PROOF OF FOREIGN LAW IN COMMON LAW COURTS

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INTRODUCTION

The quickening of international commerce is forcing common law courts to apply foreign law to the cases before it with ever greater frequency. This paper aims to explore the manner in which foreign law is enforced in common law courts and canvasses some of the more controversial issues faced by courts in fulfilling this task. The first part of the paper will examine the manner in which common law courts prove foreign law. The second part of the paper will examine the limits on the application of foreign law and explore more precisely when common law courts will refuse to apply foreign law and for what reasons.

PART I - ESTABLISHING FOREIGN LAW

1. By Pleading and Proof

Common law jurisdictions have traditionally required that foreign law be established by "pleading and proof." In this regard they differ markedly from civil law jurisdictions where courts have considerably more power to establish foreign law on their own initiative. While common law courts are not entirely precluded from doing so, such initiatives are clearly the exception to the rule.

The common law's "pleading and proof" system first requires the party relying upon the foreign law to allege the law in its statement of claim or statement of defence (the "pleadings") by setting out a concise statement of the provisions of the foreign law upon which the party relies and summarizing its effect on the issue before the court. The trier of fact must

then determine the content of the foreign law in question. Foreign law is almost always ascertained by the judge, even in jury trials. Although this was not always the case in the past. Foreign law was, at one time, determined by the jury when trial was by jury. Almost all jurisdictions have now changed this either by statute, procedural rule or case law.[1] To help the judge ascertain foreign law, the party alleging its application is required to prove it as a fact by introducing evidence as to its content and effect through an expert's report or viva voce evidence, or both.[2] In principle, foreign law cannot be proved by putting the foreign statute, case law or text books to the court.[3] Such materials can only be brought before the court as part of the evidence of an expert witness.

a) Who is a Competent Expert?

While the witness who proves foreign law will usually be a lawyer, legal academic or judge of the foreign jurisdiction, formal qualification as legal practitioner is not a pre-requisite. Common law courts tend to have broad discretion to accept or reject some one as an expert. In practice, it is rare that proposed "experts" are disqualified.[4] It is more likely that any hesitations about their expertise will be reflected in the weight which the judge gives to their evidence.

As a result, common law formulations to determine whether someone is an expert have been somewhat vague. It has been suggested that anyone who knows more about foreign law than the domestic judge can be accepted as an expert.[5] The more conservative view is that any person whose official position requires knowledge of foreign law and who has acquired actual knowledge of it may prove the foreign law.[6] However, there must be proof that the office

which the proposed witness holds requires knowledge of the foreign law.[7] Typically, however, such evidence is almost always obtained from a legal practitioner or an academic lawyer with the relevant expertise.[8]

In the case of conflicting evidence by experts, the court will determine what the weight is to be given to an expert's testimony by looking at a wide variety of factors including the following:

1) formal qualifications;
2) publications by the expert;
3) general reputation as a legal scholar or practitioner;
4) legal specialization;
5) first hand experience with the issue or foreign law;
6) inconsistent statements made by the expert;
7) ability to communicate to the court;
8) the expert's demeanor at trial;[9]
9) bias.

Since foreign law is a question of fact which must be determined on the evidence before the court, the uncontradicted evidence of an expert witness about the effect of foreign law must, as a rule, be accepted by the court.[10] It is therefore essential to call a contradicting expert or impeach the credibility of your opponent's expert in order to prevent the court from accepting his testimony. This general rule does not of course prevent a court from using its own intelligence as on any other question of fact.[11] If, for example, an expert were to state that a foreign statute had a meaning which was patently inconsistent with the words of the English

translation, a court would be entitled to reject this construction unless the expert had some additional foreign authority which compelled an interpretation contrary to the words of the statute.[12] Similarly, the judge is free to give more or less weight to even a single expert's testimony based upon the judge's observations about credibility, bias, reliability or other circumstances surrounding the testimony which may lead a judge to believe or disbelieve a particular expert.[13]

b) Scope of Expert Testimony - Text and Effect of Foreign Law

The foreign law expert does not merely identify the text of the foreign law but is also expected to testify about the way in which that law has been interpreted and applied by the foreign court and to provide a view about the effect of the law on the case at hand.[14] The common law position in this regard was summarized early on in *Earl Nelson* v. *Lord Bridport* where Lord Langdon concluded that foreign law must be proved by:

> ... witnesses who can state, from their own knowledge and experience, gained by study and practice not only what are the words in which the law is expressed, but also, what is the proper interpretation of those words, and the legal meaning and effect of them as applied to the case in question.[15]

Experts are required to identify the relevant text of the foreign law (as opposed to having trial counsel put the text before the judge) to ensure that the text submitted is the one currently in force and has not been abrogated or amended.[16] Common law courts require experts to state the effect of the law as opposed to permitting the judge to interpret the text because of the common law tradition of looking beyond the mere words of a text to determine its effect.

Thus the expert is expected to provide guidance about the manner in which the text has been interpreted, whether language has been construed narrowly or broadly, to state the policy behind the law and to provide the appropriate social, cultural and economic context. A foreign law may often be aimed at furthering a social or economic policy that is not followed by the domestic court. A domestic court would therefore be inclined to interpret the foreign law in light of its own social and economic norms. This could lead to a misapplication of foreign law if the judge were unaided by the appropriate expert to provide a cultural context.

Where the domestic court is dealing not with a foreign statute but with a foreign document, such as a contract, the situation becomes more nuanced. In such instances, the expert might not be permitted to testify about the effect of the document. Instead he may be limited to testifying about the rules of construction which are applied to the document and the manner in which those rules have been applied by the foreign court. It is then left to the domestic court to apply the foreign rules of construction, interpret the document and determine its affect on the parties.[17] By way of example: in most legal systems, the meaning of a contract depends on the intention of the parties. Different legal systems may, however, have different ways of ascertaining that intention. Some jurisdictions may examine negotiating history, prior drafts or may look at the legislative history of the statutory provisions which govern a contract. It is the role of the expert to set out these foreign rules of construction for the domestic court and then permit the domestic court to apply them to the facts as it finds them.[18]

c) Jurisdiction to Consider the Constitutionality of Foreign Law

Common law courts are frequently asked to determine the constitutionality of their own forum's legislation. In keeping with this power, they have also reserved to themselves

the power to determine whether a foreign law is constitutional under the foreign jurisdiction's constitution.[19] Thus, if an English court were applying American law, and one party to the action in England wished to contest the constitutionality of the American legislation in question, he may be entitled to do so before the English court. There are, however, several limits to this authority. First, common law courts will not entertain an action the sole object of which is to determine the constitutionality of foreign legislation.[20] Second, the constitutionality of the foreign legislation must be contestable before an ordinary court of the foreign jurisdiction. Thus where the foreign jurisdiction has no authority to determine constitutionality, the common law domestic court will not assume that power either. Similarly, where constitutionality in the foreign jurisdiction is reserved to a special constitutional court, such as Germany's Verfassungsgericht, the common law court will not assume such jurisdiction.[21]

