and had since then instituted divorce proceedings, intending to end the marriage, should seek to recover further substantial amounts. And the New York court, in this Superior Court's opinion, "*would and should*" have had the same view. The judgment for $12,010 on the fourth consolidation was therefore disallowed.

One further comment. The foreign judgment is not *chose jugée*—that is the basic principle. We are not bound to declare it executory. If we do so, it should be upon conditions we deem proper. If we may grant the whole, we may grant part and thus do justice as we see it, respect that "*équivalence juridique*" which Niboyet so rightly emphasizes, and reject what offends our ideas of justice and of public order. Three courses are open to us—to rubber-stamp the foreign judgment, though it offends us; to make

[51] Italics added.

it executory for part; to dismiss the action. The middle course may be the better part of prudence and reasonableness.

Another interesting example of the defences that may be set up under article 210 C.C.P. occurred in *Orsi* v. *Irving Samuel Inc.*,[52] an action on a foreign arbitration award.

Orsi sued on an exemplification of an award of the Commercial Arbitration Tribunal of the American Arbitration Association, and of a judgment of the New York State Supreme Court confirming the award. The defendant neither appeared in nor contested either of those proceedings. The contract, made in New York, was for the sale by Orsi, of New York, to Samuel, of Montreal, of certain merchandise (for which eventually the latter refused to pay), subject to two principal conditions, the first of which was that any dispute arising out of the contract should be settled by arbitration before the Commercial Arbitration Tribunal. All legal formalities under New York law, as to the arbitration and the confirming judgment, as the proof showed, were duly complied with and as such binding on the parties, the judgment rules. The contract, made in New York, was governed by New York law, but our law, the *lex fori*, article 210 C.C.P. determined the defendant's rights of defence—the right to plead all grounds which might have been set up to the original action. Orsi contended that the "original action" meant the proceeding before the Supreme Court, not that before the Arbitration Tribunal. Smith J. did not agree.[53] The proof was, said his Lordship, that the only issues that could be raised before the Supreme Court were those relating to the impartiality of the award and the legality of the arbitration proceedings: the merits could not be gone into:[54]

The rights conferred by C.P. 210 would therefore be illusory if

[52] [1957] S.C. 209 (Smith J.).

[53] "While the court has not been able to find any Quebec jurisprudence on the point, it has been held both in England and the United States, that an award of a competent and duly constituted board of arbitration in a foreign country is a judgment which the courts will enforce, provided that it appears that the said award was rendered impartially and in accordance with the law of the country in which it was rendered." However, Johnson, *op. cit.*, *ante*, footnote 30, II, 398 (note), cites *Stolp & Co.* v. *Browne*, [1930] 4 D.L.R. 703 (Ont.): "when an arbitral award is presented to a foreign court of competent jurisdiction as prescribed by the foreign law, and therefore becomes effective as a judgment thereof, it may be sued upon as a foreign judgment in Ontario." Read, Recognition and Enforcement of Foreign Judgments (1938), p. 80, discusses the *Stolp* decision, and clearly explains the decision in *Merrifield Ziegler & Co.* v. *Liverpool Cotton Association Ltd.* (1911), 105 L.T.R. 97, that a foreign award of arbitration "does not come within the definition of a foreign judgment until it is made an order of Court; it is then merged in that order, which is in effect the judgment of the Court in the matter."

[54] Which is our Quebec rule: art. 1444 C.C.P.

> they merely entitled the defendant to plead . . . only those grounds of defence which it might have raised before the Supreme Court . . . the proceedings had before the Arbitration Tribunal . . . were proceedings 'in the original action' within the meaning of article 210 C.P.

Hence the defendant could raise all grounds of defence that it might have raised before the Arbitration Tribunal.

The defence was that there was not a binding contract of sale because Orsi had not accepted the order in the terms in which it was made, before defendant cancelled and withdrew it, and besides, Orsi had not tendered the goods with his action. The proof showed, said the court, that both these grounds of defence might have been raised before the Arbitration Tribunal.

The second of the two conditions of the order above mentioned was, and I summarize very briefly, that Orsi was not bound until satisfied as to Samuel's credit standing. Actually, as the proof abundantly disclosed, Samuel repeatedly asked for confirmation of his credit and for shipment as the goods were urgently needed. Finally, Samuel wrote cancelling, and this action followed. Seeing Orsi's failure to confirm the credit and ship, there was no unconditional acceptance of the order—there was in effect only an offer or *pollicitation* by Samuel which he was free to cancel prior to acceptance. As proved, that was also the law of New York. On that score, the action was held unfounded.

