ENFORCEMENT OF FOREIGN JUDGMENTS IN EQUITY

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Introduction

Foreign judgments may be recognized and enforced either at common law or pursuit to a statute. Where the judgment which is sought to be enforced is a judgment of another State or Territory within Australia it may be registered in the State in which it is to be enforced pursuant to the Service and Execution of Process Act 1901 (Cth.). Judgments which may be enforced under that Act are not limited to those requiring payment of a sum of money, but include any judgment, decree, rule or order, whereby any person is required to do or not to do any act or thing other than the payment of money.[1] If however a plaintiff seeks to enforce a judgment of a country outside Australia he must rely on the State legislation permitting registration and enforcement of certain foreign judgments,[2] or he must rely on the common law. Generally only judgments for a monetary sum may be enforced pursuant to the legislative provisions,[3] although under the State and Territorial legislation derived from the Foreign Judgments (Reciprocal Enforcement) Act, 1933 (U.K.), a judgment to which such legislation would apply if the judgment required the payment of a sum of money, will be recognized as conclusive evidence between the parties in all proceedings founded on the same cause of action.[4]

Accordingly, if a plaintiff seeks to enforce a judgment which required a party to do or not to do some act other than the payment of money he must either rely on the common law, or sue on the original cause of action and rely on the provisions of the legislation referred to above, if the judgment is a final and conclusive judgment

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[1] Section 3.

[2] Foreign Judgments (Reciprocal Enforcement) Act, 1973 (N.S.W.); Foreign Judgments Act, 1962 (Vic.); Reciprocal Enforcement of Judgments Act, 195[illegible] (Qld); Foreign Judgments (Reciprocal Enforcement) Act, 1963 (W.A.); Foreign Judgments (Reciprocal Enforcement) Ordinance 1954 (A.C.T.); Foreign Judgments (Reciprocal Enforcement) Act, 1963-1965 (Tas.); Foreign Judgments (Reciprocal Enforcement) Ordinance 1955 (N.T.); *cf.* Foreign Judgments Act 1971 (S.A.).

[3] N.S.W.: s.5(4); Vic.: s.4(3); Qld: s.4(3); W.A.: s.6(3); A.C.T.: s.5(3); Tas.: s.3(2); N.T.: s.5(2); But *cf.* S.A.: s.4.

[4] N.S.W.: s.11; Vic.: s.10; Qld: s.10; W.A.: s.12; A.C.T.: s.11; Tas.: s.10; N.T.: s.12.

of a country to which the legislation applies.[5] In the latter case the plaintiff can rely on a cause of action estoppel against the defendant.

This article will examine the right of a plaintiff to enforce at common law a judgment which requires the defendant to do or not to do some act other than the payment of money. This is a question of practical importance. For example if a United States' Court has directed a defendant to execute a transfer of shares, and the defendant moves to an Australian State, must the plaintiff relitigate his right to a transfer in that State, or may he seek a mandatory injunction relying solely upon the United States judgment?

The textwriters[6] state that at common law a foreign judgment *in personam* will only be enforced if it requires the payment of a definite sum of money. The reason given for this rule is that in England before the Judicature Act, 1873 the form of action for the enforcement of a foreign judgment was in debt or assumpsit. In England these actions were brought in the Superior Courts of Law and required that a sum certain in money be owed to the plaintiff. The abolition of the forms of action did not confer on the courts any greater jurisdiction to enforce foreign judgments than the Superior Courts had formerly possessed. Some textwriters add that a foreign judgment requiring or enjoining some specific act other than the payment of money, although not supporting a cause of action, may entitle the plaintiff to rely on the foreign judgment as raising a cause of action estoppel in a suit brought on the original cause of action.[7]

The assumption in all of this reasoning is that before the Judicature Act, 1873 the only means of enforcing a foreign judgment was by an action of debt or assumpsit brought in the Courts of Law. However the Court of Chancery exercised a concurrent jurisdiction with the Superior Courts of Law to enforce foreign judgments. It was the appropriate forum in which to enforce a foreign judgment which required the defendant to do or abstain from doing some act other than the payment of money, and it was not trammelled by the forms of action. It is the nature of the jurisdiction of the Court of Chancery which must be examined to determine whether equitable remedies are available to enforce a foreign judgment, not the procedures of the Courts of Law. If it is found that the Court of Chancery had jurisdiction to enforce foreign judgments it will be unnecessary to assert a distinction between enforcing the judgment and relying upon it as *res judicata*.

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[5] *Cf.* n. 3 and n. 4.

[6] Nygh, *Conflict of Laws in Australia* (3rd ed., 1976) at 87; Sykes & Pryles, *Australian Private International Law* (1979) at 70; Dicey and Morris, *The Conflict of Laws* (9th ed. 1973) at 1037-8; Cheshire and North's *Private International Law* (10th ed.) at 651; Graveson, *The Conflict of Laws* (7th ed. 1974) at 628; Morris *The Conflict of Laws* (2nd ed. 1980) at 423; *cf. Halsbury's Laws of England* (4th ed.) Vol. 8, para. 715, at 475.

[7] Dicey and Morris, *op. cit. supra* n. 6 at 1038.

