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Assumed Jurisdiction of Canadian Common Law Courts

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ASSUMED JURISDICTION OF CANADIAN COMMON LAW COURTS

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I. GENERAL CONSIDERATIONS

In all the common law provinces, when a defendant cannot be served within the jurisdiction or does not submit to it, statutory rules provide for service of the writ or notice of the writ or originating notice[1] out of the jurisdiction in cases where there is some connection between the subject-matter of the action or the parties and the forum. This legislation which is valid under section 92 (13) and (14) of the British North America Act[2] is very useful as it is often highly desirable and altogether appropriate to try a case in a province in which the defendant may not be present at all. The extension of jurisdiction over absent defendants in specified circumstances, which is an interference with the exclusive jurisdiction of the province or state where service is to be effected, originated in England.[3] However, the statutory rules in the common law provinces are not always the same as the English rules. In some

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[1] As to what constitutes a writ of summons see Ont. R. 2 (s). Where leave is given to issue a writ for service *ex juris* and a foreign defendant is served with notice, but no writ has been issued, the service is a nullity. *Duggan* v. *Duggan*, [1947] O.W.N. 182; *Morris* v. *Morris*, [1947] O.W.N. 191; *Brown* v. *Humble*, [1959] O.R. 586.

[2] See *Ashbury* v. *Ellis*, [1893] A.C. 339; *Stairs* v. *Allan* (1896), 28 N.S.R. 410 (C.A.).

[3] See English *Common Law Procedure Act* of 1852, 15 & 16 Vict., c. 76, ss. 18 & 19, now see Order 11 of the Rules of the Supreme Court.

provinces, they contain similar provisions with a few variations, in others they depart from the English model.[4] In spite of the differences certain principles are common to all the rules of practice.

The rules are exhaustive and embrace all the cases in which the jurisdiction of the court is to be exercised where the defendant was not served within the jurisdiction.[5]

In most provinces, the court, upon an application being made to it, may authorize the service of the writ or notice of summons upon an absent defendant, provided the subject-matter of the suit prima facie falls within the scope of the rules, although, it may be that something more must be shown than a prima facie case. The proper test has been said to be "a good arguable case" or "a strong case for argument".[6] In other words the plaintiff must show that he has a good cause of action within the rules. However, he need not satisfy the court beyond a reasonable doubt.[7]

Invariably, applications are made ex parte and must be supported by an affidavit.[8] The plaintiff has a duty to disclose all the facts in his possession that might help the court in deciding whether to allow or refuse service. For instance, in British Columbia every application for leave to serve a writ *ex juris* must be supported by affidavit or other evidence, stating that in the belief of the deponent the plaintiff has a good cause of action, and showing in what place or country such defendant is or probably may be found, and the grounds upon which the application is made. No leave will be granted unless it is made sufficiently to appear to the court or judge that the case is a proper one for

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[4] See for instance B.C. Order XI; Sask. Order IV; N.B. Order 11; Alta. Part 4; N.S. Order XI.

[5] Note that where a person though resident out of the jurisdiction is carrying on business within the jurisdiction in a name other than his own, he may be sued as provided by R. 110 (Ont.) which appears to constitute an exception to this principle, unless the plaintiff wishes to serve the defendant personally in which case R. 28-29 (Ont.) must be complied with.

[6] *Vitkovice Horni a Hutni Tezirstuo* v. *Korner*, [1951] A.C. 869; *Jenner* v. *Sun Oil Co.*, [1952] O.R. 240; *Fleming & Poole* v. *Eastern Textile Products Ltd.*, [1952] O.W.N. 542. Also *Can. Brine Ltd.* v. *Wilson Marine Tpt. Co.*, [1964] 2. O.R. 278.

[7] *Can. Westinghouse Co.* v. *Davey*, [1964] 2 O.R. 282 (C.A.).

[8] *O'Neil* v. *O'Neil* (1913), 4 W.W.R. 478, 11 D.L.R. 440 (Sask.), [whether plaintiff's solicitor is a proper party to make affidavit].

service out of the jurisdiction.[9] Something more must appear by the affidavit than the mere statement that the depondent or the plaintiff's solicitor considers that it is a proper case for granting leave for service out of the jurisdiction. The affidavit must show and not merely state that the case is a proper one for granting the leave. This does not mean that there is to be a trial of the applicant's rights, but there should be enough disclosure of the material facts to enable the judge to exercise his discretion judicially in determining whether the case is a proper one for service out of the jurisdiction.[10]

The affidavit must show that the deponent believes the applicant has a right to the relief claimed, the place or country in which the person to be served is or probably may be found; whether the person to be served is a British subject and that the case is a proper one for service out of the jurisdiction under the rules.

Service effected at a place other than that provided for in the order is a nullity.[11] The order setting aside improper service does not affect the validity of the writ itself.[12]

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[9] O. XI, R. 4. In Ontario see R. 26, in Sask., R. 30, Alta. R. 31; see *Empire-Universal Films Ltd.* v. *Rank*, [1948] O.R. 235; the affidavit must not only state the grounds of the belief that the facts alleged in the statement of claim are true but must show that the plaintiff has a good cause of action under the rule. *Niagara of Western Ontario Ltd.* v. *Monarch Massage Equipment Ltd.*, [1967] 2 O.R. 182; *Soucy* v. *Routhier* (1967), 68 D.L.R. (2d) 154 (N.B.C.A.); *Cottrell* v. *Hanen*, [1963] 1 O.R. 164; *Imperial Bank* v. *Orbit Film Corp.*, [1962] O.W.N. 65; *Safrance* v. *Morris*, [1956] O.W.N. 97; *Philcox* v. *Philcox*, [1943] O.W.N. 191; *Can. Brine Ltd.* v. *Nat. Sand & Material Co.*, [1963] Ex. C.R. 31; *Rabbiah* v. *Deak & Co.*, [1961] O.W.N. 280; *Bell Bros. Transport Ltd.* v. *Cummins Diesel Power Ltd.* (1962), 40 W.W.R. 169 (Alta.); *Davis* v. *Winatchee Valley Fruit Growers' Ass'n.* (1913), 3 W.W.R. 922, 23 W.L.R. 326, 9 D.L.R. 402 (Alta.); *McCully* v. *Barber* (1969), 2 N.B.R. (2d) 78; *McCowan* v. *Menasco Mfg. Co.*, [1941] O.W.N. 133; *Perkins* v. *Mississippi etc. SS Co.* (1884), 10 P.R. 198; *Holund Holdings Ltd.* v. *Lewicky* (1968), 63 W.W.R. 766 (B.C.); *Orr* v. *Brown*, [1932] 2 W.W.R. 626, 45 B.C.R. 323, [1932] 3 D.L.R. 364 (C.A.); *Jones* v. *Bissonnette* (1902), 3 O.L.R. 54; *Batchlett* v. *United Cobalt Mines Ltd.*, [1953] O.W.N. 425; *Gilpin* v. *Hazel etc. Mining Co.* (1913), 5 O.W.N. 518; *Heaman* v. *Humber* (1914), 6 O.W.N. 221; *Kurtz* v. *Ins. Co. of N.A.* (1929), 37 O.W.N. 148; *Lehman and Mulholland* v. *Semmler*, [1948] 1 W.W.R. 152 (Alta.); *Frid Lewis Co.* v. *Holmes* (1915), 8 W.W.R. 1195 (Sask.).

[10] *Empire-Universal Films Ltd.*, v. *Rank*, [1948] O.R. 235; *Deuterium of Canada Ltd.* v. *Burns & Roe of Canada Ltd.* (No. 2) (1971), 15 D.L.R. (3d) 585 (N.S.).

[11] *Safrance* v. *Morris*, [1956] O.W.N. 97; *Castagner* v. *Kaasa*, [1935] 2 W.W.R. 425 (Sask.).

[12] *Safrance* v. *Morris*, *ibid.*

After service upon him, the defendant may appear to contest the jurisdiction. In some provinces, in some cases, no prior leave or order is necessary before the writ of summons or statement of claim can be served out of the jurisdiction. Thus it is not necessary to obtain an order allowing service *ex juris* before commencement of the action.[13] Every statement of claim served out of the jurisdiction without leave must state specifically upon which ground service is permitted under the rule.[14]

The assumed jurisdiction over an absent defendant is discretionary. He will not be forced to answer local proceedings merely because a case comes within the rules of practice for service *ex juris* unless it is reasonable and convenient in all the circumstances to ask him to do so. Any ambiguity or doubt in the application of the rules and the exercise of discretion is to be resolved in favour of the absent foreign defendant.[15] Thus, the court, before granting leave to

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[13] See *e.g.* Sask. O. IV, R. 27 (1). However in the cases provided for in R. 29 leave must be obtained *e.g.* action upon a foreign judgment and the defendant has assets within the jurisdiction. In Manitoba see R. 28 and for leave of court R. 29, 30 and *Belan* v. *Neumeyer* (1960), 67 Man. R. 141.

[14] Sask. O. IV, R. 27 (2). In provinces where prior leave of court is necessary, leave to issue a writ of summons for service out of the jurisdiction must be distinguished from leave to serve the writ or notice thereof out of the jurisdiction. There are two applications, one for leave to issue a writ and one for leave to serve it. *Roth* v. *Broadfoot* (1953), 8 W.W.R. (N.S.) 349 (B.C.C.A.). O. II, R. 4 of B.C. states: "No writ of summons for service out of the jurisdiction, or of which notice is to be given out of the jurisdiction shall be issued without leave of the Court or judge"; and see *Bloom* v. *N.Y. Tailoring Co.* (1913), 5 W.W.R. 80, 18 B.C.R. 395, 13 D.L.R. 789. In British Columbia in a matrimonial cause no leave is required to issue or serve a writ or notice of a writ out of the jurisdiction (O. LX, R. 15 and *Holland* v. *Holland* (1963), 45 W.W.R. 412 (B.C.).) As to the B.C. practice where one defendant outside the jurisdiction and other defendants within the jurisdiction see *Bell* v. *Klein* (1954), 13 W.W.R. (N.S.) 203 (B.C.).

Where an action is brought in respect of a personal tort against an infant, resident within the province, service of the writ on his guardians also resident within the province, is good service on the infant.

If however at the time of the service of the writ upon his guardians within the province, the infant is *ex juris*, the proper procedure in British Columbia is to apply for the appointment of a guardian *ad litem* and the infant must be served *ex juris* with the notice of motion for such appointment. *Humm* v. *West* (1966), 56 W.W.R. 257 (B.C.).