But, his Lordship proceeded, assume that there has been a complete and binding sale, would the action here be good without a tender of the goods? Unfortunately, the plaintiff had tried, by its answer to plea, to save the situation by alleging that under New York law tender was not necessary before either the Arbitration Tribunal or the Supreme Court, and that tender had been made and was now renewed. These allegations had previously been struck by Smith J. upon motion, as an attempt to remake the action. So that there was no existing allegation of tender or of wrongful refusal to take delivery. And the court was not satisfied that proof was clearly made that under New York law tender was not necessary.

So that:

> In the absence of allegation and satisfactory proof that the law of the State of New York in respect of the vendor's obligation to tender the goods when suing for payment of the price, is different from that of the Province of Quebec, the contrary must be assumed.

For all those reasons, the dispositif concludes, the court:

> Doth declare the alleged contract of sale between the plaintiff and

the defendant to be null and void and of no effect; and *Doth Dismiss* plaintiff's action with costs.

The only criticism which, with respect, suggests itself, is a doubt whether it was necessary, or even within our right, to declare the New York alleged contract "null and void" as well as "of no effect". True, it was of no effect in Quebec because of all the circumstances disclosed in the action; but those circumstances went more directly and logically against the enforcing of the exemplified award and judgment in Quebec and against a money condemnation, as prayed by the action. Would it not have been sufficient, and alone proper, to declare the award and the judgment not executory in Quebec, and hence to dismiss the action?

The general conclusion that can be drawn from the above discussion is this: that under article 210 C.C.P., by way of defence to the action in Quebec, the foreign judgment can be attacked on grounds as to its own validity. In a word, our court can review the defences that were or might have been set up to the foreign action, and according to circumstances decide that the judgment was right and declare it executory, or that it was unfounded and refuse to enforce it.

Defences Apart From Article 210

The defence may attack the foreign judgment as being contrary to public order or good morals as conceived in Quebec. The action itself may be contested on grounds pertaining to its own validity or regularity,[55] which includes denial of the foreign judgment.

The defence of public policy, public order, is decided by our law. It is there to protect our ideas of morality and social justice, our way of life. We will go a long way to recognize acquired rights, but we have our limits which are this side of a no-man's land of eroding practises and ideas.

Articles 211 and 212 C.C.P. provide that under certain conditions of service or appearance, a judgment from another province is *res judicata* in our courts, and the plea of public order has been difficult to maintain: So where in an action upon an exemplification of an Ontario judgment it was pleaded that the consideration of the debt sued upon was illegal, prohibited by law and contrary to public order and good morals, this plea was struck.[56] A similar judgment was rendered under like circumstances, where it was pleaded that a Nova Scotia judgment was based on a note

[55] *Ryan* v. *Pardo*, *ante*, footnote 32.
[56] *McCurry* v. *Reid*, *ante*, footnote 30.

given for a gambling debt.[57] In each case, the court felt bound by the stringent rule of articles 211 and 212 C.C.P. It is conceivable that different considerations might apply if the plea of public policy were based upon ideas of public policy stringent in Quebec, though not in the other province where such a plea would not have availed.[58]

The inference is that such defences would be more successful in Quebec as against a foreign judgment.

As Niboyet points out, the defence of public order strikes at the existence of the request for an *exequatur*, and a different judgment in France cannot take the place of the foreign judgment.[59] And, he adds, it is not possible in France to grant *exequatur* of a judgment that in France is deemed unjust, contrary to concepts of good justice and equity. It would be strange if in Quebec we viewed the matter less seriously. Niboyet mentions also the defence of "*contrariété de jugements*":

> Il peut arriver qu'un tribunal français soit saisi d'une demande d'exequatur relative à un litige qui a déjà été solutionné en France par un jugement ayant l'autorité de la chose jugée, ou bien qui est encore pendant devant un tribunal français. En pareil cas, la jurisprudence rejette toujours la demande d'exequatur. Dans la première hypothèse, le jugement étranger se heurte à l'autorité de la chose jugée en France précédemment, et on ne peut le rendre exécutoire parce qu'il n'y serait pas susceptible d'exécution à l'encontre de la décision précédente. L'ordre public serait troublé par la contrariété de jugements. Dans le second cas, on doit attendre que le procès commencé en France soit terminé.[60]

And he expresses a fundamental principle when he says:

> En ce qui concerne la chose même, qui a été jugée, l'ordre public peut être intéressé de deux manières différentes:
>
> 1. Soit parce que la condamnation en elle-même ne peut s'exécuter sans heurter l'ordre public.
>
> 2. Soit parce que les juges étrangers ont mal jugé le procès, quant au fond, et qu'il n'est pas possible d'ordonner l'exécution en France d'une décision que l'on sait injuste. Ce résultat serait contraire à l'idée morale d'une bonne justice et de l'équité. Il troublerait l'ordre public parce qu'il n'est pas possible d'assurer le fonctionnement international du droit sans un minimum *d'équivalence juridique*. Lorsque la cause a été manifestement mal jugée ce minimum n'existe pas.[61]

That is a point of great importance in Quebec where it has

[57] *Riordan* v. *McLeod* (1910), 13 P.R. 67; (1911), 13 P.R. 156. Art. 1927 C.C.

