RECIPROCAL RECOGNITION OF FOREIGN COUNTRY MONEY JUDGMENTS: THE CANADA-UNITED STATES EXAMPLE†

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I. INTRODUCTION

Picture an American[1] family vacationing near the Canadian border in the Thousand Islands section of northern New York State. While driving through the beautiful countryside along highway 12, their automobile is suddenly struck from behind by another car. Unfortunately for this mythical family, the mishap caused some serious injuries and destroyed their car, not to mention their vacation. Bad luck, yes, but if the driver of the vehicle at fault happened to be a citizen of nearby Canada, protected by an insurer with no assets in the United States, the family's misfortune has just begun.

An American judgment obtained against the negligent Canadian driver, under most circumstances, will go unrecognized by the courts of Canada[2] and will be unenforceable against the driver's Canadian assets.[3] The family could obtain no redress against the negligent Canadian through a United States judgment.[4] This result would follow even if the defendant were to be duly served in Canada under a constitutionally valid long-arm statute.[5] Yet if the accident occurred just over the International Bridge in Ontario, and was due to the negligence of the American driver, a Canadian lawyer would have far less

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1. In this Comment the adjective "American" will pertain solely to the United States.
2. In most cases the American court issuing the judgment lacks personal jurisdiction over the defendent sufficient for recognition in Canada. See text accompanying notes 29-30 *infra*. Under some circumstances, however, the United States court's jurisdiction will be adequate. See note 58 *infra* and accompanying text. Hence, if the other requisites outlined in part II *infra* are satisfied, recognition may be given by the Canadian court.
3. See part II *infra*.
4. Of course, the American family could take the matter up in Canada, but if the accident happened on American soil, this might place an unfair burden on them. A New York forum probably would be more convenient to the plaintiff and to the witnesses. Though possibly inconvenient to the defendent, he has chosen to make "contacts" within the state. The problem is not, however, in obtaining a local forum which has jurisdiction to hear the action. See, e.g., *Simpson* v. *Loehmann*, 21 N.Y.2d 305, 234 N.E.2d 669, 287 N.Y.S.2d 633 (1967); *Seider* v. *Roth*, 17 N.Y.2d 111, 216 N.E.2d 312, 269 N.Y.S.2d 99 (1966) (local forum provided even where defendent has little or no "contact" with it). Rather, the dilemma is in persuading a Canadian court to recognize the judgment of the local tribunal. Similar judgments of local forums are routinely recognized by sister states through the full faith and credit clause. The considerations are much simpler, however, where the litigation is interstate rather than international. For one thing, litigation within the United States is ultimately under the auspices of the Constitution and the Supreme Court. The situation is different with a judgment brought from one country to the other. The decree is influenced by two legal systems having no common overseer. This factor should not be minimized. Nonetheless, looked at merely in terms of litigational convenience and fairness to the parties, the ideal should be to ensure recognition of a judgment of a local forum awarded to an American citizen involved in international litigation, and arising from a tort committed in, or resulting from other sufficient minimum contact with, a state of the United States.
5. See notes 58-87 *infra* and accompanying text.

trouble gaining recognition and enforcement[6] of his Canadian judgment by the courts of the United States.[7]

This dichotomy[8] is faced by American citizens, and their attorneys, in all their dealings with Canadians. These dealings, primarily taking the form of trade and travel, are increasing at accelerating rates.[9] As contacts between the nations become more frequent, so will litigation. Thus, it is highly desirable to create and to maintain dependable methods for foreign execution of each country's judgments, so as to help keep harmonious the ever-increasing contacts between their peoples. Yet, recognition by each nation of the other's judgments has been uneven and, particularly in the case of Canadian recognition of Unites States' judgments, often nonexistent.

Moreover, the Canada-United States example, while the focus of this Comment,[10] is hardly unique. Throughout the world similar situations exist where foreign courts refuse to

6. The phrase "recognition and enforcement" is redundant. This is because "recognition" of an extranational judgment by the home country's tribunal is accomplished either by "enforcement" of the judgment or by treating it as "resjudicata." A. Ehrenzweig, *A Treatise on the Conflict of Laws* §61, at 215 (1962) [hereinafter cited as Ehrenzweig]. See also *Restatement (Second) of Conflict of Laws* § 117, comment c (1971), where the distinction is utilized. Enforcement is generally effected by obtaining a new judgment in the country where execution is sought. Ehrenzweig, *supra* at 216. See also text accompanying note 24 *infra* and note 127 *infra* and accompanying text. Of course, if there are no assets, there may be no enforcement. A judgment is deemed to be res judicata when a court of the home country refuses to retry a cause of action already litigated before a foreign tribunal. Ehrenzweig, *supra* at 216. "International res judicata" is perhaps a more accurate term in the context of extranational judgments. See Smit, International Res Judicata and Collateral Estoppel in the United States, 9 U.C.L.A.L. Rev 44 (1962) [hereinafter cited as Smit].
This Comment will use the term "recognition" to mean either the enforcement of a judgment (the usual means of recognition of a foreign country money judgment) or the treatment of the judgment as res judicata.

7. See part III *infra*. The situation has been otherwise described. See J.-G. Castel, *Private International Law* 257-58 (1960) ("American and Canadian courts are quite liberal with regard to each other's judgments . . . . "). Such a description should be read with caution. Compare *id.* with, *e.g.*, Castel, Reciprocal Enforcement of Judgments in the Province of Quebec, 21 Revue du Barreau de la Province de Quebec 128, 129 (1961) [hereinafter cited as Quebec Judgments] ("In the common-law provinces . . . the rules prevailing there are more generous [than those in Quebec] although by no means liberal.").

8. There are several reasons for the disparity, but the most important is the difference in the two nations' views on the subject of personal jurisdiction. See text accompanying notes 29-30 *infra*.

9. Several illustrative statistics reveal the extent of the rise in interaction between the countries. In trade, United States exports of merchandise to Canada increased during the decade 1960-1970 from about $3.8 billion to about $9.1 billion, and further increased to about $19.9 billion in 1974. U.S. Bureau of the Census, Statistical Abstract of the United States: 1975, at 814 (96th ed. 1975). Imports of merchandise increased during the same decade from approximately $2.9 billion approximately $11.1 billion, and rose approximately $22.3 billion in 1974. Id. Of course, inflation accounts for part of the increase. In all, about two-thirds of Canada's foreign trade is with the United States. Cohen, Canada and the United States—Possibilities for the Future, 12 Colum. J. Transnat'l L. 196, 198-99 (1973).
Travel expenditures have also greatly increased. In 1965 United States residents spent about $600 million in Canada while travelling there. By 1974 the amount had more than doubled to over $1.3 billion. U.S. Bureau of the Census, Statistical Abstract of the United States: 1975, at 219 (96th ed. 1975) (1974 figures are preliminary). During the same 1965-1974 period, expenditures by Canadians travelling in the United States rose from about $490 million to over $1.2 billion. Id.

10. The subject matter of this Comment, recognition of foreign country money judgments, is but a subsection of the discipline known as private international law. This term is a British expression for that branch of law known as conflict of laws in the United States. It is defined as "that part of law which comes into play when the issue before the court affects some fact, event or transaction that is so closely connected with a foreign system of law as to necessitate recourse to that system." P. North, *Cheshire's Private International Law* 5 (9th ed. 1974) [hereinafter cited as Cheshire]; see J.-G. Castel, *Canadian Conflict of Laws* 4-5 (1975) [hereinafter cited as Canadian Conflicts].
The discipline deals with disputes of a private nature, though one of the parties may be a sovereign state. As such, it is to be distinguished from public international law, which primarily governs relations between nations. Cheshire, supra at 13.
While the scope of this Comment is confined to money judgments, wherever appropriate, authority is drawn from cases and other sources involving non-monetary decrees. The usual instance is where there is no case on point involving a money judgment, and the principle taken from the other type of case is of universal application.

recognize United States federal and state money judgments.[11] This lack of credit persists even in the face of commendable generosity on the part of the United States courts in recognizing and enforcing money judgments of these same countries.[12]

The goal of this Comment is to examine the Canadian and American systems of foreign country money judgment recognition, their similarities and their disparities. The emphasis is upon the elements and procedures necessary to present effectively a judgment for recognition in the courts of each nation. Thus, the discussion begins with an outline of the traditional Canadian common-law rules, then turns to the modifications made by statute. Next follows a summary of the corresponding American precedents and statutory restatement. A detailed comparison will be made between the Canadian and American uniform acts on this subject. In addition, throughout this Comment, aspects of the two systems will be compared, the objective being to illustrate that, while the present situation calls for improvement, the compatibility of the two legal systems provides cause for optimism.

II. CANADIAN RECOGNITION OF UNITED STATES JUDGMENTS[13]

As a starting point it should be noted that recognition of foreign country judgments is a matter of Canadian provincial, not federal law.[14] The Constitution of Canada is construed as

11. See Nadelmann, Non-Recognition of American Money Judgments Abroad and What to Do About It, 42 Iowa L. Rev. 236 (1975) [hereinafter cited as Non-Recognition).

12. These actions by American courts are both commendable and generous because, it would seem, the natural human reaction is not to recognize, but to deny recognition to judgments of non-cooperating countries through the doctrine of reciprocity.
Reciprocity or, as the doctrine is sometimes unflatteringly referred to, retorsion, reflects the natural desire to return to another person (or country) the same character of treatment received. Cf. A. Ehrenzweig, *Psychoanalytic Jurisprudence* 164 (1971), where the author posits that the whole field of private international law could be better understood, and its destiny better charted, if examined from a psychological viewpoint. See generally Lenhoff, Reciprocity: The Legal Aspect of a Perennial Idea, 49 Nw. U.L. Rev. 619 & 752 (1954-1955).
Under the doctrine of reciprocity, if, for example, Austria refuses to recognize Canada's judgments, Canada would refuse to recognize Austria's judgments. The doctrine has been roundly criticized by commentators as, at best, counterproductive. E.g., Smit, *supra* note 6, at 49-50 & n.39 (1962). Despite the criticism, however, the principle is sufficiently entrenched in the human psyche to remain the law of such nations as Austria and Germany. Herzog, International Law, National Tribunals and the Rights of Aliens: The West European Experience, 21 Vand. L. Rev. 742, 750-51, 754-55 (1968) (non-matrimonial cases).
It has also been pronounced the law of the United States by the Supreme Court, at least in certain cases. See *Hilton* v. *Guyot*, 159 U.S. 113, 227-8 (1895); notes 137-60 & 211-14 *infra* and accompanying text; cf. *United States* v. *United Continental Tuna Corp.*,425 U.S. 164 (1976) (suits by foreign nationals in cases involving a public vessel of the United States barred unless their governments reciprocate by allowing similar suits by United States nationals).

13. See generally Castel, Recognition and Enforcement of Foreign Judgments in Personam and in Rem in the Common Law Provinces of Canada, 17 McGill L.J. 11 (1971) [hereinafter cited as Recognition]. No attempt is made in this section to duplicate the scope of the extensive Castel article. The purposes of this section are to summarize Canadian law on this subject, to outline the law in convenient format, to discuss new material that has arisen since 1971, and to present an American view of the subject.

14. J.-G. Castel, *Private International Law* 258 (1960). The Canadian practice is similar to that in the United States. State law generally controls unless a federal question is involved. See notes 178-79 *infra* and accompanying text.
There is full acknowledgment of the right of a nation, in an action seeking its recognition of a foreign country judgment, to decide the case according to its own conflict of laws rules. E.g., Reese, The Status in This Country of Judgments Rendered Abroad, 50 Colum. L. Rev. 783, 786 (1950) [hereinafter cited as Reese].

providing for this treatment.[15] The provincial courts, with the exception of those of Quebec,[16] apply principles of English common law.[17] As a result, their approaches to this subject are quite similar.

As with recognition of judgments from foreign countries, recognition of judgments from other Canadian provinces is wholly a matter of the law of the enforcing province. The same precedents control in both interprovincial and international litigation.[18] This is because, for purposes of recognition, each province is considered a separate foreign country. [19] Persons with judgments from one province traditionally have had to relitigate in the other province,[20] under this common body of

15. *British North America Act*, 1867, 30 & 31 Vict., c. 3, § 92(14). See also Recognition, *supra* note 13, at 132. This legislation of the British Parliament, as amended, is the Constitution of Canada. Rand, Some Aspects of Canadian Constitutionalism, 38 Can. B. Rev. 135, 137-38 (1960), although the present Canadian government is pledged to develop a Constitution written by Canadians. See N.Y. Times, February 23, 1977, at A-6, col. 6. *The Statute of Westminster*, 1931, 22 Geo. 5, c. 4, is thought of as an additional component of the Canadian constitution. Rand, *supra* at 137-38. The statute provides, in pertinent part, that, after the date of enactment, no act of the Parliament of the United Kingdom shall extend to Canada. *The Statute of Westminster*, 1931, 22 Geo. 5, c. 4.
While cases involving foreign country money judgments are first heard in provincial courts, appeal often lies to the Supreme Court of Canada. Litigants may appeal to that Court as of right from any final judgment of the highest court of a province, provided that the issue is not solely one of fact and that the amount in controversy exceeds ten thousand dollars. Can. Rev. Stat. c.44, § 1 (1st Supp. 1970). See also J. Lyon & R. Atkey, *Canadian Constitutional Law in a Modern Perspective* 279 (1970). The Supreme Court is the court of last resort in Canada. Its judgments are final and conclusive, for appeal may no longer be taken to the Privy Council in Britain.

16. Quebec has been influenced by the legal systems of both France and England, the influence resulting in a unique combination of civil and common law. The differences between the rules of foreign money judgment recognition in Quebec and in the common-law provinces are not fundamental. Quebec Judgments, supra note 7, at 143. It should be noted, however, that the major variances occur in two crusial areas; personal jurisdiction and conclusiveness of the foreign court's judgment. *Id.* at 131. See generally Johnson, Foreign Judgments in Quebec, 35 Can. B. Rev. 911 (1957). The Quebec rules of judgment recognition are outside the scope of this Comment.

17. Of course, the common law is superseded when the point is governed by statute. The two territories of Canada, the Yukon and Northwest Territories, also apply English common law. Throughout this Comment, unless otherwise stated, "provinces" should be read to include the territories.

18. E.g., *Gyonyor* v. *Sanjenko*, 23 D.L.R.3d 695 (Alta. Sup. Ct. 1971) (Montana judgment not recognized; cases involving Quebec judgments cited as controlling).

19. H. Read, *Recognition and Enforcement of Foreign Judgments in the Common Law Units of the British Commonwealth* 12-13 (1938) [hereinafter cited as Read]. "The provinces of Canada are separate law districts and the judgments of the courts of each are foreign to those of each of the others . . . ." *Id.* at 13.

20. This difficulty has been mitigated through passage by most of the provinces of versions of the Reciprocal Enforcement Judgments Act, formulated by the Conference of Commissioners on Uniformity of Legislation in Canada. See parts II-B, IV infra. The name of the body has been changed to the Uniform Law Conference of Canada. For a description of the work of the Conference, see MacTavish, Uniformity of Legislation in Canada—An Outline, 25 Can. B. Rev. 36, 47-52 (1947).
The act has facilitated interprovincial lawsuits by eliminating in many cases the need for relitigation. "The Legislature's clear and commendable intention in enacting the Reciprocal Enforcement of Judgments Act was to [avoid] . . . having to sue upon the foreign judgment or relitigate the cause of action in the Manitoba Courts." *Re Aero Trades Western Ltd. and Ben Hocum & Son Ltd.*, 51 D.L.R.3d 617, 620 (Man. County Ct. 1974) (italics omitted) (registration and enforcement granted without a trial de novo despite defendant's attempt to raise two defenses and one counterclaim which could have been raised in the original action). Compare *id.* with *Re Gacs and Maierovitz*, 68 D.L.R.2d 345, 350-51 (B.C. Sup. Ct. 1968) (registration denied because, under common-law principles, the recognizing court re-examined the merits and found "manifest error" in the judgment) and *Traders Group Ltd.* v. *Hopkins*, 69 D.L.R.2d 250, 254 (Nw. Terr. Terr. Ct.), aff'd, 1 D.L.R.3d 416 (Nw. Terr. 1968) (registration denied because jurisdiction of the adjudicating court, although sufficient under its long-arm statute, was insufficient under the common law). It has not, however, changed the conception of provinces as separate law districts. This is because "[t]he [Reciprocal Enforcement of Judgments] Act does not make the judgments to which the Act applies any less 'foreign' judgments or any more directly enforceable than before the Act was passed." *Can. Credit Men's Trust Ass'n. Ltd.* v. *Ryan*, [1930] 1 D.L.R. 280, 282 (Alta. Sup. Ct. 1929); accord, *Re Kenny*, [1951] 2 D.L.R. 98, 105 (Ont.). See also J.-G. Castel, *Private International Law* 258 (1960).
Nor has it altered the use of a common set of precedent in both interprovincial and international recognition actions. See, e.g. *Wedlay* v. *Quist*, [1953] 4 D.L.R. 620, 624 (Alta.) (interprovincial action under Act, decided under precedents involving international litigation).

case law, because the Constitution of Canada has no counterpart to the full faith and credit clause.