[15] *Jenner* v. *Sun Oil Co.*, [1952] O.R. 240; *Beaver Lamb etc. Co.* v. *Sun Ins. Office*, [1951] O.R. 401; *Charles* v. *City News Co.* (1928), 37 O.W.N. 41; *Can. Westinghouse Co.* v. *Davey*, [1964] 2 O.R. 282.

serve a writ out of the jurisdiction or leave to proceed, must consider very seriously whether it would be a convenient forum to try the case. The discretion of the court should be exercised only with great care and with full knowledge and careful consideration of all the relevant circumstances. Full and fair disclosure is necessary and failure to do so may justify the court in refusing to make an order or in subsequently setting it aside.[16] The matter under consideration must be within the spirit and letter of the rule. The court will look at the whole matter. There must be reasonable evidence that the case falls within one of the subsections or clauses of the rule unless the defendant can convince the court that such evidence should be disregarded. Where the plaintiff makes out a good arguable case but a doubt still remains which will be resolved at the trial, service may be allowed and the defendant granted leave to enter a conditional appearance.[17] Thus, in general the court is not bound to allow service merely because the case falls within the terms of the rule.[18]

In considering whether the court of a province can do justice in the particular case, the following factors should be considered: whether the forum is one to which the parties may conveniently resort; whether it can give an intelligent decision as to the law and the facts; and whether it has or is likely to have the power to enforce its decision.

Substituted service within the jurisdiction may be allowed of a writ for service out of the jurisdiction.[19] Objec-

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[16] *Empire-Universal Films Ltd.* v. *Rank*, [1948] O.R. 235 (C.A.).

[17] Ont. R. 48; see also *Can. Brine Ltd.* v. *Wilson Marine Tpt. Co.*, [1964] 2 O.R. 278.

[18] *Brenner* v. *American Metal Co.* (1920), 48 O.L.R. 525; *Denton, Mitchell & Duncan Ltd.* v. *Jacobs* (1923), 23 O.W.N. 677; *Kerner* v. *Angus & Co.*, [1946] O.W.N. 624; *O'Connor* v. *Lemieux* (1927), 60 O.L.R. 365; *Lewis* v. *Wiley* (1923), 53 O.L.R. 608; *Fowler* v. *Home Frocks Ltd.*, [1942] O.W.N. 633; *McCutcheon* v. *McCutcheon* (1930), 38 O.W.N. 90; *Aitken* v. *Gardiner*, [1953] O.W.N. 555; *Lawrence* v. *Lawrence*, [1953] O.W.N. 124; *Curley* v. *Clifford*, [1941] O.W.N. 154; *Lawson* v. *Lawson*, [1964] 2 O.R. 321; *Frustaglio* v. *Barbuto*, [1960] O.W.N. 551; *Russell* v. *Greenshields* (1911), 23 O.L.R. 171, 24 O.L.R. 113; *Perkins* v. *Mississippi etc. SS. Co.* (1884), 10 P.R. 198; *Preiswerck Ltd.* v. *Angeles-Seattle Motor Express Incorp.* (1957), 23 W.W.R. 574 (B.C.); *International Power* v. *Clark* (1963), 41 D.L.R. (2d) 260; aff'd (1964), 43 D.L.R. (2d) 394 (B.C.C.A.); *Original Blouse* v. *Bruck Mills* (1963), 45 W.W.R. 150 (B.C.); *Brewer* v. *Hadley Manufacturing Co. et al.*, [1969] 2 O.R. 756; *Can. Brine Ltd.* v. *Nat. Sand & Material Co.*, [1963] Ex. C.R. 31.

[19] *Goodman* v. *Brull* (1916), 11 O.W.N. 175; *Bedell* v. *Gefaell* (No. 2), [1938] O.R. 726, at 729; *Sakalo* v. *Tassotti*, [1963] 2 O.R. 537 (C.A.); *Saskatoon Mtge. & Loan Co.* v. *Roton*, [1942] 3 D.L.R. 54, at 57 (Sask. C.A.).

tions to an order for service out of the jurisdiction cannot be raised as a defence, but by motion to set aside the order and the service.[20]

Service *ex juris* other than in compliance with Ontario Rule 25 is a nullity and subsequent proceedings against such person founded on such service cannot be maintained when the person upon whom such irregular service has been attempted subsequently attorned to the jurisdiction of the court.[21]

Foreign corporations are within the rule and may be served abroad.[22]

Notwithstanding that an order permitting service out of the jurisdiction has been made, the defendant can still be served within the province so long as he is not enticed to enter the jurisdiction. The plaintiff must then elect under which service he will proceed and if he elects to proceed on the personal service, he may be ordered to pay the costs of the proceedings to allow and affirm the other service and of the proceedings taken on the strength thereof.[23]

Where a defendant desires to contend that an order for service out of the jurisdiction could not properly be made, a conditional appearance may be entered by leave.[24] If the

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[20] *Grocer's Wholesale Co.* v. *Bostock* (1910), 22 O.L.R. 130; *B.A. Oil Co.* v. *Born Eng. Co.* (1963), 38 D.L.R. (2d) 523 (Alta. C.A.).

[21] *Sakalo* v. *Tassotti*, [1963] 2 O.R. 537.

[22] *Alta. Pulpwood Exporting Co.* v. *Falls Paper Co.* (1954), 13 W.W.R. (N.S.) 536 (Alta. C.A.).

[23] *Lewis* v. *Wiley* (1923), 53 O.L.R. 608; also, *Empire-Universal Films Ltd.* v. *Rank*, [1948] O.W.N. 704.

[24] *Howland* v. *Ins. Co. of North America* (1895), 16 P.R. 514; *Campau* v. *Randall* (1896), 17 P.R. 243; *Grocer's Wholesale Co.* v. *Bostock* (1910), 22 O.L.R. 130. See also the following cases dealing with leave to enter a conditional appearance: *Bain* v. *University Ltd.* (1914), 6 O.W.N. 22; *Standard Const. Co.* v. *Wallberg* (1910), 20 O.L.R. 646; *Bedell* v. *Gefaell*, [1938] O.W.N. 88; *Can. Brine Ltd.* v. *Wilson Marine Tpt. Co.*, [1964] 2 O.R. 278; *McCowan* v. *Menasco Mfg. Co.*, [1941] O.W.N. 133; *McCutcheon* v. *McCutcheon* (1930), 38 O.W.N. 90; *Auburn Nurseries Ltd.* v. *McGrady* (1913), 5 O.W.N. 165; *Blackley* v. *Elite Costume Co.* (1905), 9 O.L.R. 382; *Nixon* v. *Jamieson* (1909), 18 O.L.R. 625; *Burson* v. *German Union Ins. Co.* (1904), 3 O.W.R. 230, 372; *Canadian Radiator Co.* v. *Cuthberston* (1905), 9 O.L.R. 126; *Osolsky* v. *Schwartz* (1929), 37 O.W.N. 121; *Kemerer* v. *Watterson* (1910), 20 O.L.R. 451; *Wolsely Tool etc. Co.* v. *Jackson Potts & Co.* (1914), 6 O.W.N. 109; *Farmers Bank* v. *Heath* (1912), 3 O.W.N. 682, 805, 879; *McMahon* v. *Waskochil*, [1945] O.W.N. 887; *Stanwell Oil and Gas Ltd.* v. *Blair Holding Corp.*, [1954] O.W.N. 853; *cf.*: *Dom. Coal Co.* v. *Kingswell SS. Co.* (1897), 30 N.S.R. 397; *Sarco Can Ltd.* v. *Pyrotherm Equipment Ltd.* (1969), 41 Fox Pat. 22 (Ont.).

defendant enters an unconditional appearance to the writ of summons, he cannot subsequently seek to have that appearance set aside and apply for leave to enter a conditional appearance.[25] In Ontario, the conditional appearance is not a provisional appearance. It is used where, for some reason, it is not convenient to determine the question whether the case can be brought within Rule 25 until the hearing of the action. Ontario Rule 48 applies only to the case where an order for service out of the jurisdiction has been made.[26]

A defendant who moves to set aside an order permitting service out of the jurisdiction or in the alternative, for leave to enter a conditional appearance is not precluded from appealing the dismissal of the motion to set aside the order permitting service *ex juris* simply because he has been successful in obtaining leave to enter a conditional appearance.[27]

Ontario Rules 27, 28, 29, 30 provide as follows:

27. — (1) An order allowing service of a writ of summons out of Ontario may be made before the writ is issued and shall limit the time for entering appearance.

(2) An order allowing service out of Ontario of a notice of motion or attaching order shall limit a time that must elapse after service before the day when the motion is to be heard.

(3) An order allowing service out of Ontario of a judgment or order or notice to prove claims thereunder shall limit a time for moving to add to, vary or set aside the judgment or order.

(4) In limiting the time, regard shall be had to the place where service is to be effected.[28]

An order allowing service of the writ of summons out of Ontario must comply with form 70 by providing that the statement of claim must be served with the writ.[29]

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[25] *Raymond* v. *Adrema Ltd.*, [1962] O.R. 677; *Sears* v. *Meyers* (1893), 15 P.R. 456; *Croil* v. *McCullough* (1906), 11 O.L.R. 282.

[26] *Gonzales* v. *Pardo, Halprin* v. *Pardo,* [1946] O.W.N. 910.

[27] *Empire-Universal Films Ltd.* v. *Rank,* [1948] O.R. 235. And see *McCowan* v. *Menasco Mfg. Co.,* [1941] O.W.N. 133; *Pickard* v. *Reynolds International Pen Co.,* [1946] O.W.N. 907, unsuccessful application to set aside order for service *ex juris* not a bar to application under R. 48.

[28] Form 70.

[29] In general see *Kurtz* v. *Ins. Co. of North America* (1929), 37 O.W.N. 148; *Sharpe* v. *Price,* [1945] O.W.N. 355, *Caplan* v. *Beecroft,* [1940] O.W.N. 104.

28. Where a defendant is to be served out of Ontario with a writ of summons or notice in lieu thereof, the statement of claim shall be served therewith unless the writ is specially endorsed.[30]

29. Where the defendant is to be served out of Ontario and he is neither a British subject nor in British dominions, notice of the writ and not the writ itself shall be served, and such notice shall, except as herein provided, be served personally unless otherwise directed.[31]

Service of a writ may be made on a foreigner anywhere in British dominions[32] but service of a writ instead of a notice on a foreigner not in British dominions is a nullity.[33]

30. Where service is to be effected upon a person, other than a British subject, in a foreign country to which this rule is by direction of the Chief Justice of Ontario made to apply, the following procedure shall be adopted:

1. The notice of the writ and statement of claim shall be transmitted by the Registrar of the Supreme Court to the Under-Secretary of State for External Affairs for Canada with a copy thereof, translated into the language of the country in which service is to be effected, with a request for further transmission of the same to the government of the country in which it is to be served, with the request that service, either personal or in such manner as is consistent with the practice and usage of that country when personal service cannot be made, be effected and that return be made showing how such service has been effected.