[58] Johnson, *op. cit.*, *ante*, footnote 30, 442-3.

[59] Niboyet, *op cit.*, *ante*, footnote 5, Nos. 830-31, 833-836.

[60] *Ibid.*, Nos. 832.

[61] Niboyet, *op. cit.*, *ante*, footnote 5, No. 833.

been perhaps somewhat obscured by the jurisprudence that has followed the rule laid down in *Bauron* v. *Davies* that the foreign judgment is the best proof of the foreign law, of the foreign jurisdiction, of the at least *prima facie* rightness of the judgment *au fond*. In a word, we are entitled to be a little more objective and critical.

The procedure on the action is governed by our law. The existence of the alleged foreign judgment or the accuracy of the exemplification may be denied. That it does not on its face show a good cause of action may be pleaded—a question to be discussed *infra*. The jurisdiction of the foreign court may be denied, as, for example, its competence to decide as to a right affecting immoveables in Quebec, or to decree a divorce of a person of Quebec domicile.[62] It may have jurisdiction to award custody of children; but if they are later found in Quebec, our courts take jurisdiction to award custody as may seem in their paramount interest. Our courts will enforce a foreign judgment, final and not reviewable, for accumulated arrears of alimony, but the finality of the order must be alleged and proved or Quebec law will be applied.[63] The prescription of thirty years that can be opposed to a Quebec judgment would be a good defence to an action on a foreign judgment.[64] We would not enforce a foreign judgment for taxes imposed by a foreign state.[65]

There are examples of unsuccessful pleas—the plea of excessive alimony award, already discussed *supra*; pleas as to the name under which suit is brought by a foreign plaintiff, in view of article 56(a), C.C.P.; as to action by a foreign wife without marital authorization; as to her right to continue an action after a foreign divorce.[66]

The plea of *lis pendens* is unfounded. It raises the question whether the fact that an action is pending or that a judgment has been rendered, in a foreign court, between the same parties in respect of the same issue, is a ground to dismiss. An early decision[67] held the plea good, on very questionable reasoning which in effect denied the relevance of article 121 of the *Ordonnance* of 1629. But the then provincial Court of Appeal, in 1833, had held that *litis-*

[62] *Binns* v. *Jekill*, *ante*, footnote 30.
[63] Johnson, *op. cit.*, *ante*, footnote 30, II, 262; *McDowell* v. *McDowell*, *ante*, footnote 44.
[64] *King* v. *Demers* (1870), 15 L.C.J. 129; *Almour* v. *Harris* (1884), M.L.R. 2 Q.B. 439, 5 L.N. 376; *Dunbar* v. *Almour*, *ante*, footnote 38, 10 L.N. 301; Johnson, *op cit.*, *ante*, footnote 30, II, 441.
[65] Johnson, *op. cit.*, *ante*, footnote 30, II, 448-9.
[66] *Ryan* v. *Pardo*, *ante*, footnote 32.
[67] *Vaughan* v. *Campbell* (1855), 5. L.C.R. 431. Review.

pendance in a foreign court was no bar to an action in Quebec.[68] The question occurred again in 1894,[69] and after referring to the then article 42(a) of the Code of Procedure (now article 210), Andrews J. held:

> *This is a re-enactment of Art. 121* of the Ordonnance of 1629, which the court in *Vaughan* v. *Campbell*, 5 L.C.R., p. 431 (cited by the defendants) had refused to recognize as in force in this province. *Its existence as a rule of our law renders a foreign judgment comparatively valueless here*[70] and adds a reason, which does not exist in England, for refusing to allow a foreign suit to stay one in this Province,—for in England a foreign judgment is *res judicata*, if a final one, and obtained without fraud.

Production of Foreign Records

The defendant's right to have the foreign records produced is an important one, especially where the foreign judgment turns in whole or in part on writings. The foreign court may have misunderstood or wrongly applied them. If recited in the judgment there is the chance of error in the transcription. They may be only summarized. The defence may turn on their exact wording and interpretation. A comma, its position or omission, may be vital.

In the old case of *Holmes* v. *Cassils*,[71] the defendant's motion for production of documents and to suspend the action until produced, was granted. In *Ryan* v. *Pardo*,[72] all the proceedings before the New York court and all the evidence brought before it for the purpose of adjudicating upon the quantum of the alimony, including the report of a referee appointed to consider that quantum, were produced by the plaintiff and considered by our court—they "have become part of this record: their fyling as part of this record was, in this court's opinion, relevant and legal", Brossard

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[68] *Russell* v. *Field* (1833), Stuart's Reports, 558.

