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Recognition and Enforcement of Foreign Judgments - The Common Law's Jurisdiction Requirement

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ABSTRACT

A judgment will be enforced or recognised in other nations or states only if the court that issued the judgment had “jurisdiction in the international sense”. For recognition or enforcement of a judgment in personam, the foreign court must have
had jurisdiction over the party against whom the judgment is to be enforced or otherwise applied. This is governed by the conflict of laws doctrine of the court where recognition or enforcement is sought. The law on what is a basis for jurisdictional “competence” is one of the most important elements of conflict of laws. The rules set forth in successive editions of Dicey’s Conflict of Laws treatise have long guided courts in England and most other countries in which common law doctrines govern recognition of foreign judgments. However, the rules in the Dicey treatise are intended to state contemporary English law, as altered by judicial decisions and legislation. They do not necessarily state the common law as interpreted in other countries, from which many of the relevant judicial decisions originate, and they omit bases of jurisdiction that have been accepted in some cases. Drawing on case law and authoritative writing from across the common law world, this article provides a comprehensive examination of the law of jurisdiction in the recognition and enforcement of in personam foreign judgments, with specific identification of both established and debatable grounds for jurisdiction and how they have been applied.

Introduction

The fundamental requirement of the common law for enforcement or recognition of a foreign court’s judgment is that the court have jurisdiction “in the international sense”. A foreign judgment will be enforced or recognized only if the court had jurisdiction on a basis considered sufficient for the exercise of judicial power under the private international law (conflict of laws) doctrine of the place where recognition is sought. For recognition of a judgment in personam (as distinct from a judgment in rem or judgment adjudicating status), the foreign court must have had jurisdiction “in the international sense” over the party against whom the judgment is to be enforced or otherwise applied.¹

The current edition of Dicey, Morris and Collins on the Conflict of Laws states:

[A] court of a foreign country...has jurisdiction to give a judgment in personam capable of enforcement or recognition as against the person against whom it was given in the following cases:

First case – If the person against whom the judgment was given was, at the time the proceedings were instituted, present in the foreign country.

Second case – If the person against whom the judgment was given was in claimant, or counterclaimed, in the proceedings in the foreign court.

Third case – If the person against whom the judgment was given, submitted to the jurisdiction of that court by voluntarily appearing in the proceedings.

Fourth case – If the person against whom the judgment was given, had before the commencement of the proceedings agreed, in respect of the subject matter of the proceedings, to submit to the jurisdiction of that court or of the courts of that country.  

The “Dicey Rule” has been treated as canonical in England and elsewhere. However, it has changed over time, it has been based in part on UK legislation, and it does not reflect other possible bases of jurisdiction that have been accepted in some cases.

This article will set forth what the common law (the law without specific alteration by statute) has been and now is on the subject of “jurisdiction in the international sense”. Drawing on case law and authoritative writing from across the common law world, the article will identify and examine established and debatable grounds for jurisdiction and how they have been applied. As will be seen from references to cases in courts outside England and writings on conflict of laws in countries other than England, for some countries the law on jurisdictional “competence” is or may be different from what is stated in the current version of the Dicey Rule.

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2 Dicey (n 1) 689-690 (Rule 43).
3 See Rubin v Eurofinance SA [2012] UKSC 46, [2013] 1 AC 236. The principal judgment in Rubin was delivered by Lord Collins of Mapesbury, the general editor of the Dicey treatise.
6 Administration of Justice Act 1920, c 81, s 9(2) (UK); Foreign Judgments (Reciprocal Enforcement) Act 1933, c 13, s 4(2) (UK).
7 These are, however, discussed in an extensive comment in the Dicey treatise. Dicey (n 1) 690-709.
8 See n 1.
9 This article draws upon and applies to the law in “mixed” common law/civil law legal systems, such as those of Scotland and South Africa, as well as the law in legal systems founded on common law only. In most respects the relevant law of the mixed jurisdictions is similar to that of common law jurisdictions. See Scotland: Pick v Stewart, Galbraith & Co Ltd (1907) 15 SLT 447 (OH); AE Anton, Private International Law (3d ed PR Beaumont and PE McElevy 2011) 377-383; South Africa: De Naamloze Vennootschap Alintex v Von Gerlach 1958 (1) SA 13 (T); Forsyth (n 1) 421-438; Christian Schulze, On Jurisdiction and the Recognition and Enforcement of Foreign Money Judgments (2005) 17-26. The article does not include the United States, where the common law jurisdictional requirements for recognition of foreign judgments have been eclipsed by Hilton v Guyot (1895) 159 US 113, and the “minimum contacts” rule of International Shoe Co v Washington (1945) 326 US 310.
Foundations of the Dicey Rule and grounds for jurisdiction

The Dicey Rule, as expressed in numerous editions of Dicey’s Conflict of Laws, stems mainly from cases decided in the late nineteenth and early twentieth centuries – primarily Schibsby v Westenholz,10 Rousillon v Rousillon,11 Sirdar Gurdayal Singh v Rajah of Faridkote,12 and Emanuel v Symon.13 The court’s judgment in Schibsby v Westenholz, delivered by Blackburn J, stated:

...If the defendants had been at the time of the judgment subjects of the country whose judgment is sought to be enforced against them, we think that its laws would have bound them. Again, if the defendants had been at the time when the suit was commenced resident in the country, so as to have the benefit of its laws protecting them, or, as it is sometimes expressed, owing temporary allegiance to that country, we think that its laws would have bound them.

If at the time when the obligation was contracted the defendants were within the foreign country, but left it before the suit was instituted, we should be inclined to think the laws of that country bound them; though before finally deciding this we should like to hear the question argued....

...[W]e think it clear, upon principle, that if a person selected, as plaintiff, the tribunal of a foreign country as the one in which he would sue, he could not afterwards say that the judgment of that tribunal was not binding upon him.14

Blackburn J acknowledged authority to the effect that a foreign judgment was binding on a defendant who voluntarily appeared in the case15 but left open the question of whether a judgment bound a defendant who appeared only “to try to save some property in the hands of the foreign tribunal”.16 There might be additional grounds for “holding a person bound by a judgment”, but “we doubt very much whether the possession of property, locally situated in that country and protected by its laws, does afford such a ground”.17 The fact that English courts were empowered to summon “foreigners” to appear and grant judgments against them by default, in circumstances similar to the case in the foreign tribunal, was not a ground for enforcing a foreign judgment. The principle on which foreign judgments were enforced was not “comity” but rather the duty or obligation imposed by the judgment of a court of “competent jurisdiction”.18 None of the accepted grounds of jurisdiction existed in Schibsby v Westenholz, so the judgment of a French tribunal was not enforced.

10 (1870) LR 6 QB 155.
11 (1880) 14 Ch D 351.
12 [1894] AC 670 (PC).
13 [1908] 1 KB 302 (CA).
14 Schibsby v Westenholz (1870) LR 6 QB 155, 161.
15 De Cosse Brissac v Rathbone (1861) 16 H & N 301 (Exch), 158 ER 123, 30 LJ Ex 238.
16 Schibsby v Westenholz (1870) LR 6 QB 155, 162.
17 Ibid 163. A court could execute process against the property, but the judgment would not impose upon its owner a duty or obligation.
18 Ibid 159.
In Rousillon v Rousillon, Fry J, sitting alone, declared: The Courts of this country consider the defendant bound where he is a subject of the foreign country in which the judgment has been obtained; where he was resident in the foreign country when the action began; where the defendant in the character of plaintiff has selected the forum in which he is afterwards sued; where he has voluntarily appeared; where he has contracted to submit himself to the forum in which the judgment was obtained, and possibly, if Becquet v. MacCarthy be right, where the defendant has real estate within the foreign jurisdiction, in respect of which the cause of action arose whilst he was within that jurisdiction.

This excluded the defendant’s being in the foreign country at the time the obligation sued upon was contracted, which had been tentatively accepted as a ground of jurisdiction in Schibsby v Westenholz.

Sirdar Gurdyal Singh v Rajah of Faridkote arose from actions brought by the Rajah of Faridkote in a court of British India to enforce two judgments the Rajah had obtained in a court of his own state. One judgment was in a suit to recover an amount allegedly lost to the Rajah’s treasury because of defalcations when the defendant was the treasurer. The other judgment was to recover an amount the defendant had received from the State of Faridkote and the price of some property in Lahore. The defendant was never domiciled in Faridkote, and he had left the state without any intention of returning before the suits in Faridkote were instituted.

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19 (1880) 14 Ch D 351.
20 (1831) 2 B & Ad 951 (KB), 109 ER 1396.
21 Rousillon v Rousillon (1880) 14 Ch D 351, 371.
22 The exclusion is apparently attributable to Copin v Adamson (1874) LR 9 Ex 345, more fully reported in 43 LJ Ex 161, 31 LT 242, aff’d (1875) 1 Ex D 17 (CA). The defendant in Rousillon v Rousillon, who was sued on a judgment of a court in France, had made a contract with the plaintiffs during a short stay in France. Fry J noted that the defendant did not intend to reside in France and the parties did not contemplate performance of the contract in France. Rousillon v Rousillon (1880) 14 Ch D 351, 371.
23 [1894] AC 670 (PC).
24 The appellant in the case was the treasurer’s son, the treasurer having died during the litigation, but apparently this was of no consequence to the decision. Judges have decided or assumed that enforcement of a foreign judgment against the representative or successor of a deceased person depended on whether the foreign court had jurisdiction over the deceased. See Mattar v Public Trustee (Administrator of Coudsi Estate) [1952] 3 DLR 399 (Alta AD), (1952) 5 WWR 29, aff’g (1951) 3 WWR 287 (Alta SC); Andhra Bank Ltd v Srinivasan [1962] 3 SCR 391, AIR 1962 SC 232.
25 Although the facts of the original lawsuits are unusual, the case is representative of the many actions to enforce a judgment from one of the numerous territories and native states of pre-independence India in another territory or state. As “foreign” judgments, they could be recognised and enforced only if the court that issued the judgment had jurisdiction in the international sense. See Sirdar Gurdyal Singh v Rajah of Faridkote [1894] AC 670 (PC) 682-683; Veeraraghava Ayyar v Muga Sait (1914) ILR 39 Mad 24 (FB) sub nom Veeraraghava Iyer v Muga Sait AIR 1915 Mad 486; Vareed v Ramabai Gopalbai Patel ILR 1954 Tra-Co 694 (FB) sub nom Vareed v Gopalbai Bahubai Patel Rambai Gopalbai Patel AIR 1954 Tra-Co 358; Raj Rajendra Sardar Maloji Marsingh Rao Shitole v Sri Shankar Saran [1963] 2 SCR 577 sub nom...
The Chief Court of the Punjaub held that the Faridkote court was a court of “competent jurisdiction” because the obligation sued upon arose out of a contract that was made by the defendant while resident in Faridkote and to be fulfilled there. This decision was reversed by the Judicial Committee of the Privy Council. The Privy Council’s judgment, delivered by the Earl of Selborne, stated:

...[T]here was, in their Lordships’ opinion, nothing to take this case out of the general rule, that the plaintiff must sue in the Court to which the defendant is subject at the time of suit....All jurisdiction is properly territorial....Territorial jurisdiction attaches (with special exceptions) upon all persons either permanently or temporarily resident within the territory while they are within it; but it does not follow them after they have withdrawn from it, and when they are living in another independent country....[N]o territorial legislation can give jurisdiction which any foreign Court ought to recognise against foreigners, who owe no allegiance or obedience to the Power which so legislates.

In a personal action...a decree pronounced in absentem by a foreign Court, to the jurisdiction of which the defendant has not in any way submitted himself, is by international law an absolute nullity. He is under no obligation of any kind to obey it; and it must be regarded as a mere nullity by the Courts of every nation except (when authorized by special local legislation) in the country of the forum by which it was pronounced.

These are doctrines laid down by all the leading authorities on international law;...and no exception is made to them, in favour of the exercise of jurisdiction...by the Courts of the country in which the cause of action arose, or (in cases of contract) by the Courts of the locus solutionis. In those cases, as well as all others, when the action is personal, the Courts of the country in which a defendant resides have power, and they ought to be resorted to, to do justice.

In response to the contention that the judgment in Schibsby v Westenholz had accepted that a foreign court’s judgment was to be treated as binding when the obligation sued upon was contracted when the defendant was in the foreign country, Lord Selborne said:

[T]he laws of the country in which an obligation was contracted might bind the parties, so far as the interpretation and effect of the obligation was concerned, in whatever forum the remedy might be sought. [Blackburn J] had not to consider whether it was a legitimate consequence from this, that they would be bound to submit, on the footing of contract or otherwise, to any assumption of jurisdiction over them in respect of such a contract, by the tribunals of the country in which the contract was made, at any subsequent time, although they might be foreigners resident abroad. That question was not argued, and did not arise, in the case then before the Court....[T]heir Lordships do not doubt that, if

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27 Ibid 683-684.

28 See the passage quoted at n 14.
[Blackburn J] had heard argument upon the question, whether an obligation to accept the forum loci contractus, as having, by reason of the contract, a conventional jurisdiction against the parties in a suit founded upon that contract for all future time, wherever they might be domiciled or resident, was generally to be implied, he would have come (as their Lordships do) to the conclusion, that such obligation, unless expressed, could not be implied.29 In substance, it was not a ground for jurisdiction that the cause of action arose in the foreign country or that the contract was made there.30 Moreover, an agreement that the place of contracting would have jurisdiction in a suit founded on the contract would not be implied from a contract.

In Emanuel v Symon,31 the defendant had entered a partnership with five other persons for the purpose of developing a gold mine in Western Australia. At the time, the defendant resided in Western Australia and carried on business there. Subsequently, he left Australia and went to live in England. A few years after his departure, the other partners brought suit against the defendant in the Supreme Court of Western Australia for a dissolution of the partnership, sale of the mine and an accounting. The partnership was found to have liabilities in a certain amount, which the plaintiffs paid. They then sued the defendant in England to recover one-sixth of that amount as the defendant’s share of the liabilities. The defendant contended that the Australian court had no jurisdiction over him, so he was not bound by the court’s order or finding.

The principal issues of Emanuel v Symon were whether a foreign court had jurisdiction on the ground that the action arose from the defendant’s ownership of real estate within the foreign country and whether the defendant’s entering a partnership for the operation of a mine in Western Australia was to be taken as an agreement to submit to the jurisdiction of the courts of Western Australia in litigation of partnership disputes. All of the judges of the Court of Appeal decided that no such agreement was to be implied from entering the partnership contract.32 This conclusion was based primarily on Sirdar Gurdyal Singh v Rajah of Faridkote, in which the Privy Council had decided that a defendant did not, by reason of having made a contract in a foreign country, submit to the jurisdiction of the country’s courts.33 The judges were also unanimous in rejecting ownership of real property as a ground for jurisdiction in personam in litigation involving the property. The old case of Becquet v Mac Carthy34 appeared to accept that a foreign court had jurisdiction in an action for damage to real property in the foreign country. But the Privy Council’s judgment in Sirdar Gurdyal Singh stated that the correct explanation of Becquet v Mac Carthy was that

“the defendant held a public office [Deputy Paymaster of Her Majesty’s Forces in Mauritius] in the very colony in which he was originally sued.” He still held that office at the time when he was sued; the cause of action arose out of,

30 Whether the case was one of contract or tort was, in the Privy Council’s view, immaterial to the question of jurisdiction. Ibid 683.
31 [1908] 1 KB 302 (CA).
32 Ibid 307-309 (Lord Alverstone CJ), 311-312 (Buckley LJ), 313-314 (Kennedy LJ).
33 See above at nn 23-30.
34 (1831) 2 B & Ad 951 (KB), 109 ER 1396.
or was connected with it; and, though he was in fact temporarily absent, he might, as the holder of such an office, be regarded as constructively present in the place where his duties required his presence, and therefore amenable to the colonial jurisdiction.  

Otherwise the case would have been wrongfully decided. In Emanuel v Symon, the judges adopted this interpretation of Becquet v Mac Carthy and the law of jurisdiction.

Referring to the enumeration of the grounds for jurisdiction in Rousillon v Rousillon, the judgment of Buckley LJ stated:

In actions in personam there are five cases in which the Courts of this country will enforce a foreign judgment: (1.) Where the defendant is a subject of the foreign country in which the judgment has been obtained; (2.) where he was resident in the foreign country when the action began; (3.) where the defendant in the character of plaintiff has selected the forum in which he is afterwards sued; (4.) where he has voluntarily appeared; and (5.) where he has contracted to submit himself to the forum in which the judgment was obtained.

This came to be regarded as the authoritative code of the grounds of jurisdiction in a foreign judgment case. However, the contemporary editions of Dicey, which set forth a rule corresponding in substance to the statement of Buckley LJ, questioned both the inclusion of the defendant’s being a subject of the country where the judgment was obtained and the exclusion of the defendant’s being present in the country when the action commenced, which was the fundamental common law basis of an English court’s jurisdiction in personam.

35 Sirdar Gurdyal Singh v Rajah of Faridkote [1894] AC 670 (PC) 685. The quotation is from Don v Lippmann (1837) 5 CI & Fin 1 (HL) 21, 7 ER 303, 310.
36 Emanuel v Symon [1908] 1 KB 302 (CA) 306-307 (Lord Alverstone CJ), 310-311 (Buckley LJ), 312-313 (Kennedy LJ).
37 Ibid 309 (Buckley LJ), citing Rousillon v Rousillon (1880) 14 Ch D 351.
40 Dicey (1st ed) (n 39) 375-376; Dicey (2d ed) (n 39) 368-369.
41 Dicey (1st ed) (n 39) 370-374; Dicey (2d ed) (n 39) 362-368.
In the century since Emanuel v Symon, the defendant’s being present when the action was instituted has been added to the Dicey Rule as a ground for the foreign court to have jurisdiction, and the defendant’s being a subject or resident of the foreign country has been deleted. This reflects developments in English law during that century, some of which have not been replicated in other countries. Court judgments and academic writings have considered possible grounds of jurisdiction outside the Dicey Rule, and there has been much case law and analysis in texts and articles on how accepted grounds of jurisdiction, such as voluntary submission to the foreign court, are to be applied. This article will proceed to identify and examine established and other possible grounds for “jurisdiction in the international sense” and how they have been applied – not only in England, but also in the many other countries in which common law rules govern recognition and enforcement of foreign judgments.

**Presence in foreign court’s country or state when proceedings instituted**

**Individuals.** It may seem odd to begin with presence in the foreign court’s country or state, as this was not recognised as a ground for jurisdiction in the foundational cases on recognition of foreign judgments. However, it is a logical starting point, and the first ground listed in the present version of the Dicey Rule. Many recitations of the bases on which a foreign court has jurisdiction to render a judgment *in personam* include the defendant’s presence in the foreign state when the action against the defendant was instituted. Shortly after the Privy Council’s judgment in *Sirdar Gurdyal Singh v Rajah of Faridkote*, Lord Russell of Killowen CJ decided in *Carrick v Hancock* that a court in Sweden had jurisdiction over an Englishman who was served with process during a short visit to Sweden. He is reported to have said in giving judgment that

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42 Dicey (n 1) 689-690 (Rule 43).
43 The leading modern case is *Adams v Cape Industries Plc* [1990] Ch 433 (CA), discussed at nn 63-134.
44 Dicey (n 1) 689-690 (Rule 43), quoted at n 2.
47 (1895) 12 TLR 59 (QBD).
The jurisdiction of a Court was based upon the principle of territorial dominion....All persons within any territorial dominion owe their allegiance to its sovereign power and obedience to all its laws and to the lawful jurisdiction of its Courts....That duty of allegiance was correlative to the protection given by a State to any person within its territory. This relationship and its inherent rights depended upon the fact of the person being within its territory....The question of the time the person was actually in the territory was wholly immaterial. This being so it was quite clear that...the Swedish Courts had ample jurisdiction to enforce the plaintiff’s claim against the defendant....

This proposition was not endorsed by the Court of Appeal in Emanuel v Symon, but Carrick v Hancock appears to have established for English law that a foreign court would have jurisdiction for purposes of recognition of its judgment if the defendant was physically present in the court’s territory when sued. This did not become a major point in another reported case in England until Adams v Cape Industries Plc, decided almost a century after Carrick. However, it was a major point in some cases in other countries, and it was not always accepted that a foreign court had jurisdiction by reason of the defendant’s temporary presence.

In Herman v Meallin, a judgment of a court in Victoria was enforced against a resident of New South Wales who was served with the writ while passing through Victoria. Stephen J rejected the defendant’s contention that the Victorian court lacked the jurisdiction necessary for enforcement of its judgment in New South Wales, saying

[I]t seems to me that, the defendant having, even though temporarily, submitted by his presence to the jurisdiction of the Victorian Court, and that Court having exercised its undoubted right of issuing its process against him, no valid reason exists for refusing to render that judgment effective here.

