

SCHIBSBY v WESTENHOLZ AND THE RECOGNITION AND ENFORCEMENT OF
JUDGMENTS IN ENGLAND

In *Vizcaya Partners Ltd v Picard*, Lord Collins of Mapesbury suggested that:¹

“The common law rules which identified those foreign courts which were to be regarded as having jurisdiction for the purpose of the recognition and enforcement of judgments were developed in the 19th century, and had largely (though not entirely) been settled by the time of the great decisions of the Court of Appeal in *Schibsky v Westenholz*² and *Copin v Adamson*³.”

This article takes a different view, that the decision of the Queen’s Bench Division⁴ in *Schibsky v Westenholz* is anything but a “great decision”. It disturbed an emerging consensus as to the treatment of foreign judgments in the English courts, and led the English common law along a narrow stream into the stagnant waters that it occupies today. The article takes a fresh look at *Schibsky*, and the cases and commentaries that relied upon it, in the hope that the courts or the legislature may in the future consider themselves free to set a new course for the English common law, building upon the principles elaborated by English judges before 1870.

I. THE DECISION IN *SCHIBSBY v WESTENHOLZ*

The plaintiff and defendants in *Schibsky* were merchants of Danish nationality. The plaintiff, understood to be Peter-Michelson Schibsky,⁵ was resident in Caen in Normandy and the defendants, the partners of Westenholz Brothers, a firm of London merchants.⁶ They concluded,

¹ [2016] UKPC 5; [2016] 3 All E.R. 181; [2016] Bus. L.R. 413, [6].

² (1870) L.R. 6 Q.B. 155; 40 L.J.Q.B. 73; 19 W.R. 587. Unless otherwise stated, references in the following footnotes are to the judgment as reported in the Law Reports series.

³ (1875) 1 Ex. D. 17; 45 L.J. Ex. 15, affirming (1874) L.R. 9 Ex. 345.

⁴ As appears below, the decision in *Schibsky* was given in the course of proceedings at first instance. The Court of Appeal was not created until 1875.

⁵ The notices page (p. 4) of *L’E Bonhomme Normand* for 9 May 1868, recording the marriage between Schibsky and a Mlle Tacheau, describes him as a merchant.

The Law Journal report, unlike the other reports listed above (fn. 2), uses the plural “plaintiffs”. In 1866, Schibsky had been in partnership with one Puggaard in Caen (see p. 2 of the same newspaper for 31 March of that year recording a conviction for theft of grain from the partnership), but there is nothing else to suggest that he was also named as a plaintiff in this action.

⁶ Westenholz Brothers is understood to have been established in the 1850s by Anders Peder Westenholz and his brother, Ragnar, trading from premises in Mark Lane. Ragnar appears to have returned to Denmark shortly after that to pursue a political career. The *London Gazette* for 4 January 1876 reports the dissolution by consent of a partnership, by then based in Great-

apparently in London, a contract for the sale by the defendants to the plaintiff of a cargo of oats, to be shipped from Sweden to Caen. The plaintiff asserted short delivery and other defects in the cargo, allegations which the defendants denied.

The plaintiff issued proceedings before the Tribunal de Commerce in Caen, relying on Art 14 of the French Civil Code which entitled him, as a foreigner resident in France, to sue another foreigner before the French courts, regardless of the defendant's place of residence. In accordance with the applicable rules of procedure, the summons was served on the Procureur Impérial, which (following established practice) forwarded a copy to the French consulate in London, for transmission to the defendants. The plaintiff entered judgment in default of appearance for 11,537 Francs (equivalent to approximately £461), and sued in England upon that judgment. The claim was defended on the grounds, first, of a general denial of indebtedness, secondly, a particularised denial of the plaintiff's assertion that the French court was "a court duly holden, and having jurisdiction in that behalf"⁷ and, thirdly, a specific plea⁸ that the defendants were not resident or domiciled in or natives of France, and were not otherwise subject to the jurisdiction of the French court, and that they had not been summoned, nor had any notice of knowledge of the proceedings or opportunity of defending themselves.

At the trial before Blackburn J., the jury found that the defendants had notice and knowledge of the summons, and of the pendency of the proceedings, in time to have appeared to defend themselves. His Lordship directed that judgment be entered for the plaintiff with leave given to the defendants to move for a verdict in their favour.

The defendants' application for a non-suit was successful before a bench comprised of Blackburn, Mellon, Hannen and Lush JJ. On the same day, the first three named judges delivered judgment in the case of *Godard v Gray*,⁹ argued some six months previously, in which they confirmed that the theoretical basis for enforcement in England of a foreign judgment is that "the judgment of a court of competent jurisdiction over the defendant imposes a duty or obligation on the defendant to pay the sum for which judgment is given, which the courts in this country are bound to enforce; and consequently that anything which negatives that duty, or

Tower Street, between Anders Peder Westenholz, Hendrik Pontopidan, Jurgen Wilhelm Kirschstein and Johannes Herfordt Theilmann, all believed to have been of Danish nationality.

⁷ See text to fn. 126 below.

⁸ A plea of non-compliance with the requirements of natural justice: see text to fn. 127 and fn. 130-145 below.

⁹ (1870) L.R. 6 Q.B. 139; 40 L.J.Q.B. 62.

forms a legal excuse for not performing it, is a defence to the action”.¹⁰ The majority (Blackburn and Lush JJ.) also determined that a mere error of fact or law, even of English law and even if appearing on the face of the judgment, did not provide a sufficient reason for negating the duty to comply with the judgment.¹¹ There being no other ground of objection to the obligatory force of the judgment in *Godard*, the parties having appeared and argued the case before the French tribunal, it fell to the Court in *Schibsby* to consider the limits of that principle.

Delivering the judgment of the Court, Blackburn J. rejected the submission that it was a relevant consideration, in deciding whether the judgment of the French court in *Schibsby*'s favour was binding on Westenholtz Brothers, that the Queen's Bench Division and other common law courts, acting under the Common Law Procedure Act 1852, asserted the power to give judgment in default of appearance in certain cases (including where the cause of action had arisen within the jurisdiction).¹² His Lordship admitted to having been attracted by that argument at the trial,¹³ and suggested that it would have been irresistible if foreign judgments were recognised and

¹⁰ *Schibsby v Westenholz* (1870) L.R. 6 Q.B. 155 at 159 echoing *Godard v Gray* (1870) L.R. 6 Q.B. 139 at 148-149 (Blackburn and Mellor JJ).

This approach, denying to the foreign judgment the status of formal *res judicata* but giving it obligatory force between the parties, can be traced to the judgment of the Court of Chancery in *Dupleix v De Roven* (1705) 2 Vern. 540; 23 E.R. 950 (William Cowper, Lord Keeper). The authorities principally relied on in *Godard* and *Schibsby* for this proposition were *Russell v Smyth* (1842) 9 M.&W. 810; 152 E.R. 343 and *Williams v Jones* (1845) 13 M.&W. 628; 153 E.R. 262 (the latter case concerning a judgment of an inferior court in England).

The obligatory force of a foreign judgment, it must be noted, is not limited to an obligation to pay the amount of any money judgment but extends to an obligation not to impeach the grounds of that judgment, giving the foreign judgment a status equivalent to *res judicata* (see text to fn. 112-113 below).

¹¹ *Godard* (1870) L.R. 6 Q.B. 139 at 149-153 (Blackburn and Mellor JJ), but compare at 153-154 (Hannen J).

As the majority judgment in *Godard* makes clear, the reviewability of a foreign judgment for error had long been controversial. See the detailed accounts of the English cases in F Maude and T Chitty (eds.), *Smith's Leading Cases* 6th edn (London: Stevens, 1867), vol II, 726-727 and *Hilton v Guyot* (1895) 159 US 113 at 168-180, 195-199.

Doubts lingered even after the judgment in *Godard*: see *Abouloff v Oppenheimer* (1882) 10 Q.B.D 295 at 300 (Lord Coleridge CJ), but were soon dispelled (*Nouvion v Freeman* (1887) 37 Ch.D. 244 at 256 (Lindley L.J.)). Professor Dicey appeared to entertain no doubt on the point in the first edition of his noted work (A V Dicey, *The Conflict of Laws* 1st edn (London: Stevens, 1896) (Dicey), Rule 97). cf. *Meyer v Ralli* (1876) 1 CPD 358, which Dicey (above, 413) considered either to rest on “very special circumstances” or to have been wrongly decided.

¹² A Dickinson, ‘Keeping Up Appearances: The Development of Adjudicatory Jurisdiction in the English Courts’ (2016) 86 B.Y.I.L. ***, ***. It seems, however, doubtful whether the plaintiffs' cause of action in *Schibsby*, for breach of a contract made in England and providing for shipment in Sweden “free on board” a vessel sailing to Caen, would be considered to have arisen within the jurisdiction of the French court.

¹³ *Schibsby* (1870) L.R. 6 Q.B. 155 at 158, 159.

enforced on the basis of “comity”,¹⁴ but rejected it as incompatible with the principle laid down in *Godard*: in his view, the critical question in cases such as the one before him was not whether the foreign court had properly jurisdiction asserted jurisdiction under its own law, or whether that law was in accord with the rules of adjudicatory jurisdiction applied by the English courts to matters before them, but whether the foreigner was “under any obligation which the [local courts] could recognise to submit to the jurisdiction thus created”¹⁵ or, putting the question another way, “whether the defendant in the particular suit was such a person as to be bound by the judgment which it is sought to enforce”?¹⁶ The Court’s answer to this question was as follows:¹⁷

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

If at the time when the obligation was contracted the defendants were within the foreign country, but left it before the suit was instituted, we should be inclined to think the laws of that country bound them; though before finally deciding this we should like to hear the question argued. But every one of those suppositions is negatived in the present case.”

In the following passages, the Court considered (*obiter*) the position of plaintiffs who had chosen the forum for litigation and of defendants who appeared voluntarily in the proceedings,

¹⁴ cf. *Adams v Cape Industries* [1990] Ch. 433 at 462; [1991] 1 All E.R. 929 at 1037 (CA), discussed text to fn. 53 below.

¹⁵ (1870) L.R. 6 Q.B. 155 at 160. Blackburn J. was here considering a hypothetical example of enforcement of an English judgment in the United States, whose law he believed to be the same as English law. cf. *Hilton v Guyot* (1859) 159 US 113, in which the US Supreme Court adopted a “comity” based approach requiring reciprocity as a condition of enforcement.

¹⁶ (1870) L.R. 6 Q.B. 155 at 161. It must be noted that these two formulations are substantively different: the obligation to *appear in the proceedings* and the obligation to *obey the judgment* had always been treated by the courts of common law and equity as distinct obligations (see Dickinson (2016) B.Y.I.L. ***, **-*). This conflation of distinct obligations may have led the Court into error. cf. *Douglas v Forrest* (1828) 4 Bing. 686 at 703; 130 E.R. 933 at 940 (Best C.J.: “no obligation to attend its courts, or to obey its laws”).

¹⁷ (1870) L.R. 6 Q.B. 155 at 161.

suggesting that both would be bound.¹⁸ Finally, they expressed a doubt as to whether the possession of property within the foreign court's jurisdiction afforded a sufficient ground for imposing on the foreign owner of that property a duty or obligation to comply with the judgment.¹⁹

II. THE INFLUENCE OF THE DECISION IN *SCHIBSBY v WESTENHOLZ*

The Court's conclusion in *Schibsby* was modest:²⁰

“We think, and this is all that we need decide, that there existed nothing in the present case imposing on the defendants any duty to obey the judgment of a French tribunal.”

