NO. S-1510120
VANCOUVER REGISTRY

IN THE SUPREME COURT OF BRITISH COLUMBIA

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED

AND

IN THE MATTER OF THE *BUSINESS CORPORATIONS ACT*, S.B.C. 2002, c. 57, AS AMENDED

AND

IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF WALTER ENERGY CANADA HOLDINGS, INC. AND THE OTHER PETITIONERS LISTED ON SCHEDULE "A"

PETITIONERS

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TAB 1

2 of 5 DOCUMENTS

IN RE AUGIE/RESTIVO BAKING COMPANY, LTD., AUGIE'S BAKING COMPANY, LTD., Debtors. UNION SAVINGS BANK, Appellant, v. AUGIE/RESTIVO BAKING COMPANY, LTD., AUGIE'S BAKING COMPANY, LTD., MANUFACTURERS HANOVER TRUST COMPANY, LTD., Appellees

No. 88-5014

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

860 F.2d 515; 1988 U.S. App. LEXIS 14587; Bankr. L. Rep. (CCH) P72,482; 18 Bankr. Ct. Dec. 852

August 17, 1988, Argued
October 24, 1988, Decided

PRIOR HISTORY: [**1] Appeal from an order of the United States District Court for the Eastern District of New York (Jack B. Weinstein, Judge) affirming an order of the Bankruptcy Court (Cecelia H. Goetz, Bankruptcy Court Judge) substantively consolidating the reorganization proceeding of Augie/Restivo Baking Company, Ltd. with that of Augie's Baking Company, Ltd.

DISPOSITION: Reversed.

CASE SUMMARY:

PROCEDURAL POSTURE: Appeal from an order of the United States District Court for the Eastern District of New York, which affirmed an order of the bankruptcy court that substantively consolidated the reorganization proceeding of the debtor companies.

OVERVIEW: Company one borrowed from appellant. Company two borrowed from appellee trust company. Companies one and two merged (debtors) and planned to sell their assets to another company. The debtors moved for substantive consolidation of the two cases because appellant could prevent confirmation of the plan. Their motion was granted and upheld by the bankruptcy court. On appeal, the court determined that the course of dealing and expectations did not justify consolidation because both appellant and appellee trust company assumed they were dealing with separate entities and that appellant's claims were superior to that of appellee trust company. The court reversed the bankruptcy court's decision because consolidation impaired the rights of certain creditors, principally appellant, which extended credit to company one before it had any relationship with company two. It also unfairly benefitted later creditors of the merged companies, principally appellee trust company, who were aware of the debtors' corporate status.

OUTCOME: The decision of the bankruptcy court to consolidate the bankruptcy cases was reversed because appellant's claim against the debtors' assets was superior to that of appellee trust company and consolidation would impair the rights of appellant and unfairly benefit appellee trust company.

CORE TERMS: consolidation, real property, entity, super-priority, commingling, collateral, merger, mortgage, borrower's, separate entity, reorganization plan, de facto, subordinated, entanglement, debenture, stock, accounts receivable, inter-company, substantively, shareholders, continuity, inventory, corporate status, financial statements,

equitable treatment, interrelationships, post-petition, pre-petition, confirmation, undersecured

LexisNexis(R) Headnotes

Bankruptcy Law > Case Administration > Court Powers
[HN1] Substantive consolidation has no express statutory basis but is a product of judicial gloss. Because of the dangers in forcing creditors of one debtor to share on a parity with creditors of a less solvent debtor, the court has stressed that substantive consolidation is no mere instrument of procedural convenience, but a measure vitally affecting substantive rights to "be used sparingly".

Bankruptcy Law > Case Administration > Court Powers
[HN2] Courts have found the power to consolidate substantively in the court's general equitable powers as set forth in 11 U.S.C.S. § 105.

Bankruptcy Law > Case Administration > Court Powers
[HN3] The sole purpose of substantive consolidation is to ensure the equitable treatment of all creditors. Numerous considerations have been mentioned as relevant to determining whether equitable treatment will result from substantive consolidation. Two considerations are: (i) whether creditors dealt with the entities as a single economic unit and did not rely on their separate identity in extending credit or (ii) whether the affairs of the debtors are so entangled that consolidation will benefit all creditors.

Bankruptcy Law > Case Administration > Court Powers
Real Property Law > Purchase & Sale > Fraudulent Transfers
[HN4] Commingling can justify substantive consolidation only where the time and expense necessary even to attempt to unscramble them is so substantial as to threaten the realization of any net assets for all the creditors or where no accurate identification and allocation of assets is possible. In such circumstances, all creditors are better off with substantive consolidation.

Mergers & Acquisitions Law > Liabilities & Rights of Successors > De Facto Mergers
Mergers & Acquisitions Law > Mergers > General Overview
[HN5] To find that a de facto merger has occurred there must be a continuity of the selling corporation, evidenced by the same management, personnel, assets and physical location; a continuity of stockholders, accomplished by paying for the acquired corporation with shares of stock; a dissolution of the selling corporation, and the assumption of liabilities by the purchaser.

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Brian M. Cogan, New York, New York (Daniel H. Golden, Sanford P. Rosen, New York, New York, Bonnie J. Schindel, Stroock & Stroock & Lavan, New York, New York, of Counsel), for Appellees and Debtors.

JUDGES: Winter and Miner, Circuit Judges, and Billings, District Judge. *

* The Honorable Franklin S. Billings, Jr., United States District Judge for the District of Vermont, sitting by designation.

OPINION BY: WINTER

OPINION

[*516] WINTER, Circuit Judge:

This appeal concerns the substantive consolidation of two bankruptcy proceedings. We reverse because the consolidation impairs the rights of certain creditors, principally Union Savings Bank ("Union"), which extended credit to Augie's Baking Company, Ltd. [**2] ("Augie's"), before Augie's had any relationship with Restivo Brothers Bakers, Inc. ("Restivo"). In turn, it also unfairly benefits later creditors of Restivo and Augie/Restivo, principally Manufacturers Hanover Trust Company ("MHTC"), who were aware of the debtors' separate corporate status.

BACKGROUND

Prior to 1985, Augie's and Restivo were two unrelated family-run wholesale bakeries. Augie's was located on Long Island in Central Islip and was a borrower of appellant Union. Restivo was based in Queens and was a borrower of MHTC. Between July 1983 and September 1984, Union loaned Augie's approximately $ 2.1 million, secured by a mortgage on Augie's real [*517] property in Central Islip, to finance an apparently improvident expansion.

In early November 1984, Augie's borrowed an additional $ 300,000 from Union, secured by its inventory, equipment and accounts receivable. Union was at the time unaware that Augie's had commenced negotiations with Restivo. On November 27, 1984, Augie's and Restivo entered into an agreement providing for Restivo's acquisition of all of Augie's stock in exchange for fifty percent of Restivo's stock. In the agreement, Augie's represented that it had receivables [**3] of over $ 630,000 and equipment and inventory valued at over $ 1.9 million. No provision for the legal transfer of Augie's real property or equipment to Restivo was made, and no such transfer occurred. Augie's thus remains the owner of that property.

After the exchange of stock on January 1, 1985, Restivo changed its name to Augie/Restivo Baking Company, Ltd. ("Augie/Restivo") and moved its manufacturing operations and some of its equipment from Brooklyn to Augie's plant in Central Islip. Augie's affairs were wound up and Restivo became the sole operating company, keeping a single set of books and issuing financial statements under the name Augie/Restivo. Augie's was not dissolved, however. From January through April 1985, MHTC extended further credit to Augie/Restivo in the amount of $ 750,000. MHTC also sought and received a guarantee of Augie/Restivo's obligations from Augie's, including a subordinated mortgage on Augie's real property in Central Islip in the sum of $ 750,000. By March 1986, MHTC had advanced a total of approximately $ 2.7 million to Augie/Restivo. During the period January 1985 through March 1986 various other firms extended trade credit to Augie/Restivo.

In April [**4] 1986, Augie/Restivo and Augie's were forced into bankruptcy. Union was listed as a creditor of Augie's only. Following the consolidation of the cases for procedural purposes, Augie/Restivo and MHTC entered into a series of more than twenty-five "cash collateral" stipulations, in which it was agreed that Augie/Restivo's accounts receivable constituted cash collateral (as defined in 11 U.S.C. § 363(a) (1982 & Supp. IV 1986)). The cash collateral was placed in a special account at MHTC from which MHTC agreed to make loans to Augie/Restivo in a sum equivalent to the cash collateral deposits. The loans were secured by the assets of Augie/Restivo, as debtor-in-possession, and carried a super-priority administrative expense status. Over time, the cash collateral stipulations were renewed in greater and greater amounts until eventually the entire amount of MHTC's pre-petition loans to Augie/Restivo, $ 2.7 million, had been converted to post-petition super-priority administrative debt, secured by Augie/Restivo's accounts receivable and by the subordinated mortgage on Augie's real property.

On November 30, 1987, the debtors agreed, conditioned upon confirmation of a reorganization plan, to [**5] sell their assets to Leon's Bakery for approximately $ 7.5 million. Apparently because Union could prevent confirmation of such a plan with regard to Augie's, the debtors moved for substantive consolidation of the two cases on December 17, 1987. Union opposed the motion. The bankruptcy court judge granted the motion on February 5, 1988, 84 Bankr. 315, finding that Augie's and Restivo had merged and that the contemplated sale of assets to Leon's was in the interests of the creditors of both companies.

After the consolidation motion was granted, the proposed sale fell through because of difficulty in obtaining financing. If the consolidation stands, the equity in Augie's assets will be used to pay the debts of Augie/Restivo and Restivo,

including the $ 2.7 million super-priority administrative debt to MHTC and certain priority tax liabilities in a sum over $ 1.2 million. Although Union's loan secured by the mortgage on Augie's real property will continue to have priority as to that property, Union's subsequent now undersecured $ 300,000 loan will be subordinated to MHTC's super-priority administrative debt. Union appealed the substantive consolidation to the district court, and Judge Weinstein affirmed.

[**6] [*518] DISCUSSION

[HN1] Substantive consolidation has no express statutory basis but is a product of judicial gloss. [1] *See, e.g., In re Commercial Envelope Mfg. Co.*, 3 B.C.D. 647 (Bankr. S.D.N.Y. 1977). Substantive consolidation usually results in, *inter alia*, pooling the assets of, and claims against, the two entities; satisfying liabilities from the resultant common fund; eliminating inter-company claims; and combining the creditors of the two companies for purposes of voting on reorganization plans. *See* 5 *Collier on Bankruptcy* § 1100.06, at 1100-32 n.1 (L. King ed. 15th ed. 1988). The effect in the present case is, as stated, to subordinate Union's undersecured claims against Augie's to MHTC's super-priority administrative claims. Because of the dangers in forcing creditors of one debtor to share on a parity with creditors of a less solvent debtor, we have stressed that substantive consolidation "is no mere instrument of procedural convenience . . . but a measure vitally affecting substantive rights," *Flora Mir Candy Corp. v. R.S. Dickson & Co.*, 432 F.2d 1060, 1062 (2d Cir. 1970), to "be used sparingly." *Chemical Bank New York Trust Co. v. Kheel*, 369 F.2d 845, 847 (2d Cir. 1966). [**7]

1 [HN2] Courts have found the power to consolidate substantively in the court's general equitable powers as set forth in 11 U.S.C. § 105 (1982 & Supp. IV 1986). *See, e.g., In re Donut Queen, Ltd.*, 41 B.R. 706, 708-09 (Bankr. E.D.N.Y. 1984); *In re Richton Int'l Corp.*, 12 B.R. 555, 557 (Bankr. S.D.N.Y. 1981).

[HN3] The sole purpose of substantive consolidation is to ensure the equitable treatment of all creditors. Numerous considerations have been mentioned as relevant to determining whether equitable treatment will result from substantive consolidation. *See, e.g., In re Continental Vending Machine Corp.*, 517 F.2d 997, 1001 (2d Cir. 1975) (whether creditors knowingly deal with corporations as unit), *cert. denied sub nom. James Talcott, Inc. v. Wharton, Trustee*, 424 U.S. 913, 47 L. Ed. 2d 317, 96 S. Ct. 1111 (1976); *Flora Mir*, 432 F.2d 1060 (whether one debtor was independent of other debtor when certain securities issued; whether creditor dealt only with one debtor and lacked knowledge of its relationships with others; whether interrelationships of group were closely entangled); *Kheel*, 369 F.2d 845 (whether entanglement of business affairs of related corporations was so extensive that the cost of untangling [**8] would outweigh any benefit to creditors); *In re Donut Queen, Ltd.*, 41 B.R. 706 (Bankr. E.D.N.Y. 1984) (presence or absence of consolidated financial statements; difficulty in segregating individual debtors' assets and liabilities; existence of parent and inter-corporate guarantees on loans; unity of interests and ownership; existence of transfers of assets without observance of corporate formalities; profitability of consolidation at single physical location); *In re Richton Int'l Corp.*, 12 B.R. 555 (Bankr. S.D.N.Y. 1981) (same); *In re Food Fair*, 10 B.R. 123 (Bankr. S.D.N.Y. 1981) (same). An examination of those cases, however, reveals that these considerations are merely variants on two critical factors: (i) whether creditors dealt with the entities as a single economic unit and "did not rely on their separate identity in extending credit," *5 Collier on Bankruptcy* § 1100.06, at 1100-33; *see also Flora Mir*, 432 F.2d at 1062-63; *Kheel*, 369 F.2d at 847; *Soviero v. Franklin Nat. Bank*, 328 F.2d 446 (2d Cir. 1964) (consolidation proper where creditors dealt with debtor and its affiliates as if they were one corporation and failed to demonstrate reliance on credit [**9] of any separate judicial entity); *In re D.H. Overmyer*, 2 B.C.D. 412 (Bankr. S.D.N.Y. 1976); or (ii) whether the affairs of the debtors are so entangled that consolidation will benefit all creditors, *Kheel*, 369 F.2d at 847; *Commercial Envelope*, 3 B.C.D. at 649-52.

With regard to the first factor, creditors who make loans on the basis of the financial status of a separate entity expect to be able to look to the assets of their particular borrower for satisfaction of that loan. Such lenders structure their loans according to their expectations regarding that borrower and do not anticipate either having the assets of a more sound

company available in the case of insolvency or having the creditors of a less sound debtor **[*519]** compete for the borrower's assets. Such expectations create significant equities. Moreover, lenders' expectations are central to the calculation of interest rates and other terms of loans, and fulfilling those expectations is therefore important to the efficiency of credit markets. Such efficiency will be undermined by imposing substantive consolidation in circumstances in which creditors believed they were dealing with separate entities.

The course of dealing **[**10]** and expectations in the instant case do not justify consolidation. It is undisputed that Union's loans to Augie's were based solely upon Augie's financial condition, and that, at the time the loans were made, Union had no knowledge of the negotiations between Augie's and Restivo. MHTC also operated on the assumption that it was dealing with separate entities. MHTC thus sought and received a guarantee from Augie's of MHTC's loans to Augie/Restivo in 1985, including a subordinated mortgage on Augie's real property. Union's claims against Augie's assets are thus clearly superior to those of MHTC. Given these circumstances, the fact that the trade creditors may have believed that they were dealing with a single entity does not justify consolidation. Upon a proper showing, the interests of the trade creditors can be protected by their participating in Augie's case as creditors of that entity. *See 2 Collier on Bankruptcy* § 101.04, at 101-20-21. The fact that they may have been unaware of Augie's separate corporate status is not cause for subordinating Union's claims to those of MHTC by substantively consolidating the two cases.

The second factor, entanglement of the debtors' affairs, **[**11]** involves cases in which there has been a commingling of two firms' assets and business functions. Resort to consolidation in such circumstances, however, should not be Pavlovian. Rather, substantive consolidation should be used only after it has been determined that all creditors will benefit because untangling is either impossible or so costly as to consume the assets. Otherwise, for example, a series of fraudulent conveyances might be viewed as resulting in a "commingling" that justified substantive consolidation. That consolidation, because it would eliminate all inter-company claims, would prevent creditors of the transferor from recovering assets from the transferee. [HN4] Commingling, therefore, can justify substantive consolidation only where "the time and expense necessary even to attempt to unscramble them [is] so substantial as to threaten the realization of any net assets for all the creditors," *Kheel*, 369 F.2d at 847; *Commercial Envelope*, 3 B.C.D. at 648, or where no accurate identification and allocation of assets is possible. In such circumstances, all creditors are better off with substantive consolidation.

The evidence of commingling of assets and business functions **[**12]** in the instant case in no way approaches the level of "hopeless[] obscur[ity]" of "interrelationships of the group" found necessary to warrant consolidation in *Kheel*, 369 F.2d at 847. Business functions may have been commingled, but that hardly weighs in favor of consolidation in the instant case because the principal beneficiary of consolidation, MHTC, was not deceived and fully realized it was dealing with separate corporate entities. So far as the commingling of assets is concerned, Augie's real property and equipment appear to be traceable. The record also indicates that each company's inventory, liabilities and receivables as of January 1, 1985 are identifiable. It also appears that records exist of all transactions subsequent to that date.

A cornerstone of the bankruptcy court's decision with regard to the entanglement issue was its finding that there had been a merger between Augie's and Restivo. That finding is clearly erroneous. The two corporations were never legally merged because: (i) they failed to comply with the laws of merger under New York law; (ii) neither corporation was ever dissolved; and (iii) Augie's never formally transferred its assets and retains ownership **[**13]** of the Central Islip facility. Furthermore, the requirements for the finding of a *de facto* merger were not met. In *Ladjevardian v. Laidlaw-Coggeshall, Inc.*, 431 F. Supp. 834 **[*520]** (S.D.N.Y. 1977), the prerequisites for a *de facto* merger were summarized:

> [HN5] To find that a *de facto* merger has occurred there must be a continuity of the selling corporation, evidenced by the same management, personnel, assets and physical location; a continuity of stockholders, accomplished by paying for the acquired corporation with shares of stock; a dissolution of the selling corporation, and the assumption of liabilities by the purchaser.