Turning to the precepts governing recognition of foreign country judgments, Canadian provinces are in accord with commentators in recognizing that the acts and judicial decrees of one sovereign are ineffective outside its borders.[21] In essence, this means that neither American federal nor state money judgments have any direct influence upon persons or property situated in Canada,[22] nor are such pronouncements entitled to automatic recognition and enforcement by the courts of the provinces.[23] Instead, to be recognized, American judgments must be sued upon in a Canadian enforcement action, or raised as res judicata in a Canadian action readjudicating the same rights.[24]

In either case, whether a Canadian court will recognize a United States money judgment will depend upon rules of the common law.[25] This is the situation even under the Canadian judgment enforcement statutes, which have not fundamentally altered the common law.[26] Under the common-law rules, the foreign court must have jurisdiction, the judgment must be final, it must be for a definite or easily ascertainable sum, it must be untainted by fraud, and the proceedings must not offend Canadian notions of natural justice.

A. *Canadian Common Law of Foreign Money Judgment Recognition*

1. The Foreign Court Must Have Had Jurisdiction

In the provinces, the modern interpretation of this requirement stems from a nineteenth century English chancery decision, *Pemberton v. Hughes*.[27] The principle derived from this case is that a judgment of a foreign court will be recognized

21. Compare, e.g., Yntema, The Enforcement of Foreign Judgments in Anglo-American Law, 33 Mich. L. Rev. 1129, 1142-44 (1935) and Recognition, *supra* note 13, at 13, with *McGuire* v. *McGuire*, [1953] 2 D.L.R. 394, 397 (ont.) (divorce action) and *Assiniboia Land Co.* v. *Acres*, 28 D.L.R. 364, 366 (Ont. Sup. Ct. 1916) (dictum). But see Stevenson, "Extraterritoriality" in Canadian—United States Relations, 63 Dep't State Bull. 425 (1970), where the author asserts that, because of the closeness of our modern world, it is inevitable that certain exercises of jurisdiction have some extraterritorial effect.

22. J.-G. Castel, *Private International Law* 257 (1960); cf. *Chassy* v. *May*, 68 D.L.R. 427 (Can. 1921). While there was no money judgment at issue in Chassy, the court held that the Washington court's declaratory judgment could have no direct effect upon British Columbia lands. Id. at 429.

23. See *Frederick A. Jones, Inc.* v. *Toronto Gen. Ins. Co.*, [1933] 2 D.L.R. 660, 667-68 (Ont.) (Masten, J.A.).

24. See note 6 *supra*.

25. There are no treaty provisions in existence between the two nations which cover recognition of extranational judgments. U.S. Dep't of State, Pub. No. 8847, Treaties in Force on January 1, 1976 (1976); *Toronto-Dominion Bank* v. *Hall*, 367 F. Supp. 1009, 1011 (E.D. Ark. 1973).
There are several theories as to why Canadian courts, following common-law rules, recognize foreign judgments at all. Comity, reciprocity, legal obligation, vested rights, or res judicata may be the motivating force. Recognition, *supra* note 13, at 13-25. Whichever is the true rationale, however, and there may be several, it is presently inscrutable. Terms such as comity and res judicata appear far more infrequently in Canadian cases than in American cases. Perhaps this is because English common law has long ago been settled in this area. See, e.g., the cases cited in notes 27, 32, 34 & 88 *infra*. By the process of stare decisis, various hard rules have endured. Today, in many cases, the rules themselves, not the doctrines of, for example, comity or res judicata, are the basis for decision.

26. See note 20 *supra*.

27. [1877] 1 Ch. 781 (C.A.).

if the court has jurisdiction over the subject matter and parties.[28]

While lack of subject matter jurisdiction usually poses little problem to the party seeking recognition of the judgment, the question of adequate jurisdiction over the person is a major hurdle. The courts of Canada and those of the United States implement the requirement of personal jurisdiction in vastly different ways.[29] In fact, different rules of personal jurisdiction account for the major disparity in the frequency of recognition of extranational judgments by courts of the two nations.[30]

a. *Predicates of Jurisdiction*

In *Pemberton*, the English court recognized a Florida divorce decree only because the state court had jurisdiction in the international sense.[31] The concept has been clearly defined. For a foreign court to possess jurisdiction in the international sense, it must have territorial jurisdiction over the defendant.[32]

The requirement continues to apply in Canada.[33] Provincial courts define territorial jurisdiction by looking to dictum from a lasting English decision, *Emanuel* v. *Symon*.[34] According to rules outlined in this case and adhered to by Canadian courts,[35] a provincial court would find that the foreign tribunal enjoyed territorial jurisdiction over the defendant in five circumstances:[36] (1) where the defendent was a citizen of the foreign country in which the judgment was obtained;[37] (2) where he was a

28. *Id.* at 790-91. The court also imposed the requirements that the judgment be final, and that it not offend English notions of substantial justice. *Id*; see notes 88-93 & 101 *infra* and accompanying text. Since the foreign court had personal and subject matter jurisdiction, and the judgment was final and in accord with English notions of substantial justice, the court did not inquire whether the jurisdiction was properly exercised under the foreign court's own law. *Id.*
Although *Pemberton* involved a judgment in rem, its principles have been reaffirmed by Canadian courts in cases involving money judgments rendered in personam. *E.g., Re Guildhall Ins. Co. and Jackson*, 69 D.L.R.2d 137, 141 (Alta. Sup. Ct. 1968); *Wigston* v. *Chowen*, 48 D.L.R.2d 155, 159-60 (Sask. Q.B. 1964). Pemberton has also recently been reaffirmed by the Supreme Court of Canada in a matrimonial action. *Powell* v. *Cockburn*, 68 D.L.R.3d 700, 709-10 (Can. 1976) (Dickson, J.).

29. Compare the following discussion of Canadian jurisdictional rules with the discussion of American jurisdiction at notes 165-77 *infra* and accompanying text.

30. This disparity of treatment was alluded to earlier in part I.

31. "[T]he jurisdiction which alone is important in these matters is the competence of the [foreign] Court in an international sense — i.e., its territorial competence . . . over the defendant." [1899] 1 Ch. at 791 (Lindley, M.R.). See also Cheshire, *supra* note 10, at 632-33.

32. *Sirdar Gurdyal Singh* v. *Rajah of Faridkote*, [1894]A.C. 670, 683 (P.C.) (Punjab). In fact, a judgment rendered by a court lacking territorial jurisdiction over the person "is by international law an absolute nullity." *Id.* at 684.

33. See, e.g., *Moran* v. *Pyle Nat'l* (Canada) Ltd., 43 D.L.R.3d 239, 242 (Can. 1973); *Mattar* v. *Public Trustee*, [1952] 3 D.L.R. 399, 401-02 (Alta.) (Frank Ford, J.A.) (dictum); *Gyonyor* v. *Sanjenko*, 23 D.L.R.3d 695, 697-98 (Alta. Sup. Ct. 1971); *Bodnar* v. *Popovich*, [1974] 3 W.W.R. 658, 661-62 (Alta. Dist. Ct. 1973); *Re Kenny*, [1951] 2 D.L.R. 98s, 105 (Ont.). This notion that territorial jurisdiction is essential is also expressed in *Pemberton* v. *Hughes*, [1899] 1 Ch. 781, 791 (C.A.) (Lindley, M.R.); see cases cited in note 28 *supra*. See also Cheshire, *supra* note 10, at 643.

34. [1908] 1 K.B. 302 (C.A. 1907).

35. See, e.g., *Mattar* v. *Public Trustee*, [1952] 3 D.L.R. 399, 403 (Alta.) (Macdonald, J.A.); *Gyonyor* v. *Sanjenko*, 23 D.L.R.3d 695, 696-97 (Alta. Sup. Ct. 1971); *Webster* v. *Connors* Bros. Ltd., [1935] 2 D.L.R. 483, 486-87 (N.B.K.B).

36. *Emanuel* v. *Symon*, [1908] 1 K.B. 302, 309 (dictum of Buckley, L.J.).

37. See, e.g., *Marshall* v. *Houghton*, [1923] 2 W.W.R. 553 (Man.).

resident of, or in some way present in, the foreign jurisdiction when the action began;[38] (3) where he in some manner selected the forum either as claimant or counterclaimant;[39] (4) where he voluntarily appeared in the foreign court;[40] or (5) where he in some way agreed in advance to submit himself to the authority of the forum.[41]

38. In *Emmanuel* v. *Symon* the court referred only to "residence." [1908] 1 K.B. 302, 309 (C.A. 1907) (dictum of Buckley, L.J.). It is clear, however, that the court actually referred to three degrees of presence: physical presence, residence and domicile. See Recognition, *supra* note 13, at 34-37. Thus, as to physical presence, it has been held that territorial jurisdiction is acquired even where the defendant is served while merely passing through the forum on a casual visit. *Forbes* v. *Simmons*, 20 D.L.R. 100 (Alta. Sup. Ct. 1914). The only limitation on physical presence is where the defendant is fraudulently induced to enter the jurisdiction for the purpose of being served. See 1 W. Williston & R. Rolls, *The Law of Civil Procedure* [*Canada*] 2 (1970) [hereinafter cited as Williston & Rolls].
When defendant is served outside the forum, pursuant to its jurisdictional statutes, the fact that he was once or twice physically present in the forum in the past will not move Canadian courts to acknowledge the statutory jurisdiction. Rather, for the foreign court to have territorial jurisdiction, a defendant served outside the forum must be a resident of that forum at time of service. See, e.g., *Mattar* v. *Public Trustee*, [1952] 3 D.L.R. 399, 404 (Alta.) (Macdonald, J.A.); *Belcourt* v. *Noel*, 9 D.L.R. 788 (Alta. Sup. Ct. 1913); *Read & Co.* v. *Ferguson*, 8 D.L.R. 737, 739 (Sask. Sup. Ct. 1912) (dictum); Recognition, *supra* note 13, at 36.
For the Canadian definition of residence, which is essentially identical to the American, see Williston & Rolls, *supra* at 333-37. It is possible to have dual residency. Id. at 333-34. See also *Frederick A. Jones, Inc.* v. *Toronto Gen. Ins. Co.*, [1933] 2 D.L.R. 660, 669 (Ont.) (Masten, J.A.) (territorial jurisdiction over a corporation exists where it does business, or has an agent doing business on a steady basis).
Although domicile is specified as one of the degrees of presence acceptable to Canadian courts where defendant is served outside the forum, some cases dispute this, presumably because domicile is difficult to ascertain. *Mattar* v. *Public Trustee*, [1952] 3 D.L.R. 399, 400 (Alta.) (Frank Ford, J.A.); Recognition, *supra* note 13, at 36-37.

39. See *Burnfiel* v. *Burnfiel*, [1925] 3 D.L.R. 935, 939 (Sask. K.B.), rev'd on other grounds, [1926] 2 D.L.R. 129 (Sask. C.A.); Recognition, supra note 13, at 37-38. See generally Annot., *Consent as a Basis of Jurisdiction in Personam of a Foreign Court*, [1931] 1 D.L.R. 1 [hereinafter cited as Canadian Annotation].

40. There are three possibilities of submission by voluntary appearance to the jurisdiction of a foreign court. These are where the defendant appears and pleads to the merits without raising lack of jurisdiction, where he appears and pleads to the merits notwithstanding his defense of lack of jurisdiction, and where he appears solely to contest jurisdiction. Recognition, supra note 13, at 38. In the first of these instances there is general agreement that the defendant has submitted, and that the resulting judgment should be recognized in Canada. See Read, *supra* note 19, at 165. Recent Ontario cases indicate that, in the second instance, answering the complaint and thereby pleading to the merits is submission to the foreign court, even in the face of a defense of lack of jurisdiction. *Bank of Bermuda Ltd.* V. *Stutz*, [1965] 2 Ont. 121 (high Ct.); *First Nat'l Bank of Ore.* v. *Harris*, 10 Ont. 2d 516 (Sup. Ct. 1975). In the third situation, the defendant has not submitted to the authority of the foreign court. Recognition, *supra* note 13, at 42.
In each case, the issue of submission is one of fact to be resolved by the Canadian court when recognition is sought. *Mattar* v. *Public Trustee*, [1952] 3 D.L.R. 399, 403 (Alta.) (Macdonald, J.A.); *Richardson* v. *Allen*, 28 D.L.R. 134, 135 (Alta. 1916) (defending the merits after losing jurisdictional challenge found as a fact to be submission to the foreign court); see *Esdale* v. *Bank of Ottawa*, 51 D.L.R. 485 (Alta. 1920) (mere offer to appear in foreign court for express purpose of annulling previous default judgment found as a fact not to be submission).

41. Clauses within valid contracts binding both parties to take proceedings in the courts of a particular law district are effective to confer jurisdiction on the selected courts, even though such courts otherwise lack in personam jurisdiction. See, e.g., *Mattar* v. *Public Trustee*, [1952] 3 D.L.R. 399, 401 (Alta.) (Frank Ford, J.A.); *Gyonyor* v. *Sanjenko*, 23 D.L.R.3d 695 (Alta. Sup. Ct. 1971); *Hughes* v. *Sharp*, 70 D.L.R.2d 298 (B.C. Sup. Ct. 1968), rev'd on other grounds, 5 D.L.R.3d 760 (B.C. 1969) (confession of judgment made pursuant to cognovit recognized by British Columbia court); *Harbican* v. *Kennedy*, [1937] 2 D.L.R. 541 (Man. K.B.); *E.K. Motors Ltd.* v. *Volkswagen Canada Ltd.*, [1973] 1 W.W.R. 466 (Sask. 1972).
Whether there is an agreement to submit, written or oral, is a question of fact. *Mattar* v. *Public Trustee*, [1952] 3 D.L.R. 399, 403-04 (Macdonald, J.A.). No agreement is implied in law, see *Id.*, but the parties may expressly agree or, by their conduct, may give rise to an implication that they intend to be contractually bound to the authority of a foreign court. Canadian Annotation, *supra* note 39, at 12; Recognition, *supra* note 13, at 43; see notes 54-57 *infra* and accompanying text.
Two forms of conduct which are insufficient to confer jurisdiction upon a foreign court recognizable in Canada are particularly important due to the proximity of the two nations. One is mere ownership of property in a foreign country. Recognition, supra note 13, at 32. Of course, the Canadian court can do nothing to prevent the foreign tribunal from executing the in personam judgment against the foreign land. *Id.* The second is entrance into a contract in a foreign country to be performed there, or affecting property there. See *Id.* at 44.
A related question, although separate from the matter of recognition of foreign country judgments, is whether a Canadian court should decline to exercise jurisdiction in a case where the parties to the

While these requirements may not seem unduly demanding, analysis reveals that most United States judgments would fail to fulfill them. For example, the first circumstance above, the general rule acknowledging national citizenship as a valid jurisdictional base, appears to represent an opportunity for a United States judgment creditor to gain recognition of his judgment in the case of a defendant who, while still a United States citizen, lives or has assets in Canada. It would seem that a judgment obtained in any American court against a United States citizen would be capable of recognition in Canada. Judgments from the United States are, however, exceptions to this general rule.[42] In Canada, it has been held that an American citizen is a citizen only of the United States, and not of any state, unless the person at the time of service resides in that state.[43] Thus, Canadian courts define citizenship of an American state as residence of the state.[44] Territorial jurisdiction asserted on the basis of United States citizenship does not exist unless the defendant is a resident of the forum state at the time suit is

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controversy have contractually agreed to submit their disputes to a specified foreign court. The issue arises when one of the parties chooses to litigate in Canada, notwithstanding his previous agreement to sue elsewhere. Canadian courts have the common-law power to exercise jurisdiction regardless of any agreement between the parties, provided, of course, the matter falls within the Canadian court's own rules of personal and subject matter jurisdiction. Canadian Conflicts, *supra* note 10, at 314.
In essence, the court may rewrite the parties' agreement, without regard to their earlier intent, at least where the agreement is not crystal clear on the point. See, e.g., *A.S. May & Co.* v. *Robert Reford Co.*, 6 D.L.R.3d 289 (Ont. High Ct. 1969) (finding Ontario the forum of convenience, notwithstanding agreement that disputes be litigated in Yugoslavia; also finding defendant had submitted to the jurisdiction of Ontario courts). See generally Cowen & Mendes da Costa, The Contractural Forum — A Comparative Study, 43 Can. B. Rev. 453 (1965).

42. The exception to the general rule would hold true in the case of any other nation possessing dual federal-state court systems. Canada is just such a nation.

43. *Dakota Lumber Co.* v. *Rinderknecht*, 2 West. L.R. (Can.) 275 (Nw. Terr. 1905). The reason for the special rule is that in a federal system, such as that of the United States, an independant source of substantive rights in state law. See id. at 276; *Guaranty Trust Co.* v. *York*, 326 U.S. 99, 108-09 (1945). In addition, each state operates under a separate legal system. Thus, to the issue of jurisdiction based upon allegiance, state citizenship is far more relevant than is national citizenship, at least in cases where state substantive rights are involved. See *Dakota Lumber Co.* v. *Rinderknecht*, 2 West. L.R. (Can.) 275 (Nw. Terr. 1905). In other cases, where federal substantive rights are involved, it can be argued that national citizenship should be determinative. See note 51 *infra* and accompanying text.