The decision nevertheless had an immediate, fundamental and longlasting influence on this tributary of the conflict of laws in England. This influence has two aspects: first, in the emergence of a “closed list” approach to the circumstances in which English common law will recognise a foreign court's authority to bind the parties by judgment; and, secondly (albeit as an unintended consequence) in marginalising the significance in such cases of the question whether the foreign court was competent to adjudicate upon the dispute under its own law.

(a) *The “closed list” approach to the foreign court's adjudicatory authority*

In *Copin v Adamson* (the second of the two decisions referred to by Lord Collins in *Vizcaya Partners v Picard*), Amphlett B. (with whom Pigot B. concurred) stated:²¹

“The cases which have been referred to shew that before an Englishman can be made amenable to a foreign Court he must bear either an absolute or a qualified or temporary allegiance to the country in which the Court is. He must, as is pointed out by Blackburn

¹⁸ As to the position of defendants who appeared in the proceedings, the Court was disinclined to follow *obiter* remarks by the Court of Exchequer in *General Steam Navigation Company v Guillou* (1843) 11 M.&W. 877 at 894; 152 E.R. 1061 at 1068, suggesting that they would not be bound (*Schibsby* (1870) L.R. 6 Q.B. 155 at 161-162, referring to *De Cosse Brissac v Rathbone* (1861) 6 H.&N. 301; 158 E.R. 123). See also *Voinet v Barrett* (1885) 55 L.J. Q.B. 39; *Guiard v De Clermont & Donner* [1914] 3 K.B. 145; 83 L.J. K.B. 1407; *Harris v Taylor* [1915] 2 K.B. 580; 84 L.J. K.B. 1839; *Henry v Geopresco Ltd* [1976] Q.B. 726; [1975] 2 All E.R. 702. cf. Civil Jurisdiction and Judgments Act 1982, s. 33.

In *General Steam Navigation v Guillou*, the party relying on findings in the judgment to exonerate him from liability had not been a party to the proceedings before the foreign court.

¹⁹ *Schibsby* (1870) L.R. 6 Q.B. 155 at 163, giving a restrictive interpretation to the decision of the Court of Common Pleas in *Douglas v Forrest* (1828) 4 Bing. 686 (see text to fn. 109-111 below).

²⁰ *Schibsby* (1870) L.R. 6 Q.B. 155 at 163.

²¹ *Copin v Adamson* (1874) L.R. 9 Ex 345 at 354; also at 349 (Kelly CB); *Rousillon v Rousillon* (1880) 14 Ch.D. 351 at 371-372 (Fry J).

J. in *Schibsby v Westenholz*, be a subject of the country, or as a resident there when the action was commenced (or perhaps it would be enough if he were there when the obligation was contracted, though upon this point doubt is expressed), so as to be under the protection of or amenable to its laws.”

The decision in that case, affirmed by the Court of Appeal,²² was to the effect that “independently of that question, ... a man may contract with others that his rights shall be determined not only by foreign law, but by a foreign tribunal, and *thus by reason of his contract, and not of any allegiance absolute or qualified*, would become bound by that tribunal's decision”.²³ Thus, a decision of a foreign court chosen by the parties has, as the Privy Council's decision in *Vizcaya Partners v Picard* emphasises, contractual force, and Amphlett B.'s broader statement of general principle was no more than *obiter dictum*. It evidences, however, the emerging view that the decision in *Schibsby* founded the obligation to comply with a foreign judgment on the criterion of “allegiance”, thereby controlling the circumstances in which a foreign court would be considered to have adjudicatory authority as a matter of English law.

This emphasis upon “allegiance” was reinforced as the end of the 19th Century approached. Two decisions proved particularly influential. First, in *Singh v Rajah of Faridkote*,²⁴ the Privy Council (in an opinion delivered by the Earl of Selbourne) held that, contrary to the view expressed (*obiter*) by the Court in *Schibsby*, the defendant's presence within the territory over which the foreign court exercised jurisdiction at the time that the cause of action arose was not a sufficient basis for an obligation to obey the judgment.²⁵ In the Board's opinion, the “general rule”, founded in (public) international law, was that the plaintiff “must sue in the Court to which the defendant is subject at the time of suit” and “no territorial legislation can give jurisdiction which any foreign Court ought to recognise against foreigners, who owe no allegiance or obedience to the Power which so legislates”.²⁶ A judgment given in the defendant's absence in other circumstances “is by international law an absolute nullity” which a defendant is under no obligation to obey.²⁷ These

²² *Copin* (1875) 1 Ex. D. 17

²³ *Copin v Adamson* (1874) L.R. 9 Ex 345 at 354.

²⁴ [1894] A.C. 670.

²⁵ See also *Turnbull v Walker* (1892) 37 Sol. Jo. 81; 67 L.T. 767 (Q.B.D.); *Emanuel v Symon* [1908] 1 K.B. 302; 77 L.J. K.B. 180 (C.A.). cf. *Waygood & Co v Bennie* (1885) 12 R. 651 (but see *Wendel v Moran* 1993 S.L.T. 44; [1992] I.L.Pr. 579).

²⁶ *Singh* [1894] A.C. 670 at 684-685.

²⁷ [1894] A.C. 670 at 685.

statements, supported with references to the writings of Story and Kent decades earlier,²⁸ cannot seriously be taken as an accurate statement of (public) international law at the end of the 19th Century, let alone today.²⁹ The Board nevertheless expressed the view that, if Blackburn J. had heard argument on the point in *Schibsby*, he would have reached the same conclusion, noting that his Lordship “had at the trial formed a different opinion from that which he ultimately arrived” on the principal issue.³⁰ Secondly, in *Carrick v Hancock*,³¹ a decision of the Queen’s Bench Division (albeit of its Chief Justice, Lord Russell), the court held that all persons present, however temporarily, within a territory of a State “owe their allegiance to its sovereign power and obedience to all its laws and to the lawful judgment of its courts”, “that duty of allegiance was correlative to the protection given by a State to any person within its territory” and “[t]his relationship and its inherent rights depended on the fact of the person being within its territory”.³² In accordance with this statement of principle, the judgment of a Swedish court against an Englishman, residing and carrying on business in Newcastle, but served with proceedings during a short visit to that Sweden, was held to be enforceable.

In the first edition of his commentary on the conflict of laws in England, Professor Dicey drew a distinction between “valid foreign judgments” (capable of being recognised and enforced in England) and “invalid foreign judgments” (which in general were to be given no legal effect in England).³³ The stated grounds for invalidity of a judgment included that the judgment “is not pronounced by a court of competent jurisdiction”.³⁴ The definition of “court of competent jurisdiction” elsewhere in the work makes clear that a foreign court’s right to adjudicate upon a given matter is to be determined “according to the principles maintained by English courts”.³⁵ The list in Dicey’s Rule 80 of the cases in which a foreign courts right to adjudicate will be

²⁸ [1894] A.C. 670 at 684, referring to J Story, *Conflict of Laws* 2nd edn (Boston: Little and Brown, 1841), ss. 546, 549, 553-556, 586 and Kent, *Commentaries on American Law* 10th edn. (New York: Halsted, 1860), vol. 1, 284, note c.

²⁹ See F T Piggott, *Foreign Jurisdiction and Judgments* (London: Butterworth, 1908), vol. I, 266-279; *The Case of the SS Lotus* (1920), P.C.I.J. (series A), no 10, 19; Sir R Jennings and Sir A Watts, *Oppenheim’s International Law* 9th edn (London: Longmans, 1992), 456-479; A Mills, *The Confluence of Public and Private International Law* (Cambridge: CUP, 2009), 240-241.

³⁰ [1894] A.C. 670 at 686. See text to fn. 13 above.

³¹ (1895) 12 T.L.R. 59.

³² (1895) 12 T.L.R. 59 at 60.

³³ Dicey, Rules 93-105.

³⁴ Rule 89. See also Rules 90 (fraud), 91 (wrongful refusal to give effect to foreign law), 92 (violation of natural justice).

³⁵ Rule 76(2).

recognised³⁶ is formulated principally with reference to the judgment in *Schibsby v Westenholz*. In the following commentary, the author states:³⁷

“The question, therefore, raised, in so far as it really referred to the competence of the foreign tribunal, has been whether it was or was not the ‘duty’ of the defendant to obey the judgment of the foreign Court, or (what is the same thing) the command of the sovereign under whose authority the Court acted; and the answer to this enquiry has been judicially given in the form of a more or less complete enumeration of the cases in which a party to an action abroad is bound to obey the judgment of the foreign Court, or the command of the foreign sovereign.”

In a later passage, Dicey admits that:³⁸

“The list given in this Rule of the cases in which foreign Courts are, or may be, Courts of competent jurisdiction is not necessarily exhaustive. The law on the authority to be ascribed to the decisions of foreign tribunals is still uncertain, and still liable to undergo further development by means of judicial legislation. It is impossible, therefore, to assert with confidence that the jurisdiction of foreign Courts is in the opinion of English judges absolutely confined to the Cases enumerated in Rule 80.”

That uncertainty soon dissipated. Today, although the editors of the current (15th edition) of what is now *Dicey, Morris & Collins on the Conflict of Laws*, recognise that the corresponding list of cases in which the common law will recognise a foreign court’s authority to deliver a judgment *in personam* is “not necessarily exclusive” and that “[l]ike any other common law rules, they are no doubt capable of judicious expansion to meet the changing needs of society”,³⁹ the judiciary (including at Supreme Court level) and legal practitioners treat the list as closed and immutable in practice.⁴⁰ The legislation adopted in the early decades of the 20th Century to promote reciprocal

³⁶ Rule 80 lists three cases. First, the defendant’s residence or (possibly) presence in the foreign country at the time of commencement of the action. Secondly, the defendant’s status as a subject of the sovereign of such country. Thirdly, appearance as plaintiff or as defendant, without protest, or contractual submission by the party objecting to the judgment.

³⁷ Dicey, 371.

³⁸ Dicey, 373-374.

³⁹ Lord Collins of Mapesbury with specialist editors, *Dicey, Morris & Collins: The Conflict of Laws* 15th edn (London: Sweet & Maxwell, 2012) (**Dicey, Morris & Collins**), [14-082].

⁴⁰ *Lucasfilm Ltd v Ainsworth* [2009] EWCA Civ 1328; [2010] Ch. 503 at [193]-[194] (C.A.) (revd. without considering this point [2011] UKSC 39; [2012] 1 AC 208); *Rubin v Eurofinance SA* [2012] UKSC 46; [2013] 1 AC 236 at [7]-[10] (Lord Collins). For recent examples, see *Swiss Life AG v Kraus* [2015] EWHC 2133 (QB) at [52]-[55] (Green J.); *US Mortgage Finance II LLC v Dew* [2015] EWHC 3621 (Comm), [7] (Burton J.), affd. [2017] EWCA Civ. 299.

enforcement between the legal systems of the United Kingdom, British dominions and other States and territories with whom reciprocal arrangements existed (by treaty or otherwise) has also been interpreted on these lines.⁴¹

In *Adams v Cape Industries plc*, the leading modern English decision on the recognition and enforcement of foreign judgments at common law, the Court of Appeal expressed the opinion⁴² that (1) the court must direct its mind to the competence or otherwise of the foreign court “to summon the defendant before it and to decide such matters as it has decided”,⁴³ (2) in the absence of any form of submission to the foreign court, such competence depends on the physical presence of the defendant in the country concerned at the time of suit, and (3) the temporary presence of a defendant in the foreign country will suffice provided at least that it is voluntary (i.e. not induced by compulsion, fraud or duress⁴⁴). The Court left open the question whether residence without presence would suffice, and tentatively expressed the view that the date of service of process rather than the date of issue of proceedings constitutes the “time of suit” for these purposes.⁴⁵

The Court then turned to consider foreign judicial competence based on the defendant’s presence in greater detail. Noting criticism of *Carrick v Hancock*⁴⁶ in the then current editions of Dicey’s work⁴⁷ and *Cheshire and North’s Private International Law*,⁴⁸ the Court replied that:⁴⁹

⁴¹ Administration of Justice Act 1920, s. 9(2); Foreign Judgments (Reciprocal Enforcement) Act, s. 4; *Société Coopérative Sidmetal v Titan International Ltd* [1966] 1 Q.B. 828; [1965] 3 All E.R. 494; *Dicey, Morris & Collins* (fn. 39), [14-059], [14-176], [14-190].