[69] *The Howard Guernsey Mfg. Co.* v. *King*, *ante*, footnote 32, cited in *Courtney* v. *Laplante*, *ante*, footnote 43. And see *Canadian Acceptance Corporation* v. *West* (1933-34), 36 P.R. 6 (Boyer J.).

[70] Italics added. Surveyer J., The Exception of Lis Pendens, (1924), 2 R. du D. 394, at pp. 399-400, approved the view of the two early decisions: *Russell* v. *Field* and *Howard Guernsey Mfg. Co.* v. *King*, *ante*, footnote 32. Cf. Lafleur, The Conflict of Laws in the Province of Quebec (1898), p. 247.

[71] (1877), 21 L.C.J. 28 (Torrance J.). And see *Salaman* v. *Blackley* (1898), 4 R.L.n.s. 312 (Mathieu J.). Even in a default case, the court will require the plaintiff to prove the cause of action: *Chapman* v. *Gordon* (1864), 8 L.C.J. 196. If the plaintiff has been ordered to fyle a detailed account or a bill of particulars showing the nature of the claim under the foreign judgment, the defendant may move to fix a further delay and to dismiss if not produced: *Hoppock* v. *Demers* (1867), 13 L.C.J. 224. And see *Marcotte* v. *Smith* (1894), 5 S.C. 376 (Ouimet J.).

[72] *Ante*, footnote 32.

J. held. In *Smith* v. *Beaubien*[73] production was refused because, it was held, the document requested (a statement of account) was already in the defendant's possession or available to him in the record.

In *Ryan* v. *Pardo*, again, the defendant moved, after the *enquête* was closed, to reopen to permit proof of a judgment in Peru (which in fact had been appealed) relevant to his plea that his domicile was in Peru and the New York courts without jurisdiction in his wife's separation action taken in New York. The motion was dismissed because, it was ruled, the defendant had already had ample opportunity to make proof of the Peruvian law.

In an action upon exemplification of a Nova Scotia judgment, the defendant, after appearing and obtaining security for costs, by motion alleged that the exemplification did not set forth the cause of the action and prayed that plaintiff be ordered to produce an authentic copy of the record in the Nova Scotia proceedings. The motion was granted, and the plaintiff filed certified copies of the statement of claim, of the defence, and of the formal judgment of the court.[74]

Inscription in Law—Plea to the Merits

Added here, are a few notes on the procedure of attack which I have collected in the course of reading.

The general rule of article 191 C.C.P. is that an issue of law may be raised as to the whole or part of the demand whenever the facts alleged or some of them do not give rise to the right claimed. In several instances the action has been attacked by inscription in law (demurrer) on the ground that the exemplification did not on its face show a good cause of action. In some other instances the attack has been made by the plea *au fond.*

In *May* v. *Ritchie*,[75] the defence *au fond* that the exemplification showed no cause of action was maintained and the action dismissed. In *Green* v. *Brooks*,[76] to the action on an Ontario judgment the defendant pleaded compensation. The plaintiff inscribed in law, on the ground that the action was on an Ontario judgment, that it did not appear that the defendant was not personally served in Ontario or had not appeared, that the plea of compensation

[73] (1902), 4 P. R. 473 (Mathieu J.).
[74] *Chechik* v. *Rabinovitch* (1928), 45 K.B. 129, at p. 131.
[75] (1871), 16 L.C.J. 81 (Rev.).
[76] (1888), M.L.R. 4 S.C. 475 (Mathieu J.). But see *Almour* v. *Harris*, *ante*, footnote 64, demurrer dismissed.

had no connection with the original action, and that defendant could not now plead a defence he could have set up to the original action. The inscription in law was dismissed, since it would be only after proof at the merits that it could be determined whether the plea was good. In *The Howard Guernsey Mfg. Co.* v. *King*,[77] a plea of *lis pendens* was dismissed on inscription in law. In *Binns* v. *Jekill*[78] a total inscription in law to the defendant's plea that he was not domiciled in England when a divorce and alimony were decreed there, was unfounded, since for the purposes of a total inscription in law the allegations must be taken to be true and under article 210 C.C.P. were defences that he might have set up to the original action.

In *McDowell* v. *McDowell*[79] the whole defence to an action on an English judgment for alimony following a divorce, was raised and decided on the merits. In *Spohn* v. *Bellefleur & Vanier*[80] a total inscription in law against the action on the ground, *inter alia*, that it did not disclose the foreign court's jurisdiction, was dismissed because, as to that point, it was held, it is only after *enquête* that the question of jurisdiction can be judicially determined: it cannot be disposed of on an inscription in law. That may not be the proper view, in the particular circumstances, for on its face the exemplification disclosed no ground of jurisdiction. For even in an *enquête*, the plaintiff could not prove a cause of action which was not alleged and thus illegally attempt to remake his action, and the exemplification did not disclose domicile or service or property within the jurisdiction. The view of Casey J. that the declaration showed that the foreign court was that of the County of Saratoga, and that "the *accident* occurred within the jurisdiction", was beside the real point of the inscription in law. In *Binns* v. *Jekill*, on the contrary, a defence of fact was raised that the defendant was at all relevant times domiciled in Canada, and hence that the English court had not jurisdiction to decree the divorce and to award alimony. The allegations as to domicile could be decided only during *enquête*, not on an inscription in law.