44. This is the definition given in the leading Canadian case, *Dakota Lumber Co.* v. *Rinderknecht*, 2 West. L.R. (Can.) 275 (Nw. Terr). 1905. The United States definition, which arises in the context of diversity of citizenship cases, is that a person is a citizen of the state of his domicile. E.g., *Mas* v. *Perry*, 489 F.2d 1396, 1399 (5th Cir.), cert. denied, 419 U.S. 842 (1974); Janzen v. Goos, 302 F.2d 421, 424 (8th Cir. 1962). This eliminates, for purposes of diversity, the possibility of simultaneous citizenship of two or more states. See *Restatement (Second) of Conflict of Laws* § 11(2) (1971). But see id. § 11, comment n (conflicting conclusions about domicile are sometimes reached by courts of separate states). The *Dakota Lumber* case, however, implies that dual state citizenship is possible for purposees of recognition of an American judgment in Canada. Admittedly, the case speaks in restrictive terms: a United States citizen is subject to the jurisdiction of the courts of "the State in which he resides, but not . . . any other State . . . ." 2 West. L.R. (Can.) at 278. But, since a person can simultaneously be a resident of more than one state, a definition which relies upon the term "resides" necessarily must encompass situations of dual state citizenship. On the other hand, it can be argued that the intent of the above quoted words was to establish the more restrictive concept of "domicile" as the court's standard.
In any event, partly because of the relative difficulty in defining state citizenship as opposed to national citizenship, one British commentator cautions that citizenship cannot currently be relied upon as a basis for jurisdiction in the international sense. This is particularly so where the citizenship in question is of the United States. J. Morris, *Dicey and Morris on the Conflict of Laws* 1003 (9th ed. 1973) [hereinafter cited as Dicey and Morris].

brought.[45] Accordingly, in the case of United States judgments, this rule would not facilitate recognition in Canada in any instances not already encompassed by the jurisdictional base founded upon residence.[46]

An interesting question is whether a judgment of a federal district court would be considered by provincial tribunals a judgment of a "national" court. In other words, would a provincial court find defendant's United States citizenship at the time of service jurisdictionally sufficient, regardless of whether he were a citizen of the state in which the district court sits?[47] Although there is no Canadian law directly on point,[48] the provincial courts' practice of applying the same rules of recognition without distinction to both state and federal judgments provides a partial answer.[49] Moreover, were the issue to be decided by a Canadian tribunal, the federal judgment would not likely be held to be one from a national court because, in many instances, jurisdictional predicates of federal district courts are defined by state standards.[50] This being the case, Canadian courts would likely find no reason to differentiate, since the federal courts would be sitting as mere surrogates for state tribunals. This, of course, is the reality in diversity cases.[51] A contrary argument, however, can be constructed in those instances where the federal courts' jurisdictional bases are fixed independently of state norms.[52]

45. It is unavailing to take a judgment from the adjudicating state to the state of defendant's citizenship in order to get a new judgment to be brought to Canada. The second judgment will not be recognized in Canada, even though defendant is a citizen of the second state, because that state is a mere conduit which must give full faith and credit to the original judgment. *Frederick A. Jones*, Inc. v. *Toronto Gen. Ins. Co.*, [1933] 2 D.L.R. 660, 672-73 (Ont.) (Masten, J.A.) (Florida judgment against corporation was taken to state where corporation did business and a new judgment was issued; recognition refused).

46. See note 38 *supra*.

47. If so, service anywhere within the country upon a United States citizen-defendant could support a federal court judgment capable of recognition in Canada.

48. The judgment sought to be recognized in Dakota Lumber was issued by a state court in *South Dakota*. *Dakota Lumber Co.* v. *Rinderknecht*, 2 West. L.R. (Can.) 275 (Nw. Terr. 1905).

49. See e.g., *Hughes* v. *Sharp*, 70 D.L.R.2d 298 (B.C. Sup. Ct. 1968), rev'd on other grounds, 5 D.L.R.3d 760 (B.C. 1969) (judgment of federal district court recognized under precedents used for judgments from state courts); *First Nat'l Bank* v. *Harris*, 10 Ont. 2d 516 (Sup. Ct. 1975) (same).

50. Fed. R. Civ. P. 4(d)-(e) (effective service may be made in the manner prescribed by the law of the state in which the district court is held); Fed. R. Civ. P. 4(f) (effective service may be made within the territorial limits of the state in which the district court is held).

51. *Guaranty Trust Co.* v. *York*, 326 U.S. 99, 108-09 (1945). In a case involving federal substantive rights, on the other hand, the entire nation is governed by one system of law. *Dakota Lumber*, in essence, held that the only allegiance that is relevant to the question of jurisdiction of a foreign court is citizenship to the territory governed by the legal system utilized in the lawsuit. *Dakota Lumber Co.* v. *Rinderknecht*, 2 West. L.R. (Can.) 275, 276-77 (Nw. Terr. 1905). Thus, national citizenship would appear to be sufficient in an action to recognize a judgment decided under federal substantive law. Nevertheless, insofar as federal courts look to state law in one crucial area, their own in personam jurisdiction, it is unlikely that a Canadian court could be convinced that anything other than citizenship of the adjudicating state is sufficient.

52. E.g., 15 U.S.C. §§ 5, 22 (1970) nationwide service of process in antitrust actions); id. § 78aa (global service of process in suits under the Securities Exchange Act of 1934); 28 U.S.C. § 2361 (1970) (nationwide service of process in interpleader actions); see Fed. R. Civ. P. 4(f) (in certain cases effective service may be made within 100 miles of the courthouse, irrespective of state jurisdictional rules); cf. Fed. R. Civ. P. 4(i) (effective service may be made in foreign countries in instances beyond those authorized by federal or state law). See generally C. Wright & A. Miller, *Federal Practice and Procedure*: Civil §§ 1118, 1125 (1969). As to Canada's reaction to giving extraterritorial effect to United States antitrust laws, see Henry, The United States Antitrust Laws: A Canadian Viewpoint, 8 Can. Y.B. Int'l L. 249 (1970).

Other difficulties arise under the fifth category, agreements to submit to a foreign forum.[53] Because the existence of any such agreement is a question of fact,[54] careful distinctions must be drawn between the situations in which submission to a foreign tribunal will be found by a Canadian court. For example, when business corporation statutes, or the certificate of incorporation governing a foreign corporation expressly provide that a shareholder is answerable to the courts of the incorporating country (or state), the act of becoming a shareholder, while not an express contract, is a manifestation of conduct that gives rise by implication in fact to an agreement to submit to such jurisdiction.[55]

It might be supposed that the same implication of consent would be made in the case of a statute requiring appointment of the secretary of state as agent to receive service of process arising out of any motor vehicle accident occurring within the forum and involving a nonresident driver.[56] The contrary is probably the case. When faced with the issue, a Canadian court would likely find that mere operation of a motor vehicle within the state by a Canadian resident is insufficient to signify an agreement by the Canadian that a summons served upon the secretary of state has the same force as if served upon him personally.[57] The provincial court would therefore hold that the American tribunal lacked territorial jurisdiction over the defendant. The United States plaintiff would find that his judgment, founded upon statutory service on the secretary of state, would go unrecognized in Canada.

The actions appear similar. It could be argued that purchasing stock and driving in the state are analogous and therefore both should subject the nonresident to the jurisdiction imposed by the statutes. A possible rationale for the difference in treatment is in the degree of deliberation involved in each act. A securities purchaser, particularly one who buys into a company

53. See note 41 *supra* and accompanying text.

54. See note 41 *supra*.

55. See Canadian Annotation, supra note 39, at 10-11; Recognition, *supra* note 13, at 44-45; cf. *Allen* v. *Standard Trusts Co.*, 57 D.L.R. 105, 108-11 (Man. 1920) (shareholder, sued in Manitoba upon liability created by the laws of Minnesota, deemed to be subject to suit in both Manitoba and Minnesota).
Contrast a situation where a Canadian resident purchases stock in a foreign corporation whose certificate is silent on the matter, as are the laws of the incorporating country. In this instance, according to Canadian courts, the act of buying the stock does not clearly evince an intention to agree to submit to the foreign courts. No agreement in fact will be implied. Canadian Annotation, *supra* note 39, at 10-12.
Relying on some of these same cases, a British commentator has concluded that agreements to submit to the jurisdiction of a foreign court must be express. Dicey and Morris, *supra* note 44, at 999. An example of an express agreement to submit is a corporation directly appointing the secretary of state as agent for service, as required by statute. A judgment founded upon this express agreement is recognized in Canada. See Recognition, *supra* note 13, at 45. Even if the corporation made no such express agreement, it still may be subject to the foreign court's jurisdiction if it is doing business in the state. See note 38 *supra*.

56. E.g., N.Y. Veh. & Traf. Law § 253 (McKinney 1970); Hwy. Traf. Act, Ont. Rev. Stat. c. 202, § 134 (1970).

57. Richardson, Problems in Conflict of Laws Relating to Automobiles, 13 Can. B. Rev. 201, 206-09 (1935). The author puts forth a plausible argument that Canadian courts would find no submission, although case law directly on point is nonexistent.

incorporated in a foreign country, presumably acts only after inquiry and reflection. Driving a car across an open border is not such a considered act. The distinction drawn is, of course, cold comfort to a victim of the driver's negligence.

b. *The Problem of Jurisdiction Based Upon Service Outside the Forum*

Many United States judgments brought to Canada for recognition are founded upon statutory jurisdiction over the defendant. Where an American court has in personam territorial jurisdiction, the fact that defendant was served abroad pursuant to a statute is unimportant because territorial jurisdiction alone is sufficient.[58] If, on the other hand, the court's power over the defendant is based solely upon the statute, jurisdiction is insufficient, and recognition will be denied in Canada.[59] This is the case in numerous instances because, as the above discussion would indicate, many situations encompassed by modern long-arm and other jurisdictional statutes fall outside the realm of territorial jurisdiction.

In Canada, jurisdictional standards required of foreign courts for purposes of recognition were never made dependent upon norms formulated for Canadian courts in asserting their own in personam jurisdiction.[60] Instead, the twin facets evolved separately.[61] Today, Canadian courts assert contemporary forms of statutory jurisdiction over absent defendants.[62] At the same time, they insist that, in recognition actions, the foreign tribunal must have had territorial jurisdiction over the defendant.[63] Insofar as Canadian courts embrace modern forms of statutory jurisdiction while refusing to acknowledge comparable forms asserted by foreign tribunals, they adhere to a double standard.[64]

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58. See *Pemberton* v. *Hughes*, [1899] 1 Ch. 781, 791 (C.A.) (Lindley, M.R.) (British decision). Canadian courts look to *Pemberton* in defining the requirements for foreign court jurisdiction sufficient for recognition. See note 28 *supra*. In *Pemberton* the defendant contended that the Florida decree was void because the plaintiff did not comply with a state statute requiring ten days notice of the lawsuit. The court, deeming this contention unimportant, refused to reach it. *Id.* at 790 (Lindley, M.R.). So long as the defendant was served within the state, the Florida court had territorial jurisdiction and it was irrelevant whether the jurisdictional statute was observed. See *id.* at 789-90 (Lindley, M.R.); *id.* at 795-96 (Vaughan Williams, L.J.). This of course means that it is possible for a foreign judgment to have greater effect in England, and Canada, than it has in the country where rendered. In such a case, though jurisdiction would be invalid under the local law of the adjudicating court, it would be proper in the international sense.

59. See notes 65-67 *infra* and accompanying text.

60. See Recognition, *supra* note 13, at 46-47.

61. Some commentators have argued that the two standards should develop separately and should be based on different considerations. Others, perhaps more practical, disagree. See note 77 *infra*.

62. See Canadian Conflicts, *supra* note 10, at 226-35, 244-68.

63. See notes 31-33 *supra* and accompanying text.

64. The inconsistency has not gone unnoticed by commentators in Canada or by those in England, where the disparity originated and still persists. See, e.g., Cheshire, *supra* note 10, at 87-88, 693 (England); Williston & Rolls, *supra* note 38, at 11 (Canada); Castel, Jurisdiction and Money Judgments Rendered Abroad. Anglo-American and French Practice Compared, 4 McGill L.J. 152, 174 (1958) (Canada); Hurlburt, Conflict of Laws — Jurisdiction — Service Ex Juris — Place of Tort, 52 Can. B. Rev. 470, 479-80 (1974) (Canada) [hereinafter cited as Hurlburt]; Kennedy, "Reciprocity" in the Recognition of Foreign Judgments, 32 Can. B. Rev. 359, 378-83 (1954) (Canada) [hereinafter cited as Reciprocity]; Recognition, *supra* note 13, at 56-60 (Canada).

In *Gyonyor v Sanjenko*,[65] for example, a default judgment was obtained against defendant, a resident of the province of Alberta. The action arose out of a motor vehicle accident in Montana, and defendant was duly served under that state's long-arm statute. Although the Montana court had statutory jurisdiction under its own laws, the Alberta court held that the state tribunal lacked the requisite common-law territorial jurisdiction over the defendant.[66] The court denied recognition and enforcement of the judgment.[67] Yet Alberta has a long-arm statute quite similar to the Montana statute utilized by the plaintiff in *Gyonyor*.[68] In essence, the Alberta court afforded to the Montana tribunal a narrower sweep of jurisdictional power than the provincial tribunal itself claimed.

Nonetheless, the decision in *Gyonyor* would appear at first glance to be eminently reasonable. The Alberta court was discharging its duty by following precedents of English common law, and it could be said there was nothing irrational in the court's refusal to acknowledge the Montana court's authority merely because the latter had jurisdiction according to Montana law. After all, to Canadians, Montana operates under somewhat unfamiliar laws. Moreover, United States courts may possess different and greater power than do Canadian courts. Thus,

65. 23 D.L.R.3d 695 (Alta. Sup. Ct. 1971).

66. *Id.* at 697-98.

67. *Id.* at 698. Indeed, this result was mandated by the lingering rule of *Sirdar Gurdyal Singh* v. *Rajah of Faridkote*, [1894] A.C. 670 (P.C.) (Punjab); see notes 32-33 *supra* and accompanying text. In that case the courts made it clear that a judgment rendered by a court with statutory, but not territorial jurisdiction is valid only in the country of the adjudicating court. "[The defendant] is under no obligation of any kind to obey [such a judgment]; and it must be regarded as mere nullity by the Courts of every nation except (when authorized by special local legislation [e.g., a long-arm statute]) in the country of the forum by which it was pronounced." [1894] A.C. at 684.

68. Compare, for example, the relevant portions of the long-arm statutes of the two jurisdictions, Montana and Alberta, involved in the litigation in *Gyonyor* v. *Sanjenko*, 23 D.L.R.3d 695 (Alta. Sup. Ct. 1971): Mont. R. Civ. P. 4B: "JURISDICTION OF PERSONS. (1) Subject to Jurisdiction. All persons found within the state of Montana are subject to the jurisdiction of the courts of this state. In addition, any person is subject to the jurisdiction of the courts of this state as to any claim for relief arising from the doing personally, through an employee, or through an agent, of any of the following acts: . . . (b) the commission of any act which results in accrual within this state of a tort action; . . . (e) entering into a contract for services to be rendered or for materials to be furnished in this state by such person . . . .
Alta. R. of Ct. 30: "Service outside of Alberta of any document by which any proceeding is commenced, or of notice thereof, may be allowed by the Court whenever: . . . (f) the proceeding is to enforce, rescind, resolve, annul or otherwise affect a contract or to recover damages or obtain any other relief in respect of the breach of a contract, being (in any case) a contract (i) made within Alberta, or (ii) made by or through an agent trading or residing within Alberta on behalf of a principal trading or residing out of Alberta, or (iii) which is by its terms, or by implication governed by Alberta law, or (iv) in which the parties thereto agree that the courts of Alberta shall have jurisdiction to entertain any action in respect of the contract; . . . (h) the action is founded on a tort committed within Alberta; . . . ."
While the circumstances encompassed by the two rules are quite similar, certain elements do differ. The operation of the Alberta rule is discretionary with the court while the Montana rule is automatic. There are other differences in language and specificity. One commentator has suggested that provincial long-arm jurisdictional provisions similar to Alberta's be made more definite. Granger, Conflict of Laws — Jurisdiction — Place of Commission of Tort — *Moran* v. *Pyle*, 7 Ottawa L. Rev. 240, 246 (1975). However, the most important distinction in language probably is that the Montana rule confers personal jurisdiction on the court in the enumerated instances, while the Alberta rule provides only for discretionary service of process outside the jurisdiction. However, the Supreme Court of Canada has held that service upon a nonresident defendant, pursuant to a provincial long-arm statute, imparts jurisdiction over the defendant to the provincial court. *Moran* v. *Pyle Nat'l* (Canada) Ltd., 43 D.L.R.3d 239, 242-43 (Can. 1973) (tort action). Thus, whenever the Canadian court decides to allow long-arm service, the effect of the two rules is identical.
Canadian long-arm statutes generally require personal service upon the defendant in the foreign jurisdiction. E.g., Ont. R. Prac. & Pro. 29, codified at Ont. Rev. Regs., reg. 545, r. 29 (1970).

recognition of judgments from American courts could, in effect, result in provincial courts exercising authority other than that which can be granted by their own parliaments.[69]

While the position of Canadian courts in recognizing only territorial jurisdiction can be understood, it cannot be justified as a practical matter. For one thing, it is not true that a judgment handed down by a United States court and founded upon long-arm jurisdiction is rendered by a tribunal with greater powers than the courts of Canada. The long-arm statutes of the common-law provinces[70] are quite similar to those of the states of the United States.[71] Admittedly, the facets of jurisdiction of provincial courts and acknowledgement of jurisdiction in the hands of foreign courts have evolved independently,[72] but both have been largely judge-made.[73] A coordinated examination and revision has not been undertaken.[74] Nor have the Canadian courts confronted the problem with an eye toward reconciling the conflict.[75] This is unfortunate because the desirability of

69. Recognition, *supra* note 13, at 11.

70. See J.-G. Castel, *Private International Law* 245 & n.56 (1960).

71. See *e.g.*, the Canadian and American long-arm statutes set out in note *supra*.

72. See text accompanying note 61 *supra*.

73. One facet, rules of foreign judgment recognition, has primarily been created by common-law judges of English and Canadian courts. The other, promulgation in Canada of rules governing long-arm service and jurisdiction, has typically been delegated by the legislatures to provincial judges. For example, the Legislature of Ontario has empowered a Rules Committee to formulate rules, inter alia, allowing service of process outside of Ontario. Ont. Rev. Stat. c.228, § 114(10)(c) (1970). The Rules Committee is composed primarily of Ontario provincial court judges and lawyers. *Id* § 114(1). Its acts are subject to the approval of the Lieutenant Governor in Council. *Id.* § 114(10).