It has been noted, however, that a constitutional determination of another forum's legislation is inconsistent with the general principle that one sovereign will not pass judgment on the validity of the acts of a foreign sovereign,[22] although presumably a constitutional determination is slightly different because the foreign sovereign itself would view its act as inappropriate. Courts are mindful, however, of the dangers of constitutional determinations. Such questions frequently involve, social and economic policy or questions about the appropriate division of power in federal states. It is difficult enough for courts to deal with these issues in the domestic context. It becomes even more burdensome to determine such matters for a foreign society.

d) Scope of Review on Appeal of Finding of Foreign Law

Ordinarily, a determination of fact by a common law court cannot be appealed unless it has been made without regard to the evidence, or cannot be supported by the evidence. A finding of fact on a question of foreign law is, however, treated differently and is subject to appeal, essentially to the same degree as a determination of domestic law would be subject to appeal in the domestic forum.[23] Some commentators have tried to rationalize this difference in approach by holding that the existence of foreign law is a question of fact, but the *effect* of that law upon the rights of the parties is a question of law,[24] and is, therefore, reviewable on appeal.[25] The cases, however, would appear to go beyond this and permit a court of appeal to determine not just what the effect of the law is but also, what the law is.[26]

2. Initiative of the Court

As a general rule, common law judges outside of the United States may not conduct their own inquiry or research to determine foreign law[27] and must rely on expert evidence to do so. That said, the judge is not expected to be merely a conduit for the expert's views but is expected to exercise a certain amount of inquiry and critical analysis.

For example, judges are permitted to refer to the authorities cited by the expert as part of his evidence. Indeed, where the evidence of expert witnesses conflicts, the court may be bound to look at the foreign sources in order to decide between conflicting testimony.[28] In examining these foreign sources the judge should, however, interpret them according to the rules or guidelines set out by the expert and not based on the domestic forum's cannons of construction, the judge's personal views or the judge's personal research.[29] Where, on the other hand, a statute has simply been entered into evidence without testimony about foreign interpretation, the judge may impose his own interpretation and may assume that foreign rules of

constructions are the same as those of the domestic forum.[30] Finally, it may be that a particular point of law has not been resolved by the foreign court. In that case, the domestic common law judge is free to decide the issue[31] although he should probably do so based on the experts' evidence concerning rules of construction and the general context of the law in question.

Greater difficulties arise when the domestic court makes determinations based on sources of law which have not been specifically referred to in evidence. This can arise where the domestic judge has been given an extract from a statute or civil code but has been referred to only one paragraph of the code. While the judge may review that paragraph of the Code, he may generally go no further. As a general rule, the common law judge should not refer to other paragraphs in the text which he has been given and may not be permitted to conduct his own research into the question. Indeed, to do so may amount to making a finding without regard to the evidence in the record.[32] The concern is twofold. First, that the remaining portions of the text may have been abrogated, amended or may otherwise not accurately reflect foreign law. Second, that the paragraph the judge reviews on his own initiative may have been interpreted in a particular manner or may be otherwise limited by competing provisions in the code or competing principles of law in the foreign jurisdiction.[33]

In rare cases, foreign law may be judicially noticed as a notorious fact, without expert evidence.[34] For example, judicial notice has been taken of the fact that roulette is not unlawful in Monte Carlo.[35] Conversely, it has been held that judicial notice could not be taken of the fact that continental lawyers adopt a more liberal attitude than English lawyers towards the construction of documents since this fact was not notorious.[36]

Some jurisdictions have developed tools which grant judges more flexibility in foreign legal research than does the common law. Many federal jurisdictions, for example, allow a judge to take judicial notice of the laws in other states or provinces of the federation.[37] In addition, some jurisdictions allow their courts to approach a foreign court or governmental agency for a determination of a question of law, although this is generally restricted to approaches within the federal state.[38]

In addition, the United States has perhaps gone further than any other common law jurisdiction in granting its judges relatively wide scope to determine foreign law. Rule 44.1 of the federal rules of procedure,[39] for example, permits a judge to "consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under the Federal Rules of Evidence" in order to determine foreign law. In practice, most judges still require litigants to "plead and prove" foreign law but a judge is at least permitted to conduct his own research. It should be noted that the rule gives judges a right but imposes no duty on them to conduct their own research. Moreover, in practice the right appears to be exercised only infrequently,[40] and then almost only with respect to the laws of other American States or of other similar common law jurisdictions such as Canada or England.[41]

3. Previous Findings of the Domestic Court

Since foreign law is a question of fact and since facts change from one case to another, the black letter rule in most common law jurisdictions is that previous domestic decisions about the nature and effect of a foreign law have no bearing on subsequent cases raising the same issue and certainly do not have precedential value for the subsequent case.[42] It is therefore entirely possible for common law courts to reach conflicting conclusions about the

effect of foreign law in different cases. Indeed, one American court had to consider whether Americans could inherit under German inheritance laws six times within a seven year period. Three decisions held yes, three held no.[43]

The greater frequency with which such issues have begun to appear in common law courts is leading to gradual change. Some American courts have, for example, begun referring to previous American decisions dealing with the same issue.[44] While they have not yet taken to relying upon other American decisions to determine a point of foreign law, they have certainly looked to them to help resolve conflicts among experts, assist in the analysis of the issues or to establish incidental points of foreign law which the parties may not have addressed.[45] In Britain, statutory reform has begun making an impact. The *Civil Evidence Act* of 1972 now allows a litigant to introduce into evidence another decision of a court in the United Kingdom on the same issue of foreign law. The Act then deems foreign law to be in accord with the previous finding unless the contrary is established. The provisions do not, however, apply to a situation where there are conflicting decisions on the same point of law.[46]

4. By Agreement

Since the common law views foreign law as a question of fact, it generally allows the parties to agree on the nature of foreign law, just as it would permit the parties to agree on any other fact.[47] This is so even if the agreement is based on an incorrect understanding of foreign law.[48] It has been observed that it seems odd to permit parties to agree to an incorrect statement of foreign law when they would not be permitted to do so with domestic law,[49] this,

however, seems to be a necessary incongruity as long as foreign law remains a question of fact and as long as common law judges are denied the ability to determine it on their own initiative.

The parties may also agree on the applicable foreign statute, place it before the domestic judge and ask the judge to interpret it as he thinks fit, without regard to expert evidence.[50] The judge will not, however, verify that the statute is the correct one or that it remains in force. Nor will the judge determine how the statute has been interpreted in the foreign jurisdiction.[51] While judges are prepared to interpret statutes pursuant to such agreements, it appears that they are highly reluctant to take the same course of action with respect to case law.[52]

PART II - LIMITS ON THE APPLICATION OF FOREIGN LAW

1. Consequences of Failure to Prove Foreign Law

Although foreign law may apply, it will sometimes be impossible for a court to determine the state of foreign law on a particular point. This may come about in a variety of ways. The parties may deliberately chose not to prove foreign law for tactical or financial reasons. It may not be possible to obtain an expert to testify to foreign law, or even if evidence is called, the evidence may not be sufficient to permit a judge to come to a conclusion on the state of foreign law.[53]

Given that foreign law is a fact, the failure to prove it may, strictly speaking, amount to a failure to prove a necessary element of one's case. Indeed, historically, some courts have been willing to dismiss a claim or defence for failure to prove foreign law,[54] although it appears that American courts were more willing to do so than the courts of other common law

jurisdictions.[55] The harshness of this result, coupled with a recognition of the difficulties which the need to prove foreign law created for some litigants has led to the development of a general common law rule that, where foreign law is not proved, it is presumed to be the same as that of the domestic forum.[56]

The presumption originated when most common law jurisdictions were ruled by judge made common law, usually imported from England or in which English courts played an important formative role.[57] In this context, the presumption may have made some sense.