431 F. Supp. at 839 (citing *Shannon v. Samuel Langston Co.*, 379 F. Supp. 797, 801 (W.D. Mich. 1974)). Several of

these requirements are unfulfilled in the instant case. First, there was no dissolution of Augie's, which remains an independent corporate entity. Second, Restivo did not assume Augie's liabilities. Third, no transfer of title to Augie's real property or equipment has ever taken place. Although there was continuity of shareholders in the transaction in the sense that the former shareholders of Augie's and Restivo became the new shareholders **[**14]** of Augie/Restivo, this alone does not sustain a finding of a *de facto* merger.

We turn now to the bankruptcy judge's finding that the proposed reorganization plan and sale justified the consolidation because consolidation would benefit the creditors of both companies. We do not pause to scrutinize her various speculations as to events that would occur if the proceedings were to continue separately because we do not believe that a proposed reorganization plan alone can justify substantive consolidation. Where, as in the instant case, creditors such as Union and MHTC knowingly made loans to separate entities and no irremediable commingling of assets has occurred, a creditor cannot be made to sacrifice the priority of its claims against *its* debtor by fiat based on the bankruptcy court's speculation that it knows the creditor's interests better than does the creditor itself. The rationale of the bankruptcy judge in the instant case would allow consolidation of two completely unrelated companies upon a finding that the creditors would be better off under some proposed plan involving the joint sale of their assets. The plan would then be approved under "cram-down" provisions that **[**15]** would subordinate the wishes of the creditors of one debtor to those of the other. We do not read the bankruptcy code to allow such a result. Where substantive consolidation is not otherwise justified, a proposed buyer can make contingent offers for each debtor so that priorities among creditors can be preserved. [2]

2 The recent falling through of the sale to Leon's reveals the bankruptcy court's decision to be all the more misguided, because the principal effect of consolidation is now a windfall for MHTC.

The plain fact is that Union's claim against Augie's assets is superior to that of MHTC, and, as a result, the undesirability of consolidation is as clear in the instant case as it was in our earlier decision in *Flora Mir*. In *Flora Mir*, a corporation and twelve of its subsidiaries filed for bankruptcy. The debtors moved to consolidate substantively the proceedings relating to the thirteen companies. The primary asset of Meadors, Inc., one of the subsidiaries, was a misappropriation claim against Flora Mir, which, as an inter-company claim, would have been eliminated in substantive consolidation. Certain debenture creditors of Meadors opposed the consolidation on the **[**16]** ground that they had extended credit to Meadors six years before it was acquired by Flora Mir and had relied solely on Meadors's balance sheet in making the loan. 432 F.2d at 1062. Even though there was some evidence of financial entanglement among the companies, we held that a consolidation was inequitable to Meadors's debenture creditors because, in consolidation, the assets of their debtor would be distributed to the creditors of all thirteen companies, robbing them of the benefit of their bargain. *Id.* at 1062-63. We did so even though the denial of consolidation would thwart an otherwise desirable arrangement among creditors under Chapter IX. As Judge Friendly stated in *Flora Mir*, "The nub of counsel's argument was that only consolidation will permit **[*521]** the quick consummation of an arrangement under Chapter IX. That may indeed be desirable *but not at the cost of sacrificing the rights of Meadors' debenture holders." Id.* at 1063 (emphasis added).

Union is in the same position as were the debenture holders in *Flora Mir*. The result of substantive consolidation in the instant case would be to make the assets of Augie's available to pay the debts of Augie/Restivo, **[**17]** and to enrich MHTC (whose entire pre-petition loans to Augie/Restivo have been converted to fully-secured post-petition super-priority administrative debt pursuant to the cash collateral stipulations) at the expense of Union. Even if the reorganization and sale remained viable, moreover, there would be no justification for submitting Union to "cram-down" procedures dominated by creditors of Augie/Restivo.

Reversed.

TAB 2

1 of 5 DOCUMENTS

HILTON v. GUYOT.; HILTON v. GUYOT.

Nos. 130, 34.

SUPREME COURT OF THE UNITED STATES

159 U.S. 113; 16 S. Ct. 139; 40 L. Ed. 95; 1895 U.S. LEXIS 2294

Argued April 10, 1894.
June 3, 1895, Decided

PRIOR HISTORY: ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

THE first of these two cases was an action at law, brought December 18, 1885, in the Circuit Court of the United States for the Southern District of New York, by Gustave Bertin Guyot, as official liquidator of the firm of Charles Fortin & Co., and by the surviving members of that firm, all aliens and citizens of the Republic of France, against Henry Hilton and William Libbey, citizens of the United States and of the State of New York, and trading as copartners, in the cities of New York and Paris and elsewhere, under the firm name of A.T. Stewart & Co. The action was upon a judgment recovered in a French court at Paris in the Republic of France by the firm of Charles Fortin & Co., all whose members were French citizens, against Hilton and Libbey, trading as copartners as aforesaid, and citizens of the United States and of the State of New York.

The complaint alleged that in 1886, and since, during the time of all the transactions included in the judgment sued on, Hilton and Libbey, as successors to Alexander T. Stewart and Libbey, under the firm of A. T. Stewart & Co., carried on a general business as merchants in the cities of New York and Paris and elsewhere, and maintained a regular store and place of business at Paris; that during the same time Charles Fortin & Co. carried on the manufacture and sale of gloves at Paris, and the two firms had there large dealings in that business, and controversies arose in the adjustment of accounts between them.

The complaint further alleged that between March 1, 1879, and December 1, 1882, five suits were brought by Fortin & Co. against Stewart & Co. for sums alleged to be due, and three suits by Stewart & Co. against Fortin & Co., in the Tribunal of Commerce of the Department of the Seine, a judicial tribunal or court organized and existing under the laws of France, sitting at Paris, and having jurisdiction of suits and controversies between merchants or traders growing out of commercial dealings between them; that Stewart & Co. appeared by their authorized attorneys in all those suits; and that, after full hearing before an arbitrator appointed by that court, and before the court itself, and after all the suits had been consolidated by the court, final judgment was rendered on January 20, 1883, that Fortin & Co. recover of Stewart & Co. various sums, arising out of the dealings between them, and amounting to 660,847 francs, with interest, and dismissed part of Fortin & Co.'s claim.

The complaint further alleged that appeals were taken by both parties from that judgment to the Court of Appeals of Paris, Third Section, an appellate court of record, organized and existing under the laws of the Republic of France, and having jurisdiction of appeals from the final judgments of the Tribunal of Commerce of the Department of the Seine, where the amount in dispute exceeded the sum of 1500 francs; and that the said court of appeal, by a final judgment, rendered March 19, 1884, and remaining of record in the office of its clerk at Paris, after hearing the several parties by

their counsel, and upon full consideration of the merits, dismissed the appeal of the defendants, confirmed the judgment of the lower court in favor of the plaintiffs, and ordered, upon the plaintiffs' appeal, that they recover the additional sum of 152,528 francs, with 182,849 francs for interest on all the claims allowed, and 12,559 francs for costs and expenses.

The complaint further alleged that Guyot had been duly appointed, by the Tribunal of Commerce of the Department of the Seine, official liquidator of the firm of Fortin & Co., with full powers, according to law and commercial usage, for the verification and realization of its property, both real and personal, and to collect and cause to be executed the judgments aforesaid.

The complaint further alleged that the judgment of the Court of Appeals of Paris, and the judgment of the Tribunal of Commerce, as modified by the judgment of the appellate court, still remain in full force and effect; "that the said courts respectively had jurisdiction of the subject-matter of the controversies so submitted to them, and of the parties, the said defendants having intervened, by their attorneys and counsel, and applied for affirmative relief in both courts; that the plaintiffs have hitherto been unable to collect the said judgments or any part thereof, by reason of the absence of the said defendants, they having given up their business in Paris prior to the recovery of the said judgment on appeal, and having left no property within the jurisdiction of the Republic of France, out of which the said judgments might be made;" and that there are still justly due and owing from the defendants to the plaintiffs upon those said judgments certain sums, specified in the complaint, and amounting in all to 1,008,783 francs in the currency of the Republic of France, equivalent to $195,122.47.

The defendants, in their answer, set forth in detail the original contracts and transactions in France between the parties, and the subsequent dealings between them, modifying those contracts; and alleged that the plaintiffs had no just claim against the defendants, but that, on the contrary, the defendants, upon a just settlement of the accounts, were entitled to recover large sums from the plaintiffs.

The answer admitted the proceedings and judgments in the French courts; and that the defendants gave up their business in France before the judgment on appeal, and had no property within the jurisdiction of France, out of which that judgment could be collected.

The answer further alleged that the Tribunal of Commerce of the Department of the Seine was a tribunal whose judges were merchants, ship captains, stockbrokers and persons engaged in commercial pursuits, and of which Charles Fortin had been a member until shortly before the commencement of the litigation.

The answer further alleged that in the original suits brought against the defendants by Fortin & Co. the citations were left at their storehouse in Paris; that they were then residents and citizens of the State of New York, and neither of them at that time or within four years before had been within, or resident or domiciled within, the jurisdiction of that tribunal, or owed any allegiance to France; but that they were the owners of property situated in that country, which would by the law of France have been liable to seizure if they did not appear in that tribunal; and that they unwillingly, and solely for the purpose of protecting that property, authorized and caused an agent to appear for them in those proceedings; and that the suits brought by them against Fortin & Co. were brought for the same purpose, and in order to make a proper defence, and to establish counter claims arising out of the transactions between the parties, and to compel the production and inspection of Fortin & Co.'s books; and that they sought no other affirmative relief in that tribunal.

The answer further alleged that pending that litigation the defendants discovered gross frauds in the accounts of Fortin & Co.; that the arbitrator and the tribunal declined to compel Fortin & Co. to produce their books and papers for inspection; and that if they had been produced, the judgment would not have been obtained against the defendants.

The answer further alleged that, without any fault or negligence on the part of the defendants, there was not a full and fair trial of the controversies before the arbitrator, in that no witness was sworn or affirmed; in that Charles Fortin was permitted to make, and did make, statements not under oath, containing many falsehoods; in that the privilege of cross-examination of Fortin and other persons who made statements before the arbitrator was denied to the defendants;

and in that extracts from printed newspapers, the knowledge of which was not brought home to the defendants, and letters and other communications in writing between Fortin & Co. and third persons, to which the defendants were neither privy nor party, were received by the arbitrator; that without such improper evidence the judgment would not have been obtained; and that the arbitrator was deceived and misled by the false and fraudulent accounts introduced by Fortin & Co., and by the hearsay testimony given without the solemnity of an oath and without cross-examination, and by the fraudulent suppression of the books and papers.

The answer further alleged that Fortin & Co. made up their statements and accounts falsely and fraudulently, and with intent to deceive the defendants and the arbitrator and the said courts of France, and those courts were deceived and misled thereby; that, owing to the fraudulent suppression of the books and papers of Fortin & Co., upon the trial, and the false statements of Fortin regarding matters involved in the controversy, the arbitrator and the courts of France "were deceived and misled in regard to the merits of the controversies pending before them and wrongfully decided against said Stewart & Co. as hereinbefore stated; that said judgment hereinbefore mentioned is fraudulent, and based upon false and fraudulent accounts and statements, and is erroneous, in fact and in law, and is void; that the trial hereinbefore mentioned was not conducted according to the usages and practice of the common law, and the allegations and proofs given by said Fortin & Co., upon which said judgment is founded, would not be competent or admissible in any court or tribunal of the United States in any suit between the same parties involving the same subject-matter; and it is contrary to natural justice and public policy that the said judgment should be enforced against a citizen of the United States; and that, if there had been a full and fair trial upon the merits of the controversies so pending before said tribunals, no judgment would have been obtained against said Stewart & Co.

"Defendants, further answering, allege that it is contrary to natural justice, that the judgment hereinbefore mentioned should be enforced without an examination of the merits thereof; that by the laws of the Republic of France, to wit, article 181 [121] of the Royal Ordinance of June 15, 1629, it is provided, namely: 'Judgments rendered, contracts or obligations recognized, in foreign kingdoms and sovereignties, for any cause whatever, shall give rise to no lien or execution in our kingdom. Thus the contracts shall stand for simple promises, and notwithstanding such judgments our subjects against whom they have been rendered may contest their rights anew before our own judges.'

"And it is further provided by the laws of France, by article 546 of the Code de Procedure Civile, as follows: 'Judgments rendered by foreign tribunals shall be capable of execution in France, only in the manner and in the cases set forth by articles 2123 and 2128 of the Civil Code.'

"And it is further provided by the laws of France, by article 2128 [2123] of the Code de Procedure Civile [Civil Code], 'A lien cannot, in like manner, arise from judgments rendered in any foreign country, save only as they have been declared in force by a French tribunal, without prejudice, however, to provisions to the contrary, contained in public laws and treaties;' [and by article 2128 of that code, 'Contracts entered into in a foreign country cannot give a lien upon property in France, if there are no provisions contrary to this principle in public laws or in treaties.']

"That the construction given to said statutes by the judicial tribunals of France is such that no comity is displayed toward the judgments of tribunals of foreign countries against the citizens of France, when sued upon in said courts of France, and the merits of the controversies upon which the said judgments are based are examined anew, unless a treaty to the contrary effect exists between the said Republic of France and the country in which such judgment is obtained; that no treaty exists between the said Republic of France and the United States, by the terms or effect of which the judgments of either country are prevented from being examined anew upon the merits, when sued upon in the courts of the country other than that in which it is obtained; that the tribunals of the Republic of France give no force and effect, within the jurisdiction of the said country, to the duly rendered judgments of the courts of competent jurisdiction of the United States against citizens of France after proper personal service of the process of said courts is made thereon in this country."

The answer further set up, by way of counter claim, and in detail, various matters arising out of the dealings between the parties; and alleged that none of the plaintiffs had since 1881 been residents of the State of New York, or within the

jurisdiction of that State, but the defendants were and always had been residents of that State.

The answer concluded by demanding that the plaintiffs' complaint be dismissed, and that the defendants have judgment against them upon the counter claims, amounting to $102,942.91.

The plaintiffs filed a replication to so much of the answer as made counter claims, denying its allegations, and setting up in bar thereof the judgment sued on.

The defendants, on June 22, 1888, filed a bill in equity against the plaintiffs, setting forth the same matters as in their answer to the action at law, and praying for a discovery, and for an injunction against the prosecution of the action. To that bill a plea was filed, setting up the French judgments; and upon a hearing the bill was dismissed. 42 Fed. Rep. 249. From the decree dismissing the bill an appeal was taken, which was the second case now before this court.

The action at law afterwards came on for trial by a jury; and the plaintiffs put in the records of the proceedings and judgments in the French courts; and evidence that the jurisdiction of those courts was as alleged in the complaint, and that the practice followed and the method of examining the witnesses were according to the French law; and also proved the title of Guyot as liquidator.

It was admitted by both parties that, for several years prior to 1876, the firm of Alexander T. Stewart & Co., composed of Stewart and Libbey, conducted their business as merchants in the city of New York, with branches in other cities of America and Europe; that both partners were citizens and residents of the city and State of New York during the entire period mentioned in the complaint; and that in April, 1876, Stewart died, and Hilton and Libbey formed a partnership to continue the business under the same firm name, and became the owners of all the property and rights of the old firm.

The defendants made numerous offers of evidence in support of all the specific allegations of fact in their answer, including the allegations as to the law and comity of France. The plaintiffs, in their brief filed in this court, admitted that most of these offers "were offers to prove matters in support of the defences and counter claims set up by the defendants in the cases tried before the French courts, and which or most of which would have been relevant and competent if the plaintiffs in error are not concluded by the result of those litigations, and have now the right to try those issues, either on the ground that the French judgments are only prima facie evidence of the correctness of those judgments, or on the ground that the case is within the exception of a judgment obtained by fraud."

The defendants, in order to show that they should not be concluded by having appeared and litigated in the suits brought against them by the plaintiff in the French courts, offered to prove that they were residents and citizens of the State of New York, and neither of them had been, within four years prior to the commencement of those suits, domiciled or resident within the jurisdiction of those courts; that they had a purchasing agent and a storehouse in Paris, but only as a means or facility to aid in the transaction of their principal business, which was in New York, and they were never otherwise engaged in business in France; that neither of them owed allegiance to France, but they were the owners of property there, which would, according to the laws of France, have been liable to seizure if they had not appeared to answer in those suits; that they unwillingly, and solely for the purpose of protecting their property within the jurisdiction of the French tribunal, authorized an agent to appear, and he did appear in the proceedings before it; and that their motion to compel an inspection of the plaintiffs' books, as well as the suits brought by the defendants in France, were necessary by way of defence or counter claim to the suits there brought by the plaintiffs against them.

Among the matters which the defendants alleged, and offered to prove, in order to show that the French judgments were procured by fraud, were that Fortin & Co., with intent to deceive and defraud the defendants, and the arbitrator and the courts of France, entered in their books, and presented to the defendants, and to the French courts, accounts, bearing upon the transactions in controversy, which were false and fraudulent, and contained excessive and fraudulent charges against the defendants, in various particulars specified; that the defendants made due application to the Tribunal of Commerce to compel Fortin & Co. to allow their account books and letter books to be inspected by the defendants, and the application was opposed by Fortin & Co., and denied by the tribunal; that the discovery and inspection of those

books were necessary to determine the truth of the controversies between the parties; that, before the Tribunal of Commerce, Charles Fortin was permitted to and did give in evidence statements not under oath, relating to the merits of the controversies there pending; and falsely represented that a certain written contract, made in 1873, between the Stewart & Co. and Fortin & Co., concerning their dealings, was not intended by the parties to be operative according to its terms; and, in support of that false representation, made statements as to admissions by Stewart in a private conversation with him; and that the defendants could not deny those statements, because Stewart was dead, and they were not protected from the effect of Fortin's statements by the privilege of cross-examining him under oath; and that the French judgments were based upon false and fraudulent accounts presented and statements made by Fortin & Co. before the Tribunal of Commerce during the trial before it.

The records of the judgments of the French courts, put in evidence by the plaintiffs, showed that all the matters now relied on to show fraud were contested in and considered by those courts.