⁴² *Adams* [1990] Ch. 433 at 517-518

⁴³ The quoted extract is taken from *Pemberton v Hughes* [1899] 1 Ch. 781 at 790 (Lindley M.R.) (see text to fn. 74-81 below).

⁴⁴ On this point, see *Dicey, Morris & Collins*, [14-064].

⁴⁵ *Adams* [1990] Ch. 433 at 518. The actual question before the Court in *Adams* concerned the enforcement of a foreign judgment against a company. As the Court noted (at 519-520), the terminology of “presence” or “residence” is of limited assistance in determining the features of the case sufficient to establish jurisdiction over a legal person. Quotation marks are used around the word “presence” on several occasions within the judgment (at 521, 528, 530, 531, 545, 547, 550). In expressing its conclusions on this point, although the Court used these terms interchangeably and tentatively (see at 524-525, 530), the tests adopted (requiring a “fixed place of business”) appear closer to a test of residence than one of mere presence. Against this background, the Court’s more general observations concerning the significance of the defendant’s presence within the foreign jurisdiction should be approached with a measure of caution (see *Dicey, Morris & Collins*, [14-061]).

As to the criterion of nationality, see text to fn. 73 below.

⁴⁶ Text to fn. 31-32 above. For a more forthright condemnation of the decision in *Carrick*, see Piggott, *Foreign Jurisdiction and Judgments*, 236-239.

“We see the force of these points. ... Nevertheless, while the use of the particular phrase 'temporary allegiance' may be a misleading one in this context, we would, on the basis of the authorities referred to above, regard the source of the territorial jurisdiction of the court of a foreign country to summon a defendant to appear before it as being his obligation for the time being to abide by its laws and accept the jurisdiction of its courts while present in its territory. So long as he remains physically present in that country, he has the benefit of its laws, and must take the rough with the smooth, by accepting his amenability to the process of its courts. In the absence of authority compelling a contrary conclusion, we would conclude that the voluntary presence of an individual in a foreign country, whether permanent or temporary and whether or not accompanied by residence, is sufficient to give the courts of that country territorial jurisdiction over him under our rules of private international law.”

The Court refused to see presence (or residence) as but one example of a broader principle of “curial allegiance” arising “where there is sufficient connection between the debtor and the rendering court at the date of suit so as to make it 'just' to enforce a judgment of that court”:⁵⁰

“While residence or presence will *ex hypothesi* give rise to a connection, it is the residence or presence, not the connection as such, which gives rise to the jurisdiction of the court. The question whether residence or presence existed at the time of suit is determined by our courts not by reference to concepts of justice or by the exercise of judicial discretion; it is a question of fact which has to be decided with the help of the guidance given by the authorities.”

⁴⁷ L Collins and others (eds.), *Divey & Morris: The Conflict of Laws* 11th edn (London: Stevens, 1987), 439-440.

⁴⁸ P North and J. Fawcett (eds.), *Private International Law* 11th edn. (London: Butterworths, 1987), 342.

The editors of these works pointed out, in particular, that the decision to allow enforcement in *Carrick* could equally well have been explained on the ground of the defendant's voluntary appearance (see fn. 18 above). The headnote in the report ((1895) 12 T.L.R. 59, 60) records that: “Though he did not himself remain in Sweden he was represented throughout the subsequent proceedings. He put in a defence and counterclaim, and on three separate occasions took his opponent to the Court of Appeal in Gota.” Despite the defendant's protestations that he had only appeared “under pressure duress and compulsion”, that conduct was likely sufficient to render the judgment enforceable against him (*Molony v Gibbons* (1810) 2 Camp. 502; 70 E.R. 1232; *Voinet v Barrett* (1885) 55 L.J. Q.B. 39. cf. Civil Jurisdiction and Judgments Act 1982, s. 33).

⁴⁹ *Adams* [1990] Ch. 433 at 518-519.

⁵⁰ [1990] Ch. 433 at 519

Later in its judgment, the Court returned to the question of the theoretical basis of enforcement when addressing what it described as the “country issue”, i.e. whether the judgment of a US Federal Court sitting in Texas, in the exercise of its diversity jurisdiction,⁵¹ would be recognised or enforced on the basis of a finding that the defendant was present (or resident) elsewhere in the United States (in Illinois) at the time of service.⁵² The Court's analysis of this issue is instructive. Having considered the approach of the trial judge, Scott J., founded on the proposition that the English court should recognise the legitimate exercise by the United States of its own sovereign powers to exercise and allocate adjudicatory competence, the Court commented:⁵³

“Any attempt to weigh up the soundness of this or any other account of the rules governing the recognition of foreign judgments should ... begin with an exploration of the reasons why such judgments are recognised at all. Unfortunately, the cases give virtually no guidance on this essential question. Underlying it all must be some notion of comity, but this cannot be comity on an individual nation-to-nation basis, for our courts have never thought it necessary to investigate what reciprocal rights of enforcement are conceded by the foreign country, or to limit their exercise of jurisdiction to that which they would recognise in others. The most one can say is that the duty of positive law first identified in *Schibsby v Westenholz* must stem from an acknowledgement that the society of nations will work better if some foreign judgments are taken to create rights which supersede the underlying cause of action,⁵⁴ and which may be directly enforced in countries where the defendant or his assets are to be found. But this tells one nothing of practical value about how to identify the foreign judgments which have this effect.”

⁵¹ 28 USC c. 85, s. 1332 (see *Adams* [1990] Ch. 433 at 485-487).

⁵² *Adams* [1990] Ch. 433 at 550-551. As the Court pointed out (at 550, 557), the analysis of this issue was *obiter*, as the Court had found the defendant not to be present anywhere in the United States.

⁵³ [1990] Ch. 433 at 552-553.

⁵⁴ Insofar as this statement suggests that the underlying cause of action is taken to merge in the foreign judgment, it is inconsistent with the common law rule of non-merger established, albeit on rather shaky foundations, in the 19th century (see *Smith's Leading Cases* 6th edn, 726; Piggott, *Foreign Jurisdiction and Judgments*, 18-30; Dicey, 421; J. H C Morris and others (eds.), *Dicey & Morris: The Conflict of Laws* 10th edn (London: Stevens, 1982), 1077-1078, and the cases there cited. cf. Civil Jurisdiction and Judgments Act 1982, s. 34, considered in *Republic of India v India Steamship Co. (The Indian Grace)* [1993] A.C. 410; [1993] 1 All E.R. 198).

The Court then turned to consider, and reject, the possibility that the underlying principle was based on allegiance, as *Schibsby* and the cases immediately following it had suggested:⁵⁵

“This idea, of which traces are found in the earliest cases,⁵⁶ may have provided at least a moral underpinning for the concept that a foreigner who has chosen to establish himself within the territory of a sovereign owes to him, in exchange for an obligation to ensure the stranger's personal safety and well-being, a personal duty to pay the sovereign due respect, an obligation which involves an obligation to respect the sovereign's law as enforced by his courts. This concept may have served well enough in the case of an individual established in long-term residence, but the idea that the *Dunlop Company*,⁵⁷ a foreign company of manufacturers, present in the United Kingdom for a few days only through having set up a stall at an exhibition, thereby incurred a duty of fealty to the King-Emperor is surely fanciful.

Nor in our judgment can this concept be made to seem more persuasive by re-writing it in modern terminology. A foreigner who is physically present in a country does thereby acquire rights and duties expressed in terms of the local law, although not necessarily the same as those which apply to the local citizens; but these are not rights and duties which in any sensible way can be described as arising reciprocally with the sovereign. The foreigner does not owe duties to the Queen, or to the United States of America.”

Having put allegiance to one side, the Court in *Adams* turned to consider the role of territorial sovereignty. It considered this relevant “in the sense that an identification of the source from which the local laws and the agencies which enforce them derive their powers must be part at least of the task of delineating the obligations, stemming from the judgments of those agencies, which a foreign court ought to regard as binding”⁵⁸ but not as sufficiently explaining, as a matter of English law, why judgments are recognised and enforced:⁵⁹

“Merely to identify X as the ultimate law giver and creator of the agencies through which those laws are enforced, and then move on to the proposition that a judgment given

⁵⁵ *Adams* [1990] Ch. 433 at 553.

⁵⁶ It may be that the Court had in mind *Calvin's Case* (1608) 7 Co. Rep. 1a; 77 E.R. 377, which had been cited to it. See 1 Bl. Comm. 366-375, and text to fn. 64-65 below.

⁵⁷ The reference here is to *Dunlop Pneumatic Tyre Co Ltd v Actien-gesellschaft für Motor und Motorfahrzeugbau vorm Cudell & Co* [1902] 1 K.B. 342; 71 L.J. K.B. 284.

⁵⁸ *Adams* [1990] Ch. 433 at 553.

⁵⁹ [1990] Ch. 433 at 553-554. As to the treatment of connections within the British Empire, see *Phillips v Batho* [1913] 3 K.B. 25; 82 L.J. K.B. 882 (Scrutton J); *Gavin Gibson & Co Ltd v Gibson* [1913] 3 K.B. 379; 82 L.J. K.B. 1315.

anywhere in the territory governed by X against someone present anywhere else in those territories should be enforced by foreign courts, seems a large step. Even today, Scotland and England are not the same jurisdictions, and if one looks to the past, it is hard indeed to acknowledge that in Imperial times, all persons present in one part of the Empire could properly be regarded as present everywhere else in the Empire, notwithstanding the immense variety of laws, courts and constitutional systems which then prevailed, simply because as the ultimate source of power there was to be found a single sovereign.”

In the Court's view, the obligation to comply with the judgment, which English law recognises, is instead based on consent:⁶⁰

“To our minds, the only way to find an answer is to consider why a person who goes abroad thereby incurs a duty to abide in England by a foreign judgment. The only reason that we can see is that by going to a foreign place he invests himself by tacit consent with the rights and obligations stemming from the local laws as administered by the local court: those laws including, of course, the local rules on the conflicts of laws.”

In the Court's opinion:⁶¹

“[A] foreigner who has set himself up in Scotland ... could properly be regarded as having done so, and having been allowed to do so, on terms that his rights and duties were to be governed by the laws of Scotland. But not by English law, or by decisions of the English courts, even though the latter might without procedural impropriety purport to exercise a jurisdiction over him. Equally, an Englishman who has gone to live in France and engaged in transactions there, might find himself sued on those transactions in Texas. Any resulting judgment would be unenforceable here, not because the Texas court had broken its own rules, or indeed had broken any rules of international comity, but simply because the Englishman had done nothing to bring himself into a relationship with the court in Texas and the law which it administered.”