As time went on, statute law began to assume greater importance. Statutes, however, often differed markedly from one jurisdiction to another. This, in turn, led some courts to draw a distinction between statute law and common law. So, for example, if the issue was governed by common law in the domestic forum, the court would presume that its common law was the same as that of the foreign jurisdiction. If, however, the issue was governed by statute in the domestic forum, the court would tend to ignore its statute and presume that foreign law was the same as the domestic jurisdiction's common law rule it was amended by statute.[58] The theory being that, since statutes reflected recent changes to the common law, it could not be presumed that foreign jurisdictions would have made the same changes quite as quickly.

This too, may have made sense in an era where statutes were the exception rather than the rule. As large bodies of common law began to be supplanted by statute, however, it made ever less sense to have domestic judges apply increasingly antiquated common law principles to cases having a foreign element when such principles would never be applied to cases having only a domestic element.[59] Courts struggled with this by applying the domestic forum's statute law where it had been longstanding but its common law rules where statutory

change had been relatively recent.[60] The theory presumably being that if you give the foreign jurisdiction enough time, it would adopt the same statutory reform as the domestic forum had.

The logical absurdity of the position has become glaringly clear to both courts and commentators and has led scholars from a variety of jurisdictions to call for the abolition of the presumption in favour of the simple application of the domestic law.[61]

Although attractive in its simplicity, the simple application of domestic law may not necessarily do justice between the parties. *The Ship "Mercury Bell"* v. *Amosin et al.*[62] decided by Canada's Federal Court of Appeal well illustrates the need for a more nuanced rule. In the *Mercury Bell*, Philippine sailors worked on a Liberian ship. The sailors were subject to a collective agreement which had been signed in Australia. The agreement provided for the payment of higher wages than the sailors were actually paid. When the ship docked in Canada, the sailors had it arrested and sued for the difference. As a starting point, the Court noted that relations between a ship and her crew were governed by the law of the ship's registry, Liberia. No evidence was called on Liberian law. Under the common law presumption, Canadian law was therefore applicable. Unfortunately for the sailors, both Canadian common law and its statutory reform would have defeated their claim. At common law, the plaintiffs would have failed because it did not permit an employee to sue on a collective agreement he had not signed. Statutory reform permitting the enforcement of collective agreements did not assist them because the agreement did not contain two clauses which were necessary prerequisites to its recognition as a collective agreement: a no-strike clause prohibiting workers from striking about any issue concerning the interpretation or enforcement of the collective agreement (as the

plaintiffs effectively were) and a mandatory arbitration clause requiring all disputes under the agreement to be submitted to binding arbitration.

The Court the examined the presumptions concerning foreign and domestic law including the permutations which had arisen around common law and statute law. It concluded that the presumption of similarity rested on the premise that the law at issue had some potential for universality and found in favour of the sailors by applying only those provisions of current Canadian law (i.e. the statute) which had some degree of universal application. The recognition of a collective agreement and the right to enforce it was found to have the requisite degree of universality. The statutory requirements for binding arbitration and no-strike clauses were found to be peculiar to Canadian circumstances and were therefore not applicable.[63]

Many American courts appear to have taken a similar approach. The *American Restatement (Second) on Conflicts of Laws* deals with the old presumption by stating that, where foreign law has not been proved, the Court should decide the case in accordance with local law "except when to do so would not meet the needs of the case or would not be in the interests of justice." In such situations the court should decide the case with reference to the application of fundamental principles of law that exist in all civilized countries[64] or with reference to "universal principles of right and wrong".[65] This more nuanced approach reflected in the *Mercury Bell* and in the *Restatement* is arguably preferable to the simple application of domestic law.

2. Pleading an Unavailable Remedy

The starting point of the common law approach is easily articulated: Remedies are procedural and are therefore governed by the *lex fori*.[66] Rights are substantive and are therefore

governed by the *lex causae*. Matters get muddier as right and remedy approach each other because the common law also requires a certain degree of proximity between domestic remedy and the foreign right.[67] If the domestic court concludes that the remedies it offers is sufficiently similar to those offered by the *lex causae*, the domestic court will award a remedy. Where, however, the remedy offered by the forum is so different from that provided by the *lex causae* as to make the right being enforced in the domestic forum quite different from that created by the *lex causae*, the action will be dismissed for want of a remedy.

In *Phrantzes v. Argenti,*[68] for example, the plaintiff was the defendant's daughter. Both were Greek nationals who were residing in England. The daughter had recently married and was pursuing her father before the English courts to enforce her right to a dowry which the Greek civil code of the time obligated the father to provide. The English court first noted that Greek law gave the daughter the right to compel the father to enter into a dowry contract in accordance with the directions of the court. In issuing those directions the Greek court would take into account the assets and social position of the father, daughter and son-in-law as well as whether the daughter committed a fault within the meaning of the code. The English court noted that the inquiry involved a large measure of discretion and particularly noted that the daughter's right was not to a fixed sum or fixed proportion of assets but was a right to have a court compel the father to enter into a contract in accordance with its directions. The English court concluded that this right was so different from any remedy available to an English court that any attempt to award a remedy would, in fact, be enforcing a completely different right.[69] Since England offered no appropriate remedy, the court followed the common law rule and dismissed the action for want of a remedy.

3. Substantive Law versus Procedural Law

When dealing with foreign law, common law courts have typically distinguished between substance and procedure. Matters relating to procedure are governed exclusively by the law of the forum,[70] while matters relating to the substantive rights of the parties are governed by foreign law.[71]

Generally speaking, rules which govern the mode of proceeding or machinery by which a right is enforced are procedural.[72] Rules that give or define the right are substantive.[73] While easy to enunciate, the rule is more difficult to apply in practice, in part because the common law is changing its attitude towards the distinction. At the origin of the rule, courts were admonished to characterize matters as procedural in the event of any doubt.[74] This was understandable in an era during which the common law viewed itself as superior and during which most of the conflicts issues dealt with by common law jurisdictions arose between Britain and her colonies which were perceived to have less developed legal systems.[75] This has, however, led to the situation where matters which do not relate to the process by which a right is enforced are nevertheless characterized as procedural. Such matters include statutes of limitations which govern the time period in which an action may be brought or the statute of frauds which specifies which types of contracts must be in writing in order to be enforced.[76]