However, the court in RMS Veerappa Chitty v MPL Mootappa Chitty came to the opposite conclusion. The plaintiff in this case brought an action in Singapore to enforce a judgment of a court in Johore. The defendant, who resided in Singapore, had been served with a summons in the Johore proceedings when he was in Johore for a day on business. Bonser CJ rejected a decision of his predecessor and held that the Johore court did not have the jurisdiction necessary for enforcement of the judgment in Singapore. He interpreted Schibsby v Westenholz, Rousillon v Rousillon and other English cases to exclude temporary presence as a basis of jurisdiction, because it was

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48 Ibid 60.
49 [1908] 1 KB 302 (CA), discussed at nn 31-38.
51 [1990] Ch 433 (CA), discussed at nn 63-134.
52 (1891) 8 WN (NSW) 38 (SC).
53 Ibid 38. Admittedly, the Victorian court had domestic jurisdiction over the defendant because of his presence in Victoria.
54 (1893) 2 SSLR 12 (Sing SC).
55 Sidgreaves CJ in Kader Nina Merican v Kader Meydin (1876) 1 SSLR 3 (Sing SC), holding that a Johore court did have jurisdiction when a Singapore resident was served with the summons while temporarily in Johore.
not included in the judgments as a basis on which the defendant would be “bound” by a foreign judgment and because the fact that a Singapore court would exercise jurisdiction over defendants temporarily in Singapore would not, under Schibsby v Westenholz, be a basis for accepting that a foreign court had jurisdiction over defendants temporarily present in its territory.\textsuperscript{56}

\textit{Herman v Meallin} and \textit{Chitty} preceded \textit{Carrick v Hancock}. Judgments in cases decided after \textit{Carrick v Hancock} do accept that a foreign court has jurisdiction if the defendant was within the court’s territory when served with process. The main cases prior to \textit{Adams v Cape Industries Plc} appear to be two Canadian cases from early in the twentieth century. In an action in the Supreme Court of Saskatchewan to recover a sum due under a judgment from Michigan, Haultain CJ concluded that the Michigan court had jurisdiction over one of the defendants because he was at least present in Michigan (if not still actually resident there) when the action was commenced and the summons was served.\textsuperscript{57} In the second case\textsuperscript{58} the defendant, who was domiciled in Alberta, had been served with a writ in a British Columbia action while on a visit there to see his wife, who was in a Vancouver hospital. After quoting from the Privy Council’s judgment in \textit{Sirdar Gurdyal Singh v Rajah of Faridkote},\textsuperscript{59} including the statement that “Territorial jurisdiction attaches (with special exceptions) upon all persons either permanently or temporarily resident within the territory while they are within it...”\textsuperscript{60} Simmons J stated that “The essence and foundation of the jurisdiction is the fact that the person or property, as the case may be, is within the territory.” The defendant was subject to “the general rule that territorial jurisdiction is effective against him on account of his presence in the territory when action was begun and process served upon him”.\textsuperscript{61} The court rejected the defendant’s contention that he should not be considered a temporary resident of British Columbia because his visit to the province was “casual” and for the purpose of visiting his hospitalised spouse.\textsuperscript{62}

In \textit{Adams v Cape Industries Plc},\textsuperscript{63} the plaintiffs sued to enforce a judgment of a federal district court in the United States. The defendants were two English

\begin{thebibliography}{99}
\item\textsuperscript{56} The judge’s decision may have been influenced by his evident concern that “if the contention of the Plaintiff be correct, every merchant who spends a Sunday in Johore renders himself liable to have his business rights and obligations adjudicated upon by a Mohammendan judge administering Mohammedan law”. \textit{RMS Veerappa Chitty v MPL Mootappa Chitty} (1893) 2 SSLR 12 (Sing SC) 13.
\item\textsuperscript{57} \textit{FW Read and Co v Ferguson} (1912) 5 Sask LR 405 (SC) sub nom \textit{Read & Co v Ferguson} 8 DLR 737, 3 WWR 611. The court cited \textit{Carrick v Hancock} and \textit{Rousillon v Rousillon}.
\item\textsuperscript{58} \textit{Forbes v Simmons} (1914) 8 Alta LR 87 (SC), 20 DLR 100, 7 WWR 97.
\item\textsuperscript{59} [1894] AC 670 (PC).
\item\textsuperscript{60} \textit{Ibid} 683.
\item\textsuperscript{61} \textit{Forbes v Simmons} (1914) 8 Alta LR 87 (SC) 90, 20 DLR 100, 102, 7 WWR 97, 98.
\item\textsuperscript{62} That a foreign court would have jurisdiction if the defendant was temporarily present in its territory when sued was accepted in brief passages in other judgments. \textit{Harris v Taylor} [1915] 2 KB 580 (CA) 592 (Bankes LJ); \textit{Employers’ Liability Assurance Corp Ltd v Sedgwick, Collins and Co Ltd} [1927] AC 95 (HL) 114-115 (Lord Parmoor); \textit{Mallappa Yellappa Bennur v Raghavendra Shamrao Deshpande} ILR 1938 Bom 16, 25-26; AIR 1938 Bom 173, 177; \textit{Steinberg v Cosmopolitan National Bank of Chicago} 1973 (2) Rhod LR 128 (AD) 139-140, 1973 (4) SA 564, 574-575.
\item\textsuperscript{63} [1990] Ch 433 (CA).
\end{thebibliography}
companies, not individuals, so the English courts were not required to decide whether an individual’s temporary presence in a foreign country was a ground for a foreign court’s assumption of jurisdiction.\(^\text{64}\) However, in addressing whether the federal district court had jurisdiction over the defendants on the ground of their “residence” or “presence” in the United States,\(^\text{65}\) the Court of Appeal discussed at some length whether a defendant’s temporary presence in a foreign country was sufficient for jurisdiction. It concluded that this was sufficient.\(^\text{66}\) The Court of Appeal quoted from the judgments in \textit{Carrick v Hancock} and \textit{Sirdar Gurdyal Singh v Rajah of Faridkote}, including the Privy Council’s statement quoted above. It also quoted from the speech of Lord Parmoor in \textit{Employers’ Liability Assurance Corp Ltd v Sedgwick, Collins and Co Ltd},\(^\text{67}\) who had said that service of a writ on foreigners present in the country (in this instance, England) was effective in other countries as a source of jurisdiction.\(^\text{68}\) From these three authorities the Court of Appeal “extracted” the principle that in the absence of submission to the foreign court, the court’s jurisdictional competence depended on the defendant’s physical presence in the country at the time of suit.\(^\text{69}\) The source of the foreign court’s “territorial jurisdiction...to summon a defendant to appear before it” was the defendant’s obligation for the time being to abide by the country’s laws and accept the jurisdiction of its courts while present in its territory.\(^\text{70}\)

The Court of Appeal acknowledged criticism in the \textit{Dicey & Morris} and \textit{Cheshire & North} texts of “casual presence” as an undesirable basis of jurisdiction\(^\text{71}\) – the foreign court was unlikely to be the forum conveniens. For \textit{Cheshire & North} the analogy to an English court’s domestic jurisdiction based on physical presence was not convincing. In a domestic case the court had a discretion to stay the proceedings, which might be exercised when jurisdiction was founded on “mere presence”.\(^\text{72}\) The Court of Appeal saw “the force of these points” but believed they supported the desirability of conventions for reciprocal enforcement or non-enforcement of foreign judgments rather than a different view of existing law.\(^\text{73}\)

The next edition of \textit{Cheshire & North}, reiterating the view that casual presence is not a desirable basis of jurisdiction, described the Court of Appeal’s endorsement of

\(^{64}\) Ibid 467 (Scott J).

\(^{65}\) Presence or residence as a ground for jurisdiction over a company or other legal entity is discussed at nn 122-135.

\(^{66}\) \textit{Adams v Cape Industries Plc} [1990] Ch 433 (CA) 515-519.

\(^{67}\) \[1927\] AC 95 (HL).

\(^{68}\) Ibid 114-115 (Lord Parmoor).

\(^{69}\) \textit{Adams v Cape Industries Plc} [1990] Ch 433 (CA) 518.

\(^{70}\) Ibid 519. See also ibid 555 (the only reason why a person who goes abroad incurs a duty to abide by a foreign judgment in England is that by going to a foreign place he “invests himself by tacit consent” with the rights and obligations stemming from the local laws as administered by the local court, including local conflict of laws rules).


\(^{72}\) Cheshire (11th ed) (n 71) 342. See also Briggs (n 1) 693.

\(^{73}\) \textit{Adams v Cape Industries Plc} [1990] Ch 433 (CA) 518-519. Whether residence without presence would suffice was left open. Ibid 518. See the discussion at nn 143-146.
it in *Adams v Cape Industries Plc* as obiter.\(^{74}\) However, there can be little actual doubt that the defendant’s temporary presence in the foreign country is now sufficient in English law for recognition of a foreign judgment.\(^{75}\) *Adams* led the editors of *Dicey & Morris* to change the “First case” in the Dicey Rule on jurisdiction to give a judgment *in personam* from “If the judgment debtor was, at the time the proceedings were instituted, resident (or perhaps, present) in the foreign country.”\(^{76}\) to “If the judgment debtor was, at the time the proceedings were instituted, present in the foreign country.”\(^{77}\) What can be questioned is whether this is now the rule in countries other than England. Some of the authors on conflict of laws in these countries state that temporary presence is a ground of jurisdiction,\(^{78}\) but in almost all of these countries there has been no direct court decision on this since *Adams*\(^{79}\).

South Africa is an exception. The Supreme Court of Appeal decided in *Richman v Ben-Tovim*\(^ {80}\) that a foreign court had jurisdiction if the defendant was physically present within the foreign court’s state at the commencement of the action.\(^{81}\) The defendant had been served with process in an English action at a London hotel, where he was staying during a temporary stay in England.\(^{82}\) The decision could have been different. There was no definitive precedent in South African cases, and under the Roman-Dutch law in force in South Africa a court did not have domestic jurisdiction on the basis of the defendant’s physical presence.\(^{83}\) But the court was persuaded that

> There are compelling reasons why,...in this modern age, traditional grounds of international competence should be extended, within reason, to cater for itinerant international businessmen. In addition it is now well


\(^{75}\) See *Rubin v Eurofinance SA* [2012] UKSC 46, [2013] 1 AC 236 [7]-[8] (Lord Collins of Mapesbury); Briggs (n 45) 169-171; Collier (n 45) 239.

\(^{76}\) *Dicey* (11th ed) (n 5) 436.


\(^{78}\) See texts and articles cited in n 45.

\(^{79}\) Jurisdiction on the basis of presence was accepted in the Supreme Court of Canada’s judgment in *De Savoye v Morguard Investments Ltd* [1990] 3 SCR 1077, 1103-1104, (1990) 76 DLR (4th) 256, 274. The judgment in *Wendel v Moran* 1992 SCLR 636 (OH) 642, 1993 SLT 44, 48, stated that the rules of private international law required that the defender be resident or at least present in the territory of the foreign court when the action was commenced. In *United Malayan Banking Corp v Khoo Boo Hor* [1996] 1 Sing LR 359 (HC) 362, the court stated that “Either the residence, or sometimes mere presence, of the judgment debtor in the foreign country is sufficient as a basis of jurisdiction...” and cited *Adams*. But the defendant in the case had not been resident in the foreign country or served with a writ when present in the country. The earlier Singapore case holding that a defendant’s temporary presence was not a basis for enforcement of a foreign judgment (discussed at nn 54-56) was not mentioned.

\(^{80}\) [2006] ZASCA 121, 2007 (2) SA 283.


established that the exigencies of international trade and commerce require ‘that final foreign judgments be recognised as far as is reasonably possible in our courts, and that effect be given thereto’. This Court (albeit in a slightly different context) said in *Mayne v Main* that a ‘common-sense’ and ‘realistic approach’ should be adopted in assessing jurisdictional requirements because of ‘modern-day conditions and attitudes and the tendency towards a more itinerant lifestyle, particularly among business people. And because not to do so might allow certain persons habitually to avoid the jurisdictional nets of the courts and thereby escape legal accountability for their wrongful actions.’

In a future case, criticism of “casual presence” as an insufficient or “exorbitant” ground of jurisdiction might prevail. But it is more likely that a court will accept that it is a basis for recognition of a foreign judgment. Physical presence when served is the fundamental basis of a common law court’s jurisdiction over a defendant, and it has the advantage of simplicity and predictability. Parties to litigation would almost always know when a defendant was served with process while physically present in the court’s geographic area of jurisdiction, and therefore could predict extraterritorial recognition of the court’s judgment.

*Issues connected to physical presence.* If it is accepted that a foreign court has jurisdiction “[i]f at the time of the commencement of the action the defendant is physically present within the state to which the court belongs”, some further questions may arise. At least four can be found in the judgments of Scott J and the Court of Appeal in *Adams v Cape Industries Plc*:

1. At what point in the commencement of the proceedings must the defendant have been present?
2. Does the foreign court have “jurisdictional competence” if the defendant was present because of force or fraud?
3. If the foreign court was in a nation consisting of states or provinces with their own court systems and laws, must the defendant have been present in the

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84 [2001] ZASCA 35, 2001 (2) SA 1239 [6].
85 *Richman v Ben-Tovim* [2006] ZASCA 121, 2007 (2) SA 283 [9].
87 If so, the court would probably accept that a court in the state where the defendant resided had “international competence”. See Forsyth (n 1) 430-431.
89 See Adrian Briggs, *Private International Law in English Courts* (2014) 468; Forsyth (n 1) 429; Oppong (n 86) 325.
90 Pollak (n 81) 219, quoted in *Richman v Ben-Tovim* [2006] ZASCA 121, 2007 (2) SA 283 [7]. Cf Briggs (n 89) 461 (“present within the territorial jurisdiction of the foreign court”); Castel (n 45) § 14.4.c (“present in the country, state, province or territory of the foreign court”); Dicey (n 1) 690 (Rule 43 First Case) (“present in the foreign country”).
91 [1990] Ch 433 (CA).
court’s state or province or will presence within the nation suffice? and (4) How is the rule that a court has jurisdiction on the basis of presence to be applied to legal entities such as corporations that are not natural persons?

Time of presence. Concerning the point or time in the commencement of the proceedings the defendant must have been present, the Court of Appeal’s judgment in Adams stated: “[I]t would appear that the date of service of process rather than the date of issue of proceedings is to be treated as ‘the time of suit’ for these purposes.”92 This seems to be correct. In all of the cases in which a foreign court was found to have jurisdiction because of the defendant’s physical presence when the action against the defendant was initiated, the defendant had been served with the writ or summons when present in the foreign country.93 That the defendant had been personally served in the country is specified in some of the decisions as a basis for the foreign court’s jurisdiction.94 The defendant is “amenable or answerable to the command of the writ” because of his presence within the jurisdiction when served.95

Presence because of force or fraud. The Court of Appeal’s conclusion on whether temporary presence was a ground for a foreign court’s jurisdiction was that “the voluntary presence of an individual in a foreign country...is sufficient to give the courts of that country territorial jurisdiction over him under our rules of private international law”.96 The court had accepted a submission that “the temporary presence of a defendant in the foreign country will suffice provided at least that it is voluntary (i.e. not induced by compulsion, fraud or duress)”.97 This should not be interpreted to require for jurisdiction that the defendant’s presence be voluntary. In Adams there was no issue of involuntary presence and the court made no other statement about it.

92 Ibid 518.
93 See above at nn 47-85.
94 Herman v Meallin (1891) 8 WN (NSW) 38 (SC); FW Read and Co v Fergusson (1912) 5 Sask LR 405 (SC) sub nom Read & Co v Ferguson 8 DLR 737, 3 WWR 611; Forbes v Simmons (1914) 8 Alta LR 87 (SC), 20 DLR 100, 7 WWR 97; Close v Arnot [1997] NSWSC 569 (discussing whether critical time is when defendant was served or when process was initiated). See also the references to service of process in Employers’ Liability Assurance Corp Ltd v Sedgwick, Collins and Co Ltd [1927] AC 95 (HC) 114-115 (Lord Parmoor); Steinberg v Cosmopolitan National Bank of Chicago 1973 (2) Rhod LR 128 (AD) 139-140, 1973 (4) SA 564, 574-575. Compare Boffey v Boffey (1910) 27 SC 192 (Cape SC) (English judgment in which summons issued a few days before defendant left England not enforced).
95 Laurie v Carroll (1958) 98 CLR 310, 323. Laurie v Carroll was not a case on recognition of a foreign judgment, but the High Court’s judgment supports the view that the time at which the defendant must be in the jurisdiction is the time the writ is served, not the time of issuance. Ibid 323-328. See also Bradford A Caffrey, International Jurisdiction and the Recognition and Enforcement of Foreign Judgments in the LAWASIA Region (1985) 115; Castel (n 45) § 14.4 n 28; Cheshire (n 1) 518; JG Collier, Conflict of Laws (3d ed 2001) 111; Graeme Johnston, The Conflict of Laws in Hong Kong (2d ed 2012) 633; Ben A Wortley, The Enforcement of Claims in Personam in the Conflict of Laws, in Ius et Lex: Festgabe zum 70. Geburtstag von Max Gutzwiller (1959) 347, 350-353.
96 Adams v Cape Industries Plc [1990] Ch 433 (CA) 519.
97 Ibid 518.
No definite conclusion on involuntary presence as a basis of jurisdiction can be found in reported cases. If it were essential to jurisdictional competence that there be a connection between the defendant and the foreign country or its court sufficient to make the assertion of jurisdiction a just one, there would be a strong argument that there is no jurisdiction when a defendant is present in a foreign country only because of fraud or force, even lawful force such as extradition. But *Adams* rejects the proposition that requisite connection is the basis of jurisdiction, as distinct from specific connections such as physical presence. If, as *Adams* accepts, a country has jurisdiction over a person by reason of the person’s presence in its territory and while present a person has an obligation to abide by the country’s laws and accept the jurisdiction of its courts, this logically includes someone present in the country because of force, fraud or duress. The country’s courts might decline to exercise jurisdiction in this situation, but if jurisdiction is exercised the defendant is bound by the judgment.

*Presence in nation.* The questions of the required time of presence and involuntary presence were addressed only briefly in *Adams v Cape Industries Plc*, but what was called the “country issue” – what is the “country” or geographic unit in which the defendant must have been present? – was addressed in detail by both Scott J and the Court of Appeal. It arose because the action was to enforce a judgment of a United States district court in Texas and arguably the defendants were present in another American state (Illinois) when sued.

In ordinary usage, “country” means “nation”, but in conflict of laws it usually means a geographic entity that has its own body of general law and its own courts, whose powers do not extend beyond the boundaries of the entity. Many territories that would not be regarded as nations, such as British colonies, overseas territories and dependencies, are “countries” for conflicts purposes. England, Scotland and Northern Ireland are separate “countries” even though for lengthy periods they did not have their own legislatures. Most significantly for *Adams v Cape Industries Plc*, each American state is a “country” because each has its own legislature with general lawmaking powers, its own body of statutory and common law, and its own courts, whose jurisdiction does not extend beyond the state. Similarly, the states and territories of Australia and the provinces and territories of Canada are “countries” for conflicts

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98 *Ibid* 519.  
99 *Ibid* 519. See also *ibid* 555.  
100 A defendant who is induced by the plaintiff’s fraud to travel to a country so that he can be served with process there may have a right to have the process set aside. *Stein v Valkenhuysen* (1858) E B & E 65 (QB), 120 ER 431, 4 Jur NS 411, 27 LJQB 236, 31 LTOS 80; *Watkins v North American Land and Timber Co (Ltd)* (1904) 20 TLR 534 (HL).  
101 See Briggs (n 89) 467; Dicey (n 1) 694-695. Other texts take the position that a court does not have jurisdiction *in personam* when the defendant’s presence was due to compulsion, duress or fraud. J-G Castel, *Canadian Conflict of Laws* vol 1 (1st ed 1975) 430; Cheshire (n 1) 518; Collier (n 45) 239 (reasoning that the justification for enforcing the foreign court’s judgment is the defendant’s acceptance of the territorial power of the court).  
102 *Adams v Cape Industries Plc* [1990] Ch 433, 484-492.  
104 It was ultimately decided that the defendants were not present. *Ibid* 467-484 (Scott J), 512-550 (CA).
purposes even though in ordinary usage the countries are Australia and Canada as a whole. “Country” is legally synonymous with “nation” when it has essentially one body of nationwide law, although supplemented with provincial or municipal laws and regulations, and one national judicial system. If a foreign court’s jurisdiction “in the international sense” depends upon whether the defendant was present in the court’s “country” – or (as discussed later) whether the defendant was resident or domiciled in the country – “country” will mean the court’s state or province in the typical proceedings to enforce a judgment of an American or Australian state court or a court of a Canadian province. But are there circumstances in which the United States, Australia or Canada as a whole can be regarded as the relevant “country”, so that the defendant’s presence (or residence or domicile) anywhere in the nation is sufficient for purposes of recognising a court’s judgment?

If there are, it would be because the judgment was that of a federal court rather than a state or provincial court, or because the court was exercising jurisdiction it possessed under federal (national) law. The strongest case for treating the nation as a whole as the relevant country is when the foreign judgment is that of a federal court functioning as a court of nationwide jurisdiction and applying federal law. In Adams v Cape Industries Plc, Scott J discussed hypothetically such a case.

Suppose then, in a federal question case, a defendant who did not appear or take any part in the case had a damages default judgment entered against him. If the federal district court was sitting in Texas and the defendant was resident in Illinois, would an English court decline to enforce the judgment against the defendant on the ground that the “country” of the court was Texas and the court, by the standards of English law, lacked jurisdiction over the defendant? I do not see any reason why it should do so. The court would be a United States court applying United States law. Why should not such a court in such a case command the obedience of a resident anywhere in the United States? I justify my reaction by relying on the fundamental principle underlying territoriality as a basis of jurisdiction. The sovereignty of the United States in its own territory is, of course, recognised by English law. The entitlement of the United States to establish in its territory courts in which

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105 See Dicey (n 1) 30-32; Read (n 86) 6-8. “Law area” might be used in preference to “country”. See Nygh (n 1) 9-11. Dicey suggested “law district”. Dicey (1st ed) (n 39) 67.
106 At nn 136-151, 186-209.
107 See Adams v Cape Industries Plc [1990] Ch 433 (CA) 553. This is assumed sub silentio in almost every case in which the jurisdiction of the foreign court was in issue. Eg FW Read and Co v Ferguson (1912) 5 Sask LR 405 (SC) sub nom Read & Co v Ferguson 8 DLR 737, 3 WWR 611; Clarke v Lo Bianco (1991) 59 BCLR (2d) 334 (SC), 84 DLR (4th) 244; Zwysig v Zwysig 1997 (2) SA 467 (W); Close v Arnot [1997] NSWSC 569. But see SHC v O’Brien (1991) 3 PRNZ 1 (HC Master) 17, which appears to decide that state courts in the United States had jurisdiction because the defendant resided in the United States. (This was not a contested issue.)
issues arising under its laws may be adjudicated upon and disposed of is an attribute of its sovereignty. It is also an attribute of its sovereignty that the United States is entitled to invest its courts with jurisdiction over any persons resident in its territory. If Congress had chosen to establish a federal district court at Washington D.C. for the purpose of dealing with federal anti-trust cases, and with in personam jurisdiction over any persons resident in the United States, the proposition that, under English law, that jurisdiction was excessive, would, in my view, have been unarguable. Under English law a resident in Alaska would owe the same obligation of obedience to such a court as would a resident of Washington D.C. The “country” of the court would, unarguably, be the United States as a whole.

...In my judgment, where a federal district court is exercising federal question jurisdiction it is doing so as a court of the United States in circumstances in which the “country” of the court is, for English law purposes, the United States.\(^\text{109}\)

But the argument for treating the entire nation as the country for jurisdictional purposes is considerably weaker when the judgment is that of a state court given jurisdiction by federal law or that of a federal court applying state law, including its jurisdictional laws. In *Adams* the judgment sued upon was from a United States district court in Texas exercising jurisdiction on the basis of diversity of citizenship. In a “diversity case”, a federal court applies the law of the state in which it sits and has jurisdiction *in personam* over non-resident defendants only as provided by the law of that state. In effect, it functions as an alternative state court.\(^\text{110}\)

Counsel for the defendants submitted that the federal court had been functioning as a part of the system of administration of justice in Texas and should be regarded as a state court with a territorial jurisdiction covering Texas only, so the defendants would have to have been resident or present in Texas.\(^\text{111}\) Scott J disagreed.

...[T]he territorial basis of jurisdiction is dependent upon and cannot, in my opinion, be divorced from, the sovereignty of the “country” that has established the court in question. It is, I think, recognition of the sovereignty of a foreign country that leads to recognition of the entitlement of its courts to take jurisdiction over persons resident in its sovereign territory. I do not regard the United Kingdom with its constituent private international law “countries” as inconsistent with this thesis. It would be open to Parliament, if it so desired, to create a court structure for the whole of the United Kingdom for a specified class of case. I can see no reason of principle why foreign countries, with a private international law similar to ours, should decline to recognise the jurisdiction of such a court over persons anywhere in the United Kingdom. The United States is a sovereign power with a territory over which its sovereignty extends. It has established courts whose in personam jurisdiction, although subject to limits and derived from state statutes, is capable of extending to individuals anywhere in the United States.

\(^{109}\) *Adams v Cape Industries Plc* [1990] Ch 433, 489 (Scott J).

\(^{110}\) See *ibid* 486-487.

\(^{111}\) *Ibid* 490.
As a matter of principle, in my view, if a United States court exercises jurisdiction over a person resident in the United States, it is exercising powers inherent in the sovereignty which adheres to the United States. As a matter of principle, too, in my view, English law should recognise the legitimacy of that exercise of jurisdiction.