The plaintiffs objected to all the evidence offered by the defendants, on the grounds that the matters offered to be proved were irrelevant, immaterial, and incompetent; that, in respect to them, the defendants were concluded by the judgment sued on and given in evidence; and that none of those matters, if proved, would be a defence to this action upon that judgment.

The court declined to admit any of the evidence so offered by the defendants, and directed a verdict for the plaintiffs in the sum of $277,775.44, being the amount of the French judgment and interest. The defendants, having duly excepted to the rulings and direction of the court, sued out a writ of error.

The writ of error in the action at law and the appeal in the suit in equity were argued together in this court January 19, 22, and 23, 1894; and, by direction of the court, were reargued in April, 1894, before a full bench.

CASE SUMMARY:

PROCEDURAL POSTURE: Defendants appealed an order from the Circuit Court of the United States for the Southern District of New York, which directed a verdict for plaintiffs in the amount a French court had awarded. Defendants had alleged fraud on the part of plaintiffs.

OVERVIEW: Plaintiffs sued defendants in a French court under a contract claim. Defendants alleged fraud on the part of plaintiffs, and sought an injunction from bringing suit, but the court would not admit evidence and entered a directed verdict for plaintiff. The judgment was affirmed in a French appeals court. Defendants then sought review in the United States. The court found that comity was reciprocal. Because France did not recognize final judgments of the United States, and would try such judgments anew, French judgments would be given the same treatment. Thus, the comity of the United States did not require the court to give conclusive effect to the judgments of the courts of France. Defendants could receive a new trial.

OUTCOME: The judgment was reversed and the cause was remanded for a new trial because comity was not afforded to foreign judgments when the country did not reciprocate comity.

CORE TERMS: foreign judgment, tribunal, conclusive, reciprocity, comity, prima facie evidence, sentence, foreign country, treaty, judgment rendered, assumpsit, impeached, decree, executory, civilized, adjudged, domestic, founded, competent jurisdiction, impeach, sovereignty, afterwards, foreigner, foreign law, international law, judgment recovered, cause of action, pronounced, kingdom, abroad

LexisNexis(R) Headnotes

Constitutional Law > The Judiciary > General Overview

[HN1] The most certain guide to answer questions of law is a treaty or a statute of this country. But when there is no written law upon the subject, the duty still rests upon the judicial tribunals of ascertaining and declaring what the law is, whenever it becomes necessary to do so, in order to determine the rights of parties to suits regularly brought before them. In doing this, the courts must obtain such aid as they can from judicial decisions, from the works of jurists and commentators, and from the acts and usages of civilized nations.

Governments > Courts > Judicial Comity
International Law > Dispute Resolution > Comity Doctrine > General Overview
[HN2] Comity is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws.

Governments > Courts > Judicial Comity
International Law > Dispute Resolution > Comity Doctrine > General Overview
International Law > Dispute Resolution > Conflicts of Laws > General Overview
[HN3] Comity is, and ever must be, uncertain. It must necessarily depend on a variety of circumstances which cannot be reduced to any certain rule. No nation will suffer the laws of another to interfere with her own to the injury of her citizens; whether they do or not must depend on the condition of the country in which the foreign law is sought to be enforced, the particular nature of her legislation, her policy, and the character of her institutions. In the conflict of laws it must often be a matter of doubt which should prevail; and that, whenever a doubt does exist, the court, which decides, will prefer the laws of its own country to that of the stranger.

Governments > Courts > Judicial Comity
Governments > State & Territorial Governments > Relations With Governments
International Law > Dispute Resolution > Comity Doctrine > General Overview
[HN4] The comity thus extended to other nations is no impeachment of sovereignty. It is the voluntary act of the nation by which it is offered, and is inadmissible when contrary to its policy, or prejudicial to its interests.

Civil Procedure > Judgments > Entry of Judgments > Enforcement & Execution > General Overview
Governments > Courts > Judicial Comity
International Law > Dispute Resolution > Comity Doctrine > General Overview
[HN5] No sovereign is bound, unless by special compact, to execute within his dominions a judgment rendered by the tribunals of another state; and if execution be sought by suit upon the judgment, or otherwise, the tribunal in which the suit is brought, or from which execution is sought, is, on principle, at liberty to examine into the merits of such judgment, and to give effect to it or not, as may be found just and equitable. The general comity, utility and convenience of nations have, however, established a usage among most civilized states, by which the final judgments of foreign courts of competent jurisdiction are reciprocally carried into execution, under certain regulations and restrictions, which differ in different countries.

Governments > Courts > Judicial Comity
International Law > Dispute Resolution > Comity Doctrine > General Overview
[HN6] The effect to be given to foreign judgments is altogether a matter of comity, in cases where it is not regulated by treaty.

International Law > Dispute Resolution > Comity Doctrine > General Overview
[HN7] Every foreign judgment, of whatever nature, in order to be entitled to any effect, must have been rendered by a court having jurisdiction of the cause, and upon regular proceedings and due notice. In alluding to different kinds of judgments, therefore, such jurisdiction, proceedings and notice will be assumed. It will also be assumed that they are untainted by fraud.

Civil Procedure > Jurisdiction > Personal Jurisdiction & In Rem Actions > In Rem Actions > True in Rem Actions
Constitutional Law > Relations Among Governments > Full Faith & Credit
International Law > Dispute Resolution > Comity Doctrine > General Overview
[HN8] A judgment in rem, adjudicating the title to a ship or other movable property within the custody of the court, is treated as valid everywhere. The sentence of a competent court, proceeding in rem, is conclusive with respect to the thing itself, and operates as an absolute change of the property. By such sentence, the right of the former owner is lost, and a complete title given to the person who claims under the decree. No court of coordinate jurisdiction can examine the sentence. The question, therefore, respecting its conformity to general or municipal law can never arise, for no coordinate tribunal is capable of making the inquiry.

Constitutional Law > Relations Among Governments > Full Faith & Credit
International Law > Dispute Resolution > Comity Doctrine > General Overview
[HN9] A judgment affecting the status of persons, such as a decree confirming or dissolving a marriage, is recognized as valid in every country, unless contrary to the policy of its own law.

International Law > Dispute Resolution > Comity Doctrine > General Overview
[HN10] Other judgments, not strictly in rem, under which a person has been compelled to pay money, are so far conclusive that the justice of the payment cannot be impeached in another country, so as to compel him to pay it again. For instance, a judgment in foreign attachment is conclusive, as between the parties, of the right to the property or money attached.

International Law > Dispute Resolution > Comity Doctrine > General Overview
[HN11] The foreign judgment shall be prima facie evidence of the debt, and conclusive till it be impeached by the other party.

International Law > Dispute Resolution > Comity Doctrine > General Overview
[HN12] It is in one way only, that the sentence or judgment of a court of a foreign state is examinable in the courts, and that is, when the party who claims the benefit of it applies to the courts to enforce it. When it is thus voluntarily submitted to the jurisdiction, the court treats it, not as obligatory to the extent to which it would be obligatory, perhaps, in the country in which it was pronounced, nor as obligatory to the extent to which, by the law, sentences and judgments are obligatory, not as conclusive, but as matter in pais, as consideration prima facie sufficient to raise a promise. The court examines it as they do all other considerations or promises, and for that purpose the court receive evidence of what the law of the foreign state is, and whether the judgment is warranted by that law.

International Law > Dispute Resolution > Comity Doctrine > General Overview
[HN13] Natural law requires the courts of this country to give credit to those of another for the inclination and power to do justice; but not, if that presumption is proved to be ill founded in that transaction, which is the subject of it; and if it appears in evidence, that persons suing under similar circumstances neither had met, nor could meet, with justice, that fact cannot be immaterial as an answer to the presumption.

Civil Procedure > Judgments > Entry of Judgments > Enforcement & Execution > Foreign Judgments
Civil Procedure > Eminent Domain Proceedings > Pleadings > General Overview
Criminal Law & Procedure > Postconviction Proceedings > Motions for New Trial
[HN14] There might be such glaring injustice on the face of a foreign judgment, or it might have a vice rendering it so ludicrous, that, it could not raise an assumpsit, and, if submitted to the jurisdiction of the courts of this country, could not be enforced.

Civil Procedure > Judgments > Preclusion & Effect of Judgments > Full Faith & Credit > General Overview
Constitutional Law > Relations Among Governments > Full Faith & Credit
[HN15] Full faith and credit shall be given, in each of these states, to the records, acts and judicial proceedings of the courts and magistrates of every other state. 1 Stat. 4.

Civil Procedure > Judgments > Preclusion & Effect of Judgments > Full Faith & Credit > General Overview
Constitutional Law > Relations Among Governments > Full Faith & Credit
[HN16] Full faith and credit shall be given in each state to the public acts, records and judicial proceedings of every other state; and the Congress may by general laws prescribe the manner in which such acts, records and proceedings shall be proved, and the effect thereof. U.S. Const. art. 4, § 1.

Constitutional Law > Relations Among Governments > Full Faith & Credit
Evidence > Authentication > General Overview
[HN17] Records and judicial proceedings authenticated in other jurisdictions, shall have such faith and credit given to them in every court within the United States, as they have by law or usage in the courts of the state from whence the said records are or shall be taken.

Constitutional Law > Relations Among Governments > Full Faith & Credit
Governments > Local Governments > Boundaries
International Law > Dispute Resolution > Comity Doctrine > General Overview
[HN18] Wherever the court may have proceeded on municipal law, the rule is, that the judgments are not conclusive evidence of debt, but prima facie evidence only. The proceedings have not the conclusive quality which is annexed to the records or proceedings of United States courts, where the court approve both of the rule and of the judges who interpret and apply it. A foreign judgment may be impeached; defendant may show that it is unjust, or that it was irregularly or unduly obtained.

International Law > Dispute Resolution > Comity Doctrine > General Overview
[HN19] A foreign judgment of a competent court may indeed be impeached, if it carries on the face of it a manifest error.

Governments > Courts > Judicial Comity
International Law > Dispute Resolution > Comity Doctrine > General Overview
International Law > Dispute Resolution > Tribunals
[HN20] Where there has been opportunity for a full and fair trial abroad before a court of competent jurisdiction, conducting the trial upon regular proceedings, after due citation or voluntary appearance of the defendant, and under a system of jurisprudence likely to secure an impartial administration of justice between the citizens of its own country and those of other countries, and there is nothing to show either prejudice in the court, or in the system of laws under which it was sitting, or fraud in procuring the judgment, or any other special reason why the comity of this nation should not allow it full effect, the merits of the case should not, in an action brought in this country upon the judgment, be tried afresh, as on a new trial or an appeal, upon the mere assertion of the party that the judgment was erroneous in law or in fact.

Civil Procedure > Jurisdiction > Personal Jurisdiction & In Rem Actions > General Overview
International Law > Dispute Resolution > Comity Doctrine > General Overview
International Law > Dispute Resolution > Tribunals
[HN21] While an appearance by the defendant in a court of a foreign country, for the purpose of protecting his property already in the possession of that court, may not be deemed a voluntary appearance, yet an appearance solely for the purpose of protecting other property in that country from seizure is considered as a voluntary appearance.

International Law > Dispute Resolution > Comity Doctrine > General Overview
International Law > Dispute Resolution > Tribunals
[HN22] When the practice followed and the method of examining witnesses were according to the laws of a foreign country, United States courts are not prepared to hold that the fact that the procedure in these respects differed from that of United States courts is, of itself, a sufficient ground for impeaching the foreign judgment.

Civil Procedure > Judgments > Entry of Judgments > Enforcement & Execution > Foreign Judgments

Contracts Law > Defenses > Fraud & Misrepresentation > General Overview
Contracts Law > Defenses > Illegal Bargains
[HN23] It may be assumed that, as the courts of a country will not enforce contracts made abroad in evasion or fraud of its own laws, so they will not enforce a foreign judgment upon such a contract.

Constitutional Law > The Judiciary > General Overview
[HN24] It is the paramount duty of the court, before which any suit is brought, to see to it that the parties have had a fair and impartial trial, before a final decision is rendered against either party.

Governments > Courts > Judicial Comity
International Law > Dispute Resolution > Comity Doctrine > General Overview
[HN25] When a foreign judgment appears to have been rendered by a competent court, having jurisdiction of the cause and of the parties, and upon due allegations and proofs, and opportunity to defend against them, and its proceedings are according to the course of a civilized jurisprudence, and are stated in a clear and formal record, the judgment is prima facie evidence, at least, of the truth of the matter adjudged; and it should be held conclusive upon the merits tried in the foreign court, unless some special ground is shown for impeaching the judgment, as by showing that it was affected by fraud or prejudice, or that, by the principles of international law, and by the comity of the country, it should not be given full credit and effect.

Civil Procedure > Jurisdiction > Personal Jurisdiction & In Rem Actions > In Rem Actions > True in Rem Actions
International Law > Dispute Resolution > Comity Doctrine > General Overview
[HN26] Any foreign judgment, whether in rem or in personam, may be impeached upon the ground that it was fraudulently obtained.

Governments > Courts > Judicial Comity
International Law > Dispute Resolution > Comity Doctrine > General Overview
[HN27] There is no obligation, recognized by legislators, public authorities, and publicists, to regard foreign laws; but their application is admitted only from considerations of utility and the mutual convenience of states -- ex comitate, ob reciprocam utilitatem. The general comity, utility and convenience of nations have, however, established a usage among most civilized states, by which the final judgments of foreign courts of competent jurisdiction are reciprocally carried into execution.

International Law > Dispute Resolution > Comity Doctrine > General Overview
[HN28] Judgments rendered in France, or in any other foreign country, by the laws of which United States' judgments are reviewable upon the merits, are not entitled to full credit and conclusive effect when sued upon in this country, but are prima facie evidence only of the justice of the plaintiffs' claim.

LAWYERS' EDITION HEADNOTES:

International law -- how determined -- comity of nations -- action on foreign judgment -- appearance -- foreign practice -- judgment, when prima facie evidence -- foreign law -- reciprocity -- evidence. --

Headnote:

1. International law, including questions concerning the rights of persons within the dominion of one nation by reason of acts done within the dominion of another, is part of our law, and should be ascertained and administered by the courts as often as such questions are duly submitted to their determination.

2. Where there is no written law upon the subject, such as treaty or statute, questions of international law must be determined by judicial decisions, the works of jurists, and the acts and usages of civilized nations.

3. Comity of nations is the recognition which one nation allows within its territory to the legislative, executive, or judicial acts of another nation, having due regard to international duty and convenience, and to the rights of its own citizens or others who are under the protection of its laws.

4. Appearance by a citizen of New York having his principal place of business in the city of New York and a storehouse and agent in Paris, where he purchased but did not sell goods, in a suit in a French court, and carrying it on to prevent his property in Paris not in the custody of the court from being taken on judgment, give that court jurisdiction of his person.

5. Allowing plaintiff to testify without oath or cross-examination, or admitting papers in evidence, in France, according to the laws and practice of that country, is not sufficient ground for impeaching the foreign judgment in this country.

6. A foreign judgment for money in favor of a citizen of the foreign country against a citizen of this country, rendered by a competent court having jurisdiction of the cause and of the parties, upon due allegations and proofs and opportunity to defend according to the course of a civilized jurisprudence, whose record is clear and formal, is prima facie evidence, at least, in a suit upon it in this country, and is conclusive on the merits, unless impeached on special ground, or shown by international law or the comity of this country not entitled to full faith and credit.

7. Judgments rendered in a foreign country, by the laws of which our judgments are reviewable on the merits, are not entitled to full credit and conclusive effect when sued upon in this country, but are only prima facie evidence of the justice of the plaintiff's claim.

8. In the absence of statute or treaty, the comity of this country does not require that judgments of a foreign country be recognized as conclusive in this country, where such foreign country does not give like effect to our own judgments.

9. In an action on a French judgment, evidence by defendant that the French courts give no force and effect to the judgments of this country against French citizens, and that they are there re-examined on the merits, although rendered after proper personal service of process made in this country, is admissible.

SYLLABUS

A citizen and resident of this country, who has his principal place of business here, but has an agent in a foreign country, and is accustomed to purchase and store large quantities of goods there, and, in a suit brought against him by a citizen and in a court of that country, appears and defends with the sole object of preventing his property within the jurisdiction, but not in the custody of that court, from being taken in satisfaction of any judgment that may be recovered against him there, cannot, in an action brought against him in this country upon such a judgment, impeach it for want of jurisdiction of his person.

The admission, at the trial in a court of a foreign country, according to its law and practice, of testimony not under oath and without opportunity of cross-examination, and of documents with which the defendant had no connection and which by our law would not be admissible against him, is not of itself a sufficient ground for impeaching the judgment of that court in an action brought upon it in this country.

When an action is brought in a court of this country, by a citizen of a foreign country against one of our own citizens, to recover a sum of money adjudged by a court of that country to be due from the defendant to the plaintiff, and the foreign judgment appears to have been rendered by a competent court, having jurisdiction of the cause and of the parties, and upon due allegations and proofs, and opportunity to defend against them, and its proceedings are according to the course of a civilized jurisprudence, and are stated in a clear and formal record, the judgment is prima facie evidence, at least, of the truth of the matter adjudged; and the judgment is conclusive upon the merits tried in the foreign court, unless some special ground is shown for impeaching it, as by showing that it was affected by fraud or prejudice, or that by the principles of international law, and by the comity of our own country, it is not entitled to full credit and effect.

A judgment for a sum of money, rendered by a court of a foreign country, having jurisdiction of the cause and of the parties, in a suit brought by one of its citizens against one of ours, is prima facie evidence only, and not conclusive of the merits of the claim, in an action brought here upon the judgment, if by the law of the foreign country, as in France, judgments of our own courts are not recognized as conclusive.

COUNSEL: Mr. James C. Carter and Mr. Elihu Root for plaintiffs in error and appellants. Mr. Horace Russell was on their briefs.

There is scarcely any doctrine of the law which, so far as respects formal and exact statement, is in a more unreduced and uncertain condition than that which relates to the question what force and effect should be given by the courts of one nation to the judgment rendered by the courts of another nation. Very numerous decisions have been had, especially in England, relating to this question in the various forms in which it has arisen; but if we should undertake to learn from the opinions of the courts in these cases what principles had been decided, we should find ourselves in utter confusion. On some occasions judges have said that the judgments of foreign tribunals should be treated as being as conclusive as those of our own; on others, that they are at most but prima facie evidence, and are subject to examination generally to ascertain whether justice has been done in them or not; and on others, that whether they are open to examination or not depends upon the circumstances under which they were pronounced.