[77] *Ante*, footnote 32. See also the successful motion for production of documents, in *Salaman* v. *Blackley*, *ante*, footnote 71, and the exception to the form in *Smith* v. *Beaubien*, *ante*, footnote 73, (Mathieu J.) and in *McEntyre* v. *Schatz* (1934), 56 K.B. 520.

[78] *Ante*, footnote 30. See *Chechik* v. *Rabinovitch*, *ante*, footnote 74, at p. 133, where it was held that where a defendant had insisted on production of certain exhibits and had then fyled a cross-action, on a total inscription in law against his cross-action, communication could be taken of the exhibits.

[79] *Ante*, footnote 44.

[80] *Ante*, footnote 46, reversing Smith J. Appeal to the Supreme Court of Canada dismissed, May 22nd, 1957.

In *Beare* v. *Schram*[81] the successful plea in defence was that the "exemplification" was only a certificate that a judgment had been rendered, and it did not disclose jurisdiction.

V. *The Burden of Proof*

Under that general heading a number of difficult questions arise. We enter an area that seems confused by rulings and stated principles defying reconciliation, and all one can do is to move tentatively through the material.

We start with the fact that article 210 C.C.P. reflects the old common law and that basically a foreign judgment is not *chose jugée*. Yet the presumption established by *Bauron* v. *Davies* has the effect of making it *prima facie chose jugée*. It has been argued to me that the words of article 210 C.C.P. clearly imply that the burden of proof falls on the defendant because he must meet an "action brought *upon a judgment*" that stands against him until he shows that it should not be enforced. If that is so, it should be stated clearly in the article as part of the rule, and it is not stated. It is just one more presumption added to that deduced from article 1220 C.C. Some value must still be allowed to reside in the rule *actori incumbit probatio*. The plaintiff could sue on the original cause of action. The judgment rendered in a foreign state has of itself no currency here, for the foreign sovereign's fiat runs only within his state. To say that the judgment of his court is *chose jugée*, needing only our rubber stamp, or *prima facie chose jugée*, amounts for so much to an invasion of our sovereignty which we voluntarily admit — on conditions imposed by us.

Now one condition, applied in some earlier jurisprudence but since obscured by *Bauron* v. *Davies* and the decisions that have followed and even expanded its ruling, is this, that: *Foreign judgments must be good on their face.*

The exemplification must disclose that quality. The point was first decided in *May* v. *Ritchie*.[82] In Review, reversing the court below, it was held: that the exemplification was "irregular on the face of it":

> It says that the defendant was a British subject out of the jurisdiction, and was to be summoned in a particular way, but does not say

[81] *Ante*, footnote 34.

[82] *Ante*, footnote 75, cited in *Bentley* v. *Stock*, *ante*, footnote 38, at p. 385; the Code has placed in the same category of proof all judgments rendered outside Quebec. Johnson, *op. cit.*, *ante*, footnote 30, II, 263, citing an unreported judgment, *Bessunger* v. *Hartman*, June 17th, 1929, S.C. 36849, dismissing an action for accumulated arrears, because the foreign judgments were not properly exemplified.

that he was so summoned, or even summoned at all. There is nothing to show that the note was made in Ontario, and defendant denies that he even made the note at all. Effect can only be given to foreign judgments when they are good on the face of them. See the *Duchess of Kingston's* case, in Smith's *Leading Cases*, where this is fully discussed.

Considering that there is no juridical evidence that the defendant is indebted to plaintiff, as by him pretended, and that there is error, reverses the judgment.

It seems proper to conclude, then, that as by article 1220 C.C. the exemplification makes only *prima facie* proof, that proof in order to stand up, should on its face justify the judgment by all ordinary legal criteria: disclose jurisdiction, identify the parties, precise the cause of action, and visibly support the judgment.

Yet in *Salaman* v. *Blackley*[83] it was held that in an action on exemplification of an Ontario judgment, the defendant here is entitled to demand the production of all exhibits on which the original action was based, *if the exemplification does not show the cause of action nor that the original action was personally served on the defendant.*

It would seem, however, that if the judgment is not good on its face, the action should be dismissed. The motion for production is a contestation, and if the production is made, the defendant has himself invited the imperfect action to be for at least so much made good.