74. But see Hurlburt, *supra* note 64, at 478-80, where the author discusses a recent case decided by the Supreme Court of Canada, *Moran* v. *Pyle Nat'l* (Canada) Ltd., 43 D.L.R. 3d 239 (Can. 1973). The Supreme Court in *Moran* may have laid the ground work for a reassessment of the rules of territorial jurisdiction. See *id.* at 242; Hurlburt, *supra* note 64, at 478-80. This may lead to a coordinated revision of both sides of the dichotomy. See also Blom, Service Out of the Jurisdiction — Tort Committed Within the Jurisdiction — Negligent Manufacture — *Moran* v. *Pyle National (Canada) Ltd.*, 9 U.B.C.L. Rev. 389 (1974).
The United States has had a different experience evaluating foreign judgments based upon long-arm jurisdiction. As the needs of a changing world have dictated, the Supreme Court has liberalized the requirements for constitutionally valid state court jurisdiction over the person. Compare *Pennoyer* v. *Neff*, 95 U.S. 714, 722 (1877) ("no tribunal [of a state] can extend its process beyond that territory so as to subject either persons or property to its decisions") with *International Shoe Co.* v. *Washington*, 326 U.S. 310, 316 (1945) ("now . . . due process requires only that in order to subject a defendant to a judgment in personam, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.' " (citations and italics omitted)). This liberalization has meant that long-arm statutes are presumably constitutionally valid; hence judgments rendered under their authority are entitled to full faith and credit by each sister state when offered for recognition and enforcement. In addition, courts in the United States will often readily recognize foreign country judgments founded upon long-arm jurisdiction presumably because they are accustomed to doing so for judgments of sister states. See note 146 *infra*.

75. See, e.g., *Wedlay* v. *Quist*, [1953] 4 D.L.R. 620 (Alta.); *Traders Group Ltd.* v. *Hopkins*, 68 D.L.R.2d 250 (Nw. Terr. Terr. Ct.), aff'd, 1 D.L.R.3d 416 (Nw. Terr. 1968). In *Wedlay* v. *Quist*, the Alberta court refused to register a default judgment rendered by a British Columbia court possessing statutory, but not territorial jurisdiction over the defendant. Rather than expand common-law notions of jurisdiction in the international sense so as to encompass statutory jurisdiction, the court argued that it would be better to contract statutory jurisdiction. [1953] 4 D.L.R. at 624-25. In short, while this court perceived that there should be a correlation between jurisdiction exercised and recognized, it would prefer to relinquish its own long-arm jurisdiction rather than recognize a foreign court's long-arm jurisdiction. But see Reciprocity, *supra* note 64, at 374-75 where the author suggests that the court in *Wedlay* would have given effect to reciprocity of jurisdiction, had the argument been made.
The suggestion is questionable because Alberta's highest court had failed, just one year before the decision in *Wedlay* v. *Quist*, to include foreign statutory jurisdiction as an acceptable basis of jurisdiction in Alberta. *Mattar* v. *Public Trustee*, [1952] 3 D.L.R. 399 (Alta.). Lower Alberta courts have recently affirmed the Mattar principle and similarly have failed to give effect to foreign statutory jurisdiction, whether under the doctrine of reciprocity of jurisdiction or upon any other basis. *Gyonyor* v. *Sanjenko*, 23 D.L.R.3d 695 (Alta. Sup. Ct. 1971); *Bodnar* v. *Popovich*, [1974] 3 W.W.R. 658 (Alta. Dist. Ct. 1973).

reciprocity of jurisdiction, subject to guarantees of natural justice and due process,[76] is widely accepted.[77] Reciprocity of jurisdiction means simply that courts credit foreign tribunals with forms of jurisdiction similar to those which they themselves claim.[78] Using the example of *Gyonyor v. Sanjenko,*[79] were Canadian courts to adopt the doctrine of reciprocity of jurisdiction, the Alberta court would acknowledge the validity of the Montana court's statutory jurisdiction because Alberta's and Montana's jurisdictional statutes[80] are so similar.[81]

While the future may bring changes in the form of increased recognition of judgments founded upon statutory jurisdiction, the current status of Canada's rules of territorial jurisdiction can be illustrated by an elementary, but undoubtedly frequent example. Suppose a New York resident is injured in New York while riding in a car negligently driven by a resident of Ontario. The driver is deviod of United States assets, as is his insurer. Of course, personal service within New York is always sufficient, but suppose further that the Canadian is back home before service can be effected.

Counsel's first reaction might be to serve the secretary of state, deemed the agent of the nonresident driver under the New York statute. Ontario has an almost identical law,[82] but because of the double standard, the Ontario court would not acknowledge this jurisdictional predicate merely because the court itself assumes this jurisdiction. Nor is defendant's conduct of the character likely to induce a Canadian court to imply an agreement to submit to a New York court. Any judgment founded upon this service would be rendered by a court lacking territorial in personam jurisdiction.

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76. Canadian notions of natural justice and due process have been defined as including an opportunity to be heard and to defend the suit. Castel, Jurisdiction and Money Judgments Rendered Abroad. Anglo-American and French Practice Compared, 4 McGill L.J. 152, 178 (1958); notes 103-06 infra and accompanying text.

77. See, e.g., Castel, Jurisdiction and Money Judgments Rendered Abroad. Anglo-American and French Practice Compared, 4 McGill L.J. 152, 178 (1958); Reciprocity, *supra* note 64, at 378-83. But see A. von Mehren and Trautman, Recognition of Foreign Adjudications: A Survey and a Suggested Approach, 81 Harv. L. Rev. 1601, 1617 n.53 (1968) [hereinafter cited as Foreign Adjudications], where the authors use the term "equivalence" of jurisdiction, so as to avoid confusion with the term "reciprocity" as used in *Hilton* v. *Guyot* (discussed at notes 137-55 & 211-14 *infra* and accompanying text). They conclude that, at present, "equivalence" is an unsatisfactory jurisdictional model because assumption of jurisdiction and acknowledgement of foreign court jurisdiction should be based on different factors. Foreign Adjudications, supra at 1621.

78. See Reciprocity, *supra* note 64, at 359.

79. 23 D.L.R.3d 695 (Alta. Sup. Ct. 1971).

80. See note 68 *supra*.

81. In defining the doctrine of reciprocity of jurisdiction, commentators have not suggested that the relevant jurisdictional statutes must be identical, merely similar. Reciprocity, *supra* note 64, at 359; Recognition, *supra* note 13, at 46-47. One commentator in a discussion of reciprocity of jurisdiction in foreign divorce laws puts forth a proposal that is of general application to reciprocity of jurisdiction in foreign money judgments. He suggests that if the two jurisdictional statutes are founded upon the "same substantial basis," the requisite similarity exists and the doctrine can and should be applied. Reciprocity, *supra* note 64, at 363.

82. See the statutes cited in note 56 *supra*.

Counsel may then decide to serve personally the Canadian in Ontario under New York's long-arm statute, since the driver is alleged to have committed a tort within New York. Ontario has a similar long-arm statute, but, due to the double standard, this is of no import. Unless the Canadian falls within one of the above five categories,[83] the New York court has no territorial jurisdiction, regardless of the tribunal's statutory in personam jurisdiction. The judgment would go unrecognized.

Finally, counsel perhaps would resolve to litigate in Ontario. Jurisdiction is no problem, for the driver presumably can be found and served within the province.[84] But there is a catch. Even though the Ontario court would have jurisdiction, the action would be dismissed. Under their choice of law rules[85] Ontario courts refuse to hear an action involving an out-of-province wrong, unless the wrong is of such character that it would have been actionable if committed in Ontario.[86] Because Ontario has a guest statute barring suits in Ontario by gratuitous passengers against drivers, the hypothetical passenger is effectively deprived of his last remaining remedy against the negligent driver.[87]

The above hypothetical exemplifies the undesirable situation now existing between these two countries. There are instances, however, where the judgment creditor is able to surmount the significant obstacle of territorial jurisdiction. In such cases the judgment still must meet several other standards before recognition in Canada is gained.

2. The Foreign Money Judgment Must Be a Final Judgment

This prerequisite to recognition has been settled law since at least the nineteenth century.[88] The principle, still followed in Canada,[89] is that for a foreign judgment to be recognized, the

83. See text accompanying notes 37-41 *supra*.

84. If the driver's assets are in another province, it would do no good to sue in Ontario. This is because the other provinces essentially are foreign jurisdictions. See note 19 supra and accompanying text. Thus, any Ontario judgment founded upon long-arm jurisdiction could be met with a familiar defense: the Ontario court lacked territorial jurisdiction over the defendant.

85. Choice of law doctrines, which are areas of conflict of laws separate from the sphere of foreign judgment recognition, are beyond the scope of this Comment.

86. See Hancock, Canadian-American Torts in the Conflict of Laws: The Revival of Policy-Determined Construction Analysis, 46 Can. B. Rev. 226, 228-29 (1968) and cases cited therein.

87. *Id.* An eventuality which should be considered is that plaintiff may sucessfully convince the Ontario court to hear the action. The possibility exists that the court would spare plaintiff the hardship of effectively being denied access to any court. Also if the New York decree reflected a finding that the defendant was grossly negligent the judgment would be capable of recognition in Canada See Hwy. Traf. Act Ont. Rev. Stat. C. 202, § 132(3) (1970) Quest statue does not bar recovery in cases where driver is grossly negligent.

88. *Nouvion* v. *Freeman*, 15 App. Cas. 1, 8-9 (1889) (Lord Herschell).

89. See, e.g., *Walls* v. *Hanson*, 49 D.L.R.2d 435, 439 (N.B. County Ct. 1964); *Lear* v. *Lear*, 38 D.L.R.3d 655, 657j-58 (Ont. High Ct. 1973), rev'd on other grounds, 51 D.L.R.3d 56 (Ont. 1974); *Ashley* v. *Gladden*, [1954] 4 D.L.R. 848, 851-52 (Ont.).

judgment creditor must show[90] that it is conclusive, final, and has established the debt as res judicata between the parties.[91] The rationale is that it would be unfair to fix the rights of the parties in the Canadian court if a modification of the underlying judgment could be obtained in the original court.[92]

A default judgment should also be subject to this general principle. Thus, the default judgment should be capable of recognition only if the prescribed period, if any, for reopening the litigation has passed. It has been held, however, that a foreign default judgment is a final judgment as long as it stands, even though it may eventually be set aside by the rendering court.[93]

3. The Foreign Money Judgment Must Be For a Definite or Easily Ascertainable Sum

The judgment debt must show an amount on its face, or be easily computed based upon the information contained in the

90. A recent case illustrates the dimensions of the burden that the judgment creditor carries. In *Lear* v. *Lear*, 51 D.L.R.3d 56 (Ont. 1974), the court held that while the party seeking recognition carried the burden of proving conclusiveness, as the term is defined by the law of the adjudicating state, failure to meet that burden did not result in automatic denial of recognition. Rather, where the burden is not met, it is assumed that the foreign judgment is similar to a like Canadian judgment. Thus, it would be deemed final if a comparable provincial judgment would be so deemed. Id. at 61-63. This liberal approach significantly eases the requirement of proving the finality of a judgment because it affords the plaintiff the option of either proving finality according to the law of the adjudicating state, or relying upon notions of finality according to the law of the enforcing province.

91. *Nouvion* v. *Freeman*, 15 App. Cas. 1, 9 (1889) (Lord Herschell).

92. The fact that the judgment is subject to an appeal, or even that an appeal is pending, is, as a common-law proposition, an insufficient reason to deny recognition. E.g., *Davis* v. *Williams*, [1938] Ont. W.N. 504, 505 (High Ct.). It is immaterial that the judgment is capable of being rescinded or varied by another court of competent appellate jurisdiction, so long as the adjudicating court cannot alter its decree. Recognition, *supra* note 13, at 61. The rule in the United States is the same. Judgments subject to appeal may be recognized. See note 227 *infra* and accompanying text.
The Canadian rule is subject to an exception where, according to the law of the original court, the judgment creditor is prevented from executing upon the Judgment during the pendency of the appeal. In this and other limited cases, recognition is refused until after the appeal is decided. Recognition, *supra* note 13, at 62. Further, the common-law rule has been altered by the Canadian enforcement statute. Under this legislation a judgment subject to an appeal is to be denied recognition. See note 227 *infra* and accompanying text.

93. *Boyle* v. *Victoria Yukon Trading Co.*, 9 B.C. 213 (1902). The default may be denied recognition, at least in British Columbia, if the judgment debtor shows to the Canadian court "manifest error" in the judgment. Id. at 217; see *Re Gacs and Maierovitz*, 68 D.L.R. 2d 345, 350-51 (B.C. Sup. Ct. 1968). This part of the opinion in Boyle and the opinion in *Re Gacs* deal with an issue closely related to finality of foreign judgments. The issue is whether a final judgment is conclusive, or is capable of impeachment for error in fact or in law. The common-law rule states that the merits of a foreign judgment, whether or not taken by default, shall not be re-examined, even where manifest error shows on its face. In essence, at common law, every foreign judgment is taken as conclusive on the merits. No defence may be asserted in the recognition proceeding, if it could have been asserted at trial. See, e.g., *State Bank of Butler* v. *Benzanson*, 16 D.L.R. 848 (Alta. Sup. Ct. 1914). Thus, the Boyle holding that a judgment can be impeached for "manifest error" erroneously violates a common-law rule generally adhered to in Canada. Recognition, *supra* note 13, at 70-71. In fact, by virtue of Boyle and its progeny, British Columbia is the only province where, at common law, a default judgment is refused recognition if manifest error is shown. *Id.* at 71.
The common-law rule has been modified by statute, notably in Manitoba. In that province defenses that could have been raised in the original action may be interposed in the recognition proceeding. Man. Rev. Stat. c. C280, § 83 (1970). The problem with this type of statute is that, in sanctioning a retrial of the merits, it sterilizes the foreign tribunal by ignoring its judgment and denying its very existence. Cf. Nadelmann, Enforcement of Foreign Judgments in Canada, 38 Can. B. Rev. 68, 81-82 (1960) [hereinafter cited as Nadelmann].

judgment.[94] Since a judgment creates a contract debt between the parties,[95] the judgment creditor must bring an action on the judgment within the statutory period, generally computed from the date of judgment.[96]

4. The Foreign Judgment Must Not Have Been Obtained Through Fraud

Tension exists between the desire of Canadian courts to preclude recognition of foreign judgments obtained through fraud and the general policy of treating foreign judgments as conclusive on the merits.[97] To reconcile the conflict, a distinction is drawn between fraud relating to a matter which was in issue before the foreign court and fraud connected with an issue never brought before the original tribunal (extrinsic fraud).[98] In the former case, the defendant is deemed to have had an opportunity to raise the alleged fraud in the original action. It is assumed that it was raised and rejected, or was not raised, and was thereby waived. Thus, a foreign judgment upon a contract allegedly obtained by fraud will not be denied recognition.[99]

With regard to extrinsic fraud, the foreign judgment will be vitiated.[100] There is no objection to consideration of the alleged fraud by the Canadian court because the matter is not part of the record of the foreign court and impliedly was never considered there.

5. The Foreign Proceedings Must Not Offend Canadian Notions of Natural Justice

The importance of the concept of natural (or substantial) justice to the principles of foreign judgment recognition was concisely stated in *Pemberton v. Hughes:*[101]

> If a judgment is pronounced by a foreign Court over persons within its jurisdiction and in a matter with which it is competent to deal, English Courts never investigate the propriety of the proceedings in the foreign Court, unless they offend against English views of substantial justice.[102]

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94. See Recognition, *supra* note 13, at 64-65. Similarly, Canadian courts will not recognize in personam or in rem decrees ordering an act. E.g., *Duke* v. *Andler*, [1932] 4 D.L.R. 529 (Can.) (California decree purporting directly to transfer title to British Columbia realty denied recognition).

95. E.g., *State Bank of Butler* v. *Benzanson*, 16 D.L.R. 848 (Alta. Sup. Ct. 1914) (dictum).

96. The statutory period for simple contract actions is typically six years. E.g., Ont. Rev. Stat. c. 246, § 45(1)(g) (1970).

97. See note 93 *supra*.

98. *Locke* v. *Hulett*, [1929] 3 D.L.R. 572, 575-76 (Alta. Sup. Ct.). Examples of extrinsic fraud are allegations of bribing of witnesses by the plaintiff and allegations, supported by specific proof, that the foreign court itself fraudulently conspired to give judgment against the defendant. Dicey and Morris, *supra* note 44, at 1028; Recognition, *supra* note 13, at 97. In the latter case, it would be ludicrous to deny a rehearing on this matter, even if it were raised and rejected in the original action.

99. Recognition, *supra* note 13, at 89.

100. *Id.* A foreign judgment will also be denied recognition if it is shown that the foreign court was fraudulently led to believe it had jurisdiction. *Powell* v. *Cockburn*, 68 D.L.R.3d 700, 708-14 (Can. 1976) (Dickson, J.).