2. Any such official return shall be regarded as proof of the facts therein stated.

3. The plaintiff's solicitor shall, before the papers are transmitted, pay or secure to the satisfaction of the Registrar a sum to answer the fees and charges in connection with such service.

This rule applies to countries to which it is expressly made applicable by order of the Chief Justice of Ontario.

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[30] See *Sharpe* v. *Price, ibid.*, and *Rabbiah* v. *Deak & Co.*, [1961] O.W.N. 280.

[31] See *Batchlett* v. *United Cobalt Mines*, [1953] O.W.N. 425 (third party notice); *Saulnier* v. *McCormick* (1929), 1 M.P.R. 495 (N.B.C.A.). Note that under the present English O. 11, R. 3, notice of a writ is to be served on all defendants out of the jurisdiction whether British subjects or not and wherever served abroad.

[32] *Spink* v. *Sill* (1916), 10 O.W.N. 404.

[33] *Henderson* v. *Hall* (1880), 8 P.R. 353; *Bedell* v. *Gefaell* (No. 2), [1938] O.R. 726, at 729.

A. Service of Process of Foreign Court

31. Where in a civil or commercial matter pending before a court or tribunal of a foreign country a letter of request from such court or tribunal for service on a person in Ontario of any process or citation in such matter is transmitted to the Supreme Court of Ontario, the following procedure shall be adopted:

1. The letter of request for service shall be accompanied by a translation thereof in the English language and by two copies of the process or citation to be served, and two copies thereof in the English language.

2. Service of the process or citation shall, by a direction of a judge, be effected by any sheriff or his authorized agent.

3. Such service shall be effected by delivering to and leaving with the person to be served one copy of the process to be served and one copy of the translation thereof or may be effected in such other manner as is directed by the letter of request.

4. After service has been effected, the process shall be returned to the Registrar of the Supreme Court, together with the evidence of service by affidavit of the person effecting the service, sworn before a notary public and verified by his seal, and particulars of charges for the cost of effecting such service.

5. The Registrar of the Supreme Court shall return the letter of request for service, together with the evidence of service, with a certificate appended thereto (Form 17) duly sealed with the seal of the said court.

6. Nothing in this rule prevents service from being effected in any other manner in which it may now be made. This rule prescribes the procedure to be followed for serving the process of a foreign court in Ontario.

B. International Conventions

As yet Canada has signed no multilateral convention on civil procedure, but she has signed several bilateral ones, whose provisions are generally quite similar. First the documents to be served abroad must be sent through the diplomatic channels of the requesting state for proper authentication.[34] These documents must be written not only in the language of the requesting state but also in an authentic

[34] *Canada-Austria Convention,* Canada Treaty Series 1935, No. 16, art. 3(a).

translation into the language of the state of execution. Herein are included descriptions of the original parties to the action, of the recipient, of the nature of the documents themselves, and copies thereof.

Each state specifies to whom the request should be forwarded, for instance in Austria it is the Federal Ministry of Justice and in Spain, the President of the competent Territorial Court.

Service is effected according to the local laws of the state of execution, but the latter may comply with special requests where these are not incompatible with its own law.[35] In addition many conventions allow other methods of service without any direct intervention such as: (1) service by diplomatic or consular officers of the requesting state; (2) service by an agent appointed for that purpose either by a judicial authority of the requesting state, or by a party on whose application the document was issued; (3) by the post[36]; (4) any other mode of service recognized as valid in the requesting state[37] or the state of execution[38].

But of course, with these methods no compulsion may be used, and the validity of the service is a matter to be determined by the respective courts of the High Contracting Parties.

If the request is sent to an authority who is incompetent to execute it, he is under an obligation to send it himself to the proper competent authority where it can be executed.[39]

Most treaties provide that a requested state may refuse assistance if the authenticity of the request is not established and the sovereignty or safety of the requested state may be compromised by executing the request, or the latter provision alone may be stipulated.

The requested authority is obliged to furnish a document proving that service was executed, or giving the reason why the request was not carried out.[40]

Finally all the conventions stipulate that although there is to be no fee for complying with a foreign request, never-

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[35] *Ibid.*, 3(e).

[36] *See Canada-Turkey Convention,* Canada Treaty Series 1935, No. 19.

[37] *Canada-Austria Convention, supra* n. 34, art. 4(d).

[38] *Canada-Poland Convention,* Canada Treaty Series 1935, No. 18, art. 4(a).

[39] *Canada-Greece Convention,* Canada Treaty Series 1936, No. 11, art. 3(d).

[40] *Canada-Austria Convention, supra* n. 34, art. 3(g).

theless the requesting state is obliged to pay for the service according to the local tariff in the state of execution.

The Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters concluded on November 15, 1965 creates appropriate means to ensure that judicial and extrajudicial documents to be served abroad shall be brought to the notice of the addressee in sufficient time. It also improves the organization of mutual judicial assistance for that purpose by simplifying and expediting the procedure.

In each contracting state a Central Authority shall be designated which will undertake to receive requests for service coming from other contracting states. The authority competent under the law of the state in which the documents originate shall forward to the Central Authority of the state addressed a request conforming to the model annexed to the Convention without any requirement of legislation or other equivalent formality.

The document to be served or a copy thereof shall be annexed to the request. The request and the document shall both be furnished in duplicate. The Central authority of the state addressed shall itself serve the document or shall arrange to have it served by an appropriate agency.

The Central Authority of the state addressed or any authority which it may have designated for that purpose, shall also complete a certificate in the form of the model annexed to the Convention stating that the document has or has not been served. This certificate shall be forwarded directly to the applicant.

According to articles 15 and 16:

Article 15

> Where a writ of summons or an equivalent document had to be transmitted abroad for the purpose of service, under the provisions of the present Convention, and the defendant has not appeared, judgment shall not be given until it is established that —
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> a) the document was served by a method prescribed by the internal law of the State addressed for the service of documents in domestic actions upon persons who are within its territory, or
>
> b) the document was actually delivered to the defendant or to his residence by another method provided for by this Convention,

and that in either of these cases the service or the delivery was effected in sufficient time to enable the defendant to defend.

Each contracting State shall be free to declare that the judge, notwithstanding the provisions of the first paragraph of this article, may give judgment even if no certificate of service or delivery has been received, if all the following conditions are fulfilled —

a) the document was transmitted by one of the methods provided for in this Convention,

b) a period of time of not less than six months, considered adequate by the judge in the particular case, has elapsed since the date of the transmission of the document,

c) no certificate of any kind has been received, even though every reasonable effort has been made to obtain it through the competent authorities of the State addressed.

Notwithstanding the provisions of the preceding paragraphs the judge may order, in case of urgency, any provisional or protective measures.

Article 16

When a writ of summons or an equivalent document had to be transmitted abroad for the purpose of service, under the provisions of the present Convention, and a judgment has been entered against a defendant who has not appeared, the judge shall have the power to relieve the defendant from the effects of the expiration of the time for appeal from the judgment if the following conditions are fulfilled —

a) the defendant, without any fault on his part, did not have knowledge of the document in sufficient time to defend, or knowledge of the judgment in sufficient time to appeal, and

b) the defendant has disclosed a prima facie defence to the action on the merits.

An application for relief may be filed only within a reasonable time after the defendant has knowledge of the judgment.

Each contracting State may declare that the application will not be entertained if it is filed after the expiration of a time to be stated in the declaration, but

which shall in no case be less than one year following the date of the judgment.

This article shall not apply to judgments concerning status or capacity of persons.

C. Federal Courts

According to section 75 (1) of the *Exchequer Court Act*[41],

(1) When a defendant, whether a British subject or a foreigner, is out of the jurisdiction of the Exchequer Court and whether in Her Majesty's dominions or in a foreign country, the Court or a judge, upon application, supported by affidavit or other evidence, stating that, in the belief of the deponent, the plaintiff has a good cause of action, and showing in what place or country such defendant is or probably may be found, may order that a notice of the information, petition of right, or statement of claim be served on the defendant in such place or country or within such limits as the Court or a judge thinks fit to direct.

(2) The order shall in such case limit a time, depending on the place of service, within which the defendant is to file his statement in defence, plea, answer, exception or demurrer, or otherwise make his defence, according to the practice applicable to the particular case, or obtain from the Court or a judge further time to do so.

(3) Upon service being effected as authorized by the order, the Court has jurisdiction to proceed and adjudicate in the cause or matter to all intents and purposes in the same manner, to the same extent, and with the like effect as if the defendant had been duly served within the jurisdiction of the Court.

Before the repeal of Exchequer Rule 42 in 1966, the Supreme Court of Canada had maintained that the combined effect of section 75 of the Exchequer Court Act and of Rules 76 and 42 was to make applicable in any proceedings in the Exchequer Court respecting any patent of invention, copyright, trademark or individual design, Order XI of the Supreme Court of Judicature in England.[42] Now any gap in

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[41] R.S.C. 1952, c. 98 as amend., see also R. 76 and Forms 16-17. *Now see Federal Court Act,* (1970), Bill C-172, third session, s. 62(6).

[42] *Composers, Authors and Publishers Association of Canada* v. *International Good Music,* [1963] S.C.R. 136; *Muzack Corporation* v. *Composers, Authors and Publishers of Canada Ltd.,* [1953] 2 S.C.R. 182; see also section 35 of the *Exchequer Court Act.*

the rules of the Exchequer Court is to be regulated by analogy to the practice and procedure in force for similar proceedings in the courts of that province to which the subject matter of the proceedings most particularly relates.[43]

II. CASES FOR SERVICE EX JURIS

Under Ontario Rule 25 and like rules[44] jurisdiction may be assumed over a defendant who is absent from the province in a variety of circumstances. The clauses of rules of court are to be read disjunctively and each is complete in itself and independent of the others.[45] An action may fall at the same time within more than one of the clauses of Rule 25.

A. Where the whole subject-matter of the action is land situate within the jurisdiction (with or without rents or profits).[46]

This clause covers any action in which the ownership, possession or status of land is disputed. In *McMahon* v. *Waskochil*[47] it was held that this clause applied to an action for a declaration that the defendants were trustees for the estate of a deceased person and had themselves no beneficial interest in lands within the jurisdiction.[48] An action to realize against lands in Ontario the amount of a foreign judgment is not within this clause.[49]

B. Where any act, deed, will, contract, obligation or liability affecting land or hereditaments, situate within the jurisdiction, is sought to be construed, rectified, set aside or enforced.[50]

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[43] R. 2(b).

[44] *See e.g.*, N.B. O. 11 (1956), N.S. O. XI (1951), Sask. O. IV, R. 27-31 (1961), Man. 28-30 (1968), B.C. O. XI (1961), Alta. R. 30-31 (1969).

