

THE EQUITABLE JURISDICTION TO ENFORCE FOREIGN JUDGMENTS

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There are a variety of instances when courts exercising equitable jurisdiction have recognised and enforced foreign judgments. But when those instances are acknowledged at all, they have tended to be consigned to discrete subject areas and not treated as examples of a wider genus. A new approach is required to keep apace with the needs of an increasingly borderless society. In this article, the author collects in one place the established instances of equitable intervention and argues that they are merely illustrations of a comprehensive equitable jurisdiction to recognise and enforce foreign judgments.

I INTRODUCTION

A lot of attention has been paid to the common-law and statutory aspects of the topic of enforcement of foreign judgments. But the jurisdiction in equity to enforce foreign judgments has not attracted anywhere near the same degree of interest. This trend has encouraged or suffered wrong assumptions to be made. That includes the notion that only foreign money judgments can be enforced, and that this is only by an action in the nature of *indebitatus assumpsit*. The lack of attention to equitable modes of enforcement creates an environment where alarmist concerns can flourish about the alleged dangers of recognition of foreign non-money orders. Such concerns are then quelled by taking easy refuge in comforting themes. The time has now come to revisit this topic to demonstrate that there is a comprehensive equitable jurisdiction to enforce foreign judgments.

In times gone by, the jurisdiction to enforce foreign judgments has been justified by reason of the 'deference which, for the sake of international comity, the law of England pays to the law of the civilized world generally'.¹ It has also been said:

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¹ *Freke v Lord Carbery* (1873) LR 16 Eq 461, 466, cited by Barton J in *Australian Mutual Provident Society v Gregory* (1908) 5 CLR 615, 632 ('Gregory').

The judgment of a court of competent jurisdiction over the defendant imposes a duty or obligation on him to pay the sum for which judgment is given, which the courts in this country are bound to enforce.²

But, whatever the rationale, no one suggests that money orders of foreign courts apply automatically of their own force and effect in the country where the judgment is sought to be enforced.³ Such judgments are enforced because the law of the enforcing court chooses to regard them as giving rise to an obligation. There is no reason why it should necessarily be any different for foreign *in personam* orders to perform an act other than the payment of money.

In the time of Coke, there was a debate about whether Chancery orders were capable of having any effect if they were not obeyed. That controversy was stilled a long time ago, or no longer matters, for domestic equity decrees.⁴ But it is as if that kind of thinking continues to dominate the law of foreign judgments. There was no necessity for common-law courts to intervene in the case of domestic Chancery decrees because the Court of Chancery had its own procedures of enforcement. But a necessity to intervene exists in the case of foreign decrees.⁵ Thus, common-law courts were willing to enforce foreign money decrees of an equitable nature, provided they were for an ascertained sum.⁶ That being so, there is no reason why foreign judicial orders compelling a defendant to perform an act other than the payment of money, should not also be treated by courts possessing equitable jurisdiction as having an effect if such orders are not obeyed.

Of course, the courts of the country where the judicial order is sought to be enforced are entitled to insist that the foreign proceedings comply with certain minimum standards of jurisdiction and natural justice, and are consistent with the other usual preconditions to recognition such as public policy and the like.

Further, regard must always be paid to the intervention of third-party rights, which can be readily achieved. Just because a foreign judicial order is recognised does not mean it has to be enforced. Enforcement against a third party involves more than just the recognition of the foreign judgment. It involves the adjustment of rights between competing claimants.

² *Schibbsby v Westenholz* (1870) LR 6 QB 155, 159.

³ As much follows from the fact that such foreign judgments do not operate to merge the original cause of action.

⁴ See, eg, *Common Law Practice Act 1867*, 31 Vic No 17, s 19, and *Civil Proceedings Act 2011* (Qld) s 83.

⁵ WW Cook, 'The Powers of Courts of Equity (Pt III)' (1915) 15(3) *Columbia Law Review* 228 (pt 3), 234ff.

⁶ *Sadler v Evans* (1808) 1 Camp 253, 255; 170 ER 948, 948–9; *Henley v Soper* (1828) 8 B & C 16; 108 ER 949.

But those things, when they are satisfied or not applicable, do not stand in the way of recognising an equitable jurisdiction to enforce foreign *in personam* orders, including those in relation to property.

The 2019 *Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters* ('*Hague Judgments Convention*')⁷ makes provision for the recognition and enforcement in one contracting state of certain kinds of non-money (as well as money) judgments issued by the courts of another contracting state. This even extends to decrees enforcing rights *in personam* in relation to immovables situate outside of the country of the original court.⁸ However, Australia is not a party to the *Hague Judgments Convention*.

The *Foreign Judgments Act 1991* (Cth), which primarily deals with registration of foreign money-orders, also allows for regulations to be made extending the operation of the Act to non-money orders: s 5(6). But to date, no such regulations have been promulgated. Therefore, for non-money orders one must consider the matter more broadly. It should also be noted that the *Trans-Tasman Proceedings Act 2010* (Cth) makes provision for (amongst other things) registration of certain New Zealand non-money orders.⁹ Also, inter-state non-money judgments are enforceable within Australia under s 105 of the *Service and Execution of Process Act 1992* (Cth). This article is concerned with international judgments.¹⁰

This article will initially seek to put into perspective the jurisdiction to enforce foreign money judgments. It will then survey well-established categories of cases where courts exercising equitable jurisdiction do enforce foreign judgments. Attention will then turn to the procedures available to enforce foreign decrees executing other equitable rights, including trusts and similar rights established by foreign courts in respect of property outside the country of the original court. The article will move on to deal briefly with registration of decrees concerning movables under statute. It will then deal with immovable property. Finally, the topic of third-party rights will be considered before concluding.

II PERSPECTIVE

There were forms of action available prior to the *Judicature Acts 1873–75*, and there are now procedures to enforce foreign judgments other than an action in the

⁷ *Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters*, concluded 2 July 2019 ('*Hague Judgments Convention*').

⁸ *Ibid* arts 5 and 6.

⁹ *Trans-Tasman Proceedings Act 2010* (Cth) ss 68, 72(1)(c) and 4 ('judgment').

¹⁰ This article uses the terms 'judgment' interchangeably with 'judicial order'.

nature of *indebitatus assumpsit*. For example, there is jurisdiction in probate to recognise a foreign domiciliary grant of probate or letters of administration by issuing a fresh local grant. This is commonly referred to as ‘following the grant’. That extends at least to cases where the estate comprises movables situated in the country of the recognising court.¹¹

There is also the jurisdiction in admiralty to enforce foreign decrees when the ship was within the territorial waters of the original court at the time of the proceedings but has since come into the territorial waters of the enforcing court. At least where the foreign orders were made in an action *in rem*, there is such a jurisdiction to enforce not only foreign money decrees, but also maritime liens and orders for possession and sale.¹²

At common law, there is little doubt that a foreign judgment in replevin or detinue (insofar as it includes an order for recovery of the chattel) relating to chattels situated in the country of the original court, can be enforced elsewhere by a similar order, when the chattels are lately removed into the country of the enforcing court.¹³ Also, a foreign judicial order giving authority to a person to get in another person’s funds and stock, situated outside the country of the original court, can be recognised in an action of detinue at the *situs*.¹⁴

Furthermore, prior to the intervention of statute, there was a jurisdiction at common law to recognise foreign divorces, at least when granted by the courts of the husband’s domicile — a rule that was relaxed over time.¹⁵

Therefore, it is artificial to focus on the jurisdiction to enforce foreign money judgments. The common-law jurisdiction to enforce foreign money judgments is but one facet of the topic of foreign judgments. It should therefore come as no surprise that equity should contribute to the subject of foreign judgments, too. As

¹¹ *Lewis v Balshaw* (1935) 54 CLR 188, 193–4, 197–8 (‘*Lewis*’). See the comprehensive discussion of this topic in Queensland Law Reform Commission, *Uniform Succession Laws — Recognition of Interstate and Foreign Grants of Probate and Letters of Administration* (Discussion Paper WP No 55, 2001). See also, eg, *British Probates Act 1898* (Qld) s 4. In the case of some types of movables, the foreign grant is automatically recognised by force of statute: *Corporations Act 2001* (Cth) s 1091; *Life Insurance Act 1995* (Cth) s 211.

¹² *SS Pacific Star v Bank of America* [1965] WAR 159; *The Despina GK* [1983] 1 QB 214.

¹³ Cf *Castrique v Imrie* (1870) LR 4 HL 414, 429. WW Cook, ‘The Powers of Courts of Equity’ (1915) 15(2) *Columbia Law Review* 106 (pt II), 124, 130–1, argues that such actions (detinue to the extent of the order for recovery of the chattel) are actions *in rem*.

¹⁴ *Didisheim v London and Westminster Bank* [1900] 2 Ch 15. One could also readily imagine a case where a common-law action is brought for conspiracy to defraud a foreign judgment creditor, in which case the foreign judgment is accepted as a datum and not re-litigated.