The Court then turned to consider the case before them. On balance, although it was not necessary to decide the point, the Court was inclined to reject the defendants' submission that

⁶⁰ [1990] Ch. 433 at 555. The Court also referred (at 556) to “the concept of 'contracting in' by presence”, to which it had already alluded earlier in its judgment (at 553) (“by making himself present he contracts-in to a network of obligations, created by the local law and by the local courts”).

⁶¹ [1990] Ch. 433 at 555.

“there was no sufficient connection between the defendants, resident as for present purposes we assume they were in Chicago, and the federal court in [Texas], to justify the inference that by establishing their residence there they had consented to the administration of Texan laws as administered by the [Texan] court”.⁶²

This idea of “tacit consent” recalls theories of political philosophy based on conceptions of a social contract of government or contract of submission.⁶³ It seems distinguishable from Blackstone’s “implied, original and virtual allegiance”⁶⁴ only insofar as the notional promisee is not the sovereign ruler of a State but a court (or, perhaps more accurately, the courts) exercising jurisdiction over a particular territory. As such, it is difficult to disentangle from the idea of “curial allegiance”, which the Court had apparently cast aside.⁶⁵ It appears, at best, to be of very limited utility as an explanation of the legal basis for the recognition and enforcement of foreign judgments. Beyond the case of a choice of court agreement (correctly regarded in *Copin v Adamson* as involving a separate principle⁶⁶), to identify consent as the basis of an obligation to abide by a judgment, and the suggestion that consent to be bound may be inferred from the defendant’s conduct, tells us nothing about the nature of that consent or the circumstances in which it will be held to exist: it is not, as the Court of Appeal appears to think,⁶⁷ a “test”. Moreover, even if it is more than a fig-leaf disguising conclusory reasoning, the Court of Appeal’s account does not seek answers to difficult questions that would then arise as to the law applicable in determining the existence of consent,⁶⁸ or explain why a person not party to the consensual arrangement (the claimant) is entitled to benefit from it. Moreover, it seems a far-fetched explanation of adjudicatory jurisdiction based on the defendant’s temporary presence: to borrow the test used by the English courts in a contractual context,⁶⁹ would a reasonable, fair-minded observer conclude that a foreigner passing straight through Heathrow Airport on his way to catch a connecting flight, or flying over the Isle of Wight, had consented to comply with English laws and to abide by English judgments? It is, with respect to the Court of Appeal,

⁶² [1990] Ch. 433 at 555-557.

⁶³ J W Gough, *The Social Contract* (Oxford: Clarendon, 1936), 2-3; J. Sommerville in G Klosko (ed), *The Oxford Handbook of the History of Political Philosophy* (Oxford: OUP, 2011), 573-583.

⁶⁴ 1 Bl. Comm. 369.

⁶⁵ fn. 50 above.

⁶⁶ Text to fn. 23 above. See also *Vizcaya Partners v Picard* [2016] UKPC 5; A Briggs, ‘Recognition of foreign judgments: a matter of obligation’ (2013) 129 L.Q.R. 87, 92-94.

⁶⁷ fn. 60 above.

⁶⁸ *Vizcaya Partners* [2016] UKPC 5 at [59]-[61].

⁶⁹ *RTS Flexible Systems v Molkerei Alois Müller GmbH & Company KG* [2010] UKSC 14; [2010] 3 All E.R. 1.

telling that all of its examples avoid a defendant who is only temporarily present, referring instead to defendants who are “set up”, “established” or “resident” in a particular place.

Happily, the suggestion in *Adams v Cape* that the enforcement of foreign judgments in such cases rests on “tacit consent” has not yet been followed judicially.⁷⁰ In *Lucasfilm v Ainsworth*, the Court of Appeal limited itself to the following observation with respect to the recognition of a foreign court’s authority over persons present within its jurisdiction:⁷¹

“[S]uch presence, although it may be temporary, reflects some form of concept or metaphor of allegiance to the laws of the country concerned ...”

The Court concluded that selling goods or advertising into a foreign country, by online or offline transactions, could not establish the requisite presence in that country.⁷²

Whatever credit is given to the Court of Appeal’s reasoning in *Adams v Cape Industries*, it is clear that this “metaphor of allegiance”, which *Schibsby v Westenholz* nurtured, must now be treated with considerable caution. The clearest signal of this is that the defendant’s status as a subject of the foreign country in which judgment is given is no longer, on the prevailing view, treated as establishing the foreign court’s competence to give judgment.⁷³ If allegiance were taken seriously as underpinning the obligation to comply, this would surely be the exemplar.

(b) *Marginalising the foreign court’s competence under local law*

The emphasis in *Schibsby* and the decisions following it on the foreign court’s competence in a more abstract sense had a further consequence, fixed by the Court of Appeal’s decision in *Pemberton v Hughes*,⁷⁴ that the common law now treats the question of the foreign court’s competence under the rules of jurisdiction of its own legal system as being of little or no significance in the enquiry as to whether a foreign judgment is binding in England. In the course of his judgment in that case, concerning recognition of a divorce decree, Lindley MR stated:⁷⁵

⁷⁰ The editors of Dicey, Morris & Collins refer briefly to the reasoning ([14-009]) without comment. See also J. Fawcett and J. Carruthers (eds.), *Cheshire, North & Fawcett: Private International Law* 15th edn (Oxford: OUP, 2017), 529-539.

⁷¹ *Lucasfilm Ltd v Ainsworth* [2009] EWCA Civ 1328 at [191]. The Court referred, with approval, to the passage from the Court of Appeal’s judgment in *Adams* quoted above (text to fn. 49).

⁷² [2009] EWCA Civ 1328 at [192]-[193] (C.A.).

⁷³ Dicey, Morris & Collins [14-085], and the cases there cited. See also *Adams* [1990] Ch. 433 at 515. cf. *Independent Trustee Services Ltd v Morris* [2010] NSWSC 1218.

⁷⁴ *Pemberton v Hughes* [1899] 1 Ch. 781.

⁷⁵ [1899] 1 Ch. 781 at 790-791.

“It sounds paradoxical to say that a decree of a foreign Court should be regarded here as more efficacious or with more respect than it is entitled to in the country in which it was pronounced. But this paradox disappears when the principles on which English Courts act in regarding or disregarding foreign judgments are borne in mind. If a judgment is pronounced by a foreign Court over persons within its jurisdiction and in a matter with which it is competent to deal, English Courts never investigate the propriety of the proceedings in the foreign Court, unless they offend against English views of substantial justice. Where no substantial justice, according to English notions, is offended, all that English Courts look to is the finality of the judgment and the jurisdiction of the Court, in this sense and to this extent - namely, its competence to entertain the sort of case which it did deal with, and its competence to require the defendant to appear before it. If the Court had jurisdiction in this sense and to this extent, the Courts of this country never enquire whether the jurisdiction has been properly or improperly exercised, provided always that no substantial injustice, according to English notions, has been committed.”

He continued:⁷⁶

“There is no doubt that the Courts of this country will not enforce the decisions of foreign Courts which have no jurisdiction in the sense above explained, - i.e., over the subject-matter or over the persons brought before them.”

At this point, he referred to authorities including *Schibsby v Westenholz* and *Singh v Faridkote*, before concluding:⁷⁷

“But the jurisdiction *which alone is important in these matters* is the competence of the Court in an international sense - i.e., its territorial competence over the subject-matter and over the defendant.”

Neither *Schibsby* nor *Singh* stands as authority for this proposition of law. The foreign court’s competence under local law was not in issue before the Privy Council in *Singh v Faridkote*. In *Schibsby*, the defendant’s second plea (although unsuccessful on the facts) had concerned the French courts alleged lack of competence under French law, and in the following passage the Court clearly acknowledged the potential significance of that enquiry:⁷⁸

⁷⁶ [1899] 1 Ch. 781 at 791.

⁷⁷ [1899] 1 Ch. 781 at 791 (emphasis added).

⁷⁸ *Schibsby* (1870) L.R. 6 Q.B. 155 at 159-160 (emphasis added). See also the opinion of Blackburn J., with respect to a judgment *in rem*, in *Castrique v Imrie* (1870) L.R. 4 H.L. 414 at 429,

“[I]f, judgment being given against a foreigner in our courts, an action were brought upon it in the courts of the United States (where the law as to the enforcing foreign judgments is the same as our own), a *further question* would be open, viz, *not only whether the British legislature had given the English courts jurisdiction over the defendant*, but whether he was under any obligation which the American courts could recognize to submit to the jurisdiction thus created. This is precisely the question which we have now to determine with regard to a jurisdiction assumed by the French jurisprudence over foreigners.”

Nor does *Vanquelin v Bouard*,⁷⁹ the authority principally relied on by the Master of the Rolls in *Pemberton*, serve to support the breadth with which the above proposition is stated. In *Vanquelin*, the French court had made findings on fact on which its jurisdiction over the defendants under local law rested. Insofar as that court was competent to determine facts and matters relevant to the existence of its jurisdiction, existing authority supported the conclusion in *Vanquelin* that an English court would presume to follow the foreign court’s findings with respect to such facts and matters.⁸⁰ No decision before *Pemberton* had gone further than this, and pleas as to the absence of jurisdiction under local law had been frequently entertained.⁸¹

(c) *Summary*

There are signs that the influence of *Schibsby v Westenholz* upon the English common law is waning. As noted above, the Courts have questioned the utility of a metaphor of allegiance as explaining the obligation to comply with a foreign judgment. More recently, in *Rubin v Eurofinance*, Lord Collins described the “obligation theory”, central to the decision in *Schibsby*, as “a purely theoretical and historical basis for the enforcement of foreign judgments at common law”.⁸² Although he did not expand on this, it may well be that his Lordship had in mind the remarks on this subject of Gray J. in delivering the majority judgment in the US Supreme Court’s landmark decision in *Hilton v Guyot*, describing the obligation theory as a “remnant” of an “ancient fiction”, adding that it is “hardly a sufficient guide at the present day in dealing with

and the commentary by Dicey, 401-403. Dicey was counsel for the successful appellant in *Pemberton v Hughes* [1899] 1 Ch. 781 at 785-786.

⁷⁹ (1863) 15 C.B. N.S. 341, 143 E.R. 817.

⁸⁰ *Molony v Gibbons* (1810) 2 Camp. 502 at 503; 170 E.R. 1232 (Lord Ellenborough: “I will look to these foreign judgments with great jealousy; but I must give them credit for the facts which they specially allege; and I must presume in the present case, that the Court saw Ferrier properly constituted attorney for the defendant.”).

⁸¹ See text to fn. 126 below.

⁸² *Rubin v Eurofinance SA* [2012] UKSC 46 at [9]. cf. A Briggs (2013) 129 L.Q.R. 87 at 100.

questions of international law, public or private, and of the comity of our own country, and of foreign nations”.⁸³

It is, nevertheless, clear that *Schibsby* has determined the course followed by the English courts in dealing with foreign judgments, and that it marked the beginning of a process that has shaped a narrow, rigid, autonomous English law notion of foreign judicial “competence”, and placed questions of the foreign court’s competence under its own laws at the margins of enquiry. That process has left the law in an unsatisfactory, ossified state, without a clear theoretical underpinning. The position is not dissimilar to that faced by the law of unjust enrichment, dogged by the “implied contract fallacy” before Professor Birks and Lord Goff, among others, ushered the subject into a new era.⁸⁴

The Canadian Supreme Court has already moved away from the “old common law rules” for the recognition and enforcement of interprovincial and foreign judgments in favour of a test founded on the existence of a “real and substantial connection” of the subject matter of the action or the defendant to the court or the territory over which it exercises jurisdiction,⁸⁵ but there has been no rush by its English counterpart to follow suit.⁸⁶

For the law to evolve, ghosts of the past must be exorcised. In the following sections, the Court’s reasoning in *Schibsby* will be critically examined, and an alternative approach to the recognition and enforcement in England of foreign judgments will be advanced, based on the earlier jurisprudence.