Jurisdiction in Equity

One of the earliest cases on the enforcement of foreign judgments arose in equity. In *Morgan's Case*[8] the plaintiff had obtained a decree from a Welsh Court (semble the Court of Great Session) for the payment of a legacy, and to avoid execution of the decree the defendant moved to England. The plaintiff filed a bill in Chancery to enforce the Welsh decree, and the report states that Lord Hardwicke, L.C. inclined to the view that an "original independent decree" might be obtained in the Court of Chancery for the legacy. The question was stood over to the final hearing of the cause, but either then or in a similar case Lord Hardwicke decided that an action did lie to enforce the Welsh decree, although the Court of Chancery would examine the Welsh decree to see if it were rightly made before lending the Court's aid to its enforcement.[9] Of course the Welsh Court was not a foreign court, but the case was subsequently treated as an authority bearing on the enforcement of foreign judgments proper.[10]

The next major decision which affirms the existence of an equitable jurisdiction to enforce foreign judgments is *Houlditch* v. *Marquis of Donegal*.[11] This was a decision of the House of Lords sitting on appeal from the Court of Chancery in Ireland. The plaintiff had obtained a decree in the Court of Chancery in England for the appointment of a receiver of the defendant's estate in Ireland. The plaintiff filed a bill in the Court of Chancery in Ireland to enforce the decree by obtaining the appointment from that court of a receiver, and the usual injunction to restrain the defendant from interfering with the receipt by the receiver of the rents and profits of the estate.[12] The House of Lords held that because the correctness of the English decree could be examined in the Irish Court, that Court had jurisdiction to enforce the decree in the manner sought.[13] A foreign judgment could be a ground of proceedings in a Court of Chancery just at it could be a ground for an action of debt or assumpsit in a Court of Law, but both at law and in equity the foreign judgment should be regarded as only *prima facie* evidence of the cause of action.[14] Not only was a foreign court not to be regarded as a court of record, but to give conclusiv

[8] (1737) 1 Atk. 408.

[9] *Walker* v. *Witter* (1778) 1 Dougl. 1; *cf.* Mitford, *Pleadings in Chancer* (2nd ed.) at 87.

[10] *Walker* v. *Witter, Supra.* n. 9; *Galbraith* v. *Neville* (1788) 1 Dougl. 6

[11] (1834) 8 Bligh N.S. 301; 2 Cl. & F. 470.

[12] Gordon, "The Converse of *Penn* v. *Lord Baltimore*" (1933) 49 *L.Q.* 547 at 552 states that the motion was for the appointment of an interi receiver. He refers to the report of the proceedings in Beatty's Rep. 390 befo the Irish Lord Chancellor where that motion was refused. That interlocuto proceeding was heard in July and November 1829. The appeal to the House Lords was not from that interlocutory decision but from the decision of Lo Plunket in January 1832. See Lloyd and Goolds Cases 82. Gordon's commen on the case proceed from this wrong basis.

[13] *Per* Lord Brougham, L.C., 8 Bligh N.S. 301, 341.

[14] *Ibid.* at 338-9, 345.

effect to its judgments could produce injustice if its procedures did not meet the standards exacted by an English court, or if it was unsuitable to give effect in England to the substantive law applied by the foreign court. Their Lordships were satisfied that in fact there was no ground for rebutting the substantial parts of the English decree. Accordingly they directed the Court of Chancery of Ireland to give its assistance to carry the English decree into effect, by itself appointing a receiver and enjoining the defendant from interfering with the receivership.

It should be noted that the effect of the English decree appointing a receiver was not to vest in the receiver any of the defendant's assets in Ireland. The case is not analogous to the recognition of the title of any person whether as executor, trustee in bankruptcy, or otherwise, to assets situate in the forum. It is a case of a court of equity granting ordinary equitable remedies to carry into effect a foreign decree which, without the assistance of the enforcing court, could only be enforced by proceedings for contempt in the foreign court.

In *Paul* v. *Roy*[15] Sir John Romilly, M.R. said there was no doubt that the Court of Chancery had jurisdiction to enforce a foreign judgment, though it was clear from *Houlditch* v. *Marquis of Donegal* that the Court would enquire into the propriety of such a judgment.

In *Reimers* v. *Druce*[16] the plaintiff had obtained a judgment for a debt in a foreign court and (the other party to the proceedings having died), filed a bill against the administrator of the debtor's estate seeking to satisfy the judgment from the estate assets. The bill was dismissed on two grounds: first, error on the face of the foreign judgment; and secondly, the plaintiff's laches. It was not doubted however that the Court of Chancery possessed jurisdiction to entertain the proceedings.

Since *Reimers* v. *Druce* was decided in 1857 there is little authority on the equitable jurisdiction to enforce a foreign judgment *in personam*. In *Re Kooperman*[17] the Antwerp Tribunal de Commerce declared K., who owned leasehold properties in England, bankrupt. A curateur was appointed and authorized to sell the leasehold properties in England. The Belgian judgment could not by its own force affect the title to immovable property in England and as K. could not be compelled to appear before the English Court, the curateur sought the authority of the English Court to deal with the property. Astbury, J. appointed the curateur receiver, with authority to sell the leasehold properties and retain and deal with the proceeds as trustee in the Belgian bankruptcy[18]. It is hard to classify the Belgian judgment as a judgment *in personam*, but in respect of immovable property situated

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[15] (1852) 15 Beav. 433.
[16] (1857) 26 L.J. Ch. 196.
[17] [1928] W.N. 101.
[18] In *In re Osborn* (1932) 74 L.J. Ch. 134, Farwell, J. made a similar order pursuant to s. 122 of the Bankruptcy Act, 1914 (U.K.).

in England it did not operate as a judgment *in rem*. The case is an interesting example of equity's jurisdiction to grant an appropriate remedy to carry a foreign judgment into effect.

In *Schemmer* v. *Property Resources Limited*[19] the plaintiff had been appointed by the United States District Court for the Southern District of New York as receiver to take possession of a variety of assets of the defendant. He sought an order from the English Court appointing him receiver of the company's assets in England, by way of recognition and enforcement of orders made in the United States. As in *Houlditch* v. *Marquis of Donegal*, the appointment of the plaintiff as receiver by the foreign court did not have the effect of vesting in him the title to any of the assets of the defendant in the forum.[20] For a variety of reasons Goulding, J. refused the plaintiff's application, but did not doubt that the Court had jurisdiction in an appropriate case to give effect to a foreign order appointing a receiver by making a similar order in England. The plaintiff failed because the defendant had not been a party to the American proceedings, it was not incorporated in America nor did it do business there, nor was its seat of management there. Further, to have granted the plaintiff's application would have been to have lent the aid of the Court to the enforcement of the American Securities Exchange Act, 1934 at the suit of a public officer. To have done so would have been counter to the principle that the courts will not enforce the penal laws of another country.