Courts and commentators are clearly becoming dissatisfied with this state of affairs. Some courts now hold that matters should be categorized as procedural only if the question is beyond any doubt, and in case of doubt, the issue should be resolved by finding the question to be substantive.[77] Some commentators have suggested that the reason for the

distinction is to permit a court to apply those rules of procedure (i.e. the actual machinery by which a right is enforced) with which it is familiar as opposed to having to learn a new process each time a case involving foreign law comes before it.[78] This has led them to suggest that the domestic court should apply all of the foreign law without regard to formal labels of substantive or procedural unless the particular law would "interfere with a forum's judicial machinery or shock it sense of justice".[79]

4. Public Policy

Common law courts will not apply foreign law when to do so would be against the public policy of the forum in which application of the law is sought. It is, however, a narrow exception which is rarely applied.[80] A common law forum will generally apply foreign law even if the result to which it leads is contrary to domestic law.[81] Public policy will prevent the application of a foreign law only if the foreign law is contrary to essential public morality. This is not, however, the morality of some people but that which runs through the fabric of society to the extent that to enforce the law would be counter to the forum's system of justice and general moral outlook.[82] That said, what is counter to the domestic forum's "general moral outlook" can sometimes be curious. A variety of common law jurisdictions have cases which refuse to enforce gambling debts incurred outside of the forum for reasons of public policy.[83]

5. Foreign Penal and Revenue Laws

As a general rule, common law courts will refuse, either directly or indirectly, to enforce a claim or a judgment based upon the penal or revenue laws of a foreign state.[84] Penal laws are those which enforce a punishment for a duty owed to the state as opposed to a remedial

law which aims to compensate a private person.[85] The historic reason for refusing to enforce foreign penal or revenue laws relates to the concept of jurisdiction at international law which typically holds that the jurisdiction of a government ceases at its border.[86] Since penal and revenue laws are sovereign acts, the enforcement of those laws in a foreign jurisdiction amounts to permitting the foreign government to exercise his jurisdiction in the domestic forum. Common law courts generally do not permit this to occur in the absence of an international treaty. To do otherwise would deny the government of the domestic forum the right to insist on reciprocity from the foreign jurisdiction.[87]

The definition of penal laws creates interesting issues with respect to legal rules which are designed to punish but which assign vindication of the right to a private actor. The situation has often arisen with respect to American treble damages awards. Indeed, the 5th Circuit Court of Appeals has stated that since treble damage awards are designed in part to penalize and deter wrong doers, it would have no doubt that a foreign court would refuse to entertain claims based on them.[88] It has been observed, however, that such damages should be recoverable in a foreign common law court if they were awarded for the benefit of a private plaintiff.[89] In principle, the private pursuit of a civil remedy for breach of a statutory obligation is enforceable in a foreign jurisdiction and should not be viewed as penal[90] even if the object of such civil action is to "punish" the wrongdoer or deter a certain type of conduct.[91] Using this approach, Canadian courts have, for example, refused to regard American treble damage awards as penal in nature and have enforced them.[92]1 R.S.C. 1985, c. F-29, s. 8.[93]

Penal or revenue laws would, however, include suits in favour of the state for the recovery of pecuniary penalties for the breach of a statute or for the protection of state

revenues.[94] Important in this regard is that vindication of the right must rest with the state itself.[95] However, not all suits at the instance of a state will fall into this category. In *United States of America* v. *Ivey et al.*,[96] for example, the government of the United States brought an action in Canada to enforce judgments that it had obtained against the defendants in Michigan pursuant to an American environmental statute. The United States, as plaintiff, sought to recover the clean-up costs of a site owned and operated by the defendants. The court found that the statute was not a penal or revenue law because the plaintiff sought to recover only the actual cost of removal and remediation.[97] Since the aim was restitution and not punishment, the law could not be considered to be penal in nature. The restitutionary nature of the claim also removed it from the ambit of characterization as a revenue or tax law.[98]

It is important to note, however, that the domestic court which is being asked to enforce the foreign law must decide for itself whether the law is penal. In doing so it should not rely on decisions of the foreign state. Thus, even though the foreign state may have determined that the law is penal, this does not bind the domestic court.[99] To hold otherwise would mean that the domestic court would enforce the law of one state which has found its law to be non-penal but would refuse to enforce the same law from a second state which characterizes its law as being penal in nature.[100] Although the manner in which the foreign jurisdiction characterizes its law will not be determinative, it will of course merit serious attention.[101] It should also be noted that some American courts (it appears those Pennsylvania and the Third Circuit) have held that the foreign court's characterization of its law will be determinative unless the courts of the foreign jurisdiction have made conflicting determinations.[102]

6. Laws of a Public Nature

The final exception to the circumstances in which common law courts will enforce the laws of a foreign state is more controversial and is known as the "public law exception." According to Dicey and Morris, English courts do not have jurisdiction to entertain an action "for the enforcement, either directly or indirectly, of a penal, revenue or *other public law* of a foreign state."[103] The exemption is thought to relate to the enforcement of rights which only a sovereign state can exercise. The authors concede that there is no House of Lords authority for the proposition to support the "public law" exception although there is authority from the English Court of Appeal.[104] In Canada the doctrine has been described as having a "rather shaky foundation"[105] although an older minority judgment of the Supreme Court of Canada has suggested it may apply.[106] New Zealand has questioned it while Australia has recognized and applied it.

The best example of the competing tensions which the exception creates is the "Spycatcher" case where the highest courts of New Zealand and Australia had the same issue before it and came to completely opposite conclusions on the application of the exception. The case involved a former agent of the British security services who had published a book about the service and his experiences in it. The British government sought damages and an injunction to restrain serialization of the book in newspapers in Australia and New Zealand.

When dealing with the issue in *Attorney General* v. *Heinemann Publishers Australian Pty. Ltd.*[107] the High Court of Australia began by investigating the origins of the exception. The court began by quoting Dicey and noting that the rule against the enforcement of penal, revenue or other public law really related to the enforcement of powers which were unique to government.

The court then held that the entire exclusion was based on the principle the court should only undertake a function if it can proceed by determining whether the law in question is proper.[108] This was found to be similar to the public policy exemption which courts are free to apply when dealing with the application of foreign laws to private actors. To draw a distinction, however, between the good and the bad acts of a foreign sovereign would drag the courts into a political excursion which it was not equipped to undertake and which could provoke serious international complications. Thus, the only safe rule was one of universal rejection.[109]

Although the court then noted that Australia imposed similar statutory obligations of confidentiality on its secret service agents and imposed similar private law concepts of confidentiality on its citizens, this was of little assistance because a determination of whether to enforce confidentiality in a particular situation involved balancing the interests of the state against the interest of the public to know because the defendant had raised by way of defence that the nature of the wrongdoing he was exposing was such that it overrode any duty of confidence. The court noted that it was completely ill- equipped to conduct such a balancing act. It would first be required to balance English interests in favour of disclosure or nondisclosure but would also have to balance Australian interests. Since it may well be that Australian interests called for disclosure while English interests call for nondisclosure the court was put into an impossible position.