¹⁵ *Armitage v Attorney General* [1906] P 135; *Travers v Holley* [1953] P 246; *Indyka v Indyka* [1969] 1 AC 33. See also *Ainslie v Ainslie* (1927) 39 CLR 381 (judicial separation). See now *Family Law Act 1975* (Cth) s 104.

Part III will demonstrate, just because the foreign judgment is not a money judgment, and even when it is, that does not mean that equity has no jurisdiction to enforce it. Examples are taken from six areas recognised in the cases.

III PROCEDURES IN EQUITY ACCEPTED IN CASE LAW

A *Equitable Money Relief*

Just because the common law will recognise and enforce foreign money decrees for an ascertained sum, does not mean that equity does not have a concurrent jurisdiction where the foreign decree can be characterised as equitable in nature.¹⁶ Litigants may not often avail themselves of equitable remedies to enforce foreign money decrees because the remedies at law are adequate. Courts of equity may adopt an attitude of discretionary restraint in such cases. But it would be wrong to assume that a concurrent jurisdiction does not exist. It would be an even greater error to assume that equity will not enforce foreign decrees when the common law is powerless to act.

These points were well made by Lord Denman CJ in *Henderson v Henderson*:

The power of the Court of Chancery may exist without excluding that of other Courts capable of giving a remedy as complete and much more expeditious. The decrees of foreign Courts of Equity may indeed, in some instances, be enforceable nowhere but in Courts of Equity, because they may involve collateral and provisional matters to which a Court of Law can give no effect; but this is otherwise where the Chancery suit terminates in the simple result of ascertaining a clear balance, and an unconditional decree that an individual must pay it. The circumstances by which the Court arrives at that conclusion do not affect the right of suing in a Court of Law, which grows out of the legal duty to pay.¹⁷

In 1852, the point arose before Sir John Romilly MR. In *Paul v Roy*,¹⁸ the plaintiff and the defendant had been the subject of a Scottish interpleader order, requiring them jointly and severally to pay monies into Court. The defendant decamped to England and the plaintiff was forced to pay the whole amount. The plaintiff obtained an assignment of the judgment and sued the defendant in England in the Court of Chancery for contribution in equity. His Lordship dismissed the bill on the ground that the foreign judgment was interlocutory, not final. But he observed: 'It has not been questioned, and I have no doubt, that this Court has jurisdiction to enforce a foreign judgment.'¹⁹ His Lordship expressly reserved for

¹⁶ See also *Morgan's Case* (1737) 1 Atk 408; 26 ER 259.

¹⁷ (1844) 6 QB 288, 297.

¹⁸ (1852) 15 Beav 433; 51 ER 605.

¹⁹ Ibid 439; 608; cf also at 443; 609.

future consideration whether the enforcement of foreign money orders should be left to the common law, as he did not need to decide it. But nothing he said indicated a view that equity lacked the power to enforce foreign judgments, whether money or non-money orders, even though it was a question whether, as a matter of discretion, equity should decline to grant relief in money cases where the remedy at law was adequate.

Five years later, in *Reimers v Druce*, a similar issue arose before his Lordship.²⁰ A bill was brought in the Rolls Court to enforce a money decree of a Hanoverian court. The plaintiffs were Hanoverian traders who had consigned wheat to a London merchant (Mr Hennings) for sale. The latter was unable to sell it readily and incurred warehouse charges, which he claimed more than offset the value of the goods. In proceedings in Hanover, judgment was pronounced in 1842 in favour of the plaintiffs in the sum of 16,200 Dutch guilders. Mr Hennings died in 1846 and his estate was fully administered in England, the legal personal representatives not having notice of the Hanoverian judgment. The plaintiffs filed a bill against the personal representatives of the deceased in England in 1855 to enforce the Hanoverian judgment. Sir John Romilly MR dismissed the bill on grounds of laches, but there was no suggestion that the judgment was only enforceable at law. His Lordship clearly regarded that the same principles for enforcing foreign judgments applied as they would have applied had the action to enforce the judgment been brought in a common-law court.

The plaintiffs then appealed to the Lord Justices. The appeal was compromised by the payment to the plaintiffs of £2000 and costs as between solicitor and client of all proceedings including in Hanover.²¹ The Court must have formed the view that it had jurisdiction to enforce the Hanoverian decree, as it sanctioned the compromise.

B *Equitable Relief in Bankruptcy*

Since the eighteenth century, the Court of Chancery, acting pursuant to judge-made rules, would enforce foreign sequestration decrees. Thus, it was held that creditors of a person adjudicated bankrupt abroad, having recovered local debts owed to the bankrupt, could be held liable to account to the foreign assignee for the value of the debt so received.²² In such cases, the title of the foreign assignee

²⁰ (1857) 26 LJ Ch 196; 23 Beav 145; 53 ER 57.

²¹ Ibid 201n; 158n; 62.

²² *Solomons v Ross* (1764) 1 Hy Bl 131n; 126 ER 79 ('*Solomons*'); *Jollet v Deponthieu* (1769) 1 Hy Bl 132n; 126 ER 80 ('*Jollet*'); *Neale v Cottingham* (1764) 1 Hy Bl 132n; 126 ER 81.

was accepted without question. The same principle has been recognised in relation to receivers or liquidators appointed pursuant to foreign winding up orders.²³

But the enforcement jurisdiction of the Court of Chancery was not confined to granting equitable money relief. In *Solomons v Ross*,²⁴ a Dutch firm (Deneufville) traded with various London merchants. The partners of Deneufville were declared bankrupt by a Dutch court, which appointed curators as assignees of the firm's assets. Mr Ross was a London creditor of the Dutch firm. By proceedings in the Mayor's Court of London, Mr Ross attached a debt in the sum of about £1200 owed to the Dutch firm by a Mr Michael Solomons, another London merchant. Mr Ross later obtained a default judgment. Mr Michael Solomons gave Mr Ross a promissory note payable in a month in satisfaction of the judgment. The garnishee order nisi occurred before, but the final judgment was granted after, the curators were appointed. The curators, by their attorney, a Mr Israel Solomons, filed a bill in the Court of Chancery against Mr Michael Solomons seeking that the latter account to the curators for the amount of the debt and that he be restrained from paying the amount of the note to Mr Ross. Mr Michael Solomons interpleaded and paid the moneys to a stakeholder. The Court of Chancery decreed that stock that had been bought with the moneys be transferred to Mr Israel Solomons for the benefit of the creditors of the bankrupts, and that Mr Ross deliver up the note for cancellation. Therefore, the Court of Chancery granted *in personam* relief other than an order for the payment of money by way of enforcement of a foreign non-money judgment.²⁵

This jurisdiction probably also extended to the appointment of a receiver to immovables situated in the forum, with power of sale. This has been done in modern cases.²⁶ In those case, the Court's power was derived from statute.²⁷ But

²³ *Alivon v Furnival* (1834) 1 CM&R 277, 296; 149 ER 1084, 1092; *Macauley v Guaranty Trust Co of New York* (1927) 44 TLR 99.

²⁴ *Solomons* (n 22). For a fuller account, see Wallis-Lyne's *Irish Chancery Reports* 59n (1839). To like effect, see *Jollet* (n 22), where an account and an injunction were granted. See also *Cockerel v Dickens* (1840) 3 Moo PC 98; 13 ER 45 (as to the movable property).

²⁵ See the discussion of this case in *Galbraith v Grimshaw* [1910] AC 508, 511; *Re Doyle* (1993) 71 FCR 40; *Al Sabah v Grupo Torras* [2004] UKPC 1, [39]–[45]; and Kurt H Nadelmann, 'Solomons v Ross and International Bankruptcy Law' (1946) 9(2) *Modern Law Review* 154.

²⁶ *Re Kooperman* (1928) WN 101; *Re Osborn* (1931–2) B & CR 189. See also *Re A Debtor* [1981] Ch 384; *Re Levy's Trusts* (1885) 30 Ch D 119, 124, 125.

²⁷ *Bankruptcy Act 1914* (UK) s 122, based on *Bankruptcy Act 1883* (UK) s 118. The comparable provision in Australia is *Bankruptcy Act 1966* (Cth) s 29. See also *Corporations Act 2001* (Cth) s 581, and the *Cross-Border Insolvency Act 2008* (Cth). For an analysis of s 29 of the *Bankruptcy Act*, see *Re Ayers* (1981) 56 FLR 235; *Radich v Bank of New Zealand* (1993) 116 ALR 676; *Re Hanna* [2018] FCA 156, [51]. Section 29 even gives the Court a discretion to vest local immovable property in the foreign

in a 1921 Scottish decision, it was done apparently without the aid of statute. In *Araya v Coghill*, one William Coghill, a Chilean exchange broker, died in 1919.²⁸ His estate was adjudicated insolvent and a sequestration order was granted by a Chilean court, appointing Mr Araya as Official Receiver. Mr Coghill died possessed of insurance policies and immovable property situated in Scotland. Mr Araya, and his Scottish mandatory, applied in Scotland for orders confirming the sequestration order and to authorise Mr Araya and his local mandatory to make up a title to the Scottish property and sell the same. The Court granted that relief, even as to the immovables, but made directions to require the proceeds of sale to be paid into Court and reserving the right of the Scottish heir-at-law to have his rights to the proceeds of the immovable property adjudicated at a later date.