It should finally be noted that Goulding, J. said of *Houlditch* v. *Marquis of Donegal*:

> The essential grounds of the decision of the House of Lords, put into more modern language, seem to me to be as follows: the English proceedings against Lord Donegal were proceedings in personam, Lord Donegal had submitted to the jurisdiction of the English Court, therefore the English decree was binding on him unless shown to be wrong, and consequently the Irish Court should enforce his obligations thereunder.[21]

The cases in which the Court of Chancery enforced foreign judgments are few, although there are further cases where the Court of Chancery recognized foreign judgments as creating an estoppel.[22] If today one asks whether a party can obtain an equitable remedy to enforce a foreign judgment, say an injunction or an order for specific performance, the matter is not determined by examining the jurisdiction of the Courts of Law, but of the Court of Chancery. I

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[19] [1975] Ch. 273.

[20] Compare *Macaulay* v. *Guaranty Trust Co. of New York* (1927) 4 T.L.R. 99.

[21] [1975] Ch. 273 at 286.

[22] *White* v. *Hall* (1806) 12 Ves. 321; *Farquharson* v. *Seton* (1828) 5 Rus 45; *Henderson* v. *Henderson* (1843) 3 Hare 100; *Ricardo* v. *Garcias* (1845) 1 Cl. & F. 368; *Carl-Zeiss-Stiftung* v. *Rayner and Keeler* (*No. 2*) [1967] 1 A.C 853.

the Court of Chancery enforced foreign judgments in the course of its administration of deceased estates, and if it had jurisdiction to enforce a foreign judgment by the appointment of a receiver and the grant of an injunction to make the appointment effectual, why in principle would it have denied its assistance in any other type of case? The inference should be that unless a sufficient reason to the contrary is shown, any other part of equity's jurisdiction which is appropriate to enforce a foreign judgment may be invoked to do so.

If one turns to the cases cited by the textwriters for their restrictive proposition, it is noteworthy that in none of the English cases was doubt cast on the existence of an equitable jurisdiction to enforce a foreign decree. *Sadler* v. *Robins*[23] is the case usually cited to show that the only foreign judgments which are enforceable are those for a definite sum of money. Assumpsit was there brought on a decree of the Court of Chancery of Jamaica by which executors were ordered to pay certain sums to the plaintiffs after deducting their taxed costs. The action failed as the amount of costs to be deducted had not been fixed, and assumpsit would not lie as there was no sum certain. Lord Ellenborough, C.J. said that assumpsit would lie on an equitable decree for a sum certain as well as on a judgment at law.[24] No equitable remedy was sought in the proceedings and no reference was made to the jurisdiction of the Court of Chancery.

In *Henley* v. *Soper*[25] the Court of King's Bench allowed an action in debt on a decree of the Supreme Court of Newfoundland for money due on a partnership account. The action on the decree lay at law notwithstanding that no action at law was then maintainable in England for money due on a partnership account. The case is authority for the proposition that a decree in equity of a foreign court may give rise to an obligation to pay a sum certain enforceable at law, but says nothing as to the jurisdiction of the Court of Chancery to enforce foreign judgments and decrees.

In *Russell* v. *Smyth*[26] the Court of Exchequer allowed an action of assumpsit for a fixed amount of costs awarded in divorce proceedings in Scotland. This case also said nothing as to the jurisdiction of the Court of Chancery on foreign judgments.

Finally, in *Henderson* v. *Henderson*[27] the Court of Queen's Bench allowed an action in debt brought on a decree of the equity side of the Supreme Court of Newfoundland whereby a sum certain was found to be owing by the defendant to the plaintiffs on trust and executorship accounts. Lord Denman, C.J. said that the Court of Chancery had power to enforce foreign decrees and cited *Houlditch* v. *Marquis of*

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[23] (1808) 1 Camp. 253.
[24] *Ibid* at 255.
[25] (1828) 8 B. & C. 16.
[26] (1842) 9 M. & W. 810.
[27] (1844) 6 Q.B. 288.

Donegal[28] for that proposition. His Lordship held that the Court of Chancery and the Courts of Law exercised jurisdiction concurrently and where the foreign decree was for a sum certain, actions of debt or assumpsit would lie at law notwithstanding that the foreign decree related to equitable subject matter. His Lordship said:

> . . . The power of the Court of Chancery may exist without excluding that of other courts capable of giving a remedy as complete and much more expeditious. The decree of foreign Courts of Equity may indeed, in some instances, be enforceable nowhere but in Courts of Equity, because they may involve collateral and provisional matters to which a Court of Law can give no effect; but this is otherwise where the Chancery suit terminates in the simple result of ascertaining a clear balance, and an unconditional decree that an individual must pay it.[29]

The only case which applies the textwriters' proposition is *Bonn* v. *National Trust Co. Limited*.[30] The plaintiff had obtained judgment in the State of New York against a New York administrator of a deceased estate for $6,951.18 and sought to enforce the judgment against a defendant who had obtained letters of administration of the estate in Ontario. All five members of the Appellate Division of the Ontario Supreme Court held that there was no privity between the separate administrators and a judgment against one was not enforceable against the other. However as an additional ground of decision, Masten, J.A., with whom one other judge concurred, held that the New York judgment against the administrator must be presumed to be only against so much of the estate as he had in his hands to administer, and accordingly it was not for a sum certain. *Sadler* v. *Robins*[31] was the only authority in point which was cited to show the necessity that the foreign judgment be for a sum certain. The majority of the Court did not advert to the point.