It follows that I agree with [counsel for the plaintiffs] that the answer to the question which I must answer does not lie in investigating the function discharged by the court but lies in investigating the source of the authority of the court. Whatever the function of a federal district court in a diversity case, the source of its authority is to be found in the sovereign power which established it. For those reasons I conclude that the exercise of jurisdiction by a federal district court over a person resident in the United States is, by the standards of English law, a legitimate and not an excessive exercise of jurisdiction. If I had felt able to conclude that Cape and Capasco were, when the...actions were commenced, present in Illinois, I would have held that to be a sufficient basis, in English law, for the exercise by the [federal] court of jurisdiction over them.\(^{112}\)

The Court of Appeal did not accept the reasoning of Scott J. Scott J had relied on constitutional theory – what could be done by Congress or Parliament to create a unified court structure – rather than “what has really happened”.\(^{113}\) But it did not accept the argument for the defendants. Without expressing a “final conclusion”, the Court of Appeal stated that “[W]e all incline to favour, albeit with varying degrees of doubt, the view that if the plaintiffs had not failed at the first hurdle [proving the defendants’ presence in the United States] they would on the country issue have been entitled to succeed.”\(^{114}\) The principal reasons given in the judgment were that a person who goes to a foreign place incurs a duty to abide by a judgment there, because “he invests himself by tacit consent with the rights and obligations stemming from the local laws as administered by the local court”\(^{115}\); in this the foreigner is in the same position for purposes of an in personam judgment as a local resident;\(^{116}\) in the United States the local laws include being subject to the jurisdiction of the federal courts in another state; it is by federal law enacted by Congress (not state law) that this is so; and that is not altered by the application of substantive state law and state law on jurisdiction in federal courts.\(^{117}\)

There must be some numbers of actions in other countries to enforce a money judgment of an American federal court. But so far as can be determined, the issue of whether jurisdiction in personam could be based on presence or residence anywhere in the United States has not been decided in another reported case. Whether a court in another country would adopt the views of the Court of Appeal, or those of Scott J, cannot be predicted. The argument advanced by counsel for the defendants is cogent. In exercising diversity jurisdiction, an American court functions as a state court. It

\(^{112}\) Ibd 491.
\(^{113}\) Adams v Cape Industries Plc [1990] Ch 433 (CA) 554.
\(^{114}\) Ibid 557.
\(^{115}\) Ibid 555.
\(^{116}\) Ibid 556.
\(^{117}\) Ibid 557.
applies the law of the state in which it sits (except for matters of procedure) and has jurisdiction in personam only to the extent provided by the state law applicable to the state’s courts. That depends upon the defendant or the cause of action having a particular connection to the state.\textsuperscript{118} It is irrelevant to the court’s jurisdiction that the defendant was present in another state rather than only in a foreign country. In another state, the judgment can be enforced only as a foreign judgment.\textsuperscript{119} Its judgment will be considered valid in another federal court only if the defendant had “minimum contacts” with the state in which the court issuing the judgment was located.\textsuperscript{120} Consequently, the jurisdictional basis for recognition of a judgment in an American diversity action should be the requisite connection with the state, be it presence, residence or domicile.\textsuperscript{121}

**Corporations and other legal entities.** If a court has jurisdiction over a defendant because the defendant was present in the court’s state when the defendant was sued, in principle the rule applies to corporations and other legal entities as well as to individuals.\textsuperscript{122} But a “juristic person” cannot possibly be physically present in the same way as a natural person. It can only be regarded as present because it is incorporated or chartered by the state, it conducts activities in the state, it owns property there, or it has agents or employees in the state. And on a narrow view, corporate “presence” would be tantamount to a domicile or residence in the state, which itself can be a basis of jurisdiction.\textsuperscript{123}

In the earlier cases on recognition of a foreign judgment against a company, the tendency was to adopt the rule that had been applied when the issue was whether a court had domestic jurisdiction in an action against a company.\textsuperscript{124} If a company had a definite place of business in the country and conducted substantial business there

\textsuperscript{118} See Adams v Cape Industries Plc [1990] Ch 433, 485-487 (Scott J).


\textsuperscript{120} See Graciette v Star Guidance, Inc (1975) 66 FRD 424 (SDNY); Donnelly v Copeland Intra Lenses, Inc (1980) 87 FRD 80 (EDNY); Coil Co, Inc v Weather-Twin Corp (1982) 539 F Supp 464 (SDNY).

\textsuperscript{121} See Ram (n 108) at 1466, 481. The Court of Appeal’s views on this point have been criticised as incorrect or (more politely) “surprising” by a number of authors. Cheshire (n 1) 520; Alan Reed, Anglo-American Perspectives on Private International Law (2003) 496-497; Peter Stone, The Conflict of Laws (1995) 327; Carter (n 119) 404. Clarkson (n 108) 178 suggests that Adams might not be followed in this respect. One ground of criticism is that a judgment that was not enforceable in the United States (because of the absence of “minimum contacts” with the state) would be enforceable in England because of a connection with some place in the United States.

\textsuperscript{122} See Clarkson (n 108) 175-176; Collier (n 45) 240-244; Dicey (n 1) 693-696.

\textsuperscript{123} See below at nn 136-151, 186-209.

\textsuperscript{124} As in Newby v Von Oppen (1872) LR 7 QB 293; La Bourgogne [1899] P 1 (CA) aff’d [1899] AC 431 (HL); Saccharin Corp Ltd v Chemische Fabrik von Heyden Aktiengesellschaft [1911] 2 KB 516 (CA); Okura & Co Ltd v Forsbacka Jernverks Aktiebolag [1914] 1 KB 715 (CA). See Collier (n 45) 241; Dicey (n 1) 695; JA Clarence Smith, Personal Jurisdiction (1953) 2 ICLQ 510, 533-537.
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(including business conducted through an agent), it was resident in the country and the courts of the country therefore had jurisdiction in an action against the company; if the company had no more than some agent in the country, it was not a resident of the country and a judgment against the company there would not recognised unless there was another basis of jurisdiction, such as voluntary submission.\textsuperscript{125}

In \textit{Adams v Cape Industries Plc},\textsuperscript{126} the recognised basis for jurisdiction in an action against a company shifted from residence in the country where it was sued to presence in the country.\textsuperscript{127} But the Court of Appeal did not intend substantive change in the criteria employed in deciding whether a foreign court had jurisdiction in an action against a company. It noted that “resident” and “present”, or equivalent terms, had been used interchangeably,\textsuperscript{128} and in discussing when a company was present the court discussed and applied what had become a long line of cases on whether a company was resident in a country. The court agreed with Pearson J in \textit{F & K Jabbour v Custodian of Israeli Absentee Property}:\textsuperscript{129}

A corporation resides in a country if its carries on business there at a fixed place of business, and, in the case of an agency, the principal test to be applied in determining whether the corporation is carrying on business at the agency is to ascertain whether the agent has authority to enter into contracts on behalf of the corporation without submitting them to the corporation for approval.

The Court of Appeal concluded from the authorities that:

(1) The English courts will be likely to treat a trading corporation incorporated under the law of one country (“an overseas corporation”) as present within the jurisdiction of the courts of another country only if either (i) it has established and maintained at its own expense (whether as owner or lessee) a fixed place of business of its own in the other country and for more than a minimal period of time has carried on its own business at or from such premises by its servants or agents (a “branch office” case), or (ii) a representative of the overseas corporation has for more than a minimal period of time been carrying on the overseas corporation’s business in the other country at or from some fixed place of business.

(2) In either of these two cases presence can be established if it can fairly be said that the overseas corporation’s business (whether or not together with the representative’s own business) has been transacted at or from the fixed place of business.\textsuperscript{130}

\textsuperscript{125} Ramanathan Chettiar v Kalimuthu Pillai (1912) ILR 37 Mad 163 sub nom Ramanathan Chettyar v Kalimuthu Pillay AIR 1914 Mad 556; Littauer Glove Corp v FW Millington (1920) Ltd (1928) 44 TLR 746 (KBD); Price v Mona’s Herald Ltd 1952-60 Manx LR 39 (SGD); Vogel v R and A Kohnstamm Ltd [1973] QB 133. As pointed out in numerous cases, whether a company was “resident” in a country is essentially a question of fact.

\textsuperscript{126} [1990] Ch 433 (CA).

\textsuperscript{127} Ibid 518-519. See above at nn 44-89 on physical presence as a basis for jurisdiction.

\textsuperscript{128} Ibid 523.

\textsuperscript{129} [1954] 1 WLR 139 (QBD) 146.

\textsuperscript{130} Adams v Cape Industries Plc [1990] Ch 433 (CA) 530. The court stated that the principles applicable to trading corporations would presumably apply to non-trading corporations,
Adams v Cape Industries Plc remains the leading authority on whether, for purposes of recognition of a foreign judgment against a company, the foreign court had jurisdiction by reason of the company’s “presence” or “residence”. There are many jurisdictions in which the most recent case of relevance precedes Adams, or contains only brief statements such as “The equivalent concept [to residence or presence] is whether a corporation carries on business in the foreign country so as to render itself amenable to the jurisdiction of the foreign court.”

But it is probable that Adams will be followed when the question of whether a foreign judgment can be recognised on the basis of corporate “presence” must be decided.

A related question, discussed by Scott J and the Court of Appeal in Adams, is whether a parent corporation is to be regarded as resident or present in a country if a wholly owned subsidiary is resident and carries on business there. The answer given in the judgments is “no”. The subsidiary’s conducting the subsidiary’s business in a country did not subject the parent company to suit there. It was fundamental that a parent corporation and its subsidiaries had separate legal identities. But the possibility that a parent might be present in a country by carrying on its business through a subsidiary was not ruled out entirely.

It should be noted that no analogous rule applies to jurisdiction over an individual. A natural person is not regarded as present in a country, for purposes of jurisdiction, because the person has carried on business in the country. Presence means the individual’s physical presence in the country.

*Adams v Cape Industries Plc* [1990] Ch 433 (Scott J); *Reiss Engineering Co Ltd v Insamcor (Pty) Ltd* 1983 (1) SA 1033 (W); 160088 Canada Inc v Socoa International Ltd [2006] IEHC 193, [2008] 1 ILMR 543, aff’d [2012] IESC 12, [2012] 1 IR 722; *Vizzaya Partners Ltd v Picard* 2015 Gib LR 282 (CA) rev’d [2016] UKPC 5, [2016] Bus LR 413, [2016] 3 All ER 181; Anderson (n 45) 243-245 (Caribbean); Anton (n 9) 381 (Scotland); Mortensen (n 45) 132 (Australia). Briggs (n 1) 694-696 suggests reasons to criticise the requirement of a fixed place of business in the foreign country but concludes that it is justifiable as a requirement for recognition of a judgment, which might involve a claim not connected to the corporation’s business in that country.

*Adams v Cape Industries Plc* [1990] Ch 433 (Scott J) 471-484, (CA) 531-547.

There is also the question of whether a foreign court that had jurisdiction over the parent company could thereby exercise jurisdiction over a subsidiary. In *Re Singer Sewing Machine Co of Canada Ltd* [2000] ABQB 116, (2000) 79 Alta LR (3d) 95, [2000] 5 WWR 598, the answer was a short and sharp “no”. It is a question likely to arise in the bankruptcy of a company with foreign subsidiaries. The highest courts of Britain and Ireland have held that the common law jurisdictional requirements apply to recognition of judgments in personam issued in foreign insolvency proceedings. In *the Matter of Flightlease (Ireland) Ltd* [2012] IESC 12, [2012] 1 IR 722; *Rubin v Eurofinance SA* [2012] UKSC 46, [2013] 1 AC 236.

*See Nalla Karuppa Settiar v Mahomed Iburam Saheb* (1896) ILR 20 Mad 112 sub nom *Nalla Karuppa Chettiar v Iburam Saheb* 7 Mad LJR 76; *Blohn v Desser* [1962] 2 QB 116, 122;
Residence in foreign court’s country or state when proceedings instituted

Judgments in all of the foundational British cases discussed earlier state in substance that a foreign judgment can be enforced if the defendant was resident in the foreign country when the action there began. Numerous editions of Dicey specified that a foreign court had jurisdiction in an action in personam if the defendant was resident in the foreign country. This proposition is accepted in other conflict of laws texts and in many cases outside England. The defendants in most of the cases were not resident in the country where the original action was brought, so a foreign judgment was not recognised on the ground of the defendant’s residence. However,

United Malayan Banking Corp v Khoo Boo Hor [1996] 1 Sing LR 359 (HC) 362 (in enforcement of foreign judgments at common law, concept of “carrying on business” is peculiar to corporations; but under legislation relevant to registration of foreign judgment against individual); Lucasfilm Ltd v Ainsworth [2009] EWCA Civ 1328, [2010] Ch 503 [187]-[195], rev’d [2011] UKSC 39, [2012] 1 AC 208 (individual not present in United States by reason of sales of articles to US customers, and advertising and Internet communications directed at US customers); Collier (n 45) 239-240; McLeod (n 1) 586-587; Nygh (n 1) 896-897; Blom (n 45) 411.

At nn 10-41.

Schibsby v Westenholz (1870) LR 6 QB 155, 161 (defendants bound by country’s laws if resident in country when suit commenced); Rousillon v Rousillon (1880) 14 Ch D 351, 371 (defendant bound by judgment where resident in foreign country when action began); Sirdar Gurdyal Singh v Rajah of Faridkote [1894] AC 670 (PC) 683, 684 (territorial jurisdiction attaches upon all persons resident within territory while they are within it; courts of country in which defendant resides have power to do justice); Emanuel v Symon [1908] 1 KB 302 (CA) 309 (Buckley LJ) (courts will enforce foreign judgment in personam where defendant resident in foreign country when action began).

Dicey (1st ed) (n 39) 369 (Rule 80) through Dicey (11th ed) (n 5) 436 (Rule 37). Eventually this was deleted from the “Dicey Rule” on account of Adams v Cape Industries Plc [1990] Ch 433 (CA). See the discussion at nn 143-148.

Read (n 86) 148-149; England: Cheshire (n 1) 517; Jack IH Jacob, Private International Litigation (1988) 71-72; Scotland: Anton (n 9) 376, 379-380; Australia: Nygh (n 1) 897; Edward I Sykes and Michael C Pryles, Australian Private International Law (3d ed 1991) 113; Canada: Castel (n 45) § 14.4.c; McLeod (n 1) 584-586; India: RS Chavan, Indian Private International Law (1982) 202-204; Diwan (n 1) 621-622; Ireland: William Binchy, Irish Conflicts of Law (1988) 589; South Africa: Forsyth (n 1) 421-422; Schulze (n 9) 18-19.

there are cases in both Canada\textsuperscript{141} and South Africa\textsuperscript{142} in which the defendant’s residence was a ground for deciding that the foreign court had jurisdiction.

Whether the defendant’s residence in the foreign country when sued there remains a basis for “jurisdiction in the international sense” can nevertheless be questioned. One reason is the paucity of cases in which the foreign court was found to have jurisdiction on the basis of residence when the defendant was not physically present in the foreign country or domiciled there. Another is the Court of Appeal’s judgment in \textit{Adams v Cape Industries Plc}, discussed earlier.\textsuperscript{143} The Court of Appeal not only specifically left “open” the question of whether residence without physical presence would suffice\textsuperscript{144} but also stated that it would “regard the source of the territorial jurisdiction of the court of a foreign country to summon a defendant to appear before it as being his obligation for the time being to abide by its laws and accept the jurisdiction of its courts while present in its territory”\textsuperscript{145}. This would not exist when the defendant had a dwelling in the foreign country but was absent when legal process issued. But the residence issue may have been left open in \textit{Adams} because of the difficulty of framing a satisfactory definition of residence and doubt that residence was a sufficient connection between the defendant and the foreign country, for purposes of jurisdiction, if it was not limited to principal residence.\textsuperscript{146} If residence for purposes of jurisdiction were no more than one of several places where the defendant resided some of the time,\textsuperscript{147} it would be a slender ground for the exercise of jurisdiction and resemble the foreign court’s having jurisdiction because the defendant owned property in the country, which is not a basis for “jurisdiction in the international sense.”\textsuperscript{148} The defendant’s having a principal residence in the foreign court’s territory would, however, be a substantial ground for the exercise of jurisdiction.

In \textit{Rubin v Eurofinance SA},\textsuperscript{149} the UK Supreme Court applied the post-\textit{Adams} version of the Dicey Rule, which does not include residence as a ground for the foreign

\begin{thebibliography}{9}
\bibitem{141}FW Read and Co v Fergusson (1912) 5 Sask LR 405 (SC) sub nom Read & Co v Ferguson 8 DLR 737, 3 WWR 611.
\bibitem{142}Zwyssig v Zwyssig 1997 (2) SA 467 (W).
\bibitem{143}At nn 63-134.
\bibitem{144}Adams v Cape Industries Plc [1990] Ch 433 (CA) 518.
\bibitem{145}\textit{Ibid} 519. See above at nn 63-70. Decades earlier Cheshire, in his treatise on private international law, had contended that a foreign judgment is actionable only because it imposes an obligation upon the defendant, there had to be a “correlation between the legal obligation of the defendant and the right of the tribunal to issue its command”, the right of a court to summon the defendant depended upon the power to summon, and that power was exercisable only against persons present in the country. GC Cheshire, \textit{Private International Law} (1st ed 1935) 489-490. See also Briggs (n 1) 694.
\bibitem{146}See \textit{State Bank of India v Murjani Marketing Group Ltd} 1991 WL 11780428 (CA, 27 March 1991) (Sir Christopher Slade), explaining one judge’s reasons for leaving the issue open in \textit{Adams}. The judge was “strongly incline[d]” to the view that a court in the country where a person had his principal home would have jurisdiction, even though the person was (temporarily) absent from the country.
\bibitem{147}As in Zwyssig v Zwyssig 1997 (2) SA 467 (W).
\bibitem{148}See below at nn 210-216.
\bibitem{149}[2012] UKSC 46, [2013] 1 AC 236.
\end{thebibliography}
court’s jurisdiction, but this should not be interpreted as a definitive rejection of jurisdiction by reason of the defendant’s residence. In countries where the courts and conflict of laws texts have not yet questioned residence as a basis for recognition of a foreign judgment, it probably remains the law that the foreign court had jurisdiction in personam if the defendant resided within the court’s territory when the defendant was sued.\(^{151}\)

**Citizen or subject of sovereign power in country**

If a foreign judgment is binding when the defendant owed “allegiance” to the foreign country and accordingly was bound by its laws,\(^{152}\) the defendant’s being a subject of the country may be a reason why the defendant owed allegiance and therefore was bound by a judgment issued in accordance with the country’s laws. Blackburn J’s judgment in *Schibsby v Westenholz* stated that “If the defendants had been at the time of the judgment subjects of the country whose judgment is sought to be enforced against them, we think that its laws would have bound them.”\(^{153}\) In *Rousillon v Rousillon*, Fry J said, “The Courts of this country consider the defendant bound where he is a subject of the foreign country in which the judgment has been obtained...”\(^{154}\) and the defendant’s being a subject of the foreign country was one of the grounds for enforcement of a foreign judgment listed by Buckley LJ in *Emanuel v Symon*.\(^{155}\) From this one could readily assume that a foreign country has jurisdiction over a defendant if the defendant is a subject of the foreign country or its sovereign.\(^{156}\) But this has long been in doubt, at least as a general proposition.

Apart from the absence of authority squarely deciding that a foreign court had jurisdiction by reason of the defendant’s nationality in itself, the main reason for doubt

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\(^{150}\)Dicey (n 1) 689-690 (Rule 43), quoted above at n 2.

\(^{151}\)See Anton (n 9) 376, 379-380 (Scotland); Nygh (n 1) 897 (Australia); Castel (n 45) § 14.4.c (Canada); Diwan (n 1) 621-622 (India); Harder (n 45) 258-259 (Australia); Yeo (n 45) 458 (Singapore). This is clearly the position in South Africa. *Erskine v Chinatex Oriental Trading Co* 2001 (1) SA 817 (C) 820-821; *Purser v Sales* [2000] ZASCA 46, 2001 (3) SA 445 [12]; Forsyth (n 1) 421-422; Schulze (n 9) 18-19. Writers are divided on the desirability of residence as a basis of jurisdiction. Some support it as a more substantial connection to the foreign country than physical presence when sued. Anderson (n 45) 243; Castel (1st ed) (n 101) 431; Clarkson (n 108) 175; Collier (n 45) 239. Others prefer physical presence to residence because residence is an imprecise concept, and in many instances there could be uncertainty about whether the defendant resided in the country when sued. Briggs (n 1) 694; Briggs (n 89) 468 (also contending that territorial jurisdiction requires physical presence); Caffrey (n 95) 113-117.

\(^{152}\)See *Schibsby v Westenholz* (1870) LR 6 QB 155, 161. Compare *Sirdar Gurdyal Singh v Rajah of Faridkote* [1894] AC 670 (PC) 684 (no jurisdiction over “foreigners, who owe no allegiance or obedience to the Power which so legislates”).

\(^{153}\) *Schibsby v Westenholz* (1870) LR 6 QB 155, 161.

\(^{154}\)*Rousillon v Rousillon* (1880) 14 Ch D 351, 371.

\(^{155}\)[1908] 1 KB 302 (CA) 309.

\(^{156}\)Bankes LJ did so in *Harris v Taylor* [1915] 2 KB 580 (CA) 591. See also decisions that the defendant’s plea was bad when it did not specify that the defendant was not a subject of the country in which the judgment was granted. *Fowler v Vail* (1879) 4 OAR 267; *British Linen Co v McEwan* (1892) 8 Man R 99 (FC).
was that it became apparent that courts in countries under the British Crown did not have a jurisdiction over all British subjects that would make their judgments enforceable in any other country under the British Crown. As Scrutton J observed in Phillips v Batho, the defendant in Emanuel v Symon was a subject of the sovereign of Western Australia and England, but no one argued that this brought the case within the class of judgments enforceable because the defendant was a subject of the foreign country, and the Court of Appeal held the WA judgment to be unenforceable in England. In 1901 a court in India did enforce an English judgment because the defendant was a subject of the sovereign of both England and British India, where he resided. But in 1902 the same court decided that a British subject was not within the jurisdiction of a court in Mauritius. He was a “foreigner” for purposes of the case. Otherwise, “upon a judgment obtained in a Court of any colony of the British Crown against an absent person, who was not a native of or either permanently or temporarily resident or domiciled within that colony..., he might be successfully sued upon that judgment in any other Court within the British dominions”.

This is the position that has prevailed in subsequent cases. In a Canadian case early in the twentieth century, the court interpreted “subject of the country whose judgment is sought” to mean subject of what Dicey had described as a “law district” – a territory subject to one system of law, such as England, Scotland or an American state – rather than the British Empire as a whole. A defendant’s being bound by a foreign judgment if he was a subject of the country did not mean that a British subject could be sued in any part of the empire. A court of what was then the British East Africa Protectorate decided that a court in British India lacked jurisdiction over a defendant residing in the protectorate. “The Defendant does not owe allegiance or obedience to the Governor-General of India in Council. The fact that persons natives [sic] to India and to this Protectorate are both subjects of the same Emperor is not such a bond as to impose upon a native of this Protectorate obedience to Indian Courts.”

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157 [1913] 3 KB 25, 29.
158 See also Turnbull v Walker (1892) 67 LT 767 (QBD), 9 TLR 99 (New Zealand judgment not enforceable against “Englishman”).
159 Moazzim Hossein Khan v Raphael Robinson (1901) ILR 28 Cal 641 sub nom Syed Moazim Hossein Khan Bahadur v Raphael Robinson 5 Cal WN 741.
160 Kassim Mamojoojee v Isuf Mahomed Sulliman (1902) ILR 29 Cal 509 (FB) sub nom Hadjee Kaseem Mamooji v Hadjee Isup Mahomed Sulliman 6 Cal WN 829. The earlier case was not cited in the judgment. Possibly it was thought to be distinguishable because legislation of the “sovereign power” had authorised the English court to exercise jurisdiction, but it had not been shown that there was legislation authorising the Mauritius court to exercise jurisdiction in the second case. See Shaik Aham Sahib v Davud Sahib (1909) ILR 32 Mad 469, 472, 19 Mad LJ 457, 462; Indian and General Investment Trust Ltd v Raja of Khalikote AIR 1952 Cal 508, 521.
161 Kassim Mamojoojee v Isuf Mahomed Sulliman (1902) ILR 29 Cal 509 (FB) 517, sub nom Hadjee Kaseem Mamooji v Hadjee Isup Mahomed Sulliman 6 Cal WN 829, 833-834.
162 Dicey (1st ed) (n 39) 67.
163 Dakota Lumber Co v Rinderknecht (1905) 6 Terr LR 210 (NWTFC), 2 WLR 275.
164 Mohamedally Mulla Ebramji v Alibhai Jivanji Mamuji (1918) 7 E Afr LR 89 (HC).
165 Ibid 92. See also Borough of Finsbury Permanent Investment Building Society v Vogel (1910) 31 Natal LR 402 (FC) (English court lacked jurisdiction over defendant domiciled in Natal; defendant not subject of England); Gavin Gibson & Co Ltd v Gibson [1913] 3 KB 379.
Analogously, it was decided in Canada that a state court in the United States did not have jurisdiction by reason of the defendant’s being a subject (citizen) of the United States rather than a subject of the state.\textsuperscript{166} The effect of these decisions is that a court of a foreign country does not have jurisdiction by reason of the defendant’s national citizenship or being a subject of the country’s sovereign when there are numerous states or territories with different laws and legal systems, but a common nationality, and the defendant was not domiciled or resident in the state or territory where the court was located.\textsuperscript{167} However, the courts did not reject the proposition that the defendant’s being a subject of the foreign country was a ground of jurisdiction.