C *Estoppel Per Rem Judicatam*

The classic case is *Henderson v Henderson*.²⁹ Elizabeth Henderson, wife of Jordan Henderson who had died intestate, brought proceedings in Newfoundland for an account against her brother-in-law, Bethel Henderson. The brothers' father, also deceased, had admitted his sons into a partnership, and thereafter gave to them his share of the partnership. He also gave a sizeable sum of money to Bethel for the benefit of Bethel and Jordan. After Jordan's death, Bethel refused to account for the moneys so received or for what was due to Jordan in respect of the partnership. Elizabeth Henderson's bill in Newfoundland was successful, despite Bethel having decamped. It resulted in an order that Bethel pay her a certain sum of money. Elizabeth then brought an action at law in England on the Newfoundland judgment, and Bethel there filed a bill in Chancery for an account and to restrain Elizabeth from pursuing the common-law action. He alleged errors in the Newfoundland proceedings and that he wanted an opportunity to raise matters that he had not raised abroad.

Wigram VC dismissed Bethel's bill, holding that the subject matter of the suit was *res judicata*. In an oft-cited passage, he said that '[t]he plea of *res judicata* applies, except in special cases, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the

assignee: *Levy v Reddy* [2009] FCA 63, [12]; *Cambridge Gas Transportation Corporation v Official Committee of Unsecured Creditors of Navigator Holdings plc* [2006] UKPC 26, [19].

²⁸ [1921] 1 SLT 321 ('Araya').

²⁹ (1843) 3 Hare 100; 67 ER 313.

parties, exercising reasonable diligence, might have brought forward at the time.’³⁰

Although that was a case where Bethel had tried to re-open the same cause of action as that ruled on abroad, it is also now clear that the doctrine of issue estoppel is capable of applying with respect to discrete issues involved in foreign proceedings.³¹

Some commentators have suggested that when a plaintiff, successful abroad, sues elsewhere on the original cause of action, the plaintiff can rely on issue estoppel to prevent the defendant raising defences that were taken, or could have been taken, abroad.³² But no case has been cited where this actually occurred.³³ In *Carl Zeiss Stiftung v Rayner & Keeler Ltd* itself,³⁴ the plaintiff failed abroad and brought a fresh action in England, and the defendant raised issue estoppel as a defence. The only comments in that case on the instant point were ambiguous or against the proposition.³⁵ Instead of agonising over that issue, it would be more direct to acknowledge that there is an equity to enforce foreign judgments.

D *Common Injunction*

In *Burroughs v Jamineaux*,³⁶ one Skinner, a London merchant, drew two bills of exchange on the plaintiffs who carried on business in Leghorn, in favour of Leghorn merchants (the defendants), which bills were indorsed ultimately in favour of Langlois & Co. The plaintiffs accepted the bills, not having notice of the fact that Skinner had since stopped payment. The plaintiffs brought proceedings in Leghorn (as they were obliged to do under Leghorn law) against Langlois & Co, paying the amount of the bills into court, challenging their liability on the bills. The Leghorn court held, applying the laws of Leghorn, that the plaintiffs were not bound by their acceptance of the bills, as they had no notice that the drawer had failed and had no assets of the drawer in their hands, and ordered that the monies be paid back to the plaintiffs.

³⁰ Ibid 115; 319.

³¹ *Carl Zeiss Stiftung v Rayner & Keeler Ltd* [1965] AC 853 (‘*Carl Zeiss*’).

³² See, eg, Martin Davies, Andrew S Bell and Paul LG Brereton (eds), *Nygh’s Conflict of Laws in Australia* (LexisNexis Butterworths, 8th ed, 2010) [40.45] (‘*Nygh’s*’).

³³ *Carl Zeiss* (n 31) was referred to by the editors of *Nygh’s* (n 32), as was also *RDCW Diamonds Pty Ltd v DA Gloria* [2006] NSWSC 450, [28], where the comment was dicta and the only authority cited was *Carl Zeiss*. Another case repeating the assertion, by way of dicta, is *Xplore Technologies Corporation of America v Tough Corp Pty Ltd* [2008] NSWSC 1267, [16], but none of the cases cited there were in point. *Delfino v Trevis* [No 2] [1963] NSW 194 has also been cited, but it says nothing of the sort.

³⁴ *Carl Zeiss* (n 31).

³⁵ Ibid 917, 938, 946, 947.

³⁶ (1726) Mos 1; 25 ER 235.

Soon after, the plaintiffs came to England, and the defendants brought an action against them in the Court of Common Pleas for judgment on the bills of exchange. The plaintiffs filed a bill in the Court of Chancery and obtained a perpetual injunction to restrain the defendants from pursuing the proceedings at law. In granting the relief, the Lord Chancellor held that the order of the Leghorn court was binding.

The injunction was not granted because of the principle of *res judicata*. The Lord Chancellor said that an injunction was necessary, as it was not clear whether the foreign decree would be a defence at law, on account of the defendant not having been a party to the foreign proceedings. A preferable explanation for the injunction is that it was vexatious or oppressive for the defendant to sue the plaintiff at law having regard to the foreign decree.

E *Mareva Orders, Discovery and Inspection*

In the Australian legal tradition, there is a clear equity to grant a *mareva* injunction ('*mareva* order') in aid of the execution of a final domestic judgment.³⁷ There is a similar equity in aid of the execution of foreign money orders.

This jurisdiction is illustrated by a 1979 English case, *Cook Industries v Galliher*.³⁸ A corporation obtained a money judgment in New York for some US\$2.5 million against one Sarlie. The New York court had found that the CEO of that corporation had 'fleeced' the corporation to repay the CEO's personal indebtedness to Sarlie, who well knew where the money had come from. The New York judgment ordered Sarlie to repay the moneys with interest. It was now alleged in the English proceedings that Sarlie had invested the moneys in Picasso paintings and had left them in the possession of his friend, one Galliher, who stored them in a Paris flat leased in Galliher's name, in order to evade the judgment debt. Galliher claimed that the lease and the chattels belonged to him.

The assignees of the judgment debt brought proceedings in England against Galliher and Sarlie, seeking a declaration that Galliher held the lease of the Paris flat and the contents thereof on trust for Sarlie and that the plaintiffs were entitled to execute the New York judgment obtained against Sarlie, or that the dispositions to Galliher were made to evade Sarlie's creditors. Galliher lived in England for part of the year and the process was served on him personally in England.

The plaintiffs obtained an *ex parte* injunction enjoining Galliher from disposing of or removing any of the contents of the Paris flat. The matter came on by way of motion on notice for continuation of the injunction and for an Anton

³⁷ *Cardile v LED Builders Pty Ltd* (1999) 198 CLR 380, 401 [43] ('*Cardile*').

³⁸ [1979] Ch 439 ('*Cook Industries*').

Piller order, permitting the plaintiffs by an agent to inspect the Paris flat. His Lordship Justice Templeman dismissed various objections to jurisdiction, continued the injunction and granted the Anton Piller order, pending the trial of the action, saying that if he did not grant the relief sought, there was 'a very grave danger that the plaintiffs, if they are right, will be wholly frustrated'.³⁹

Although his Lordship did not say so, the granting of the injunction was no doubt supported by the well-known statutory provision empowering the grant of interlocutory injunctions when it is 'just or convenient' to do so.⁴⁰ But, even so, the mareva order, like the Anton Piller order, still had the effect of enforcing the foreign judgment, preventing the judgment debtor from deliberately evading or frustrating it, which foreign judgment had not received any final judicial imprimatur in the English court. Moreover, there is little doubt from his Lordship's approach that he would have been disposed to grant an injunction in the same terms as part of the final relief in the action if the plaintiffs ultimately succeeded in showing that Galliher had no beneficial title to the lease and contents.⁴¹ That happened in *White v Verkouille*,⁴² discussed below.

More recently, Australian authority has confirmed that there is an inherent jurisdiction, quite apart from statute, to grant a mareva order to prevent the dissipation of local assets to defeat an actual or prospective foreign judgment,⁴³ and to grant other relief such as discovery.⁴⁴ Some rules of procedure also permit the granting of mareva orders pending the litigation of foreign proceedings, provided the judgment would be enforceable in the jurisdiction.⁴⁵

The jurisdiction to grant injunctions restraining attempts to evade a foreign judicial order should not be limited to foreign money orders. There is also no reason why a procedure to restrain a defendant from leaving the jurisdiction

³⁹ Ibid 446.

