IN THE MATTER OF AN APPLICATION FOR A WRIT OF PROHIBITION AGAINST RAYMOND FRANCIS WHITE, CHIEF COLLECTOR OF TAXES, PAPUA NEW GUINEA AND JOHN EDWARD NOONAN, PROTHONOTARY OF THE SUPREME COURT OF NEW SOUTH WALES.

Ex parte F. A. FIELD PTY LTD[1]

THE FACTS

The prosecutor sought a writ of prohibition to restrain the Prothonotary of the Supreme Court of New South Wales from registering, pursuant to s. 20 of the *Service and Execution of Process Act* 1901 (Cth) as amended, a certificate of judgment given by the Supreme Court of Papua New Guinea which ordered the Prosecutor to pay an amount in respect of unpaid taxes to the Chief Collector of Taxes, Papua New Guinea. The amount to be paid was expressed in the legal tender of Papua New Guinea (viz. the kina).

Service and Execution of Process Act 1901 (Cth) s. 3:

"Judgment" includes any judgment, decree, rule or order given or made by a Court in any suit where any sum of money is made payable or any person is required to do or not to do any act or thing other than the payment of money. "Suit" means any suit, action or original proceeding between parties or in rem, but does not include —

(a) a suit, action or proceeding in which a person is charged with an offence, whether the offence is punishable summarily or on indictment.

S. 20. Any person in whose favour a judgment is given or made, whether before or after the Commencement of this Act, in a suit by any Court of Record of any State or part of the Commonwealth, may obtain from the prothonotary or registrar or other proper officer of such Court a certificate of such judgment in the form and containing the particulars set forth in the third schedule hereto or as near thereto as the circumstances will permit which certificate such officer is hereby required to grant his hand and the seal of such Court.

THE GROUNDS

The prosecutor sought a writ of prohibition of the following three grounds:

(1) that the judgment given by the Supreme Court of Papua New Guinea was not a final judgment within the meaning of the *Service and Execution of Process Act* by reason of an appeal pending against the assessment.

(2) that s. 20 of the same Act ought to be construed with reference to the common law principle that an English Court will enforce neither directly nor indirectly the revenue laws of a foreign country, and thus exclude registration and enforcement of this judgment.

(3) that the judgment was not a judgment within the meaning of s. 20 of the Act because the Supreme Court of an Australian State may not give judgment for the payment of money other than in the currency which is the legal tender of Australia (viz. dollars and cents).

THE DECISION

It is convenient here to discuss the grounds in the order in which they were argued before the High Court.

(1) Chief Justice Barwick, with whose reasoning the other members of the Court

[1] (1975) 49 A.L.J.R. 351. High Court of Australia, *per* Barwick C.J., Gibbs and Jacobs JJ.

(Gibbs and Jacobs JJ.) concurred, decided that the judgment in respect of taxes unpaid was final and conclusive notwithstanding the appeal pending against the assessment.[2] Barwick C.J. referred to ss. 257, 263 and 264 of the *Income Tax Act* 1959 (P.N.G.) which have substantially the same effect as s. 201 of the Commonwealth *Income Tax Assessment Act* 1936-75. The Commonwealth section provides that the amount assessed is a debt recoverable by the Crown regardless of appeal or objection. This section has been interpreted literally and this finding of the Chief Justice is, it is therefore thought, correct.[3]

This finding also accords with the common law principle that in an application to enforce a foreign judgment, the possibility of an appeal *per se*, cannot alter the final and binding nature of the judgment.[4] But it is by no means clear whether the broader requirement that the judgment be final is appropriate to the registration of judgments under the *Service and Execution of Process Act*.[5] The first Australian decision which incorporated the common law requirement into statutory registration was *Davis v. Davis*.[6] In that case plaintiff sought to enforce a Victorian judgment for arrears of alimony by suing firstly at common law on the judgment debt, and secondly on the basis of registration under the *Service and Execution of Process Act*.

The Court found that both the common law action and the statutory action required that the judgment be final. Wade J., specifically quoted[7] *Nouvion v. Freeman*,[8] the case which established the original common law proposition and applied it to both Grounds. The special nature of the registration under s. 20 and the extended definition of 'judgment' under s. 3 were not considered by any member of the Court.