A foreign court’s having jurisdiction when the defendant was a subject of the foreign country has long been doubted in leading texts on conflict of laws, including Dicey’s,\textsuperscript{168} and some authors have gone beyond doubt to strong criticism of nationality as a basis of jurisdiction. Cheshire wrote in the first edition of his treatise:

...[T]he criterion by which the competence of an English Court is tested must also be adopted when the inquiry relates to the competence of a foreign Court. Personal jurisdiction in this country depends upon the right of a Court to summon the defendant. Apart from special powers conferred by statute it is obvious that, since the right to summon depends upon the power to summon, jurisdiction is in general exercisable only against those persons who

\begin{itemize}
\item \textit{Marshall v Houghton} (1923) 33 Man R 166 (CA), [1923] 2 WWR 553 (defendant’s English domicile of origin and intent to return to England stated as reasons why English court had jurisdiction over British subject who was in United States when served with writ); \textit{Patterson v D’Agostino} (1975) 8 OR (2d) 367 (Co Ct), 58 DLR (3d) 63 (court in Wales did not have jurisdiction over British subject not domiciled in Wales).
\item \textit{Dakota Lumber Co v Rinderknecht} (1905) 6 Terr LR 210 (NWTFC), 2 WLR 275, rev’g (1905) 6 Terr LR 210 (NWTS), 1 WLR 481. In \textit{Clarke v Lo Bianco} (1991) 59 BCLR (2d) 334 (SC) 337, 84 DLR (4th) 244, 248, the court decided that an American citizen who was sued in California after establishing a domicile in British Columbia was no longer a “subject” of the state of California.
\item See, rejecting nationality as a ground of jurisdiction in these circumstances, AE Anton, \textit{Private International Law} (1st ed 1967) 581-582; Cheshire (n 1) 528; Dicey (n 1) 705; McLeod (n 1) 595-597; Nygh (n 1) 905; Read (n 86) 153-154; JG Castel, Jurisdiction and Money Judgments Abroad. Anglo-American and French Practice Compared (1958) 4 McGill LJ 152, 161-162. There are also decisions that a foreign court did not have jurisdiction on the basis of the defendant’s nationality in instances of dual citizenship, where the defendant was a national of the court’s country under that country’s law but the defendant had severed ties with the country and was a citizen of another nation. \textit{Christien v Delamere} (1899) ILR 26 Cal 931, 3 Cal WN 614; \textit{Rossano v Manufacturers’ Life Insurance Co} [1963] 2 QB 352, 382-383. Contra \textit{Mathrakovil Kizhakkappat Matathil Ramalinga Ayyar v Swaminatha Ayyar} ILR 1941 Mad 891 sub nom \textit{Mathrakovil Kizhakkappat Matathil Ramalinga Iyer v Swaminatha Ayyar} AIR 1941 Mad 688.
\item AV Dicey and A Berriedale Keith, \textit{A Digest of the Law of England with Reference to the Conflict of Laws} (3d ed 1922) 393, 401-402; JHC Morris, \textit{Dicey’s Conflict of Laws} (6th ed 1949) 351, 356-357; Read (n 86) 151-155; Martin Wolff, \textit{Private International Law} (1st ed 1945) 262. In recent editions: Castel (n 45) § 14.4.c; Dicey (n 1) 705; Mortensen (n 45) 134.
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are present in England. If the defendant is absent from a country and has no place of business there, then, whether he be a citizen or an alien, he would appear to be immune from the jurisdiction, unless he has voluntarily submitted to the decision of the Court....

...[I]t is submitted with some confidence that nationality per se is not a reason which, on any principle recognized by Private International Law, can justify the exercise of jurisdiction. The argument usually advanced in its favour, namely, that ‘a subject is bound to obey the commands of his Sovereign, and, therefore, the judgments of his sovereign[’s] Courts’, 169 is surely out of touch with the known facts of modern life. Allegiance is all important in Public International Law, but in itself has not been a contributing element to the formation of Private International Law. If a Roumanian Court were to give judgment in personam against a person, who, though born in Roumania had left that country in his infancy and acquired a domicil in England without taking out letters of naturalization, it is difficult to appreciate the justification for holding the judgment actionable in England. 170

Martin Wolff’s Private International Law said:

English courts have often pronounced, though only obiter, that foreign judgments in personam are to be recognized if, at the time of the judgment, the defendant was a subject of the country of the adjudicating court. This rule, however, raises grave doubts; and not only because nationality is not the normal point of contact in private international law. Even those continental countries which test the status of a person by his nationality and not by his domicile – such as France or Germany – have no rule of this character. English law does not provide that the defendant’s British nationality alone is enough to render him amenable to the British court’s jurisdiction. Thus it would seem surprising to find that nationality is considered sufficient to give jurisdiction to a foreign court. It has been argued in favour of the doctrine that a ‘subject is bound to obey the commands of his sovereign and therefore the judgments of his sovereign’s courts’. 171 Even if this were entirely true with regard to subjects residing abroad it would not follow that it is the duty of another sovereign to see those commands obeyed. 172

170 Cheshire (1st ed) (n 145) 489, 497.
172 Wolff (1st ed) (n 168) 126. Substantially similar criticisms of nationality as a ground of jurisdiction are stated in other texts, including Anton (1st ed) (n 167) 581-582; Briggs (n 89) 476; Diwan (n 1) 628-629; Forsyth (n 1) 433-434; Nygh (n 1) 905; Schulze (n 9) 23. See also Castel (n 167) 161-162. As observed in recent editions of the Cheshire and Dicey treatises, the granting or withholding of nationality is determined by the law and policy of the country concerned. Cheshire (n 1) 528; Dicey (n 1) 705. A party in foreign litigation may have been a national of the foreign country only because it was difficult or impossible to renounce the nationality or acquire another one. Some support for nationality as a ground of jurisdiction can be found in Smith (n 124) 529-531 and Wortley (n 95) 357-359.
This has led judges in some of the later cases, including Adams v Cape Industries Plc, to refer to nationality as a doubtful ground of jurisdiction, and in one case it was definitely rejected. This is Rainford v Newell-Roberts, in the Irish High Court. The plaintiffs claimed a sum due under an English judgment entered against a British subject who lived in Ireland. After a detailed discussion of English cases and texts (there was no relevant Irish precedent), Davitt P stated:

...There is no doubt that judicial opinion, in so far as it has been expressed in the cases referred to, is all the one way, and more text-book writers can possibly be cited in favour of nationality than can be cited against it. Very little, if indeed anything, in the way of reasoned argument appears, however, to have been mustered in its favour, while arguments of substance have been adduced against it....English courts do not base their jurisdiction on the allegiance of British subjects. They rest it upon the presence of the defendant within the territorial jurisdiction so as to be available for service of the writ of summons....At common law a writ could not be served on a defendant when out of England. It seems strange that nationality should be accepted as a basis of jurisdiction in the case of a foreign judgment, when it is clearly not so in the case of the Courts in England itself, and when it does not appear to be generally accepted by foreign courts as the basis of their jurisdiction. Moreover, the proposition that allegiance is the basis of jurisdiction failed to stand the test of application in the case of nations within the British Commonwealth.

With considerable diffidence I must say that I prefer the view expressed by Cheshire to the contrary opinions expressed by other text-book writers, and, with all respect, to the judicial opinions expressed obiter in the cases to which I have made reference....

The plaintiffs have not succeeded in persuading me that the defendant is under any duty or obligation to comply with the judgment upon which this action is brought....

Decisions in two later Australian cases are in opposition to Rainford. In Federal Finance and Mortgage Ltd v Winternitz, a judge of the New South Wales Supreme Court enforced a judgment of a Hawaii state court against a defendant who had established permanent residency in Australia but remained a United States citizen,

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175 [1962] IR 95 (HC).
176 Ibid 102-104.
177 See also Anthinarayana Mudaliar v Ajit Singh (1953) 19 Mal LJ 229 (SC), accepting on the authority of Buckley LJ’s judgment in Emanuel v Symon [1908] 1 KB 302 (CA) that a court in Madras had jurisdiction because the defendant was a subject of the country where the judgment was pronounced. The relevant time is the date of the judgment, not the date the action commenced. See Attorney General of British Columbia v Buschkewitz [1971] 3 WWR 17 (BC Co Ct) 24; Dicey (3d ed) (n 168) 401.
178 NSWSC, 9 November 1989.
using an American passport, and registered voter in Hawaii. After quoting the statement of Buckley LJ in Emanuel v Symon that a foreign judgment would be enforced where the defendant was a subject of the foreign country in which the judgment was obtained, Sully J said,

It seems to me that a fair, sensible and practical view...compels the view that the first defendant, as at the date of the Hawaiian judgment against him, occupied a position vis-a-vis the State of Hawaii which is properly to be equated to allegiance in the sense necessary to constitute him a person subject to the proper judicial processes of the State of Hawaii, and a person, therefore, properly to be regarded as a “subject” of the State of Hawaii in the sense contemplated by the terms of the first of the five categories enunciated by Buckley LJ.

In Independent Trustee Services Ltd v Morris, Bryson AJ enforced an English judgment against a United Kingdom citizen and passport-holder resident in Australia. He believed that he should follow the English judgments, as Sully J had in Federal Finance and Mortgage Ltd v Winternitz, even though the nationality ground of jurisdiction had not been contested and upheld after argument. Bryson AJ did not find the judgment in Rainford v Newell-Roberts “persuasive to any extent which would justify my not following the opinion repeatedly expressed in England”.

At present, Rainford v Newell-Roberts remains the most prominent modern case on whether a foreign court has jurisdiction because the defendant is a national of the foreign country, and its conclusion is supported in a number of texts and articles, but the Australian cases demonstrate the authority that still attaches to the statements in Emanuel v Symon and earlier cases which endorse enforcement of a foreign judgment when the defendant was a “subject” of the foreign country. In most of the common law world, whether a foreign court has jurisdiction in personam because of the defendant’s nationality remains an open issue.

179 Emanuel v Symon [1908] 1 KB 302 (CA) 309 (Buckley LJ).
180 Federal Finance and Mortgage Ltd v Winternitz (NSWSC, 9 November 1989) para 3.7.
182 Ibid [28].
183 Including Anderson (n 45) 249 (Caribbean); Anton (n 9) 376, 382 (Scotland); Binchy (n 139) 595-596 (Ireland); Briggs (n 89) 476 (England); Cheshire (n 1) 328 (England); Forsyth (n 1) 433-434 (South Africa); Pitel (n 45) 170 (Canada).
185 The proposition that a foreign court has jurisdiction over its nationals was discussed in some detail and rejected in Foord v Foord 1924 WLD 81, although the case did not involve enforcement of a foreign judgment, and it is not included in the bases of jurisdiction recognised in Erskine v Chinatex Oriental Trading Co 2001 (1) SA 817 (C) and Purser v Sales [2000] ZASCA 46, 2001 (3) SA 445. Consequently, it appears that nationality is not now a basis of jurisdiction in the international sense in South African recognition of foreign judgments.
Domicile in foreign court’s country or state when proceedings instituted

Domicile has been a critical factor in recognition of foreign divorces and other adjudications of personal status, but it has not been prominent as a ground for recognition of a foreign judgment in personam. Undoubtedly this is because Dicey’s rule and the judgments in Schibsby v Westenholtz, Roussillon v Roussillon, Sirdar Gurdayal Singh v Rajah of Faridkote, and Emanuel v Symon did not include a defendant’s domicile in a foreign country as a basis for giving binding effect to a judgment of the country’s courts. Dicey was of the view that domicile was not sufficient to give a foreign court jurisdiction. However, domicile is arguably a more substantial connection with a country than residence, and one that should be accepted as a ground for judicial jurisdiction if residence in a country is accepted. Furthermore, if there is jurisdiction when the defendant is a “subject” of the country in which the judgment was obtained and the defendant was a British subject, or a citizen of a federation such as the United States, the defendant might for jurisdictional purposes be considered a subject only of the state or territory in which the defendant was domiciled.

Judgments in an early English case implied that domicile was a basis of jurisdiction (the defendant’s failure to plead that he was not domiciled in Scotland being a reason for rejecting his plea and giving judgment for the plaintiff), but this is not stated explicitly. In Gavin Gibson & Co Ltd v Gibson, Atkin J expressed doubt that a judgment of the defendant’s domicile had binding effect. But a few years later, the majority judgment of a Canadian court said, “[F]or the purpose of extra-territorial recognition the court of domicile alone has jurisdiction, unless the litigant chooses to attorn to some other court which asserts jurisdiction and submit himself to that tribunal for the examination and adjudication of his rights....”

The most extensive judicial examination of this topic is in a Manitoba case that is now almost one hundred years old, Marshall v Houghton. The plaintiff sought enforcement of an English judgment. The defendant was a British subject, born in

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Forsyth (n 1) 433-434; Schulze (n 9) 23; Paul Bäder and Thalia Kruger, The Recognition and Enforcement of Foreign Judgments in South Africa (2014) 15 Yrbk Pvt Int’l L 467, 476.

See Anton (n 9) 765-766, 811-812; Dicey (n 1) 1020-1022, 1253-1256; Forsyth (n 1) 444-454; Graveson (n 50) 303-316, 332-339.

See above at nn 10-41.

Dicey (1st ed) (n 39) 374.

See Caffrey (n 95) 117-121.

See above at nn 152-185.

See Dakota Lumber Co v Rinderknecht (1905) 6 Terr LR 210 (NWTFC), 2 WLR 275; Borough of Finsbury Permanent Investment Building Society v Vogel (1910) 31 Natal LR 402 (FC).

Cowan v Braidwood (1840) 9 Dowl 26 (CP), Drinkwater 40, 1 Man & G 882, 133 ER 589, 2 Scott NR 138, 10 LJC P 42.

[1913] 3 KB 379, 385.

Richer v Borden Farm Products Co Ltd (1921) 49 OLR 172 (AD) 174, 64 DLR 70, 71.

(1922) 68 DLR 308 (Man KB), [1922] 3 WWR 65, aff’d (1923) 33 Man R 166 (CA), [1923] 2 WWR 553.
England, who retained his English domicile of origin and intended to return to England but prior to suit was in Canada and the United States, with no “fixed place of abode”.\footnote{Marshall v Houghton (1923) 33 Man R 166 (CA) 169, [1923] 2 WWR 553, 556 (Perdue CJM).} Dysart J, in the Court of King’s Bench, said:

...[I] is conceded by all authorities that residence – even temporary presence – in a country, gives the Courts of that country jurisdiction over the person, because his presence within the given territory entitles a man to the protection of the laws, and the use of the Courts, and co-relatively demands from him obedience to those laws and Courts. If domicile is the equivalent of residence or presence then domicile is a ground for jurisdiction because at common law the only ground of jurisdiction was personal service of the King’s writ effected upon defendant while personally present in the realm.

There is no reported case in which our Courts have gone this length....From the best examination that I have been able to make of the authorities, I feel that as the term was used in Roman law domicile is a ground for jurisdiction, but as it is used in common law it is not such a ground. In Roman law domicile means the place of a man’s residence, usually his permanent or chief residence, but it must be residence in fact. Under that law a person may have more than one domicile. At common law a person can have but one domicile. One domicile, however, he must have, and if he does not select one the law selects one for him and imposes it upon him, even against his wishes. This domicile is a fiction or idea of law. Of course it generally corresponds with his residence but not necessarily so. Suppose, for instance, the defendant having left his domicile of origin in England with a fixed intention never to return to England but to establish a home elsewhere, still his English domicile remains with him until he acquires a new domicile of choice. For some purposes the retention of his domicile of origin would create no hardship as for instance in matters affecting his status and situs of personal property. But why should he be bound to obey the laws and Courts of England in purely personal actions if he has left the country and done everything that he humanly can do to free himself from that obedience? Why should he thereafter be subject to English judgments which were obtained against him on the ground of domicile, and which by international law would be conclusive proof against him of the claims litigated. In my opinion, therefore, until the matter is otherwise settled by decisions, domicile is not and ought not to be accepted as a ground of jurisdiction.\footnote{Marshall v Houghton (1922) 68 DLR 308 (Man KB) 310-311, [1922] 3 WWR 65, 67-68.} Dysart J also rejected the contention that the English court had jurisdiction because the defendant was a British subject. “[T]he allegiance which the British subjects owe to their sovereign they owe to the sovereign of the empire; while the allegiance which they owe to their laws and Courts, they owe to the laws and Courts of some particular Dominion.”\footnote{Ibid 311, 69.} He did, however, find that the English court had jurisdiction on a different ground and granted judgment for the plaintiff.
In the Manitoba Court of Appeal there were four individual judgments. All concluded that the defendant’s appeal should be dismissed, but three of the judgments disagreed to some extent with Dysart J on whether the English court had jurisdiction by reason of the defendant’s English domicile or being a British subject. Perdue CJM thought the English court had jurisdiction on several grounds, one of which was that the defendant was an English British subject who intended to return to England.199 Fullerton JA believed the English court had jurisdiction because the defendant was a British subject born in England who retained his English domicile.200 Dennistoun JA, in discussing whether the English court had jurisdiction because the defendant was a British subject, accepted domicile as a ground of jurisdiction more explicitly.

Does he come within Lord Justice Buckley’s first rule,201 as a subject of a foreign country, in which the judgment has been obtained?...

...[A British subject] is a subject of the King, and not of any particular portion of the King’s dominions.

Some other test must be substituted for that contained in Lord Justice Buckley’s rule No. 1, and it is submitted that it is allegiance, or obedience, owed to the legislative power of the state the Courts of which are seeking to establish jurisdiction.

In the case of *Sirdar Gurdyal Singh v Rajah of Faridkote* 202...the Earl of Selborne says: “No territorial legislation can give jurisdiction which any foreign court ought to recognize against foreigners, who owe no allegiance or obedience to the Power which so legislates.”203

The reverse must be equally true, that territorial legislation can give jurisdiction, which foreign Courts ought to recognize, against those, who, by domicile, and ordinary residence, owe allegiance and obedience, to the power which so legislates, and a temporary abandonment of that residence will not alter the case....

While there may be difficulty in determining the question under consideration upon the sole grounds of nationality, allegiance, domicile, or residence, none of which, taken singly appears under the cases to be conclusive, in my humble opinion, there is another test, which is conclusive, when established. If, in the words of the *Sirdar* judgment, the defendant owes allegiance or obedience to the power which legislates, the Courts of that power have jurisdiction over him, no matter where he may be found. And, if it be shown (as in this case) that by domicile of origin, and of choice, by ordinary residence, temporarily suspended, the defendant has made himself subject to the laws of England, he cannot free himself from the operation of those laws, by taking up a shifting abode, alternating between Canada and the United States, until his affairs have settled themselves, and he is able to carry out his

200 Ibid 176, 562 (Fullerton JA).
201 Emanuel v Symon [1908] 1 KB 302 (CA) 309 (Buckley LJ).
203 Ibid 684.
expressly declared intention of returning once more to England, to reside there permanently.\cite{Marshall_v_Houghton}

*Marshall v Houghton* should not be interpreted as holding that a foreign court has jurisdiction when the defendant was domiciled in the foreign country. The majority of the appellate court did not go beyond acceptance of a British court’s jurisdiction when the defendant was a British subject domiciled in the country. A judge in a later Canadian case (in which *Marshall v Houghton* was not cited) said that “domicile is of no consequence in that enforceability depends on the residence of the defendant at the material times”.\cite{Marshall_v_Houghton}

Domicile does appear to be an accepted ground for recognition of a foreign judgment in South Africa.\cite{Marshall_v_Houghton}

Elsewhere, the question of whether domicile is a basis for “jurisdiction in the international sense” remains open. Some of the conflict of laws texts state that domicile is not a ground of jurisdiction.\cite{Marshall_v_Houghton}

This is supported by the argument that domicile is a technical or artificial concept that sometimes has a person domiciled in a country the person left years earlier.\cite{Marshall_v_Houghton}

Other writers, more tentatively, treat domicile as a possible ground of jurisdiction.\cite{Marshall_v_Houghton}

Whether a court in the future will accept domicile as a common law basis of jurisdiction, or be persuaded not to do so, is difficult to predict.

**Ownership of property in foreign country or state**

The judgment of the Court of Common Pleas in an early nineteenth century case, *Douglas v Forrest*,\cite{Douglas_v_Forrest} implied, although not strongly, that a foreign court would have jurisdiction if the defendant owned property in the foreign country and was therefore protected by the country’s laws.\cite{Douglas_v_Forrest}

But Blackburn J’s judgment for the Court of Queen’s Bench in *Schibsby v Westenholz* stated that

[W]e doubt very much whether the possession of property, locally situated in that country and protected by its laws, does afford such a ground [for holding a person bound by the judgment]. It should rather seem that, whilst every tribunal may very properly execute process against the property within its...

\begin{footnotes}
\item[204] *Marshall v Houghton* (1923) 33 Man R 166 (CA) 180-182, [1923] 2 WWR 553, 566-567 (Dennistoun JA).
\item[205] *Mattar v Public Trustee (Administrator of Coudsi Estate)* (1951) 3 WWR 287 (Alta SC) 288, aff’d [1952] 3 DLR 399 (Alta AD), (1952) 5 WWR 29.
\item[206] See *Reiss Engineering Co Ltd v Insamcor (Pty) Ltd* 1983 (1) SA 1033 (W) 1037-1038; *Purser v Sales* [2000] ZASCA 46, 2001 (3) SA 445 [12], accepting the position of Pollak (n 81) 209-211.
\item[207] Anderson (n 45) 249 (Caribbean); Binchy (n 139) 596-597 (Ireland); Briggs (n 1) 710 (England); Chavan (n 139) 203 (India); Cheshire (n 1) 528 (England); Diwan (n 1) 629 (India); McLeod (n 1) 597-598 (Canada).
\item[208] See Anton (1st ed) (n 167) 581; Binchy (n 139) 596-597; Forysth (n 1) 433; Christian Schulze, Practical Problems Regarding the Enforcement of Foreign Money Judgments (2005) 17 SA Merc LJ 125, 129.
\item[209] Castel (n 45) § 14.4.c; Mortensen (n 45) 134; Nygh (n 1) 906. The current edition of *Dicey* is inconclusive. *Dicey* (n 1) 705-706.
\item[210] (1828) 4 Bing 686 (CP), 130 ER 933, 1 Moo & P 663, 6 LJOSCP 157.
\item[211] *Also Cowan v Braidwood* (1840) 9 Dowl 26 (CP), Drinkwater 40, 1 Man & G 882, 133 ER 589, 2 Scott NR 138, 10 LJCP 42.
\end{footnotes}
jurisdiction, the existence of such property, which may be very small, affords no sufficient ground for imposing on the foreign owner of that property a duty or obligation to fulfil the judgment.\(^{212}\)

Subsequent cases, including *Emanuel v Symon*,\(^{213}\) confirm that a defendant’s possession of property in a country does not give the courts of the country jurisdiction to give a judgment *in personam*, even in an action concerning the property.\(^{214}\) This is the position even in the law of Scotland and South Africa, in which possession of property is a common law ground for domestic jurisdiction.\(^{215}\) It is unlikely that there will be any departure from this position in the future.\(^{216}\)

**Action on wrong committed or obligation incurred in foreign country or state**

The English courts’ enforcement of foreign judgments in *Douglas v Forrest*\(^{217}\) and other cases of the same vintage\(^{218}\) could be taken to imply that a foreign court would have jurisdiction in an action arising from a contractual obligation incurred in the foreign country or tortious injury in the country.\(^{219}\) In *Schibsby v Westenholz*, the court was “inclined to think” that the defendants would be bound by the foreign judgment if the defendants had been in the foreign country “when the obligation was contracted”.\(^{220}\) This view was not adopted in subsequent English cases,\(^{221}\) but it did

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\(^{212}\) *Schibsby v Westenholz* (1870) LR 6 QB 155, 163.