Even this case may not be authority against the existence of an equitable jurisdiction on foreign judgments. There is no doubt that for a foreign judgment to be enforceable at law it must be for a fixed or ascertainable sum of money. It is only in equity that there may not be this requirement. One might suppose that as the New York Judgment in *Bonn* v. *National Trust Co. Limited* related to a deceased estate it would have been enforceable in equity had there been an identity of parties. But if that is wrong, and the only action lay at law, it would be unexceptionable to insist that the judgment be for a sum certain in money.

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[28] *Supra* n. 11.
[29] (1844) 6 Q.B. 288 at 297.
[30] [1930] 4 D.L.R. 820.
[31] *Supra* n. 23.

Although there is little to be said for the general view of the textwriters there is an argument against the existence of an equitable jurisdiction to enforce foreign judgments advanced by Professor Beale, namely that a court of equity could not treat a foreign judgment as conclusive on its merits as to do so would leave the door open to the possibility of injustice.[32]

Conclusiveness in Equity of a Foreign Judgment

In *Houlditch* v. *Marquis of Donegal* the House of Lords stressed that the Court of Chancery had jurisdiction to enforce foreign judgments because it could examine whether the judgments were rightly made. Since *Godard* v. *Gray*[33] was decided there has been no question that at law a foreign judgment is conclusive on its merits and cannot be impeached for error, even error on the face of the record or error in the application of English law. Does this mean that if foreign judgments are enforceable in equity it will be on different principles from those on which judgments for a fixed sum of money are enforced at law?

The short answer is that when *Houlditch* v. *Marquis of Donegal* was decided the preponderance of authority both at law and in equity was in favour of the view that a foreign judgment was not conclusive, but was only prima facie evidence of the plaintiff's cause of action.[34] Indeed three years after *Houlditch* v. *Marquis of Donegal* was decided the House of Lords held in an action for debt that a foreign judgment was only prima facie evidence of the cause of action.[35] Nevertheless in a line of subsequent authority[36] commencing with *Russell* v. *Smyth*[37] and concluding with *Godard* v. *Gray*[38] the Courts of Law developed the principle that a foreign judgment is enforced because the defendant is obliged by the judgment itself to obey it. It is this obligation which is enforced not the plaintiff's original cause of action and accordingly it is irrelevant whether the judgment was right or wrong. There is no suggestion during this period that equity would not follow the law in the principles on which foreign judgments should be enforced. In

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[32] *Treatise on the Conflict of Laws*, 1935, Vol. 2, at 1416-7.

[33] (1870) L.R. 6 Q.B. 139.

[34] *Bayley* v. *Edwards* (1792) 3 Swanst. 703 *per* Lord Camden, L.C.; *Phillips* v. *Hunter* (1795) 2 H. Black 402 *per* Eyre, C.J. at 410; *Hall* v. *Obder* (1809) 11 East 118; *Novelli* v. *Rossi* (1831) 2 B. & Adol. 757. Compare *Bayley* v. *Edwards per* Thomas Plumer, M.R.; *Becquet* v. *MacCarthy* (1831) 2 B. & Adol. 951; *Alivon* v. *Furnival* (1834) 1 Cr. M. & R. 277; and *Martin* v. *Nicolls* (1830) 3 Sim. 458.

[35] *Don* v. *Lippman* (1837) 5 Cl. & Fin. 1.

[36] *Russell* v. *Smyth* (1842) 9 M. & W. 810; *Williams* v. *Jones* (1845) 13 M. & W. 628; *Henderson* v. *Henderson* (1844) 6 Q.B. 288; *Bank of Australasia* v. *Nias* (1851) 16 Q.B. 717; *De Cosse Brissac* v. *Rathbone* (1861) 6 H. & N. 301; *Vanquelin* v. *Bouard* (1863) 15 C.B. (N.S.) 341; *Godard* v. *Gray* (1870) L.R. 6 Q.B. 139.

[37] *Supra* n. 36.

[38] *Supra* n. 36.

Reimers v. *Druce*[39] Sir John Romilly, M.R., accepted that he was bound by the authority of the Court of Queen's Bench in *Bank of Australasia* v. *Nias*[40] on the grounds on which a foreign judgment could be examined. Finally in *Godard* v. *Gray* itself, Blackburn, J. disapproved of Lord Brougham, L.C.'s opinion in *Houlditch* v. *Marquis of Donegal* that a foreign judgment was only prima facie evidence of the cause of action. Blackburn, J. did not distinguish Lord Brougham, L.C.'s opinion as applicable only to equity's jurisdiction.

If equitable remedies are available to enforce a foreign judgment on the basis that the defendant has an obligation to obey it, the foreign judgment must be conclusive on its merits. If the defendant's conscience is bound by the judgment, it is irrelevant to consider the original cause of action. The reasons in favour of a foreign judgment being conclusive on its merits are that public policy favours that there be an end to litigation, and a party who has once successfully asserted his claim ought not to be vexed by another proceeding on the same matter. Therefore it is desirable that the findings of fact in the foreign court not be the subject of review in enforcement proceedings. Moreover, if the foreign court applies its own law to the facts, it would be absurd for the court of the forum to hold that it was in error. If it applied a law different from its own on the principle that proof of foreign law is a question of fact, the finding of the relevant principles of law were findings of fact. It is a matter for the parties to bring forward as matters of evidence the relevant principles of law other than the *lex fori.* If the foreign court misapplies a principle of law other than its own, the party aggrieved is in no different position than if he failed to prove any other matter of fact. Whether that failure be the result of insufficient evidence being adduced, or a misapprehension of the evidence by the foreign court, the desirability that there be an end to litigation requires that the finding of the foreign court should only be disturbed by whatever appellate proceedings are available in the foreign country.