III. THE FLAWS IN *SCHIBSBY*

The defendant’s application for a non-suit in *Schibsby* was argued over two days by leading counsel.⁸⁷ The reports show that a significant number of cases and commentaries were cited to

⁸³ *Hilton v Guyot* (1895) 159 US 113 at 199-202, esp at 201. In the sentence following the latter quotation, the majority suggested that it might be safer to adopt the maxim *in praesumptione legis iudicium redditur in invitum* (in law the presumption is that a judgment is rendered against one’s will) (Co. Litt. 248b). This, however, takes matters little further, suggesting that the litigant’s consent to be bound by the judgment must be real, and presenting the difficulties encountered in relation to the theory of “tacit consent” (see text to fn. 63-70 above).

⁸⁴ P Birks, *An Introduction to the Law of Restitution* (Oxford: Clarendon, 1989), 29-39; C Mitchell, P Mitchell and S Watterson (eds.), *Goff & Jones: The Law of Unjust Enrichment* 9th edn (London: Sweet & Maxwell, 2016), [1-06].

⁸⁵ *Beals v Saldabna* [2003] 3 S.C.R. 416, 2003 SCC 72, discussed text to fn. 149-152 below.

⁸⁶ cf. *Rubin v Eurofinance* [2012] UKSC 46 at [109]-[110] (Lord Collins: “There is no support in England for such an approach except in the field of family law.”).

⁸⁷ Joseph Brown QC for the plaintiff, Sir George Honynman for the defendants. A detailed account of the submissions can be found in the Weekly Reporter (fn. 2).

the Court.⁸⁸ Against this background, the paucity of legal reasoning supporting the legal principle for which the Court argued is striking.⁸⁹ On this aspect of the case, Blackburn J. referred to six authorities only. Of these, three had not been cited by counsel and have little bearing upon the central issue.⁹⁰ Of the remaining three, only one (*General Steam Navigation v Guillou*) contains anything close to a statement supporting the principle adopted in *Schibsby*, but that statement is *obiter*⁹¹ and itself unsupported. The other two cases discussed, *Buchanan v Rucker* and *Douglas v Forrest* are undoubtedly in point, but both on closer examination undermine the Court's reasoning in *Schibsby* rather than support it.

The Court's treatment of *Buchanan v Rucker* is of particular note, and worth citing in full:⁹²

“Again, it was argued before us that foreign judgments obtained by default, where the citation was (as in the present case) by an artificial mode prescribed by the laws of the country in which the judgment was given, were not enforceable in this country because such a mode of citation was contrary to natural justice, and if this were so, doubtless the finding of the jury in the present case would remove that objection. But though it appears by the report of *Buchanan v Rucker* [(1807) 1 Camp. 63, 170 E.R. 877], that Lord Ellenborough in the hurry of *nisi prius* at first used expressions to this effect, yet when the

⁸⁸ The plaintiffs relied on *Crawford v Whittall* (1733) 1 Doug. 4; 99 E.R. 2 (note) (also reported *sub nom Crawford v Witten*, 1 Lofft. 154; 98 E.R. 154); *Sinclair v Fraser* (1768) 1 Doug. 5; 99 E.R. 5 (note) (also reported *sub nom Sinclair v Frazer* (1768) Mor. 4542); *Walker v Witter* (1778) 1 Doug. 1; 99 E.R. 1; *Buchanan v Rucker* (1807) 1 Camp. 63; 170 E.R. 877 and (1808) 9 East 192; 103 E.R. 546; *Cavan v Stewart* (1816) 1 Stark. 525; 171 E.R. 551; *Becquet v MacCarthy* (1831) 2 B.&Ad. 951; 109 E.R. 1396; *Russell v Smyth* (1842) 9 M.&W. 810; 152 E.R. 343; *Bank of Australasia v Nias* (1851) 16 Q.B. 717; 117 E.R. 1055; *General Steam Navigation Company v Guillou* (1843) 11 M.&W. 877; 152 E.R. 1061; *Maubourquet v Wyse* (1867) 1 Ir. Rep. Common Law Series 471.

The defendants relied additionally on *Emerson v Lashley* (1793) 2 H.Bl. 248; 126 E.R. 533; *Williams v Jones* (1845) 13 M.&W. 628; 153 E.R. 262; *Don v Lippmann* (1837) 5 Cl.&F. 1; 7 E.R. 303; *Vallee v Dumergue* (1849) 4 Ex. 290; 154 E.R. 1221; *Meens v Thelluson* (1853) 8 Ex. 638; 155 E.R. 1507; *Bissell v Briggs* 9 Mass. Rep. 438; *Jefferys v Boosey* (1854) 4 H.L. Cas. 815; 10 E.R. 681; *Yelverton v Yelverton* (1859) 1 Sw.&Tr. 574; 164 E.R. 866; *Allhusen v Malgarejo* (1869) 37 L.J. Q.B. 169 (also L.R. 3 Q.B. 340).

The commentaries referred to included Story's *Conflict of Laws* 2nd edn and Smith's *Leading Cases* 6th edn.

⁸⁹ See text to fn. 17 above.

⁹⁰ *London and North Western Railway Co v Lindsay* (1858) 6 W.R. 386; 3 Macq. 99.; *De Cosse Brissac v Rathbone* (1861) 6 H.&N. 301; 158 E.R. 123; *Simpson v Fogo* (1863) 1 H.&M. 195; 71 E.R. 85. *De Cosse Brissac* and *Simpson* (which Blackburn J. had mentioned in argument) were referred to in the course of a brief discussion of the position of a defendant who enters an appearance (see fn. 18 above). The reference to *L.N.W.R. v Lindsay*, a Scots appeal concerning the exercise by a Scots court of jurisdiction based on attachment of locally held assets, serves as a postscript to the Court's comment on *Douglas v Forrest* (see text to fn. 109-111 below).

⁹¹ fn. 18 above.

⁹² *Schibsby* (1870) L.R. 6 Q.B. 155 at 160.

case came before him *in banco* in *Buchanan v Rucker* [(1808) 9 East. 192, 103 E.R. 546], he entirely abandoned what (with all deference to so great an authority) we cannot regard as more than declamation, and rested his judgment on the ground that laws passed by our country were not obligatory on foreigners not subject to their jurisdiction. ‘Can,’ he said, ‘the Island of Tobago pass a law to bind the rights of the whole world?’”

With great respect to a judge of Blackburn J.’s standing, this appears to misrepresent or misinterpret the course of the proceedings in *Buchanan*, as reported. Perhaps his Lordship was influenced by his own change of mind in *Schibbsby*: at *nisi prius*, he had formed the opinion that the judgment on the general issue should be in the plaintiff’s favour. Putting that speculation to one side, there is nothing in the two reports of the case to suggest that Lord Ellenborough changed his mind between the trial at *nisi prius* and the hearing of the defendant’s application to vacate the judgment in *Buchanan*.

The plaintiff, Alexander Buchanan, brought an action in *assumpsit* in the Court of King’s Bench upon a judgment of the Court of Common Pleas in Tobago for an amount in local currency corresponding to £2000. The defendant, Sigismund Rucker, pleaded *non assumpsit* and asserted that, as appeared on the face of the judgment, he had not been served with process or had an opportunity to defend the action. Buchanan admitted that the writ had been nailed to the court house door, but asserted that this was the practice of the court in Tobago where the person sued was not a resident. His counsel, William Garrow Q.C., submitted that a foreign judgment must be presumed valid. It was to this submission that Lord Ellenborough replied:⁹³

“That may be so, if the judgment appears on the face of it consistent with reason and justice; but it is contrary to the first principles of reason and justice that either in civil or criminal proceedings, a man should be condemned before he is heard. ... [I]f the practice were proved, it is *mala praxis*, and cannot be sanctioned. If a judgment could thus be recovered against anyone behind his back, a man would have nothing more to do but go to Tobago, there sue us to any amount, and then return to this country to put his judgments in force against us. In a case somewhat like the present, that came before Lord Kenyon,⁹⁴ the defendant had resided in the island, had property there, and had left a power of attorney behind him: therefore, he might be considered as virtually present. But the practice here contended for is opposite to right reason, and shall not prevail.”

⁹³ *Buchanan v Rucker* (1807) 1 Camp. 63 at 66; 170 E.R. 877 at 878.

⁹⁴ *Galbraith v Nevill*, B.R.E. 29 Geo. 3, noted in the report of *Walker v Witter* (1778) 1 Doug. 1 at 6; 99 E.R. 1 at 5.

In response, Garrow suggested that the practice of the court in Tobago accorded with that prevailing in the Court of King's Bench in England. Lord Ellenborough's response was as follows:⁹⁵

“That is only where a man has resided in this country, and has some known place of residence. A foreigner, or a subject who is abroad, may be outlawed here, and his effects, if he has any in the country, may be seized under the outlawry; but it is impossible for the plaintiff to recover a judgment against him, when he has never appeared to the action. The defendant not being resident in Tobago, there was no pretence for suing him in the Courts of that colony. In answer to an observation from the plaintiff's counsel, that the judgment or sentence of a foreign Court must be received as evidence of the right it establishes, and must at any rate be taken to be just and regular, till the contrary is shewn by extrinsic proof; - his Lordship said, there might be such glaring injustice on the face of a foreign judgment, or it might have a vice rendering it so ludicrous, that it could not raise an *assumpsit*, and if submitted to the jurisdiction of the Courts of this country could not be enforced.”

Pausing there, it should be noted that, in both passages, Lord Ellenborough's reasoning is founded on the proposition that the procedure before the court in Tobago did not accord with the fundamental requirements of justice, which defect was sufficient to negate the existence of a legal obligation to comply with the court's judgment. The second passage is particularly noteworthy, insofar as his Lordship appears, first, to countenance that the requirements of justice may vary according to the circumstances of the case, and in particular to distinguish between residents and non-residents, and, secondly, to be prepared to have regard to the procedures adopted by the English courts in similar cases in answering the question put to him.

Contrary to the assertion in *Schibsby*, Lord Ellenborough's reference to the “first principles of justice” is more than a mere declamation.⁹⁶ To the contrary, it seems clear⁹⁷ that he was adopting the reasoning of the Chief Justice of the Common Pleas, William de Grey, in the case of *Fisher v Lane*, decided in 1772.⁹⁸ That case also concerned a claim of *assumpsit* upon a judgment entered without the claim being notified to the defendant. In *Fisher*, the judgment was not of a foreign

⁹⁵ *Buchanan* (1807) 1 Camp. 63 at 67; 170 E.R. 877 at 879.

⁹⁶ In *R v Local Government Board ex p Arlidge* [1914] 1 K.B. 160 at 198, Hamilton L.J. expressed the view that the “weighty opinion” of Lord Ellenborough, “very temperately expressed”, had been “coldly dismissed” by the Court in *Schibsby*.