\(^{213}\) *Emanuel v Symon* [1908] 1 KB 302 (CA). See above at nn 31-37.

\(^{214}\) See Cheshire (n 1) 529; Dicey (n 1) 704. Outside England: *Nalla Karuppa Settiar v Mahomed Iburam Saheb* (1896) ILR 20 Mad 112 sub nom *Nalla Karuppa Chettiar v Iburam Saheb* 7 Mad LJR 76; *Becker v Peers* (1990) 106 Alta R 127 (QB Master); Binchy (n 139) 598 (Ireland); Diwan (n 1) 630 (India); McLeod (n 1) 595 (Canada); Nygh (n 1) 906 (Australia).

\(^{215}\) Scotland: *Pick v Stewart, Galbraith & Co Ltd* (1907) 15 SLT 447 (OH); Anton (n 9) 382-383; South Africa: *Acutt Blaine & Co v Colonial Marine Assurance Co* (1882) 1 SC 402 (Cape FC); *Mendelssohn v Mendelssohn’s Executor* [1908] TH 190 (WHC); Forsyth (n 1) 434.

\(^{216}\) See *De Savoye v Morgaard Investments Ltd* [1990] 3 SCR 1077, (1990) 76 DLR (4th) 256, in which the Supreme Court of Canada created a new ground of jurisdiction (“real and substantial connection”, discussed below at nn 384-406) after accepting that the defendant’s having real property in the foreign country was not a common law ground for recognition of a foreign judgment, *ibid* 1088, 262-263.

\(^{217}\) (1828) 4 Bing 686 (CP), 130 ER 933, 1 Moo & P 663, 6 LJOSCP 157. See above at nn 210-211.

\(^{218}\) *Becquet v Mac Carthy* (1831) 2 B & Ad 951 (KB), 109 ER 1396; *Cowan v Braidwood* (1840) 9 Dowl 26 (CP), Drinkwater 40, 1 Man & G 882, 133 ER 589, 2 Scott NR 138, 10 LJCP 42.

\(^{219}\) Other interpretations are possible, including the defendant’s failure to sufficiently plead the absence of valid grounds of jurisdiction. It is not clear from the reports of *Cowan v Braidwood* that the defendant’s obligation was incurred in Scotland, where the judgment was issued. The Privy Council’s judgment in *Sirdar Gurdyal Singh v Rajah of Fardkote* [1894] AC 670 (PC) 685, stated that *Becquet v Mac Carthy* was wrongly decided unless it could be distinguished on the ground that the defendant was amenable to the jurisdiction of a colonial court because he held a public office, connected to the cause of action, in the colony. He might in these circumstances be regarded as “constructively present” although temporarily absent.

\(^{220}\) *Schibsby v Westenholz* (1870) LR 6 QB 155, 161.
prevail in some colonial courts, including the Chief Court of the Punjaub in *Sirdar Gurdyal Singh v Rajah of Faridkote*. In *R Waygood & Co v Bennie*, the Scottish Court of Session concluded that an English court had jurisdiction in an action for an injunction to restrain a resident of Scotland from circulating in England material that infringed the plaintiffs’ copyright. For this reason it enforced a judgment for costs against the defendant. However, in the *Sirdar Gurdyal Singh* case the Judicial Committee of the Privy Council rejected the proposition that a foreign court had jurisdiction because a contract or tort action arose within its territory, or because a contract was to be performed there. In consequence of the Privy Council’s decision, it became the established rule that a foreign court did not have jurisdiction in the international sense on the ground that the action arose from a tort or breach of contract within the foreign country.

Under *Phillips v Batho*, a judgment granting damages against a co-respondent in a divorce case is enforceable even though the court lacked jurisdiction over the defendant on the grounds applicable to actions for damages, at least when the judgment was of a court under British sovereignty. The reasons given by Scrutton J for this conclusion are essentially that the foreign court had internationally recognised jurisdiction in the divorce action because of the spouses’ domicile, the award of

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221 See *Rousillon v Rousillon* (1880) 14 Ch D 351, 370-372; *Turnbull v Walker* (1892) 67 LT 767 (QBD), 9 TLR 99.

222 *Mullins v Ditchburne* (1874) 5 Aust Jurist R 119 (Vic FC); *Berry v Shead* (1886) 7 LR (NSW) 39 (FC) (at least if defendant was resident of foreign country when contract made and liability incurred). Contra *Mathappa Chetti v Chellappa Chetti* (1876) ILR 1 Mad 196.

223 [1894] AC 670 (PC).

224 (1885) 12 R 651 (Scot Ct Sess).


226 [1913] 3 KB 25.
damages was ancillary to the court’s jurisdiction to dissolve the marriage, and the
sovereign of the foreign court and the English court had authorised the foreign court to
issue judgments for damages in divorce cases against co-respondents not otherwise
within the court’s jurisdiction. The power to grant such damages was limited to courts
of the spouses’ domicile which could adjudicate divorce cases. Thus the plaintiff
could not obtain damages for adultery from the defendant in England, where the
defendant resided. In the usual action for damages the plaintiff could sue in “the Court
to which the defendant is subject at the time of suit” but this option was not available
to the plaintiff in *Phillips v Batho*.

The decision on jurisdiction in *Phillips v Batho* was soon followed by Bray J
in *Harris v Taylor*, but it has not been endorsed by appellate courts in England or
followed elsewhere in analogous cases. *Phillips v Batho* is criticised as wrongly
decided in several texts. It appears that the general rules of jurisdiction apply to independent actions for maintenance (as distinct from ancillary orders for
maintenance made in divorce or separation proceedings), unless altered by
legislation.

The unenforceability of foreign judgments for a tort or breach of contract
within the foreign court’s state or country, unless the court had jurisdiction for some
other reason, has led to decisions that a judgment would not be enforced when it was
based on defalcations by the treasurer of the foreign state’s ruler in *Sirdar Gurdyal
Singh v Rajah of Faridkote*, fraudulent misrepresentations in the foreign state, damage in a traffic accident in the foreign state, breach of a sales contract made
in the foreign state, failure to repay a loan made in the foreign state to a resident, an

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227 *Sirdar Gurdyal Singh v Rajah of Faridkote* [1894] AC 670 (PC) 683.
228 (1914) 111 LT 564 (KBD) aff’d [1915] 2 KB 580 (CA).
229 See *Redhead v Redhead* [1926] NZLR 131 (SC) (order for costs against co-respondent in
divorce case); *Patterson v D’Agostino* (1975) 8 OR (3d) 367 (Co Ct), 58 DLR (3d) 63 (judgment for damages against co-respondent in divorce case).
230 Cheshire (n 1) 533; Dicey (n 1) 1028; JD McClean, *Recognition of Family Judgments in the
Commonwealth* (1983) 108; Read (n 86) 262-267. See also Note, Tort: Action for Damages for Adultery Against a Co-Respondent by a Petitioner Not Domiciled in England (1950) 3 Int’l LQ 262. The premise that damages for adultery could not be obtained in an independent action in England was rejected in *Jacobs v Jacobs* [1950] P 146.
232 The exception found in *R Waygood & Co v Bennie* (1885) 12 R 651 (Scot Ct Sess) for
judgments in actions to restrain commission of a wrong within the foreign court’s territory (see above at n 224) may survive, at least in Scotland. See *Wendel v Moran* 1992 SCLR 636 (OH) 642, 1993 SLT 44, 48; Anton (n 9) 381.
233 [1894] AC 670 (PC).
234 *Wendel v Moran* 1992 SCLR 636 (OH), 1993 SLT 44.
236 *Edelstyn v Coleman* (1938) 72 ILTR 142 (HC).
237 *Rafferty’s Restaurants Ltd v Sawchuk* (1983) 20 Man R (2d) 440 (Co Ct), [1983] 3 WWR 261. *Cf Shaik Atham Sahib v Davud Sahib* (1909) ILR 32 Mad 469, 19 Mad LJR 457 (action...
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action for rent and damage by the lessor of property in the foreign state,\textsuperscript{238} and an action for dissolution of a partnership in a mine within the foreign state.\textsuperscript{239} That a monetary judgment is not enforceable internationally in such circumstances is probably the strongest ground for criticism of the common law rules of “jurisdiction in the international sense”.\textsuperscript{240}

Submission to jurisdiction of the foreign court

The one rule of jurisdiction in the international sense that is beyond dispute in principle is that a party will be bound by the judgment of a foreign court if the party had submitted to the jurisdiction of the court. There are, in general, two types of submission that will suffice: (1) an agreement to submit to the foreign court’s jurisdiction and (2) submission to the court’s jurisdiction when or after litigation commenced.\textsuperscript{241}

This rule, like others, stems primarily from the judgments in \textit{Schibsby v Westenholz}, \textit{Rousillon v Rousillon} and \textit{Emanuel v Symon}.\textsuperscript{242} The judgment in \textit{Schibsby v Westenholz} said that it was clear “upon principle” that a person would be bound by a foreign judgment if he had selected the foreign country’s “tribunal” as a plaintiff, and it apparently accepted that a person who voluntarily appeared in the case as a defendant or other party would also be bound.\textsuperscript{243} In \textit{Rousillon v Rousillon}, Fry J stated that the defendant was bound by a foreign judgment “where the defendant in the character of plaintiff has selected the forum in which he is afterward sued; where he has voluntarily appeared; [and] where he has contracted to submit himself to the forum in which the judgment was obtained”.\textsuperscript{244} Buckley LJ made essentially the same statement in \textit{Emanuel v Symon}.\textsuperscript{245}

There was no explanation in these cases of why a party’s voluntary appearance or agreement would give the foreign court jurisdiction over the party, when it otherwise would not have jurisdiction. The court would not have “territorial jurisdiction”\textsuperscript{246} over a party outside the territory just because the party agreed to an assertion of jurisdiction. The judgments in the three cases did not imply that the party

\textsuperscript{238} \textit{Borough of Finsbury Permanent Investment Building Society v Vogel} (1910) 31 Natal LR 402 (FC).

\textsuperscript{239} \textit{Emanuel v Symon} [1908] 1 KB 302 (CA).

\textsuperscript{240} See Clarkson (n 108) 178-179; Reed (n 121) 501; Adrian Briggs, Which Foreign Judgments Should We Recognise Today? (1987) 36 ICLQ 240, 254-256.

\textsuperscript{241} Anderson (n 45) 245-246; Briggs (n 89) 462-463; Cheshire (n 1) 520-522; Forsyth (n 1) 422-424; McLeod (n 1) 587; Nygh (n 1) 899; Adrian Briggs, Crossing the River by Feeling the Stones: Rethinking the Law on Foreign Judgments (2004) 8 Sing Yrbk Int’l L 1, 3-4.

\textsuperscript{242} Discussed above at nn 10-41.

\textsuperscript{243} \textit{Schibsby v Westenholz} (1870) LR 6 QB 155, 161.

\textsuperscript{244} \textit{Rousillon v Rousillon} (1880) 14 Ch D 351, 371. \textit{Copin v Adamson} (1874) LR 9 Ex 345 aff’d (1875) 1 Ex D 17 (CA), decided after \textit{Schibsby v Westenholz}, was authority for the statement about submission by contract.

\textsuperscript{245} [1908] 1 KB 302 (CA) 309 (Buckley LJ).

\textsuperscript{246} \textit{Sirdar Gurdayal Singh v Rajah of Faridkote} [1894] AC 670 (PC) 683.
was estopped from denying the court’s jurisdiction.\textsuperscript{247} Dicey’s explanation was “the simple and universally admitted principle that a litigant who has \textit{voluntarily submitted} himself to the jurisdiction of a Court cannot afterwards dispute its jurisdiction”.\textsuperscript{248}

When a party appeared in a foreign court to defend against an action in some way, or instituted proceedings there as a plaintiff, acceptance of the court’s acquisition of jurisdiction over the party may be explained by the belief that a party which sought a judicial decision in favour of the party should be bound by the court’s decision when it is unfavourable.\textsuperscript{249} In \textit{Harris v Taylor}\textsuperscript{250} Bankes LJ said that “The fact that the defendant has sought the protection of the Court [from the plaintiff’s action] imposes upon him an obligation to obey the judgment of the Court if it should happen that it is given against him.”\textsuperscript{251} But this is less persuasive when the defendant sought only to have the proceedings dismissed on jurisdictional or procedural grounds and did not engage the merits of the action.\textsuperscript{252} A belief that parties to a contract should be able to effectively provide for jurisdiction in litigation arising from the contract, as well as the more general belief that parties should be bound by contractual terms they have agreed to, may underlie the rule that a court has jurisdiction \textit{in personam} over a party who has agreed to the court having jurisdiction.\textsuperscript{253} Most of the many cases on submission contain no explanation or rationale of why submission warrants recognition of a judgment that otherwise would not be recognised.\textsuperscript{254}

Whether a party submitted to the jurisdiction of a foreign court in a particular instance is primarily a question of fact that will be decided by the court where

\begin{itemize}
\item \textsuperscript{247} Compare Nallatambi Mudaliar \textit{v} Ponnusami Pillai (1879) ILR 2 Mad 400, 404-405 (person who makes appearance without objecting to jurisdiction leads plaintiff to believe the proceedings are effectual and is equitably estopped from denying court’s jurisdiction).
\item \textsuperscript{248} Dicey (1st ed) (n 39) 376. The original version of the “Dicey Rule” was that courts of a foreign country had jurisdiction in an action \textit{in personam} “[w]here the party objecting to the jurisdiction of the Courts of such country has, by his own conduct, precluded himself from objecting thereto – (a) by appearing as plaintiff in the action, or (b) by voluntarily appearing as defendant in such action without protest, or (c) by having expressly or impliedly contracted to submit to the jurisdiction of such Courts”. \textit{Ibid} 369-370. The “principle of submission” was explained more elaborately in the Introduction of Dicey’s treatise. It rested in part on the court having the means of making its judgment effective, when the party has appeared in the court, and in part on the rule that a person is bound by his contracts. \textit{Ibid} 42-48.
\item \textsuperscript{249} See Boissière and Co \textit{v} Brockner and Co (1889) 6 TLR 85 (QBD) 85; Shaik Atham Sahib \textit{v} Davud Sahib (1909) ILR 32 Mad 469, 475, 19 Mad LJR 457, 465; \textit{Harris v Taylor} [1915] 2 KB 580 (CA) 587-588 (Buckley LJ), 592 (Bankes LJ); Briggs (n 241) 3.
\item \textsuperscript{250} [1915] 2 KB 580 (CA).
\item \textsuperscript{251} \textit{Ibid} 592 (Bankes LJ).
\item \textsuperscript{252} See Smith (n 124) 519-520.
\item \textsuperscript{253} See Argos Fishing Co Ltd \textit{v} Friopesca SA 1991 NR 106 (HC) 112-113, 1991 (3) SA 255, 261-262 (observing that selection of a convenient or neutral forum may facilitate international commerce); Dicey (1st ed) (n 39) 42 (submission is “a portion, or development, of the rule that a person is bound by his contracts”); Forsyth (n 1) 443 (“party autonomy is widely recognized and in consequence submission to the jurisdiction is, too”); Briggs (n 88) 92-94 (binding effect of foreign court’s judgment proceeds from agreement by word or deed to be bound by judgment).
\item \textsuperscript{254} Theoretical reasons (and their limits) for recognition of foreign judgments are examined in some detail in Briggs (n 241).
\end{itemize}
enforcement or recognition of the foreign judgment is sought, on the basis of the information presented to that court. But legal questions bearing on how a court is to decide the issue of submission have been addressed in numerous cases. The more important of these questions will be noted in the discussion that follows.

Submission by prior agreement. A court has jurisdiction in the international sense to issue a judgment in personam against any party that had agreed to the court’s being a forum for the litigation. Typically, the agreement is a term of a contract between the plaintiff and the defendant. The parties may have agreed that a legal claim arising from the contract would be brought in a specified court, or in a court of a specified country or territory.

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256 Application or recognition of this is widespread. Privy Council: Vizcaya Partners Ltd v Picard [2016] UKPC 5, [2016] 3 All ER 181; England: Feyerick v Hubbard (1902) 71 LJKB 509, 86 LT 829; Adams v Cape Industries Plc [1990] Ch 433, 458, 463-467 (Scott J); Scotland: Bank of Scotland v Gudin (1886) 14 R 123 (Scott Ct Sess); Australia: Brisbane Oyster Fishery Co v Emerson (1877) Knox 80 (NSWFC); Barbados: Raffe America Inc v Kingsboro International Holding Co Ltd (1993) 52 WIR 37 (Barb HC); Canada: Ritter v Fairfield (1900) 32 OR 350; Manitoba: Windmill and Pump Co Ltd v McLellan (1911) 4 Sask LR 127; New Zealand: Von Wyk v Engeler [1998] 3 NZLR 416; Singapore: United Malayan Banking Corp v Khoo Boo Hor [1996] 1 Sing LR 359; Southern Africa: Coluflandres Ltd v Scandia Industrial Products Ltd 1969 (2) Rhod LR 431 (GD), 1969 (3) SA 551, appeal refused 1969 (2) Rhod LR 413 (GD); Argos Fishing Co Ltd v Friopesca SA 1991 NR 106 (HC), 1991 (3) SA 255; Chandlery, Krasner & French v Evans 2002 (4) SA 144 (W) rev’d 2001 (4) SA 86 (W). Texts include Castel (n 45) § 14.4.b (Canada); Cheshire (n 1) 520-521 (England); Dicey (n 1) 702-704 (England); Forsyth (n 1) 427-429 (South Africa); McLeod (n 1) 590-593 (Canada); Nygh (n 1) 903-904 (Australia).

257 See Bank of Scotland v Gudin (1886) 14 R 123 (Scott Ct Sess) (agreement settling action in English Court of Chancery, whose procedure required order in separate action to effectuate terms of agreement); Feyerick v Hubbard (1902) 71 LJKB 509, 86 LT 829 (contract concerning patent rights provided that all disputes would be “submitted to the Belgian jurisdiction”); Jeannot v Fuerst (1909) 100 LT 816 (KBD), 25 TLR 424 (sales agreement provided that Tribunal of Commerce in France would alone have jurisdiction); Montgomery Jones & Co v Corry & Co (1911) 14 Gaz LR 111 (NZSC) (sales agreement provided for English courts to have exclusive jurisdiction over all disputes arising under contract); First City Capital Ltd v Lupul (1987) 61 Sask R 153 (CA), 1987 (2) WWR 212, sub nom First City Capital Ltd v Winchester Computer Corp 44 DLR (4th) 301 (guarantee contract provided that courts of Alberta shall have jurisdiction over disputes arising thereunder); Argos Fishing Co Ltd v Friopesca SA 1991 NR 106 (HC), 1991 (3) SA 255 (agreement for fishing venture provided that “any disputes shall be determined in the High Court of Justice in London”); Skaggs Companies Inc v Mega Technical Holdings Ltd [2000] ABQB 480, (2000) 85 Alta LR (3d) 181,
found when the defendant had agreed that service of process could be effected within the country, \(^{258}\) and when a loan contract provided for “confession of judgment” by an attorney in the event of default by the debtor. \(^{259}\) A contract providing for settlement of disputes by arbitration in a particular place has been held to be an agreement to submit to the courts of that place in an action to confirm an arbitrator’s award. \(^{260}\)

As Rousillon v Rousillon and Emanuel v Symon specified that the defendant was bound when he had “contracted” to submit to the forum, \(^{261}\) it is arguable that a non-contractual agreement would not suffice. However, the current version of the “Dicey Rule” is that the foreign court has jurisdiction when the defendant “agreed” to submit, with no requirement that the agreement be contractual, \(^{262}\) and the Privy Council has stated that “[T]he agreement does not have to be contractual in nature. The real question is whether the judgment debtor consented in advance to the jurisdiction of the foreign court.” \(^{263}\) In any event, a non-contractual agreement can be considered one of the types of conduct that constitutes submission. \(^{264}\)

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\(^{255}\) Copin v Adamson (1875) 1 Ex D 17 (CA).

\(^{258}\) Ritter v Fairfield (1900) 32 OLR 350 (DC); Metropolitan Trust and Savings Co v Osborne (1909) 14 OWR 135 (HC) aff’d (1910) 16 OWR 226 (CA), 1 OWN 785; Harbican v Kennedy [1937] 2 DLR 541 (Man KB); Batavia Times Publishing Co v Davis (1977) 18 OR (2d) 252 (HC), 82 DLR (3d) 247, aff’d (1979) 26 OR (2d) 800 (CA), 105 DLR (3d) 192.


\(^{261}\) Rousillon v Rousillon (1880) 14 Ch D 351, 371; Emanuel v Symon [1908] 1 KB 302 (CA) 309 (Buckley LJ).

\(^{262}\) Dicey (n 1) 689-690 (Rule 43).

\(^{263}\) Vizcaya Partners Ltd v Picard [2016] UKPC 5, [2016] Bus LR 413, [2016] 3 All ER 181 [56]. See also Castel (n 45) § 14.4.b; Nygh (n 1) 903. Compare Adams v Cape Industries Plc [1990] Ch 433, 463, 466 (Scott J) (consent that is not part of contract is not an agreement; it is representation that can be withdrawn and should not be ground of jurisdiction unless relied upon by party instituting foreign proceedings). (The position that consent to jurisdiction can operate on the basis of estoppel is supported in Clarkson (n 108) 172.)

\(^{264}\) See below at nn 279-294. Submission to a foreign court’s jurisdiction in advance of litigation has been found when the defendant gave a power of attorney, including the power to commence and defend actions on the defendant’s behalf, to someone who could be sued in the foreign court by parties making transactions with the defendant. Ramanathan Chettiar v Kalimuthu Pillai (1912) ILR 37 Mad 163 sub nom Ramanathan Chettyar v Kalimuthu Pillay AIR 1914 Mad 556; Janoo Hassan Sait v Mahamad Othu (1924) ILR 47 Mad 877, AIR 1925 Mad 155. Cf Blohn v Desser [1962] 2 QB 116 (member of partnership who had appointed agent resident in foreign country to conduct partnership’s business there). Compare Vithalbhai Shivbhai Patel v Lalbhai Bhimbhai ILR 1942 Bom 688, AIR 1942 Bom 199 (no submission when power of attorney revoked prior to suit).
The legal issue that is most prominent in the cases on submission by agreement is whether there must be an express agreement to submit to a court’s jurisdiction, as distinct from an implied agreement. A number of judgments hold, or at least state, that only an express agreement qualifies for recognition of a foreign court’s judgment. But some judgments have adopted the position that the agreement can be implied, although sometimes with the qualification that the submission must be clear. There is an old line of cases upholding foreign judgments against members or investors of companies who were taken to have agreed to be sued in the country where the company was created.

In Standard Bank Ltd v Butlin, Didcott J criticised what he understood to be the rule in England: that an agreement to submit to jurisdiction had to be express to be effective:

...Plenty of decisions testify to the English Courts’ recognition of tacit or implied submissions outside that field. From time to time, for instance, they so construe the line taken in the litigation itself. This makes their doctrine puzzling to someone not steeped in it. Why should they be free to infer a consent to jurisdiction from words and conduct or either in the one sort of case but not the other, why it should matter whether an agreement or something else is said to have demonstrated the consent, are questions to which the answers are by no means self-evident. Nor is it always obvious where the one category ends and the other begins.