This reasoning applies equally well to the enforcement of foreign judgments in equity as it does to their enforcement at law. Accordingly there is little substance in the argument that no equitable cause of action lies on a foreign judgment because it might be unjust to treat it as conclusive. Moreover, equity has never objected to treating a foreign judgment as conclusive for the purpose of raising a cause of action estoppel or an issue estoppel.[41] There is no basis for treating a foreign judgment as less conclusive on a suit by a plaintiff to enforce it than on a defence to the plaintiff's claim.[42]

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[39] *Supra* n. 16.
[40] *Supra* n. 36.
[41] *Supra* n. 22.
[42] Such a distinction has been drawn, e.g. *Reimers* v. *Druce* (1857) 26 L.J. 198; *Phillips* v. *Hunter* (1795) 2 H. Black 402 *per* Eyre, C.J.; Story, *Conflict of Laws* at 743 *et seq.*, esp. at 749. But compare *Carl-Zeiss-Stiftung* v. *Rayner and Keeler* (*No. 2*) [1967] 1 A.C. 853 *per* Lord Wilberforce at 965-6.

Of course there might be other matters, such as laches, that would make it inequitable to enforce a foreign judgment, and these are dealt with below. These matters however go to the defences that can be raised to an equitable action on the judgment, they do not prevent there being a cause of action.

As has been shown above,[43] it has been held that a foreign equitable decree may give rise to an obligation enforceable by an action at law where the decree requires the payment of a fixed or ascertainable sum of money. There is no reason in principle why that obligation should not be created by an equitable decree which requires the doing of any other act. It does not matter that the decree might have been discretionary. The only relevant circumstance is that the foreign court, having jurisdiction over the defendant, has made an order which he is obliged to obey. The considerations behind the judgment, be they legal or equitable, or considerations of a system of law which does not know that distinction, are irrelevant. It should follow that not only may equitable remedies be sought to enforce a foreign judgment, but the judgment will be enforced in equity on the same principle of obligation as would apply if it were sought to be enforced at law.

Which Foreign Judgments Will be Enforced in Equity?

It was held by the English Court of Appeal in *Perry* v. *Zissis*[44] that equitable execution, in the form of the appointment of a receiver of the defendant's assets in the jurisdiction, is not an available means of executing a foreign judgment for the payment of money which had not (and could not have been) registered under the Foreign Judgments (Reciprocal Enforcement) Act, 1933 (U.K.). The plaintiff was required first to sue on the foreign judgment in the forum. Execution might then issue on the judgment of the court of the forum given in the enforcement proceedings. That form of execution was also held not to be available to enforce an interim foreign writ of attachment. That is, the means of execution available to a judgment creditor in an Australian State or Territory are only available to judgments of the courts of that State or Territory or to judgments which pursuant to legislation may be registered and enforced as a judgment of the State or Territory. Of course, the critical issue for present purposes is in what cases a judgment of the court of the forum may be obtained to enforce rights under a foreign judgment.

In many cases a judgment which requires or enjoins the doing of some act has a territorial limitation. If a court of country A orders a defendant to do some act in that country, or enjoins him from certain conduct in that country, obviously the judgment cannot be

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[43] *Supra* n. 36.

[44] [1977] 1 Lloyd's Rep. 607. In *The Siskina* [1977] 3 All E.R. 803 at 814, Lord Denning, M.R. said he was not sure that the case was correctly decided.

relied upon by a plaintiff in an Australian State to compel the defendant to do or enjoin him from doing that act in that State. If it could, the judgment would be altered not enforced. The judgment could still be enforced in Australia, as for example, if the defendant removed himself from Country A to, say, New South Wales, the New South Wales Supreme Court could order him to do or enjoin him from doing that act in country A.

Although an order that a defendant pay damages to a plaintiff may only be enforced by the court making the order within its territorial jurisdiction, nevertheless, the obligation of the defendant to pay the money is often not restricted to effecting payment within that territory, and thus can be enforced by a foreign court. Where the order in question requires or enjoins the doing of an act other than the payment of money it will be necessary to determine whether the defendant's obligation is restricted to doing the act or refraining from conduct within the territorial jurisdiction of the foreign court. For example, if an English court requires a defendant to execute a transfer of property, that order could be enforced in, say, New South Wales, by the New South Wales Supreme Court ordering the defendant to execute that transfer. However, if in a passing off suit an English court restrains a defendant from advertising or selling his product in a particular form, it will be unlikely that the court's order was intended to extend beyond England, and to restrain such conduct in Australia would be to extend, not to enforce the order. In each case it will be necessary to decide what is the nature and extent of the defendant's obligation under the order of the foreign court. To do that it may be necessary to go behind the foreign judgment and examine the cause of action: not to see if the foreign court judged rightly, but to see precisely what was adjudged.

If it appears that the foreign court purported to bind the defendant's conduct outside its territorial jurisdiction, although the defendant will have an obligation to obey the judgment, the further question will then arise whether there are reasons of public policy for refusing to enforce the foreign judgment. In some cases the enforcement of a foreign judgment regulating activities in the enforcing State, while not a derogation of sovereignty of the enforcing State (for the judgment takes effect only through the agency of the enforcing court), would be an impermissible impairment of activities conducted in that State, or interference with interests protected by it. This presumably is the reason for the Foreign Anti-Trust Judgments (Restriction of Enforcement) Act, 1979. In this context the variety of foreign judgments which may be denied enforcement may not be limited to those judgments which give effect to the penal or revenue laws of the foreign state. For example, an injunction issued by a foreign court restraining the publication anywhere of what was there adjudged to be a defamation, might be refused enforcement on the grounds of public policy.