In the learned notes to the Duchess of Kingston's case, in Smith's Leading Cases, a very minute reference is made to the various decisions in England and in this country, and some attempt made to group and classify them; but the reader will scarcely gain any assistance from them, and will, after perusal, feel certain of one thing only, viz.: that the subject is involved in great confusion.

The natural and obvious method of doing justice between two contending parties is to examine their allegations, to ascertain the facts respecting the matter in dispute, and to declare the law arising upon these facts. Aside from reasons of policy, this is the only course which should be pursued. It would be quite irrelevant for one of the parties to say, "This same process has once been pursued before, and the result then reached ought to preclude further inquiry." To this answer it would be quite sufficient to reply that if justice had been done before, it could be again, and if it had not been done, it ought to be done now. But it would be an intolerable burden and expense, both to the public and to the parties, if the courts of the same country could be continually vexed with trials of the same controversy. "Interest reipublicoe ut sit fins litium." It is necessary that some limitation should be imposed; and the conclusion of state policy in this country and in England has been that the parties should be allowed one full and fair opportunity to try their grievances, and one alone. This is sufficient to prevent attempts at the private redress of injuries. Hence, the general rule applicable to domestic judgments, that the judgment of a court of competent jurisdiction is conclusive between the same parties upon the same question in another court, whether as a plea, a bar, or as evidence.

In reaching this conclusion, some concession is perhaps made from strict and absolute justice in favor of convenience. But justice nevertheless is, as it always must be, the overruling consideration; and the doctrine would never have been adopted unless the conclusion had been thought to be a safe one, that the judgment in the first and only trial allowed would be, in the vast majority of cases, a sound and righteous one.

This doctrine has been established among us in view of the fact that rules and safeguards have been adopted which, if followed, will make the judgment one which may be enforced without further inquiry. It rests upon two principal considerations: (1) That there is a reasonably safe assurance that the former judgment, reached only after the employment of precautions carefully devised for the elimination of error, is just and right; and (2) that the maxim "interest reipublicoe ut sit finis litium," which deems it a satisfaction of the duty of government to furnish remedial justice, if one fair opportunity has been given, has been duly considered. Both of these considerations are wanting in the case of foreign judgments.

Except in the case of England and some of her colonies, where the national standards of justice, and also the methods of

procedure, very much resemble our own, we can have no full assurance that a just conclusion has been reached. In many, perhaps most, other instances, there are substantial differences in the general conceptions of justice, manifested sometimes by peculiar local laws, and sometimes by peculiar doctrines of general jurisprudence, and sometimes by both. And, generally, the methods deemed essential by us to the working out of a just conclusion are not enforced. Jury trials, exclusion of improper evidence, cross-examination of witnesses, etc., are matters to which comparatively little attention is given. And if we may believe what has often been alleged upon good authority, in many countries there is a scandalous amount of partiality, favor and even bribery, in the administration of justice.

The maxim, "interest reipublicoe ut sit finis litium," applies to our own nation only. It is no part of our policy to restrict litigation in the world generally. In the case where a foreign judgment is set up as conclusive, we have not as yet afforded the one fair opportunity to litigate the question upon its original merits, which it is the duty of governments to furnish.

The suggestion that the comity of nations requires conclusive force to be given to foreign judgments, inasmuch as otherwise they will not give like force to our judgments, is wholly insufficient. This comity does, indeed, have a place in this branch of the law, but by no means the force thus suggested. We can never allow the assumption that Morocco, or Turkey, or Russia, or even Germany, Italy, or France has methods of judicial administration equal to our own, so as to justify ourselves in making a tacit agreement that we will enforce their judgments, if they will ours.

Our courts cannot show a comity toward England which they would deny to Russia. If a reciprocity in the treatment of judicial proceedings should be thought desirable, it can be safely brought about by treaty alone, where it may be yielded or withheld at pleasure. We shall consider this more at length later.

If, therefore, foreign judgments are in any case to be held conclusive with us, it must be for other reasons than those upon which we hold domestic judgments conclusive. It cannot be said that foreign judgments are ever so conclusive that no inquiry into them can be allowed; but there are many cases in which they may be justly held substantially conclusive. The common characteristic of all of them is that the obligation of the State to ascertain, declare, nd enforce justice according to its own conceptions of justice does not in such cases exist, or is greatly diminished in force; and that it is wiser, safer, and better to adopt and enforce the judgment of the foreign State.

A careful examination of all the cases warrants us in assuming that the question whether a foreign judgment is conclusive, so as to preclude inquiry into the original merits of the controversy, depends upon the circumstances under which it was rendered; and that it is not thus conclusive where the State is under its ordinary obligation to the party demanding such inquiry to give him at least one full and fair opportunity of having his cause adjudicated upon its original merits. It is well settled that wherever a domestic judgment is interposed as a bar to an original investigation, it must appear that such judgment was the result of a proceeding so instituted and prosecuted as to show that the party sought to be precluded from original inquiry did have, in the suit in which the judgment was rendered, this full and fair opportunity. The American courts never can have any such complete assurance that he party against whom a foreign judgment has been rendered did have a full and fair opportunity for an adjudication of his cause, according to our conceptions of justice; and consequently, if, in any case, a foreign judgment is held conclusive, it must be because there is not, in the particular case, any such obligation on the part of the State to that party to afford him even one such full and fair opportunity to have his cause adjudicated according to its conceptions of justice.

Indeed, the general doctrine, as stated in most cases in the courts of the United States, goes much further than any of the necessities of the present controversy require; and perhaps further than would be allowed in a precise statement of its extent. It declares that foreign judgments are prima facie evidence only. Only two cases are cited to the contrary. Lazier v. Westcott, 26 N.Y. 146; and New York, Lake Erie & Western Railroad v. Henry, 21 Blatchford, 400. In the first case the only question before the appellate court was whether the record was receivable in evidence notwithstanding the technical objections. The court held it was; but the learned Judge (Davies) who gave the opinion, then proceeded to argue a question not raised, namely, whether foreign judgments were conclusive, and held that they

were. This opinion is unimportant. The second was a case of precisely the same character. The judgment was in no respect impeached.

A review of the English cases will show that the doctrine in England never has been, and is not now, inconsistent with the rule herein maintained; but that, on the contrary, the question whether a foreign judgment should be held conclusive depends upon the circumstances under which it was rendered.

First, as to the cases decided before A.D. 1800. Isquiredo v. Forbes, 1 Doug. 6 (n.). This is cited as a decision by Lord Hardwicke, that foreign judgments, when an action is brought upon them, are merely prima facie evidence on behalf of the plaintiffs.

Gage v. Bulkeley, 3 Atk. 215. On a plea of a foreign sentence in a Commissionary Court in France relating to the same matters for which a bill was brought in England, Lord Hardwicke said: "It must be overruled, for it is the most proper case to stand for an answer, with liberty to except, that I ever met with."

Sinclair v. Fraser (1768), 1 Doug. 5 (n.); more fully in Morison's Dec. 4542 (House of Lords). Mrs. Fraser, of Scotland, succeeded to an estate in Jamaica, and, being under age, her tutors appointed Sinclair to manage it. The estate was sold in 1763, and Sinclair procured a judgment in the Supreme Court of Jamaica for a balance due him upon an account current, and then brought suit in Scotland on the Jamaica judgment. The defendant prayed that plaintiff should produce the vouchers of the debts claimed, in order to introduce a fair count. The Lord Ordinary ordered the vouchers to be produced. The plaintiff appealed to the Lords of Sessions, who sustained the Lord Ordinary; upon an appeal to the House of Lords they held that the judgment of the Supreme Court of Jamaica ought to be received as evidence prima facie of the debt, and that it lay upon the defendant to impeach the justice thereof, or to show the same to have been irregularly or unduly obtained.

The decision went only upon the question of evidence and the burden of proof. Morison so treats it. In his head note he epitomizes the decision as follows: "Found that a foreign decree bearing to have been in foro contentio, had not the effect of res judicata in Scotland, but entitled the party claiming under it to plead that the onus probandi rested on his opponent."

This decision is an authority for the claim that the merits of a foreign judgment may be attacked. The Scotch courts did not give it the effect of even prima facie evidence. It this, held they were in error, but in this alone.

Herbert v. Cook, Willes, 36 (n.), Lord Mansfield, in speaking of the judgment of the Hundred Court (a domestic tribunal), said: "Besides, it is not a judgment of a court of record, but like a foreign judgment, and not conclusive evidence of the debt."

Walker v. Witter (1778), 1 Doug. 1, was an action of debt brought in Middlesex County, England, upon a judgment of the Supreme Court of Jamaica. The question was whether nil debet or nul tiel record was the proper plea. Lord Mansfield held that the former was the proper plea, and said: "Foreign judgments are a ground of action everywhere, but they are examinable. He recollected a case of a decree on the chancery side in one of the courts of great sessions of Wales, from which there was an appeal to the House of Lords, and the decree affirmed there, and Lord Hardwicke thought himself entitled to examine into the justice of the decision of the House of Lords, because the original decree was in the court of Wales, whose decisions were clearly liable to be examined. He also mentioned a case on the mortmain acts."

In this decision Justices Willes, Ashurst, and Buller, all concurred.

Galbraith v. Neville (A.D. 1789), 1 Doug. 6 (n.); S.C. 5 East, 475-9 (n.): This was an action of debt on a judgment recovered in the Supreme Court of Jamaica.There was a verdict for the plaintiff. An order to show cause was made why

there should not be a new trial. The reporters are in conflict as to the decision made upon the return of this order. Douglas has it, that there was a new trial granted. East says -- in a note on 5 East, 475 -- "It is there [Douglas 5 and 6] stated that the rule for a new trial . . . was absolute. But, according to my note of the case, it stood over from Easter 29 to Michaelmas 31 Geo. 3 for the court to advise upon it, when Lord Kenyon, C.J., said that the court had considered the matter, and were all of opinion that no new trial ought to be granted. He added that, without entering into the question how far a foreign judgment was impeachable, it was at all events clear that it was prima facie evidence of the debt; and they were of opinion that no evidence had been adduced to impeach this; and, therefore, discharged the rule."

It is apparent from these reports that if East was correct, as he probably was, in point of fact the judgment had been attacked on its merits, and the court finally determined to discuss the weight of evidence; and, upon this proposition it came to the conclusion that the weight of the impeaching evidence was not sufficient to overthrow the presumption in favor of the judgment. In this case Justice Buller said, and his opinion only is quoted, because if the report is correct in East, the court took a position side by side with him instead of with Lord Kenyon. He says: "The doctrine which was laid down in Sinclair v. Fraser has always been considered as the true line ever since; namely, that the foreign judgment shall be prima facie evidence of the debt, and conclusive till it be impeached by the other party. I have often heard Lord Mansfield repeat what was said by Lord Hardwicke in the case alluded to from Wales, and the ground of his Lordship's opinion was this: when you call for my assistance to carry into effect the decision of some other tribunal, you shall not have it, if it appears that you are wrong, and it was upon that account that he said he would examine into the propriety of the decree.

"As to actions of this sort, see how far he court could go, if what was said in Walker v. Witter were departed from; it was there held that a foreign judgment was only to be taken to be right, prima facie, that is, we will allow the same force to a foreign judgment that we do to those of our courts not of record; but if the matter were carried further we should give them more credit; we should give them equal force with the courts of record here; now a foreign judgment has never been considered as a record."

The next case in order is Messin v. Massareene, 4 T.R. 493 (1791). The plaintiff having obtained a judgment against the defendant in the Chatelet of Paris, brought an action of assumpsit in King's Bench upon that judgment. Judgment was allowed to go by default. Walton, counsel of plaintiff, obtained a rule or order to show cause why it should not be referred to a master to see what was due for principal and interest without executing a writ of inquiry. It was contended that there was no instance in which such course had been taken. Kenyon, C.J., said: "This is an attempt to carry the rule further than has yet been done, and as there is no instance of the kind I am not disposed to make a precedent." Buller, J., said: "Though debt will lie here on a foreign judgment, the defendant may go into consideration of it."

The judgment involved in the Duchess of Kingston's case was a domestic judgment, and not that of a foreign court.

This brings us to the close of the century with the following result: We have Hardwicke, Mansfield, Ashurst, Buller, and Willes holding that a foreign judgment was examinable upon the merits. There were dicta by Lord Kenyon to the contrary, but overruled by his court, if East is correct.

In no case do any of the judges combat the position, that if it appears that there has not been a fair trial upon the merits the judgment has no force as a bar.

Since 1800 we have the following cases, which appear to have been relied upon below: Henderson v. Henderson, 3 Hare, 100; Godard v. Gray, L.R. 6 Q.B. 139; Schibsby v. Westenholtz, L.R. 6 Q.B. 155; Rousillon v. Rousillon, 14 Ch. D. 351; General Steam Navigation Co. v. Guillou, 11 M. & W. 877; Becquet v. McCarthy, 2 B. & Ad. 951; Nouvion v. Freeman, 37 Ch. D. 244; Trafford v. Blanc, 36 Ch. D. 600; Voinet v. Barrett, 55 Law Journal (N.S.) Q.B. 39; Scott v. Pilkington, 2 B. & S. 11; Bank of Australasia v. Nias, 16 Q.B. 717; Martin v. Nicolls, 3 Sim. 458.

These cases, however, do not support the decision below. On the contrary, a further search would have disclosed cases

which rejected it. De Cosse Brissac v. Rathbone, 6 H. & N. 301, is the only case which appears to fully sustain the conclusiveness of a foreign judgment.

The cases in which it has been determined in England that the foreign judgment under consideration in them was conclusive happen to have been of a character in which there was no very good reason for allowing the judgment to be impeached; but the courts in pronouncing their decisions, have sometimes announced a doctrine much broader than the case before them; and, instead of saying that the foreign judgments, in the particular cases they were considering, were not open to impeachment, declared generally that such judgments were conclusive.

In declaring this large conclusion there has sometimes been an attempt to formulate a principle, or principles, which would sustain the doctrine in the eye of reason; and two principles have been laid down as sufficient to justify the broad determination.

The first was originated by a judge of high authority, Mr. Baron Parke, in the case of Russell v. Smyth, 9 M. & W. 810, that the judgment of a court of competent jurisdiction over the defendant imposes a duty or obligation on the defendant to pay the sum for which judgment is given which the courts in England are bound to enforce. This was the principle mainly relied upon in the court below by the counsel for the plaintiff in that court.

The other ground upon which the doctrine has been supported in the English cases is rather one of policy, namely, that the courts of that country should not engage in the work of retrying cases which have once been tried in a foreign country, for the reason that their judgments would not probably be any more agreeable to right and justice than the foreign judgment; which is the view which the learned judge in the court below preferred.

But an excellent opportunity was afforded to some English judges in 1882 to test the soundness of these principles, and the Court of King's Bench immediately and utterly broke away from them. Abouloff v. Oppenheimer, 10 Q.B.D. 295.

This action was brought on a Russian judgment rendered in an action where the plaintiff charged that the defendant had property in his possession which he refused to restore, and asked that its restoration on payment of its value by the defendant be compelled; and where the court decided in favor of the plaintiff and adjudged the defendant to pay the value of the goods. The defendant sought to impeach this judgment by a separate defence which alleged that it was obtained by the gross fraud of the plaintiff in representing to the court that the goods were in the defendant's possession, whereas they were at all times in the plaintiff's possession, as he well knew. To this defence a demurrer was interposed, and the argument was on this demurrer. It was not pretended that the Russian court had not full jurisdiction, or that a Russian judgment was not as conclusive as any other foreign judgment, or that the defendant in Russia was in any manner so deceived or imposed upon that he had not had a perfectly full and fair opportunity to defend himself, or that any artifice was employed by which the court was in any manner disabled or impeded in the discharge of its function of determining the truth. It was the simple case of the bringing of an action by a plaintiff who knew he had no good cause of action and supporting it by the falsehood of himself and witnesses, one or both.

The entire breaking down in this case of the rule, not founded upon the adjudications, but upon the dicta, of English cases, as well as of the erroneous principle upon which that rule had been said to rest, namely, that a foreign judgment created an obligation, is a proof of the falsity of the doctrine. In the presence of the fact, which the demurrer seemed to present, that the Russian judgment could not be enforced without committing a palpable wrong, the court determined not to enforce it. The mistake made was in not perceiving that the doctrine had been too largely stated, and that the true way of meeting the case was by limiting the doctrine to its just proportions, and making a discrimination between the cases where a foreign judgment should properly be held conclusive, and those where it should not.

This case was followed by Vadala v. Lawes, 25 Q.B.D. 310, in which the court, referring to Abouloff v. Oppenheimer, said: "I cannot fritter away that judgment, and I cannot read the judgments without seeing that they amount to this: that if the fraud upon the foreign court consists in the fact that the plaintiff has induced that court by fraud to come to a

wrong conclusion you can reopen the whole case, even although you will have in this court to go into the very facts which were investigated, and which were in issue in the foreign court. The technical objection that the issue is the same is technically answered by the technical reply that the issue is not the same, because in this court you have to consider whether the foreign court has been imposed upon. That, to my mind, is only meeting technical argument by a technical answer, and I do not attach much importance to it; but, in that case, the court faced the difficulty that you could not give effect to the defence without retrying the merits. The fraud practised on the court, or alleged to have been practised on the court, was the misleading of the court by evidence known by the plaintiff to be false. That was the whole fraud. The question of fact, whether what the plaintiff had said in the court below was or was not false, was the very question of fact that had been adjudicated on in the foreign court; and, notwithstanding that was so, when the court came to consider how the two rules, to which I have alluded, could be worked together, they said: 'Well, if that foreign judgment was obtained fraudulently, and if it is necessary, in order to prove that fraud, to retry the merits, you are entitled to do so according to he law of this country.' I cannot read that case in any other way. Lord Coleridge uses language which I do not think is capable of being misunderstood. In order to understand the judgment it is well to look at the argument for the defence -- an argument conducted by Mr. Benjamin and Mr. Cohen, and an argument which I understand to have been accepted by the court: 'Even if the Russian courts had inquired into the existence of the fraud and had been induced by fabricated evidence to come to a wrong conclusion, the circumstances under which the judgments were given could be investigated in an English court.'"