Although this decision is seen by some writers[9] as explicable on other grounds, nevertheless the requirement that the judgment be final was also held to apply in an action for the registration of a maintenance order under the *Service and Execution of Process Act* in *Winchcombe v. Winchombe*.[10] Mansfield S. P. J. found that because a maintenance order is not an order for a final sum of money, the Court could not ascertain the exact amount owing, which was a prerequisite to execution under the Act. In the definition of judgment there is no such prerequisite. This definition was again not discussed by the Court.

At common law foreign judgments were only enforceable where expressed to be for a sum of money and where the judgment was a final judgment of the Court.[11] The definition in s. 3 extends registration under the Act to judgments requiring acts to be done as well as money to be paid.[12] Also, at common law, there are various defences to attempted enforcement, such as that the Court whose judgment is sought to be enforced was not correctly seised of jurisdiction, or that there was a denial of natural justice. Under s. 20 of the *Service and Execution of Process Act* registration of a judgment is mandatory and allows no opportunity to consider any objections to the jurisdiction of the original court. It is significant that in the Act there are no defences similar to those at common law. The only relief which can be granted is a

[2] *Ibid.* 352.
[3] *Deputy Federal Commissioner of Taxation (W.A.) v. Australian Machinery v. Investment Co. Pty Ltd* (1945) 8 A.T.D. 133.
[4] *Nouvion v. Freeman* (1889) 15 App. Cases 1.
[5] *Cf.* Sykes E. I., *Australian Conflict of Laws* (1972) 363 *et seq.*
[6] (1922) 22 S.R. (N.S.W.) 185.
[7] *Ibid.* 192.
[8] (1890) 15 App. Cases 1.
[9] *E.g.* Fleming J. G., *Interstate Enforcement of Maintenance and Alimony Decrees* (1952) 26 *Australian Law Journal* 407, 409.
[10] [1955] Q.W.N. 16.
[11] *Dicey and Morris on the Conflict of Laws* (9th ed. 1973) Rule 189.
[12] See definition *supra*.

temporary stay of proceedings while the objection is heard in the State the court of which gave judgment.[13]

These differences between the *Service and Execution of Process Act* and the common law suggest that many of the rules regarding the enforcement of foreign judgments may be inapplicable to the Act.[14] Indeed in view of the general extension of the types of judgments enforceable under the Act it is at least arguable that the the common law requirement of 'finality' has been dispensed with for the purposes of the *Service and Execution of Process Act*.[15] Final resolution of this point, however, must await a High Court discussion of its merits in some future case.

(2) The second ground concerns the applicability of the common law principle, as expounded in *Government of India, Ministry of Finance (Revenue Division) v. Taylor and Another*,[16] to registration of judgments under the *Service and Execution of Process Act*. This case discusses the well-settled rule that English Courts will not enforce, directly or indirectly, the revenue or penal laws of foreign states. It also extends the concept of 'foreign State' to include member States of the British Commonwealth. Again Gibbs and Jacobs JJ. agreed with the findings of the Chief Justice.[17]

In the context of direct enforcement of revenue claims, the decision of Dunphy J. of the Supreme Court of the Australian Capital Territory in *Permanent Trustee Company (Canberra) Limited v. Finlayson*[18] *and others*; Commissioner of Stamp Duties (N.S.W.) Third Party is in point. The New South Wales Commissioner for Stamp Duties sought to enforce a revenue claim in respect of death duties under the New South Wales Stamp Duties Act against the executor of an estate in the Australian Capital Territory. The deceased died domiciled in New South Wales but most of her assets were situated in the Australian Capital Territory. Following American cases to the same effect, the learned judge held that s. 118[19] of the Constitution would support the application of the New South Wales revenue Statute to a Territory administrator.

Although this decision was reversed by the High Court[20] which found that the New South Wales revenue Statute had particular territorial limitations, the decision on appeal does not, of itself, invalidate Dunphy J.'s view. The founding fathers envisaged that this section would have a wide-ranging application to similar situations.[21] Hence as far as direct enforcement of revenue claims between Australian States is concerned, the general rule as stated by the Chief Justice would appear to have been modified.