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265 See Binchy (n 139) 594-595; Dicey (n 1) 703-704; Forsyth (n 1) 427-428; McLeod (n 1) 590-592; Leon (n 225) 334-337.
268 Reiss Engineering Co Ltd v Insamcor (Pty) Ltd 1983 (1) SA 1033 (W) 1038; Adams v Cape Industries Plc [1990] Ch 433, 465-466 (Scott J) (if implied agreement suffices, a clear indication of consent to foreign court’s exercise of jurisdiction is required).
269 Vallee v Dumergue (1849) 4 Exch 290, 154 ER 1221, 18 LJ Ex 398, sub nom Vallie v Dumarge 14 LTOS 108; Bank of Australasia v Harding (1850) 9 CB 661, 137 ER 1052, 19 LJCP 345; Kelsall v Marshall (1856) 1 CBNS 241, 140 ER 100, 26 LJCP 19; Copin v Adamson (1875) 1 Ex D 17 (CA) aff’d (1874) LR 9 Ex 345; Jamieson v Robb (1881) 7 VLR 170 (FC). Compare Bank of New Zealand v Lloyd (1898) LR 14 WN (NSW) 160 (SC) (finding no such agreement by shareholder); Veco Drilling Inc v Armstrong [1982] 1 WWR 177 (BCSC) (finding no such agreement by director who was sole owner of corporation). See Caffrey (n 95) 111-112; Dicey (n 1) 704; Read (n 86) 173-177.
270 1981 (4) SA 158 (D).
It has a formalism, an artificiality, a fussiness one may fairly say, which is out of keeping with the broad principles we tend to prefer. When it comes to undertakings, decisions, commitments and the like which have legal force, contractual or otherwise, our law does not ordinarily differentiate between those made expressly and others reached impliedly or tacitly....I can see no reason why submissions to jurisdiction should be put into a compartment of their own.\textsuperscript{271}

The most authoritative case on the issue is now \textit{Vizcaya Partners Ltd v Picard},\textsuperscript{272} decided by the Judicial Committee of the Privy Council in 2016. Believing that “in context the authorities which deny the possibility of an implied agreement...really meant that there had to be an \textit{actual} agreement (or consent)”, the Privy Council held that an agreement to submit to the jurisdiction of a foreign court “may arise through an implied term”.\textsuperscript{273} What was required was an “\textit{actual} agreement”\textsuperscript{274} rather than an express agreement. The Privy Council reasoned that “it is commonplace that a contractual agreement or a consent may be implied or inferred. [T]here is no reason in principle why the position should be any different in the case of a contractual agreement or consent to the jurisdiction of a foreign court.”\textsuperscript{276}

Even if an implied agreement to submit to a foreign court’s jurisdiction is sufficient for recognition of the court’s judgment, it is rather clear that such an agreement will not be found when the parties’ agreement provided only that the laws of the country would govern the agreement\textsuperscript{277} or on the basis that performance of the contract was to be in the territory where the judgment was obtained.\textsuperscript{278}

\textsuperscript{271} Ibid 160-161. Against this it might be argued that acceptance of agreement to submit by implication would create uncertainty and give rise to claims against defendants who did not intend to submit to the foreign court’s jurisdiction. EJ Cohn, Submission to Foreign Jurisdiction (1972) 21 ICLQ 157, 158.


\textsuperscript{273} Ibid [56].

\textsuperscript{274} Ibid [59].

\textsuperscript{275} Ibid [58].

\textsuperscript{276} Ibid [56].

\textsuperscript{277} Dunbee Ltd v Gilman & Co (Australia) Pty Ltd (1968) 70 SR (NSW) 219 (CA); Reiss Engineering Co Ltd v Insamcor (Pty) Ltd 1983 (1) SA 1033 (W); Sun-Line (Management) Ltd v Canpotex Shipping Services Ltd [1986] Sing LR 259 (HC); First City Capital Ltd v Lapul (1987) 61 Sask R 153 (CA), [1987] 6 WWR 212, sub nom First City Capital Ltd v Winchester Computer Corp 44 DLR (4th) 301; Vizcaya Partners Ltd v Picard [2016] UKPC 5, [2016] Bus LR 413, [2016] 3 All ER 181 (even when choice of law agreement would give courts of country jurisdiction under that country’s laws). Cf Sfeir & Co v National Insurance Co of New Zealand Ltd [1964] 1 Lloyd’s Rep 330 (QBD) (agreement to submit to jurisdiction not to be implied from country’s law being proper law of contract); US Mortgage Finance II LLC v Dew [2015] EWHC 3621 (Comm) aff’d [2017] EWCA Civ 299 (clause in contract providing that Florida law governed not agreement to application of Florida statute conferring jurisdiction on Florida courts in actions for breach of contract to be performed in Florida). Conflicts texts agree. Binchy (n 139) 595 (Ireland); Briggs (n 1) 708 (England); Dicey (n 1) 703 (England); Forsyth (n 1) 429 (South Africa); McLeod (n 1) 592 (Canada); Nygh (n 1) 904 (Australia). But see Park Avenue Chevrolet, Oldsmobile, Cadillac Inc v LeBlanc (1995) 164 NBR (2d) 161 (QB) (agreement to submit disputes under contract to courts of Québec implied in car lease contract made in Québec with provision that agreement was to be interpreted according to laws of
Submission during foreign proceedings. Submission to a court’s jurisdiction by agreement in advance of litigation is not the only type of submission that will result in a court’s having jurisdiction in the international sense. A court will acquire jurisdiction over a party for purposes of recognition of its judgment if the party submitted to the court’s jurisdiction when or after the proceedings commenced.279

The rule itself is not in dispute,280 but there are many reported cases in which the parties disputed whether there had been submission to the jurisdiction of the foreign court. In some of the cases, the sole or principal issue was the factual question of whether the defendant acted in a way that would be submission to the court’s jurisdiction. In others, the principal issue was one of the law. These include cases on


280 A defendant’s submission to the court in which the plaintiff sued to enforce the judgment does not carry with it submission to the court in the foreign proceedings. See Sheo Tahal Ram v Binaik Shukul (1931) ILR 53 All 477 sub nom Sheo Tahal Ram v Binaak Shukul AIR 1931 All 689.
the vexed question of whether a defendant who appeared in the foreign court but objected to the foreign court’s jurisdiction submitted to the court’s jurisdiction.

Putting aside that question for now, it is clear that a defendant submitted to the foreign court’s jurisdiction if the defendant entered an appearance in the case and took steps to defend the action or have it dismissed, as by filing an answer or statement of defence, applying to the court for leave to defend or stay of the action, applying to set aside the writ or order for service of the writ, moving to strike out or dismiss the plaintiff’s action, making a counterclaim, serving the opposition party with notice to take a deposition or a request for documents, and other active participation in the litigation. In Re Williams, Clark J was of the opinion that “a simple entry of an appearance alone” did not necessarily give a foreign court jurisdiction. But authoritative statements in judgments and texts specify

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281 See the discussion below at nn 326-349.


283 Shaik Atham Sahib v Davud Sahib (1909) ILR 32 Mad 469, 19 Mad LJR 457.


285 Re McCain Foods Ltd and Agricultural Publishing Co Ltd (1979) 26 OR (2d) 758 (HC & CA), 103 DLR (3d) 724. See Dicey (n 1) 697.

286 Harris v Taylor [1915] 2 KB 580 (CA); Henry v Geoprosco International Ltd [1976] QB 726 (CA).


288 Old Reliable Fire Insurance Co v Castle Reinsurance Ltd 1980-87 Gib LR 39 (SC) (counterclaim was submission even if required by court rules and defendant continued objection to jurisdiction).


290 Nallatambi Mudaliar v Ponnusami Pillai (1879) ILR 2 Mad 400; Boissière and Co v Brockner and Co (1889) 6 TLR 85 (QBD); Re Williams (1904) 2 N & S 183 (Tas SC); Mallappa Yellappa Bennur v Raghavendra Shamrao Deshpande ILR 1938 Bom 16, AIR 1938 Bom 173; Re Attorney-General of British Columbia and Becker (1978) 87 DLR (3d) 536 (BCSC); Pattni v Ali [2006] UKPC 51, [2007] 2 AC 85; Wong v Jani-King Franchising Inc [2014] QCA 76.

291 (1904) 2 N & S 183 (Tas SC) 185.

292 Rousillon v Rousillon (1880) 14 Ch D 351, 371; Voinet v Barrett (1885) 55 LJQB 39 (CA), 2 TLR 122; Victorian Phillip-Stephan Photo Litho, &c, Co v Davis (1890) 11 LR (NSW) 257 (FC); Emanuel v Symon [1908] 1 KB 302 (CA) 309 (Buckley LJ); Desert Sun Loan Corp v Hill [1996] 2 All ER 847 (CA).

293 Clarkson (n 108) 172; Dicey (n 1) 689-690 (Rule 43), 697; Diwan (n 1) 626-628; McLeod (n 1) 588-590; Read (n 86) 161-162; Sykes (n 139) 114. See also J-G Castel, Recognition and Enforcement of Foreign Judgments in Personam and in Rem in the Common Law Provinces of Canada (1971) 17 McGill LJ 11, 38-43.
appearance in the foreign court as a basis for the court’s jurisdiction over a party. So it would seem that making or entering an appearance in the proceedings is itself a submission to the jurisdiction of the court.  

Plaintiffs in some cases have contended that there was submission to the foreign court when the defendant or a representative of the defendant wrote a letter to the court in response to notice of the action. In *International Alltex Corp v Lawler Creations Ltd*, Kenny J said that “In my opinion a person does not submit himself to the jurisdiction of a Court or arbitrator outside this country by writing a letter in which he repudiates liability.” But defendants in several Canadian cases were held to have submitted by sending letters setting forth reasons why they should not be held liable, or indicating a desire to make an appearance or enter a defence. In Scotland, submission was found in a letter to an appellate court stating a desire to appeal a lower

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294 See *Victorian Phillip-Stephan Photo Litho, &c, Co v Davis* (1890) 11 LR (NSW) 257 (FC); *Avco Financial Services Realty Ltd v Harvie* (1985) 60 Alta R 266 (QB); *Beach Petroleum NL v Johnson* (CA, 24 November 1995). When a lawyer or other person had authority to make an appearance on behalf of a party, the appearance is a submission by the party to the court’s jurisdiction. *Charles H Lilly Co v Johnston Fisheries Co Ltd* (1909) 14 BCR 174 (FC), 10 WLR 2 (attorney authorised to enter appearance for defendant); *Baldwin & Co v Smith* (1911) 18 WLR 207 (Sask SC) (appearance entered under instruction from defendant’s solicitor); *Herzberg v Manitoba* (1984) 27 Man R (2d) 262 (QB), [1984] 3 WWR 737 (defendant in foreign paternity action authorised uncle to represent him); *Carrick Estates Ltd v MacKinnon* (1989) 80 Sask R 118 (QB) aff’d (1990) 86 Sask R 232 (CA) (son of defendant found to have authority in writing letter intended as appearance). If there was no authority, the appearance is not submission by the party. *McLean v Shields* (1885) 9 OR 699 (CPD) (appearance entered by solicitors lacking authority from one of defendants); *Redhead v Redhead* [1926] NZLR 131 (SC) (solicitors representing defendant in foreign divorce case entered appearance for correspondent without authority); *Fulford v Reid* (1996) 112 Man R (2d) 260 (QB), [1997] 1 WWR 112 (plaintiff’s lawyer filed statement of defence that defendant had sent to lawyer); *Desert Sun Loan Corp v Hill* [1996] 2 All ER 847 (CA) (jurisdiction depended on factual issue of whether defendant authorised co-guarantor to instruct attorney to accept service of process on behalf of defendant). See Cheshire (n 1) 522; Collier (n 45) 245; McLeod (n 1) 590; Nygh (n 1) 899.

In *Malaysia-Singapore Airlines Ltd v Parker* (1972) 3 SASR 300 (SC) an appearance was entered on behalf of the defendant, but later the court granted leave to withdraw the appearance. Bray CJ stated that “The effect of a withdrawal of an appearance by leave is, in my present view, to leave the matter as if the defendant had never appeared at all and hence had never submitted to the jurisdiction....” *Ibid* 302-303. This is questionable.


296 Ibid 268.

297 *Re Brandt and Overseas Food Importers and Distributors Ltd* (1981) 27 BCLR 31 (CA) sub nom *Re Overseas Food Importers & Distributors Ltd and Brandt* 126 DLR (3d) 422.


court’s decision. 300 Elsewhere, on different facts, defendants’ letters have been held not to be a submission to the foreign court’s jurisdiction. 301

The usual statement of the rule is that “voluntary” appearance is submission to the court’s jurisdiction. 302 However, no one who has involuntarily become a party in a lawsuit enters an appearance or takes other steps to defend the case out of pure free will. The party so acts because the alternative is to allow the claimant to obtain a default judgment that can be enforced at least in the same jurisdiction. 303 But almost any appearance is “voluntary” for purposes of recognition of a judgment entered in the case. Other than the hypothetical possibility of a party entering an appearance under duress, the only situation in which courts have considered an appearance to be involuntary is an appearance to “save” property that has been seized by the foreign court. 304 An appearance intended to protect property against enforcement of a default judgment is regarded as voluntary. 305 In reality the defendant’s action is as voluntary (or involuntary) when assets have already been seized by court action as when there is a high probability of assets being seized, so the distinction has been criticised. 306 It might eventually be decided that an appearance is voluntary even when it is preceded by seizure of property.

A defendant submits to the jurisdiction of a court by agreeing to a consent order or summary judgment. 307 The prevailing view is that an appeal from a judgment, or application to set it aside, is a submission that includes the judgment objected to. 308 Some courts, primarily in India, have decided the opposite, in part

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302 See cases and texts cited in nn 292-293.
303 “[N]o one supposes that when a man appears voluntarily as a defendant in an action before a foreign Court he does so because he likes it; he appears because on the whole he deems it his interest to submit to have the dispute decided by the foreign tribunal and to take his chance of winning the suit....” Boissière and Co v Brockner and Co (1889) 6 TLR 85 (QBD) 85.
305 Voinet v Barrett (1885) 55 LJQB 39 (CA), 2 TLR 122; Poissant v Poissant [1941] 3 WWR 646 (Sask DC). See Binchy (n 139) 593; Dicey (n 1) 700-701; McLeod (n 1) 589-590; Castel (n 293) 40.
306 See Rama Ayyar v Krishna Patter (1915) ILR 39 Mad 733, 737-745, sub nom Rama Aiyar v Krishna Patter AIR 1917 Mad 780, 782-786 (Tyabji J); Richardson v Allen (1916) 11 Alta LR 245 (AD) 248, 28 DLR 134, 136, 10 WWR 720, 722-723; Binchy (n 139) 593; PM North, Cheshire and North, Private International Law (10th ed 1979) 637-638; PE Nygh, Conflict of Laws in Australia (5th ed 1991) 116; Castel (n 293) 40.
because of a belief that submission must precede the court’s decree to be effective.\textsuperscript{310} In determining whether a step taken in foreign proceedings is a submission to the foreign court, it is relevant, but not conclusive, that the foreign court would not itself regard the step as a submission.\textsuperscript{311}

Initiating legal proceedings as a plaintiff is obviously a submission to the court’s jurisdiction in the action,\textsuperscript{312} even if the plaintiff subsequently withdraws the action.\textsuperscript{313} So is intervention in a case as an additional party.\textsuperscript{314} The issue that arises when a party was a plaintiff or intervenor in the foreign proceedings is whether the party submitted to the court’s jurisdiction for purposes of a counterclaim, cross-claim or claim in related proceedings that resulted in a judgment against the party. Generally a party bringing an action as a plaintiff submits to the court’s jurisdiction for purposes of a counterclaim\textsuperscript{315} or cross-claim.\textsuperscript{316} Under \textit{Murthy v Sivajothi},\textsuperscript{317} a party’s submission to jurisdiction extends to “claims concerning the same subject matter” and “related claims”.\textsuperscript{318} But it is not clear that this limits a plaintiff’s submission to counterclaims and cross-claims.\textsuperscript{319}

In \textit{Whyte v Whyte},\textsuperscript{320} the proposition that a party’s submission to jurisdiction includes “related claims” was extended to claims in separate proceedings. A decree in a US divorce case, made with the agreement of both spouses, prohibited the removal of

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\textit{Christoph Nutsugah} 1929-31 Div Ct 75 (Gold Coast DC); \textit{India: Mt Janki Sethani v Seth Laxmi Narayan} (1925) 22 Nag LR 82, AIR 1926 Nag 77; \textit{Hari Singh v Muhammad Said} (1926) ILR 8 Lah 54, 92-93, AIR 1927 Lah 200, 213; \textit{New Zealand: SCH v O’Brien} (1991) 3 PRNZ 1 (HC Master) 17; \textit{Kemp v Kemp} [1996] 2 NZLR 454 (HC).
\textsuperscript{310} The Indian decisions include \textit{Sivaraman Chetti v Iburam Saheb} (1895) ILR 18 Mad 327; \textit{Narappa Naicken v Govindaraja Naicken} (1934) ILR 57 Mad 824, AIR 1934 Mad 434, aff’d (1932) 64 Mad LJIR 531, AIR 1933 Mad 393; \textit{Ramkisan v Harmukhrai} ILR 1955 Nag 194 sub nom \textit{Ramkisan Janakilal v Seth Harmukharai Lachminarayan} AIR 1955 Nag 103. The principal decision outside India is \textit{Bank of Ottawa v Esdale} (1920) 15 Alta LR 269 (AD), [1920] 1 WWR 913, sub nom \textit{Esdale v Bank of Ottawa} 51 DLR 485, rev’g 51 DLR 168 (Alta SC), [1920] 1 WWR 283.
\textit{Rubin v Eurofinance SA} [2012] UKSC 46, [2013] 1 AC 236 [161]-[163]. Johnston (n 95) 637 contends that an act that “does not amount to a submission in the eyes of the foreign court” should not be regarded as submission.
\textsuperscript{312} \textit{Binchy} (n 139) 591; \textit{Castel} (n 45) § 14.4.a; \textit{Clarkson} (n 108) 174; \textit{Dicey} (n 1) 696; \textit{Diwan} (n 1) 628; \textit{Forsyth} (n 1) 426. It is included in the lists of instances in which a party is bound by a foreign judgment in \textit{Schibbsbv v Westenholz} (1870) LR 6 QB 151, 161; \textit{Rousillon v Rousillon} (1880) 14 Ch D 351, 371; \textit{Emanuel v Symon} [1908] 1 KB 302 (CA) 309 (Buckley LJ).
\textsuperscript{313} \textit{Zwyssig v Zwyssig} 1997 (2) SA 467 (W).
\textsuperscript{314} \textit{Parsons v McDonald’s Restaurants of Canada Ltd} (2004) 45 CPC (5th) 304 (Ont SCJ) aff’d sub nom \textit{Currie v McDonald’s Restaurants of Canada Ltd} (2005) 74 OR (3d) 321 (CA), 250 DLR (4th) 224 (party moving to intervene in class action to object to settlement).
\textit{Zwyssig v Zwyssig} 1997 (2) SA 467 (W).
\textsuperscript{315} \textit{160088 Canada Inc v Socoa International Ltd} 1997 Cayman Is LR 409 (GC). See Briggs (n 89) 470-471; \textit{Dicey} (n 1) 696; \textit{McLeod} (n 1) 587-588.
\textsuperscript{318} \textit{Ibid} 476. Various definitions or descriptions of a related claim were referred to in the judgment, but no specific definition was adopted.
\textsuperscript{319} See Briggs (n 1) 707-708; \textit{Dicey} (n 1) 696.
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their child to a country that was not party to the Hague Convention on International Child Abduction. In violation of the decree, the mother took the child to Russia and refused to return her. The father recovered the child three years later. Instead of enforcing the clause of the divorce decree that specified liability for costs and fees incurred on account of the other party’s non-compliance, the father claimed damages for “interference with possessory interest in child” under a provision of the state Family Code. The mother did not participate in the proceedings on this claim. The father was awarded over 1.6 million dollars in damages and sought enforcement of the judgment in England. The Court of Appeal held that the principle of Murthy v Sivajothi applied and the mother’s submission in the divorce action extended to the father’s claim for damages, which stemmed from the mother’s violation of the decree entered in the divorce case.321

It remains the law that “voluntary” submission to the court’s jurisdiction in one case is not a submission to the exercise of jurisdiction by the same court in another case.322 But deciding that a submission to jurisdiction in one case is submission to jurisdiction in a different but related action seems to erode what Scott J in Adams v Cape Industries Plc described as “the bedrock of consent that ought to underlie” submission.323

Another possible erosion is found in Currie v McDonald’s Restaurants of Canada Ltd.324 The case presented the question of whether a member of the plaintiff class in a foreign class action who is notified of the action and the right to opt out is bound by the judgment of the foreign court. The Ontario Court of Appeal concluded that a foreign class action judgment could have binding effect in some circumstances and bar a subsequent action on the same grounds by a member of the class, if adequate notice of the class action was provided. Arguably it would be desirable to give international recognition to judgments in class actions issued by courts with jurisdiction over the defendant, at least when the forum had a substantial connection with the subject-matter of the action. In principle, the interests of all class members, wherever located, would have been adequately represented by the representatives of the class. However, it is doubtful that under common law principles members of a class can be found to have submitted to the court’s jurisdiction by not responding to a notice containing a right to opt out of the action or a settlement.325

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321 See also Giant Light Metal Technology (Kunshan) Co Ltd v Aksa Far East Pte Ltd [2014] SGHC 16, [2014] 2 Sing LR 545 (submission to proceedings that were discontinued to enable parties to settle out of court applied to subsequent proceedings on same claim with same parties).
322 See Thirunavukkarasu Pandaram v Parasurama Aiyar (1936) 71 Mad LJR 838 sub nom Thirunavukkar Aiyar AIR 1937 Mad 97; Adams v Cape Industries Plc [1990] Ch 433, 461-463 (Scott J); Clarkson (n 108) 172-173.
324 (2005) 74 OR (3d) 321 (CA), 250 DLR (4th) 224, aff’g Parsons v McDonald’s Restaurants of Canada Ltd (2004) 45 CPC (5th) 304 (Ont SCJ).
Parties objecting to foreign court’s jurisdiction. The most prominent legal issue concerning a foreign court’s having jurisdiction because of a party’s submission has been whether a party who appeared or took other action in the foreign proceeding, but objected to the court’s exercising jurisdiction in the case, submitted to the court’s jurisdiction. It has long been well-established (if not entirely beyond dispute) that a party who denied that the foreign court had or should exercise jurisdiction over the defendant, but also stated other grounds in defence of the action (including defences on the “merits”), did submit to the jurisdiction of the court. What is actually controversial (for the common law of recognition of foreign judgments) is whether there was submission when the defence of the foreign action was limited to denying that the court had jurisdiction, objecting to service out of the jurisdiction, or seeking a stay of the action on the ground that the court was *a forum non conveniens*. For decades the leading case bearing on this question was *Harris v Taylor*. The defendant was sued for damages in the Isle of Man High Court. The plaintiff obtained an order permitting service out of the jurisdiction. The defendant was served with a writ in England, where he resided. His advocate appeared in court “conditionally” and moved to set aside the writ and service *ex juris* on the grounds (1) that the rules of court did not authorise service out of the jurisdiction in tort actions, (2) no cause of action arose within the jurisdiction of the court, and (3) the defendant had never been domiciled in the Isle of Man. The court dismissed the motion, and the defendant took no further part in the proceedings. In an interlocutory judgment, the court stated that the defendant had failed to appear or enter an appearance. Damages were assessed by a jury, and the court gave judgment for the plaintiff for the amount of...
the jury’s verdict and costs. The plaintiff then sued to enforce the judgment in England.