It is not the purpose of this article to attempt to define the cases in which a foreign judgment might be refused enforcement on the grounds of public policy.[45] The difficulties can be illustrated by examining one category of case; the enforcement of foreign judgments affecting land situated within the enforcing state.

Foreign Judgments Affecting Land

Dicey & Morris[46] state a rule that a foreign court has no jurisdiction to adjudicate upon the title to, or the right to possession of, any immovable situate outside that countrry. In the commentary upon this rule the learned editors note that it rests on slender authority and its scope is a matter of doubt. The rule reflects the decision in *British South Africa Co.* v. *De Companhia de Mocambique*[47] which imposes the same limitation on the jurisdiction of English and Australian courts, but it does not reflect the doctrine known as *Penn* v. *Lord Baltimore*[48] whereby English and Australian courts exercise jurisdiction to enforce personal equities notwithstanding that the title or right to possession of foreign land is affected.

It is clear that where a foreign court purports to deal with land situated in the enforcing state otherwise than in the course of enforcing personal rights in respect of the land, its judgment will not be recognized or enforced in Australia. In *Boyse* v. *Colclough*[49] it was held that a decree of the Court of Cancery in Ireland deciding against the validity of a will relating to realty in England could not be set up as a bar to an English suit. The judgment created no estoppel to prevent the devisee establishing the validity of the will and claiming his rights to the land under it.

The critical question is whether jurisdiction in the international sense should be conceded to the foreign court in respect of its enforcement of personal rights over land outside its territorial jurisdiction.

In *Houlditch* v. *Marquis of Donegal*[50] the decree of the English Court of Chancery for the appointment of a receiver over land in Ireland was held to be entitled to enforcement by the Irish Court of Chancery. The plaintiff did not seek the appointment of the receiver so as to alter the title to the land but merely to receive payment from the rents and profits of the land. Nevertheless the House of Lords held that the English decree was made in the exercise of the Court's

[45] Guidance may be found in Article 16 of the E.E.C. Convention on Jurisdiction and Enforcement of Judgments: Bulletin of the European Communities, supplement to 2/1969; *cf.* Committee's Report, Bulletin of the European Communities, supplement to 12/1972.

[46] *Op. cit. supra* n. 6, rule 183, at 1016.

[47] [1893] A.C. 602.

[48] (1750) 1 Ves. Snr. 444.

[49] (1854) 1 K. & J. 124.

[50] *Supra* n. 11. *Cf. Norris* v. *Chambres* (1861) 3 De G. F. & J. 583 *per* Lord Campbell, L.C. at 585.

jurisdiction under the doctrine of *Penn* v. *Lord Baltimore*. It does not follow that the case is authority in favour of enforcing foreign land decrees, for much stress was placed on the fact that the English decree would be treated as only *prima facie* evidence of the plaintiff's cause of action. Lord Brougham, L.C. said:

> All these cases show that acting *in personam,* that is, through the medium of its power over the person, the courts of equity in this country mediately, though not immediately, affect the rights of real property abroad. They cannot immediately affect it, because their decree does not bind the land. If the principle which is contended for were true — that they are conclusive before the court, because they are actually binding and of the force of judgments in the foreign country — in that case we can bind their land by a judgment here, and they can bind our land by a judgment there. That I hold, for the reasons I have already assigned, is not the law.[51]

This passage could be taken as authority that if a foreign judgment which affects rights over land situated in the enforcing state is conclusive on its merits it cannot be enforced. It is submitted however that it would be wrong to do so. It does not follow from treating a foreign judgment as conclusive on its merits that the judgment by its own force can bind the land situated in the enforcing state. The question is whether the foreign judgment will be enforced by the court of the state where the land lies, so that the title to the land is affected by the order of the court of the *situs.*

The leading decision is that of the Supreme Court of Canada in *Duke* v. *Andler*.[52] There the Court refused to enforce a judgment of the Superior Court of California which had, on grounds of fraud and breach of contract, ordered the defendants to reconvey land situated in British Columbia to the plaintiffs. The purchaser of the land, Mr Duke, had agreed to secure payment of the balance of the purchase price by giving a mortgage over certain land in California. Contrary to his agreement with the plaintiffs, the land in California was subject to an additional encumbrance. Mr Duke then fraudulently conveyed the property in British Columbia to his wife. The Californian Court ordered the defendants to reconvey the land to the plaintiffs, and in the event of their failing to comply with the order, it directed the Clerk of the Court to execute the conveyance. A conveyance was executed by the Clerk of the Court, and the plaintiffs sought and obtained a declaration from the Supreme Court of British Columbia that by virtue of the Californian judgment and the conveyance made pursuant to it, the plaintiffs were the owners of the land. The order was varied by

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[51] *Ibid.* at 344.
[52] [1932] 4 D.L.R. 529.

the Court of Appeal of British Columbia which, while not conceding that the Californian Court could itself directly affect the title to the land, nevertheless enforced that judgment by itself making an order for the vesting of the property in the plaintiffs. The Supreme Court of Canada however allowed the appeal, and refused to enforce the Californian judgment.