Britain had sought to address the court's concern about drawing distinctions between good acts and bad acts by obtaining a certificate by the Prime Minister's office of Australia indicating that the government of Australia supported the steps which Britain was seeking to take. The court rejected the usefulness of the certificate on two grounds. First, it

noted that recognizing such certificates would require the government to make invidious comparisons which might well lead to the country's embarrassment in foreign relations. Moreover, the court found that it would subvert the role of the courts if the enforceability of a claim were to depend upon a government decision.

The court then addressed Britain's argument that the obligation it sought to enforce was private, not public. The duty of confidentiality was one which was well founded in common law jurisdictions and imposed regularly upon private actors. In the court's view, however, concentrating on the private law character of confidentiality overlooked Britain's central interest in bringing the action. The interest was to ensure continued secrecy in the operations of the British Security Service. That was found to be a purely governmental interest which rendered the claim unenforceable.

As noted above, when the New Zealand Court of Appeal dealt with the same issue it came to the opposite conclusion.[110] The New Zealand Court of Appeal defined the public law exemption in the same way as Australian High Court did. That is to say, it relates to the assertion of a sovereign right which only government can exercise. The court found that the duty of confidentiality in question did arise from a breach of *The Official Secrets Act* of the United Kingdom but also arose as a common law duty implicit in many employment contracts or fiduciary relationships. The court agreed that the United Kingdom's action could be seen either as a sovereign act or as stemming from a common law employment contract. Since any private employer could enforce a duty of confidence in a foreign country, the court saw no reason to preclude a state actor from enforcing the same right.

The conflicting results of the Australia and New Zealand courts demonstrate that the issue has become needlessly complicated. Arguably the New Zealand result more closely tracks the object and purpose of the rules in question: the prevention of the exercise of a foreign sovereign power on domestic soil without the permission of the domestic sovereign.

The Australian court, it is submitted, was led down the wrong path by two errors. First, it held that the penal/public law exclusion was based on the principle that a court should only undertake a function if it can proceed by determining whether the law in question was proper. This, it is submitted, is not correct. The purpose behind the exclusion, as noted above, is to preserve the territorial sovereignty of the domestic government by prohibiting a foreign sovereign from exercising its power in a foreign state without the consent of the domestic government[111]

This then leads to what, it is submitted, was the second error, the characterization of Britain's action as the exercise of sovereign power on Australian soil. The court acknowledged that the confidentiality clause originated in an employment contract but rejected this as a grounds of enforcement because the over-riding "interest" motivating the government was a state interest relating to confidentiality within the secret service.[112] The rule does not, however, prohibit the a foreign sovereign from pursuing its interest in the domestic court. Rather, it prohibits the exercise of governmental power in the domestic forum. The expansion of the prohibition to the "interests" of a foreign sovereign would deprive all governments from pursuing any lawsuit outside of their own territories because any law suit which a government pursues presumably furthers and reflects its state interest.

CONCLUSION

It can be observed that the common law's approach to proof of foreign law reflects is approach to litigation generally: the court will do little at its own initiative and depends on the parties to set out, characterize and prove the issues. It is perhaps not surprising that civil law jurisdictions, which require much more proactive behaviour from their judges, also leave their judges with much greater initiative when it comes to proof of foreign law.

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Dicey & Morris, *The Conflict of Laws,* 12th ed. (London: Sweet & Maxwell, 1993) at 230 [hereinafter *Dicey*]. The authors cite the follov statutes as examples: *County Courts Act 1984*, s. 68 and *Supreme Court Act 1981*, s. 69(5). See also *Osgood* v. *Hatch*, [1872] Steven's Dig. 387, a cited by G. Wood, "Proof of Foreign Law in the Manitoba Courts" (1985) 1 Man. L.J. 53 at 54. See, for example, *The Manitoba Evidence Act*, R.S.M., c. E150, s. 30(2). See J.G. Sprankling and G.R. Lanyi, "Pleading and Proof of Foreign Law in American Courts" in (1983) 19(1) Stanf. J. L. 3 [hereinafter *Sprankling*].

Dicey, supra note 1 at 230. See also: *Re Brooks,* [1945] 1 D.L.R. 726 (Ont.H.C.); *Hart* v. *Wilson* (1839), 6 O.S. 19 (C.A.); *Hope* v. *Cald* (1871), 21 U.C.C.P. 241 (C.A.). For a case on the onus of proving foreign law, see *Archie Colpitts Ltd.* v. *Grimmer* (1978), 83 D.L.R. (3d) 281 (N C.A.). For cases on the evidence of expert witnesses see *Worthington* v. *Worthington* (1884), 9 S.C.R. 327; *Gold* v. *Reinblatt*, [1929] S.C.R. 74; *Duyvewaardt* v. *Barber* (1992), 71 B.C.L.R. (2d) 396 (C.A.).

Ibid.

See, for example, *In re Estate of Spoya*, 129 Mont. 83 (1955).

Sprankling, supra note 1 at 46.

See *Guerin* v. *Proulx* (1982), 37 O.R. (2d) (Co. Ct.) where a police officer was deemed to be a competent witness. Other cases include: *I the Goods of Dost Aly Khan* (1880), 6 P.D. 6 (where an embassy official was deemed competent); *Saari* v. *Nykanene,* [1944] 4 D.L.R. 619 (Ont. H (where a parish priest was allowed); and *Vander Donckt* v. *Thellusson* (1849), 8 C.B. 812 (where the testimony of a merchant was permitted).

See *Re Low,* [1933] O.R. 393 (C.A.), where the evidence of a customs inspector was deemed inadmissible because there was no proof tha the inspector's position required knowledge of foreign law and *Direct Winters Transport Ltd.* v. *Duplate Can. Ltd.*, [1962] O.R. 360 (H.C.), where evidence of a manager of a transport industry organization was ruled inadmissible to prove Illinois motor transport law.

Dicey, supra note 1 at 232.

Sprankling, supra note 1 at 46.

Sharif v. *Azad*, [1967] 1 Q.B. 605 (C.A.); *Etler* v. *Kertesz* (1960), 26 D.L.R. (2d) 209 (Ont. C.A.).

O'Callaghan v. *O'Sullivan*, [1925] 1 I.R. 90; *A/S Tallinna Laevauhisus* v. *Estonian State Steamship Line* (1947), 80 Ll.L.R. 99 (C.A.) [hereinafter *A/S Tallinna*]; *Allen* v. *Hay* (1922), 69 D.L.R. 193 (S.C.C.).

A/S Tallinna, supra note 11.

Earl Nelson v. *Lord Bridport* (1845), 8 Beav. 527 at 535 [hereinafter *Earl Nelson*].

Baron de Bode's Case (1845), 8 Q.B. 206.

Earl Nelson, supra note 13 at 535.

Dicey, supra note 1 at 232.

Ibid. at 234. See, for example, *Bausch & Lomb Optical Co. Ltd.* v. *Maislin Transport Ltd.*, [1975] 64 D.L.R. (3d) 19 (Ont. H.C.) [hereina *Bausch*].

Bausch, supra note 17 at 26-8; *Sprankling, supra* note 1 at 43.