Thus it is plain that, in the light of the above decisions, no one can say that the present doctrine of the English courts is that a foreign judgment is necessarily conclusive, even where there was full jurisdiction, and a full opportunity for trial of the very point upon which the judgment is assailed.

The leading decisions of the state and federal courts will be found reported in the following cases, and are not in conflict with our contentions: Bissell v. Briggs, 9 Mass. 462; Wood v. Gamble, 11 Cush. 8; Hall v. Williams, 6 Pick. 232; Buttrick v. Allen, 8 Mass. 273; McKim v. Odom, 3 Fairf. 12 Maine 94; Williams v. Preston, 3 J. J. Marsh. 600; Tayler v. Barron, 10 Foster (30 N.H.) 78; Aldrich v. Kinney, 4 Connecticut, 380; Olden v. Hallet, 2 Southard, 466; Taylor v. Phelps, 1 Har. & Gill, 492; Robinson v. Prescott, 4 N.H. 450; Hitchcock v. Aicken, 1 Caines, 460; Taylor v. Bryden, 8 Johns. 173; Pawling v. Bird, 13 Johns. 192; Pease v. Howard, 14 Johns. 479; McElmoyle v. Cohen, 13 Pet. 312, 324; Croudson v. Leonard, 4 Cranch, 434; Burnham v. Webster, 2 Ware, 236; De Brimont v. Penniman, 10 Blatchford, 436; Hanley v. Donoghue, 116 U.S. 1; New York, Lake Erie & western Railway Co. v. McHenry, 21 Blatchford, 400; Wiggins Ferry Co. v. Chicago & Alton Railroad, 11 Fed. Rep. 381.

Thus far nothing has been said in relation to the effect of the absolute denial by the French law to judgments of the courts of other nations of anything in the nature of conclusiveness. And this denial extends to all cases whatsoever as against French citizens. If the alleged conclusiveness of foreign judgments is placed upon grounds of comity, how can the doctrine apply to the judgments of the courts of a nation which absolutely refuses reciprocity?

This is not the case where our courts are called upon to enforce a statute, as in The Scotland, 105 U.S. 24, 33; but where they are to declare what the law of comity is and requires. If a legislature passes a law the judicial tribunals are bound to execute it, even in favor of the citizens of a nation which has no similar law. A legislature may dispense, if it chooses, with the benefit of reciprocity.

The literal meaning of the word "comity" is "courtesy" -- a disposition to accommodate -- but the word is seldom employed, in jurisdical discussions, in that sense. No court is at liberty to deny or to refuse a claim made before it, according as mere courtesy or a disposition to accommodate shall require. What comity requires is as much required in courts of justice as anything else; and the inquiry, therefore, what comity is, is only another mode of inquiring what the law is in respect to the force which the laws, judicial proceedings or other acts done in one State ought to have in another State.

Says Chief Justice Taney in Bank of Augusta v. Earle, 13 Pet. 519, 589, "It is needless to enumerate here the instances

in which, by the general practice of civilized countries, the laws of the one will, by the comity of nations, be recognized and executed in another, where the rights of individuals are concerned. The cases of contracts made in a foreign country are familiar examples; and courts of justice have always expounded and executed them, according to the law of the place in which they were made; provided that law was not repugnant to the laws or policy of their own country. The comity thus extended to other nations is no impeachment of sovereignty. It is the voluntary act of the nation by which it is offered; and is inadmissible when contrary to its policy, or prejudicial

to its interests. But it contributes so largely to promote justice between individuals and to produce a friendly intercourse between the sovereignties to which they belong, that courts of justice have continually acted upon it as a part of the voluntary law of nations. It is truly said in Story's Conflict of Laws (p. 37), that 'in the silence of any positive rule affirming or denying, or restraining the operation of foreign laws, courts of justice presume the tacit adoption of them by their own government, unless they are repugnant to its policy or prejudicial to its interests. It is not the comity of the courts, but the comity of the nation which is administered and ascertained in the same way and guided by the same reasoning by which all other principles of municipal law are ascertained and guided.'"

Our main contention, as already argued, is that it was the duty of the United States, and of each of the States, to furnish to their citizens one fair and full opportunity of establishing their claims by a trial upon the original merits; that a foreign judgment could not be made the occasion for denying this right, unless it could be said that it was certain that such judgment was as effective as our own in securing justice to the litigants; and that with our notions of the essential merits of our own judicial procedure it was impossible to assent to the view that the procedure of foreign nations, indiscriminately, was as well calculated to secure justice as our own.

If we are right in this contention, it follows that the question of comity has nothing to do with this case; because, the giving effect here to the law of France which makes her own judgments conclusive there, would be prejudicial to our own policy and to the rights and interests of our own citizens.

Assuming that our contention is correct, that foreign judgments are, in general, not conclusive, but may be so under some circumstances, there is nothing in the circumstances of the present case making this particular judgment conclusive upon the defendants therein. In no just sense could the appearance of Stewart & Co. in the French suit be deemed to be a voluntary one, so as to charge them with the responsibility of the litigation. If they had conceived that they could carry on the dry goods business in France also as well as in America, that they could cater to the wants of the French as well as French merchants, and thereby make money, and had, in pursuance of such a view, gone abroad and established a mercantile storehouse there, and offered to sell goods to the people of Paris, and thus to come in competition with other merchants of Paris; in other words, to do in France just the same thing that Frenchmen are doing, then, indeed, a very different case would be presented. They would then be doing something not required by any of the necessities of a New York business. The French themselves have drawn this distinction with great clearness by refusing general access to their courts as suitors to all foreigners who are not actually domiciled in France. Code Civil, Art. 13, 14, 15; Wheaton Int. Law, 192.

The defendants in error have been forced to partially abandon this ground of international comity, because France gives no effect to the judgments of our courts. Can they do so without endangering the stability of their entire structure?

Reciprocal comity is the only ground upon which any civilized nation in the world, aside from England and the United States, gives or ever has given conclusive effect to foreign judgments.

M. Foelix, a French author of high authority, in his Traite du Droit International Prive, gives an exhaustive review of the laws and usages of all civilized nations in respect of the effect given to foreign judgments. It appears, that aside from England and the United States, there are but two views followed. France, Spain, Portugal, Russia, Sweden and Norway, and some minor countries which derive their laws from France, such as Belgium, the canton of Geneva, Greece and Hayti, give no effect whatever to a foreign judgment as res judicata.

On the other hand, all the other countries of Europe, including Germany, Austria, Prussia, Denmark and a multitude of smaller States, have adopted the principle of reciprocity, and give the effect of res judicata to the judgments of other States which give a similar effect to their judgments.

The principle has been adopted and enforced alike by the decisions of the courts under the common law of Germany, and by the statutes of the other nations mentioned, but no nation whatever gives such effect to any foreign judgment except upon the express ground of reciprocal treatment.

The grounds upon which the German courts proceed are well illustrated by the reasons which this author recites as given by the court of Cologne, in Rhenish Prussia, in deciding that a native who has been defeated before a foreign tribunal can try anew his rights before "his natural judges, called upon to give execution to the foreign judgment." The principal reasons stated are, in substance: "That a new examination into the merits of the cause can alone assure to the subject that protection to which he has a right, and that foreign judgments ought not to receive their execution in Rhenish Prussia except as Prussian judgments receive equally their execution in the country where the judgment the execution of which is in question was rendered."

Many of the countries mentioned have express statutes embodying this reciprocal principle, and in all the others the author says "the jurisprudence and the opinion of authors have sanctioned the same principle."

The French theory is well stated in decisions of the courts of Nimes and Bordeaux. They say: "It is considered that it is a principle of the public law of France . . . that the right of the tribunals of the Kingdom to order or refuse the execution of foreign judgments draws with it that of verifying the correctness of the judgment in matters of fact as in matters of law: . . . that the party brought before the tribunals to have a judgment rendered in a foreign country put into execution against him has the right to defend himself by all the means of the law, both as to form and as to the merits, and in the same manner as if the judgment did not exist."

The entire weight of European authority, aside from Great Britain, therefore, is that no State should ever enforce against one of its own citizens the judgment of another State except upon he ground of reciprocal advantage.

It is to be observed that every decision in the United States upon which the defendants in error rely as illustrating what they claim to be a tendency towards a new rule, relates to an English or a Canadian judgment; that is, a judgment of a country which does, in fact, profess to give the effect of res judicata to our judgments.

In Lazier v. Wescott, 26 N.Y. 146, the judgment sued upon was recovered in Canada. In Dunston v. Higgins, 138 N.Y. 70, the judgment sued on was rendered by the High Court of Justice of England, Queen's Bench Division. In Baker v. Palmer, 83 Illinois, 568, the judgment sued on was Canadian. In Fisher v. Fielding, in the Superior Court of Connecticut, decided January 4, 1894, the judgment sued on was English.

The fact that England and Canada do give effect to our judgments, added to the fact that they proceed according to the course of the common law and dispense the same kind of justice in the same way as our own tribunals, may be supposed to have influenced the minds of the courts before whom these judgments were brought. Two at least of those courts (in the latest case in New York, and in the Illinois case) put their judgments upon the express ground of comity.

The Michigan case was a clear case of a voluntary appearance, the defendant having apparently gone to Canada for the express purpose of uniting with plaintiff to invoke the jurisdiction of the Canadian court, which could not otherwise have attached either to him or to his property.

The Connecticut case was decided by a single judge of a subordinate state court within the Second Circuit, and may be regarded as following rather than adding to, the decision of the Circuit Court of that circuit now under review.

The general expression of judicial opinion in this country in recent years has included this question of reciprocity as an important element in determining the treatment to be given to foreign judgments.

Judge Woodbury, in Burnham v. Webster, 1 Wood. & Min. 172 (see also 2 Ware, 236), says: "When offered and considered elsewhere than in their own jurisdiction they (foreign judgments) are ex comitate treated with respect according to the nature of the judgment and the character of the tribunal which rendered it and the reciprocal mode, if any, in which that government treats our judgments."

Judge Woodruff, in De Brimont v. Penniman, 10 Blatchford, 436, says: "The principle upon which foreign judgments receive any recognition in our courts is one of comity."

Judge Coxe says, in New York, Lake Erie &c. Railroad v. McHenry, 21 Blatchford, 400: "The rule as to foreign judgments rests upon considerations of comity."

Mr. Justice Cooley, in McEwen v. Limmer, American Law Register, speaking of the force and effect due Canadian judgments, says: "We should certainly never have assurance to demand from them more than we would freely and voluntarily concede to them. True comity is equality. We should demand nothing more and concede nothing less."

In the foregoing reference to the American authorities relied upon by the defendants in error we have omitted as having no real bearing upon the question the case of Silver Lake Bank v. Harding, 5 Ohio, 544, where the Supreme Court of Ohio held that the judgment of a Justice of the Peace in Pennsylvania was within the meaning of the constitutional provision, requiring full faith and credit to be given to the judgments of other States, and was entitled to receive effect as res judicata; and the case of Glass v. Blackwell, 48 Arkansas, 50, in which a judgment of a Justice of the Peace in Tennessee received a similar effect; and the case of Jones v. Jamison, 15 La. Ann. 35, in which a plaintiff, who had himself brought suit against a defendant in the island of Jamaica, where both parties were domiciled, and obtained a judgment, was held not entitled to sue again here on the original demand which he had by his own act caused to be merged in the judgment.

It may fairly be said that in America, as well as in Europe, the general weight of opinion and of practice tends to the result that if foreign judgments are to receive any effect at all as res judicata, that effect should be limited to judgments rendered by the courts of a country which gives similar effect to the judgments of that country in which the proceeding is brought.

Mr. William G. Choate, (with whom was Mr. William D. Shipman on the brief,) for defendants in error and appellees.

I. The French courts having jurisdiction of the subject matter and of the parties, their judgments are conclusive to the same extent as domestic judgments, unless impeached for want of jurisdiction or for fraud in procuring the same.

The modern rule both in England and this country, overruling the earlier decisions which made a foreign judgment prima facie evidence only of a debt, is that a foreign judgment in personam is conclusive as to the existence of the debt established thereby, provided the court had jurisdiction of the subject matter and of the parties; and such judgment can be impeached only for fraud.

It having been contended by the plaintiffs in error upon the first argument of this case that the law is not settled in favor of the conclusiveness of foreign judgments we submit a statement of the English cases from the earliest times to the present day.

Wier's case, 1 Rolle's Abr. 530, is the earliest case. The plaintiff, a native of Friesland, attempted to enforce in England, by execution, a judgment obtained in Friesland against the defendant, an Englishman. The court said: "It is by the law

of nations that the justice of one nation will be an aid to the justice of another nation, and the one execute the judgment of the other; and the law of England takes notice of this law and the Judge of Admiralty is the proper magistrate for this purpose, for he [sits] solely for the execution of the civil law in this realm." The Court of King's Bench, on habeas corpus, refused to release the defendant, who was taken in execution.

In Cottington's case, 2 Swanston, 326, n where the validity of a sentence of divorce by the Archbishop of Turin was involved, Wier's case was approved, the court saying: "In Wytred's [Wier's] case, 5 Jac., a judgment given in Holland for debt was executed here by the Admiralty of England upon the person who fled from execution there, and this was allowed upon a habeas corpus in B.R., so long as the judgment there remained in force; wherefore, if the petitioner can either by the laws of Savoy or of Rome repeal that sentence at Turin, let him do so; but till that be done it is not possible for the Arches or the delegates to give any other sentence than what they have given."

In Gold v. Canham, 2 Swanston, 325, the facts shown were that the plaintiff had been a member of a partnership at Leghorn with the defendants and one Lee, and upon its dissolution had received a certain sum of money and an agreement from his copartners to indemnify him against claims against the partnership, and afterwards went into a new partnership with others, and was forced by sentence of the court at Florence to pay custom to the Great Duke for goods imported during the time of the former copartnership. The defendant alleged that there were no customs due to the Duke after seven years, and that there had been a reference of all differences to arbitrators, before whom the matter of the customs was not insisted upon.

But the court said: "Let the plaintiff receive back so much of the money brought into court as may be adequate to the sum paid on the sentence for custom, the justice whereof is not examinable here."

In Dupleix v. De Roven, 2 Vernon, 543 (1705), the plaintiff filed a bill for discovery of assets and satisfaction of a judgment debt obtained in France against he defendant, an administrator. The court said: "Although the plaintiff obtained a judgment or sentence in France, yet here the debt must be considered as a debt by simple contract. The plaintiff can maintain no action here, but an indebitatus assumpsit or an insumul computasset, so that the statute of limitations is pleadable in this case."

In Burrows v. Jemino (cited as Jamereau, Jamineau, and Jemineau) (1726), 2 Stra. 733; S.C. 2 Eq. Cas. Ab. 476, a suit had been brought at Leghorn against the plaintiff as the acceptor of a bill of exchange drawn there, and the judges of the court being of the opinion that the acceptance was not valid by the law of the country, so adjudged. Both parties afterwards happening to come to England, the plaintiff in the suit at Leghorn brought his action here, but the defendant in that suit brought his bill in chancery for an injunction, and Lord Chancellor King held that "the court at Leghorn having a general and proper jurisdiction of the cause, their judgment was binding and conclusive with the court here," and granted a perpetual injunction.

In Boucher v. Lawson (1734), Cas. temp., Hardwicke, 85, the plaintiff brought an action on the case against the defendant as owner of a ship for his failure to deliver Portuguese gold, which defendant undertook to carry from Portugal to London, and there deliver to plaintiff. On the trial a special verdict was found, which determined among other things that it was unlawful according to the laws of Portugal to export gold. The counsel for defendant contended that if the courts of England held the particular determination of courts abroad to be conclusive in England, they should have more regard for the general laws of the foreign country declaring anything an unlawful trade, and not give any countenance to actions brought upon illicit commerce, citing the case of Burrows v. Jamineau. Lord Hardwicke on this point said: "The reason gone upon by King, Lord Chancellor, in the case of Burrows v. Jamineau, was certainly right, and where any court, whether foreign or domestic, that has the proper jurisdiction of the cases makes a determination, it is conclusive to all other courts." He then criticized the decision of the chancellor, on the ground that the party could have set up the defence in the suit at law, and that on that ground the bill should have been dismissed. He then refers to the case of Cottington's appeal in the time of Charles II. as supporting the same conclusion.

In Otway v. Ramsay, 2 Stra. 1090 (1737), in the King's Bench, it was held that debt does not lie in Ireland on an English judgment. The case is more fully reported in a note to 4 B. & C. 414.

In Gage v. Bulkeley, 3 Atk. 215 (1744). This was a plea of a foreign sentence in a Commissary Court in France relating to the same matters, for which the bill was brought here. Lord Hardwicke said: "It must be overruled, for it is the most proper case to stand for an answer with liberty to except that I ever met with; and the more so as it is the sentence in a commissary court only, which is of a political nature, in order to determine disputes which might arise in relation to French actions."

This case is referred to by Lord Chancellor Camden in Bayley v. Edwards, 3 Swanston, 703 (1792), as "going a great way to show the true effect of foreign sentences in this country." Yet it seems only to rule that a defence of a foreign judgment should be taken by answer and not by plea, and it is evident that Lord Hardwicke doubted whether the court was a competent court.

In Roach v. Garvan, 1 Ves. Sen. 157 (1748), before Lord Hardwicke, an infant, a ward of the court, having in France intermarried with the son of her guardian at that time, the husband petitioned for a decree for cohabitation with his wife, who was kept from him by her mother, who had lately been appointed her guardian. Lord Hardwicke: "Where a marriage is in fact had, or in a contract in praesenti or in a suit for restitution of conjugal rights, a sentence in the Ecclesiastical Court, (unless there be collusion which will overturn the whole,) will be conclusive and bind all; but not if given in a collateral suit, as for a criminal action, for it will only bind the rights of the marriage in the three cases above. This was in a criminal court in the Chatelet in Paris, and it is strange if they have no other jurisdiction in France for marriage than a criminal court."