The Court noted the general principle that rights in respect of land should be determined by the *lex situs* and by the courts of the situs. It then noted that an English Court (and a Court of British Columbia) has jurisdiction to enforce rights affecting foreign land which are based on contract, fraud, or trust, where the defendant is resident in the jurisdiction. In so acting however the Court would apply its own law to determine the parties' rights, not the law of the situs. It must be presumed that the Californian Court so acted. This jurisdiction however can only be exercised *in personam*, and neither the Californian judgment nor the conveyance executed by the Clerk of the Court could directly affect the title to the land. Nor should the Court lend its aid to carry the foreign judgment into effect by itself vesting the title to the land in the plaintiffs, as to do so would be to give the Californian judgment an effect *in rem* whereas it can only operate *in personam*. This last point is not entirely clear but seems to be what is meant by the following passage:

> In my opinion the rules stated by Dicey quoted above, that the Courts of a foreign country have no jurisdiction to adjudicate upon the title or right to the possession of any immovable not situate in such country, and the statement in the authorities referred to, that controversies in reference to land can only be decided in the state in which it depends, and that judgments of foreign Courts purporting to deal with the title and with rights to lands in another country can only be enforced by proceedings *in personam,* show that the judgment of the Court of California here in question does not, in British Columbia, affect the title to the lands in question, and is not a judgment that should be enforced by the Courts of British Columbia as binding there on the parties.[53]

The Court seems to have held that to enforce a foreign judgment which determines the parties' rights to the land, in effect would allow the foreign court to bind the land, which it cannot do. It is interesting to note in passing that the Court did not simply hold the Californian judgment unenforceable because it was not for a sum certain in money.

There is a confusion in the judgment which results from the sense in which jurisdiction is conceded to the foreign court. It is noted that the Court of British Columbia has jurisdiction to enforce personal

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[53] *Ibid.* at 541.

equities affecting foreign land. This is jurisdiction in the domestic sense: jurisdiction which the enforcing court assumes for itself. The Supreme Court assumes that the Californian Court was exercising a like jurisdiction, and appears to have conceded that in the international sense the Californian Court had jurisdiction to enforce rights *in personam* over land outside its territory. Neverthless a judgment given in the exercise of that jurisdiction was refused enforcement lest the foreign court have power to bind the land itself and thereby have an effect not only *in personam* but *in rem.* However if the foreign judgment is ever to be effective it must indirectly affect the title to the land. If the judgment is obeyed by the defendant, the title will be affected through the defendant's conveyance. The question is whether the foreign judgment can indirectly take effect through the agency of the court of the situs of the land. For the court of the situs to enforce the judgment is not to give the foreign court any power to enforce its judgment otherwise than against the person of the defendant. It seems difficult on the one hand to concede jurisdiction to the foreign court to exercise a jurisdiction *in personam,* but to refuse to make effective a judgment given in the exercise of that jurisdiction.

The question then is whether the enforcing court should recognize that, in the international sense, the foreign court had jurisdiction to enforce personal rights affecting land outside its territory. The Supreme Court of Canada in *Duke* v. *Andler* ought to be taken to have denied such jurisdiction to the Californian Court for the reason that all rights affecting land should be determined by the courts of the situs.

The decision for an Australian court as to whether jurisdiction should be conceded in the international sense to a foreign court in respect of its adjudication of personal rights over land situated in the enforcing state, is essentially a decision to be based on policy. What are the policy considerations?

This question has been debated by American writers[54] who have discussed the question whether the judgment of a court of one American State enforcing personal rights over land situated in another is entitled to full faith and credit in the latter State. Their discussion shows that decisions of the United States' Supreme Court[55] which were partly relied upon by the Supreme Court of Canada in *Duke* v. *Adler* are

[54] Especially Barbour, "The Extra-Territorial Effect of the Equitable Decree" 17 *Mich. L.R.* 527; Lorenzen, "Application of Full Faith and Credit Clauses to Equitable Decrees for the Conveyance of Foreign Land" 34 *Yale L.J.* 591; Currie, "Full Faith and Credit to Foreign Land Decrees" 21 *Uni. of Chicago L.R.* 620; Hancock, "Full Faith and Credit to Foreign Laws and Judgments in Real Property Litigation: The Supreme Court and the Land Taboo" 18 *Stanford L.R.* 1299; *Ehrenzweig on Conflict of Laws,* at 209 *et seq.*; Goodrich, *Conflict of Laws* (4th ed.) sec. 218 esp. at 412 *et seq.*

[55] *Carpenter* v. *Strange* (1891) 141 U.S. 87; 35 L.Ed.640; *Fall* v. *Eastin* (1909) 215 U.S.1; 54 L.Ed.65.

not conclusive of the issue.[56] The major point made by the American writers is that where the defendant obeys the judgment of the foreign court and executes a conveyance of the land (if that is what was ordered), the validity of that conveyance cannot be attacked. It cannot be said for example, that the conveyance is void for duress. If that result is observed with equanimity, what policy dictates that a contumacious defendant be allowed to avoid his obligation under the foreign judgment?

It was said in *Duke* v. *Andler* that an objection to enforcing the foreign judgment is that the foreign court would not have applied the *lex situs* in determining the parties' personal rights over the land. But is the *lex situs* necessarily the appropriate law to determine these matters? A party's rights under a contract affecting land depend on the proper law of the contract, which is often the *lex situs*, but need not be. If English law is still correctly stated in *Re Courtney; ex parte Pollard*[57] when an English or Australian Court enforces other personal equities affecting foreign land pursuant to the doctrine of *Penn* v. *Lord Baltimore*,[58] the *lex fori* is applied to determine those personal equities. That might or might not be the case with other countries. If it is not essential that the *lex situs* determine personal rights in respect of land, a major reason for requiring the dispute to be heard in the courts of the situs is removed.

There are however practical difficulties which would arise if the foreign judgment were enforceable. How would its enforcement affect the Comonwealth's control over foreign investment? What would be the nature of the interest held by a party entitled to the benefit of a foreign judgment directing a conveyance to him? Would he be able to assert an interest in the land against a purchaser who took the land with notice of the foreign judgment before enforcement proceedings began or were decided? Would such a party have an interest which could be protected by a caveat? These may not be insuperable difficulties. The position of such a party would seem to be analogous to the position of a person who had a contractual right against the other party to the proceedings.[59] The position would be more complex if the remedy prescribed by the foreign court was of a kind not known to the *lex situs*. However the enforcing court should still be able to give such remedy as would best give effect to the right of the party entitled to the benefit of the foreign judgment, and the interest which such a party would have in the land prior to any order being made by the enforcing court would depend upon what remedy the enforcing

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[56] Esp. Currie, *supra* n. 54. For trend of decisions at lower court level in the United States see American Law Institute, *Second Restatement, Conflict of Laws*, (1971) Ch. 5, s. 102.