Bray J gave judgment for the plaintiff on the ground that by “conditionally” appearing in the Isle of Man court, and applying to set aside the writ and order for service out of the jurisdiction, the defendant had voluntarily submitted to the jurisdiction of the court. The Court of Appeal affirmed this decision. The defendant had voluntarily submitted by making the application to the Isle of Man court, even if technically the defendant did not make an appearance, and was bound by the court’s judgment. Buckley LJ stated:

[The defendant] did something which he was not obliged to do, but which, I take it, he thought it was in his interest to do. He went to the Court and contended that the Court had no jurisdiction over him. The Court, however, decided against this contention....If the decision of the Court on that occasion had been in his favour he would have taken advantage of it; as the decision was against him, he was bound by it and it became his duty to appear in the action, and as he chose not to appear and to defend the action he must abide by the consequences which follow from his not having done so....If [the appearance by the defendant’s advocate] can be regarded as a qualified appearance, it was an appearance for the purpose of getting a decision of the Court on the question whether the defendant was bound by the jurisdiction of the Court. The decision went against him, and thereafter it was not open to the defendant to say that he was not bound.

Bankes LJ added: The fact that the defendant sought the protection of the court, to relieve him of the obligation which the plaintiff sought to put upon the defendant, imposed upon the defendant an obligation to obey the judgment of the court if it was against him. It was “an entire misconception of the principle applicable to these cases to say that there is a voluntary submission to the jurisdiction of a foreign Court only when the defendant by appearing in the action in the technical sense has consented to the jurisdiction”.

In *In re Dulles’ Settlement* (a case not involving recognition of a foreign judgment) Denning LJ, with the agreement of Evershed MR, interpreted *Harris v Taylor* as a decision that the defendant could not contest in the English proceedings whether service out of the jurisdiction was proper; it was *res judicata*, as the point had been raised and decided against him in the Manx court. *Harris v Taylor* was not authority on what constitutes submission generally. Denning LJ also declared:

I cannot see how anyone can fairly say that a man has voluntarily submitted to the jurisdiction of a court, when he has all the time been vigorously protesting that it has no jurisdiction. If he does nothing and lets judgment go against him in default of appearance, he clearly does not submit to the jurisdiction. What difference in principle does it make, if he does not merely do nothing, but actually goes to the court and protests that it has no jurisdiction? I can see no

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329 (1914) 111 LT 564 (KBD) 568. See *Harris v Taylor* [1915] 2 KB 580 (CA) 582.

330 *Harris v Taylor* [1915] 2 KB 580 (CA) 587-588 (Buckley LJ).

331 Ibid 592 (Bankes LJ).

332 [1951] Ch 842 (CA).

333 Ibid 851 (Denning LJ).
distinction at all. I quite agree, of course, that if he fights the case, not only on the jurisdiction, but also on the merits, he must then be taken to have submitted to the jurisdiction, because he is then inviting the court to decide in his favour on the merits; and he cannot be allowed, at one and the same time, to say that he will accept the decision on the merits if it is favourable to him and will not submit to it if it is unfavourable. But when he only appears with the sole object of protesting against the jurisdiction, I do not think that he can be said to submit to the jurisdiction.  

The views of Denning LJ were applied in *NV Daarnhouwer & Co Handelmaatschappij v Boulos*, but in *Henry v Geoprosco International Ltd* the Court of Appeal disagreed with the judgments in *Dulles’ Settlement and Daarnhouwer*. Interpreting *Harris v Taylor* as binding authority on what was a voluntary submission, the Court of Appeal held that when a defendant had in effect invited the foreign court to decline to exercise jurisdiction in the case (here by seeking an order setting aside service *ex juris* on grounds of the plaintiff’s supporting affidavit being defective and *forum non conveniens*), the defendant submitted to the court’s jurisdiction and was bound by its judgment. More broadly, when an issue arose for decision at any stage of the foreign proceedings and the court was invited by the defendant as well as the plaintiff to decide the issue, “the merits” were voluntarily submitted to the court and both parties were bound in respect of the dispute as a whole. A defendant who lost on that issue could not challenge the court’s jurisdiction to try the remaining issues.

The Court of Appeal left open whether an appearance “solely to protest against the jurisdiction” was, without more, a voluntary submission, but it made clear that there was a voluntary submission when the defendant’s protest took the form of what in England would be a conditional appearance and application to set aside an order for service *ex juris*.

*Harris v Taylor* and *Henry v Geoprosco International Ltd* have long been criticised by writers such as Cheshire who believed that what in substance was a protest against the assertion of jurisdiction should not be considered a submission to jurisdiction, and that a foreign judgment should not be recognised when the court lacked jurisdiction over the defendant on any other basis. The defendant had no opportunity to have the foreign court decide whether it had jurisdiction in the international sense, as that was irrelevant to the foreign proceedings. In concluding that it had jurisdiction over the defendant, the court was applying its domestic law and not deciding whether it had a basis of jurisdiction required in another country for recognition of the judgment. It is unrealistic to treat the defendant’s response to the action in the foreign court as voluntary when the defendant had or was likely to have

334 *Ibid* 850.
337 *Ibid* 746-750.
338 *Ibid* 748.
339 Cheshire (1st ed) (n 145) 492-496. Also Binchy (n 139) 591-593; Briggs (n 1) 701-702; Caffrey (n 95) 87-97; Cheshire (10th ed) (n 306) 637-640; JHC Morris (ed), *Dicey and Morris on the Conflict of Laws* (10th ed 1980) 1047-1049; McLeod (n 1) 589, 593-594; Collins (n 327); Leon (n 225) 330-334.
assets that could be taken in execution of a default judgment.\textsuperscript{340} As a policy matter it might be desirable to allow defendants to contest a court’s jurisdiction without foreclosing the possibility of resisting recognition of the judgment on the ground that the court lacked jurisdiction in the international sense, if the “merits” were not litigated also. Statutes in Britain,\textsuperscript{341} Australia\textsuperscript{342} and elsewhere,\textsuperscript{343} enacted after \textit{Henry v Geoprosco International Ltd}, so provide. Nevertheless, it is submitted that \textit{Henry} was correctly decided and that it would be correct to treat an appearance “solely to protest against the jurisdiction” as a voluntary submission – bearing in mind that “voluntary” means only that the defendant chose to appear or take other steps in the case, rather than let the plaintiff have judgment by default,\textsuperscript{344} and that court rules and procedures such as conditional appearances, which enable defendants to contend that the court lacks or should not exercise jurisdiction without conceding the point by appearing or defending, assume that the defendant will be bound by the decision that is ultimately given. The defendant submitted to the foreign court for purposes of a decision on whether it had or should exercise jurisdiction and is bound by the decision and its consequences.\textsuperscript{345}

Despite being a highly authoritative and seemingly correct interpretation of the law on submission to jurisdiction (absent alteration by statute), \textit{Henry} may not now express the law of some countries. Judgments in the some later cases outside England have, at least in \textit{dicta}, taken the position that an appearance in a foreign court to object to the exercise of jurisdiction or service \textit{ex juris} is not a submission that confers jurisdiction on the court.\textsuperscript{346} Some of the judgments adopt passages from English cases

\textsuperscript{340} See Levontin (n 327) 5-7 on the hazards of not responding to an action.
\textsuperscript{341} Civil Jurisdiction and Judgments Act 1982, c 27, s 33 (UK) (applicable to England, Wales and Northern Ireland).
\textsuperscript{342} Foreign Judgments Act 1991, No 112, s 11 (Aust).
\textsuperscript{343} Foreign Judgments (Restriction on Recognition and Enforcement) Ordinance (Cap 46), s 4 (Hong Kong); Protection of Businesses Act 99 of 1978, s 1E (South Africa) (applicable only to judgments relating to act or transaction within s 1(3) of Act); Anderson (n 45) 248 (enactments in Caribbean).
\textsuperscript{344} See above at nn 302-306.
\textsuperscript{346} Canada: Clinton \textit{v} Ford (1982) 37 OR (2d) 448 (CA) 452, 137 DLR (3d) 281, 285; \textit{Mid-Ohio Imported Car Co v Tri-K Investments Ld} (1995) 13 BCLR (3d) 41 (CA), 129 DLR (4th) 181, [1996] 2 WWR 144 (on ground that rule of court where plaintiff attempted to enforce foreign judgment provided that such an appearance was not acceptance of court’s jurisdiction); Caribbean: \textit{Banco Mercantil del Norte SA (Grupo Financiero Banorte) v Cabal Peniche} 2003 Cayman Is LR 343 (GC); \textit{Kader Holdings Co Ltd v Desarrollo Inmobiliario Negocios Industriales de Alta Tecnologia de Hermosillo, SA de CV} [2014] BMCA 2; New Zealand: \textit{Clyde & Co v Sovrybflot Commercial Corp} (1998) 12 PRNZ 1 (HC) (in part because rules of foreign court provided that defendant could dispute court’s jurisdiction without submitting to it); \textit{Von Wyl v Engeler} [1998] 3 NZLR 416 (CA) 421; \textit{Gordhan v Kerdemelidis} [2013] NZHC 566; South Africa: \textit{Supercat Incorporated v Two Oceans Marine CC} 2001 (4) SA 27 (C). This may be the position in Singapore. See Yeo (n 45) 458-459. Earlier Canadian cases followed \textit{Harris v Taylor, Kennedy v Trites Ltd} (1916) 10 WWR 412 (BCSC); \textit{Richardson v Allen
and the Dicey treatise that reflect the alterations to English law made by the Civil Jurisdiction and Judgments Act 1982,\(^{347}\) even though equivalent legislation had not been enacted locally.\(^{348}\) Definitive decisions by appellate courts will be required to settle the law on this point. If a defendant who protested the foreign court’s jurisdiction is not to be bound by the judgment, it may well be questioned why this should not apply to defendants who resisted the action on the merits as well as on jurisdiction, in order to avoid a default judgment, or why defending without a protest of jurisdiction that would have been futile makes the judgment enforceable internationally, when the court otherwise had no jurisdiction in the international sense.\(^{349}\)

**Common sovereignty**

In many of the cases in which recognition of a foreign judgment was in issue, the court in which the judgment was given and the court in which recognition was sought were both within the British Empire. Consequently, the sovereign power of both courts was the same. The court issuing the judgment did so under authority it possessed under that sovereign power, including the exercise of jurisdiction over the defendant (typically, under rules of court or legislation that expanded jurisdiction *in personam* beyond the common law grounds and authorised service *ex juris*). It was arguable that for this reason the second court was obliged to accept that the first court had the jurisdiction to issue a judgment with binding effects in other parts of the Empire.

Although there were no explicit decisions on that question, it became clear by the latter part of the nineteenth century that the judgment of a court in a different territory of the British Empire was a foreign judgment subject to the same requirements of recognition as judgments of other countries, absent valid legislation to the contrary.\(^{350}\) This was reinforced by the strongly territorial approach to jurisdiction of the Privy Council’s judgment in *Sirdar Gurdyal Singh v Rajah of Faridkote*,\(^{351}\) and by

\(^{347}\) Above at n 341.

\(^{348}\) See the dissent of Beck J in *Richardson v Allen* (1916) 11 Alta LR 245 (AD) 248-259, 28 DLR 134, 137-146, 10 WWR 720, 723-732.

\(^{349}\) See *Brisbane Oyster Fishery Co v Emerson* (1877) Knox 80 (NSWFC); *Jamieson v Robb* (1881) 7 VLR 170 (FC); *British Linen Co v McEwan* (1892) 8 Man R 99 (FC); *Turnbull v Walker* (1892) 67 LT 767 (QBD), 9 TLR 99; *Nalla Karuppa Settiar v Mahomed Iburam Saheb* (1896) ILR 20 Mad 112 sub nom *Nalla Karuppa Chettiar v Iburam Saheb* 7 Mad LJR 76.

\(^{350}\) See *Banco Mercantil del Norte SA (Grupo Financiero Banorte) v Cabal Peniche* 2003 Cayman Is LR 343 (GC); *Gordhan v Kerdemelidis* [2013] NZHC 566; *Kader Holdings Co Ltd v Desarrollo Inmobiliario Negocios Industriales de Alta Tecnologia de Hermosillo, SA de CV* [2014] BMCA 2. This includes a rule that there is submission to the foreign court’s jurisdiction only if the defendant had taken some step “which is only necessary or only useful” if an objection to jurisdiction has been actually waived, or if the objection has never been entertained at all. See *Rubin v Eurofinance SA* [2012] UKSC 46, [2013] 1 AC 236 [159]-[160].
cases deciding that a judgment from a court under the British Crown was not enforceable in another such court by reason of the defendant’s being a British subject who owed allegiance to the sovereign of both courts.352

Shaik Atham Sahib v Davud Sahib,353 a case in the High Court of Madras early in the twentieth century, is directly in point. The plaintiff sued in a court of British India on a judgment from Ceylon. The Madras court rejected the plaintiff’s contention that the rules of private international law applied only to judgments of courts in foreign independent states and not to the judgment of a court in a country subject to the same sovereignty as the country in which suit on the judgment was brought. “[W]e are not aware that the validity of a foreign judgment when it is obtained in the forum of a country with a system of administration and judicature separate and distinct from that of the country in which it is sued upon, though both the countries may owe allegiance to the same sovereign, is, apart from especial legislation, regulated by rules different from those which regulate the operation of other foreign judgments.”354 The court noted that in Emanuel v Symon355 it was assumed that the judgment from Western Australia was subject to the rules of private international law, and those rules were applied in England to judgments from Scotland and Ireland.

The court then addressed and rejected the argument that it must be held that the British Parliament empowered the Ceylon court to issue a decree binding a defendant who was a subject of the British Crown and a resident of British India – because the court derived its authority from the British Crown and by legislation passed by the Ceylon Legislative Council under the general power of legislation conferred on the Council by Parliament. Assuming that Parliament might confer authority on the Ceylon courts to exercise jurisdiction over residents of British India in a personal action of the kind under consideration, this would be recognised only if it was “conferred by the Supreme Legislature by express and clear words”. In the absence of any express enactment, “the ordinary ‘presumption that the jurisdiction of all Courts is properly and strictly territorial would not be displaced’”.356

stated that “As between different persons under one sovereignty (e.g., under the Roman Empire) the legislation of the sovereign may distribute and regulate jurisdiction; but no territorial legislation can give jurisdiction which any foreign Court ought to recognise against foreigners, who owe no allegiance or obedience to the Power which so legislates.” Ibid 684.

352 Kassim Mamoojee v Isuf Mahumed Sulliman (1902) ILR 29 Cal 509 (FB) sub nom Hadjee Kaseem Mamooji v Hadjee Isup Mahomed Sulliman 6 Cal WN 829 (observing that otherwise a judgment obtained in a court of any British colony against a person who was not a native of the colony or resident or domiciled there could be successfully sued upon in any other court within the British dominions); Gavin Gibson & Co Ltd v Gibson [1913] 3 KB 379; Mohamedally Mulla Ebramji v Aibhai Jivanji Mamaji (1918) 7 E Afr LR 89 (HC). See also Dakota Lumber Co v Rinderknecht (1905) 6 Terr LR 210 (NWTFC) 219-222, 2 WLR 275, 276-278.

353 (1909) ILR 32 Mad 469, 19 Mad LJR 457.

354 Ibid 471, 461.

355 [1908] 1 KB 302 (CA), discussed above at nn 31-38.

356 Shaik Atham Sahib v Davud Sahib (1909) ILR 32 Mad 469, 473, 19 Mad LJ 457, 463. See also Chor Mal Bal Chand v Kasturi Chand Seraogi (1936) ILR 63 Cal 1033, 1043-1044, sub nom Chormal Balchand Firm v Kasturi Chand Seraoji AIR 1938 Cal 511, 516 (in absence of express power conferred by Parliament, judgments of courts authorised by legislature to try suits against non-resident British subjects would not have extra-territorial operation in another
In subsequent cases it seems to have been beyond dispute that common sovereignty is not a ground for recognition of a foreign court’s jurisdiction over the defendant. This has been accepted not only as to judgments from different countries under British sovereignty at the time, but also judgments from within the same federation, as in Canada\(^{357}\) and Australia,\(^{358}\) and within the United Kingdom. In *Adams v Cape Industries Plc*,\(^{359}\) the Court of Appeal said:

> Merely to identify X as the ultimate law giver and creator of the agencies through which those laws are enforced, and then move on to the proposition that a judgment given anywhere in the territory governed by X against someone present anywhere else in those territories should be enforced by foreign courts, seems a large step. Even today, Scotland and England are not the same jurisdictions, and if one looks to the past, it is hard indeed to acknowledge that in Imperial times, all persons present in one part of the Empire could properly be regarded as present everywhere else in the Empire, notwithstanding the immense variety of laws, courts and constitutional systems which then prevailed, simply because as the ultimate source of power there was to be found a single sovereign.\(^{360}\)

One possible qualification to this is found in the case law. It concerns judgments of English courts, and potentially judgments from elsewhere in the United Kingdom. In *Moazzim Hossein Khan v Raphael Robinson*,\(^{361}\) the plaintiff sued on a judgment obtained in England. The defendants were British subjects resident in British India. The English court had assumed jurisdiction under the rules for service *ex juris* in Order 11 of the Rules of Court,\(^{362}\) whose issuance was authorised by an act of the British Parliament.\(^{363}\) The High Court in Calcutta held that the English court had jurisdiction if the action in England came within the rules of Order 11. Although British India had its own legislative councils, Parliament had “supreme legislative authority” over British subjects in British India. “[T]he order in question constitutes a legislative act of the sovereign power regulating the jurisdiction in the case of a British

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\(^{357}\) See *De Savoye v Morguard Investments Ltd* [1990] 3 SCR 1077, 1091-1092, (1990) 76 DLR (4th) 256, 265; Read (n 86) 12-13. The *Morguard* case changed Canadian law in this respect. See below at nn 384-404.

\(^{358}\) See *Laurie v Carroll* (1958) 98 CLR 310, 331 (in questions of jurisdiction and conflict of laws, each state is to be treated as a distinct and separate country or “law area”; doctrines are applied within local limits as they would be in England, without regard to constitutional sovereignty of Crown in right of other states and dominions or general British nationality).

\(^{359}\) [1990] Ch 433 (CA).

\(^{360}\) *Ibid* 553-554.

\(^{361}\) (1901) ILR 28 Cal 641 sub nom *Syed Moazim Hossein Khan Bahadur v Raphael Robinson* 5 Cal WN 741.

\(^{362}\) Rules of the Supreme Court 1883, Order XI r 1(e).

\(^{363}\) Supreme Court of Judicature Act 1875, c 77, s 17 (UK).
subject, resident in British India and outside the ordinary territorial jurisdiction of the English Courts, and gives the English Courts jurisdiction over such British subjects, assuming that the particular case falls within the order.”\footnote{Moazzim Hossein Khan v Raphael Robinson (1901) ILR 28 Cal 641, 648, sub nom Syed Moazim Hossein Khan Bahadur v Raphael Robinson 5 Cal WN 741, 747 (Maclean CJ). Banerjee J, agreeing, stated that “If therefore the supreme legislature in the British Empire authorizes an English Court in any class of cases to exercise jurisdiction over a non-resident foreigner by reason of the cause of action arising within its jurisdiction...and the foreigner is a native of British India, he cannot treat the judgment passed as a nullity, merely because he did not reside within the jurisdiction of the Court which passed it.” Ibid 650, 748 (Banerjee J).}

As far as can be ascertained, this proposition has never been accepted outside India. The jurisdictional requirements applied to judgments of English courts or UK courts generally have been the same as the requirements for other foreign judgments.\footnote{Eg Borough of Finsbury Permanent Investment Building Society v Vogel (1910) 31 Natal LR 402 (FC); Montgomery Jones & Co v Corry & Co (1911) 14 Gaz LR 111 (NZSC); Webster MacLaughlin Co Ltd v Connors Brothers Ltd (1935) 9 MPR 345 (NBKBD) sub nom Webster v Connors Bros Ltd [1935] 2 DLR 483.}

In any event, the reasoning of Moazzim Hossein Khan could now apply only in the territories that remain subject to the “supreme legislative authority” of the British Parliament and not in the many countries that have become independent nations or parts of independent nations.\footnote{See Indian and General Investment Trust Ltd v Raja of Khalikote AIR 1952 Cal 508, 520-522 (no common sovereignty once India had become independent and republic).}

\textit{Grounds for domestic jurisdiction (“reciprocity”)}

In numerous cases, the foreign court had jurisdiction over the defendant for a reason that would be a ground for the exercise of jurisdiction by a court of the country where recognition is sought. This is usually the situation when rules of court in both places authorised service \textit{ex juris} (service out of the jurisdiction) in an action for a tort committed in the country, or breach of a contract that was made or to be performed in the country or governed by the law of the country.\footnote{Eg Sharps Commercials Ltd v Gas Turbines Ltd [1956] NZLR 819 (SC); Rainford v Newell-Roberts [1962] IR 95 (HC); Crick v Hennessy [1973] WAR 74 (SC); Weiner v Singh (1981) 22 CPC 230 (BC Co Ct); Morguard Investments Ltd v De Savoye (1988) 27 BCLR (2d) 155 (CA), [1988] 5 WWR 650, af'd [1990] 3 SCR 1077; (1990) 76 DLR (4th) 256.}

\textit{Schibsby v Westenholz} established the legal rule that applies in this situation. A foreign court’s exercise of jurisdiction is not to be regarded as valid, for purposes of recognition of a judgment, because a court of the place where recognition was sought would have jurisdiction over the defendant in the same circumstances. Blackburn J, in delivering the court’s decision that the French judgment was not to be enforced, said:

\textbf{We were much pressed on the argument with the fact that the British legislature has, by the Common Law Procedure Act, 1852,...conferred on our courts a power of summoning foreigners, under certain circumstances, to appear, and in case they do not, giving judgment against them by default. It was this consideration principally which induced me at the trial to entertain the
opinion which I then expressed and have since changed [that the plaintiff was entitled to the verdict]. And we think that if the principle on which foreign judgments were enforced was that which is loosely called “comity,” we could hardly decline to enforce a foreign judgment given in France against a resident in Great Britain under circumstances hardly, if at all, distinguishable from those under which we, mutatis mutandi, might give judgment against a resident in France; but it is quite different if the principle be that which we have just laid down [that the judgment of a court of competent jurisdiction over the defendant imposes a duty or obligation on the defendant to pay the sum for which judgment is given, which the courts in this country are bound to enforce].

The absence of what is termed “reciprocity” in this respect is an entrenched part of conflict of laws. Courts have adhered to it in numerous cases. Some judgments in England, Canada and South Africa do support recognition of foreign judgments when the judge’s court would have jurisdiction in similar circumstances, but this has been disapproved by appellate courts in England and

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369 Ibid 159.
370 Dicey (n 1) 706; McLeod (n 1) 598; Nygh (n 1) 904; Joost Blom, Conflict of Laws—Enforcement of Extraprovincial Default Judgment—Reciprocity of Jurisdiction (1989) 68 Can B Rev 359; Briggs (n 240) 241-247; Gilbert D Kennedy, Recognition of Judgments in Personam: The Meaning of Reciprocity (1957) 35 Can B Rev 123. “Jurisdictional equivalence” might be preferable terminology, in order to avoid confusion with reciprocity in the sense of enforcing a judgment from country X in country Y if the courts of X would enforce a judgment from Y in similar circumstances. See Vaughan Black, Enforcement of Judgments and Judicial Jurisdiction in Canada (1989) 9 Oxford J Legal Stud 547, 550; Richard Frimpong Oppong, Recognition and Enforcement of Foreign Judgments in Commonwealth African Countries (2014) 15 Yrbk Pvt Int’l L 365, 374-375.