If the exemplification does not disclose the original cause of action, and the plaintiff's action concludes only that the exemplified foreign judgment be declared executory, the defect cannot be made good by amendment of the declaration. Thus, in *Howie* v. *Stanyer*[84] the action set up an Ontario judgment against defendant for some $6,734, with interest and costs, the exemplification being produced as an exhibit, and concluded that it be declared executory. The judgment showed no cause of action whatever. The plaintiff, becoming aware of this defect, moved to amend by adding the following paragraph:

In the alternative and under reserve of the foregoing allegation, plaintiff says that defendant entered into a mortgage in the form provided under the laws of the Province of Ontario dated . . ., pursuant

[83] *Ante*, footnote 71, (Mathieu J.); *Smith* v. *Beaubien*, *ante*, footnote 73, (Mathieu J.). — where the clerk of the foreign court certifies that the account sued on in the foreign action was duly served, the plaintiff will not be ordered on exception to the form to produce a copy of the account.

[84] (1944), 47 P.R. 166 (Lazure J.). In *Ryan* v. *Pardo*, *ante*, footnote 32, where a motion during trial to allege a domicile of both parties in New York was refused because if it were relevant to the issue, which it was not, the plaintiff "would be endeavouring to rebuild her action."

> to which an obligation was created on the part of the defendant to pay plaintiff . . ., the sum of . . ., with interest . . ., which sum the defendant neglects and refuses to pay.

and asking that he also be permitted to amend the conclusions by adding the words: "and in the alternative the plaintiff prays for judgment for the said sum of $6,735."

The motion was dismissed: seeing the bare conclusion that the Ontario judgment be declared executory, the amendment would allege a new basis of action and change the conclusion and the nature of the action.[85] The decision ends by distinguishing *Kerr* v. *Lanthier*.[85] In that case the original judgment was obtained in Ontario, without personal service upon defendant there and without his appearing, and he was domiciled and resident in Quebec. The Review judgment notes that the prayer of the action was, not that the judgment be declared executory, but simply that the defendant be condemned to pay a certain sum for goods sold and delivered to him at Montreal, and concludes with a dispositif modifying the judgment below by allowing the price of the goods sold. The point sought to be made by the distinction was that the action here was saved because it alleged both the foreign judgment and the debt on the sale; whereas, as the Review judgment notes, there was no prayer that the Ontario judgment be made executory and it was useless for lack of jurisdiction.

A conclusion seems to emerge from those decisions—that the exemplification, in order to be good on its face and thus to qualify for enforcement upon an action in Quebec, must on its face be as if it were an enforceable unit: it must on its face show jurisdiction, a cause of action, facts justifying its dispositif. But even if the exemplification meets all those conditions, the action to enforce the judgment is still open to contestation. If it is not contested, and if the court is satisfied that it need not call for any confirmatory evidence, judgment issues—not, I suggest, because of a presumption, but because the exemplified judgment meets the apparent rule that it must be good on its face. The court has a discretion in the matter of confirmatory proof where it has a doubt; but not, I suggest, to supply what does not appear in the exemplification as was done where a defendant made default, no cause of action was disclosed in the exemplification, and the *délibéré* was discharged and the necessary proof made upon *faits et articles* answered affir-

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[85] (1890), 19 R.L. 170. See the editorial note to this decision, citing decisions of the English provinces that the plaintiff may sue either on the original cause of action or on the judgment.

matively by the defendant.[86] And where, in an action to enforce an Ontario judgment, the defendant denied that he was ever domiciled or was served or had property there, and the exemplification disclosed none of those elements, it was for plaintiff to establish the competency of the Ontario court, and he had not done so.[87] Where a defendant pleaded *inter alia* that he was not the defendant in the original action, the action was dismissed on plaintiff's failure to prove the identity.[88]

The next problem concerns the so-called: *General rules as to international jurisdiction.*

These rules were first enunciated in *Stacey* v. *Beaudin*.[89] Textually, they reflect article 94 C.C.P., which is a rule of internal law for summoning the defendant before the court of the indicated judicial district within the province. As presented in *Stacey* v. *Beaudin* they are a synthesis of doctrine supported by the cited authors, Burge, Westlake, and Wharton, and are stated to be "general rules of private international law".[90]

Lafleur introduces and then quotes the three rules as follows:

> The first requisite for the recognition by our courts of the decree of a foreign tribunal is that it should have been pronounced by a court having jurisdiction in the matter. It is not sufficient that the foreign court should have jurisdiction according to the local law; it must be competent according to the rules of Private International Law. A foreign court has an international competency which entitles its decrees or judgments to recognition in the following cases:
>
> 1. When the defendant is domiciled within the jurisdiction.
> 2. When the cause of action arose within the jurisdiction of the court, and the defendant is personally served with the action within such jurisdiction.
> 3. When the defendant is possessed of property, not merely illusory, within the jurisdiction of the court.