⁴⁰ Judicature Act 1873 (UK) s 25(8).

⁴¹ In granting interlocutory relief, '[r]egard must still be had to the existence of a legal or equitable right which the injunction protects against invasion or threatened invasion, or other unconscientious conduct or exercise of legal or equitable rights': *Cardile* (n 37) 395–6.

⁴² [1990] 2 Qd R 191 ('White').

⁴³ *PT Bayan Resources TBK v BCBC Singapore Pte Ltd* [2015] HCA 36. See also *Davis v Turning Properties Pty Ltd* (2005) 222 ALR 676 ('Davis'); *Celtic Resources Holdings plc v Arduina Holding BV* (2006) 32 WAR 276; *Severstal Export GmbH v Bhushan Steel* (2013) 84 NSWLR 141.

⁴⁴ *Davis* (n 43) 686–7.

⁴⁵ See, eg, *Uniform Civil Procedure Rules 1999* (Qld) r 260D. Note r 257, which makes it clear that the provision made by the Rules is not to be taken as intending to limit the Court's jurisdiction otherwise.

ought not to be similarly available, in the nature of the old Chancery writ of *ne exeat regno*.⁴⁶ Some procedural rules provide for orders of this kind.⁴⁷

F Equitable Execution

When a foreign court has granted a money judgment, and has appointed a receiver by way of equitable execution, local courts having equitable jurisdiction have the power to enforce the order appointing the receiver, without the need to re-litigate the merits of the foreign judgment.⁴⁸

In *White v Verkouille*,⁴⁹ a decision of the Queensland Supreme Court, a Nevada court gave judgment in the sum of US\$467,438 plus interest against Mr Verkouille for deceit and breach of warranty. Days after those proceedings were commenced, Mr Verkouille deposited a sum of money in cash in two large suitcases at a Californian bank. Mr Verkouille then came to Australia with a Mr Gorson, together with the sum of \$360,000 sourced from that Californian bank account. The sum was credited to an account with the ANZ Bank on the Gold Coast. The complainants in the Nevada proceedings obtained an order from the Nevada court appointing a Mr White as receiver with authority to attach all assets of Mr Verkouille, whether inside or outside Nevada, including the moneys held on deposit with the ANZ Bank, and to apply them towards the judgment debt.

Mr White (the receiver) commenced an action in Queensland against Mr Verkouille and Mr Gorson for a declaration that Mr White was entitled to the moneys held in the ANZ account, an order that the defendants pay those moneys to Mr White, and an injunction restraining the defendants from dealing with the moneys. Mr Gorson argued that the moneys or some portion thereof were owned beneficially by him. Both defendants entered appearances in the action and voluntarily appeared to contest the merits of the notice of motion. Mr White applied for summary judgment.

⁴⁶ Cf *Companhia de Moçambique v British South Africa Co* [1892] 2 QB 358, 364 (Wright J) ('*Companhia*'); *Arglasse v Muschamp* (1682) 1 Vern 75, 77, 135; 23 ER 322, 322, 369 ('*Arglasse*'). For an example of a modern procedure giving expression to this right, see *Uniform Civil Procedure Rules 1999* (Qld) r 256, which makes clear that the procedure is not to be taken as limiting the Court's jurisdiction otherwise.

⁴⁷ See, eg, *Civil Proceedings Act 2011* (Qld) s 100.

⁴⁸ See also *Robb Evans v European Bank Ltd* (2004) 61 NSWLR 75. See also *Civil Proceedings Act 2011* (Qld) s 12; and *Cook Industries* (n 38) 443, referring to a charging order presumably under ord 50 of the then *Rules of the Supreme Court* (UK) (1965 revision).

⁴⁹ *White* (n 42).

It was argued for Mr Gorson that Mr White could not be recognised as receiver without a money judgment first having been granted by a Queensland court for the sum adjudicated by the Nevada court. McPherson J rejected that argument, holding that equity acts *in personam* against the conscience of the defendant, and following *Houlditch v Marquess of Donegall*.⁵⁰ There the House of Lords held that the order of an English Court of Chancery for an account and the appointment of a receiver of the rents and profits of a life tenancy of landed estates in Ireland was one that should be recognised and enforced by the Irish courts, even though no judgment at law had been entered in Ireland.

Justice McPherson went on to grant summary judgment, appointing Mr White as receiver of the funds and granting a final injunction in the terms sought. However, as his Honour considered that Mr Gorson's allegations ought to be tried, in Nevada, he required the receiver to give undertakings that would bring those matters before the Nevada court for its determination.

It is not necessary here to resolve the question of whether the principle in that case should apply even when the foreign court in a money judgment case has not made a receivership appointment, as that uncertainty can be readily overcome by seeking an appropriate order in the foreign court.⁵¹

IV OTHER EQUITABLE RIGHTS

Let it be assumed that a foreign court declares that the defendant holds property situated outside the territory of that court on trust for the plaintiff, and grants an *in personam* order compelling the defendant to transfer that property (or an interest therein) to the plaintiff. Or the foreign court grants a similar order by way of enforcement of a right of a kind that otherwise arises out of a personal obligation between the parties.⁵² In the writer's opinion, there is or should be an equitable jurisdiction to recognise and enforce such a foreign judgment, and a procedure adapted to such a case.⁵³

⁵⁰ (1834) 2 Cl & F 470; 6 ER 1232.

⁵¹ McPherson J appeared to doubt that such a prior order is a necessary pre-requisite: *White* (n 42) 195–6.

⁵² Cf *Deschamps v Miller* [1908] 1 Ch 856, 863–4. Many such other rights arising out of a personal obligation arguably involve a trust, including a constructive trust, such as a contract to sell property, at least where the purchase price has been paid, or rescission. But a trust should not be a prerequisite. This principle should also extend to rights of the kind recognised in *Tulk v Moxhay* (1848) 2 Ph 774; 41 ER 1143.

⁵³ See American Law Institute, *Restatement (Second) of Conflict of Laws* (1969) §102.

Of course, it must be shown that the foreign court had jurisdiction in the ‘international’ sense, and that the other usual defences are not applicable, such as forum public policy. But those defences aside, if courts exercising equitable jurisdiction enforce foreign judgments in the ways set out in Part III above, they should also be capable of enforcing foreign judicial orders to compel the performance of an act other than the payment of money by an order in the nature of a mandatory injunction. That is at least where the foreign court’s order is of kind that can be characterised as establishing a personal right *inter partes* to an *in personam* order regarding property. This is not to imply that there is no enforcement jurisdiction where equity acts in its auxiliary jurisdiction to restrain breach of a simple contract or tort. But that aspect of the topic deserves its own treatment.⁵⁴

As a matter of practicality, it may be that cases of enforcement of foreign judgments involving property are only likely to arise when they involve immovables situated outside the country of the original court. That is because plaintiffs may not often consider it worth their while to bring a proceeding in one country, relating to movables located in another. The dearth of reported cases of that kind might be thought to bear that out. But that does not mean that jurisdiction does not exist. It may be that practitioners are unaware of it, having been encouraged in that view by scholars for so long. It may not always be convenient for plaintiffs to bring proceedings in the country where the movables are situated, for example where the movables are situated in a number of countries — a scenario more likely to happen nowadays than a century ago. It may also be that, when the plaintiff commences the action, the movables are situated in that place, but the defendant afterwards removes them to another jurisdiction.

Moreover, if the foreign judgment involves movables, at least when situated in the foreign country at the time of the foreign proceedings, or when they are instituted, equity’s enforcement jurisdiction should extend further, to foreign judgments determining priorities claims.⁵⁵ It is not necessary to stay to consider whether foreign proceedings determining law of priorities claims are actions *in rem*, with the result that the foreign judgment would be denied recognition here if the movables were situated at all material times outside of the country of the original court.

To invoke equity’s enforcement jurisdiction, the right does not have to be necessarily identical to equitable concepts known to the law of the forum, but it must be of such a kind as to be capable of being enforced by the procedural remedies of the forum.

⁵⁴ Cf *Pro Swing Inc v Elta Golf Inc* [2006] 2 SCR 612.

⁵⁵ Cf *Gregory* (n 1) 623, 628, 633–4; *Lewis* (n 11) 193–4, 197–8; *Solomons* (n 22). The situation is unlikely to arise that a foreign judgment determining a priorities claim to land situated in that foreign country is sought to be enforced elsewhere.

If the foreign order meets those requirements, there is no reason why there should not be available an action at the *situs* for an *in personam* order compelling the defendant to, say, transfer title to the property or an interest in the property or to perform some other act, such as to deliver up movable property, in the course of which the merits of the foreign judicial order would not be re-litigated but recognised. This would occur in much the same way as occurs with actions to enforce foreign money orders, and subject to similar defences. If those defences are thought to be insufficient having regard to the nature of the order, that issue should be debated, rather than assuming that the jurisdiction does not exist at all.