Dicey, *supra* note 1 at 111. See also Edinger, E., "The Constitutionalization of the Conflict of Laws" (1994) 25 Can. Bus. L.J. 38 at 38-3

Buck v. *Attorney-General*, [1965] Ch. 745 (C.A.) at 749. *Hunt* v. *T & N plc* (1993), 109 D.L.R. (4th) 16 (S.C.C.).

Dicey, supra note 1 at 234.

See E. Campbell, "Res Judicata and Decisions of Foreign Tribunals" (1994) 16 Sydney L. Rev. 311 at 318-22, where the author argues th consideration by the forum of the constitutional validity of the *lex causae* is inconsistent with the general principle that prohibits consideration of tl validity of the acts and transactions of a foreign sovereign in the territory of the foreign sovereign. She argues further that assumption of jurisdicti decide questions concerning the constitutional validity of a foreign *lex causae* could involve a court in determination of questions it is "ill-fitted" t decide because the constitutional jurisprudence of foreign states may differ radically from that of the forum.

Parkasho v. *Singh*, [1968] P. 233 [hereinafter *Parkasho*]; approved in *Dalmia Dairy Industries Ltd.* v. *National Bank of Pakistan*, [1978] Lloyd's Rep. 223 (C.A.). According to *Sprankling, supra* note 1 at 88, the U.S. Federal Rules expressly remove foreign law from the realm of the "clearly erroneous" standard applicable to issues of fact by treating it as a matter of law: Fed. R. Civ. P. 44.1 advisory committee note (1966).

Castel, J.G., *Canadian Conflict of Laws*, 4th ed. (Toronto: Butterworths, 1997) at 161 [hereinafter *Castel*].

See *Lear* v. *Lear* (1975), 5 O.R. (2d) 572 (C.A.), in which the Court of Appeal overturned the trial judge's finding that a judgment in Ont for alimony or maintenance was not final and conclusive so far as arrears of payments was concerned.

Parkasho, supra note 23 at 746.

Dicey, supra note 1 at 232; *Castel, supra* note 24 at 158.

Guaranty Trust Corporation of New York v. *Hannay*, [1918] 2 K.B. 623 (C.A.); *Bumper Development Corp.* v. *Commissioner of Police the Metropolis*, [1991] 1 W.L.R. 1362 (H.L.).

Dicey, supra note 1 at 235.

Ibid. at 234.

Ibid. at 235.

Ibid. at 232. See also *O'Reilly* v. *O'Reilly* (1908), 21 O.L.R. 202 at 229 (C.A.).

Ibid.

Ibid.

Saxby v. *Fulton*, [1909] 2 K.B. 208.

Hartmann v. *Stuart* (1933), 50 T.L.R. 114 (H.L.).

For example, the *Evidence (colonial statutes) Act 1907* allow British courts to prove the texts of law of British Dominions without expert the statutes of various Canadian provinces allow the court to take varying degrees of judicial notice of the laws of other provinces and in the case o Manitoba, of the laws of any country of the British Commonwealth or of the United States: *The Manitoba Evidence Act*, C.C.S.M., c.E150, s. 32;

similarly most American states allow courts the discretionary ability to take judicial notice of the laws of other states. See *Sprankling, supra* note 5-9.

See, for example, the *British Law Ascertainment Act of 1859* which allows any court in "Her Majesty's Dominions" to state a case for the opinion of a court in any other of Her Majesty's Dominions to ascertain a particular point of law. British Courts enjoy a similar ability under the European Convention on Information on Foreign Law, Treaty Series No. 117 (1969) (C.mnd. 4229) which allows most member states of the Coun of Europe to request information about the law of a foreign contracting state through a designated national institution. See *Dicey, supra* note 1 at 2 for a summary of the provisions.

Fed. R. Div. P. 44.1.

Schmertz, J.R., "A Modern Procedural Framework for Establishing the Law of a Foreign Country" (1982) 28(6) The Practical Lawyer 63 70.

Sprankling, supra note 1 at 9, 80.

Castel, supra note 24 at 160. See, for example, *Lazard Brothers & Co.* v. *Midland Bank Ltd.*, [1933] A.C. 289 and *Schnaider* v. *Jaffe* (19 7 C.P.D. 696. However, this principle was lost sight of in *Simons* v. *Simons*, [1939] 1 K.B. 490 and *Re Sheba*, [1959] Ch. 166.

Sprankling, supra note 1 at 63.

Ibid. at 64. See, for example, *In re Chase Manhattan Bank*, 191 F. Supp. 206 (S.D.N.Y. 1961), *aff'd* 297 F.2d 611 (2d Cir. 1962) and *Nicholas E. Vernicos Shipping Co.* v. *United States*, 349 F.2d 465 (2d Cir. 1965).

Ibid. at 65-66.

Dicey, supra note 1 at 235.

Halsbury's Laws of England, 4th ed. 8(1) (London: Butterworths, 1996) at ¶1093 n4 [hereinafter *Halsbury's*]. See, for example, *Moulis* v. *Owen*, [1907] 1 K.B. 746 (CA), where it was admitted that a wagering contract was lawful by French law. In addition, the court c in exceptional circumstances and with the consent of the parties, decide a question of law without proof, although it is reluctant to do this: *Beatty* v. *Beatty*, [1924] 1 K.B. 807 at 814-5 (C.A.) [hereinafter *Beatty*]; *Jabbour* v. *Custodian of Israeli Absentee Property*, [1954] 1 W.L.I 139 at 147-8 (Q.B.) [hereinafter *Jabbour*].

Sprankling, supra note 1 at 10.

Ibid.

Jabbour, supra note 47 at 153; *Beatty, supra* note 47 at 814-5.

Jabbour, supra note 47 at 153.

Dicey, supra note 1 at 228.

Sprankling, supra note 1 at 84.

Norton v. *Florence Land & Pub. Works Co.* (1877), 7 Ch. D. 332.

Y.M. Morentin, "Failure to Prove Foreign Law in U.S. Courts" (1988) 5 Ariz. J. of Int. and Comp. Law 228 at 232-34 [hereinafter *Moren*

Canadian Fire Insurance Co. v. *Robinson* (1901), 31 S.C.R. 488. See also, Canada: Falconbridge, J.D., *Essays on the Conflict of Laws* (Toronto: Canada Law Book Co. Ltd., 1954) at 833; *Young* v. *Industrial Chemicals* , [1939] 4 D.L.R. 392 (B.C.S.C.), per Murphy, J.: "[The] Plaintiff[,] in my opinion[,] is entitled to rely upon a presumption which is a presumption of law, *viz.*, that the general law of the [foreign jurisdicti is the law of British Columbia. A presumption of law does not require to be pleaded (Marginal Rule 221) and of course does not require to be

proved."; *Hellens (falsely called Densmore)* v. *Densmore* (1957), 10 D.L.R. (2d) 561 (S.C.C.) [hereinafter *Hellens*]; England: R. Fentiman, "Forei Law in English Courts" (1992), 108 L. Q. Rev. 142 at 147 [hereinafter *Fentiman*]; *Lloyd* v. *Guibert* (1865), L.R. 1 (Q.B.) 115 at 129; United State America: *Leary* v. *Gladhill,* 84 A.2d 725 at 728 (1951).