Lord Hardwicke seems to have doubted in this case also whether the court could be considered as a competent court whose judgment would be conclusive and held binding in England.

Up to this time in the reported decisions, while the courts refused to give to the record of a foreign judgment the full effect of a record of the superior courts of Westminster, there seems to have been no diversity in the opinions of the judges that a foreign judgment of a competent court having jurisdiction over the party and the subject matter was to be held binding and conclusive.

The case of Sinclair v. Fraser (1771), reported in 1 Doug. 5, note, appears to be the earliest case containing a dictum to the effect that a foreign judgment is only prima facie evidence of a debt. The actual question there involved was not to what extent a foreign judgment could be reexamined on the merits, but whether it could be made the basis of an action without proof of the original consideration. It is entirely consistent with the decision, and with anything said by the judges, that the court might have held that where the parties to a foreign suit had both been within the jurisdiction, and the court had jurisdiction of the subject matter, and the cause was tried on its merits, it would have been held binding upon the parties although the defendant offered to try it over again.

This idea is suggested by Lord Campbell, in his opinion in the case of Bank of Australasia v. Nias, 16 Q.B. 717 (1851); and the suggestion is supported by the very words of the declaration of the House of Lords, above cited, that it lies upon the defendant to impeach the justice thereof, or to show the same to have been irregularly or unduly obtained.

The case of Sinclair v. Fraser was followed in 1775 by the case of Crawford v. Witten, Lofft, 154; in which it was determined that although the original cause is not considered as merged in a foreign judgment the foreign judgment could be sued on alone in Assumpsit, as implying a promise.

The Duchess of Kingston's case, 11 Hargrave's St. Trials, 198, hardly touches upon this controversy.

Walker v. Witter (1778), 1 Doug. 1, was debt on a judgment of the Supreme Court of Jamaica. The pleas were nil

debet and nul tiel record. The real question in the case was whether debt would lie on a foreign judgment. On the plea of nil debet the plaintiff took issue and a verdict was found for him. On the plea of nul tiel record, the plaintiff replied that there was such a record and made profert of what purported to be a record of the court in Jamaica. The decision, in which all the judges of the King's Bench concurred, was that debt would lie upon a foreign judgment because it was for a sum certain. The dicta of Lord Mansfield in this case seem to have been substantially the basis for the notion that afterwards prevailed, that a foreign judgment was only prima facie evidence of a debt, even to the extent of authorizing in all cases a retrial of the merits.

The case of Herbert v. Cook (1782), Willes, 36, note, also turns upon a question of pleading. It contains a dictum by Lord Mansfield that the judgment of a court not of record in "England, 'like a foreign judgment,' is not conclusive evidence of the debt." But neither in the case of Sinclair v. Fraser, or Walker v. Witter, or Herbert v. Cook was the question involved of what effect is to be given to a judgment of a foreign court or of an inferior court of England, having jurisdiction of the cause and of the parties.

In Galbraith v. Neville (1789), 1 Doug. 6, note, Lord Kenyon reviews and dissents from the conclusions of Lord Mansfield as reported in the case of Walker v. Witter. He says: "I cannot help entertaining serious doubts concerning the doctrine laid down in Walker v. Witter that foreign judgments are not binding upon the parties here."

It is true that Mr. Justice Buller dissents from these views and insists that the result of the authorities is, that a foreign judgment has no more credit than is given to every species of written agreement: that is, that it should be considered as good till it is impeached.

In a note on this case, 5 East, 475, it is said that the case stood over from the Easter Term, 29th, to Mich. Term, 31st George III., for the court to advise upon it, when Lord Kenyon said that the court had considered the matter and were of opinion that no new trial ought to be granted. He added that without entering into the question how far a foreign judgment was impeachable it was at all events clear that it was prima facie evidence of the debt, and they were of opinion that no evidence had been adduced to impeach this, and therefore discharged the rule.

In Messin v. Massareene (1791), 4 T.R. 493, the plaintiff having obtained a judgment against the defendant in the Chatelet of Paris, brought an action of assumpsit in England on that judgment, in which the defendant suffered judgment to go by default. A motion to refer it to the Master to compute the amount due and for final judgment without executing a writ of enquiry was denied.

In Bayley v. Edwards (1793), 3 Swanston, 703, before the Privy Council, the point being whether a suit pending in Jamaica could be pleaded in abatement of a suit in England, Lord Camden said: "As to the inconvenience, considering the difficulties of administering justice between parties occasionally living under the separate jurisdiction, I think the parties ought to be amenable to every court possible, . . . and we must then endeavor to correct the mischiefs of these double suits as much as we can, by allowing in each country the benefit of all the other proceedings in the other part of the King's dominions."

In Phillips v. Hunter (1795), 2 H. Bl. 402, the question before the court being to whom money collected under a judgment recovered in Pennsylvania belonged, and not at all involving the question of the effect of the judgment as binding upon the parties or otherwise, Chief Justice Eyre said: "It is in one way only that the sentence or judgment of the court of a foreign state is examinable in our courts, and that is when the party who claims the benefit of it applies to our courts to enforce it. When it is thus voluntarily submitted to our jurisdiction, we treat it not as obligatory to the extent to which it would be obligatory, perhaps, in the country in which it was pronounced, nor as obligatory, to the extent to which, by our law, sentences and judgments are obligatory, not as conclusive, but as matter in pais, as consideration prima facie sufficient to raise a promise. We examine it as we do all other considerations or promises, and for that purpose we receive evidence of what the law of the foreign state is, and whether the judgment is warranted by that law."

In Buchanan v. Rucker (1807), 1 Campbell, 63, which was assumpsit on a judgment of a court in the island of Tobago, where the objection was that the judgment was obtained by default, the defendant never having been resident in the island, and the only service of the declaration made by the nailing a copy of the same on the court-house door in accordance with the alleged law of the island, Lord Ellenborough, in answer to the suggestion that the presumption was in favor of a foreign judgment as well as of a judgment obtained in one of the courts of England, said: "That may be so if the judgment appears on the face of it consistent with reason and justice; but it is contrary to the first principles of reason and justice that either in civil or criminal proceedings a man should be condemned before he is heard."

In the same case on a motion for a new trial, 9 East, 192, an affidavit having been produced showing a law of the colony that in case of a defendant absent from the island, the declaration could be so served, Lord Ellenborough said: "There is no foundation for this motion, even upon the terms of the law disclosed in the affidavit."

In Hall v. Odber (1809), 11 East, 118, the plaintiff sued upon a balance due upon a foreign judgment and also upon the original cause of action in assumpsit. The judgment was the judgment of the province of Lower Canada. The court in directing the judgment ordered a stay of proceedings by execution for six months, in order to enable the defendant to prove a counterclaim, if he had any. The six months had elapsed before the commencement of this action, and no proceedings had been taken by the defendant for the proof of his counterclaim in the foreign court. The court held that both counts were good, the one upon the judgment and the other upon the balance of accounts.

That the general expressions used in this case as to the judgment being only evidence of the debt were not intended by the court as determining how far a foreign judgment upon the merits would conclude a party appears plainly from the case of Tarleton v. Tarleton (1815), 4 M. & S. 20, before the same court. The case was covenant on a bond by the defendant and one D.B., conditioned to indemnify the plaintiff against the debt of the copartnership which had existed between the three. The breach alleged was that certain creditors of the firm had recovered judgment against the defendants in the island of Grenada for their claim, which plaintiff had been obliged to satisfy on execution in Grenada. On the trial the defendant proposed to show that the proceedings in the court of Grenada were erroneous, inasmuch as the account was incorrectly stated. His Lordship, however, ruled that the defendant could not go into that question, inasmuch as the foreign court being a court of competent jurisdiction, what was done in it must, for the purpose of this action, be taken to be rightly done and the plaintiff had a verdict.

A motion for a new trial, made on the ground that the proceedings in the foreign court were not conclusive evidence, that it was prima facie only, and the defendant might impeach the justice of it, was denied.

In Cavan v. Stewart (1816), 1 Starkie, 525, the judgment of a Jamaica court, whereby the balance due from the defendant to the plaintiffs had been attached and sequestered at the suit of a creditor, was offered in evidence as a bar. The papers recited that the plaintiffs were absentees. It was held that as there was a default in the case, and no proof of notice, the judgment was not a bar. Lord Ellenborough: "It is perfectly clear on every principle of justice that you must either prove that the party was summoned or at least that he was once on the island."

And in the case of Power v. Whitmore (1815), 4 M. & S. 141, Lord Ellenborough says: "By the comity which is paid by us to the judgment of other courts aborad of competent jurisdiction, we give a full and binding effect to such judgments so far as they profess to bind the persons and property immediately before them in judgment, and to which their adjudications properly relate."

In Kennedy v. Earl of Cassilis (1818), 2 Swanston, 313, Lord Eldon says: "The court is bound to presume that foreign tribunals will proceed regularly and administer the justice of the case."

Arnot v. Redfern (1825), 2 C. & P. 88, was a suit on a Scotch judgment which gave interest from 1811 to date on a contract governed by English law, by which interest was not allowed. Best, C.J. Judgment given excluding this interest.

On appeal, affirmed.

Harris v. Saunders (1825), 4 B. & C. 411: Held that an Irish judgment since the Union is not a record in England, and remedy is by assumpsit. So held on authority of Otway v. Ramsay, supra.

Douglas v. Forrest (1828), 4 Bing. 686. Best, C.J., discusses the necessity for service of summons upon the party objecting to a foreign judgment in order to bind him, and gives effect to a Scotch judgment, though without actual notice, in a proceeding similar to our foreign attachment, where the debtor was a native-born Scotchman, and left property in Scotland. He approves the views expressed by Lord Ellenborough in Buchanan v. Rucker and Cavan v. Stewart.

Guinness v. Carroll (1830), 1 B. & Ad. 459, touches on the effect of a foreign judgment (Irish), but decides nothing on the subject.

Martin v. Nicolls (1830), 3 Sim. 458, before Vice-Chancellor Shadwell, appears to be the first case in which the question of the binding effect of a foreign judgment not impeachable for want of proper jurisdiction over the party, or for fraud in obtaining the same, was passed upon. The bill was filed, representing in effect that an action had been brought by the defendant in Antigua, and that a judgment had been recovered, and that afterwards an action was commenced in the Common Pleas in England upon that judgment against the plaintiff in this suit in equity, and the object of the bill was to obtain a discovery and a commission to examine witnesses in Antigua. The Vice-Chancellor said: "If I were to allow this bill to stand, I should be in effect saying that the judgment obtained in Antigua may be overruled by the Common Pleas. I must, therefore, allow this demurrer."

Novelli v. Rossi (1831), 2 B. & Ad. 757, has been supposed to be an authority that a foreign judgment could be impeached for a clear mistake in applying the law of England, where the case was or should have been governed by the English law. Since the case of Godard v. Gray, hereafter referred to, it cannot be considered authority for that position.

Becquet v. McCarthy (1831), 2 B. & Ad. 951, was an action in the King's Bench, on a judgment obtained by the plaintiff against the defendant's testator in the island of Mauritius. The trial was before Lord Tenterden, C.J.The record showed that the action was between the plaintiff and one McCarthy, defendant's testator, at present residing at the Cape of Good Hope, cited at the domicil of the substitute of the King's Attorney General in the tribunals and courts of this colony, defendant, and the Paymaster General of Her Majesty's forces also defendant.

It also appeared by the minute of the court that the defendants in the suit had been cited to answer touching a fire which was alleged to have broken out in the paymaster's office and consumed a house and other property of the plaintiff, and damages were claimed in accordance with the law of the colony. Defendant's testator having made default, a second citation issued and the defendant did not appear. The tribunal then went on and determined the case in favor of the plaintiff. It was objected that the judgment was invalid by the law of the colony itself, there being no allegation of negligence. Also that it appeared by the judgment that McCarthy was absent from the colony at the time of the proceedings against him, and it was claimed that it was contrary to justice that a man should be condemned unheard.

Lord Tenterden, C.J., said, that the island belonged to England, but the French law prevailed there. To the point that negligence was essential by that law, he said: "The law of France being the law of the colony, the French court was much more competent to decide questions arising upon that law than we can be. We ought to see very plainly that that court has decided against the French law before we say that their judgment is erroneous upon such ground. . . . Another objection, and not an unimportant one, was that the testator, when the proceedings were instituted against him, was absent from the island, and it was urged that it was contrary to the principles of natural justice that any one should be condemned unheard and in his absence. Proof, however, was given that by law of the colony, in the case of a person formerly resident in the island absenting himself and not leaving any attorney upon whom process in the suit might be served, the procurator general or his deputy was bound to take care of the interests of such absent party. . . . It must be

presumed that he would do whatever was necessary on the discharge of that public duty; and we cannot take upon ourselves to say that the law is so contrary to natural justice as to render the judgment void."

In Alivon v. Furnival (1834), 1 C.M. & R. 277, 293; S.C. 4 Tyrwh. 751, the Court of Exchequer enforced the sentence of a French tribunal of commerce in favor of syndics of a bankrupt against a party who had owed the bankrupt a certain sum in an action of debt. Parke, B.: "We must assume the judgment of the court to be according to the French law, at least until the contrary was distinctly proved, according to the principle laid down in Becquet v. McCarthy, 2 B. & Ad.;" and as to the rule of damages allowed, he said: "And it is impossible for us to say that this principle of adjusting the damages is wrong as being contrary to natural justice, and there is no evidence that it is not conformable to the law of France."

In Houlditch v. Donegal (1834), 8 Bligh, N.S. 301; S.C. 2 Cl. p Fin. 470, sub nom. Houlditch v. Donegall before the House of Lords, upon an appeal from the Chancellor in Ireland upon a bill filed in the Irish court to enforce against the defendant decrees of the English chancery court, the defendant answered that the decrees were irregular and erroneous, and ought not to be taken as binding on him. The bill was dismissed, not on the merits, but on the ground that the bill would not lie in the court of chancery in Ireland for the purpose of carrying out and enforcing the decrees of the chancery court in England. While this case may be taken to represent the individual opinion at that time of Lord Brougham, it does not represent the opinion of the House of Lords, and the manner in which he disposed of the question seems to indicate that he had some misgivings that after all he might be wrong, or at least that the subject required a more careful examination than he gave it at that time.

Don v. Lippmann (1837), 5 Cl. & Fin. 1, was an appeal from the Scotch court. Lord Brougham's opinion is evidence that he still entertained the same opinion expressed by him in Houlditch v. Donegal, that a foreign judgment is only prima facie evidence of a debt. But the case before the court was clearly one in which, upon admitted principles with regard to the necessity of the service of process upon a party or other proper notice of the suit, the judgment was a nullity outside of the country where it was rendered.

In Price v. Dewhurst (1837), 8 Sim. 279, Sir L. Shadwell, Vice-Chancellor, held that the decision of what was called the Executor's Court of Dealing in the island of St. Croix, consisting of the executors themselves, as to the disposition of personal property, would not be recognized as valid, as against an adverse party who was entitled to property by the law of England where the last will of the testator had been admitted to probate. This was affirmed (1838), 8 Sim. 617.

In Ferguson v. Mahon (1839), 11 Ad. & El. 179, in an action on an Irish judgment, the plea was, that the defendant was not arrested or served with process, nor had notice of process, nor appeared. The replication was that the defendant had had notice of certain process, to wit: a writ of summons issuing out of the court, etc. Demurrer to replication. The demurrer was overruled. On the plea judgment was given the defendant.

In Smith v. Nicolls (1839), 5 Bing. N.C. 208; S.C. 7 Scott, 147, it was held that a foreign judgment was void where defendant was not summoned, was neither present in the country, nor had an agent there. The judges review the cases and state it as a matter of some doubt whether a foreign judgment is conclusive or reexaminable on the merits.

Russell v. Smyth (1842), 9 M. and W. 810, was an action to recover on a judgment for costs rendered in a Scotch court. Abinger, C.B.: "Foreign judgments are enforced in these courts, because the parties against whom they are pronounced are bound in duty to satisfy them."

Williams v. Jones (1843), 13 M. & W. 628. The action was on a judgment of a county court. Parke, B.: "The principle on which this action is founded is that where a court of competent jurisdiction has adjudicated a certain sum to be due from one person to another, a legal obligation arises to pay that sum on which an action of debt to enforce the judgment may be maintained. It is in this way that the judgments of foreign and colonial courts are supported and enforced, and the same rule applies to inferior courts in this country, and applies whether they be courts of record or not."

These two cases, and especially the views taken by Baron Parke in them, are referred to in the later English cases as establishing the principle on which foreign judgments are held to be conclusive on the merits.

General Steam Navigation Co. v. Guillou (1843), 11 M. & W. 877. Plaintiff sued in case for injuries to plaintiff's ship by a ship of the defendant, under charge of the defendant's servants. It was pleaded that the company to which the defendant's ship belonged, and of which defendant was a member, brought suit in a court of France against the plaintiffs for negligence of their officers and crew, whereby she was sunk; that the plaintiffs appeared and defended themselves against the claim of the company, and insisted that the collision proceeded from the negligence of the defendant's servants, and that the court adjudged that the plaintiff's ship did, by the negligence of the plaintiff's officers and crew, run on board of and sink the ship of the company, and condemned the plaintiff in damages. The plea was held bad in form, so that it was unnecessary to determine whether it was bad in substance. Parke, B.: "But it is not to be understood that we feel much doubt on that question. They (the pleas) do not state that the plaintiffs were French subjects, or resident, or even present in France when the suit began, so as to be bound by reason of allegiance or domicil, or temporary presence, by a decision of a French court; and they did not elect the tribunal and sue as plaintiffs; in any of which cases the determination might have possibly bound them. They were mere strangers who put forward the negligence of the defendant as an answer, in an adverse suit in a foreign country, whose laws they were under no obligation to obey."