[45] *S.D. Eplett & Sons Ltd.* v. *Safety Freight Lines Ltd.*, [1955] O.W.N. 386, *Bell* v. *Klein (No. 4)* (1954), 13 W.W.R. (N.S.) 203 (B.C.).

[46] Sask. R. 27 (1) (a), Ont. R. 25 (1) (a), B.C. O. XI (1) (a). In B.C. the following is added: "or the perpetuation of testimony relating to land within the jurisdiction". Also Alta. R. 30 (a), N.S. O. XI (1) (a), Man. R. 28 (a); N.B. O. 11, R. 1 (1) (a).

[47] [1945] O.W.N. 887.

[48] *See also Conrad* v. *Alberta Mining Co.* (1897), 17 C.L.T. 133.

[49] *Heath* v. *Meyers* (1893), 15 P.R. 381.

[50] Ont. R. 25 (1) (b); Sask. R. 27 (1) (b); B.C. O. XI (1) (b); Alta. R. 30 (b); N.S. O. XI (1) (b); Man. R. 28 (b); N.B. O. 11, R. 1 (1) (b).

The land may be that of either the plaintiff or defendant. The matter in respect of which the action is brought must have some direct effect upon the land itself, its possession or title.[51] It has been held that this clause applies to an action by a simple contract creditor, on behalf of himself and other creditors to set aside an alleged fraudulent conveyance of lands in Ontario made by the alleged debtor out of Ontario[52] but does not apply to an action between foreigners on a foreign judgment to obtain equitable execution against lands in Ontario.[53]

C. Where relief (meaning any type of legal or equitable remedy) is sought against a person domiciled or ordinarily resident within the jurisdiction.[54]

A person's domicile[55] or ordinary residence in the province is a fair and reasonable basis upon which to base his amenability to suit there. The defendant must be ordinarily resident in the province when the action is commenced.[56] The establishment of a residence does not require the existence of an attitude of mind similar to that required for the acquisition of a domicile of choice. Ordinary residence means more than mere temporary or occasional presence; it connotes a residence that is habitual. The onus is on the plaintiff to establish that the defendant was domiciled or ordinarily resident within the jurisdiction.[57]

The word "person" in the clause includes a corporation which is deemed to be domiciled or resident at the place where it has its head office. The words "where relief is sought" are used in their widest sense and actually mean "whenever any action is brought". However, it has been held that the courts have no jurisdiction to entertain an action against a person resident in Ontario for damages

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[51] *Wilkie* v. *Smith*, [1944] 1 D.L.R. 224 (Sask. C.A.).

[52] *Livingstone* v. *Sibbald* (1893), 15 P.R. 315.

[53] *Sears* v. *Meyers* (1893), 15 P.R. 381, but see R. 25 (1) (b). As to specific performance of an agreement for the exchange of land in Ontario for foreign land, see *Montgomery* v. *Ruppensbury* (1899), 31 O.R. 433.

[54] Ont. R. 25 (1) (d); B.C. O. XI (1) (c); Sask. R. 27 (1) (c); Alta. R. 30 (c); N.S. O. XI (1) (c); Man. R. 28 (d); N.B. O. 11, R. 1 (1) (c).

[55] A defendant whose only connection with the province consists of a domicile of origin acquired abroad through his father or mother comes within the rule.

[56] *Finnerty* v. *Watson*, [1969] 1 O.R. 634.

[57] *Laurie* v. *Baird*, [1946] O.W.N. 600.

for trespass to foreign land[58] or to compel him to transfer foreign land unless there is a personal obligation moving directly from the defendant to the plaintiff[59] or to declare a conveyance of land out of the jurisdiction which is absolute in form, to be by way of mortgage only, after an absolute conveyance has been made by the grantee to other parties[60] or to decree redemption of land out of Ontario.[61]

D. Where a will of a deceased person, who at the time of his death was domiciled within the jurisdiction, affecting personal property is sought to be construed.[62]

E. Where administration is sought of the personal estate of a deceased person who at the time of his death was domiciled within the jurisdiction, or the execution (as to property situate within the jurisdiction) of the trusts of a written instrument of which the person to be served is a trustee, which ought to be executed according to the law of the forum.[63]

These clauses are limited to the personal estate or property of a deceased person.[64] The property subject to the trusts must be within the jurisdiction at the time when leave to serve the writ is applied for, or when service is effected, or at the latest when an application to set aside the writ is made.[65]

F. Where the action is upon or in relation to a mortgage or charge or lien of any description upon personal pro-

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[58] *Brereton* v. *C.P.R.* (1897), 29 O.R. 57.

[59] *Burns* v. *Davidson* (1892), 21 O.R. 547; *Purdom* v. *Pavey & Co.* (1896), 26 S.C.R. 412; *Burchell* v. *Burchell* (1926), 58 O.L.R. 515, at 528. *Cf.*, *Duke* v. *Andler*, [1932] S.C.R. 734.

[60] *Gunn* v. *Harper* (1899), 30 O.R. 650, (1901), 2 O.L.R. 611.

[61] *Henderson* v. *Bank of Hamilton* (1892), 23 O.R. 327, at 330, 20 O.A.R. 646, at 650, 23 S.C.R. 716 at 719.

[62] Man. R. 28 (c); B.C. O. XI (1) (bb); Ont. R. 25 (1) (c) contains these additional words " or where the executors of any such person apply by way of originating notice under rule [607]" (Ontario R. 607, originating notices).

[63] Man. R. 28 (e); N.B. O. 11, R. 1 (1) (d); N.S. O. XI, (1) (d); B.C. O. XI (1) (d); Ont. R. 25 (1) (e).

[64] Sask. R. 27 (1) (d); the Sask. Rule only uses the words "administration of the estate of". It does not specify whether this estate is personal or real. Also Alta. R. 30 (d) and (e).

[65] *Winter* v. *Winter*, [1894] 1 Ch. 421. The court may have jurisdiction in the administration of trusts not governed by the *lex fori* under the *Variation of Trusts Act*, R.S.O. 1960, c. 413, as amend. In England see *Re Kerr's Settlement Trusts*, [1963] Ch. 553.

perty of any description within the jurisdiction in which foreclosure, sale, possession, or redemption is sought but in which a personal judgment or order for payment is not claimed unless a personal judgment or order for payment may be claimed under some other provision of this rule.[66]

The purpose of this rule is to nullify the decision in the English case of *Deutsche National Bank* v. *Paul*[67] where it was held that an action for foreclosure or redemption of a mortgage of personal property was not covered by the clause dealing with breach of contract, even though the mortgagor had failed to pay the principal and interest due under his personal covenant. The jurisdiction is directed *in rem*, it is limited to the property within the jurisdiction.[68] An action may be brought within the jurisdiction under this clause even though all parties are domiciled elsewhere.[69]

G. Where the action is in respect of a breach committed within the jurisdiction of a contract wherever made, even though such breach was preceded by or accompanied by a breach out of the jurisdiction which rendered impossible the performance of the part of the contract which ought to have been performed within the jurisdiction.[70]

The plaintiff must show that the alleged contract has been made,[71] that it was broken and that the breach occurred

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[66] Ont. R. 25 (1) (g); B.C. O. XI (1) (h); Man. R. 28 (k). The B.C. Rule is more specific and detailed. Also Alta. R. 30 (k) and (l); N.S. O. XI (1) (j) which defines "personal property within the jurisdiction" "mortgagor" "mortgage" and "mortgagee". *Cantieri Riunti Dell Adriatico di Monfalcone* v. *Gdynia Ameryka Linje Zeglugowe Spolka Akcynjna*, [1939] 4 D.L.R. 491 (N.S.).

[67] [1898] 1 Ch. 283.

[68] In *Cantieri etc.* v. *Gdynia etc.*, [1939] 4 D.L.R. 491 (N.S.), a ship anchored in the port of Halifax was held to be personal property within the jurisdiction for the purpose of the clause.

[69] *Anderson* v. *Thomas*, [1935] O.W.N. 228.

[70] Ont. R. 25 (1) (e); B.C. O. XI (1) (e); N.B. O. 11, R. 1 (1) (e); Man. R. 28 (g); Alta. R. 30 (g); N.S. O. XI (1) (e). In Saskatchewan, R. 27 (e) is to the same effect but includes also an action for the recovery of any debt contracted within the jurisdiction and one founded on a tort committed within the jurisdiction.

[71] There must be reasonable evidence of a concluded contract: *Re O'Connor* v. *Lemieux* (1927), 60 O.L.R. 365; as to the correct practice, see *McCowan* v. *Menasco Mfg. Co.*, [1941] O.W.N. 133, at 135.

within the jurisdiction.[72] He must satisfy the court that it was a term of the contract, that it was to be performed, in whole or in part, within the jurisdiction. This must appear from the contract, either expressly or by necessary implication.[73] It is not sufficient to establish only that the contract could have been performed within the jurisdiction or some other place.[74] The test to be applied is whether the plaintiff has demonstrated a good arguable case, although it is not necessary that he go so far as to satisfy the court beyond reasonable doubt that a breach of contract has occurred in the jurisdiction.[75] It is sufficient if a part only of the contract

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[72] *La Salle Recreations Incorporated* v. *Peerless Rug Ltd.* (1969), 69 W.W.R. 149 (B.C.C.A.); *W. H. Johnson Co.* v. *Bell Organ & Piano Co.* (1896), 29 N.S.R. 84 (C.A.); *Donald C. Miller Ltd.* v. *Miramichi Air Services Ltd.* (1960), 44 M.P.R. 287 (N.B.C.A.); *Franke* v. *McGrath* (1883), 22 N.B.R. 456 (C.A.); *Bishop* v. *Scott* (1904), 6 Terr. L.R. 54; *Plant Maintenance Equipment Co.* v. *Amer-Lincoln Corp.* (1965), 53 W.W.R. 680 (B.C.); *Rooney* v. *Dawson* (1958), 25 W.W.R. 679; (1959), 15 D.L.R. (2d) 102 (B.C.C.A.); *Hemelryck Van Hemelryck* v. *Lyall Shipbuilding Co.*, [1921] 1 W.W.R. 926; [1921] 1 A.C. 698, 58 D.L.R. 48, affirming [1920] 2 W.W.R. 360, 28 B.C.R. 196, which affirmed (1919), 27 B.C.R. 240.