And, he adds:

> If the exemplification or copy of judgment sued upon does not on its face show the international competency of the foreign court,

[86] *Chapman* v. *Nimmo* (1864), 8 L.C.J. 196 (Monk J.).
[87] *Stacey* v. *Beaudin* (1886), 9 L.N. 363.
[88] *Bentley* v. *Stock*, *ante*, footnote 38. *Marcotte* v. *Smith*, *ante*, footnote 71. And see in the footnote to *Chapman* v. *Nimmo*, *ante*, footnote 86, the unreported case of *East* v. *Sutherland* where proof of identity was ordered.
[89] *Ante*, footnote 87.
[90] Lafleur, *op. cit.*, *ante*, footnote 70, p. 238; Johnson, *op. cit.*, *ante*, footnote 30, II, 374; commented on by Read, *ante*, footnote 53, p. 125, note 2; restated in *Monette* v. *Larivière*, *ante*, footnote 32, 359; at 360 Rivard J. says they are "semblables aux dispositions de l'article 94 C.P. qui détermineraient la compétence de la cour étrangère, au point de vue du lieu de l'introduction de l'action", and at 359, that "Les articles 210-211-212 C.C.P. ne sont que la consécration de cette doctrine." Though why it is such a consecration is not clear to this writer.

and if there is no evidence to bring the case under any of the above conditions, an action based merely on the foreign judgment will be dismissed.

Jurisdiction of the foreign court to hear and decide the case is a *sine qua non*. That it may appear from the exemplification that it had jurisdiction does not of itself entitle the judgment to be made executory. Manifest jurisdiction will first be looked for and scrutinized, for it is basic to the maintenance of an action on the judgment. But even if jurisdiction appears, the exemplification must on its face justify the dispositif, as we have earlier said.

The three conditions of the general rules test only the foreign jurisdiction.[91] Yet here we find an anomaly—two seemingly contradictory principles:

First: If the exemplification on its face shows jurisdiction on one or more of the three grounds, we admit the jurisdiction, subject of course to contestation. In my view, if jurisdiction is not so disclosed, the action on exemplification should be dismissed. But if it is permissible, and I think we should say it is not, for the plaintiff to cover up the defect by extraneous allegation and proof of one or more of the three grounds of jurisdiction, the burden of proof is on him. If he omits the necessary allegation in his declaration he cannot make it, and thus remake his action, by amendment or replication.

Second: That under article 1220 C.C., as interpreted, the exemplification makes *prima facie* proof of the foreign court's jurisdiction, apparently though on its face it shows no jurisdiction on one of the three grounds. But the defendant is allowed the questionable privilege of assuming the burden of proving the contrary of what does not appear in the exemplification and is merely presumed. And that is dangerous. It opens the door to fraud. It puts the defendant under the necessity of having to admit some foreign jurisdiction that is purely local (not international) or that does not exist at all. It seems to me that we should not enforce a foreign judgment showing on its face no international jurisdiction ac-

[91] A rule that seems equally general in that it is widely observed, is that status and capacity are governed by the law of the domicile. It is our Quebec rule—art. 6 C.C. In *Ryan* v. *Pardo*, *ante*, footnote 32, it was pleaded that it was a general rule of private international law that as Pardo's domicile was in Peru, the New York court had not jurisdiction to decree a separation. It was held that the existence of such a general rule was not proved; that New York took jurisdiction on the basis of residence or that the marriage was performed there; and for those and other reasons in the circumstances our court would not enforce our rule. But what, if we choose to regard our rule as a "general " rule, as we do in the case of the general rules as to jurisdiction?

cording to our own rules, and merely on the basis of the *prima facie* presumption.

Consider, therefore, in the light of that contrariety of principles, the recent decision of the court of appeal in *Spohn* v. *Bellefleur & Vanier*.[92] An appeal to the Supreme Court was dismissed, under circumstances suggesting that the court regarded the question as rather one of procedure, though, as article 210 C.C.P. is essential to the solution of a conflict of laws and at least article 1220 C.C. is substantive law, it would have been useful to have a reasoned judgment.[93]

As it is brief and to the point, I quote first the unreported judgment of Smith J. in the court below:

> The Court, seized of defendant's total inscription in law. . . .
>
> Whereas the plaintiff's action is based upon an exemplification of a judgment rendered in the Supreme Court held in and for the County of Saratoga, in the Village of Ballston Spa, in the State of New York, . . . on the 17th February, 1952;
>
> Whereas although the said exemplification of judgment, which is duly authenticated, states on its face that the defendants were served personally[94] with the writ of summons in that case and that they duly appeared, it is not stated nor does it appear either that the cause of action arose within the jurisdiction of that Court or that the defendants were personally served *within* that jurisdiction;
>
> Whereas, moreover, it does not appear from the said exemplification of judgment that the defendants or either of them were domiciled or possessed property within the jurisdiction of the Court which rendered the judgment;
>
> Whereas it therefore does not appear from the said exemplification of judgment that the Court which rendered the said judgment was a Court having international competency to render judgments which are entitled to recognition before our courts;
>
> Considering that it does not appear that the judgment upon which the plaintiff bases his action was rendered by a Court of competent jurisdiction;
>
> Considering that the plaintiff's declaration discloses no cause of action;
>
> Considering that the defendant's inscription in law is well founded;
>
> Doth Maintain said inscription in law and Doth Dismiss plaintiff's action; the whole with costs.