⁹⁷ Lord Ellenborough was familiar with *Fisher v Lane*, for it had been cited to him in *M'Daniel v Hughes* (1803) 3 East 367; 102 E.R. 638.

⁹⁸ (1772) 3 Wils. K.B. 297; 95 E.R. 1065 (also reported 2 Bl. W. 834; 96 E.R. 492).

court but of the City Court of London exercising its customary jurisdiction by foreign attachment, involving the issue of mesne process against the defendant's debtor.⁹⁹ De Grey C.J. nevertheless linked the principles to be applied in such a case to those applied to the reception of foreign law (including foreign judgments), in stating that:¹⁰⁰

“Customs of particular cities may deviate from the course of the common law, but a custom contrary to the first principles of justice can never be good; so this custom not to summon or give notice to a defendant in a suit commenced against him is contrary to the first principles of justice, and (in my opinion as at present advised) cannot be good. The twenty-seven colonies abroad cannot make a law contrary to the law of England, but they may make any law agreeable thereto, and to the principles of justice, but not contrary to the principles of justice.”

Accordingly, the central question in *Buchanan v Rucker* was whether the judgment of the court of Tobago was compatible with the “principles of justice” upon which the English courts insisted. Lord Ellenborough answered that question in the negative, and directed a nonsuit. Subsequently, the plaintiff moved to set aside the nonsuit, a motion supported by affidavit evidence of the practice adopted in Tobago in relation to non-resident defendants. Lord Ellenborough rejected that motion on the basis that he was not satisfied that the Tobagan law extended to persons who had never been present on the island.¹⁰¹ It was in that specific context, as an aid to construing the local procedural law, that he asked his now familiar question, as his following passage makes clear:¹⁰²

“Can the island of Tobago pass a law to bind the rights of the whole world? Would the world submit to such an assumed jurisdiction? *The law itself, however fairly construed, does not warrant such an inference.* for ‘absent from the island’ must be taken only to apply to persons who had been present there, and were subject to the jurisdiction of the Court out of which the process issued ...”

⁹⁹ See *Douglas v Forrest* (1828) 4 Bing. 686 at 701-702; 130 E.R. 933 at 939 (Best C.J.); *Bruce v Wait* (1840) 1 M.&G. 1; 133 E.R. 222; *Mayor and Alderman of the City of London v Cox* (1867) L.R. 2 H.L. 239. See also the reporter's notes to *Turbill's Case* (1666) 1 Saund. 67; 85 E.R. 76.

¹⁰⁰ *Fisher v Lane* (1772) 3 Wils. K.B. at 302-303; 95 E.R. 1065 at 1068.

¹⁰¹ *Buchanan v Rucker* (1808) 9 East. 192 at 194; 103 E.R. 546 at 547.

¹⁰² *Ibid* (emphasis added). For a similar approach to the interpretation of English rules concerning the exercise of adjudicatory jurisdiction with respect to absent parties, see the cases referred to by Dickinson (2016) B.Y.I.L. ***, **-**.

The Court in *Schibsby* was wrong to elevate a rhetorical device, in aid of a ruling on a point of interpretation of foreign law, to a legal principle. Contrary to the account presented in *Schibsby*,¹⁰³ Lord Ellenborough did not abandon the approach he had taken at *nisi prius*. Rather, he buttressed his conclusion that a practice which allowed judgment against a non-resident without summoning him or notifying him of the proceedings was illegitimate with a ruling that the law of Tobago did not, in fact, adopt such a practice.

This analysis is confirmed by the report of *Cavan v Stewart*, which, like *Buchanan*, was cited to the Court in *Schibsby*.¹⁰⁴ In argument in that case, the plaintiffs' counsel¹⁰⁵ referred both to *Fisher v Lane* and to *Buchanan v Rucker* in support of the argument that "it seemed contrary to the plainest principles of justice that they should be bound by a proceeding to which they were from want of notice utter strangers".¹⁰⁶ Garrow, for the defendant, argued that an actual summons was not necessary where a party, having once been present, had absented himself.¹⁰⁷ In finding for the plaintiffs, Lord Ellenborough concluded as follows:¹⁰⁸

"It is perfectly clear *on every principle of justice*, that you must either prove that the party was summoned, or at least that he was once on the island. ... If such a judgment could be enforced here without such proof, no merchant in London would be safe. The party must be proved to have been upon the island, in order to make him an absentee. If that fact had been established, his absence might perhaps have been inferred from a return of *non est inventas* to the process issued against him."

This reasoning is perfectly consistent with the above account of *Buchanan v Rucker*, and undermines the attempt in *Schibsby* to reconstruct Lord Ellenborough's reasoning in that case.

Turning, more briefly, to the case of *Douglas v Forrest*, the Court in *Schibsby* noted, correctly, that the Court of Common Pleas in *Douglas v Forrest* took care to confine its judgment to the facts of the case argued before it, involving a Scots born defendant owning property in Scotland and contracting a debt there.¹⁰⁹ However, the reasoning of Best C.J. is irreconcilable with the reasoning adopted in *Schibsby* insofar as it proceeds on the basis, first, that the critical question is

¹⁰³ Text to fn. 92 above.

¹⁰⁴ See fn. 88 above.

¹⁰⁵ In *Cavan*, the plaintiffs claimed monies received by the defendant on their account. The defendant relied on a judgment of the Supreme Court of Jamaica attaching the disputed part of the debt in satisfaction of a third party's claim against the plaintiffs.

¹⁰⁶ *Cavan* (1816) 1 Stark. 525 at 528; 171 E.R. 551 at 552.

¹⁰⁷ (1816) 1 Stark. 525 at 529.

¹⁰⁸ (1816) 1 Stark. 525 at 529-530 (emphasis added).

¹⁰⁹ *Schibsby* (1870) L.R. 6 Q.B. 155 at 162-163 referring to *Douglas* (1828) 4 Bing. 686 at 703.

whether the foreign court's decree is "consistent with the principles of justice" or "contrary to the principles of justice"¹¹⁰ and, secondly, that in answering this question it is appropriate to have regard, among other matters, to the lawful practices of the English courts in cases of a similar kind.¹¹¹ The Court in *Schibsby* failed even to acknowledge these differences of reasoning, let alone to account for them.

IV. STEERING A DIFFERENT COURSE?

It is submitted that the flaws in the reasoning of the Court of Queen's Bench in *Schibsby v Westernboez* are so substantial that the case should now be put to one side in any search for common law principles governing the recognition and enforcement of foreign judgments. On that view, the cases and commentaries in the latter part of the 19th Century which relied so heavily on *Schibsby* are also brought into doubt, and should not be followed without good reason. That, in turn, opens up the prospect that the Supreme Court might in a suitable case be persuaded to cast off the fetters of the closed list formulation and to adopt a new set of principles more suited to 21st century conditions.

The cases which preceded *Schibsby* lay out a framework for this future development. Indeed, if the Court in *Schibsby* had paid sufficient attention to them, the English common law might already have taken a different course, and reached a more satisfactory destination point. The following paragraphs seek to summarise and explain the principles which, it is submitted, had taken root by the middle of the 19th Century.

The starting point - of a technical, constitutional character - is that a foreign court operates outside the English legal system such that its judgments cannot formally have the status of *res judicata*.¹¹² Nevertheless, a foreign judgment may bind the parties both as to the existence of an obligation to pay the amount of the judgment debt and as to the grounds upon which judgment was given. The position is accurately stated by the Lord Chancellor, Lord Hardwicke, in *Gage v Bulkeley*.¹¹³

¹¹⁰ *Douglas* (1828) 4 Bing. 686 at 700-701, 702; 130 E.R. 933 at 939.

¹¹¹ (1828) 4 Bing. 686 at 701 (Best C.J.: "If we held that they were not consistent with the principles of justice, we should condemn proceedings of some of our own courts.").

¹¹² *Walker v Witter* (1778) 1 Doug. 1 at 5; 99 E.R. 1 at 4 (Lord Mansfield); *Hall v Odber* (1809) 11 East 118 at 124-125; 103 E.R. 949 at 951-952 (Lord Ellenborough); *Houlditch v Marquess of Donegal* (1834) 2 Cl.&F. 470 at 466-467; 6 E.R. 1232 at 1234 (Lord Brougham L.C.); *Smith v Nicolls* (1839) 5 Bing. N.C. 208; 132 E.R. 1084; *Philpott v Adams* (1862) 7 H.&N. 888; 158 E.R. 729. cf. *Ricardo v Garcias* (1845) 12 Cl.&F. 367 at 401; 8 E.R. 1450 at 1464 (Lord Campbell).

¹¹³ (1744) Ridge. t. Hard. 263 at 270-271; 27 E.R. 824 at 826-827 (Lord Hardwicke). See also *Nouvion v Freeman* (1887) 37 Ch.D. 244 at 256 (Lindley L.J.).

“Can a sentence or judgment pronounced by a foreign jurisdiction be pleaded in this kingdom to a demand for the same thing in any court of justice here? I always thought it could not, because every sentence, having its authority from the sovereign in whose dominions it is given, cannot bind the jurisdiction of foreign courts, who own not the same authority, and have a different sovereign, and are only bound by judicial sentence given under the same sovereign power by which they themselves act: ...

But though a foreign sentence cannot be used by way of plea in the courts here, yet it may be taken advantage of in the way of evidence: ... For though it does not bind the court as a judgment, yet it may and does the justice of the case between the parties themselves. You cannot in this kingdom maintain debt upon judgment obtained for money in a foreign jurisdiction; but you may an assumpsit in nature of debt upon a simple contract,¹¹⁴ and give the judgment in evidence, and have a verdict.”

Next, the basis upon which the common law treats a foreign judgment as binding between the parties, and giving rise to an obligation to pay the judgment debt, is that such effects are demanded as a matter of (natural) justice between the parties: “natural law requires the Courts of this country to give credit to those of another for the inclination and power to do justice”.¹¹⁵ In this respect, the common law concerning foreign judgments operates analogously to the law of unjust enrichment.¹¹⁶ The policy reasons underlying this principle of justice in this specific area are essentially the same as those which support the binding force of English judgments under the doctrine of *res judicata*,¹¹⁷ being well expressed in the Latin expressions *interest rei publicae ut sit finis*

¹¹⁴ Note the words “in the nature of”, emphasising that the action is quasi-contractual, not truly contractual. See also *Hall v Odber* (1809) 11 East 118 at 125; 103 E.R. 949 at 952 (Le Blanc J.: “a judgment in a foreign court has only the force of a simple contract between the parties”).

¹¹⁵ *Wright v Simpson* (1802) 6 Ves. Jun. 714 at 730; 31 E.R. 1272 at 1280 (Lord Eldon L.C.). See also *Arnott v Redfern* (1826) 3 Bing. 353 at 357-358; 130 E.R. 549 at 551 (Best C.J.: “plain and obvious principle of natural justice”); *Russell v Smyth* (1842) 9 M.&W. 810 at 818; 152 E.R. 343 at 346 (Lord Abinger C.B: “morality and justice”; “the advancement of substantial justice”).

¹¹⁶ *Moses v Macferlan* (1760) 2 Burr. 1005 at 1012; 97 E.R. 676 at 681 (Lord Mansfield: “the gist of this kind of action is, that the defendant, upon the circumstances of the case, is obliged by the ties of natural justice and equity to refund the money”). See *Westdeutsche Landesbank Girozentrale v Islington LBC* [1996] A.C. 669 at 697; [1996] 2 All E.R. 961 at 979 (Lord Goff of Chieveley).