The reasoning of the learned Chief Justice in this case involves a similar modification of the rule in regard to indirect enforcement of revenue judgments i.e. by enforcement of revenue judgments obtained in another state. Barwick C.J. held[22] that the evident policy or purpose of the *Service and Execution of Process Act* is to make the States, vis-à-vis each other and vis-à-vis the Commonwealth, parts and possessions of the Commonwealth thereby amending the common law position that the States, for the purposes of private international law, are foreign countries vis-à-vis

[13] *Service and Execution of Process Act* 1901 (Cth) as amended s. 25.
[14] *Cf.* Sykes *op. cit.* 365-6.
[15] *Cf. ibid.* 366.
[16] [1955] A.C. 491.
[17] (1975) 49 A.L.J.R. 353.
[18] (1967) 9 F.L.R. 424.
[19] S. 118: 'Full faith and credit shall be given, throughout the Commonwealth, to the laws, the public Acts and records, and the judicial proceedings of every State.'
[20] (1968) 122 C.L.R. 338.
[21] Quick and Garran, *The Annotated Constitution of the Australian Commonwealth* (1901) 962.
[22] (1975) 49 A.L.J.R. 352.

each other. This finding accords with the evident purpose of the Constitutional provision from which the Act derives its force — s. 51(xxiv).[23] Clearly it is undesirable that in a federation whose customs and general laws are as homogeneous as those of Australia, a defendant be allowed to escape execution of a judgment merely by crossing a state line.

It is submitted that this finding could also have been supported by s. 118 of the Constitution, thus creating a uniform rule regarding both the direct and indirect enforcement of revenue judgments between the States and Territories of the Commonwealth of Australia. S. 51(xxiv) of the Constitution gives the Commonwealth Parliament power to legislate with respect to execution and enforcement of judgments between the States and can be seen as merely one specific application of the more wide-ranging full faith and credit provision.

The learned Chief Justice also refers to *Walker v. Duncan*,[24] a judgment handed down by the High Court on Part III of the *Service and Execution of Process Act* a few months earlier. In the Supreme Court of New South Wales Taylor C.J. at C.L.,[25] held that Part III of the Act, which provides for the execution of warrants and writs of attainment, should not be restricted by the common law rule which prevents the enforcing state from executing a judgment given in respect of an offence which would not be punishable under the law of the enforcing state. Taylor C.J. at C.L. held that both on the clear words and policy of the Act such a qualification was both unwarranted and undesirable.

Taylor C.J. at C.L., however, also supported his finding on the additional ground that s. 118 of the Constitution requires that full faith and credit be given to the laws of other states, regardless of the general rules of private international law which would bar enforcement.

On an application for leave to appeal to the High Court, Barwick C.J.[26] (with whom Gibbs, Mason and Jacobs JJ. concurred) approved of Taylor C.J.'s at C.L. interpretation of the *Service and Execution of Process Act*. Barwick C.J. refused leave to appeal on this ground and was silent as to the possible application of s. 118. Murphy J.[27] delivered a strong dissenting judgment in which he stated that leave to appeal ought to be allowed to accommodate a full discussion of the implications of s. 118.

The constitutional question was not argued before the High Court. It is unfortunate that counsel for the applicant did not introduce this issue in argument, for then it may have been resolved for application in this case. As the law stands, however, s. 118 would seem to have direct applicability to the rule as to the enforcement of revenue judgments but this area will have to await a full discussion from the High Court when it falls directly on point.[28]

With regard to penal judgments, the definition of 'suit' in s. 3 of the *Service and Execution of Process Act*, expressly excludes their registration. In view of the real differences which exist between penal and revenue claims, the direct enforcement of a penal claims is not thought to be supported by the full faith and credit provision. It is however, an open question.[29]

(3) The third question involved, was whether s. 20 of the Act is to be qualified by the rule that Australian State Courts may not give judgment in currency other

[23] Quick and Garran *op. cit.* 613.
[24] (1975) 49 A.L.J.R. 231.
[25] [1975] 1 N.S.W.L.R. 106.
[26] (1975) 49 A.L.J.R. 232.
[27] *Ibid.* 233.
[28] Sykes *op. cit.* 292-5.
[29] *Ibid.* 295.

than dollars and cents. In this regard Barwick C.J. stated:[30]

> It is inappropriate to treat the kina as a form of foreign currency under the rule, if it remains the rule, that Australian Courts may not express judgment for the payment of money in a foreign currency. It is a currency authorized for use in the Territory by Australian law.