If the enforcing court grants such an order, and the defendant refuses to obey it, she or he can be dealt with for contempt. There will then usually be other procedural avenues available under the law of the forum in the event of default. Many modern jurisdictions permit an officer of the court or someone else to sign documents on behalf of the defaulting defendant.⁵⁶ These may require that the local (enforcing) court has first made an order requiring the defendant to perform the act in question. A receiver could be appointed in equity with power of sale.⁵⁷ But a receivership with power of sale, like the appointment of statutory trustees for sale, would only be satisfactory (apart from recovering income from the property) if the plaintiff were satisfied with money in lieu of an interest *in specie*. Equity should not be so confined. One need not here get into the territory of whether a vesting order or similar order can be made based purely on the foreign decree, without a prior facultative order *in personam* by the enforcing court.⁵⁸ It is enough to conclude that a vesting order should be available to enforce an *in personam* decree of the local court enforcing the foreign decree.

The enforcing court ought to be able to grant an order in the nature of the Chancery decree of delivery of possession.⁵⁹ It may not be enough by itself, though it could usefully supplement other relief, such as the appointment of a receiver with power of sale. This equitable remedy may sometimes not be necessary in the case of land, because once the plaintiff gets in the legal title she or he can get an

⁵⁶ See, eg, *Uniform Civil Procedure Rules 1999* (Qld) r 899. Provisions of this kind are descended from the *Contempt of Court Act* (1830) 1 Wm IV, c 36, s 15.

⁵⁷ See, eg, *Civil Proceedings Act 2011* (Qld) s 12. The fact that the foreign court granted an *in personam* order compelling the execution of a transfer ought to be regarded as sufficient as warranting the local court appointing a receiver with power of sale, if the plaintiff elects to take a sum of money in lieu of the land itself.

⁵⁸ Such as *Land Title Act 1994* (Qld) s 114. For vesting orders, see, eg, *Trusts Act 1973* (Qld) s 82.

⁵⁹ See *Penn v Baltimore* (1750) 1 Ves Sen 444, 454; 27 ER 1132, 1139 ('Penn'); *Solomons* (n 22). Cf *Australia and New Zealand Banking Group Ltd v Douglas Morris Investments Pty Ltd* [1992] 1 Qd R 478; *Metropolitan Permanent Building Society v McClymont* [1983] Qd R 160, 162ff; and *Civil Proceedings Act 2011* (Qld) s 90(2)(d).

order in the nature of ejectment, at least on the making of a vesting order or the registration of a transfer executed by a court officer of the enforcing court.⁶⁰ But, in the case of tangible movables, it may be necessary for the local court to grant an order for delivery of possession, by way of enforcing a foreign *in personam* order for delivery up of goods. Once the enforcing court's *in personam* order for delivery up has been breached, one could then pursue execution under rules of court for seizure of the goods, to avoid difficulties of gaining access to the place where the movables are held.⁶¹

When the foreign decree executes or enforces a right of the requisite kind, there is no reason why the foreign decree should not be picked up as a foundation for rights. The above holds true at least as regards property situated in the territory of the enforcing court at the time of the enforcement proceedings. It may be that one can go further, for example if the defendant can be found in the territory of the enforcing court, but the property is situated in a third country, then it may be propitious to grant an *in personam* order against him or her and take advantage of procedures available under the law of the enforcing court to prevent that person from leaving the jurisdiction,⁶² with imprisonment as an inducement for the defendant to execute the appropriate transfer.

V MOVABLES UNDER STATUTE

The *Foreign Judgments Act 1991* (Cth) ('the Act') allows for the registration of foreign money judgments. The Act authorises registration of non-money orders if regulations to that effect are made under s 5(6); but that power has not yet been exercised. If it were, in the writer's view, the Act should provide an avenue for enforcement of at least foreign *in personam* decrees enforcing rights *in personam* relating to movables wherever situated, on the ground that the foreign proceedings are 'actions *in personam*' within s 7(3)(a).⁶³ Some such decrees, because they are made in subject specific proceedings taken out of the definition of 'action *in personam*' by s 3(1), could fall within s 7(3)(c), which accommodates cases which are neither 'actions *in personam*' nor 'actions *in rem*'. In such cases,

⁶⁰ See also provisions for registered mortgagees to recover possession by court order, such as *Land Title Act 1994* (Qld) s 78.

⁶¹ See, eg, *Uniform Civil Procedure Rules 1999* (Qld) rr 916–17.

⁶² Based on the old Chancery writ of *ne exeat regno*; cf *Companhia* (n 46) 364 (Wright J); *Arglasse* (n 46) 77, 135; 322, 369. See, eg, *Civil Proceedings Act 2011* (Qld) s 100.

⁶³ See *Foreign Judgments Act 1991* (Cth) s 7(3)(a). This view is supported by the fact that 'judgment' is defined to mean 'a final or interlocutory judgment or order': s 3(1). There is no need to artificially read down the phrase 'action *in personam*' in s 7(3)(a) in this context. There is no comparable provision in s 7 deeming the foreign court not to have had jurisdiction in actions the subject matter of which was movable property situated outside the country of the original court, akin to s 7(4)(a), which excludes jurisdiction when the foreign judgment was in an action the subject matter of which was immovable property situated outside the country of the original court.

the foreign court's jurisdiction is deemed to be established 'if the jurisdiction of the original court is recognised by the law in force in the State or Territory in which the judgment is registered'.

There is also a question of how to characterise a foreign judgment deciding a law of priorities claim, at least relating to movables situated in the territory of the original court at the time the proceedings were commenced. Section 7(3)(b) provides that the foreign court is deemed to have had jurisdiction if the judgment was given 'in an action of which the subject matter was immovable property or in an action *in rem* of which the subject matter was movable property, if the property in question was, at the time of the proceedings in the original court, situated in the country of that court'. There is also s 7(3)(c) mentioned above.

It is not necessary or possible to deal definitively with such questions here. Whether or not (if the power in s 5(6) were exercised) the Act would be capable of extending to such judgments, the plaintiff is still at liberty to enforce judgments of that character under the general law. Section 10 of the Act prevents modes of enforcement of registrable judgments other than by way of registration, but it only applies to foreign money judgments. An application to the Court could be brought relying on both avenues, in the alternative. The Act also does not prevent the need to consider the general law where the foreign court was not a qualifying court of a participating country, or where the foreign judgment was in an action the subject matter of which was immovable property situated outside the country of the original court.

There is a further question of whether the conclusive effect provision in s 12(1) of the Act can be set up as a sword by a plaintiff who won overseas and, if so, in what cases. If, for example, a plaintiff obtained a foreign order *in personam* enforcing a right *in personam* concerning movables situated outside the country of the original court, could that plaintiff rely positively on that judgment as having conclusive effect under s 12(1)? Or does s 12(1) only allow foreign judgments to be set up as a shield? As attractive as the former possibility is, there is reason to be cautious before jumping to that conclusion.⁶⁴ But once again, it is not necessary to express a concluded view on that question. Even if s 12(1) can be set up as a sword, it would only apply where the original court is a qualifying court

⁶⁴ It is unclear whether the word 'and' in s 12(1) is to be read conjunctively or disjunctively. Section 12, like the equivalent provision in the earlier reciprocal enforcement of judgments legislation enacted around the British Commonwealth, is based on s 8 of the *Foreign Judgments (Reciprocal Enforcement) Act 1933* (UK). That Act was based on the *Foreign Judgments (Reciprocal Enforcement) Committee Report* (December 1932), chaired by Lord Justice Greer. That Report (at 6, 15, 17) said it was not intended to make any substantial change to the pre-existing law. Not even the *Carl Zeiss* case (n 31) had been decided in 1932.

from a participating country. For other courts, as well as for judgments the subject matter of which are immovables situated outside the country of the original court, it is still necessary to look to the general law, which is preserved by s 12(3).

The *Trans-Tasman Proceedings Act 2010* (Cth) provides for the registration here of certain New Zealand non-money orders (and money orders). Under that Act, judgments that are registrable can only be enforced through registration.⁶⁵ There is an exclusion where the judgment was given in a proceeding the subject matter of which was immovable property, or was given in a proceeding *in rem* the subject matter of which was movable property, situated outside of New Zealand.⁶⁶ In the writer's view, the scheme should permit registration of at least a New Zealand *in personam* decree establishing a right *in personam* relating to movables wherever situated.⁶⁷ It should also apply to a New Zealand judgment determining a law of priorities claim relating to movables, at least when situated in New Zealand.