In Henderson v. Henderson (1843), 3 Hare, 100, the next of kin of an intestate filed their bill in equity in the Supreme Court of Newfoundland against the plaintiff, and obtained a decree for a certain sum due them and afterwards brought their actions in England against him on the decree. The plaintiff thereupon brought this bill in England against the next of kin for an accounting concerning not only the same matters that had been passed upon in the colonial court, but other matters which might have been litigated in that suit, and alleged irregularities and errors in the proceedings in that court, and asked that the next of kin be restrained by injunction from proceeding with their action. The defendants demurred to the bill for want of equity. Vice-Chancellor Wigram held that the suit in Newfoundland was between the same parties as those in the present suit; that most of the matters concerning which an accounting was prayed for had been passed upon in that suit, and as to the remainder they were such as might have been litigated in it, and were therefore res judicata also.

Henderson v. Henderson (1843), 6 Q.B. 288, was an appeal by the plaintiff in the preceding suit from a judgment in the suit brought by the next of kin to enforce the Newfoundland decree. One of the points raised on the appeal was whether a foreign decree in equity could be enforced, the objection being that a decree for payment of money by a court of equity is not a declaration that the plaintiff has any legal right to the money, but only that upon certain views peculiar to the court the payment ought to be made.

The Court, per Lord Denman, C.J., after examining the authorities, was of the opinion that there was no doubt but that such a decree might be enforced where the chancery suit terminates in the simple result of ascertaining a clear balance and an unconditional decree that an individual must pay, but that there might be instances where such a decree would be enforceable nowhere but in courts of equity, because they involve collateral and provisional matters to which a court of law could give no effect.

Another point made on the appeal was that the defendants in the suit in chancery in Newfoundland had not had justice done them. Lord Denman, C.J.: "This is never to be presumed; but the contrary principle holds unless we see in the clearest light that the foreign law or at least some part of the proceedings of the foreign court are repugnant to natural justice; and this has been often made the subject of inquiry in our courts. But it steers clear of an inquiry into the merits of the case upon the facts found; for whatever constituted a defence in that court ought to have been pleaded there," etc.

In Vallee v. Dumergue (1849), 4 Exch. 290, plaintiff obtained a judgment in France against the defendant. The defendant claimed he had never resided or been in France nor subject to its laws, nor served with any process or notice

whatever, nor did he have any notice or knowledge of any proceeding, nor did he appear. He claimed that the circumstances under which the judgment was obtained were contrary to natural justice. But it appeared that the defendant was a shareholder in a certain company in France; that by the law of France it was necessary for the defendant to elect a domicil in France if he resided abroad, at which the directors of the company might notify him of all proceedings relative to the company or him self as a shareholder; that by the law of France all legal proceedings affecting any party having his real domicil out of the kingdom, left for him at such elected domicil, were as valid as if left at his real domicil; that the defendant made election of domicil at Paris, and gave notice thereof to the plaintiff; and the plaintiff caused the summons to be left at the elected domicil in Paris. The court, by Alderson, B., held that whether the defendant had had actual notice of the proceedings was unimportant, as he had waived that by becoming a shareholder and thereby agreeing to accept a particular form of notification less than actual notice.

Notwithstanding the seeming approval by Chief Justice Wilde in , Bank of Australasia v. Harding (1850)9 C.B. 661, of Lord Brougham's views as expressed in Houlditch v. Donegal, supra, the case is referred to in subsequent cases as sustaining the rule of the conclusiveness of foreign judgments upon the merits, and indeed, it was held that the declaration which set forth the colonial judgment as establishing his liability was good.

In the Bank of Australasia v. Nias (1851), 16 Q.B. 717, which was assumpsit on the same judgment of the court of New South Wales, it was held that the judgment was binding on a member of the company sued in England. The question of the conclusiveness of the foreign judgment was fully argued.

In Reimers v. Druce (1856), 23 Beavan, 145, a bill by a foreign creditor to enforce a judgment obtained in the kingdom of Hanover was dismissed on the ground of laches, but the Master of the Rolls, Sir John Romilly, discussed at some length the extent to which a foreign judgment is impeachable when sought to be enforced in England, and after a review of the principal cases, and especially of the cases of the Bank of Australasia v. Nias and Ricardo v. Garcias, said it could be impeached for error apparent on the face of it, sufficient to show that such judgment ought not to have been pronounced, but that this error cannot be shown by extrinsic evidence.

It was held in Sheehy v. Professional Life Ass. Co. (1857), 3 C.B. (N.S.), 597, affirming 2 C.B. (N.S.) 211, that a foreign judgment could be enforced notwithstanding an irregularity in the service of process, where the defendant voluntarily appeared during the argument. Erle, J., said: "I have always understood that the only ground upon which our courts can refuse to give effect to a foreign judgment is that the whole foundation of the proceeding in the foreign court fails."

In De Cosse Brissac v. Rathbone (1861), 6 H. & N. 301, the suit was on a French judgment. The plea that it was erroneous on the merits. This plea was held bad. Wilde, B.: "Ricardo v. Garcias is an authority that the judgment of a foreign court of competent jurisdiction cannot be impeached upon the merits." Martin, B.: "We are all of opinion that this question is so concluded by the authorities that it is impossible for us to decide contrary to them, and the case must go to the Court of Errors. I may observe that the question does not come before me for the first time. For many years I have had occasion to consider it." In this case also it was ruled that a plea to the effect that a defendant appeared in the French action and defended the same for the purpose of protecting his property in France, which was subject to sequestration in case of a judgment, was bad.

Scott v. Pilkington (1862), 2 B. & S. 11. Suit on a New York judgment. Held, that the fact that an appeal is pending is not a bar, but may be a ground for delay; and that a plea that the court mistook the law of the forum was bad.

Simpson v. Fogo (1862), 1 Johns. & Hem. 18, on demurrer, and 1 Hem. & Mill. 195, on motion for a decree. In chancery. A ship being subject to a valid mortgage in England, went to Louisiana and was there attached by a creditor of the mortgagor. The mortgagee intervened and proved his rights, which were superior by the law of England, but they were disregarded, and the ship was sold and the proceeds paid to the attaching creditor. The purchaser having brought the ship to England, it was decided that the mortgagee might seize and sell her, and that the Louisiana decree was not

binding, because founded on a perverse disregard of the English law, though a case properly subject to that law by the comity of nations.

In Crawley v. Isaacs, 16 Law Times, (N.S.), 529 (1867), it is said that the repugnancy to natural justice, spoken of in the cases, refers not to the decision on the merits of the case, but to matters of procedure.

The syllabus of Godard v. Gray, L.R. 6 Q.B. 139 (1870), gives a clear idea of the points decided.

"It is no bar to an action, on a judgment in personam of a foreign court having jurisdiction over the parties and cause, that the foreign tribunal has put a construction erroneous according to English law on an English contract.

"Declaration on a judgment of a French court having jurisdiction in the matter. Plea setting out the judgment, from which it appeared that the suit was for the breach by the shipowner of a charter party made in England, in which was a clause: 'Penalty for the non-performance of this agreement, estimated amount of freight'; and that the court had treated this clause (contrary to the English law) as fixing the amount of damages recoverable, and had given judgment accordingly for the amount of freight. The proceedings showed that both parties had appeared and been heard before the judgment was pronounced, but no objection was taken by the defendant to the mode of assessing the damages. Held, by Blackburn and Mellor, JJ., that the defendant could not set up, as an excuse for not paying money awarded by a judgment of a foreign tribunal having jurisdiction over him and the cause, that the judgment proceeded on a mistake as to the English law, which was really a question of fact; and that it made no difference that the mistake appeared on the face of the proceedings. By Hannen, J., that the French court could only be informed of foreign law by evidence, and the defendant, having neglected to bring the English law to the knowledge of the French court, could not impeach the judgment given against him on the ground of error as to that law." See also Castrique v. Imrie, L.R. 4 H.L. 414 (1870).

In Rousillon v. Rousillon, 14 Ch. D. 351 (1880), Fry, J., undertakes to state with precision the circumstances under which the courts of England will hold the judgment of the foreign tribunal conclusive, viz.: 1. Where the defendant is a subject of a foreign country in which the judgment has been obtained. 2. Where he was resident in the foreign country when the action began. 3. Where the defendant in the character of plaintiff has selected the forum in which he is afterwards sued. 4. Where he has voluntarily appeared. 5. Where he has contracted to submit himself to the forum in which the judgment was obtained, and possibly, 6. Where the defendant has real estate within the foreign jurisdiction, in respect to which the cause of action arose whilst he was within that jurisdiction.

The Court of Queen's Bench, in Schibsby v. Westenholtz, L.R. 6 Q.B. 155 (1870), which follows and reinforces the decision in Godard v. Gray, also said: "Now, on this, we think some things are quite clear on principle. If the defendants had been at the time of the judgments subjects of the country whose judgment is sought to be enforced against them, we think that its laws would have bound them. Again, if the defendants had been at the time when the suit was commenced resident in the country, so as to have the benefit of its laws protecting them, or, as it is sometimes expressed, owing temporary allegiance to that country, we think that its laws would have bound them. . . . Again, we think it clear, upon principle, that if a person selected, as plaintiff, the tribunal of a foreign country s the one in which he would sue, he could not afterwards say that the judgment of that tribunal was not binding on him." Per Blackburn, J.

In Messina v. Petrococchino (1872), L.R. 4 P.C. 144, Sir Robert Phillimore says: "If the Greek Consular Tribunal was a competent court, having jurisdiction over the ship and cargo, then the sentence of that court was not open to examination by the court at Malta, but would be properly enforced by it, or in the clear language of Lord Ellenborough in the case of Power v. Whitmore, 4 M. & S. 150, 'By the comity which is paid by us to the judgments of other courts abroad of competent jurisdiction, we give a full and binding effect to such judgments, so far as they profess to bind the persons and property immediately before them in judgment, and to which their adjudications properly relate.'"

In Trafford v. Blanc, 36 Ch. D. 600, it is said: "The principle on which Bank of Australasia v. Nias was decided appears

to be that the courts of this country do not sit to hear appeals from foreign tribunals, and that if the judgment of a foreign court is erroneous, the regular mode provided by every system of jurisprudence of procuring it to be examined and reversed ought to be followed. Neither do the courts of this country sit to rehear causes which have been tried abroad. Every system of jurisprudence provides a mode by which a judgment may be reviewed, and the cause reheard on the discovery of fresh evidence, and to the regular mode so provided recourse ought to be had, as in fact has been unsuccessfully done by the defendant in the present case."

The cases of Abouloff v. Oppenheimer, 10 Q.B.D. 295 (1882), and Vadala v. Lawes, 25 Q.B.D. 310 (1890), do not impair the authority of the above decisions. They apply to foreign judgments the principle of English law, that it is a defence that the plaintiff procured the former judgment by a fraud practised on the court in the trial, a defence which, by the decisive authority of this court, is not open to a domestic judgment here.

Counsel also cited and commented on the following cases decided in British colonial courts on the same subject: Bukshee v. Samunt (1871), Appellate Civil, Sutherland's Weekly Reporter, 500; Mammi v. Kalandan (1874), Appellate, 8 Madras H.C.R. 14; Pillai v. Saib (1880), Appellate Civil, Indian Law Reports, 2 Madras Series, 337; Shevakram v. Kalidas (1882), Appellate Civil, Indian Law Reports, 6 Bombay Series, 292; Mudaliar v. Pallai (1879), Appellate Civil, Indian Law Reports, 2 Madras Series, 400; Parry v. Pillai (1880), Appellate Civil, Indian Law Reports, 2 Madras Series, 407; Maubourquet v. Wyse (1867), 1 Irish C.L. 471; Fowler v. Vail (1877), 27 U. Canada C.P. 417; S.C. 4 Canada App. 267; Woodruff v. McLennan, 14 Ontario App. 242; Victorian &c. Photo. Litho. Co. v. Davis (1890), 11 New South Wales, 257; Star Kidney Pad Co. v. McCarthy (1886), 26 New Brunswick, 107; British Linen Co. v. McEwan (1892), 8 Manitoba (Law), 99; Corse v. Moon (1890), 22 Nova Scotia (10 Russ. & Gel.), 191; Denoon v. Northway (1883), 5 Sup. Ct. Circular, Ceylon, 133; Blaine v. Col. Mar. Ass. Co. (1882), 1 Juta (Cape of Good Hope), 402; Jones v. Reed (1890), 16 Victoria, 372.

Counsel also cited, with comments, the following American cases: Buttrick v. Allen, 8 Mass. 273; Rankin v. Goddard, 54 Maine, 28; S.C. 55 Maine, 389; Thurber v. Blackbourne, 1 N.H. 242; Konitzky v. Meyer, 49 N.Y. 571; Lazier v. Westcott, 26 N.Y. 146; Taylor v. Bryden, 8 Johns. 173; Hanley v. Donoghue, 116 U.S. 1; Christmas v. Russell, 5 Wall. 290, 304; McMullen v. Richie, 41 Fed. Rep. 502; De Brimont v. Penniman, 10 Blatchford, 437; Silver Lake Bank v. Harding, 5 Ohio, 545; Glass v. Blackwell, 48 Arkansas, 50; Fisher v. Fielding, 67 Connecticut, 91 (1894); Hopkins v. Lee, 6 Wheat. 109; Pennington v. Gibson, 16 How. 65.

II. The fraud which will vitiate a judgment is fraud extrinsic to the matter tried in the cause, and fraud upon the party or upon the court whereby judgment was improperly procured to be entered; not a fraud committed in the matter tried or examinable in the action. United States v. Throckmorton, 98 U.S. 64; Vance v. Burbank, 101 U.S. 514; Moffat v. United States, 112 U.S. 24; United States v. Minor, 114 U.S. 233; Marshall v. Holmes, 141 U.S. 589; Greene v. Greene, 2 Gray, 361; Ross v. Wood, 7 N.Y. 8; Ward v. Southfield, 102 N.Y. 287; Sanders v. Soutter, 126 N.Y. 193; Price v. Dewhurst, 8 Sim. 279; Ochsenbein v. Papelier, L.R. 8 Ch. 695.

III. The point made by the plaintiffs in error that France does not enforce judgments of foreign states against its own subjects is wholly immaterial.

While the efficacy of foreign judgments rests partly on principles of comity, or friendly dealing between nations at peace, or was formerly held to do so, the modern doctrine of their conclusiveness rests on the same general ground of public policy which makes domestic judgments equally conclusive, viz.: that the public interest is that there be an end of litigation -- that one fair chance to prove his cause to be just, in a competent court, is all that the good of society or the general principles of justice demand or permit a litigant to enjoy.

Nor should the well-grounded and consistent principles of our law be marred by introducing under the cover of "comity" the principle of "retaliation." That principle has been repudiated as a ground of decision by this court where the law of this country is positive and established. The Scotland, 105 U.S. 24. See also Baker v. Palmer, 83 Illinois,

568; Cross v. United States Trust Co., 131 N.Y. 330; Dammert v. Osborn, 140 N.Y. 30.

Mr. George A. Black, by leave, filed a brief on behalf of Bailey and others, to which Mr. Choate and Mr. Shipman filed suggestions in reply.

OPINION BY: GRAY

OPINION

[*162] **[**143]** **[***108]** MR. JUSTICE GRAY, after stating the case, delivered the opinion of the court.

These two cases, the one at law and the other in equity, of Hilton v. Guyot, and the case of Ritchie v. McMullen which has been under advisement at the same time, present important questions relating to the force and effect of foreign judgments, not hitherto adjudicated by this court, which have been argued **[*163]** with great learning and ability, and which require for their satisfactory determination a full consideration of the authorities. To avoid confusion in indicating the parties, it will be convenient first to take the case at law of Hilton v. Guyot.

International law, in its widest and most comprehensive sense -- including not only questions of right between nations, governed by what has been appropriately called the law of nations; but also questions arising under what is usually called private international law, or the conflict of laws, and concerning the rights of persons within the territory and dominion of one nation, by reason of acts, private or public, done within the dominions of another nation -- is part of our law, and must be ascertained and administered by the courts of justice, as often as such questions are presented in litigation between man and man, duly submitted to their determination.

[HN1] The most certain guide, no doubt, for the decision of such questions is a treaty or a statute of this country. But when, as is the case here, there is no written law upon the subject, the duty still rests upon the judicial tribunals of ascertaining and declaring what the law is, whenever it becomes necessary to do so, in order to determine the rights of parties to suits regularly brought before them. In doing this, the courts must obtain such aid as they can from judicial decisions, from the works of jurists and commentators, and from the acts and usages of civilized nations. Fremont v. United States, 17 How. 542, 557; The Scotia, 14 Wall. 170, 188; Respublica v. De Longchamps, 1 Dall. 111, 116; Moultrie v. Hunt, 23 N.Y. 394, 396.

No law has any effect, of its own force, beyond the limits of the sovereignty from which its authority is derived. The extent to which the law of one nation, as put in force within its territory, whether by executive order, by legislative act, or by judicial decree, shall be allowed to operate within the dominion of another nation, depends upon what our greatest jurists have been content to call "the comity of nations." Although the phrase has been often criticized, no satisfactory substitute has been suggested.

[HN2] "Comity," in the legal sense, is neither a matter of absolute **[*164]** obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws.

Mr. Justice Story, in his Commentaries on the Conflict of Laws, treating of the question in what department of the government of any State, in the absence of any clear declaration of the sovereign will, resides the authority to determine how far the laws of a foreign State shall have effect, and observing that this differs in different States, according to the organization of the departments of the government of each, says: "In England and America, the courts of justice have hitherto exercised the same authority in the most ample manner: and the legislatures have in no instance (it is believed) in either country interfered to provide any positive regulations. The common law of both countries has been expanded to meet the exigencies of the times as they have arisen; and so far as the practice of nations, or the jus gentium privatum, has been supposed to furnish any general principle, it has been followed out." Story's Conflict of Laws, §§ 23,

24.