101. [1899] 1 Ch. 781 (C.A.). For cases reaffirming Pemberton in Canada, see note 28 *supra*.

102. [1899] 1 Ch. at 790 (Lindley, M.R.).

Thus, even if the onerous task of obtaining territorial jurisdiction is accomplished,[103] recognition may be denied in any event when the foreign procedures are contrary to Canada's sense of natural justice.

The concept has not been precisely defined, but it is clear that it has been sparingly applied. One proposed definition is that natural justice refers to alleged irregularities of a very serious nature, not in the underlying merits of the foreign judgment, but in the procedure of the issuing court.[104]

Lack of natural justice is never presumed, but is a defense to be raised by the judgment debtor.[105] It generally arises when the defendant has not been given proper notice and an opportunity to be heard.[106] Thus, the concept resembles American notions of due process. The two are not coextensive, however. In the United States, evaluation of jurisdictional bases asserted by foreign courts, and scrutiny of notice and hearing afforded to the defendant are both made under principles of due process. In Canada, on the other hand, evaluation of jurisdictional bases is governed by the separate requirement of territorial jurisdiction.[107] Thus, when the jurisdictional predicate is not in accord with the rules of territorial jurisdiction, the judgment would be disposed of on that ground. Only when the predicate is sufficient for territorial jurisdiction (*e.g.*, agreement to submit to the foreign court[108]) would the defense of denial of natural justice, due to lack of notice and hearing,[109] become relevant.

Public policy is an area related to natural justice. While a foreign judgment will not be recognized if it is contrary to the public policy of the province,[110] it is difficult to define what exactly is provincial public policy.[111] A judge must, to a certain extent, adhere to precedent defining public policy, but he may adapt the elements of public policy to the case before him.[112] Thus, it is difficult to develop a catalogue of circumstances

103. See part II-A(1)(a) *supra*.

104. Recognition, *supra* note 13, at 99. But see note 109 *infra*.

105. See *Burchell* v. *Burchell*, [1926] 2 D.L.R. 595, 602 (Ont. Sup. Ct.).

106. *Patton* v. *Reed*, 30 D.L.R.3d 494, 498 (B.C. Sup. Ct. 1972); *Romano* v. *Maggiora*, [1935] 2 W.W.R. 524 (B.C. Sup. Ct.).

107. See part II-A(1)(a) *supra*.

108. See note 41 *supra* and accompanying text.

109. The term "natural justice" also has been used in a different sense. It has been intimated that in extreme cases Canadian courts may delve into the merits of the foreign judgment. See *Burchell* v. *Burchell*, [1926] 2 D.L.R. at 601 (dictum). This would occur when it is alleged that the foreign law itself, rather than lack of notice or other procedural matters, is repugnant to notions of natural justice. In this sense natural justice is similar to Canadian notions of public policy.
In *Burchell*, the American judgment was founded upon an Ohio law giving jurisdiction to Ohio courts to determine equitable rights in foreign land. The Ontario court stated that the law was not contrary to public policy, and not repugnant to natural justice. Thus, there was no cause to re-examine the merits. *Id.* at 600-03.
Even when the foreign law itself is challenged, Canadian courts would be reluctant to re-examine the merits meticulously. Thus, any hearing on natural justice would presumably concern itself with the foreign law itself, not the foreign court's interpretation of that law. See *id.* at 602.

110. It has been asserted that no foreign judgment has yet been refused recognition in Canada on public policy grounds. Canadian Conflicts, *supra* note 10, at 510.

111. Read, *supra* note 19, at 288.

112. Recognition, *supra* note 13, at 107.

thought to be repugnant to, or in accord with, the province's sense of public policy.[113] A recent Britishs Columbia case considered a challenge on public policy grounds to recognition of an American judgment.[114] The court held that an Idaho judgment for alimony was not contrary to the public policy of the province, even though it was for alimony in arrears for over one year. The judge used his discretion, rather than precedent in reaching this conclusion.[115]

Another area related to natural justice is the foreign tribunal's competence under its own law. If a judgment is rendered by a foreign court possessing subject matter and territorial in personam jurisdiction. Canadian courts do not investigate the propriety of the exercise of that jurisdiction, unless the foreign action is repugnant to Canadian notions of natural justice.[116]

B. *The Reciprocal Enforcement of Judgments Act*

Many provinces have eased somewhat the common-law rules of foreign money judgment recognition through passage of versions of the Reciprocal Enforcement of Judgments Act (Canadian Act).[117] This statute, which will be examined in detail later,[118] considerably facilitates enforcement of money judgments from foreign jurisdictions, provided the latter have reciprocated by enacting their own versions of the Canadian Act.[119] In addition, the current official text potentially applies not only to interprovincial actions, but to international ones as

113. Read, *supra* note 19, at 288-95, delineates several categories of judgments refused recognition as contrary to the public policy of the recognizing forum. These classes, derived from a review of British, American and Canadian cases, are: foreign money judgments imposing a fine (punitive damages are not classified as a fine), judgments for taxes, judgments on claims illegal in the recognizing province, judgments on causes of action both unknown in the recognizing province, and contrary to its established policy.

114. *Patton* v. *Reed*, 30 D.L.R.3d 494 (B.C. Sup. Ct. 1972).

115. *Id.* at 498-500.

116. See *Pemberton* v. *Hughes*, [1899] 1 Ch. 781, 790-91 (C.A.) (Lindley, M.R.); Dicey & Morris, *supra* note 44, at 1025-26; Recognition, *supra* note 13, at 52-55.

117. Reciprocal Enforcement of Judgments Act, [1958] Proceedings of the Uniform Law Conference of Canada 90, as amended, [1962] Proceedings, at 108, as amended, [1967] Proceedings, at 22 [hereinafter cited without cross-reference as Canadian Act]. The official text of the Canadian Act is set out in Appendix II infra. See also Nadelmann, supra note 93. This act, sometimes modified, has been adopted by all Canadian provinces and territories except Quebec. While it has been urged that its adoption by Quebec would not do violence to the province's unique legal system, Quebec Judgments, *supra* note 7, at 137-40, the suggestion has not been heeded.
In the other provinces the Canadian Act is codified at: Alta. Rev. Stat. c. 312 (1970) (Alberta); B.C. Rev. Stat. c. 331 (1960) (British Columbia); Man. Rev. Stat. c. J20 (1970) (Manitoba); N.B. Rev. Stat. c. R-3 (1973) (New Brunswick); Newf. Rev. Stat. c. 327 (1970) (Newfoundland); N.S. Stat. c. 13 (1973) (Nova Scotia); Ont. Rev. Stat. c. 402 (1970) (Ontario); P.E.I. Rev. Stat. c. R-7 (1974) (Prince Edward Island); Sask. Rev. Stat. c. 92 (1965) (Saskatchewan). In the territories the legislation is designated the Reciprocal Enforcement of Judgments Ordinance, and is codified at: Nw. Terr. Rev. Ord. c. R-1 (1974) (Northwest Territories); Yuk. Rev. Ord. c. R-1 (1971) (Yukon Territory).

118. See part IV *infra*.

119. See Appendix III *infra* for a chart of the Canadian provinces, foreign countries and foreign states designated "reciprocating states" by each province which has enacted the Canadian Act.

well.[120]

Unfortunately, however, the emphasis in the Canadian Act is on enforcement rather than recognition. That is, while the Canadian Act facilitates execution of the judgment by providing for simple registration in place of a suit upon the judgment, it does little to ease the requirements of for example, common-law territorial jurisdiction, a stringent prerequisite to recognition.[121] Another drawback of the Act is that registration may be denied if "the judgment debtor would have a good defence if an action were brought on the judgment."[122] This clause also reaffirms the common-law rules because it, in effect, makes registration proceedings instituted under the Act subject to the same common-law principles that govern a suit upon the judgment.[123]

Nonetheless, the Canadians have extended the scope of the Act from interprovincial to international judgments.[124] This indicates their realization that some modernization of the means of international judgment recognition is in order. Moreover, uniform recognition legislation, adopted by the provinces and states of Canada and the United States after bilateral discussion, may be a modernization particularly appropriate for these two nations.[125]

C. *Conclusion*

From a doctrinal point of view, the Canadian system of foreign country money judgment recognition makes sense. It is a workable compromise between a nationalistic desire to protect local citizens from foreign powers and the realization that Canada is a part of a larger community in which a foreign judgment must be respected. The principles are based on sound

120. The official text of the Act makes it applicable to domestic and foreign judgments. Canadian Act § 12(1). Presently, however, only six provinces have enacted provisions which potentially cover foreign country judgments. See Alta. Rev. Stat. c. 312 § 10(1970); B.C. Rev. Stat. c. 331, § 11(1960); Man. Rev. Stat. c. J20, § 12 (1970); Newf. Rev. Stat. c. 327, § 12 (1970); N.S. Stat. c. 13, § 11 (1973); P.E.I. Rev. Stat. c. R-7, § 11 (1974). Even in these provinces, no American state has qualified as a reciprocating state. See Appendix III infra. The acts of the other provinces and territories apply only to judgments rendered within Canada. See N.B. Rev. Stat. c. R-3, § 8 (1973); Ont. Rev. Stat. c. 402, § 8 (1970); Sask. Rev. Stat. c. 92, § 9 (1965); Nw. Terr. Rev. Ord. c. R-1, § 9 (1974); Yuk. Rev. Ord. c. R-1, § 8 (1971).

121. See *Traders Group Ltd.* v. *Hopkins*, 69 D.L.R.2d 250 (NW. Terr. Terr. Ct.), aff'd, 1 D.L.R.3d 416 (NW. Terr. 1968).

122. Canadian Act § 3(6)(g).

123. See *Re Guildhall Ins. Co. and Jackson*, 69 D.L.R.2d 137, 139-40 (Alta. Sup. Ct. 1968). The clause does not, however, empower the court to conduct a retrial of the merits underlying the original judgment. *Id.*

124. See note 120 *supra* and accompanying text. Canada has another uniform act which applies to foreign country judgments. The Uniform Reciprocal Enforcement of Maintenance Orders Act. This legislation, which has been adopted by all the provinces and territories except Quebec, provides for registration and enforcement of orders directing payment of alimony, maintenance, or child support. See Canadian Conflicts, *supra* note 10, at 573-74. As a reciprocal act, it applies only to judgments from courts of jurisdictions that have been designated reciprocating states. Unlike the situation under the Canadian Act, however several American states have been designated reciprocating states by some of the provinces. See, e.g., Alta. Reg. 167/70 (1970) (California); Ont. Reg. 771(2), codified at Ont. Rev. Regs., reg. 771 (1970) (Michigan, New York).

125. Nadelmann, *supra* note 93, at 87-88. But see, e.g., Golomb, Recognition of Foreign Money Judgments: a Goal-Oriented Approach, 43 St. John's L. Rev. 604, 645-48 (1969) [hereinafter cited as Goal-Oriented Approach] (treaty is best means of facilitating foreign judgment recognition).

notions of physical power, due process and other elements of perceived justice that are extant after at least one hundred years of legal history.

From a practical point of view, however, much more is required. For example, with modern transportation and communication, it is no longer reasonable to require, for all practical purposes, personal service within the forum as a prerequisite to recognition.[126] Statutory jurisdiction, already being exercised by Canadian courts, should be acknowledged in foreign courts. The provinces should ease their requirements for recognition of judgments of United States courts.

III. RECOGNITION OF CANADIAN JUDGMENTS IN THE UNITED STATES

As is the case in Canada, foreign country money judgments usually cannot be directly enforced in the United States. They first must be recognized. This is accomplished by reducing them to judgments of American courts.[127] A Canadian judgment creditor has a choice of American courts, federal or state, in which to seek the needed American judgment.

Federal courts have jurisdiction to recognize foreign nation judgments in two general situations. First, if the plaintiff is a citizen of Canada, and the defendant a citizen of a state, the former will always have the option of suing upon the judgment in federal court, under diversity of citizenship jurisdiction.[128] Second, federal courts have jurisdiction where the claim

126. Cf. Nadelmann, *supra* note 93, at 83-84; Recognition, *supra* note 13, at 50, speaking of interprovincial judgments: "To adhere strictly to the principles [of territorial jurisdiction] enunciated over sixty years ago in *Emanuel* v. *Symon* is a sign of backwardness and not in the tradition of the Anglo-Canadian system." (footnote omitted). as to international judgments, such as those from the United States, the author asserts that "a more delicate question" is presented. Id. Perhaps more caution should be shown in the case of international judgments, but it is submitted that such wariness be held to a minimum in the case of United States judgments. With their common heritage and legal systems, their long and deep friendship, and their sustained and growing interchange, Canada and the United States are ripe for creation of dependable procedures for reciprocal recognition of each other's judgments.
Individualization of the rules for each country is a course of action that perhaps may be profitably pursued. Obviously, with variations in legal systems, the appropriate treatment for a judgment from certain nations should be different than the appropriate treatment for a judgment from others. A flexible standard could be developed which accounts for the uniqueness of the system behind each judgment, while avoiding a requirement of reciprocity. See note 12 *supra*. Nevertheless, judgments brought to Canada from most countries are currently treated identically. The result is inordinate difficulty in gaining recognition of American judgments.

127. See R. von Mehren & Patterson, Recognition and Enforcement of Foreign-Country Judgments in the United States, 6 Law & Pol. in Int'l Bus. 37 (1974) [hereinafter cited as Foreign-Country Judgments].

128. 28 U.S.C. § 1332 (1970), as amended, 28 U.S.C.A. § 1332 (Supp. 1977). The jurisdictional amount of $10,000 must also be met. Id. In most cases involving recognition of foreign country judgments, the parties are of diverse citizenship. If, however, neither litigant is a United States citizen, and neither a federal question, nor any other independent federal power (e.g., admiralty) is involved, federal courts have no subject matter jurisdiction, and the parties are left to take the matter up in state court. See, e.g., *Karakatsanis* v. *Conquestador Cia.* Nav., S.A., 247 F. Supp. 423, 426 (S.D.N.Y. 1965).

involves a federal question.[129]

If the claim is a bare attempt to gain recognition of the judgment, as when a judgment creditor seeks only to execute against a judgment debtor's assets, a federal question is probably not presented.[130] On the other hand, a party may be seeking to apply a foreign judgment to a pending action which itself directly involves federal law. Recognition of such a judgment may be sought by the plaintiff merely to facilitate proof of his claim,[131] or it may be asserted by the defendant as a compulsory counterclaim,[132] or raised by the latter as res judicata or collateral estoppel.[133] In such cases federal courts have federal question jurisdiction to hear the federal claim, and may consider recognition of the foreign judgment, presumably under the concept of ancillary jurisdiction.[134]

Alternatively, plaintiff may sue in the courts of the state where the judgment debtor resides or maintains his assets, or in

129. 28 U.S.C.A. § 1331 (Supp. 1977). The matter in controversy must exceed the jurisdictional amount of $10,000. Id. In addition to this grant of general federal question jurisdiction, Congress has given federal courts specific federal question jurisdiction in certain areas, without regard to the amount in controversy. E.g., 28 U.S.C. § 1334 (1970) (bankruptcy); 28 U.S.C. § 1338 (Supp V. 1975) (statutory patents, copyrights, and trademarks); 28 U.S.C. § 1350 (1970) (alien's action for tort committed in violation of international law or treaty); see C. Wright, Federal Courts § 32, at 123-24 (3d ed. 1976). Federal courts also have jurisdiction to entertain admiralty actions, 28 U.S.C. § 1333 (1970), under the independent federal power of U.S. Const. art III. Admiralty is not, however, considered to be a general federal question. See C. Wright, *Federal Courts* § 17, at 68 (3d ed. 1976).

130. See *Adra* v. *Clift*, 195 F. Supp. 857, 866 (D. Md. 1961) (dictum); Goal-Oriented Approach, supra note 125, at 633. A suit for recognition of a judgment is in the nature of an action for debt. *Restatement (Second)* of *Conflict of Laws* § 100, comment b (1971). Moreover, the Supreme Court has never held that such an action is a matter calling for the application of a uniform body of national law. As such, it probably is not "a substantial claim founded 'directly' upon federal law," hence, not a federal question. Mishkin, The Federal "Question" in the District Courts, 53 Colum. L. Rev. 157, 168 (1953); see C. Wright, Federal Courts § 17, at 67 (1976). Thus, in the absence of diversity of citizenship between the parties, it is unlikely that a federal district court would have jurisdiction to consider a claim solely for recognition. Cf. Moore, Federalism and Foreign Relations, 1965 Duke L.J. 248, 292 (1965) (speaking generally of foreign relations cases). It is clear, however, that were the Court to hold that recognition of foreign country money judgments is a subject governed in all cases by federal common law, see part III-C infra, the decision automatically would establish federal question jurisdiction. See *Illinois* v. *City of Milwaukee*, 406 U.S. 91, 98-100 (1972) (actions decided under federal common law are federal questions); C. Wright, Federal Courts § 17, at 68 (3d ed. 1976).

131. See *Adra* v. *Clift*, 195 F. Supp. 857, 862-65 (D, Md. 1961), where the alien plaintiff's tort claim against the alien defendant arose directly under federal law. Plaintiff sought to apply his Lebanese judgment to the tort action by pleading it as collateral estoppel on one of the issues. See id. at 865. Although it lacked diversity jurisdiction, the district court had federal question jurisdiction to decide the tort claim and ancillary jurisdiction to consider recognition of the judgment. Id. at 865-66.