VI IMMOVABLES

One of the main reasons why there has been a reluctance to recognise a general equitable jurisdiction to enforce foreign judgments is the vexed question of immovables. Under the general law, the received wisdom is that even foreign *in personam* decrees relating to land outside the country of the original court will not be recognised and enforced elsewhere, because the foreign court has no jurisdiction to directly affect title to such land. The decree of a foreign court, it is said, cannot alter, *ex proprio vigore*, title to land situate in another sovereign state. This objection only applies to immovables, not movables, for *mobilia sequuntur personam*.⁶⁸

There is no decision of the High Court of Australia that holds that such foreign *in personam* decrees relating to land outside the country of the original court cannot be recognised and enforced here. There are some decisions that are not concerned with the enforcement of a foreign judgment.⁶⁹ There is also *Lewis v Balshaw*, but that was a probate case and the comments were confined to that

⁶⁵ See *Trans-Tasman Proceedings Act 2010* (Cth) s 65.

⁶⁶ See *ibid* ss 72(1)(c) and 68.

⁶⁷ See definition of 'judgment' *ibid* s 4. Except where, for example, it is an 'excluded matter' or an 'order relating to ... the administration of the estate of a deceased person': *Trans-Tasman Proceedings Act 2010* (Cth) s 66(2)(a), (e).

⁶⁸ Movables follow the person: *Gregory* (n 1) 623, 628, 633–4.

⁶⁹ *Potter v Broken Hill Pty Co Ltd* (1906) 3 CLR 479, 500–1; *Commonwealth v Woodhill* (1917) 23 CLR 482.

context.⁷⁰ And there is *Australian Mutual Provincial Society v Gregory*, which was a case involving a foreign sequestration order.⁷¹ Although the subject matter of the proceedings in that case was an equitable interest in property that was characterised as an immovable, it was a dispute between competing claimants to that equitable interest. It was not a case of a foreign *in personam* decree enforcing a trust or another personal obligation *inter partes*.⁷²

A *Duke v Andler*

The leading authority for the orthodox view, as regards foreign land decrees, is the oft-cited Canadian case of *Duke v Andler* ('Duke').⁷³ Mr Duke fraudulently procured a conveyance of real property located in British Columbia from Mrs Andler without furnishing the agreed consideration. He then conveyed the land to his wife to defeat Mrs Andler's rights. Mrs Andler brought proceedings against Mr and Mrs Duke in California, where all parties resided. The Californian court rescinded the contract of sale and ordered Mr and Mrs Duke to execute and deliver a re-conveyance to Mrs Andler and, in the event of default, directed a commissioner of the court to execute a conveyance on their behalf, which ultimately occurred. When the Registrar of Titles for British Columbia refused to register the deed executed by the commissioner, Mrs Andler brought proceedings in the British Columbia courts against the Dukes. She sought a declaration that Mrs Andler was the owner of the land by virtue of the Californian decree, alternatively by virtue of the commissioner's deed, alternatively by virtue of the decree and the deed, or alternatively a vesting order.

The Supreme Court of Canada, overturning the British Columbia Court of Appeal and the trial judge, held that Mrs Andler's claim should be rejected. It reasoned that 'the courts of a foreign country have no jurisdiction to adjudicate the title or the right to possession of any immovable not situate in such country'.⁷⁴ There were repeated references to the rule that judgments of courts do not, *ex proprio vigore*, alter title to land in another country.⁷⁵

⁷⁰ (1935) 54 CLR 188.

⁷¹ *Gregory* (n 1).

⁷² It was not even a case where the Tasmanian Supreme Court, where the land was situated, was acting under statute in aid of the Natal bankruptcy, such as by appointing a receiver. The Tasmanian court had no statutory duty under the prevailing *Bankruptcy Act 1870* (Tas) to provide assistance to a foreign bankruptcy.

⁷³ [1932] SCR 734 ('Duke').

⁷⁴ *Ibid* 744.

⁷⁵ *Ibid* 738–40, 743, 744. *Ex proprio vigore* means 'of its own force and effect'.

The comments must be seen in context. Mrs Andler conducted her case in reliance on the commissioner's deed.⁷⁶ It does not seem that the court was asked to regard the *in personam* decree alone as warranting the existence of an equity of enforcement under the *lex situs*.

The Supreme Court of Canada followed an American decision, *Fall v Eastin* ('Fall').⁷⁷ There, in Washington matrimonial proceedings, Mr EW Fall had been ordered to execute a conveyance of a moiety of Nebraskan land to his wife. On his default, a Washington Commissioner executed the transfer on his behalf. Undeterred, Mr Fall transferred the land to his sister, Elizabeth Eastin, who took as a volunteer with constructive notice. Mrs Fall brought proceedings in Nebraska against Mr Fall and Ms Eastin, unsuccessfully. A majority of the United States Supreme Court also found for Ms Eastin, for reasons similar to those later expressed in *Duke*.⁷⁸ But once again the plaintiff/wife based her argument on the Commissioner's deed.⁷⁹ Mr Fall was also not before the Nebraskan court, as he had been served constructively by way of publication, which lent itself to the view that to enforce the Washington decree would have given it an operation *in rem*.⁸⁰ Moreover, the foreign decree enforced a statutory right to a matrimonial property settlement. It may be said that this was not a right that was based on an obligation *inter partes* that could be characterised as equivalent to equitable doctrines of trust, fraud or unconscionable conduct. That point would, however, be an entirely unsatisfactory basis of distinction.⁸¹

Interestingly, though, Holmes J disagreed with the majority. He concurred but only because he considered that he was powerless to intervene.⁸² He thought that the Nebraskan Supreme Court should have held that Elizabeth Eastin took

⁷⁶ Ibid 737. See also [1931] 3 DLR 561, 566–7; [1932] 2 DLR 19, 24–7, 36–43.

⁷⁷ 215 US 1 (1909) ('Fall'), cited in *Duke* (n 73) 43. The Supreme Court of Canada also cited (at 743) *Carpenter v Strange*, 141 US 87 (1891), but that was a case where the foreign decree was not a decree requiring the defendant to perform some act such as execute a conveyance. The theory relied on by the plaintiff was one that invoked a pure question of competing titles to real estate.

⁷⁸ *Fall* (n 77) 11. Harlan and Brewer JJ dissented.

⁷⁹ The first sentence of the majority opinion (delivered by McKenna J) was (ibid 2): 'The question in this case is whether a deed to land situate in Nebraska, made by a commissioner under the decree of a court of the State of Washington in an action for divorce, must be recognized in Nebraska under the due faith and credit clause of the Constitution of the United States.'

⁸⁰ *Fall v Fall*, 113 NW 175, 176 (Neb 1907). This point was made a ground of distinction by Holmes J, in his concurring judgment: *Fall* (n 77), 15.

⁸¹ At any number of levels, the case highlights the urgent need for legislative intervention. There was also a suggestion in the case that there were public policy concerns. But these did not seem to arise out of differences in substantive matrimonial law, but rather in procedure: *Fall v Fall* (n 80) 176, 181. That can hardly seem a valid basis to invoke public policy, given that the differences were to the form of the orders, not to their effect.

⁸² *Fall* (n 77) 14–15.

subject to the Washington decree, because she was not a bona fide purchaser for value without notice. However, if the Supreme Court of Nebraska took the view that the Washington decree would not avail as against any transferee subsequent to the decree, whether they were an innocent purchaser or a volunteer with notice, then Holmes J could not say that the Full Faith and Credit clause of the Constitution was infringed.

B *No Alteration of Ownership Ex Proprio Vigore*

The main objection⁸³ raised in these cases to recognition of the foreign decree was that it would infringe the principle that no court has jurisdiction to directly affect title to immovables situated outside its territorial borders.

As a matter of logic, this objection proves too much. Just because the foreign court has made an order does not mean that it applies *ex proprio vigore* in the country of the *situs*. It may, however, apply as part of the law of the *situs* if the *situs* court chooses to recognise and enforce that decree or if the defendant voluntarily obeys the foreign decree.⁸⁴ It is well accepted that courts of equity can grant orders that, because they operate on the conscience of the defendant and not on the property directly, compel the defendant to perform an act in connection with property situated outside the territorial borders of the issuing court, on pain on contempt if that order is disobeyed.⁸⁵ This undoubted jurisdiction is not regarded as infringing any rule of international law concerning immovable property.

Thus, as Lord Herschell LC said in *British South Africa Co v Companhia de Moçambique*:

No nation can execute its judgments, whether against persons or movables or real property, in the country of another. On the other hand, if the Courts of a country were to claim, as against a person resident there, jurisdiction to adjudicate upon the title to

⁸³ The other objections commonly raised include the one about forms of action that has been mentioned above. This was raised, and rejected, at first instance in *Duke v Amler* [1931] 3 DLR 561, 565. It was not mentioned by the Supreme Court. Reliance was also placed by the Supreme Court of Canada (*Duke* (n 73) 739) on the notion that a court should not pronounce a decree that it cannot enforce, citing Dicey. But little need be said about this. Later editions of Dicey have abandoned the principle of effectiveness as a rationale of jurisdiction. That complaint really begs the question of whether the courts of the *situs* will recognise the decree. Another objection sometimes raised is that the *situs* is the most convenient venue, as views of the land are sometimes necessary. But this is likely to be more of an issue for cases seeking to enforce rights *in rem*, than rights *in personam*.