As the kina could be ultimately traced back to legislation by the Commonwealth Parliament, he found no further need to discuss the rule itself. He noted the extension of the *Service and Execution of Process Act* to Papua New Guinea in 1963 and concluded that Parliament must have contemplated the possibility of a judgment being registered in a currency other than that which was legal tender throughout Australia.

Two points arise out of these observations. Firstly that the kina is not 'foreign' currency would seem to apply only until 16 September 1975 less than a month after judgment was handed down. By s. 4 of the *Papua New Guinea Independence Act* (1975), Australia renounced all sovereign legislative, and administrative rights which it possessed in regard to Papua New Guinea as from that date. The replacement of the dollar by the kina was enacted in 1975 in the *Central Banking (Currency) Act* (P.N.G.) in contemplation of full independence. Since the Independence Act it would seem that the 1963 extension of the *Service and Execution of Process Act* to Papua New Guinea is unconstitutional. Thus on general principles Papua New Guinea since that date would be a foreign state with foreign currency for the purposes of this rule.

Secondly it is submitted, particularly in view of Papua New Guinea's independence, that if Barwick C.J. wished to cast doubt upon the existence of the rule ('if it remain a rule') then it would have been appropriate to discuss its present status. The House of Lords in *Re Limited Railways of Havana and Regla Warehouses Ltd*[31] considered the rule as being well settled in English law in 1961. Lord Reid[32] expressly states it is a rule of procedure, but that it nevertheless applies not only to prevent an English Court giving judgment for a sum in foreign currency but also to prevent the Court from issuing an order for specific performance in other than English currency.

Lord Denning M.R. in *Schorsch Meier G.m.b.H. v. Hennin*[33] upset this view by finding that the Treaty of Rome now prevented the Court from applying this rule in regard to currencies of other members of the European Economic Community. The learned Master of the Rolls then observed that although the rule had been acknowledged since 1605 as self-evident and well-settled, it had been by no means uniformly applied and only rarely litigated. In view of the sophisticated information now available regarding currency conversion, Lord Denning M.R. decided that as the reason for the rule had gone, the rule itself was no longer valid. It is interesting that Lawton L.J.,[34] while he acknowledged the force of the reasons given by Lord Denning M.R., nevertheless felt bound by the 1961 House of Lords decision.

This decision was highly controversial in England and probably is the reason for Barwick C.J. doubting the existence of the rule. It is submitted, with respect, that this question is of some importance to a trading nation and could have been validly discussed in the context of Papua New Guinea's Independence.

Gibbs and Jacobs JJ.[35] based their finding on a narrow interpretation of s. 20 in the *Service and Execution of Process Act*. In as much as the Act provided a judgment of Papua New Guinea was registrable, the currency question was not relevant:

[30] (1975) 49 A.L.J.R. 352.
[31] [1961] A.C. 1007.
[32] [1961] A.C. 1052.
[33] [1974] 3 W.L.R. 823.
[34] *Ibid.* 833.
[35] (1975) 49 A.L.J.R. 353.

'Any conversion of currency is a machinery matter which does not arise at this stage.'[36]

Presumably the learned judges contemplated that a writ could be validly issued pursuant to registration with the amount converted into Australian currency. At least, Taylor C.J.[37] in subsequent proceedings so found. However, this observation is surely true of the rule as a whole in so far as the reason English Courts would not give judgment in any other currency but sterling is because it was felt that the machinery was inadequate to accurately convert such foreign currency.

MARGOT HEATH*

[36] *Ibid.* 353.
[37] [1975] A.T.C. 4199.
* (B.A.)