J.G. McLeod, *The Conflict of Laws* (Calgary: Carswell, 1983) at 39-40 [hereinafter *McLeod*].

Johnson, W.S., *Conflict of Laws*, 2d ed. (1962) at 54. See also, *Dicey, supra* note 1 at 238; *Castel, supra* note 24 at 161-2, *McLeod, supr* note 57 at 40. In Canada, for instance, it is unreasonable to "presume" that the matrimonial property laws of Manitoba are the same as those of On when it is common knowledge that both provinces passed sweeping amendments, which differ substantially, to the common law. See *Gray* v. *Kerslake*, [1958] S.C.R. 3 at 10, per Cartwright, J.: "[b]ut the presumption relates to the general law and does not extend to the special provisions particular statutes altering the common law."

The Ship "Mercury Bell" v. *Amosin, et al.* (1986), 27 D.L.R. (4th) 641 (Fed. C.A.) [hereinafter *Mercury Bell*].

Hellens, supra note 56.

McLeod, supra note 57 at 40. *Mercury Bell, supra* note 59 at 650 . For example, see *Canadian National Steamships* v. *Watson* (1939), 1 D.L.R. 273 (S.C.C.); *Dynamit A.G.* v. *Rio Tinto Co.*, [1918] A.C. 260 at 295 (H.L.E.); *The Parchim*, [1918] A.C. 157 at 161 (P.C.); *The Colorado*, [1923] P. 102 at 111 (C.A.); *Casey* v. *Casey*, [1949] P. 420 at 430 (C.A.); *University of Glasgow* v. *The Economist, The Times,* July 13, 1990. *Restatement of the Law (Second)* Conflicts of Laws (2d) Vol. 1 (St. Paul: American Law Institute Publishers, 1971) § 136 comment at 378-9 [hereinafter *Restatement*].

Mercury Bell, supra note 59.

Ibid. at 650.

Restatement, supra note 61 at § 378-9.

Parrott v. *Mexican Central Railway,* 93 N.E. 590 at 594 (1911); *Arams* v. *Arams*, 45 N.Y.S. 2d 251 (Sup. Ct. 1943) at 335

Castel, supra note 24 at 146; *Liverpool Marine Credit Co.* v. *Hunter* (1868), L.R. 3 Ch. App. 479 at 486; *Baschet* v. *London Illustrated Standard Co.*, [1900] L.R. 1 Ch. 73 (Ch.Div.); *Chaplin* v. *Boys*, [1969] 2 All E.R. 1085 at 1106 (H.L.) [hereinafter *Chaplin*]; *National Gypsum Co. Northern Sales Ltd.,* [1964] S.C.R. 144 at 150. Note that in *Williams* v. *Downey-Waterbury* (1995), 100 Man. R. (2d) 194 (C.A.), where the Court not persuaded that it had jurisdiction to restrain the alienation of an asset situated in another province as an aid to enforce a money judgement pronounced in Manitoba. P.M. North & J.J. Fawcett, *Cheshire and North's Private International Law,* 12th ed. (London: Butterworths, 1992) at 9 [hereinafter *Cheshire*]. *Restatement, supra* note 61 at § 363-4.

Phrantzes v. *Argenti*, [1960] 1 All E.R. 778 at 784 (Q.B.) [hereinafter *Phrantzes*]; *Stuart* v. *Baldwin* (1877), 41 U.C.Q.B. 466 at 482-84 (C.A.).

Phrantzes, supra note 67.

Ibid. at 36.

Restatement, supra note 61 at §122; *Halsbury's, supra* note 47 at ¶1066. Note, however, that the US Constitution imposes limitations on State's ability to re-characterise an issue as procedural and then to determine the issue according to its own law (*John Hancock Mut. Life Ins. Co.* v *Yates*, 299 U.S. 178 (1936); *Home Insurance Co.* v. *Dick,* 281 U.S. 397 (1930)).

Restatement, supra note 61 at §122; *Halsbury's, supra* note 47 at §1066

Poyser v. *Minors* (1881), 7 QBD 329 at 333 (C.A.).

243930 Alberta Ltd. v. *Wickham* (1990), 75 O.R. (2d) 289 at 304 (C.A.); leave to S.C.C. refused (1991), 2 O.R. (3d) xi; *Traders Finance Corp.* v. *Casselman* (1960), 22 D.L.R. (2d) 177 (S.C.C.).

McLeod, supra note 57 at 214, quoting Dicey.

Ibid.

[76] A set-off that discharges or extinquishes a right is substantive: *Halsbury's*, supra note 47 at ¶1079; *Castel, supra* note 24 at 148; *MacFarlane* v. *Norris* (1862), 2 B & S 783; *Rouquette* v. *Overmann and Schou* (1875), 10 Q.B. 525 at 540-41.