[73] *Baxter* v. *Faulkner* (1905), 6 O.W.R. 198; *Pickford* v. *Hamburg-American Packet Co.* (1898), 40 N.S.R. 152 (C.A.). As to place of performance of F.O.B. contracts, see: *Blackley* v. *Elite Costume Co.* (1905), 9 O.L.R. 382; *Nixon* v. *Jamieson* (1909), 18 O.L.R. 625; *Empire Oil Co.* v. *Vallerand* (1895), 17 P.R. 27; *Phillips* v. *Malone* (1902), 3 O.L.R. 47, 492; *Can. Westinghouse Co. Ltd.* v. *Davey and United Engineering Co. Ltd.*, [1964] 2 O.R. 282; *Deuterium of Canada Ltd.* v. *Burns & Roe of Canada Ltd. (No. 2)* (1971), 15 D.L.R. (3d) s. 85 (N.S.); *Fisher* v. *Cassady* (1892), 14 P.R. 577; *Atkinson* v. *Plimpton* (1903), 6 O.L.R. 566; *Volansky Clothing Co.* v. *Bannockburn Clothing Co.*, [1919] 3 W.W.R. 913 (Alta.). Dismissal of servant by letter: *Nenna* v. *Glass Coffee Brewer Inc.*, [1935] O.W.N. 553; *Bell* v. *Villeneuve* (1895), 16 P.R. 413; insurance contract: *Montgomery* v. *Saginaw Lbr. Co.* (1906), 12 O.L.R. 144; *Rogers* v. *Fitzgerald*, [1931] O.R. 342; [1932] S.C.R. 529; *Can. Fire Ins. Co.* v. *Love* (1954), 33 M.P.R. 281; [1954] 4 D.L.R. 259. For other cases, see *Laurie* v. *Baird*, [1946] O.W.N. 600; *Lovell* v. *Coles* (1902), 3 O.L.R. 291; *Frost Machinery Co.* v. *Wagner Tractor Inc.* (1963), 67 Man. R. 356.

[74] *Laurie v. Baird*, [1946] O.W.N. 600. See also *Gibbons* v. *Berliner Gramophone Co.* (1912), 27 O.L.R. 402; *Smith & Osberg Ltd.* v. *Hollenburg (No. 2)*, [1939] 4 D.L.R. 119 (B.C.C.A.), at 127.

[75] *Can. Westinghouse Co. Ltd.* v. *Davey and United Engineering Co. Ltd.*, [1964] 2 O.R. 282. See *Fleming & Poole* v. *Eastern Textile Products Ltd.*, [1952] O.W.N. 542, where even in the absence of an express stipulation in the contract that a commission was to be paid in Ontario, the court implied a term in the contract that payment was to be made in Ontario where the defendant had done so over a number of years. *Cf.*, *Banque Nationale* v. *South America Trading Co.* (1891), 12 C.L.T. 20 (foreign judgment).

is to be performed within the jurisdicton if it is in respect of that part that a breach is alleged.[76]

Where a foreign defendant is sued for breach of a contract of which part only is to be performed within the jurisdiction, the order should expressly limit the relief to be given to relief in respect of the breach within the jurisdiction.[77]

In the case of a breach of a contract for the payment of money, service *ex juris* will be allowed if it is an express or implied term that payment is to be made within the jurisdiction.[78] Where no place of payment is named, the debtor must seek out his creditor;[79] if a proper inference from a contract is that payment is to be made within the jurisdiction then non-payment is a breach within the jurisdiction.[80]

The proposed defendant must be a person who can be sued and the subject-matter, the contract, must have been broken in Ontario. Therefore an order cannot be made against foreign executors unless probate is taken in the jurisdiction even though the deceased could have been sued for breach of contract under this clause, if alive.[81]

H. The action is for the recovery of any debt contracted within the jurisdiction[82] or the proceeding is to enforce, rescind, resolve, annul or otherwise affect a contract or to recover damages or obtain any other relief in respect of the breach of a contract, being (in any case) a contract

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[76] *Ontario Power Co.* v. *Niagara Power Co.* (1922), 52 O.L.R. 168.

[77] *Lovell* v. *Coles* (1902), 3 O.L.R. 291.

[78] *Atkinson* v. *Plimpton* (1903), 6 O.L.R. 566; *Phillips* v. *Malone* (1902), 3 O.L.R. 47, 492; *Fleming & Poole* v. *Eastern Textile Products Ltd.*, [1952] O.W.N. 542.

[79] *Graham Co.* v. *Pritchard* (1916), 10 O.W.N. 359; *Internat. Power & Enrg. Consultants Ltd.* v. *Clark* (1964), 41 D.L.R. (2d) 260, 43 D.L.R. (2d) 394 (B.C.). Also see the following cases as to place of payment: *Leonard* v. *Cushing* (1913), 5 O.W.N. 692; where payment to be made at one of two or more places, see *Ont. Power Co.* v. *Niagara etc. Power Co.* (1922), 52 O.L.R. 168. If the contract is to be construed according to Quebec law, where in the absence of express stipulation, payment must be made at the domicile of the debtor in Quebec, nonpayment is not a breach within Ontario, *Denton, Mitchell & Duncan Ltd.* v. *Jacobs* (1923), 23 O.W.N. 677; as to claim for accounting, see *Gray* v. *Turner* (1921), 21 O.W.N. 97; insurance: *Burson* v. *German Union Ins. Co.* (1905), 6 O.W.R. 21.

[80] *Wolseley Tool & Motor Car Co.* v. *Humphries,* (1913) 5 O.W.N. 72.

[81] *Patterson* v. *Hambleton,* [1933] O.W.N. 247.

[82] Sask. R. 27 (e).

i) made within the jurisdiction, or

ii) made by or through an agent trading or residing within the jurisdiction on behalf of a principal trading or residing out of the jurisdiction, or

iii) which is by its terms, or by implication governed by the law of the forum.[83]

The clause applies to a contract a) actually made within the jurisdiction[84], b) or made by or through an agent trading or residing in the jurisdiction on behalf of a principal trading or residing out of the jurisdiction, c) which by its terms or by implication is governed by the law of the forum. This means that the proper law of the contract is the law of the forum.[85] It is sufficient if the plaintiff can bring himself within any one of these sub-clauses.[86]

I. Where the action is founded on a tort committed within the jurisdiction.[87]

The language used in Nova Scotia is different. Thus, Order XI, Rule 1 (i) says "the action is for tort committed or wrong done within the jurisdiction". This difference was held to be immaterial in *Abbott-Smith* v. *Governors of University of Toronto.*[88] However, Currie J. [89] was of the opinion that the words "wrong done" were added for the purpose of widening the application of the rule but felt bound by the majority of the court in the earlier case of *Beck* v. *Willard Chocolate Co.*[90] In that case Chisholm J. in a dissenting opinion thought the words "wrong done" were not to be equated with "tort committed" within the jurisdiction. The words "wrong done" were intended to give the Nova Scotia

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[83] Alta. R. 30 (f); Man. R. 28 (f).

[84] As to the place of contracting, see Castel, *Conflict of Laws* (2nd ed. 1968), 842.

[85] *Ibid.*

[86] *See B.A. Oil Co.* v. *Born Engineering Co.* (1963), 38 D.L.R. (2d) 523 aff'd (1964), 44 D.L.R. (2d) 569 (Alta.); *Anderson* v. *McIntyre,* [1924] 2 W.W.R. 183; [1924] 2 D.L.R. 911 (Alta.); *Frost Machinery Co.* v. *Wagner Tractor Inc.* (1963), 67 Man. R. 356.

[87] Ont. R. 25 (1) (h); B.C. O. XI (1) (ee); Man. R. 28 (h); N.B. O. 11, R. 1 (1) (e); Sask. R. 27 (1) (e); Alta. R. 30 (h).

[88] (1964), 45 D.L.R. (2d) 672 (N.S.), *per* Ilsley C.J., at 677.

[89] *Ibid.*, at 688.

[90] [1924] 2 D.L.R. 1140 (N.S.); *see also* Deuterium of Canada Ltd. v. Burns & Roe (No. 2) (1971), 15 D.L.R. (3d)) s. 85 (N.S.) at 593, where Gillis J. in Chambers added: ". . . that there must be a strong arguable case that the act took place in Nova Scotia before O. XI 21(i) may be used as a ground for service *ex juris* upon a defendant in such case."

rule a more liberal interpretation. In other words not all the elements of negligence would have to have occurred within the jurisdiction. On the other hand, "tort committed within the jurisdiction" would seem to require all the constituents of negligence to be committed within the jurisdiction. The phrase "action founded on a tort" or "action for tort" refers to an actionable tort in the sense of a cause of action sounding in tort. This cause of action means all facts which give rise to a claim enforceable in an action, and every fact which is material to be proved to entitle the plaintiff to succeed forms an essential part of a cause of action in tort. When it is necessary to determine when a tort was committed, the cause of action is said to accrue when the latest of the facts essential to the cause of action occurred which in the case of an action of negligence is the occurrence of the damage.

Thus, it is important to determine exactly what are the elements of the cause of action of the particular tort alleged to come within the rule, remembering that torts are of two kinds, namely those actionable per se and those actionable only on proof of actual damage resulting from them.

A foreigner who has not been served within the jurisdiction cannot be sued for a tort committed *out* of the jurisdiction unless leave has been given for service *ex juris* under some other clause of the rules.[91]

Under this clause the power to allow service *ex juris* pivots upon the commission of the alleged tort *within* the jurisdiction.[92]

Quite often, it is difficult to determine the place of a tort, as for instance, in the case of defamation or when goods negligently manufactured in one jurisdiction injure customers in another. Is the place of a tort where the negligence occurred or where the last event necessary to make the actor liable for an alleged tort took place?[93] One possible solution would be to adopt the rule that the place of tort is where all the elements of the tort take place as it might not be advisable to fragment the tort of negligence so as to attribute its commission to the place where any one of its constituent elements happened to occur. Another alternative would be to change the rule as to service *ex juris*

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[91] *See Oligny* v. *Beauchemin* (1895), 16 P.R. 508; *Rourke* v. *Wiedenbach* (1901), 1 O.L.R. 581; *Paul* v. *Chandler & Fisher Limited* (1923), 54 O.L.R. 410; *Humm* v. *West* (1966), 56 W.W.R. 257 (B.C.).

[92] The problem of the place of tort is also considered in connection with choice of law rules.

[93] *E.g.*, damage.

to allow the victim to sue in any jurisdiction where the wrongdoer acted or where the victim suffered damage. The decisions relating to service *ex juris* in tort actions deal with defamation and negligence.

In the case of defamation the cause of action does not, subject to some exceptions, require proof of actual damage, but such proof is always required in cases of negligence. Thus, in defamation cases relating to service *ex juris* the problem of the locality of the tort has been determined solely by reference to the place of actual publication or communication of the defamatory matter as being within or without the jurisdiction because proof of actual damage did not form part of the cause of action therein.[94] Actionable negligence consists of three elements, a duty of care owed to the plaintiff, a breach of that duty and resultant damage. They must all concur to produce an actionable tort and neither alone is sufficient to give a cause of action.