[57] (1840) Mont & Ch. 239.

[58] *Supra* n. 48.

[59] *Cf. Fall* v. *Eastin* (1909) 54 L. Ed. 65 *per* Holmes, J. at 72.

court might give. Certainly the judgment of the foreign court could not operate to create an inteerst in land of a kind unknown to the *lex situs*.

These are policy considerations on which no confident conclusion can be reached. There may be complications and difficulties in enforcing such foreign judgments, but on the other hand there may be advantages which should not be ignored. If the proper law for the sale of land in New South Wales is New Zealand law, and a New Zealand Court orders specific performance of the contract, there is little to be said in favour of requiring the plaintiff to relitigate the original issues in New South Wales in order to have the contract performed.

Defences

The next issue is whether there are special defences available to the enforcement of a foreign judgment in equity. Generally the rules that are applicable to enforcing a foreign judgment for a sum of money will apply to enforcing a foreign judgment by equitable remedies. Thus the grounds on which a foreign court has jurisdiction over the defendant, the requirement of identity of parties in each suit, and the defence that the judgment was obtained contrary to the principles of natural justice, or (if it be in a defence) substantial justice, will apply equally in equity as they do at law. Again, the discovery of new material evidence after the foreign court has given judgment is not a sufficient ground for refusing to enforce its judgment either at law[60] or in equity,[61] even though the evidence could not through reasonable diligence have been made available to the foreign court. The parties seeking to rely on such evidence must apply to set aside the judgment through whatever procedure is available in the foreign jurisdiction.

Generally also the requirement that a foreign judgment be final and conclusive would apply to its enforcement in equity.[62] However there could be exceptions to that rule. If the foreign court granted an interlocutory injunction to restrain the defendant from pursuing a course of conduct in an Australian State which would be entitled to enforcement if it were a final injunction, should it be refused enforcement because it was not final and conclusive? It may well be argued that the interlocutory injunction made by the foreign court should be enforced in Australia unless and until it is altered by the foreign court. Although there is no authority to support such an argument it should be borne in mind that in the passage quoted above[63], Lord Denman C.J. in *Henderson* v. *Henderson* referred to foreign equitable decree

[60] *De Crosse Brissac* v. *Rathbone* (1861) 6 H. & N. 301.

[61] *In re Truffort; Trafford* v. *Blanc* (1887) 36 Ch.D.600.

[62] *Paul* v. *Roy* (1852) 15 Beav. 433; *Perry* v. *Zissis* [1977] 1 Lloyd's Re 607.

[63] *Supra* n. 29.

being enforceable in equity though not at law because they may involve collateral and provisional matters. It is arguable that an interlocutory injunction is a provisional matter which might be enforceable in equity.

There is no distinction between the jurisdiction in equity and at law in respect of a judgment procured through fraud.[64] Such a judgment is a nullity. In *Larnach* v. *Alleyne*[65] Chapman, J. in the Supreme Court of Victoria held that a foreign judgment is also voidable on the ground of equitable or constructive fraud. The decision is not a strong one as the authorities cited by His Honour do not sustain the proposition, and the case could have been decided on other grounds.[66] In principle however it is conceivable that the act of obtaining a judgment from a foreign court could constitute a breach of fiduciary duty. That would be so, for example, if the natural forum was the court of an Australian State, but resort was had to a foreign court to define the extent of a fiduciary duty in the expectation that less rigorous standards would be applied than those which the Australian court might be expected to apply. Presumably it would be unconscionable to rely upon or enforce such judgment.

The most important special consideration arises from the nature of equitable remedies. The general rule is that the law governing remedies as distinct from the cause of action is the *lex fori*. Thus where an equitable remedy is sought to enforce a foreign judgment, defences that go to the availability of the remedy rather than the validity of the cause of action on the foreign judgment, are determined by the law of the enforcing state. Equitable relief will be refused if the plaintiff is guilty of laches,[67] and presumably such defences as hardship, or the necessity for the continual supervision by the court of its order, will be available. As all equitable relief is discretionary, a plaintiff who engaged in forum shopping in obtaining the foreign judgment could be denied equitable relief upon it. The distinction between the remedy and the cause of action on the judgment could be difficult to draw. However that issue will always arise when an equitable remedy is sought to enforce a right governed by foreign law and is not peculiar to the enforcement of foreign judgments. Accordingly it need only be mentioned here.

Conclusion

The existence of the equitable jurisdiction on foreign judgments raises some difficult questions, especially in relation to the kinds of foreign judgments which ought to be denied enforcement because they infringe upon the interests of the enforcing State. If a plaintiff seeking an equitable remedy on a foreign judgment was in the position of

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[64] *Ochsenbein* v. *Papelier* (1873) L.R. 8 Ch. 695.
[65] (1862) 1 W. & W. (Eq.) 342.
[66] The capacity in which the parties litigated the two suits was not identical.
[67] *Reimers* v. *Druce* (1857) L.J. Ch. 196.

asking the court to take a new step in developing the law to admit his claim, the court might feel that the safer course was to leave the making of new law to Parliament. But that is not the plaintiff's position. Principle and authority show that there is an equitable jurisdiction on foreign judgments, and that cannot be ousted by statements in textbooks that the limitations of the old forms of action of debt and assumpsit mean that only foreign judgments for a fixed sum of money can be enforced. Consequently the difficulties inherent in equity's jurisdiction must be faced. It is also time that the benefits from the exercise of that jurisdiction were realized.