132. Cf. *id.* at 867, (dictum) where the alien defendant asserted a counterclaim against the alien plaintiff. Although the court dismissed the counterclaim as noncompulsory, the tribunal implied that it would have had ancillary jurisdiction to hear defendant's claim had it been compulsory, and founded upon a judgment of an Iraqi court. Id. Ancillary jurisdiction would have been possible because the court had federal question jurisdiction over plaintiff's tort claim. See note 131 *supra*.

133. See *Leo Feist, Inc.* v. *Debmar Publishing Co.*, 232 F. Supp. 623 (E.D. Pa. 1964), where plaintiff's copyright copyright infringement action was brought under the copyright laws of the United States. Defendant raised his English judgment as res judicata. The district court had federal question jurisdiction to hear the infringement matter, and ancillary jurisdiction to recognize the foreign country judgment, not as res judicata, but as operating as collateral estoppel.

134. By this concept it is held that a district court acquires jurisdiction of a case or controversy as an entirety, and may, as an incident to disposition of a matter properly before it, possesses [ancillary] jurisdiction to decide other matters raised by the case of which it could not take cognizance were they independently presented." C. Wright, *Federal Courts* § 9, at 21 (3d ed. 1976).
There must be a "tight nexus" between the claim properly before the federal court, and the matter sought to be brought in under ancillary jurisdiction. *Warren G. Kleban Eng'r Corp.* v. *Caldwell*. 490 F.2d 802, (5th Cir. 1974). Thus, the concept does not extend to a separate and distinct non-federal claim sought to be joined under the liberal joinder of claims rule. See Fed. R. Civ. P. 18(a); C. Wright, *Federal Courts* § 78, at 386 (3d ed. 1976). In effect, ancillary jurisdiction would not comprehend an attempt to invoke federal jurisdiction over a claim for recognition which bears no relationship to a federal claim, except that they involve the same parties and one has been joined to the other.

any state court that can assume personal jurisdiction over the defendant. State court is the only alternative if the federal courts lack subject matter jurisdiction.

A. *Recognition in Federal Court*

When recognition is sought in federal court, choice of law is first dependent upon the nature of the claim underlying the judgment. If the recognition claim is ancillary to one involving a federal question, or is brought in the District of Columbia, the suit upon the judgment will be decided according to federal common law.[135] On the other hand, where the federal court's subject matter jurisdiction is based solely upon diversity of citizenship, state substantive law is applied.[136]

1. Federal Common Law

In the area of recognition of foreign country money judgments, federal common law is largely defined by a Supreme Court case, *Hilton v. Guyot.*[137] In *Hilton* the court refused to recognize the judgment at issue.[138] Nevertheless, the Court took the opportunity to formulate the general rule that a foreign country money judgment should be given full credit and conclusive effect on the merits whenever the judgment is final, and has been rendered by a foreign court affording due process to the parties and possessing personal and subject matter jurisdiction.[139] Such conclusive effect should be given unless, as in *Hilton,* the judgment should be impeached because of a showing of fraud, prejudice, or other matters which, by the principles of international law and comity, indicate that recognition should not be given.[140] If the judgment fails to meet these requirements, it is denied conclusive effect and is merely prima facie evidence of the underlying claim.

Thus, the leading American case has set down the rule that principles of comity should be applied in deciding whether to give conclusive effect[141] to a foreign country money judgment.[142] Unfortunately, the components of comity were, and are,

135. Federal questions, admiralty: see, e.g., *Leo. Feist, Inc.* v. *Debmar Publishing Co.*, 232 F. Supp. 623 (E.D. Pa. 1964) (statutory copyright); *Flota Maritima Browing de Cuba, S.A.* v. *Motor Vessel Ciudad de la Habana*, 218 F. Supp. 938 (D. Md. 1963), aff'd, 335 F.2d 619 (4th Cir. 1964) (admiralty); *In re Aktiebolaget Kreuger & Toll*, 20 F. Supp. 964 (S.D.N.Y. 1937), aff'd, 96 F.2d 768 (2d Cir. 1938) (bankruptcy). District of Columbia: see, e.g., *Cherun* v. *Frishman*, 236 F. Supp. 292 (D.D.C. 1964). see also Comment, Erie Limited: The Confines of State Law in Federal Courts, 40 Corn. L.Q. 561, 574-75 (1955).

136. See part III-A(2) *infra*.

137. 159 U.S. 113 (1895) (5-4 decision).

138. *Id.* at 227-28.

139. *Id.* at 205-06. The Court listed the elements of due process relevant to foreign money judgment recognition: due allegations and proofs and the opportunity to defend against them, proceedings operated according to the course of a civilized jurisprudence, and a clear and formal record. *Id.*

140. *Id.* The French judgment in Hilton was refused recognition because, under principles of international law and comity, reciprocity was lacking. *Id.* at 227-28.

141. To grant conclusive effect to a judgment is an expression of recognition of the judgment without retrial of the merits.

142. 159 U.S. at 163-64.

uncertain.[143] Thus, to avoid confusion, more definitive explanations should perhaps be given by courts for the considerations that cause one country's tribunals to recognize, or deny recognition to, another nation's judgments.[144] Res judicata, the desire of all courts to put an end to litigation, both domestic and international, is probably a more definitive and appropriate term than is comity.[145] Full faith and credit, on the other hand, is an unsatisfactory explanation because that constitutional clause is inapplicable to extranational judgments.[146]

The requirements of *Hilton* are quite similar to those of Canadian courts.[147] One primary distinction between the rules of the two nations is in the area of international law and comity, of which the primary component, according to the American view expressed in *Hilton*, is reciprocity.[148] The Canadians do not share this view because, as a common-law proposition, a judgment from a foreign nation is not denied conclusive effect in Canada merely because of lack of reciprocity.[149]

In *Hilton*, however, conclusive effect was denied to a French judgment on the ground that reciprocity was lacking, since France denied conclusive effect to United States judgments.[150] Reciprocity seemed a reasonable approach,[151] although only a bare majority of the Court approved it in *Hilton*. It is clear, however, that the doctrine works hardship.[152] Thus, some federal courts have questioned the requirement of reciprocity as a

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143. At least one principle of comity, however, was discerned and applied by the Court. This is the doctrine of reciprocity. *Id.* at 210; see notes 148-60 *infra* and accompanying text.

144. In Canada more or less definitive explanations have been given for the provincial courts' willingness to recognize foreign country judgments. See note 25 *supra*.

145. Smit, *supra* note 6, at 52-56; *cf. Restatement (Second) of Conflict of Laws* § 98, comment b (1971).

146. *Aetna Life Ins. Co. v. Tremblay*, 223 U.S. 185 (1912). See also Smit, *supra* note 6, at 45-46. The clause's inapplicability has not prevented many American courts from applying principles of interstate conflicts law to international litigation. See generally Ehrenzweig, Interstate and International Conflicts Law: A Plea for Segregation, 41 Minn. L. Rev. 717 (1957) [hereinafter cited as International Conflicts Law]. Many courts fail to perceive that there should be any difference. See e.g., *Ambatielos v. Foundation Co.*, 203 Misc. 470, 116 N.Y.S.2d 641 (Sup. Ct. 1952). Others allow their familiarity with interstate conflicts law to control their disposition of an international case. See e.g., *Compagnie Du Port de Rio de Janeiro v. Mead Morrison Mfg. Co.*, 19 F.2d 163, 165-66 (D. Maine 1927); *Neporany v. Kir*, 5 App. Div. 2d 438, 173 N.Y.S.2d 146 (1st Dep't 1958), appeal dismissed, 7 App. Div. 2d 836, 184 N.Y.S.2d 559 (1st Dep't 1959).

147. Among other prerequisites to recognition, provincial courts require the adjudicating tribunal to have jurisdiction over the subject matter and person, to render a judgment untainted by fraud, and to provide to the parties the Canadian counterpart of due process: natural justice. See notes 28 & 97-109 *supra* and accompanying text.

148. "[I]nternational law is founded upon mutuality and reciprocity . . . ." 159 U.S. at 228. See also *id.* at 210.

149. J.-G. Castel, *Private International Law* 259 (1960).

150. 159 U.S. at 227-28. The Court was explicit, however, in stating that reciprocity would not be required in the case of judgments in rem and quasi in rem. *Id.* at 166-68.

151. See *e.g., id.* at 211-27 and authorities cited therein.

152. Although the Court in *Hilton* attempted to minimize the problem, *id.* at 228, automatic denial of conclusive effect plainly causes injustice to one party (the judgment creditor) because of actions in another country, by other parties, and beyond his control. Also, a requirement of reciprocity only adds to the dilemma of nonrecognition of American judgments abroad. See R. Leflar, *American Conflicts Law* § 74, at 171-72 (1968) [hereinafter cited as Leflar]. See generally Nadelmann, Reprisals Against American Judgments?, 65 Harv. L. Rev. 1184 (1952).

prerequisite to recognition.[153] Others considering the issue decide that reciprocity is needed, but are easily able to find that it exists.[154] Still others try to avoid the reciprocity issue by holding that it must be raised by the judgment debtor as a defense.[155]

There is never any problem with reciprocity in the case of judgments from Canada.[156] In *Ritchie v. McMullen*,[157] a companion case to *Hilton*, the Court held that Canadian judgments are entitled to conclusive effect, on the basis of reciprocity, because Canada would grant conclusive effect to similar American judgments.[158] The latter proposition is generally true if, as in *Ritchie*, the case involves a foreign judgment rendered by a court possessing territorial jurisdiction.[159] However, American courts should be cognizant of the fact that, in certain situations and in certain Canadian provinces, conclusive effect is not afforded to foreign judgments, even if the adjudicating court has territorial jurisdiction.[160] In cases where reciprocity is required, this knowledge may alter what would otherwise be a finding of reciprocity.

A federal district court case, *Cherun* v. *Frishman*, [161] is a clear example of the procedure, under federal common law, followed in an action for recognition of a Canadian judgment. The judgment debtor (Frishman) defaulted on a mortgage executed in the District of Columbia upon property in Ontario. The judgment creditor (Cherun) sued Frishman in Ontario, requesting foreclosure and a money judgment. Frishman was served with process in the District of Columbia pursuant to Ontario's long-arm statute.[162] He failed to appear and a default judgment was entered against him. After further proceedings in which the amount of the debt was fixed, Cherun sued upon the money portion of the judgment in federal in the District of Columbia.[163]

153. Foreign-Country Judgments, *supra* note 127, at 46-47 and cases cited therein. see also *Restatement (Second) of Conflict of Laws* § 98 (1971), where the rule for recognition of foreign nation judgments is stated without mention of a reciprocity requirement. The comment to section 98 does deal with reciprocity, but in ambiguous terms: "There is a question whether considerations of reciprocity are material." *Restatement (Second) of Conflict of Laws* § 98, comment e (1971). One commentator has concluded that, in the current state of the law, reciprocity is immaterial, and that "it seems regrettable that the Restatement (Second) did not more clearly consign the reciprocity rule to oblivion." Peterson, Foreign Country Judgments and the Second Restatement of Conflict of Laws, 72 Colum. L. rev. 220, 236 (1972) (italics omitted) [hereinafter cited as Peterson].

154. See, e.g., the cases cited in note 135 *supra*.

155. E.g., *Gull* v. *Constam*, 105 F. Supp. 107, 109 (D. Colo. 1952).

156. E.g., *Harrison* v. *Triplex Gold Mines, Ltd.*, 33 F.2d 667, 671 (1st Cir. 1929); *Toronto-Dominion Bank* v. *Hall*, 367 F. Supp. 1009, 1012 (E.D. Ark. 1973) (dictum); *Cherun* v. *Frishman*, 236 F. Supp. 292, 294 (D.D.C. 1964); *Flota Maritima Browning de Cuba, S.A.* v. *Motor Vessel Ciudad de la Habana*, 218 F. Supp. 938, 942 (D. Md. 1963), aff'd, 335 F.2d 619 (4th Cir. 1964) (prior Canadian judgment denied res judicata effect).

157. 159 U.S. 235 (1895).

158. *Id.* at 242-43.

159. See note 93 *supra*.

160. *Id.*

161. 236 F. Supp. 292 (D.D.C. 1964), noted in 53 Geo. L.J. 1142 (1965) and 40 Wash. L. Rev. 911 (1965).

162. 236 F. Supp. at 293. The court noted that the proceedings afforded Frishman full notice and an opportunity to be heard. *Id.*

163. *Id.* at 293-94.

The court first stated that the case was governed by the principles of *Hilton v. Guyot*, including the requirement of reciprocity. The reciprocity hurdle was easily surmounted because Canada is thought to be a reciprocating nation.[164] Since there was no controversy as to due process, subject matter jurisdiction, fraud or prejudice, the Canadian court's personal jurisdiction over the defendant was the only other condition of *Hilton* left to be considered.

In its evaluation of the in personam jurisdiction of the Ontario tribunal, the *Cherun* court first undertook an investigation of the competence of the provincial court to assert jurisdiction under the Ontario's long-arm statute. This step, which would not have been taken by a Canadian court,[165] resulted in a finding that the Ontario court acted within its own law.[166]

Next, the court raised the issue of whether, under principles of international law, the assumption of jurisdiction by the Ontario tribunal under its long-arm statute was a proper exercise of judicial power.[167] According to the court, this determination was to be made with reference to American, not Canadian, notions of due process in the area of jurisdiction.[168] The court applied the current standard of due process in this area—the "minimum contacts" doctrine[169]—a concept significantly more liberal than jurisdiction based upon teritoriality.[170] In *Cherun*, long-arm jurisdiction was acknowledged, even though the United States defendant's contact with Ontario consisted solely of ownership of land there and execution in the District of Columbia of a contract affecting that land.[171] Neither contact, according to Canadian courts, is sufficient for

164. See *id.* at 294; notes 156-60 *supra* and accompanying text.

165. In Canada, competence of a foreign court under its own law is, as a common-law proposition, generally considered unimportant. See note 116 *supra* and accompanying text.

166. 236 F. Supp. at 295.

167. *Id.*

168. *Id.* at 295-96; see Foreign-Country Judgments, *supra* note 127, at 48-49; Reese, supra note 14, at 789. Canadian tribunals make a similar evaluation of a foreign court's jurisdictional base when they decide if, according to the law of Canada, the foreign court possesses jurisdiction in the international sense. See text accompanying notes 31-41 *supra*. However, the similarity ends there. See note 170 *infra*.

169. 236 F. Supp. at 297. The doctrine originated in *International Shoe Co.* v. *Washington*, 326 U.S. 310, 316 (1945).

170. While Canadian courts strictly and narrowly confine acceptable jurisdictional bases to those of territoriality and physical power (to the virtual exclusion of all forms of modern statutory jurisdiction), see part II-A(1) *supra*, American courts have abandoned such a policy. *Cherun* v. *Frishman*, 236 F. Supp. at 296-97; Foreign-Country Judgments, supra note 127, at 52-54; see note 74 *supra*.

171. 236 F. Supp. at 298. "[Defendant] should not now be allowed to avoid the consequences of his failure to live up to that agreement solely on the ground that he was not physically present in Ontario when suit was brought therein." *Id.* It is submitted that this is both correct and a modern disposition of the personal jurisdiction issue of recognition of foreign country money judgments.
Cherun v. *Frishman* stands for allowing recognition of a Canadian judgment, although rendered by a court exercising mere long-arm jurisdiction. It has been held that, for long-arm jurisdiction to be adequate, the Canadian statute must require that notice be sent directly to the defendant. *Boivin* v. *Talcott*, 102 F. Supp. 979, 981 (N.D. Ohio 1951). It is insufficient that the statute merely allows or suggests such notice. See id. This is reminiscent of the standards set for American state long-arm statutes. See *Wuchter* v. *Pizzutti*, 276 U.S. 13 (1928). The requirement should pose no problem for modern Canadian jurisdictional statutes, since they typically require that notice be mailed to the defendant or that the defendant be personally served. See, e.g., Hwy. Traf. Act, Ont. Rev. Stat. c. 202, § 134 (1970) (allows service upon the Registrar of Motor Vehicles if a copy is mailed to the defendant); note 68 *supra*.

territorial jurisdiction.[172]

One final point from *Cherun v. Frishman* is in order. The "minimum contacts" doctrine primarily applies as a limitation upon the exercise of jurisdiction by an *adjudicating* state court over a nonresident defendent.[173] By using the doctrine in the related situation (by a *recognizing* court when appraising a foreign court's assertion of jurisdiction),[174] the *Cherun* court avoided the disconcerting double standard of Canadian courts.[175] In other words, the court in *Cherun* deemed it only fair to acknowledge in Canadian tribunals the same level of jurisdiction claimed by American courts.[176] It is submitted that this is a farsighted approach.[177]

2. State Law in Federal Court

When subject matter jurisdiction is predicated upon diversity of citizenship, rather than upon a federal question, a federal court is bound to decide a case according to substantive state law,[178] including the conflicts law of the state in which it sits.[179]

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172. See note 41 *supra*.

173. This was the use of the doctrine in the case of its genesis. See *International Shoe Co.* v. *Washington*, 326 U.S. 310 (1945).

174. "Though . . . concerned with the permissible limits of jurisdiction of a state of the United States over a nonresident defendant under the Due Process clause of the Fourteenth Amendment, this Court feels that the ["minimum contacts" doctrine applies] equally as well [in this] present international context . . ." 236 F. Supp. at 298.