371 See Anton (n 9) 374-375; Binchy (n 139) 597; Cheshire (n 1) 530; Dicey (n 1) 706-708; Mortensen (n 45) 135.

373 In re Dulles’ Settlement [1951] Ch 842 (CA) 851 (Denning LJ).
375 Duarte v Lissack (1973) 3 SA 615 (D) 623-624, rev’d 1974 (4) SA 560 (N).
Canada\textsuperscript{377} and a judgment of the Cape Provincial Division in South Africa.\textsuperscript{378} In \textit{Phillips v Batho},\textsuperscript{379} Scrutton J observed that

Under our Order XI. we constantly serve out of the jurisdiction, give judgment against foreigners, and enforce that judgment against their property within the jurisdiction. But, when we are asked to enforce the judgment of a foreign Court against an Englishman served in the same way, we decline to do so on the ground that such procedure is contrary to the principles of international law. The reason may be that our English procedure is imposed on us by statute, the justice of which it is useless to question, while the foreign procedure is not so imposed and is open to question.\textsuperscript{380}

It may seem peculiar that a court will not accept a foreign court’s having jurisdiction over a defendant when the court itself would, in the same situation, have jurisdiction over the defendant under its domestic law. If the law of country X authorises courts in X to exercise jurisdiction over non-resident defendants when the case has a specified connection with X, logically the courts of X should accept the legitimacy of courts in another country exercising jurisdiction in the same circumstances. Some writers have advocated reciprocity as a basis for recognition of foreign judgments, not only on grounds of logic but also to facilitate recognition and enforcement of judgments when the foreign state had a substantial connection with and interest in the case—for example, when injury occurred there, the contract in the case was to be performed there, or the case concerned property located there.\textsuperscript{381} But “jurisdiction in the international sense” is not based on the case having a connection with the foreign state that makes it just to sue the defendant there,\textsuperscript{382} and it does not follow from expansion of courts’ jurisdiction by statute or rules of court that judgments arising from similar expansions of jurisdiction in foreign countries should be enforced. The reasons for the provisions in statutes and rules that authorise service \textit{ex juris}, in actions having a specified connection with the forum state, do not include enforcement of foreign judgments. Typically courts have discretionary powers to refuse to permit service \textit{ex juris} and to stay an action on grounds of \textit{forum non conveniens}. That would not apply to recognition of a foreign judgment, so there would not be true “reciprocity” in practice and default judgments from places where it would have been difficult for the defendant to defend the action would be enforced. For these reasons, even those


\textsuperscript{378} \textit{Supercat Incorporated v Two Oceans Marine CC} 2001 (4) SA 27 (C).

\textsuperscript{379} [1913] 3 KB 25.

\textsuperscript{380} \textit{Ibid} 29-30.


\textsuperscript{382} See \textit{Adams v Cape Industries Pte} [1990] Ch 433 (CA) 519; Briggs (n 1) 714.
who advocate some expansion of recognition of foreign judgments tend to reject reciprocity as a basis for doing so.\textsuperscript{383}

\textit{Real and substantial connection}

The law of the common law provinces of Canada on recognition of judgments was, until 1990, substantially the same as elsewhere. But this greatly changed in consequence of the Supreme Court of Canada’s decision in what is usually referred to as the \textit{Morguard} case.\textsuperscript{384} Morguard Investments and another company were mortgagees of lands in Alberta. The mortgagor lived in Alberta when he took title to the lands and assumed the obligations of mortgagor. He later moved to British Columbia. When the mortgages fell into default, the mortgagees brought foreclosure actions in Alberta. The mortgagor was served with process in British Columbia but took no action. The mortgaged properties were sold to the mortgagees and judgments were entered against the mortgagor for the amount owed on the mortgages after deducting the value of the property sold. The mortgagees then sued the mortgagor in British Columbia to enforce the judgments.

The Alberta court had jurisdiction over the defendant in the foreclosure and deficiency judgment proceedings under typical court rules authorising service \textit{ex juris}. However, it lacked jurisdiction over the mortgagor for purposes of enforcement of its judgment in another province under \textit{Emanuel v Symon}\textsuperscript{385} and other leading cases on recognition of foreign judgments. In a judgment delivered by La Forest J, the Supreme Court of Canada held that a court within Canada was to be regarded as having jurisdiction, for purposes of recognition and enforcement in another province, when there was a “real and substantial connection” with the province or territory in which jurisdiction had been exercised.\textsuperscript{386}

The judgment referred at various points to connection with the party,\textsuperscript{387} connection with the wrongdoing,\textsuperscript{388} connection with the damages suffered,\textsuperscript{389} and


\textsuperscript{384} \textit{De Savoye v Morguard Investments Ltd} [1990] 3 SCR 1077, (1990) 76 DLR (4th) 256.

\textsuperscript{385} [1908] 1 KB 302 (CA). See above at nn 31-38.

\textsuperscript{386} There is no one point in the discursive judgment of La Forest J in which this is announced, but the judgment eventually refers to “[t]he private international law rule requiring substantial connection with the jurisdiction where the action took place”. \textit{De Savoye v Morguard Investments Ltd} [1990] 3 SCR 1077, 1109, (1990) 76 DLR (4th) 256, 278. The “real and substantial connection” concept was taken from the speech of Lord Wilberforce in \textit{Indyka v Indyka} [1969] 1 AC 33 (HL) 105, which involved recognition of foreign divorce decrees.

\textsuperscript{387} \textit{De Savoye v Morguard Investments Ltd} [1990] 3 SCR 1077, 1104, 1109, (1990) 76 DLR (4th) 256, 275, 278.

\textsuperscript{388} Ibid 1106, 276.

\textsuperscript{389} Ibid 1108, 277.
connection with the action, so the nature of the required connection with the province in which the action was brought was not made clear. Possibly what was intended was a substantial connection with the subject-matter of the action. However, in a later case, the Supreme Court said that “Morguard established that the courts of one province or territory should recognize and enforce the judgments of another province or territory, if that court...had a real and substantial connection with either the subject matter of the action or the defendant.” The required connection clearly existed with Alberta in Morguard. The lands mortgaged were in Alberta and the contracts were entered there by parties then resident in Alberta. Consequently, the judgments were enforceable in British Columbia under the rule adopted in the case.

The Morguard decision was based to a large extent on the premise that legally valid judgments of Canadian courts ought to be readily enforceable within Canada. Inter-provincial recognition of Canadian judgments should not be effectively limited to cases in which the defendant was present in the province or territory, when an action there was commenced, or somehow submitted to the court’s jurisdiction. An ability to avoid legal obligations arising in one province by moving to another province was anarchic and unfair. Canadian courts should give “full faith and credit”, to use the language of the United States Constitution, to judgments of a court in another province or territory, if that court “properly” or “appropriately” exercised jurisdiction in the action. The exercise of jurisdiction would be appropriate and reasonable when there was a real and substantial connection with the province.

However, much of the argument in the Morguard judgment was applicable to international as well as intra-national enforcement of judgments. La Forest J wrote:

Modern states, however, cannot live in splendid isolation and do give effect to judgments given in other countries in certain circumstances. Thus a judgment in rem, such as a decree of divorce granted by the courts of one state to persons domiciled there, will be recognized by the courts of other states. In certain circumstances, as well, our courts will enforce personal judgments given in other states....[O]ur courts will enforce an action for breach of contract given by the courts of another country if the defendant was present there at the time of the action or has agreed to the foreign court’s exercise of jurisdiction. This, it was thought, was in conformity with the requirements of comity, the informing principle of private international law, which has been stated to be the deference and respect due by other states to the actions of a state legitimately taken within its territory. Since the state where

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390 Ibid 1103, 1104, 1108, 274, 275, 278.
the judgment was given had power over the litigants, the judgments of its courts should be respected.

But a state was under no obligation to enforce judgments it deemed to fall outside the jurisdiction of the foreign court. In particular, the English courts refused to enforce judgments on contracts, wherever made, unless the defendant was within the jurisdiction of the foreign court at the time of the action or had submitted to its jurisdiction. And this was so...even of actions that could most appropriately be tried in the foreign jurisdiction, such as a case like the present where the personal obligation undertaken in the foreign country was in respect of property located there. Even in the 19th century, this approach gave difficulty, a difficulty in my view resulting from a misapprehension of the real nature of the idea of comity, an idea based not simply on respect for the dictates of a foreign sovereign, but on the convenience, nay necessity, in a world where legal authority is divided among sovereign states of adopting a doctrine of this kind.

...“Comity’ in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protections of its laws."

...In a word, the rules of private international law are grounded in the need in modern times to facilitate the flow of wealth, skills and people across state lines in a fair and orderly manner....“The ultimate justification for according some degree of recognition is that if in our highly complex and interrelated world each community exhausted every possibility of insisting on its parochial interests, injustice would result and the normal patterns of life would be disrupted.”

This formulation suggests that the content of comity must be adjusted in the light of a changing world order. The approach adopted by the English courts in the 19th century may well have seemed suitable to Great Britain’s situation at the time. One can understand the difficulty in which a defendant in England would find himself in defending an action initiated in a far corner of the world in the then state of travel and communications. [Emanuel v Symon], where the action arose in Western Australia against a defendant in England, affords a good illustration. The approach, of course, demands that one forget the difficulties of the plaintiff in bringing an action against a defendant who has moved to a distant land. However, this may not have been perceived as too serious a difficulty by English courts at a time when it was predominantly Englishmen who carried on enterprises in far away lands. As well, there was an exaggerated concern about the quality of justice that might be meted out to British residents abroad....

394 Hilton v Guyot (1895) 159 US 113, 163-164.
The world has changed since the above rules were developed in 19th century England. Modern means of travel and communications have made many of these 19th century concerns appear parochial. The business community operates in a world economy and we correctly speak of a world community even in the face of decentralized political and legal power. Accommodating the flow of wealth, skills and people across state lines has now become imperative. Under these circumstances, our approach to the recognition and enforcement of foreign judgments would appear ripe for reappraisal. Certainly, other countries, notably the United States and members of the European Economic Community, have adopted more generous rules for the recognition and enforcement of foreign judgments to the general advantage of litigants.  

This suggested that judgments of courts in foreign nations, as well as judgments of courts within Canada, should be enforceable on the basis of real and substantial connection. After the Morguard decision, a number of courts in Canada applied Morguard to judgments from other nations. The Supreme Court of Canada settled the issue in Beals v Saldanha. It decided to apply the real and substantial connection rule to judgments of foreign countries’ courts. The majority’s judgment quoted passages in the portion of Morguard excerpted above and added:

...[Comity] is of particular importance viewed internationally. The principles of order and fairness ensure security of transactions, which necessarily underlie the modern concept of private international law. Although Morguard recognized that the considerations underlying the doctrine of comity apply with greater force between the units of a federal state, the reality of international commerce and the movement of people continue to be “directly relevant to determining the appropriate response of private international law to particular issues, such as the enforcement of monetary judgments”.

International comity and the prevalence of international cross-border transactions and movement call for a modernization of private international law. The principles set out in Morguard...can and should be extended beyond the recognition of interprovincial judgments, even though their application may give rise to different considerations internationally....

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399 Blom (n 397) 375.
...Although La Forest J [in Morguard] and LeBel J suggested that the rules applicable to interprovincial versus foreign judgments should differ, they do not preclude the application of the “real and substantial connection” test to both types of judgments, provided that any unfairness that may arise as a result of the broadened application of that test be taken into account.

The practical effect of Morguard and Beals v Saldanha is to make enforceable most heretofore-unenforceable default judgments when the plaintiff claimed that damage or loss occurred within the country or (in federal systems) the state or province where the action was brought, or that it arose from a transaction made or at least substantially to be performed in the place where the action was brought. In these situations, “real and substantial connection” would usually be found. Indirectly, the decisions compel parties sued in a province or foreign country where they do not reside to defend the action rather than allow judgment to be given the plaintiff by default, as a default judgment is usually more favourable to the plaintiff than a judgment in a defended action and enforcement is likely under the real and substantial connection rule.

Academic commentary on Morguard was initially favourable to the decision. But experience with the consequences, including Beals v Saldanha – in which an action in Florida arising from an $8000 land sale contract led to a default judgment for $260,000 that was held enforceable – has generated criticism. The primary grounds for criticism have been the inability of defendants or their legal advisers to predict, at the time when a decision on how to respond to the plaintiff’s action is required, whether a court in proceedings to enforce a judgment would find the

requisite real and substantial connection; defendants having to incur the difficulty and expense of defending claims in foreign countries, in order to avoid default judgments that would or might be enforceable on the basis of real and substantial connection; enforcement of foreign judgments obtained because of unfair laws or procedures, or fraud; unfairness to defendants who had reasonably assumed, on the basis of the prior case law, that a judgment would be unenforceable if they did not enter an appearance in the plaintiff’s action; and the one-sided nature of the expansion of enforcement of foreign judgments: Beals v Saldanha allowed more foreign judgments to be enforced in Canada – primarily against Canadians and Canadian companies – without any expansion of the enforcement of Canadian judgments elsewhere.\textsuperscript{406}

The main question at present is whether courts outside Canada will endorse Morguard and Beals and adopt the real and substantial connection standard for recognition of foreign judgments. In In the Matter of Flightlease (Ireland) Ltd,\textsuperscript{407} both the High Court and Supreme Court of Ireland concluded, after discussing the Canadian jurisprudence in some detail, that real and substantial connection should not replace the existing requirements of jurisdiction. Clarke J, in the High Court, was influenced by the absence of “any real consensus in the common law world as to a need for a change in the direction identified by the Supreme Court of Canada”\textsuperscript{408} – common law courts elsewhere had not followed the Canadian lead, and unspecified academic commentary had cautioned against this – and by the potential injustice of doing so. “[I]t would be inappropriate to engage in such a radical restructuring of the common law which could have the effect of adversely affecting, in a retrospective way, parties who had ordered their affairs (by for example not participating in foreign proceedings) on the basis of a reasonable understanding of what the law currently was.”\textsuperscript{409} Finnegan J, delivering the majority judgment in the Supreme Court, concurred with Clarke J and added:

\textsuperscript{406} See Briggs (n 1) 712-715; Pitel (n 45) 177-178; Mortensen (n 45) 135-136; Simon Atrill, The Enforcement of Foreign Judgments in Canada (2004) 63 Camb LJ 574; H Scott Fairley, Open Season: Recognition and Enforcement of Foreign Judgments in Canada After Beals v. Saldanha (2005) 11 ILSA J Int'l & Comp L 305; Monestier (n 404). Briggs’s objections include inconsistency with the doctrine of obligation, which has been the foundation of enforcement of foreign judgments in personam.


\textsuperscript{408} Ibid [5.16].

\textsuperscript{409} Ibid [5.17].
The change contended for...is of such significance that it would in my opinion exceed the judicial function to re-state the common law in such a way. Such a change should be by legislation. Such legislation will require the evaluation of many interests and considerations that a court could not be sure to cover. Within the Canadian jurisprudence is a recognition that the change there effected may require the creation of new defences to applications for enforcement of foreign judgments. It is preferable that such matters should be dealt with in comprehensive legislation rather than by piecemeal development of the law following the introduction of a new test if uncertainty is to be avoided in an area of law where certainty is of crucial importance. In the case of conflicts of law it is preferable that developments should take place in the context of an international consensus by way of treaty or convention given effect to in national law by legislation.\textsuperscript{410}

O’Donnell J, in a separate judgment in the Supreme Court, was critical of narrow rules for the enforcement of foreign judgments, as set forth in the Dicey treatise. However, he concurred in rejection of real and substantial connection. He said that in comparison with the “Dicey Rule”, real and substantial connection “offers substantially more in terms of inherent merit” but “pays a much heavier price in terms of uncertainty and unpredictability”.\textsuperscript{411} A rule on enforcement of foreign judgments should be one with which it was possible to determine, at the time of a decision on whether to submit to jurisdiction, whether a judgment would be enforceable where the party has assets without a submission. Real and substantial connection was poorly suited for this. It was inherently uncertain. The Dicey Rule at least offered predictability. With real and substantial connection, it would be necessary to broaden the grounds for not enforcing default judgments, to avoid injustice. O’Donnell J thought there was little reason why one country should adopt real and substantial connection unilaterally, which could result in recognition of judgments granted in other countries that did not take the same expansive view. He believed that adoption of the real and substantial connection test would not produce any measurable improvement in Irish law and that such a fundamental change in the law was a matter for legislation rather than the courts. It would be best if there were a multi-lateral agreement embodied in legislation enacted with sufficient time and publicity “to allow people to adjust their behaviour to the new rule”.\textsuperscript{412}

The Irish Supreme Court’s decision in Flightlease was soon followed by that of the UK Supreme Court in Rubin v Eurofinance SA.\textsuperscript{413} The plaintiffs in Rubin did not contend that the Dicey Rule should be replaced by real and substantial connection. But the principal judgment, delivered by Lord Collins, clearly accepted the Dicey Rule as stating the rules of English law for recognition of foreign judgments in personam, in a section that discussed the Canadian Supreme Court’s adoption of real and substantial

\textsuperscript{410} In the Matter of Flightlease (Ireland) Ltd [2012] IESC 12, [2012] 1 IR 722 [69] (Finnegan J).

\textsuperscript{411} Above at n 2.


\textsuperscript{413} Ibid [85]-[90].

\textsuperscript{414} [2012] UKSC 46, [2013] 1 AC 236.
connection and its rejection by the Irish Supreme Court. This part of Lord Collins’s judgment also rejected policy arguments for liberalisation of the requirements for jurisdiction in the case of foreign insolvency proceedings. His reasons included the disadvantages for UK businesses against which foreign judgments could be enforced, without any corresponding benefit; the dilemma a connection test would create for parties who had a sufficient connection with a territory – they might have to defend enormous claims in the United States or risk enforcement of a default judgment; creditors or their representatives might have an action other than enforcement of a foreign decree; and

A change in the settled law of the recognition and enforcement of judgments, and in particular the formulation of a rule for identification of those courts which are to be regarded as courts of competent jurisdiction..., has all the hallmarks of legislation, and is a matter for the legislature and not for judicial innovation. Without saying so explicitly, the judgment unmistakably rejects any judicial acceptance of real and substantial connection becoming part of the law on “jurisdiction in the international sense”.

With the rejection of the real and substantial connection rule by the highest courts of Britain and Ireland, and also by courts of first instance in Barbados, Hong Kong, and South Africa, it seems unlikely that the rule will become part of the law of jurisdiction in any nation other than Canada. The reasons expressed in Flightlease and Rubin have much force. However, there are many nations with common law legal systems in which the real and substantial connection rule has not been rejected, and some courts in those nations might find the Canadian Supreme Court’s reasons for adopting the rule persuasive. It is possible that, in some places outside Canada, the rule will become part of modernised principles for recognition of foreign judgments.

Conclusion

A court judgment will be enforced or recognised in other nations or states only if the court that issued the judgment is thought to have had “jurisdiction in the international sense”. For judgments in personam, the court must have had this jurisdiction over the party against whom the judgment is to be enforced or recognised. The rules of jurisdiction in the international sense, or jurisdictional “competence”,

416 Ibid [129].
417 Lords Mance and Clarke, who delivered separate judgments in Rubin, expressed no disagreement with this. Cheshire (n 1) 530-531 and Dicey (n 1) 708-709 include real and substantial connection in lists of what is not a ground for jurisdiction in the international sense (without citing Rubin).
418 See Anderson (n 45) 243-244, citing Humphrey v Jolly Roger Cruises Inc (Barb HC, 26 March 1998).
419 Islamic Republic of Iran Shipping Lines v Phiniqia International Shipping LLC [2014] HKCFI 1280 [28]-[35].
420 Supercat Incorporated v Two Oceans Marine CC 2001 (4) SA 27 (C) 31.
form some of the most important rules of conflict of laws.\textsuperscript{421} They come primarily from judgments of the English courts and the Privy Council delivered in the late nineteenth and early twentieth centuries. They have been elaborated in many other cases, but in most countries judicial decisions have not made fundamental changes to the law. It remains the position that a foreign court has jurisdiction “in the international sense” over a party only if the party agreed or submitted to the court’s jurisdiction or was subject to the authority of the court by reason of the party’s residence (or perhaps domicile or nationality) or service of process upon the party while physically present in the court’s geographic area of jurisdiction. The Supreme Court of Canada stands alone in expanding the recognition of foreign judgments by adoption of “real and substantial connection” as a ground of jurisdiction. Any judicial liberalisation of the requirements for recognition is unlikely to be reciprocated.

As the Supreme Court of Canada observed, “The world has changed since the above rules were developed....” Travel and communication are far more rapid and convenient, and “[t]he business community operates in a world economy.”\textsuperscript{422} But even in the nineteenth century, judges would have been well aware of the hindrance to international commerce, and just enforcement of legal obligations, that restrictive rules for recognition of foreign judgments could cause. There might also have been “an exaggerated concern about the quality of justice that might be meted out to British residents abroad”.\textsuperscript{423} However, with the much greater international commerce, travel and communication of present times, courts are likely to see more judgments from countries in which the quality of justice is often low. And perhaps it is more likely that a defendant will have had only a slight connection with the country where the judgment was issued. It should be kept in mind that there usually is at least one country or state whose courts would have “jurisdictional competence” under the common law rules. A judgment in those courts would be enforceable in other countries where the defendant has assets. And in some countries where the defendant had assets, the defendant might be sued on the underlying cause of action.

The common law rules are vulnerable to the criticism that they do not accept the legitimacy of a foreign court’s exercise of jurisdiction on grounds that are valid grounds in domestic cases. If the courts of the state where enforcement of the foreign judgment is sought regularly exercise jurisdiction over defendants when the contract in the case was made or to be performed in the state, or the damage allegedly occurred there, or the property at issue in the case was within the state, it may be difficult to defend the proposition that the foreign court lacked jurisdiction when it did the same. It also seems unrealistic to maintain that courts have no jurisdiction over persons beyond their borders (absent submission) at a time when courts in so many cases in so many countries assert jurisdiction over non-residents under statutes and court rules.\textsuperscript{424}

\textsuperscript{421} The continued importance of the common law rules is recognised in the Privy Council’s recent judgment in \textit{Vizcaya Partners Ltd v Picard} [2016] UKPC 5, [2016] Bus LR 413, [2016] 3 All ER 181 [5].

\textsuperscript{422} \textit{De Savoye v Morguard Investments Ltd} [1990] 3 SCR 1077, 1098, (1990) 76 DLR (4th) 256, 270.

\textsuperscript{423} \textit{Ibid.}

But “reciprocity” – in the sense of accepting that a foreign court had jurisdiction over a defendant when courts in the place where recognition of the judgment is sought would exercise jurisdiction in the same circumstances – is not a satisfactory extension of the accepted common law rules. An alternative would be a limited modification of the law in order to recognise judgments in specific situations in which service ex juris is common, there is a substantial connection with the state where the action is initiated, and there is a real need to allow actions to be brought there. This might include actions to recover damages for physical injury in the state, for breach of contract occurring there, or to resolve claims to tangible property in the state. But this is a reform to be accomplished by legislation rather than judicial decision, and if enacted the legislation would likely require reciprocal recognition of judgments by other states.

England, Canada, India and South Africa are the only countries with a substantial number of precedents on jurisdiction in the international sense. When stating or ascertaining the legal rules on this subject, judges outside England have tended to follow what is stated to be the law in English cases and English conflict of laws texts, especially Dicey. But it is increasingly likely that judges will have a somewhat different understanding of the law – possibly closer to the older cases than the latest edition of the Dicey treatise, but possibly more receptive to arguments for wider recognition of foreign judgments. It cannot be assumed that the common law of “jurisdiction in the international sense” is or will be the same in all legal systems with common law foundations.

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425 See Blom (n 370) 366-367; Castel (n 293) 49-50.
426 See Anton (n 9) 383. At present there is reciprocity in the sense that no greater international recognition of a judgment is expected than is given.