> Traditionally, whether an action was barred by a statute of limitations was procedural: *Colonial Investment & Loan Co.* v. *Martin*, [1927] 3 D.L.R. 360 (Man. K.B.); aff'd on other grounds [1928] 1 D.L.R. 791 (C.A.); aff'd [1928] 3 D.L.R. 784 (S.C.C.); *Bondholders Securities Corp.* v. *Manville*, [1933] 4 D.L.R. 699 (Sask. C.A.); *Allard* v. *Charbonneau*, [1953] 2 D.L.R. 442 (Ont. C.A.). See discussion in *Cheshire, supra* note 66 at 80. In England, however, the *Foreign Limitation Periods Act, 1984*, 1984 (U.K.) c. 16 has in effect made this a substantive matter. In Canada, recent developments in case law have brought about the same result: *Jensen et al.* v. *Tolofson* (1994), 120 D.L.R. (4th) 289 at 321-22 (S.C.C.) [hereinafter *Jensen*]. In the United States, the result differs from one state to another. Some continue to characterize limitation periods as procedural while others now characterize them as substantive: For a discussion of the issue see Leflar et al., *American Conflicts Law*, 4th ed. (Charlottesville: The Michie Company, 1986) at 353 [hereinafter *Leflar*].
>
> Rules relating to the capacity of a person to sue or be sued are generally procedural: *Banque Internationale de Commerce de Petrograd* v. *Goukassow*, [1923] 2 K.B. 682 at 691 (C.A.); rev'd on facts [1925] AC 150 (H.L.); *J. H. Rayner (Mincing Lane) Ltd.* v. *Department of Trade and Industry*, [1990] 2 A.C. 418 (H.L.). But see, *Bumper Development Corp* v. *Metropolitan Police Comr*, [1991] 4 All E.R. 638 (C.A.). See also, *Restatement, supra* note 64 at § 125. However, questions relating to representative capacity are not as clear. In England, for example, the *lex causa* determines whether a trustee in bankruptcy: *Smith* v. *Buchanan* (1800), 1 East 6 at 11; *Macaulay* v. *Guaranty Trust of New York* (1927), 44 TLR 99; *Kamouh* v. *Associated Electrical Industries International Ltd.*, [1980] Q.B. 199 at 206, liquidator: *Bank of Ethiopia* v. *National Bank of Egypt and Ligouri*, [1937] Ch 513; *Kamouh, supra* at 206, or receiver: *Schemmer* v. *Property Resources Ltd.*, [1974] 3 All E.R. 451 (Ch. D.); *Kamouh, supra* at 206, may sue or be sued — if so, the *lex fori* will acknowledge the representative status: *Kamouh, supra* at 206. But the *lex fori* alone will govern the "administrators of deceased persons, whose foreign appointment is ineffective in England and Wales, and curators of disappeared persons:" *Halsbury's, supra* note 47 at ¶1069; *Ibid.* at 206; *New York Breweries Co. Ltd.* v. *A-G*, [1899] AC 62.
>
> Rules relating to whether a party to a particular action is the proper plaintiff or defendant have sometimes been found to be procedural and at other times, substantive. For example, a rule relating to whether an assignee of a chose in action may bring an action in the assignee's own name is procedural "where the rule is not intended to have an extra-territorial effect, and [is] substantive in all other cases": *Halsbury's, supra* note 47 at ¶1069; *Jeffery* v. *M'Taggart* (1817), 6 M & S 126; *Barber* v. *Mexican Land and Colonization Co Ltd.* (1899), 16 TLR 127; *Innes* v. *Dunlop* (1800), 8 Term Rep 595. See also *Restatement, supra* note 61 at §125. Similarly, a rule under which the defendant is liable, but liability is contingent upon other people being sued first, is procedural: *Halsbury's, supra* note 47 at ¶1069; *General Steam Navigation Co.* v. *Guillou* (1843), 11 M & W 877; *Bullock* v. *Caird* (1875), 10 Q.B. 276; *Re Doetsch, Matheson* v. *Ludwig*, [1896] 2 Ch 836; *Johnson Mathey & Wallace Ltd.* v. *Alloush* (1984) 135 NLJ 1012 (C.A.), while a rule under which the defendant is not liable unless other people are sued first, is substantive: *General Steam Navigation Co., supra.*
>
> An estoppel (the assertion that a party is prevented from taking a particular position because of prior conduct or agreement) can be either procedural or substantive. If for example the estoppel relates to the remedy, it is procedural. If, however, it relates to the right asserted, it is substantive: *J D' Almeida Araujo Lda* v. *Sir Frederick Becker & Co. Ltd.*, [1953] 2 All E.R. 288 at 290-293 (Q.B.); *Chaplin, supra* note 66 at 1093 at 1095, 1105-06 (H.L.); *Breavington* v. *Godleman* (1988), 169 CLR 41 (Aust H.C.); *Stevens* v. *Head* (1993), 176 CLR 433 (Aust H.C.).

Block Bros. Realty Ltd. v. *Mollard* (1981), 122 D.L.R. (3d) 323 at 327-28 (B.C.C.A.); Cited with approval, *Jensen, supra* note 76 at 318.

Leflar, supra note 76.

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Ibid.

Castel, supra note 24 at 164.

Broadwalk Regency Corp. v. *Maalouf* (1992), 88 D.L.R. (4th) 612 at 616 (Ont. C.A.).

Ibid.

M & R Investment Co. v. *Marsden* (1987), 63 O.R. (2d) 509 (Dist.Ct.).

Huntington v. *Attrill,* [1893] A.C. 150 (P.C.) [hereinafter *Huntington*]. This interpretation has been adopted in the *Restatement, supra* nc 61 at §89.

Olde North State Brewing Co. v. *Newlands Services Inc.*, [1998] B.C.J. No. 2474 at ¶48 [hereinafter *Olde*] quoting *Castel, supra* note 24.

F.A. Mann, "The International Enforcement of Public Rights" (1987) 19 N.Y. Int. J. Law in Politics 603 at 608 [hereinafter *Mann*].

Ibid. at 608-609.

Industrial Inv. Dev. Corp. v. Mitsui & Co., 671 F.2d 876, 891 (5th Cir. 1982) (citations omitted), *vacated on other grounds*, 460 U.S. 100 *reaff'd on remand*, 704 F.2d 785 (5th Cir.) (per curiam), *cert. denied*, 464 U.S. 961 (1983).

Mann, supra note 86 at 614.

Huntington, supra note 84 at 159.

Rein v. *Koons Ford Inc.,* 567 A. 2d 101 (Md. 1989) 101 at 103 [hereinafter *Rein*].

It should be noted that the *Foreign Extraterritorial Measures Act*

:s the Attorney General of Canada the discretion to declare treble damages awards based on anti-trust laws to be unenforceable. *Olde, supra* not)L) 10 (C.A.)

Huntington, supra note 84 at 151

Ibid. at 157.

United States v. *Ivey et al.* (1995), 26 O.R. (3d) 533 (Gen.Div.); aff'd (1996) 30 O.R. (3d) 370 (C.A.) [hereinafter *Ivey*].

Ibid. at 548.

Similar results have been reached in American and English Courts: *Chase Manhattan Bank* v. *Hoffman*, 665 F.Supp. 73 (D.Mass. 1987); *Restatement, supra* note 61 at §89; *Attorney General of New Zealand* v. *Ortiz*, [1982] 3 All E.R. 432 at 467 (Q.B.) [hereinafter *New Zealand*].

Huntington, supra note 84 at 155; *New Zealand, supra* note 97 at 466; *Rein, supra* note 91.

Huntington, supra note 84 at 155.

United States of American v. *Inkley*, [1988] 3 All E.R. 144 at 150 (C.A.).

Nesbitt v. *Clark*, 116 A. 404 (Penn. S.C., 1922); *Commercial National Bank* v. *Kirk*, 71 A. 1085 (Penn. S.C., 1909); *Campbell* v. *Mitsubi Aircraft International Inc.,* 452 F.Supp. 930 at 932; dismissed at 594 F.2d 854 (C.A. 1979).

Dicey, supra note 1 at 103 (emphasis added).

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New Zealand, supra note 97.

Ivey, supra note 95 at 547 (Ont. Gen. Div.) per Sharpe J.

Laane v. *Estonian State Cargo & Passenger Steamship Line,* [1949] S.C.R. 530 where Rand J. refused to recognize the nationalization of Estonian ship in a Canadian port on the basis of the public law or political law exception whereas the majority justified the same result on the more traditional basis of refusing to recognize a foreign state's jurisdiction to confiscate property located outside their territory.

(1988), 165 C.L.R. 30 (Aust. H.C.).

Citing *Moore* v. *Mitchell*, 30 F. 2d 600 (1929) per learned Hand J.

Buchanan Ltd. et al. v. *McVey*, [1955] A.C. 516

Attorney General for the United Kingdom v. *Wellington Newspapers Ltd.,* [1988] 1 N.Z.L.R. 129 (H.C.).

Mann, supra note 86 at 608-609.

See J.G. Collier, *Conflict of Laws*, 2d ed. (Cambridge: Cambridge University Press, 1987) at 369-70.