That judgment was reversed in appeal:

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[92] *Ante*, footnote 46, reversing Smith J.

[93] In *Rabinovitch* v. *Chechik*, *ante*, footnote 37, at p. 400, where the question was as to an inscription in law against a cross-demand, Rinfret J. held: ". . . il s'agit d'une question de procédure dans laquelle nous considérons que la décision du plus haut tribunal de la province de Québec doit être respectée."

[94] The judgment says only that they were "duly served".

> Considering that the allegations in the action are sufficient to give rise to the conclusions of appellant's declaration.

The notes of opinion of the members of the court supporting that single *considérant* ignore, take no note of, the rule that the exemplification must on its face disclose a good action, justifying the dispositif, so that our court can read it and conclude that on its face it leads logically to the decision—jurisdiction, cause of action attributable to the defendant and facts justifying that attribution. But what do we find here? Service of the proceedings on the defendants was not personal within the jurisdiction, but by mail addressed to them in Quebec—a purely local and not an international basis of jurisdiction. If you read the allegations of the original declaration recited in the opinions in appeal, it appears that no cause of action attributable to the defendants is alleged, but simply that the plaintiff's claim "arises from an automobile accident". The original judgment does not mention the accident or any act or participation by the defendants but records that:

> The plaintiff's allegations and proofs having been duly heard by the court, and the court having duly assessed the plaintiff's damages at the sum of . . ., adjudged that the plaintiff recover of the defendants . . . the sum of . . . .

Upon those few words, aided by article 1220 C.C., McDougall J. was of opinion that:

> In virtue of the article [1220 C.C.] therefore there is a *prima facie* case that the law was complied with and defendants properly condemned. — In my view the production of the foreign judgment throws on defendants the burden of establishing that they should not have been condemned.

In a word, an unreasoned foreign judgment, on its face lacking any remote compliance with our rules, disclosing no facts or cause of action or personal service within the jurisdiction, in every respect deficient, was held *prima facie* binding and good; it must *prima facie* be presumed that the defendants by their fault caused the accident, that the court had jurisdiction, that on the merits the judgment was justified, and the defendants bound to the burden of proving the contrary of those propositions which appear nowhere. Either our rule as to what a foreign judgment must on its face show means something or it means nothing, and the appeal reasoning leaves it meaning nothing, and leaves article 1220 C.C., as interpreted, dangerous to defendants in Quebec and permitting a serious invasion of our sovereignty.

Conclusions

One can hope that as a result of the foregoing study, article 210 C.C.P. may be seen in perspective more truly for what it was intended to be. Conceived in the spirit of the old French law under which a foreign judgment was neither *chose jugée* nor *prima facie chose jugée*, its meaning and protection have been diluted, indeed almost extinguished. Our rule that the foreign judgment must on its face disclose a good action, our rule as to recognition of international jurisdiction, to mention only two, and these of basic importance (if they are any longer our rules, which is doubtful) are lost sight of under the operation of the *prima facie* decisions.

What court will rid us of these complexities, these baffling uncertainties? Perhaps it is too late to ask. But, as Renan somewhere remarked: "Our opinions become fixed at the point where we stop thinking."

We have arrived at pretty well a dead end, a *cul de sac*. If you will read *Bauron* v. *Davies* again you will see that the only question in issue was whether the French judgment as to the plaintiff's status and capacity to sue was to be accepted at its face value, without any other or confirmatory proof. English judgments (of little authority as an aid in interpreting our own old French law) are quoted. Some slight French opinion is quoted to the effect that foreign judgments as to status and capacity are not subject to *exequatur*, that is, are *chose jugée de plein droit*, lacking only executory force. Massé's opinion is cited, that all foreign judgments, until the contrary is proved, make proof of their contents even before *exequatur* is granted—but his view has not been followed. A theoretical German writer, Von Bar, is quoted to offset our best evidence rule that the foreign law must in every instance be proved by experts in that law. On those premises, then, it was held that, in virtue of article 1220 C.C., the French judgment made proof of its contents—that the plaintiff was entitled to the bequest, and that she had, in accordance with French law, been duly authorized to claim it and give a discharge—there being no contestation.

But to widen the impact of that interpretation, as we have above seen has been done, whether the action on the judgment is contested or not, and in instances other than those of status and capacity, is to place both the plaintiff and the defendant in a position not contemplated by article 210 of the Quebec Code of Civil Procedure.