⁸⁴ This point was clearly understood in *Gregory* (n 1) 623–4 and 627 (Griffith CJ), and 644 (Isaacs J), and by Cook (n 13) 128.

⁸⁵ See *Penn* (n 59) 447, 454; 1134–5, 1139; *Cranstown v Johnston* (1796) 3 Ves Jun 170, 182–3; 30 ER 952, 958–9; *Ex Parte Pollard* (1840) Mont & Ch 239, 250–1.

land in a foreign country, and to enforce its adjudication in personam, it is by no means certain that any rule of international law would be violated.⁸⁶

If that is so, then other courts should not be constrained by international law, if they choose, from picking up such a foreign decree as a datum and treating it as a foundation for rights recognised under the law of the *situs* (or forum), just as can happen by force of statute in the fields of insolvency,⁸⁷ probate⁸⁸ and mental illness.⁸⁹

In *Fall*, Holmes J well understood this when he observed:

The real question concerns the effect of the Washington decree. As between the parties to it, that decree established in Washington a personal obligation of the husband to convey to his former wife. A personal obligation goes with the person. If the husband had made a contract, valid by the law of Washington, to do the same thing, I think there is no doubt that the contract would have been binding in Nebraska. ... So I conceive that a Washington decree for the specific performance of such a contract would be entitled to full faith and credit as between the parties in Nebraska.⁹⁰

Moreover, the *Hague Judgments Convention* provides for the enforcement of non-money orders enforcing rights *in personam* in relation to immovables situate outside the country of the original court.⁹¹ Therefore, a respected international instrument proceeds on the principle that there is no objection in international law to a *situs* court choosing to recognise a foreign decree enforcing a right *in personam* in relation to immovable property.

Furthermore, there are two clear instances where such foreign decrees do have an effect at the *situs*. First, if the defendant executes a conveyance in the form required by the law of the *situs*, and delivers it up to the plaintiff, in obedience to the foreign decree, under pain of contempt, there can be no doubt that such a transfer would be treated as valid according to the law of the *situs*, assuming the plaintiff registers it or takes whatever steps are required under the *lex situs* to formalise it. This evidently does not infringe international law. As has been pointed out, such a transfer would be voidable for duress if the foreign decree

⁸⁶ [1893] AC 602, 624. The later comments, at 626–7, citing Story, do not express a firm conclusion.

⁸⁷ See above n 27.

⁸⁸ If the estate comprises or includes immovables, the better view is that resealing operates to vest in the executor or administrator under the foreign grant the real as well as personal property of the deceased situate in the resealing jurisdiction, although that assumes that the discretion to reseat is exercised: Queensland Law Reform Commission (n 11) 121. See *British Probates Act 1898* (Qld) s 4; *Land Title Act 1994* (Qld) s 111(2)(a). See also special legislation in some jurisdictions: *Probate Rules 2015* (SA), r 42; *Non-Contentious Probate Rules 1987* (UK) r 30.

⁸⁹ See, eg, *Public Trustee Act 1978* (Qld) s 79.

⁹⁰ *Fall* (n 77) 14–15, citing *Ex parte Pollard*, 4 Deacon, Bankr 27, 40; *Polson v Stewart*, 167 Mass 211.

⁹¹ *Hague Judgments Convention* (n 7) arts 5 and 6.

were not treated as having some effect under the law of the *situs*.⁹² Second, no one doubts that such non-*situs* decrees, including in regard to land outside the territory of the original court, give rise to an issue estoppel, at least if the defendant brings proceedings at the courts of the *situs* inconsistent with the foreign decree.⁹³ That being so, it follows that, for that purpose, the foreign decree is regarded as having some effect at the *situs*, and is not regarded as infringing any rule of international law.

These consequences would not follow if the foreign decree had no effect under the law of the *situs*. It has that effect not because it operates *ex proprio vigore* at the *situs*, but rather because the law of the *situs* chooses to pick it up as a datum.

If there is an objection to this process occurring automatically without the need of a court order by the enforcing court, it would be possible for the foreign land decree to be regarded as something approximating a 'mere equity'. But only in this sense: while the foreign decree would not mature into an equitable interest until the enforcing court recognises it, it would conclusively establish an obligation *inter partes* that the enforcing court would be *required* to recognise subject to well-recognised exceptions such as public policy and the defendant's lack of sufficient connection with the foreign country.⁹⁴ This would allay concerns that the foreign decree is operating of its own force and effect as regards immovables situated outside that original country. This classification is not the writer's preferred position, including because it involves treating the foreign decree as giving rise to a mere equity when the underlying facts might themselves without regard to the decree give rise to an equitable interest in the land, in some circumstances at least. It would not put the plaintiff in any different position as against the defendant.⁹⁵ But, if third-party rights have intervened, the plaintiff's position would be somewhat more fragile, though only in some circumstances. This is discussed in Part VII below.

C *The Sanctity of the Lex Situs*

The other main reason advocated in *Duke*⁹⁶ in favour of the traditional view as regards foreign land decrees is that the right to immovables can only be determined according to the *lex situs*. On a point of clarification, in a sense the *lex situs* must always be complied with, in that the forms for transferring legal title to

⁹² A point first made by Sedgwick CJ, dissenting, in *Fall v Fall* (n 80) 186.

⁹³ *In the Marriage of Caddy and Miller* (1986) 84 FLR 169; *O'Hara v Public Trustee of Manitoba* (1987) 46 DLR (4th) 504; *Burnley v Stevenson*, 24 Ohio St 474 (1873).

⁹⁴ And such other limited defences if any as can be demonstrated to be necessary. See *quaere*, eg, *Reimers v Druce* (n 20).

⁹⁵ See, eg, *Land Title Act 1994* (Qld) ss 184(3) and 185(1)(a).

⁹⁶ *Duke* (n 73) 738–42.

property under the *lex situs* need to be adhered to. For example, for legal title to land or to an interest therein to pass, a transfer must be lodged for registration in the proper form. But that is not what is at issue here. A defendant can be compelled to execute such a form, or other relief granted that operates *in personam* such that there is brought about a change in property rights in accordance with the forms of the *lex situs*. The issue under discussion is what rules are to govern the question whether the defendant should be so compelled or, on default, whether a transfer should be executed on his behalf.

Five points can be made about the *lex situs* objection.

First, this objection should not affect recognition of foreign decrees that apply the *lex situs* of the immovable. If they do, it cannot be a reason to refuse to recognise the decree that the foreign court allegedly made a mistake of fact, or indeed even a mistake of law, as otherwise a refusal to do so would be inconsistent with a fundamental principle of the law of foreign judgments.⁹⁷

Second, the failure to apply the *lex situs* cannot matter if the *lex situs* would have arrived at the same result. The Supreme Court of Canada acknowledged the difficulty this presented to its conclusion.⁹⁸

Third, the sanctity of the *lex situs* is apparently not so strong a policy as to prevent the acceptance of transfers signed by the defendant, or to prevent an issue estoppel arising. There are also statutory inroads into the view that the *lex situs* must always be given primacy in some fields such as insolvency, probate and mental illness.⁹⁹ The *Hague Judgments Convention* also rejects the primacy of the *lex situs* for foreign judgments enforcing rights *in personam*.

Fourth, when there is no question of intervening third-party rights, it is difficult to see why a foreign *in personam* land decree should never be recognised and enforced merely because it did not apply the *lex situs*. Our own courts are willing to apply forum law in granting *in personam* decrees over foreign land. They do so because the right to relief arises from dealings *inter partes* that bind the conscience of the defendant, and because and when forum law is the appropriate law. It is inconsistent with comity if our courts refuse to recognise a jurisdiction that *mutatis mutandis* they claim for themselves.¹⁰⁰ In the event that a foreign judgment leads to a consequence considered obnoxious to the enforcing court, there is always the public policy escape valve. But where there is no public policy issue, by recognising the foreign decree the courts of the forum (where that is also the *situs*) are applying the *lex situs*, being a different branch of the *lex situs*.

Fifth, as will be seen below, there is no basis for any apprehension of prejudice to third-party rights.

⁹⁷ *Godard v Gray* (1870) LR 6 QB 139.

⁹⁸ *Duke* (n 73) 742.

⁹⁹ See above nn 87–9.

¹⁰⁰ *Indyka v Indyka* [1969] 1 AC 33, 75, 84 and 109.

VII THIRD-PARTY RIGHTS

The concern about prejudicing the rights of third parties, particularly *situs* residents, lies at the heart of the orthodox view as regards foreign land decrees. Residents should be able to carry on their business without being affected unwittingly by some lurking foreign decree. This concern is unfounded for three reasons.