Indeed, both areas have succumbed at one time to the fallacy that the obligation “in nature of debt upon a simple contract” must rest on consent (see *Sinclair v Brougham* [1940] A.C. 398; [1914] All E.R. Rep. 622, not followed *Westdeutsche v Islington LBC* (above); *Adams v Cape Industries*, discussed text to fn. 69-70 above.

¹¹⁷ *Geyer v Aguilar* (1798) 7 T.R. 681 at 695-696; 101 E.R. 1196 at 1204 (Lord Kenyon C.J.); *Bank of Australasia v Nias* (1851) 16 Q.B. 717 at 736-738; 117 E.R. 1055 at 1063 (Lord Campbell C.J.)

litium (the public interest that there be an end to litigation) and *nemo debet bis vexare pro una et eadem causa* (no one should be troubled twice by one and the same cause).¹¹⁸ At the policy level, no fundamental distinction was drawn between the judgments of English and foreign courts.¹¹⁹ Indeed, *Henderson v Henderson*,¹²⁰ now regarded as a landmark decision in the development of the law concerning the *res judicata* effects of English judgments¹²¹ was concerned with a judgment of a foreign (colonial) court.¹²²

The above considerations explain the *prima facie* force given to a judgment of a foreign court, whereby its validity is to be presumed.¹²³ Nevertheless, and consistently with the governing principle identified in the preceding paragraph, it is open to the party against whom the judgment is invoked to “impeach the justice of the judgment” by showing it to be irregularly, or unduly, obtained.¹²⁴ Although the substance of the judgment may not be re-opened,¹²⁵ that party

¹¹⁸ *Carl Zeiss Stiftung v Rayner & Keeler Ltd* [1967] 1 A.C. 853 at 933; [1966] 2 All E.R. 536 at 564 (Lord Guest); *Thrasivoulou v Secretary of State for the Environment* [1990] 2 A.C. 273 at 289 (Lord Bridge of Harwich); *Naraji v Shelbourne* [2011] EWHC 3298 (QB) at [124]-[125] (Popplewell J.).

¹¹⁹ The *dictum* of Lord Brougham, L.C., in *Houlditch v Donegal* (1834) 2 Cl.&F. 470 at 477; 6 E.R. 1232 at 1234 that “the difference between our Courts and their Courts is so great, that it would be a strong thing to hold that our Courts should give a conclusive force to foreign judgments” is concerned with possible grounds of objection to the recognition and enforcement of a foreign judgment, in particular on the ground of violation of the principles of natural justice.

¹²⁰ (1843) 3 Hare 100; 67 E.R. 313 (Court of Chancery); (1844) 6 Q.B. 288; 115 E.R. 111 (Court of Queen’s Bench).

¹²¹ *Virgin Atlantic Airways Ltd v Zodiac Seats UK Ltd* [2013] UKSC 46; [2014] A.C. 160 at [18]-[19] (Lord Sumption).

¹²² In the Court of Chancery, Wigram V-C declined to express an opinion as to whether the same force would attach to a judgment of “a foreign Court, from which there was no appeal to any superior jurisdiction which a Court of Equity in this country could regard as certain to administer justice in the case” (1843) 3 Hare 100 at 118; 67 E.R. 313 at 321. Elsewhere, the judgments of colonial and other courts were treated alike (see *Williams v Jones* (1845) 13 M.&W. 628 at 633; 153 E.R. 262 at 265 (Parke B.); *Emanuel v Symon* [1908] 1 K.B. 302; *Gavin Gibson & Co Ltd v Gibson* [1913] 3 K.B. 379).

¹²³ *Molony v Gibbons* (1810) 2 Camp. 502; 70 E.R. 1232; *Alivon v Furnival* (1834) 1 Cr. M.&R. 277 at 294; 149 E.R. 1084 at 1091 (Parke B.); *Russell v Smyth* (1844) 9 M.&W. 810 at 817-818 (Lord Abinger C.B.), 819 (Parke B.); 152 E.R. 343 at 346-347; *Robertson v Struth* (1844) 5 Q.B. 941; 114 E.R. 1503; *Henderson v Henderson* (1844) 6 Q.B. 288 at 298; 115 E.R. 111 at 115 (Lord Denman C.J.); *Ricardo v Garcias* (1845) 12 Cl.&F. 367 at 398; 8 E.R. 1450 at 1463 (Lord Lyndhurst L.C.); *Reynolds v Fenton* (1846) 3 C.B. 187 at 192; 136 E.R. 75 at 77 (Tindal C.J.); *Barber v Lamb* (1860) 8 C.B. N.S. 95; 141 E.R. 1100; *Crawley v Isaacs* (1867) 16 L.T. 529. References in the case law to the foreign judgment constituting “*prima facie* evidence” of the debt should be understood in this sense (see *Bank of Australasia v Nias* (1851) 16 Q.B. 717 at 735; 117 E.R. 1055 at 1062 (Lord Campbell C.J.)).

¹²⁴ *Sinclair v Frazer* (1768) Mor. 4542; *Walker v Witter* (1778) 1 Doug. 1 at 5; 99 E.R. 1 at 4 (Lord Mansfield); *Robertson v Struth* (1844) 5 Q.B. 941; 114 E.R. 1503; *Henderson v Henderson* (1844) 6 Q.B. 288 at 298; 115 E.R. 111 at 115 (Lord Denman C.J.).

may contest the binding force of the judgment on the ground, first, that the foreign court was not a court of “competent jurisdiction”, in the sense that it lacked adjudicatory jurisdiction with respect to the parties or the subject matter under the laws of the system of which it forms part;¹²⁶ or, secondly, that the foreign proceedings were contrary to the requirements of natural justice;¹²⁷ or, thirdly, that the foreign judgment was procured by fraud,¹²⁸ which itself may best be regarded as a particular aspect of natural justice.¹²⁹

The emerging consensus in the English case law prior to *Schibsby*, reflected in the submissions of the plaintiff’s counsel in that case,¹³⁰ is fully and accurately summarised by Pigot C.B. in the Irish case of *Maubourquet v Wyse*:¹³¹

See also *Henderson* at 299 (at 115) referring to the possibility of an application to the Court of Chancery for an injunction when the circumstances “render it unconscientious and inequitable to claim the sum which the [foreign court] has decreed to be paid”.

¹²⁵ *Godard v Gray* (1870) L.R. 6 Q.B. 139, discussed text to fn. 9-11 above.

¹²⁶ *Jurado v Gregory* (1669) 1 Vent. 32; 86 E.R. 23; *Ferguson v Mahon* (1839) 11 Ad.&E. 179 at 182-183; 113 E.R. 382 at 383 (Lord Denman C.J.); *Gage v Bulkeley* (1744) Ridge. t. Hard. 263 at 273-275; 27 E.R. 824 at 827-828 (see also Ves.Sen.Supp. 408; 28 E.R. 563); *Gage v Lady Stafford* (1754) 2 Ves. Sen. 556; 28 E.R. 354; *Robertson v Struth* (1844) 5 Q.B. 941; 114 E.R. 1503. See also *Robinson v Bland* (1760) 2 Burr. 1077 at 1080 (97 E.R. 717 at 719) (Lord Mansfield); *Vanquelin v Bonard* (1863) 15 C.B. N.S. 341, 143 E.R. 817, discussed text to fn. 79-80 above. cf. *Pemberton v Hughes* [1899] 1 Ch. 781, discussed text to fn. 74-81 above.

¹²⁷ *Wright v Simpson* (1802) 6 Ves. Jun. 714; 31 E.R. 1272; *Buchanan v Rucker* (see text to fn. 92-103 above); *Cavan v Stewart* (see text to fn. 104-108 above); *Douglas v Forrest* (see text to fn. 109-111 above); *Becquet v MacCarthy* (1831) 2 B.&Ad. 951; 109 E.R. 1396; *Alivon v Furnival* (1834) 1 Cr. M.&R. 277; 149 E.R. 1084; *Don v Lippmann* (1837) 5 Cl.&F. 1 at 20-21; 7 E.R. 303 at 310 (Lord Brougham); *Price v Dewhurst* (1839) 8 Sim. 279 at 302-305; 59 E.R. 111 at 120-121 (Shadwell V.C.); *Cowan v Braidwood* (1840) 1 M.&G. 882; 133 E.R. 589; *Henderson v Henderson* (1844) 6 Q.B. 288 at 298; 115 E.R. 111 at 115 (Lord Denman C.J.); *Reynolds v Fenton* (1846) 3 C.B. 187; 136 E.R. 75; *Vallee v Dumergue* (1849) 4 Ex. 290; 154 E.R. 1221; *Bank of Australasia v Nias* (1851) 16 Q.B. 717; 117 E.R. 1055; *Kelsall v Marshall* (1856) 1 C.B. N.S. 241; 140 E.R. 100; *Sheehy v The Professional Life-Assurance Company* (1857) 2 C.B. N.S. 211; 140 E.R. 395 and 3 C.B. N.S. 597; 140 E.R. 875; *Liverpool Marine Credit Co v Hunter* (1867) L.R. 4 Eq. 62 at 67-68 (Page Wood V.C.); *Crawley v Isaacs* (1867) 16 L.T. 529. See also *Maubourquet v Wyse* (1867) 1 Ir. Rep. Common Law Series 471, discussed text to fn. 131, 142 and 145 below.

¹²⁸ *Price v Dewhurst* *Price v Dewhurst* (1839) 8 Sim. 279; 59 E.R. 111; also Donn. 264; 47 E.R. 361; *Bank of Australasia v Nias* (1851) 16 Q.B. 717 at 734-736; 117 E.R. 1055 at 1062-1063 (Lord Campbell C.J.); *Ochsenbein v Papelier* (1873) L.R. 8 Ch.App. 695.

¹²⁹ *Crawley v Isaacs* (1867) 16 L.T. 529 at 531 (Bramwell B.). An examination of the limits of reviewability of a foreign judgment for fraud, or of the correctness of the decision of the Court of Appeal in *Aboulloff v Oppenheimer* (1882) 10 Q.B.D. 295, falls outside the scope of this article. See *AK Investment v Kyrgyz Mobil Tel Ltd* [2011] UKPC 7, [2012] 1 W.L.R. 1804 at [109]-[116] (Lord Collins).

¹³⁰ (1870) 19 W.R. 587 at 588.

¹³¹ *Maubourquet v Wyse* (1867) 1 Ir. Rep. Common Law Series 471 at 481. Although Pigot C.B. dissented as to the outcome of the case, the difference between the judges related to a point

“The proceedings in a foreign judgment ought to be in accordance with the law of the country in which the judgment has been given.¹³² And the comity of nations¹³³ requires that we should give full effect to such a judgment, provided it not be obtained by fraud or in a measure contrary to natural justice. If it be obtained in a proceeding conducted in a manner contrary to natural justice, then, although it may have been conformable to the law of the country in which it was pronounced, it cannot be legally enforced in a tribunal governed by the laws of England.”

In this area of the law, no less than in the law of unjust enrichment, it would be wrong to regard the principle of justice underlying the recognition and enforcement of foreign judgments as involving the exercise of discretion by the English court: “natural justice means, not a body of abstract principles, but practical maxims to be applied by the courts in the decision of actual cases”.¹³⁴ The circumstances in which the justice of a foreign judgment may be impeached must be identified according to the common law method of reasoning by reference to, and analogy with, the decided cases, albeit with due regard to the likelihood of changes over time in the “interests of justice” that underpin the common law, as legal, social and economic conditions develop.¹³⁵ On this approach, the jurisprudence and commentaries of the late 19th and early 20th Centuries should not be taken to have fixed once and for all the conditions under which foreign judgments will be recognised by English courts.¹³⁶

of pleading and not to the substantive law concerning the effect to be given to foreign judgments (see at 495-497 (Fitzgerald B.)).