Actually, the Canadian cases that have arisen under this clause are negligence cases where the breach of duty or negligent conduct occurred abroad and the damage was suffered within the jurisdiction. In each case, the court

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[94] *Jenner* v. *Sun Oil Co.*, [1952] 2 D.L.R. 526, [1952] O.R. 240, where the plaintiff claimed damages resutling from defamatory words spoken on a broadcast, originating in the United States of America, and alleged to have been heard in Toronto. The court, considering all the circumstances, felt that the case was one in which it was proper to allow the issue of a writ for service out of Ontario under Rule 25 (1)(g), now 25(1) (h) on the basis that the action was for a tort committed within Ontario. The essential feature of the tort of defamation was the publication of the defamatory words to a person other than the plaintiff, and there was at least a good arguable case that the words in question had been published in Ontario, where the words were heard. In coming to this conclusion the court relied upon *Bata* v. *Bata*, [1948] W.N. 336, an English decision involving defamation. *See also Shearman* v. *Findlay* (1883), 32 W.W.R. 122 and *Charles* v. *City News Co.* (1928), 37 O.W.N. 41 where the libel appeared in a newspaper published in Chicago. Leave was refused although a copy of the newspaper had come into the hands of the plaintiff in Ontario, it not being shown that the publisher had any agent in Ontario for the sale of the newspaper. Actually, the tort must have a substantial connection with the jurisdiction. The mere fact that an isolated copy of defamatory material published abroad reaches Ontario is not sufficient to bring the case within the clause. In England, see *Kroch* v. *Rossell et Cie*, [1937] 1 All E.R. 725; *Composers, Authors & Publishers Ass'n of Canada Ltd. v. Internat'l Good Music Inc.* (1963), 37 D.L.R. (2d) 1; [1963] S.C.R. 136 (copyright infringement by foreign television communications reaching Canada). As to infringement of patent, see *Sarco Can. Ltd.* v. *Pyrotherm Equipment Ltd.* (1969), 41 Fox Pat. 22 (Ont.).

came to the conclusion that the occurrence of the damage within the jurisdiction was not enough to constitute the commission of the tort of negligence within the jurisdiction where it also appeared that the negligent conduct occurred outside the jurisdiction. Thus, in order to allow service *ex juris* the court would have to be satisfied that all the elements of the cause of action have arisen within the jurisdiction. This was the approach taken by the Supreme Court of Nova Scotia in *Abbott-Smith* v. *Governors of University of Toronto*.[95]

The intended plaintiff, a resident of Nova Scotia, after taking in that province a drug known as the Sabin Oral Polio Vaccine, suffered an attack of paralytic poliomyelitis which permanently disabled him. He applied for an order for leave to serve a writ of summons out of the jurisdiction on the intended defendants in Toronto, whom he alleged were negligent in the manufacture of the vaccine in Ontario, although it had been administered by the City of Halifax. After an exhaustive analysis of the authorities, the Supreme Court of Nova Scotia refused to grant leave on the ground that "[n]o English or Canadian case has been cited which has led courts to the conclusion that the mere occurence of the damage within the jurisdiction is sufficient to justify an order for service *ex juris*".[96]

The tort or wrong of negligence cannot be said to have been committed or done within the jurisdiction when the negligent act or omission (the breach of duty) occurred outside the jurisdiction, even where damage therefrom resulted to the plaintiff within the jurisdiction. In other words, for purposes of service *ex juris* in the case of negligence, there must be a concurrence of all the elements of tort within the jurisdiction. As any doubts should be resolved in favour of the foreigner, it could not be said that the fact of injury within Nova Scotia was "sufficient to attract to this Province the whole cause of action".[97]

In *Anderson* v. *Nobels Explosive Co.*,[98] an order permitting service upon the defendants abroad was set aside where the cause of action alleged against the defendants, a company engaged in the manufacture of explosives in Scotland, was that they were negligent in allowing a fuse, which had been purchased by the plaintiff's employers, and which injured the plaintiff at a place in Ontario, to be manufactured

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[95] *Supra*, n. 88.

[96] *Ibid.*, at 679, *per* Ilsley C.J.

[97] *Per* Boyd J. in *Oligny* v. *Beauchemin* (1895), 16 P.R. 508, at 511.

[98] (1906), 12 O.L.R. 644.

and sold in a defective condition, the manner in which the fuse reached the plaintiff's employers not being alleged or suggested. The manufacture and sale were deemed to have taken place in Scotland, and, although the invasion of the plaintiff's right of personal security occurred in Ontario, the tort comprised also the wrongful act or omission of the alleged tortfeasor. It is only where the tort for which the plaintiff brings an action has been "committed" within Ontario, that rule 25 (1)(h) entitles him to ask the court to entertain an action against a non-resident defendant who is to be served with process abroad.

The *Anderson* case was applied in *Paul* v. *Chandler & Fisher Limited*[99] where an action was brought in Ontario for damages for the death of the plaintiff's husband in a Toronto hospital, caused as alleged, by the use, as a suture during or after an abdominal operation, of catgut manufactured and sold by the defendant company domiciled in Manitoba, the catgut having brought on tetanus from which the man died.

Negligence was charged in that the catgut was negligently manufactured, and being a dangerous article was sold and delivered in Ontario. Upon the evidence, all sales of catgut made to the hospital wherein the death occurred were completed in Manitoba, and if there was negligence, the negligent act was wholly within Manitoba, therefore the action was not founded upon a tort committed within Ontario, and service of the writ of summons in the action could not be allowed under Rule 25.

In *Beck* v. *Willard Chocolate Co. Ltd.*,[100] Harris C. J. also adopted the reasoning of Anglin J. in the *Anderson* case. MacDonald J. in the *Abbott-Smith* case did not think Orde J.'s words in *Paul* v. *Chandler & Fisher Ltd.*[101] that "the negligent act (in manufacture or sale) which constituted the tort was wholly within Manitoba" or Mellish J.'s words in the *Beck* case[102] that "wrong done contemplates a tortious act or omission as distinguished from its consequences" seemed to imply that the lack of competence stemmed from the fact that the sole determinant of locality of the tort is the place where the negligent conduct or breach of duty occurred. He said: "If it be suggested that these judges were simply saying that *for the purposes of the ex juris Rule* the tort must be deemed to have been committed where the

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[99] (1923), 54 O.L.R. 410.

[100] [1924] 2 D.L.R. 1140, 57 N.S.R. 246.

[101] 54 O.L.R. 410, at 413.

[102] [1924] 2 D.L.R. 1140, at 1153.

negligent act or omission took place, the answer must surely be that the Rule is designed to enable such service to be made (contrary to ordinary principles of jurisdiction) in the sole event of the actionable tort having occurred within the local jurisdiction, and that the established doctrine is that this unusual power is to be construed strictly".[103]

As in the case of negligence there can be no liability or actionable tort until the damage is inflicted, it might be more logical to say that the place of commission is the place where the tortious conduct culminated in the injury.[104] After all, the main aim of the law of torts is to compensate the victim rather than punish the tortfeasor.

Where products liability is involved, to require all the elements of negligence to occur within one jurisdiction is unfair to a plaintiff who has been injured by defective goods he has purchased outside the jurisdiction. Yet for the courts of the forum to take jurisdiction over the foreign manufacturer of these defective goods just because the damage occurred within the jurisdiction may result in an ineffective judgment in favour of the purchaser because the manufacturer has no assets within the jurisdiction, or the courts of the country where he has assets will refuse to recognize and enforce the foreign judgment. However, it still seems better to localize the tort in the area of use rather than manufacture.[105]

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[103] At 695. For a criticism of the case, *see* comments by David McClean (1965), 14 *Int. & Comp. L.Q.* 997; Woloshyn (1964), 29 *Sask. Bar Rev.* 193, and criticism by Gerber, "Tort Liability in the Conflict of Laws" (1965), 40 Aust. L.J. 44, at 45, who believes that the case "[n]o longer represents the current view of the law of torts, nor is consonant with current ideas of justice or morality". In *George Monro Limited* v. *American Cynamid and Chemical Corporation*, [1944] K.B. 432; [1944] 1 All E.R. 386, Goddard J. said that the words: "[T]ort committed within the jurisdiction" in Rule 1 (ee) of Order XI must be limited to a wrongful act committed within the jurisdiction, and do not extend to a case where the wrongful act was committed out of the jurisdiction but the damage resulting therefrom took place within the jurisdiction. To reach this conclusion, he distinguished between cause of action and right of action.

[104] *See* Chisholm J. in the *Beck* case, at 1142.

[105] For other cases involving negligence see *Anderson* v. *Thomas*, [1935] O.W.N. 228; *Custovich* v. *Krueger, Clairol Incorporated and Clairol Inc. of Canada* (1955), 16 W.W.R. (N.S.) 303 (B.C.); *S. D. Eplett & Sons Ltd.* v. *Safety Freight Lines Ltd.*, [1955] O.W.N. 386; *Canadian Brine Ltd.* v. *Wilson Marine Transport Co.*, [1964] 2 O.R. 278; as to malicious prosecution see *Oligny* v. *Beauchemin* (1895), 16 P.R. 508; as to fraudulent conveyances see *Clarkson v. Dupré* (1895), 16 P.R. 521; *Burns* v. *Davidson* (1892), 21 O.R. 547. *Smith* v. *Fecampois*, [1929] 2 D.L.R. 925 (N.S.) (collision of ships).

In *Original Blouse Co. Ltd.* v. *Bruck Mills Ltd.*,[106] the court held that an order for service out of the jurisdiction was properly made under Order XI, Rule 1 (ee) of the British Columbia Supreme Court Rules by reason of the action being founded on a tort committed within the jurisdiction, namely an action for damages for fraudulent misrepresentation of facts which although made by the defendant by letters and telephone from Quebec, became actionable only when received and acted upon by the plaintiff in British Columbia where the damage was suffered.[107]

Where an action for damages for enticement was brought in Alberta by a husband domiciled there against a resident of British Columbia, it was held that the locus of the tort was the place of the husband's domicile.[108]

The approach taken by the Nova Scotia court in *Abbott-Smith* rejects, for the purpose of identifying the place of tort, the place of the defendant's last act as well as the place of the last event necessary to make an actor liable.[109] Actually from the point of view of service *ex juris* where judicial discretion plays a decisive role, there is no reason why the tort should be treated as occurring in one place if its elements did in fact occur in several places. Yet the attitude of the Nova Scotia court makes the clause impotent in relation to the defective manufacture of goods outside the province.