175. See notes 60-81 *supra* and accompanying text.
A question arises if it is proper, in international litigation, to use the "minimum contacts" doctrine, a concept "established by and for American courts [for use in interstate litigation] and conditioned upon the peculiar history and functions of American concepts of jurisdiction . . . ." International Conflicts Law, *supra* note 146, at 725. It is submitted that, since the "minimum contacts" concept is at least as reasonable as the common-law requirement of territorial jurisdiction, and is more in tune with today's world, assimilation of the concept into American international conflicts law is both reasonable and a step forward. The common-law rule was created expressly for extranational judgments; the minimum contacts rule can be adapted for that role.

176. Ironically, the District of Columbia's jurisdictional statutes at the time provided for personal service within the District, or service outside the District only upon a resident. 40 Wash. L. Rev. 911, 914 (1965). Thus, the Canadian court was afforded greater power than the federal court itself could claim. The principle illustrated is that the jurisdictional base asserted by a Canadian court must comport with American standards of due process, although it need not be cognizable per se under American law. See Reese, supra note 14, at 789-90 n. 36.
The principle applies in Canada as well, where some jurisdictional bases potentially are encompassed by the concept of territorial jurisdiction, but, at the same time, are not asserted by Canadian courts. Cf. note 58 supra (foreign court's lack of jurisdiction under its own law is unimportant, so long as it is in accord with notions of jurisdiction in the international sense). The reality is, however, that territorial jurisdiction is significantly narrower than the jurisdictional bases currently asserted by Canadian courts. See text accompanying notes 60-68 *supra*. The result has been a double standard in Canada.

177. *Cf.* Leflar, supra note 152, at 172 n.7. See also *Rzeszotarski* v. *Rzeszotarski*, 296 A.2d 431, 437 (D.C. Ct. App. 1972).
A recent Nevada case directly applied the Cherun principle in an action seeking recognition of a Canadian default judgment. *Davidson & Co.* v. *Allen*, 89 Nev. 126, 508 P.2d 6 (1973). Defendant was personally served in Nevada pursuant to the British Columbia long-arm statute. The court denied recognition, holding that the British Columbia tribunal lacked personal jurisdiction because the defendant lacked "essential minimum contacts" with the province. Id. at 130, 508 P.2d at 8. In fact, said the court, defendants "had no contact whatsoever" with the Canadian plaintiff. Id. The decision indicates that the mere fact than an American defendant is served under a Canadian long-arm statute, such service being satisfactory to Canadian authorities, does not guarantee recognition. The judgment is recognized only if the statutory service is justified by "essential minimum contacts" with the province.

178. *Erie R.R.* v. *Tompkins*, 304 U.S. 64 (1938). For an outline of the relevant state law in this area, see part III-B infra.

179. *Klaxon Co.* v. *Stentor Elec. Mfg. Co.*, 313 U.S. 487, 497 (1941).

While no federal court has decided a diversity action involving recognition of foreign country judgments without applying state law,[180] it is clear that this approach creates problems. For one thing, foreign policy considerations may mandate the pre-emption of state law.[181] Moreover, precedents in this area are scarce. Many states have never spoken on the subject.[182] Others have only ancient case law which may now be obsolete.[183] Thus, it may be difficult for a court to ascertain the conflicts law of the state where the recognition action is brought. This must be done by federal courts in diversity cases, and it poses a particular problem because federal courts cannot make law for the states in which they sit. Except in the rare instance where a state statute governing recognition exists, they can only follow existing precedent or, where the case law is nonexistent or considered obsolete by the court, "predict" what the law would be if contemporaneously decided by the state's courts.[184] This is often difficult and frequently risky, more so than in other diversity cases, in view of the dearth of case law in this branch of the law. These difficulties suggest that an alternate approach is desirable.[185]

B. *Recognition in State Court*

As in federal practice, *Hilton v. Guyot*[186] is the leading case in the area.[187] While it is said that *Hilton* is not binding on the states,[188] many have followed it, holding that recognition is

180. Restatement (Second) of Conflict of Laws § 98, comment e (1971); Peterson, supra note 153, at 237. The alternative is for federal courts to apply federal common law, including rules derived from Hilton v. Guyot, in all cases. But federal courts apparently consider Hilton to be "a specific application of the principle of *Swift* v. *Tyson*, 41 U.S. (16 Pet.) 1 (1842). "Foreign Adjudications, supra note 77 at 1661 n. 192. Thus, after Erie, they have consistently applied state law in diversity actions seeking recognition of foreign country money judgments. E.g., *Somportex Ltd.* v. *Philadelphia Chewing Gum Corp.*, 453 F.2d 435, 440 (3d Cir. 1971), cert. denied, 405 U.S. 1017 (1972); *Svenska Handelsbanken* v. *Carlson*, 258 F. Supp. 448, 450 (D. Mass. 1966). The matter is not free from controversy, however. Even if state doctrines would normally control in diversity actions, state law in the area of foreign judgment recognition may be pre-empted. See note 181 infra and accompanying text; part III-C infra.

181. See, e.g., Foreign-Country Judgments, supra note 127, at 39-40; Reese, supra note 14, at 786-88; 8 Texas Int'l L.J. 247, 248 (1973). But see *Johnston* v. *Compagnie Generale Transatlantique*, 242 N.Y. 381, 386-87, 152 N.E. 121, 123 (1926).

182. E.g., *Toronto-Dominion Bank* v. *Hall*, 367 F. Supp. 1009, 1012 (E.D. Ark 1973) (Arkansas law). In addition, the following states appear to have no reported case law on the subject: Colorado, Hawaii, Idaho, Indiana, Mississippi, Montana, Nebraska, North Carolina, North Dakota, Rhode Island, South Carolina, Sout Dakota, Virginia, and Wyoming. A recent Oregon case, while not directly on point, applied the principles of comity from *Hilton* v. *Guyot* to a divorce decree of an Indian tribal court, treated as a tribunal of a foreign nation. *In re Marriage of Red Fox*, ——— Ore. App. ———, 542 P.2d 918 (1975).

183. See, e.g., *Svenska Handelsbanken* v. *Carlson*, 258 F. Supp. 448, 450-51 (D. Mass. 1966), where the court looked to Massachusetts precedents dating from 1811 and 1813, the latest cases on point.

184. See *Toronto-Dominion Bank* v. *Hall*, 367 F. Supp. 1009, 1012-14 (E.D. Ark. 1973). See also C. Wright, Federal Courts § 58, at 268-71 (3d ed. 1976).

185. See part III-C infra.

186. 159 U.S. 113 (1895); see notes 137-60 supra and accompanying text.

187. State case law on the subject is surveyed in Foreign-Country Judgments, supra note 127, at 45-72.

188. New York courts have flatly stated that Hilton is not binding on the states, E.g., *Johnston* v. *Compagnie Generale Transatlantique*, 242 N.Y. 381, 387, 152 N.E. 121, 123 (1926). However, "[n]o definite answer to this fundamental question can be made at the present time, "because it is unclear whether recognition of foreign country money judgments is a matter "governed" [in all cases] by national law." Reese, supra note 14, at 787; see part III-C infra. See also Foreign-Country Judgments, supra note 127, at 46.

dependent upon considerations of comity,[189] as the term is there defined.[190] Other states have rejected the decision, at least insofar as it requires reciprocity as a prerequisite to recognition.[191] While comity is a term frequently used even in these latter cases, it is probably more accurate to base a recognition decision upon principles of res judicata. [192]

A recent development has been the codification of state law,[193] with the exception of the reciprocity doctrine, into the Uniform Foreign Money-Judgments Recognition Act (Uniform Act).[194] The Uniform Act, which will be discussed in depth later,[195] applies only to money judgments and seeks only to codify "rules that have long been applied by the majority of courts in this country."[196] Still, it makes a significant contribution to this subject since it represents a current legislative mandate to the courts, and is a clear statement of the law. To date, ten states have enacted versions closely following the uniform text: Alaska, California, Georgia, Illinois, Maryland, Massachusetts, Michigan, New York, Oklahoma, and Washington.[197] While they constitute a small minority of states, many of the enacting states are large centers of international

189. E.g., *Northern Aluminum* Co. v. *Law*, 157 Md. 641, 147 A. 715 (1929); *Estate of Alexandravicus*, 83 N.J. Super. 303, 199 A.2d 662 (App. Div. 1964) (unclear if reciprocity is required); *In re Estate of Christoff*, 411 Pa. 419, 422, 192, A.2d 737, 738 (1963), cert. denied, 375 U.S. 965 (1964).

190. See notes 40-49 supra and accompanying text.

191. New York was the first state to repudiate the doctrine of reciprocity, and has been particularly outspoken on the subject. E.g., *Johnston* v. *Compagnie Generale Transatlantique*, 242 N.Y. 381, 152 N.E. 121 (1926); *Cowans* v. *Ticonderoga Pulp and Paper Co.*, 219 App. Div. 120, 219 N.Y.S. 284, aff'd mem., 246 N.Y. 603, 159 N.E. 669 (1927). See also Ehrenzweig, supra note 6, at 165. On the other hand, New York has followed the general rule of comity of *Hilton* v. *Guyot*. E.g., *International Firearms Co.* v. *Kingston Trust Co.*, 6 N.Y.2d 406, 411, 160 N.E.2d 656, 658, 189 N.Y.S.2d 911, 913-14 (1959). See also *Clarkson Co.* v. *Shaheen*, 544 F.2d 624, 629 (2d Cir. 1976) (New York law).
Reciprocity is a necessity in several other states. For example, New Hampshire has enacted a statute which requires reciprocity for recognition of judgments from only one country: Canada. N.H. Rev. Stat. Ann. § 524:11 (1974). The statute was enacted in retaliation against the drastic limitations placed upon recognition of foreign judgments by Canadian courts. Foreign Adjudications, supra note 77, at 1662. For a survey of case law on the subject of reciprocity, see Comment, The Present Status of the Doctrine of *Hilton* v. *Guyot*, 6 So. Texas L.J. 129 (1962).

192. See *Bata* v. *Bata*, 39 Del. Ch. 258, 275-90, 163 A.2d 493, 503-11 (1960), cert. denied, 366 U.S. 964 (1961) (Dutch judgment held to neither res judicata nor collateral estoppel; recognition thereby refused); text accompanying notes 144-45 supra.

193. For many years California had the only statute in the United States dealing with recognition of foreign country judgments. Act of June 30, 1967, ch. 503, § 2, [1967] Cal. Stats. 1849 (repealed 1974). The statute was originally enacted in 1872 and amended in 1907 and again in 1967. It has an interesting history; the 1907 amendment being traceable to the 1906 San Francisco earthquake and fire. Non-Recognition, supra note 11, at 252-53. The purpose of the 1907 amendment was to facilitate recognition in Germany of money judgments held by these earthquake victims. 11 Cal. L. Revision Comm'n Rep. 473 (1973). Considered to be unnecessary in the light of present legislation, see note 197 infra and accompanying text, the statute was repealed in 1974. Act of May 2, 1974, ch. 211, § 6, [1974] Cal. Stats. 409, repealing Cal. Civ. Proc. Code § 1915 (West 1955).

194. Handbook of the National Conference of Commissioners on Uniform State Laws 242 (1962), reprinted in 13 Unif. Laws Ann. 269 (1975) [hereinafter cited without cross-reference as Uniform Act]. The official text of the Uniform Act is set out in Appendix I infra.

195. See part IV infra.

196. Uniform Act, Commissioners' Prefatory Note. The statute is intended, in part, as a message to those foreign countries which require reciprocity that American states are generally hospitable to their judgments. Id. The hope is that they will reciprocate.

197. Alaska Stat. §§ 09.30.100-.180 (1973); Cal. Civ. Proc. Code §§ 1713-29 (West 1972), as amended, (West Supp. 1976); Ga. Code Ann. §§ 110-1301 to -1308 (Supp. 1976); Ill. Ann. Stat. ch. 77, §§ 121-29 [Smith-Hurd 1966]; Md. Cts. & Jud. Proc. §§ 10-701 to -709 (1974); Mass. Ann. Laws. ch. 235, § 23A (Michie/Law. Co-op 1974); Mic. Comp. Laws Ann. §§ 691.1151-.1159 (1968); N.Y.C.P.L.R. §§ 5301-09 (McKinney Supp. 1976); Okla. Stat. Ann. tit. 12, §§ 710-19 (West Supp. 1976); Wash. Rev. Code Ann. §§ 6.40.010-.915 (Supp. 1975).

commerce.[198]

Although courts in states where the Uniform Act applies probably will base their judgments in recognition actions primarily upon the act, litigants still must examine relevant state precedents. This is because the Uniform Act expressly does not prevent recognition in situations it does not cover.[199] These situations should be relatively infrequent in view of its wide coverage.[200] Nonetheless, where such situations arise, they are governed by state common law. Courts will also look to state precedents for assistance in defining the provisions of the Uniform Act.[201] Because nothing in the act contradicts this case law,[202] the latter serves to define the somewhat general provisions of the act and to provide a point of departure in instances where a court concludes that the act does not apply.[203] Thus, adoption of the Uniform Act is at once a move to stabilize the case law by stating it succinctly, and a realization that the common law will continue to develop.

C. *Conclusion*

So long as the cases in this area can be decided under state law, as the majority are, a possibility is always present that fifty different approaches may be taken.[204] While this is inevitable in any federal system, the international implications in this area call for a consistency of approach. One possibility is the adoption by all states and the federal government of the Uniform Act. Although considerable progress has been made in this regard,[205] enactment by many different legislatures is a time-consuming and uncertain process.[206]

A more expedient approach, and perhaps a preferable one, would be a pronouncement by the Supreme Court that recognition of foreign country money judgments is one of the "uniquely federal interests" to be governed in all cases[207] by

198. With respect to Canada, enactment by more states bordering on the Dominion would be particularly desirable. This would facilitate recognition of Canadian judgments rendered against residents of these border states upon liability incurred, for example, while travelling or doing business in Canada.

199. Uniform Act § 7.

200. "This Act applies to any foreign judgment [as defined] that is final and conclusive [as defined] and enforceable where rendered even though an appeal therefrom is pending or it is subject to appeal." Uniform act § 2. see also Uniform Act § 5(b), authorizing courts to recognize bases of jurisdiction other than those enumerated.

201. See, e.g., *New Cent. Jute Mills Co* v. *City Trade & Indus., Ltd.*, 65 Misc. 2d 653, 318 N.Y.S.2d 980 (Sup. Ct. 1971).

202. Kulzer, Recognition of Foreign Country Judgments in New York: The Uniform Foreign Money-Judgments Recognition Act, 18 Buffalo L. Rev. 1, 47 (1968).

203. the nonrestrictive nature of the act allows courts to proceed outside its provisions whenever appropriate. See note 199 supra and accompanying text.

204. This has not been the experience to date. See notes 188-90 supra and accompanying text.

205. See note 197 supra and accompanying text.

206. See generally P. Hay, Unification of Law in the United States: Uniform State Laws, Treaties and Judicially Declared Federal Common Law, in J. Hazard & W. Wagner, Legal Thought in the United States of America Under Contemporary Pressures 261, 262-65 (1970) [hereinafter cited as Hay].

207. Although the matter is in some doubt, the federal common law promulgated in *Hilton* v. *Guyot* and its offspring is thought to bind only federal courts and, then, only in cases not involving diversity. See notes 180 & 188 supra and accompanying text. Whether this national judge-made Law should control in all state and federal court actions seeking recognition of foreign country money judgments is a question that can be definitely answered by the Supreme Court. See Reese, supra note 14, at 786-88.

federal common law.[208] If held to be a federal interest, the law would then be uniform because state and federal courts would be bound to apply the federal doctrine, state law being pre-empted.[209] The step would have the immediate effect of making the relevant law readily ascertainable by both American and foreign courts.[210]

There are, however, possible disadvantages to the extension of federal common law to all recognition actions. Principally, it would mean that *Hilton v. Guyot* and its requirement of reciprocity would govern.[211] The drawbacks of such an eventuality have previously been stated.[212] In fact, the spectre of a requirement of reciprocity may explain the reluctance of some state courts to adopt *Hilton* and its federal common-law progeny as the standard in recognition actions.

Still, if the reach of *Hilton* is extended, the possibility exists that the advantages of uniformity will outweigh any disadvantages. Further, if the reciprocity requirement is applied in all cases,[213] the nation may actually realize several benefits.[214]

With respect to Canada, the effects of adoption of a uniform body of United States law are uncertain. Under the present system Canadian judgments generally fare well in United States courts. Nonetheless, it is conceivable that provincial judgment creditors would prevail with greater frequency under new rules favoring recognition, consistently applied, even in states currently hostile to foreign judgments. Yet this improvement

208. This step was taken by the Court in a case involving the act of state doctrine. *Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398, 426-27 (1964). At least one commentator suggests that the act of state doctrine and foreign country judgment recognition both include analogous political and legal considerations; thus, a uniform national law, applied in all cases, may be called for. Scoles, Interstate and International Distinctions in Conflict of Laws in the United States, 54 Calif. L. Rev. 1599. 1607 (1966). See generally Goal-Oriented Approach, supra note 125, at 637-42. On the other hand, the political and legal propriety of this step has been quesitoned. See id. at 642-45 (Supreme Court is ill-equipped to formulated policy in this area); Lenhoff, Reciprocity, The Legal Aspect of a Perennial Idea, 49 Nw. U.L. Rev. 752, 762 (1955) (Supreme Court does not control conflict of laws generally; should not prescribe recognition policies).