First, the question of priorities between competing claimants to land is governed by the *lex situs*. The recognition of the foreign decree itself does not alter that fact. The *recognition* of the foreign decree certainly obviates the need of the plaintiff to re-establish the creation or validity of his or her rights. To that extent, and to that extent alone, the third party is bound by the judgment (if that is necessary¹⁰¹), as the third-party claims through or under the defendant.¹⁰² But that is as far as the judgment goes: it does not by itself establish that the plaintiff's interest must *prevail over* that of the third party. The question of who prevails as between the plaintiff and the third party falls to be decided separately.¹⁰³ If the plaintiff prevails, only then will the foreign judgment be *enforced*, because orders will be made inconsistent with the rights of the intervening third party. If the third party prevails, then the foreign judgment will have been recognised, but not enforced.

Second, even if there were occasions where the choice of law rules of the forum do not point to the *lex situs* as governing the priorities question, then that is the choice of the forum court. If the applicable foreign law or the result to which it leads is obnoxious, then the forum can always refuse to apply the foreign *lex causae* on public policy grounds.¹⁰⁴

Third, Australian law, when it applies as the *lex situs* or on some other basis, provides adequate protection for third parties. Even if it did not, the issue of priorities should be addressed openly and debated; it should not just be left to be resolved by the blunt instrument of 'no jurisdiction'. The rights of forum resident third parties should not prevail in all cases, as that would unfairly discriminate

¹⁰¹ If the third party does not have a beneficial interest, but holds on trust for the defendant, or if the assignment is set aside as in fraud of the plaintiff, then it may not matter if the third party is or is not bound by the foreign decree.

¹⁰² Cf *Tomlinson v Ramsey Food Processing Pty Ltd* [2015] HCA 28 [17], [28]–[33].

¹⁰³ This distinction was well understood by the High Court in *Gregory* (n 1), where the Court considered the case on the alternative footing that the interest at stake was movable property as opposed to immovable property. It was also well understood in *White* (n 42) and *Araya* (n 28).

¹⁰⁴ Cf *Gregory* (n 1) 633–4, 643–4, 646. Cf also *Nadelmann* (n 25) 161–2.

against foreign residents. That invites the question: is the true goal — the hidden rationale — of the rule of ‘no jurisdiction’ to prefer forum residents?

Thus, in the case of immovables situated in Australia, third parties who perfect their interests by registration under the Torrens system of land titles have nothing to fear from rights, however characterised, declared by a foreign decree in foreign proceedings. This assumes, as would usually be the case, that the plaintiff’s equity was not protected by registration prior in time.¹⁰⁵ Where the third party is first registered, that interest will prevail over the plaintiff’s right, however described, even if the third party took with notice, or even if the third party gave no consideration (at least in the latter case provided they took with no actual notice).¹⁰⁶ However, if the defendant disposed of the property or an interest therein to the third party in fraud of the plaintiff, and the third party knew of that fact and gave no consideration, then it is hard to imagine that the third party would prevail over the plaintiff even though the third party registered their interest.¹⁰⁷ And the third party could not fairly be heard to complain in those circumstances.

If neither the plaintiff nor the third party had registered their right, the general law would apply. Even if the plaintiff’s right were regarded as an equitable interest, the rules adequately protect third parties. The starting point would be that, where the equities are equal, the first in time prevails. If the plaintiff was first in time, but had not caveated, and the third party (being a purchaser) checked the register before paying the consideration, then the third party would surely prevail. If the third party’s interest arose first in time, the third party would also prevail, unless the equities were not equal. If the third party was a volunteer, if it had an equitable interest at all, it is hard to imagine how its equity could be superior. If the third party loses under such rules, it is difficult to see that the third party would have just cause for complaint.

But if the plaintiff’s right were regarded as a mere equity prior to local recognition, then the third party would be in a stronger position. The rule would then be that the third party, being second in time, would prevail if she or he were a bona fide purchaser for value without notice. The third party could not fairly complain if they lost under that rule.

In fact, the concern here is more the adequate protection of the plaintiff’s rights. It is unclear whether a mere equity is a caveatable interest. Even if it is, it is doubtful that the foreign proceedings would themselves satisfy the requirement that exists in many jurisdictions that caveators bring proceedings to

¹⁰⁵ If somehow the plaintiff were able to register, and do so first in time, the third party could hardly be heard to complain.

¹⁰⁶ See, eg, *Land Title Act 1994* (Qld) ss 180, 184(1) and (2)(a).

¹⁰⁷ See, eg, *ibid* ss 184(3) and 185(1)(a). If the third party took with actual notice of the fraud and was a volunteer, surely that would amount to ‘fraud’ within s 184(3)(a) of that Act: cf *Property Law Act 1974* (Qld) s 228.

establish their interest. The plaintiff could seek an interlocutory *mareva* order (even *ex parte*) once the foreign decree is granted, having started proceedings at the *situs* to enforce the foreign decree. But by then it may be too late. As noted above, it is possible to seek such a *mareva* order pending the foreign litigation, provided the court considers that the foreign judgment, if granted, would be enforceable at the *situs*. The *situs* court would need to take the view advanced herein that foreign *in personam* decrees are enforceable. On the back of a *mareva* order, the plaintiff could then lodge a caveat.¹⁰⁸ The plaintiff might seek a *mareva* order in the foreign proceedings themselves. But if the defendant ignores the substantive part of the decree in those proceedings, then the grant of a *mareva* there is unlikely to be of much comfort. There may be other avenues, but also not without risk.¹⁰⁹ There is need for reform of real property legislation to better protect plaintiffs to foreign proceedings of the kind here under consideration.¹¹⁰

It is not necessary here to survey the applicable priorities rules if the competition is between a foreign *in personam* decree relating to movables situated in Australia, and a third party who acquired an interest in those movables subsequently to the foreign decree. That is because there is no blanket rule that a foreign court lacks jurisdiction to determine title to movables situated outside of the country of the original court. In that situation, the separate priorities question will ordinarily be governed by the *lex situs*. If the movables are here, one suspects that the priority rules that would be applied would also adequately protect third parties, whether it be under the general law or under legislation such as the *Personal Property Securities Act 2009* (Cth). If the foreign decree itself adjudicated the priorities question against the 'third party', then, assuming the movables were situated in the country of the original court at the material time and that such court applied the *lex situs*, then that would be consistent with principle. But if any foreign judgment, no matter what law it applied, leads to a result considered obnoxious, there is always the public policy escape value.¹¹¹

It is sufficient to conclude that any concern that the enforcement of foreign non-money land decrees would unfairly prejudice third-party rights is misplaced and unjustified. Courts are astute to ensure that third-party rights are fairly protected.¹¹² If it is still complained that forum residents are not adequately protected, the point is that there should be a debate about the priorities rules or

¹⁰⁸ See, eg, *Land Title Act 1994* (Qld) s 122(1)(e).

¹⁰⁹ Where the plaintiff can, they may be able to lodge a caveat based on the underlying cause of action. But that may give rise later to the need to lodge a second caveat, as to which leave is needed: see, eg, *Land Title Act 1994* (Qld) s 129. This demonstrates the need for reform.

¹¹⁰ For example, sections such as s 122(1)(d) of the *Land Title Act 1994* (Qld) should also be enlarged to include foreign *in personam* decrees. But this is not enough for, as noted, protection is needed during the pendency of the foreign proceedings.

¹¹¹ See, eg, *Gregory* (n 1); *Araya* (n 28). Cf also *Simpson v Fogo* (1863) 1 H & M 195; 71 ER 85, although the opposite conclusion was reached in *Liverpool Marine Credit Co v Hunter* (1868) LR 3 Ch App 479.

¹¹² See *White* (n 42); *Araya* (n 28).

the defences to recognition and enforcement, not just an overbroad rejection of all foreign non-money decrees based on wrong assumptions and a refusal to have that debate.

VIII CONCLUSION

Ultimately the aim of any legal system, especially one administering rules of equity, should be to promote equal justice at the least cost and without regard to legal technicalities. The view that there is no comprehensive equitable jurisdiction to enforce foreign judgments fails to meet that standard. It does not give sufficient credit to established authority. The justifications offered for that view do not provide a firm foundation for it and do not accommodate the needs of a modern, globalised world. It is time to adopt a rule that meets those needs. If there are other concerns, then they should be robustly debated. But ultimately, the onus is on commentators to do that, in the course of dealing comprehensively with equity's contribution to the subject of foreign judgments. Much also depends on practitioners bringing appropriate cases before the courts to pursue justice for their clients, thereby allowing the courts an opportunity to create new precedents. And the legislature needs to intervene as a matter of urgency. A good place to start would be for Australia to become a party to the *Hague Judgments Convention*.