From the point of view of the choice of the applicable law the Nova Scotia solution is unacceptable as it amounts to refusing to decide where the tort is to be located when some of its elements occurred in different places. Therefore the court, whether it applies *Phillips* v. *Eyre*[110] or the *lex loci delicti*, could not solve the case.[111]

It must be pointed out however that in the *Abbott-Smith* case, Ilsley C. J. when considering and criticizing Goddard L. J.'s remarks on the nature of the tort of negligence in *Monro* v. *American Cyanamid and Chemical Corporation*, remarked that[112] if it were necessary to identify a single

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[106] (1963), 42 D.L.R. (2d) 174 (B.C.S.C.).

[107] *See* Hebenton, "Jurisdiction: The Place Where the Tort is Committed" (1966), 2 *U.B.C.L. Rev.* 361.

[108] *Guy* v. *Shulhan* (1962), 38 W.W.R. 227 (Alta.).

[109] *See Restatement of the Conflict of Laws*, s. 377.

[110] (1869), L.R. 6 Q.B. 1.

[111] Currie J. in the *Abbott-Smith* case would have rejected any attempt to distinguish between cases on service *ex juris* and those involving choice of law situations, at 688.

[112] At 679, 684.

place of tort, then this, for the tort of negligence, would be where the damage is sustained.[113]

In the case of service *ex juris* why not give the victim the option of suing in the jurisdiction where the defective goods were manufactured or where they were acquired or where they caused damage provided always that the defendant could invoke the doctrine of *forum non conveniens.*

i. Special leave

In Saskatchewan *The Queen's Bench Act*[114] provides that:

"Notwithstanding anything in section 53, no action shall be brought in Saskatchewan for damages in respect of a tort committed outside the province, except by special leave of the court or a judge."[115]

ii. International convention

According to *The Foreign Aircraft Third Party Damage Act*[116] which implements the Convention on Damage caused by Foreign Aircraft to Third Parties on the Surface, any person who suffers damage on the surface in Canada caused by an aircraft in flight registered in the territory of a contracting state other than Canada, or by any person or thing falling therefrom, is entitled to compensation as provided by the convention.

Actions under the provisions of this convention may be brought only before the courts of the contracting state where the damages occurred. Nevertheless, by agreement between any one or more claimants and any one or more defendants, such claimants may take action before the courts of any other contracting state, but no such proceedings shall have the effect of prejudicing in any way the rights of persons who bring actions in the state where the damage occurred. The parties may also agree to submit disputes to arbitration in any contracting state.[117]

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[113] *Cf.*, 687, where the Chief Justice thought that another possible construction of the clause rule would be that the place of tort is where the act constituting the breach of duty took place.

[114] R.S.S., 1965, c. 73, s. 54.

[115] *See Canadian Pacific Railway Company* v. *Sears et al.* (1970), 73 W.W.R. 703 (D.C. Sask.).

[116] Stat. Can., 1955, c. 15.

[117] Art. 20.

J. Where an injunction is sought as to anything done or to be done within the jurisdiction, or any nuisance within the jurisdiction is sought to be prevented or removed, whether damages are or are not claimed in respect thereof.[118]

The purpose of the clause is to allow the courts to give relief with respect to acts done within the jurisdiction. The claim for an injunction must be bona fide and must not be ancillary to the relief which the plaintiff desires.[119]

The injunction must be capable of being made effective. Of course the court has no jurisdiction to grant an injunction restraining a person resident abroad from doing acts abroad.

Where the plaintiff, a foreigner, sued the defendant, also a foreigner, on a foreign judgment, alleging that the defendant was the owner of lands within Ontario and claiming relief by way of equitable execution against such lands and an injunction restraining the defendant from dealing therewith, leave to serve the writ out of Ontario was refused.[120]

K. Where a person out of the jurisdiction is a necessary or proper party to an action properly brought against another person duly served within the jurisdiction.[121]

This clause applies to a foreigner as well as to a British subject resident out of the jurisdiction. Three conditions are necessary: a) there must be an action properly brought against the defendant within the jurisdiction. This defendant must not be a person against whom the action is brought for the sake of giving the court jurisdiction over his co-defendant resident outside the jurisdiction; b) the local defendant must be duly served within the jurisdiction. The court cannot acquire jurisdiction over a third person resident outside the jurisdiction by reason only of the fact that another person also resident out of the jurisdiction has attorned to the jurisdiction of the court;[122] c) the co-defend-

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[118] Ontario R. 25 (1)(i); Alta. R. 30(i); Man. R. 28(i); Sask. R. 27(1)(f) says "to be done" and omits "done"; N.S. O. XI(1)(f); N.B. O. 11, R. 1(1)(f); also B.C. O. XI(1)(f).

[119] *Marshall v. Dom. Mfrs. Ltd.* (1914), 6 O.W.N. 385; *Belan v. Neumeyer et al.* (1960), 33 W.W.R. 48, 67 Man. R. 141 affirming *sub nom Selan v. Neumeyer* (1959), 29 W.W.R. 542 (Man.); *Phelan v. Famous Players Can. Corp.*, [1937] O.W.N. 93, at 95-97.

[120] *Sears v. Meyers* (1893), 15 P.R. 381.

[121] Ont. R. 25(1)(j); Sask. R. 27(1)(g); B.C. O. XI (1)(g); Alta. R. 30(j); N.S. O. XI (1) (g); Man. R. 28 (j); N.B. O. 11, R. 1 (g).

[122] *Fasig-Tipton Co.* v. *Willmot*, [1969] 2 O.R. 1.

ant who is resident outside the jurisdiction must be either a necessary or proper party to the action.[123] In determining whether a defendant is a necessary or proper party the Ontario courts will apply the criterion of Rule 67. All parties may be joined as defendants against whom a claim for relief may be made, if the right to relief arises from the same transaction or occurrence.[124] The transaction must give the plaintiff "a cause of action against one or more persons" and afford to him a claim "jointly, severally, or in the alternative" against them. The court must ask itself whether, supposing both parties had been within the jurisdiction, they both would have been proper parties to the action. If this is the case, then provided one party is within the jurisdiction, service *ex juris* can be affected on the party resident abroad; thus the plaintiff must show that he has a prima facie case against both defendant parties.[125] The order under the clause is discretionary; the court must exercise its power only in the clearest possible cases.[126]

The relief sought against the defendant out of the jurisdiction need not necessarily be the same as, but must be connected with, the relief sought against the defendant within the jurisdiction.[127]

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[123] *Belan v. Neumeyer* (1960), 33 W.W.R. 48, 67 Man. R. 141 aff'g *sub nom Selan v. Neumeyer et al.* (1959), 29 W.W.R. 542.

[124] *See* for instance *Boston Law Book Co.* v. *Can. Law Book Co. See also Deuterium of Canada Ltd.* v. *Burns & Roe of Canada Ltd. (No. 2)* (1971), 15 D.L.R. (3d) 585 (N.S.). (1918), 43 O.L.R. 233; *Beaver Lamb etc. Co.* v. *Sun. Ins. Co.*, [1951] O.R. 401; *Marshall* v. *Dom. Mfrs. Ltd.* (1914), 6 O.W.N. 385; *MacKay v. Colonial Inv. Co.* (1902), 4 O.L.R. 571; *Phelan v. Famous Players Can. Corp.*, [1937] O.W.N. 93; *Simpson v. Hall* (1891), 14 P.R. 310; *Paul* v. *Chandler & Fisher Ltd.* (1923), 54 O.L.R. 410; *Brewer v. Hadley Manufacturing Co. et al.*, [1969] 2 O.R. 756.

[125] *Boston Law Book Co. v. Can. Law Book Co.* (1918), 43 O.L.R. 233; *Kerner v. Angus & Co.*, [1946] O.W.N. 624; *Beaver Lamb Co. v. Sun Ins. Co.*, [1951] O.R. 401. As to third party proceedings see *Batchlett v. United Cobalt Mines Ltd.*, [1953] O.W.N. 425. An order granting leave to serve a third party notice out of the jurisdiction is properly made when there is a good cause of action against the foreign third parties and the parties within the jurisdiction were proper parties to the proceedings; *Aitken v. Gardiner*, [1953] O.W.N. 555, there must be at least two third parties alleged to be liable, one of whom is within the jurisdiction. See also *Wolsely Tool etc. Co. v. Jackson* (1914), 6 O.W.N. 109 (third party notice for contribution).

[126] *Beaver Lamb & Shearling Co. v. Sun Ins. Co., supra;* as to exercise of discretion *see Curley* v. *Clifford*, [1941] O.W.N. 154.

[127] *Marshall v. Dom. Mfrs. Ltd.* (1914), 6 O.W.N. 385.

The plaintiff must show a bona fide claim against the defendant served within the jurisdiction. This defendant must be shown to have been served.[128] Thus it is the only clause under which it is necessary to serve the party within the jurisdiction before obtaining an order for service outside.[129] An action is not properly brought against a person in the jurisdiction if no claim is made against him.[130] A non-resident defendant should not have a claim set up against him which is not set up against the defendant within the jurisdiction.[131] Where the only relief claimed against the defendant was an injunction, the plaintiff's right to which depended upon his establishing his claim against the defendant out of the jurisdiction, the latter was allowed to enter a conditional appearance.[132]

L. Where the action is for any other matter and it appears that the plaintiff has a good cause of action against the defendant upon a contract or in respect of a claim for alimony, and that the defendant has assets in the jurisdiction of a value of $200 at least which may be rendered liable for the satisfaction of the judgment; but the order allowing service shall in such case provide that, if the defendant does not appear, the plaintiff shall prove his claim to the satisfaction of a judge before judgment is entered.[133]

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[128] *Rock & Power Machinery Ltd. v. Kennedy Machinery & Engineering Co.* (1916), 11 O.W.N. 192; *Postlethwaite v. McWhinney* (1903), 6 O.L.R. 412; *Higgins v. Merland Oil*, [1933] O.W.N. 679.

[129] *S. D. Eplett & Sons Ltd. v. Safety Freight Lines Ltd.*, [1955] O.W.N. 386; *Wolsely Tool Co. v. Jackson* (1914), 6 O.W.N. 109; *Postlethwaite v. McWhinney* (1903), 6 O.L.R. 412; *Rock & Power Machinery Ltd. v. Kennedy & Co.* (1916), 11 O.W.N. 192; *Paul v. Chandler & Fisher Ltd.* (1923), 54 O.L.R. 410.

[130] *Bayer Co.* v. *Farbenfabriken Vorm Fried Bayer & Co.*, [1944] O.R. 488.

[131] *Phelan v. Famous Players Canadian Corp.*, [1937] O.W.N. 93.

[132] *Marshall v. Dom. Mfrs. Ltd.* (1914), 6 O.W.N. 385.