209. See *Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398, 426-27 (1964); C. Wright, Federal Courts § 45, at 196 (3d ed. 1976); Hay, supra note 206, at 279-81. But see Foreign-Country Judgments, supra note 127, at 40.

210. Readily ascertainable precedent is particularly desirable in those states which rarely address this question.

211. Of course, even in cases where *Hilton* v. *Guyot* currently governs, many federal courts find ways to avoid its effects. See notes 154-55 supra and accompanying text. Moreover, the Court itself may decide to repudiate the doctrine by overruling a portion of the Hilton decision. In any event, were the Court to find desirable the extension, in all instances, of federal common law to the area of foreign country judgment recognition, the decision should be accompanied by a clear statement as to whether reciprocity would be required. If required, lower courts should have guidance on methods of determining which nations are reciprocating countries. The latter involves delicate areas of foreign relations, where Supreme Court interference may be undesirable. Thus, any authoritative federal action in this area may best be left to the executive and legislative branches. See Goal-Oriented Approach, supra note 125, at 642-45.

212. See note 152 supra and accompanying text.

213. Where federal common law presently applies and it is conceded that reciprocity is the general rule, courts have demanded it in only one class of cases. Reese, supra note 14, at 792. Moreover, at least one commentator has stated that, since Hilton, not one judgment has been refused recognition by an American court solely because of lack of reciprocity. Peterson, supra note 153, at 235 n. 96.

214. The benefits would include the facilitation of negotiations for treaties promoting multilateral enforcement of judgments, and, even without a treaty, greater recognition of American judgments abroad because a uniform plan, rather than many divergent policies, would be better understood by foreign nations. See Reese, supra note 14, at 793; Comment, Judgments Rendered Abroad — State Law or Federal Law?, 12 Vill. L. Rev. 618, 628-30 (1967); 8 Texas Int'l L.J. 247 (1973). See also Non-Recognition, supra note 11, at 251-57.

would not lead directly to greater recognition of United States judgments in Canada, since the provinces do not adhere to the doctrine of reciprocity. Thus, the relationship between treatment received from, and afforded to, United States tribunals is tenuous at best. The most that can be hoped for is that more favorable treatment of Canadian judgments by American courts would encourage provincial tribunals to modernize their handling of this nation's judgments.[215] Alternatively, the gesture may induce the executive and legislative branches of both governments to equalize, by treaty or uniform legislation, the procedure surrounding recognition of each other's judgments.

IV. THE CANADIAN AND AMERICAN UNIFORM ACTS: A COMPARISON

Because any accord between Canada and the United States on the subject of recognition of judgments may take the form of uniform legislation,[216] it is important to determine the compatibility of the Canadian Act[217] and the Uniform Act.[218] The consistencies are apparent.

As their titles indicate, the Canadian Act is directed toward enforcement, while the Uniform Act concentrates on recognition. The difference, however, is more apparent than real. Admittedly, the Canadian Act has detailed provisions governing enforcement by registration of the foreign judgment,[219] while the Uniform Act devotes only one sentence to the matter. But this sentence provides that, if eligible, a judgment is to be enforced "in the same manner as the judgment of a sister state which is entitled to full faith and credit,"[220] in other words, by registration of the judgment.[221] Thus, the execution procedures of the Canadian Act and of the Uniform Act are essentially identical.

The acts are also quite similar on the issue of recognition. The core of the Uniform Act deals with recognition,[222] as does a sizeable portion of the Canadian Act.[223] Both require that the

215. This would be accomplished by modernizing the common-law rules, at least with respect to American decrees.

216. See note 125 *supra* and accompanying text.

217. See note 20 *supra* and notes 117-25 *supra* and accompanying text.

218. See notes 194-203 *supra* and accompanying text.

219. Canadian Act §§ 3(1)-3(8), 7.

220. Uniform Act § 3. Thus, the court is referred to another body of law to work execution of the money judgment. The use of interstate full faith and credit law in the realm of foreign country judgments has been critized. E.g., Smit, *supra* note 6, at 45-46. The Uniform act's limited use of the law developed under the clause merits little objection, however, because the Act sets out criteria for recognition independent of interstate law. It directs attention to the latter only for the narrow purpose of execution.

221. A comment directs the court to the method of enforcement of the Uniform Enforcement of Foreign Judgments Act of 1948. Uniform Act § 3, Comment. The method referred to is registration. Uniform Enforcement of Foreign Judgments Act (1948 Act) § 2; see R. Ginsburg, Recognition and Execution of Foreign Civil Judgments and Arbitration Awards, in J. Hazard & W. Wagner, *Legal Thought in the United States Under Contemporary Pressures* 237, 251-52 n.67 (1970) (questions method of enforcement). enforcement). the emphasis of both the Canadian Act and the Uniform Act is on recognition through enforcement, rather than through treatment of the judgment as res judicata.

222. Uniform Act §§ 1-7.

223. Canadian Act §§ 2, 3(6).

foreign judgment be rendered by a court possessing jurisdiction over the person and subject matter,[224] and affording proceedings untainted by fraud.[225] Moreover, both mandate that the judgment be in accord with the public policy of the recognizing state or province[226] and no longer subject to an appeal.[227]

With respect to personal jurisdiction, the facet which creates most of the dilemma in this branch of the law, the acts are very much alike. Both acts include, as acceptable jurisdiction bases, either personal service in the foreign law district,[228] voluntary appearance or other submission,[229] domicile,[230] or the transaction of business.[231] In addition, the Uniform Act allows jurisdictional bases other than those enumerated.[232] The Canadian Act implies provision for additional bases.[233]

The similarity continues in the area Canadians call natural justice. Both acts require that the defendant be afforded notice and an opportunity to be heard.[234]

One difference between the acts is that the Canadian Act requires reciprocity,[235] while the Uniform Act rejects the doctrine of *Hilton v. Guyot* by omitting that requirement.[237] While a reciprocity prerequisite in the Canadian Act may be viewed as an unfortunate impediment to recognition, the practical effect should be minor. This is because, in all material areas, the Uniform Act affords at least as much credit to foreign judgments as does the Canadian Act. In this way the Uniform Act

224. Canadian Act §§ 3(6) (a); Uniform Act §§ 4(a) (2)-(3). The Canadian Act clearly requires the original court to possess jurisdiction under both its own law and under the conflicts rules of the enforcing province. This alters the common law. See note 165 *supra*. The Uniform Act, on the other hand, does not specify the law under which the evaluation is to be made. The determination is left to case law. For one case dealing with this determination, see *Cherun v. Frishman*, 236 F. Supp. 292, 295-96 (D.D.C. 1964) (evaluation made according to the rules of both the original court and the recognizing court).

225. Canadian Act § 3(6) (d); Uniform Act § 4(b)(2).

226. Canadian Act § 3(6)(f); Uniform Act § 4(b)(3).

227. Canadian Act § 3(6)(e); Uniform Act § 6. The Uniform Act does not require automatic denial of recognition of judgments subject to appeal. Rather, it provides for a discretionary stay of the recognition action pending disposition of the appeal, or expiration of any time limits. *Id.*

228. See Canadian act § 2(2); Uniform Act § 5(a)(1). Under the Canadian Act, personal service under a long-arm statute outside the jurisdiction of the foreign court will not result in automatic denial of recognition. Canadian Act § 2(2). This alters the common law. See part II-A(1) *supra*.
The Uniform Act allows nonrecognition where jurisdiction is based solely on personal service, and the foreign court is a "seriously inconvenient forum." Uniform act § 4(b)(6).

229. Canadian Act § 3(6)(b); Uniform Act §§ 5(a)(2)-(3).

230. Canadian Act § 3(6)(b) ("ordinarily resident"); Uniform Act § 5(a)(4) ("domiciled"). According to Canadian law, the concepts of ordinary residence and comicile are only similar, not identical. See Williston & rolls, *supra* note 38, at 333-37.

231. Canadian Act § 3(6)(b); Uniform Act §§ 5(a)(4)-(5). The Uniform Act authorizes an additional base of jurisdiction: operation of a motor vehicle or airplane within the foreign state. Uniform Act §5(a)(6). For the Canadian common-law approach to motor vehicle operation, see notes 56-57 *supra* and accompanying text.

232. Uniform Act § 5(b).

233. See Canadian Act § 3(6)(a)(i), where the Canadian Act implies acceptance of any jurisdictional base recognizable at common law.

234. See Canadian Act § 3(6)(c); Uniform Act §§ 4(a)(1), (b)(1).

235. "Where the Lieutenant-Governor in Council is satisfied that reciprocal provisions will be made by a state in or outside Canada for the enforcement therein of judgments given in (name of province), he may by order declare it to be a reciprocating state for the purposes of this Act." Canadian act § 12(1).

236. 159 U.S. 113 (1895); see notes 148-55 supra and accompanying text.

237. Foreign-Country Judgments, supra note 127, at 47 n.51. However, in enacting its version of the Uniform Act, Massachusetts added a requirement of reciprocity. Mass. Ann. Laws. ch. 235, § 23A (Michie/Law. Co-op 1974).

should effectively establish reciprocity between the enacting states and the Canadian provinces. Recognition in Canada should not be jeopardized on this ground.

The final comparison is the most enlightening. Both acts apply to money judgments rendered by courts of foreign nations.[238] Thus, the Uniform Act is available, in states that have enacted it, for use by judgment creditors seeking recognition of Canadian judgments. The Canadian Act, on the other hand, is beyond the reach of persons holding United States judgments because not a single American state has qualified as a reciprocating jurisdiction.[239] This is unfortunate because the preceding comparison would indicate that, *even under existing law,* each state adopting the Uniform Act should qualify. This being the case, the two acts could easily be harmonized with slight revisions worked out in bilateral conferences. Yet, there will always be some differences in approach because, even under a bilateral uniform act, the underlying systems of common law will remain distinct.[240] Such adherence to national legal traditions is to be expected, and even encouraged. But, with a uniform act, disparities in treatment of each nation's judgments should be greatly lessened.[241]

Thus, while problems remain to be solved,[242] it appears that the twin acts are already well synchronized. The great bulk of work has been completed.

V. CONCLUSION

For decades, the United States and Canada have maintained a remarkable relationship. Their vast common frontier, mutual heritage and longtime friendship are circumstances that have spawned a kinship that can only be characterized as unique. Yet despite the affinity, Canada's legal system is a mystery to many Americans. This Comment has attempted to ascertain whether the general similarity between the countries is reflected in the procedures for recognition of each other's money judgments.

Several dissimilarities exist. For one thing an American

238. Uniform Act §§ 1, 2. The Canadian Act potentially applies to judgments rendered outside Canada, although only some provinces have so extended it. See note 120 *supra.*

239. See Appendix III *infra.*

240. That the bodies of common law will continue to flourish is apparent from an examination of the existing uniform laws. The Uniform Act does not thwart the development of state case law. See notes 199-203 *supra* and accompanying text. Similarly, under the Canadian Act, provincial conflicts precedent still has impact because the Canadian Act makes enforcement subject to any defenses that could be raised in a common-law recognition action. See Canadian Act § 3(6)(g); Recognition, *supra* note 13, at 143 & n.494.

241. The disparity results from the application of differing, and often outdated, common-law rules. Widespread adoption of uniform statutes, representing a legislative statement favoring recognition, should serve to counteract some of the more restrictive of these rules. *CF.* Quebec Judgments, *supra* note 7, at 142, praising the Canadian Act: "[it] take[s] into account the very nature of a foreign judgment. [It] acknowledge[s] the fact that litigation has already taken place abroad and that the enforcing court is not a court of appeal for the dissatisfied foreign judgment debtor."

242. While the language of the acts is similar, the differences should be eliminated in order to promote uniformity of application. Moreover, because full benefit from the uniform legislation will be obtained only if a significant percentage of the jurisdictions adopt it, all states and provinces should be encouraged to enact the law.

judgment creditor experiences greater difficulty gaining recognition in Canada than does a Canadian in the United States. This is largely caused by different personal jurisdiction requirements. The Canadian plaintiff in *Cherun* v. *Frishman*[243] was successful against an American defendant because the district court acknowledged the Ontario court's power over the defendant, even though founded solely upon an Ontario statute. In short, the American court was willing to afford to the Canadian court bases of jurisdiction similar to those asserted by United States tribunals. The court applied modern standards of jurisdiction to give credit to the Ontario tribunal and to its judgment.

The American plaintiff in *Gyonyor* v. *Sanjenko*[244] *was not* so fortunate. He sought compensation for his personal injuries against a Canadian defendant, but was rebuffed by the Alberta court. Recognition of his Montana judgment was denied because the Montana court possessed only statutory jurisdiction over the Canadian defendant. Although the Alberta court enjoyed similar statutory jurisdiction, it felt constrained by nineteenth century precedent and was unwilling to apply modern jurisdictional standards. Thus, credit was refused to the Montana tribunal and to its judgment. If Mr. Gyonyor desired or needed compensation for his loss he would have to begin all over again in Alberta.

This situation is regrettable. Yet, reason for optimism exists because many of the similarities between the two nations exend to this area of the law.[245] Under each nation's common law several of the prerequisites to recognition are alike. Moreover, the latest statements of the law—the uniform acts of Canada and of the United States—continue the similarity and add a further dimension: the acts demonstrate that the current thinking in each nation is virtually the same. Thus, even in the troublesome area of personal jurisdiction, the gap in outlook has been narrowed appreciably. Further progress is required, for the doctrine of territoriality persists in Canada. It should be noted, however, that the recent Canadian rules on the subject of personal jurisdiction indicate meaningful change. For example, under provincial common law, statutory jurisdiction was unquestionably insufficient by itself to justify recognition.[246] Yet the Canadian Act does not on its face mandate denial of recognition in such situations.[247] This is a modernization which might open the door to recognition of countless United States judgments, if only the Canadian Act were available to American

243. See notes 161-77 *supra* and accompanying text.

244. See notes 65-68 *supra* and accompanying text.

245. Because the law dealt with here is that of two autonomous nations, the similarities naturally will not approach absolute likeness. Nevertheless, the resemblance would indicate that the two legal systems are not nearly as far apart as might otherwise have been supposed.

246. See text accompanying note 59 *supra*.

247. See note 228 *supra*. However, insofar as the Canadian Act remains dependent upon the traditional common-law rules, the present situation will continue unchanged.

judgments.

The optimum solution to the problem of nonrecognition may be synchronization and adoption of the uniform acts by all provinces and states. Uniform legislation is particularly appropriate for these two nations since, under the present system, each province and state usually formulates the law to be applied when a judgment is presented for recognition within its jurisdiction. The disadvantage of this approach is the difficulty in gaining acceptance of one piece of legislation by some sixty-four jurisdictions, while keeping the law substantially uniform.

Another possibility is the negotiation of a bilateral or multilateral treaty between the two federal governments.[248] A bilateral treaty may be more expedient than a multilateral because many issues have already been resolved, albeit independently, by the committees on uniform laws of Canada and the United States.

Alternatively, the courts of the two nations could take action. In Canada, where the rules of personal jurisdiction create difficulties, action by the provincial courts could take the form of adoption of the doctrine of reciprocity of jurisdiction. In the United States, where an absence of uniformity among state laws contributes to nonrecognition of American judgments abroad, the action taken might be formulation by the Supreme Court of a federal common-law rule to be universally applied. In either case serious consideration should be given to the question of whether it is appropriate for the judiciary, rather than the executive and the legislature, to work reforms in this area.

Whatever solution is preferable, it is hoped that the comparison presented has clearly illustrated the large common ground shared by Canada and the United States in the area of recognition of foreign money judgments. There should be little difficulty gaining recognition of judgments on both sides of the border because one common impediment to recognition—dissimilarity between legal systems—simply does not here exist.

Calls for rationalization of the law on this subject are not new.[249] Thus, it would be naive to think that any dramatic changes will soon be forthcoming, either from Canada or from

248. Although treaties and conventions on this subject now exist, see, *e.g.*, Canadian Conflicts, *supra* note 10, at 561-67, Canada and the United States are not signatories to a common agreement. See note 25 *supra*.

249. E.g., Non-Recognition, *supra* note 11, at 257-64.

the United States.[250] But the time has never been more appropriate, and the foundation surely has been laid. The next step is an understanding to be reached between friends.

250. A dramatic development, however, has recently come from the United Kingdom and the United States. In London in October, 1976, after some five years of negotiation, representatives of the two nations initialled the Convention between the United Kingdom of Great Britain and Northern Ireland and the United States of America Providing for the Reciprocal Recognition and Enforcement of Judgments in Civil Matters. See Hay & Walker, The Proposed Recognition-of-Judgments Convention Between the United States and the United Kingdom, 11 Texas Int'l L.J. 421, 422-23 (1976). If formally adopted, the Convention will be known as the "United Kingdom/United States Civil Judgments Convention 197...." See October, 1976 text of the proposed Convention, art. 26 (not yet in force).
As the first United States accord on the subject of recognition and enforcement of foreign country civil judgments, the proposed convention is an ambitious endeavor. It goes further than the Uniform Act and Canadian Act in several respects. Compare, e.g., Hay & Walker, supra at 426 (proposed convention applies to money and nonmoney judgments), with Uniform Act § 1(2) (applies to money judgments and Canadian Act § 2(1)(a) (same). See also, e.g., Hay & Walker, *supra* at 436 (acceptable bases of personal jurisdiction in tort actions broader under proposed Convention than under Uniform Act). Another advantage of the Convention is that it would bind all state courts, thereby promoting uniformity. *Id.* at 423. The Convention may become a model for future recognition of judgment treaties between the United States and countries such as Canada. See *id.*