¹³² See *Crawford v Witten* (1733) Lofft. 154; 98 E.R. 584 (Aston J.). This correctly identifies the exercise as one involving a choice of law process.

¹³³ The reference here, and elsewhere, to “the comity of nations” adds little in terms of substantive reasoning, other than to flag the judicial instinct to attribute to foreign judgments a force similar to English judgments (see *Geyer v Aguilar* (1798) 7 T.R. 681; 101 E.R. 1196; *Alves v Bunbury* (1814) 4 Camp. 2, 171 E.R. 10).

¹³⁴ See also A L Lowell, *The Government of England* (New York: Macmillan, 1912), vol. 2, 481, quoted by Sir W Holdsworth, *A History of the English Law* (London: Methuen 1964), vol. 10, 199.

With respect to the law of unjust enrichment, see *Lowick Rose LLP v Synnison* [2017] UKSC 32; [2017] 2 W.L.R. 1161 at [22] (Lord Sumption); *Goff & Jones* 9th edn, [1-26]-[1-27].

¹³⁵ See, e.g., *British Railways Board v Herrington* [1972] A.C. 877 at 941; [1972] 1 All E.R. 749 at 795 (Lord Diplock); *R v Governor of Brockhill Prison* [2001] 2 A.C. 19 at 48; [2000] 4 All E.R. 15 at 39 (Lord Hobhouse); *Lagden v O'Connor* [2003] UKHL 64; [2004] 1 A.C. 1067 at [86] (Lord Scott); *Michael v Chief Constable of South Wales Police* [2015] UKSC 2; [2015] A.C. 1732 at [102] (Lord Toulson).

¹³⁶ In *Abela v Baadarani* [2013] UKSC 44; [2013] 1 W.L.R. 2043 at [53], Lord Sumption drew attention to the facts that “[l]itigation between residents of different states is a routine incident of modern commercial life” and that “[a] jurisdiction similar to that exercised by the English court is now exercised by the courts of many other countries”. See also *Agar v Hyde* (2000) 201 C.L.R.

By contrast with the rigid approach that now prevails, the cases that preceded *Schibsby*¹³⁷ recognised that the enquiry as to whether the foreign proceedings were compliant with natural justice required that account be taken of *all* of the circumstances of the case¹³⁸ including (1) the nature of the adjudicatory jurisdiction asserted by the foreign court in the particular case,¹³⁹ (2) the connections between the parties and the subject matter of the dispute to the foreign court and to the territory over which it exercised jurisdiction,¹⁴⁰ and (3) the nature of the adjudicatory jurisdiction legitimately exercised by English courts in similar cases.¹⁴¹ This approach allowed a differentiation in treatment between absent defendants who had no substantial connection to the foreign jurisdiction (such as the defendant in *Buchanan*) who could never justly be summoned to appear before its courts,¹⁴² and those with such a connection (such as the defendant in *Douglas*), who could be summoned provided that adequate notice of the proceedings had been given to enable him to defend himself, the adequacy of the steps taken being judged according to the type and degree of connection.¹⁴³ The defendant's absence was not, of itself, sufficient to invalidate the proceedings.¹⁴⁴

552 at [42] (Gaudron, McHugh, Gummow and Hayne JJ., H.C. Aus.), but cf. A Dickinson (2014) 130 L.Q.R. 197, 201. cf. also *Lucasfilm v Ainsworth Ltd* [2009] EWCA Civ 1328 at [193].

¹³⁷ See fn. 123-131 above.

¹³⁸ *Don v Lippmann* (1837) 5 Cl.&F. 1 at 21; 7 E.R. 303 at 310 (Lord Brougham: “[*Douglas v Forrest*] shows how much the rule is affected by circumstances”). See also *Maubourquet v Wyse* (1867) 1 Ir. Rep. Common Law Series 471 at 483-492 (Pigot C.B.).

¹³⁹ *Buchanan v Rucker* (1807) 1 Camp. 63; 170 E.R. 877 and (1808) 9 East 192; 103 E.R. 546; *Douglas v Forrest* (1828) 4 Bing. 686; 130 E.R. 933; *Becquet v MacCarthy* (1831) 2 B.&Ad. 951; 109 E.R. 1396; *Ferguson v Mahon* (1839) 11 Ad.&E. 179; 113 E.R. 382; *Reynolds v Fenton* (1846) 3 C.B. 187; 136 E.R. 75; *Meus v Thelluson* (1853) 8 Ex. 638; 155 E.R. 1507; *Sheehy v The Professional Life-Assurance Co.* (1857) 2 C.B. N.S. 211; 140 E.R. 395 and 3 C.B. N.S. 597; 140 E.R. 875.

¹⁴⁰ *Buchanan* (1807) 1 Camp. 63; 170 E.R. 877 and (1808) 9 East 192; 103 E.R. 546; *Cavan v Stewart* (1816) 1 Stark. 525; 171 E.R. 551; *Douglas* (1828) 4 Bing. 686; 130 E.R. 933; *Cowan v Braidwood* (1840) 1 M.&G. 882; 133 E.R. 589.

¹⁴¹ *Douglas* (fn. 16) (see text to fn. 101 above). See also *Sheehy v Professional Life* (1857) 2 C.B.N.S. 211 at 241-242 (140 E.R. 395 at 407) (Cockburn C.J., in argument).

¹⁴² See text to fn. 92-103 above; see also *Maubourquet v Wyse* (1867) 1 Ir. Rep. Common Law Series 471 at 485-486, 491 (Pigot C.B.).

¹⁴³ *Cowan* (1840) 1 M.&G. 882, at 893; 133 E.R. 589, 593 (Tindal C.J.: “reasonable to suppose that someone would have appeared for him”), at 894 (at 594) (Coltman J.: “sufficient notice of the proceedings as to satisfy the justice of the case”); *Reynolds* (1846) 3 C.B. 187 at 193; 136 E.R. 75 at 78 (Tindal C.J.: “the defendant had no means of being present”); *Vallee v Dumergue* (1849) 4 Ex. 290 at 303; 154 E.R. 1221 at 1227 (Alderson B.: “it is not contrary to natural justice that a man who has agreed to receive a particular mode of notification of legal proceedings should be bound by the judgment in which that particular mode of notification has been followed, even though he may not have had actual notice of them”); *Bank of Australasia v Nias* (1851) 16 Q.B. 717 at 734; 117 E.R. 1055 at 1062 (Lord Campbell C.J.); also *Maubourquet v Wyse* (1867) 1 Ir. Rep. Common Law Series 471 at 483-484, 487-491 (Pigot C.B.).

¹⁴⁴ *Cowan* (1840) 1 M.&G. 882 at 895; 133 E.R. 589 at 594 (Maule J.).

Through this approach, the English courts had begun to develop and to refine a broad and flexible spectrum of enforceability varying according to the circumstances of the case.¹⁴⁵ That evolution was abruptly terminated with the judgment of the Court of Queen’s Bench in *Schibsby*. As appears above,¹⁴⁶ the Court in *Schibsby* chose to focus exclusively and rigidly upon a limited number of territorial connections, denuding the law of the flexibility and sensitivity to the circumstances that it had formerly possessed. Later cases and commentaries further controlled the requisite territorial connections, placing the common law in a straitjacket from which it has not yet emerged.¹⁴⁷

If the English courts can be persuaded to put *Schibsby v Westenholz* to one side, the principle of (natural) justice identified above offers a framework for developing a more flexible approach to the recognition and enforcement of judgments in England.¹⁴⁸ The approach would, in terms of the underlying principle if not the detail, be compatible with that now adopted by the Supreme Court of Canada,¹⁴⁹ which has required the presence of a “real and substantial connection with either the subject matter of the action *or* the defendant” as a minimum condition for the recognition and enforcement of a foreign judgment,¹⁵⁰ subject in any event to a defence if it can be shown that judgment does not comply with the requirements of “natural justice” (i.e. “Canadian notions of fundamental justice”).¹⁵¹ According to the “real and substantial connection” test, “a defendant can reasonably be brought within the embrace of a foreign jurisdiction’s law where he or she has participated in something of significance or was actively involved in that foreign jurisdiction”.¹⁵² It is not necessary that he or she be present or resident within the territory over which the foreign court exercises jurisdiction at the time of commencement of proceedings. Those propositions are in accordance with the approach that almost every legal system, including England, takes to the exercise of civil jurisdiction by their own courts, requiring a substantial connection to the dispute but no more than that.¹⁵³

¹⁴⁵ See the authorities referred to in the preceding footnotes, summarised by Pigot C.B. in *Maubourquet v Wyse* (1867) 1 Ir. Rep. Common Law Series 471 at 483-492.

¹⁴⁶ See section I of this article.

¹⁴⁷ See section II.

¹⁴⁸ *Schibsby* could perhaps be accommodated within this framework, as an attempt (albeit flawed) to lay down the limits of the circumstances in which a defendant could justly be summoned by a foreign court in 1870.

¹⁴⁹ *Beals v Saldanha* [2003] 3 S.C.R. 416.

¹⁵⁰ [2003] 3 S.C.R. 416 at [21], [29] (Major J.).

¹⁵¹ [2003] 3 S.C.R. 416 at [35], [40], [59]-[70], but cf. at [235]-[245], [252]-[266] (LeBel J.).

¹⁵² [2003] 3 S.C.R. 416 at [32].

¹⁵³ *Abela v Baadarani* [2013] UKSC 44 at [53] (Lord Sumption).

No doubt, the test as applied by the Canadian courts (and any test founded upon the common law's conception of what justice requires) is open to criticism as being too vague and as being capable of giving rise to legal uncertainty.¹⁵⁴ The answer lies, however, not in rejection of the underlying principle but in guidance from the courts as to what degree of connection may be, and what is not, capable of supporting recognition and enforcement in accordance with that principle.¹⁵⁵ Just as the *Buchanan v Rucker* and the decisions that followed it sought to lay down the limits of the doctrine in the 19th century,¹⁵⁶ so too their modern counterparts would be called upon provide guidance suited to international litigation in the 21st century.

Andrew Dickinson *

* Fellow, St Catherine's College and Professor of Law, University of Oxford; Solicitor.

¹⁵⁴ *Club Resorts Ltd v Van Breda* [2012] 1 S.C.R. 572 at [30]; A Briggs (2013) 129 L.Q.R. 87, 94-96; J-G Castel, 'The Uncertainty Factor in Canadian Private International Law' (2007) 52 McGill L.J. 555. See also T Monestier '(Still) A Real and Substantial Mess – The Law of Jurisdiction in Canada' (2013) 36 Fordham Int. L.J. 397, esp at 455-458; J Blom, 'Constitutionalizing Canadian private international law – 25 years after Morguard' (2017) 13 J. Priv. Int. L. 259, 281-285.

¹⁵⁵ This is the approach that the Canadian courts have taken in extending the "real and substantial connection" test to questions concerning their own adjudicatory jurisdiction (see *Club Resorts Ltd v Van Breda* [2012] 1 S.C.R. 572 esp at [35], [82]).

¹⁵⁶ See sections III and IV of this article.