[133] Ontario R. 25 (1)(k); B.C. O. XI (1)(j); Sask. R. 29 (b) covers also a judgment, see *infra* (o); Alta. R. 30 (p); Man. R. 30 and *Gardner v. Eaton* (1914), 6 W.W.R. 758, 17 D.L.R. 637. In New Brunswick see O. 11, R. 1 (1)(h) to the effect that: the action is upon any contract wherever made for any breach wherever committed or upon any judgment or order wherever obtained and it appears to the satisfaction of a Court or a Judge that it is in the interest of justice that the same should be tried in this jurisdiction and that there are or probably will be property or assets or rights or credits or income within the Province of New Brunswick which are or may be made or may become available to satisfy in whole or in part any judgment which may be recovered or order made against the defendant. *Donald C. Millar Ltd. v. Miramichi Air Services Ltd.* (1959), 44 M.P.R. 287 (N.B.C.A.).

There is no corresponding English rule. The clause is limited to cases where the plaintiff is suing on a contract[134] or for alimony[135] and it is shown that the defendant has assets in Ontario to the value of at least $200 which may be rendered liable to satisfy the plaintiff's claim, if judgment is recovered.[136]

Garnishable debts due to the defendant by debtors within the jurisdiction are "assets" within the clause.[137] As in the case of other clauses of the rule, the court exercises discretion.[138] The court will not order service *ex juris* where the assets cannot be applied in satisfaction of the judgment sought.[139]

M. In an action upon a contract where the parties have agreed that the courts of the jurisdiction shall have jurisdiction to entertain the action or have agreed as to the manner in which service, either within or out of the jurisdiction, of the writ in an action brought within the jurisdiction may be affected. In either of such cases, service may be effected in the manner agreed upon or as may be ordered.[140]

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[134] *McCutcheon* v. *McCutcheon* (1930), 38 O.W.N. 90.

[135] *See Cheesborough* v. *Cheesborough*, [1958], O.W.N. 150; *Lawrence v. Lawrence*, [1953] O.W.N. 124; *Lawson v. Lawson*, [1964] 2 O.R. 321.

[136] In other provinces *see* in Manitoba, British Columbia, Saskatchewan $200, and in Alberta, $500.

[137] *Kemerer v. Watterson* (1910), 20 O.L.R.. 451. See also *Brand v. Green* (1900), 13 Man. R. 101. However in *Love v. Bell Furniture Co., Neilson Furniture Co. (Garnishee)* (1909), 10 W.L.R. 657, 2 Alta. L.R. 209, the court held that a debt due from a debtor residing in the province to a foreign creditor does not constitute an "asset in the province" within the meaning of the rule so as to allow such foreign creditor to be served without the jurisdiction with a writ in an action against him upon a contract or judgment. The debt has no locality for the purpose of the rule. For other cases dealing with assets see *Gibbons v. Berliner Gramophone Co.* (1913), 28 O.L.R. 620 (floating balances of accounts); *Lawrence v. Lawrence*, [1953] O.W.N. 124 (contingent interest in estate); *Quinn v. Quinn*, [1939] O.W.N. 477 (furniture); *Lawson v. Lawson*, [1964] 2 O.R. 321 (contingent interest in land); *O'Brien v. Raynault*, [1959] O.W.N. 173 (accounts receivable); *Capital Nat. Bank v. Merrifield*, [1968] 1 O.R. 3 (foreign judgment); *Rogers v. Fitzgerald*, [1931] O.R. 342, aff'd [1932] S.C.R. 529 (deposit); *Alexander v. Alcerno Mfg. Co.* (1919), 17 O.W.N. 151 (goods warehoused in name of defendant not "assets").

[138] *Brenner v. Amer. Metal Co.* (1921), 50 O.L.R. 25; *Denton Mitchell Ltd. v. Jacobs* (1923), 23 O.W.N. 677; *Nenna v. Glass Coffee Brewer Inc.*, [1935] O.W.N. 553.

[139] *Superior Copper Co. v. Perry* (1918), 42 O.L.R. 45.

[140] Ontario R. 25 (1) (l); Alta. R. 30 (f) (iv); Man. R. 29; N.B. O. 11, R. 2(A); B.C. O. XI (2).

No contractual stipulation as to service of a writ of summons shall invalidate a service thereof that would otherwise be valid and effective under the rules of court.[141]

> **N.** Where the action is founded upon a judgment of any court in the jurisdiction.[142]

The words "of any court in the jurisdiction", were added in Ontario to resolve the difference of opinion which arose among the judges as to whether the rule covered foreign judgments.[143] In Ontario an action on a foreign judgment is now covered by clause 25 (k) making it necessary for the plaintiff to show assets of the defendant within the jurisdiction.

> **O.** The action is upon a foreign judgment and it is proved to the satisfaction of the court that the defendant has assets within the jurisdiction.[144]
>
> **P.** In an action to declare a marriage void; or
>
> **Q.** Except in a matrimonial cause, where the claim is for or in respect of the custody or maintenance of or access to an infant.[145]

Where it is necessary or proper to serve persons not already parties to an action with an office copy of any judgment or order or notice to prove claims thereunder, service of the same out of the jurisdiction may be allowed.[146] In Ontario service out of the jurisdiction may also be allowed of an attaching order, in cases falling within Rule 597.[147]

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[141] B.C. O. XI, 2 (A).

[142] Ont. R. 25 (m); Alta. R. 30 (m).

[143] *Bedell v. Gefaell*, [1938] O.W.N. 88; [1938] O.R. 718 (C.A.); *Bedell v. Gefaell* (No. 2), [1938] O.R. 726 (C.A.).

[144] Sask. R. 29 (a). In this province an action on a judgment is covered by R. 27 (b) or (e) or R. 29 (a). N.S. O. XI (1) (h); "the action is on any judgment, foreign or otherwise, obtained against a person who has real or personal property situate within the jurisdiction". B.C. O. LVIII, R. 1: "Service of a writ of summons or notice thereof on a defendant out of the Province of British Columbia may be allowed by a judge whenever the action is upon a foreign judgment, and it is proved to the satisfaction of the judge that the defendant has assets within the Province of British Columbia". Thus for practical purposes the differences between the Ontario and the B.C. practice are not very important.

[145] Ont. R. 25 (n) and (o); Alta. R. 30 (n).

[146] Ont. R. 25 (2).

[147] Garnishment proceedings and *Rogers v. Fitzgerald*, [1931] O.R. 342, [1932] S.C.R. 529.

R. The action is brought by or on behalf of the Crown to recover money owing for taxes or other debts due to the Crown.[148]

S. The action is brought under *The Carriage by Air Act*.[149]

The Carriage by Air Act[150] gives effect to a Convention for the unification of certain rules relating to international carriage by air. Article 28 of the Convention states that an action for damages must be brought, at the option of the plaintiff, in the territory of one of the High Contracting Parties, either before the court having jurisdiction where the carrier is ordinarily resident, or has his principal place of business, or has an establishment by which the contract has been made, or before the court having jurisdiction at the place of destination. Questions of procedure are governed by the *lex fori*. The rules of jurisdiction cannot be

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[148] B.C. O. XI (1)(i).

[149] R.S.C. 152, c. 45 as amend. 1963, c. 33; B.C. O. XI (1) (k), (also Alta. R. 30 (o)) and B.C. O. XI 8 B (1): Where for the purpose of an action under the *Carriage by Air Act*, R.S.C. 1952, c. 45, and the Convention therein set out, leave is given to serve a notice of a writ of summons upon a high contracting party to the Convention other than Her Majesty, the provisions of this Rule shall apply.

(2) The notice shall specify the time for entering an appearance as limited in pursuance of Rule 5 of this Order.

(3) The notice shall be sealed with the seal of the Supreme Court for service out of the jurisdiction, and shall be transmitted to the Secretary of State, together with a copy thereof translated into the language of the country of the defendant, and with a request for the further transmission of the same to the Government of that country.

(6) An official certificate transmitted by the Secretary of State to the Supreme Court certifying that the notice was delivered on a specified date to the Governmentt of the country of the defendant shall be deemed to be sufficient proof of service, and shall be filed of record as, and be equivalent to, an affidavit of service within the requirements of these Rules in that behalf.

(7) After entry of appearance by the defendant or, if no appearance is entered, after the expiry of the time limited for appearance, the action may proceed to judgment in all respects as if the defendant had for the purposes of the action waived all privileges and submitted to the jurisdiction of the Court.

(8) Where it is desired to serve or deliver a notice of motion, order, or notice in the proceedings on the defendant out of the jurisdiction, the provisions of this Rule shall apply, with such variations as circumstances may require.

[150] *Ibid.*

altered by the parties. Nevertheless, for the carriage of goods, arbitration clauses are allowed, if the arbitration is to take place within one of the jurisdictions referred to in article 28 (1).[151]

Unless a High Contracting Party to the convention has declared that the convention does not apply to carriage performed by the state or by legally constituted public bodies, he shall for the purposes of any action brought in a court in Canada in accordance with the provisions of article 28 to enforce a claim in respect of carriage undertaken by him, be deemed to have submitted to the jurisdiction of that court, and accordingly rules of court may provide for the manner in which any such action is to be commenced and carried on.[152] However, the *Act* does not authorize execution against the property of any High Contracting Party.

> **T.** In probate actions service of a writ of summons or notice of a writ of summons may by leave of the Court or a Judge be allowed out of the jurisdiction.[153]
>
> **U.** Service may also be allowed where the action is for any other matter and it appears to the satisfaction of the Court or a Judge that the plaintiff has any good cause of action against the defendant and that it is in the interest of justice that the same should be tried in this jurisdiction; but in such case, if the defendant does not appear, the Court or a Judge shall give directions from time to time as to the manner and proceedings in the action, and shall require the plaintiff, before obtaining judgment, to prove his claim before a Judge or jury, or in such manner as may seem proper.[154]

In cases where the claim does not fall within any of the clauses of Order XI, Rule 1, (1) the plaintiff may rely on rule 1 (2) but in such a case he must present much stricter proof to satisfy the court or a judge, that he has a "good cause of action against the defendant and that it is in the interest of justice that the same should be tried in this jurisdiction". If he succeeds in meeting those additional requirements he is entitled to an order. It is immaterial that the jurisdiction of the New Brunswick court assumed under Order 11, Rule 1 (2) over an absent defendant might not be recognized in other jurisdictions.[155]

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[151] *See* art. 32.

[152] S. 3.

[153] B.C. O. XI, R. 3, *see also* N.B. O. 11, R. 3, more extensive.

[154] N.B. O. 11, R. 1 (2).

[155] *Paradis v. King* (1956), 6 D.L.R. (2d) 277 (N.B.C.A.).