Afterwards, speaking of the difficulty of applying the positive rules laid down by the Continental jurists, he says that "there is indeed great truth" in these remarks of Mr. Justice Porter, speaking for the Supreme **[**144]** Court of Louisiana: "They have attempted to go too far, to define and fix that which cannot, in the nature of things, be defined and fixed. They seem to have forgotten that they wrote on a **[***109]** question which touched the comity of nations, and that that [HN3] comity is, and ever must be, uncertain; that it must necessarily depend on a variety of circumstances which cannot be reduced to any certain rule; that no nation will suffer the laws of another to interfere with her own to the injury of her citizens; that whether they do or not must depend on the condition of the country in which the foreign law is sought to be enforced, the particular nature of her legislation, her policy, and the character **[*165]** of her institutions; that in the conflict of laws it must often be a matter of doubt which should prevail; and that, whenever a doubt does exist, the court, which decides, will prefer the laws of its own country to that of the stranger." Story's Conflict of Laws, § 28; Saul v. His Creditors, (1827) 5 Martin (N.S.) 569, 596.

Again: Mr. Justice Story says: "It has been thought by some jurists that the term comity is not sufficiently expressive of the obligation of nations to give effect to foreign laws when they are not prejudicial to their own rights and interests. And it has been suggested that the doctrine rests on a deeper foundation; that it is not so much a matter of comity or courtesy, as a matter of paramount moral duty. Now, assuming that such a moral duty does exist, it is clearly one of imperfect obligation, like that of beneficence, humanity and charity. Every nation must be the final judge for itself, not only of the nature and extent of the duty, but of the occasions on which its exercise may be justly demanded." And, after further discussion of the matter, he concludes: "There is then not only no impropriety in the use of the phrase 'comity of nations,' but it is the most appropriate phrase to express the true foundation and extent of the obligation of the laws of one nation within the territories of another." Story's Conflict of Laws, §§ 33-38.

Chief Justice Taney, likewise, speaking for this court while Mr. Justice Story was a member of it, and largely adopting his words, said: "It is needless to enumerate here the instances in which, by the general practice of civilized countries, the laws of the one will, by the comity of nations, be recognized and executed in another, where the rights of individuals are concerned." [HN4] "The comity thus extended to other nations is no impeachment of sovereignty. It is the voluntary act of the nation by which it is offered, and is inadmissible when contrary to its policy, or prejudicial to its interests. But it contributes so largely to promote justice between individuals, and to produce a friendly intercourse between the sovereignties to which they belong, that courts of justice have continually acted upon it, as a part of the voluntary lw of nations." "It is not the comity of the courts, but the comity **[*166]** of the nation, which is administered and ascertained in the same way, and guided by the same reasoning, by which all other principles of municipal law are ascertained and guided." Bank of Augusta v. Earle, (1839) 13 Pet. 519, 589; Story's Conflict of Laws, § 38.

Mr. Wheaton says: "All the effect, which foreign laws can have in the territory of a State, depends absolutely on the express or tacit consent of that State." "The express consent of a State, to the application of foreign laws within its territory, is given by acts passed by its legislative authority, or by treaties concluded with other States. Its tacit consent is manifested by the decisions of its judicial and administrative authorities, as well as by the writings of its publicists. There is no obligation, recognized by legislators, public authorities, and publicists, to regard foreign laws; but their application is admitted, only from considerations of utility and the mutual convenience of States -- ex comitate, ob reciprocam utilitatem." Wheaton's International Law, (8th ed.) §§ 78, 79. [HN5] "No sovereign is bound, unless by special compact, to execute within his dominions a judgment rendered by the tribunals of another State; and if execution be sought by suit upon the judgment, or otherwise, the tribunal in which the suit is brought, or from which execution is sought, is, on principle, at liberty to examine into the merits of such judgment, and to give effect to it or not, as may be found just and equitable. The general comity, utility and convenience of nations have, however, established a usage among most civilized States, by which the final judgments of foreign courts of competent jurisdiction are reciprocally carried into execution, under certain regulations and restrictions, which differ in different countries." § 147.

Chancellor Kent says: [HN6] "The effect to be given to foreign judgments is altogether a matter of comity, in cases where it is not regulated by treaty." 2 Kent Com. (6th ed.) 120.

In order to appreciate the weight of the various authorities cited at the bar, it is important to distinguish different kinds of judgments. [HN7] Every foreign judgment, of whatever nature, in order to be entitled to any effect, must have been rendered **[*167]** by a court having jurisdiction of the cause, and upon regular proceedings and due notice. In alluding to different kinds of judgments, therefore, such jurisdiction, proceedings and notice will be assumed. It will also be assumed that they are untainted by fraud, the effect of which will be considered later.

[HN8] A judgment in rem, adjudicating the title to a ship or other movable property within the custody of the court, is treated as valid everywhere. As said by Chief Justice Marshall: "The sentence of a competent court, proceeding in rem, is conclusive with respect to the thing itself, and operates as an **[**145]** absolute change of the property. By such sentence, the right of the former owner is lost, and a complete title given to the person who claims under the decree. No court of coordinate jurisdiction can examine the sentence. The question, therefore, respecting its conformity to general or municipal law can never arise, for no coordinate tribunal is capable of making the inquiry." Williams v. Armroyd, 7 Cranch, 423, 432. The most common illustrations of this are decrees of courts of admiralty and prize, which proceed upon principles of international law. Croudson v. Leonard, 4 Cranch, 434; Williams v. Armroyd, above cited; Ludlow v. Dale, 1 Johns. Cas. 16. But the same rule applies to judgments in rem under municipal law. Hudson v. Guestier, 4 Cranch, 293; Ennis v. Smith, 14 How. 400, 430; Wisconsin v. Pelican Ins. Co., 127 U.S. 265, 291; **[***110]** Scott v. McNeal, 154 U.S. 34, 46; Castrique v. Imrie, L.R. 4 H.L. 414; Monroe v. Douglas, 4 Sandf. Ch. 126.

[HN9] A judgment affecting the status of persons, such as a decree confirming or dissolving a marriage, is recognized as valid in every country, unless contrary to the policy of its own law. Cottington's case, 2 Swanston, 326; Roach v. Garvan, 1 Ves. Sen. 157; Harvey v. Farnie, 8 App. Cas. 43; Cheely v. Clayton, 110 U.S. 701. It was of a foreign sentence of divorce, that Lord Chancellor Nottingham, in the House of Lords, in 1688, in Cottington's case, above cited, said: "It is against the law of nations not to give credit to the judgments and sentences of foreign countries, till they be reversed by the law, **[*168]** and according to the form, of those countries wherein they were given. For what right hath one kingdom to reverse the judgment of another? And how can we refuse to let a sentence take place till it be reversed? And what confusion would follow in Christendom, if they should serve us so abroad, and give no credit to our sentences."

[HN10] Other judgments, not strictly in rem, under which a person has been compelled to pay money, are so far conclusive that the justice of the payment cannot be impeached in another country, so as to compel him to pay it again. For instance, a judgment in foreign attachment is conclusive, as between the parties, of the right to the property or money attached. Story on Conflict of Laws, (2d ed.) § 592 a. And if, on the dissolution of a partnership, one partner promises to indemnify the other against the debts of the partnership, a judgment for such a debt, under which the latter has been compelled to pay it, is conclusive evidence of the debt in a suit by him to recover the amount upon the promise of indemnity. It was of such a judgment, and in such a suit, that Lord Nottingham said: "Let the plaintiff receive back so much of the money brought into court as may be adequate to the sum paid on the sentence for custom, the justice whereof is not examinable here." Gold v. Canham, (1689) 2 Swanston, 325; S.C. 1 Cas. in Ch. 311. See also Tarleton v. Tarleton, 4 M. & S. 20; Konitzky v. Meyer, 49 N.Y. 571.

Other foreign judgments which have been held conclusive of the matter adjudged were judgments discharging obligations contracted in the foreign country between citizens or residents thereof. Story's Conflict of Laws, §§ 330-341; May v. Breed, 7 Cush. 15. Such was the case, cited at the bar, of Burroughs or Burrows v. Jamineau or Jemino, Mosely, 1; S.C. 2 Stra. 733; 2 Eq. Cas. Ab. 525, pl. 7; 12 Vin. Ab. 87, pl. 9; Sel. Cas. in Ch. 69; 1 Dickens, 48.

In that case, bills of exchange, drawn in London, were negotiated, indorsed and accepted at Leghorn in Italy, by the law of which an acceptance became void if the drawer failed without leaving effects in the acceptor's hands. The acceptor, accordingly, having received advices that the drawer had failed **[*169]** before the acceptances, brought a suit at Leghorn against the last endorsees, to be discharged of his acceptances, paid the money into court and obtained a sentence there, by which the acceptances were vacated as against those endorsees and all the endorsers and negotiators of the bills, and the money deposited was returned to him. Being afterwards sued at law in England by subsequent holders of the bills, he applied to the Court of Chancery and obtained a perpetual injunction. Lord Chancellor King, as

reported by Strange, "was clearly of opinion that this cause was to be determined according to the local laws of the place where the bill was negotiated, and the plaintiff's acceptance of the bill having been vacated and declared void by a court of competent jurisdiction, he thought that sentence was conclusive and bound the Court of Chancery here;" as reported in Viner, that "the court at Leghorn had jurisdiction of the thing, and of the persons;" and, as reported by Mosely, that, though "the last endorsees had the sole property of the bills, and were therefore made the only parties to the suit at Leghorn, yet the sentence made the acceptance void against the now defendants and all others." It is doubtful, at the least, whether such a sentence was entitled to the effect given to it by Lord Chancellor King. See Novelli v. Rossi, 2 B. & Ad. 757; Castrique v. Imrie, L.R. 4 H.L. 414, 435 2 Smith's Lead. Cas. (2d ed.) 450;.

The remark of Lord Hardwicke, arguendo, as Chief Justice, in Boucher v. Lawson, (1734) that "the reason gone upon by Lord Chancellor King, in the case of Burroughs v. Jamineau, was certainly right, that were any court, whether foreign or domestic, that has the proper jurisdiction of the case, makes a determination, it is conclusive to all other courts," evidently had reference, as the context shows, to judgments of a **[**146]** court having jurisdiction of the thing; and did not touch the effect of an exectory judgment for a debt. Cas. temp. Hardw. 85, 89; S.C. Cunningham, 144, 148.

In former times, foreign decrees in admiralty in personam were executed, even by imprisonment of the defendant, by the Court of Admiralty in England, upon letters rogatory from the foreign sovereign, without a new suit. Its right to **[*170]** do so was recognized by the Court of King's Bench in 1607 in a case of habeas corpus, cited by the plaintiffs, and reported as follows: "If a man of Frizeland sues an Englishman in Frizeland before the Governor there, and there recovers against him a certain sum; upon which the Englishman, not having sufficient to satisfy it, comes into England, upon which the Governor sends his letters missive into England, omnes magistratus infra regnum Angliae rogans, to make execution of the said judgment. The Judge of the Admiralty may execute this judgment by imprisonment of the party, and he shall not be delivered by the common law; for this is by the law of nations, that the justice of one nation should be aiding to the justice of another nation, and for one to execute the judgment of the other; and the law of England takes notice of this law, and the Judge of the Admiralty is the proper magistrate for this purpose; for he only hath the execution of the civil law within the realm. Pasch. 5 Jac. B.R., Weir's case, resolved upon an habeas corpus, and remanded." 1 Rol. Ab. 530, pl. 12; 6 Vin. Ab. 512, pl. 12. But the only question there raised or decided was of the power of the English Court of Admiralty, and **[***111]** not of the conclusiveness of the foreign sentence; and in later times the mode of enforcing a foreign decree in admiralty is by a new libel. See The City of Mecca, 5 P.D. 28, and 6 P.D. 106.

The extraterritorial effect of judgments in personam, at law or in equity, may differ, according to the parties to the cause. A judgment of that kind between two citizens or residents of the country, and thereby subject to the jurisdiction, in which it is rendered, may be held conclusive as between them everywhere. So, if a foreigner invokes the jurisdiction by bringing an action against a citizen, both may be held bound by a judgment in favor of either. And if a citizen sues a foreigner, and judgment is rendered in favor of the latter, both may be held equally bound. Ricardo v. Garcias, 12 Cl. & Fin. 368; The Griefswald, Swabey, 430, 435; Barber v. Lamb, 8 C.B.(N.S.) 95; Lea v. Deakin, 11 Bissell, 23.

The effect to which a judgment, purely executory, rendered **[*171]** in favor of a citizen or resident of the country, in a suit there brought by him against a foreigner, may be entitled in an action thereon against the latter in his own country -- as is the case now before us -- presents a more difficult question, upon which there has been some diversity of opinion.

Early in the last century, it was settled in England that a foreign judgment on a debt was considered not, like a judgment of a domestic court of record, as a record or a specialty, a lawful consideration for which was conclusively presumed; but as a simple contract only.

This clearly appears in Dupleix v. De Roven, (1706) where one of two merchants in France recovered a judgment there against the other for a sum of money, which, not being paid, he brought a suit in chancery in England for a discovery of assets and satisfaction of the debt; and the defendant pleaded the statute of limitations of six years, and prevailed, Lord Keeper Cowper saying: "Although the plaintiff obtained a judgment or sentence in France, yet here the debt must be considered as a debt by simple contract. The plaintiff can maintain no action here, but an indebitatus assumpsit or an

insimul computassent; so that the statute of limitations is pleadable in this case." 2 Vernon, 540.

Several opinions of Lord Harfwicke define and illustrate the effect of foreign judgments, when sued on or pleaded in England.

In Otway v. Ramsay, (1736) in the King's Bench, Lord Hardwicke treated it as worthy of consideration, "what credit is to be given by one court to the courts of another nation, proceeding both by the same rules of law," and said, "It is very desirable, in such case, that the judgment given in one kingdom should be considered as res judicata in another." But it was held that debt would not lie in Ireland upon an English judgment, because "Ireland must be considered as a provincial kingdom, part of the dominions of the Crown of England, but no part of the realm," and an action of debt on a judgment was local. 4 B. & C. 414-416, note; S.C. 14 Vin. Ab. 569, pl. 5; 2 Stra. 1090.

A decision of Lord Hardwicke as Chancellor was mentioned **[*172]** in Walker v. Witter, (1778) 1 Doug. 1, 6, by Lord Mansfield, who said: "He recollected a case of a decree on the chancery side in one of the courts of great sessions in Wales, from which there was an appeal to the House of Lords, and the decree affirmed there; afterwards, a bill was filed in the Court of Chancery, on the foundation of the decree so affirmed, and Lord Hardwicke thought himself entitled to examine into the justice of the decision of the House of Lords, because the original decree was in the court of Wales, whose decisions were clearly liable to be examined." And in Galbraith v. Neville, (1789) 1 Doug. 6, note, Mr. Justice Buller said: "I have often heard Lord Mansfield repeat what was said by Lord Hardwicke in the case alluded to from Wales; and the ground of his lordship's opinion was this: when you call for my assistance to carry into effect the decision of some other tribunal, you shall not have it, if it appears that you are in the wrong; **[**147]** and it was on that account, that he said, he would examine into the propriety of the decree." The case before Lord Hardwicke, mentioned by Lord Mansfield, would appear (notwithstanding the doubt of its authenticity expressed by Lord Kenyon in Galbraith v. Neville) to have been a suit to recover a legacy, briefly reported, with references to Lord Hardwicke's note book, and to the original record, as Morgan v. Morgan, (1737-8) West. Ch. 181, 597; S.C. 1 Atk. 53, 408.

In Gage v. Bulkeley, (1744) briefly reported in 3 Atk. 215, cited by the plaintiffs, a plea of a foreign sentence in a commissary court in France was overruled by Lord Hardwicke, saying, "It is the most proper case to stand for an answer, with liberty to except, that I ever met with." His reasons are fully stated in two other reports of the case. According to one of them, at the opening of the argument he said: "Can a sentence or judgment pronounced by a foreign jurisdiction be pleaded in this kingdom to a demand for the same thing in any court of justice here? I always thought it could not, because every sentence, having its authority from the sovereign in whose dominions it is given, cannot bind the jurisdiction of foreign courts, who own not the same authority, **[*173]** and have a different sovereign, and are only bound by judicial sentence given under the same sovereign power by which they themselves act." "But though a foreign sentence cannot be used by way of plea in the courts here, yet it may be taken advantage of in the way of evidence." "You cannot in this kingdom maintain debt upon judgment obtained for money in a foreign jurisdiction; but you may an assumpsit in nature of debt upon a simple contract, and give the judgment in evidence, and have a verdict. So that the distinction seems to be, where such foreign sentence is used as a plea to bind the courts here as a judgment, and when it is made use of in evidence as binding the justice of the case only." And afterwards, in giving his decision, he said: "The first question is, Whether the subject-matter of the plea is good? The second is, Whether it is well pleaded? The first question depends upon this, Whether the sentence or judgment of a foreign court can be used by way of plea in a court of justice in England? And no authority, either at law or in equity, has been produced to show that it may be pleaded: and therefore I shall be very cautious how I establish such a precedent." "It is true, such sentence is an evidence, **[***112]** which may affect the right of this demand, when the cause comes to be heard; but if it is no plea in a court of law to bind their jurisdiction, I do not see why it should be so here." Ridgeway temp. Hardw. 263, 264, 270, 273. A similar report of his judgment is in 2 Ves. Sen. (Belt's Supplt.) 409, 410.

In Roach v. Garvan, (1748) where an infant ward of the Court of Chancery had been married in France by her guardian to his son before a French court, and the son "petitioned for a decree for cohabitation with his wife, and to have some money out of the bank," Lord Hardwicke said, as to the validity of the marriage: "I has been argued to be valid from being established by the sentence of a court in France, having proper jurisdiction. And it is true, that if so, it is

conclusive, whether in a foreign court or not, from the law of nations in such cases; otherwise the rights of mankind would be very precarious and uncertain. But the question is, whether this is a proper sentence, in a proper cause, and between proper **[*174]** parties? Of which it is impossible to judge, without looking farther into the proceedings; this being rather the execution of the sentence, than the sentence itself." And after observing upon the competency of the French tribunal, and pointing out that restitution of conjugal rights was within the jurisdiction of the ecclesiastical court, and not of the Court of Chancery, he added, "Much less will I order any money out of the bank to be given him." 1 Ves. Sen. 157, 159. He thus clearly recognized the difference between admitting the effect of a foreign judgment as adjudicating the status of persons, and executing a foreign judgment by enforcing a claim for money.

These decisions of Lord Hardwicke demonstrate that in his opinion, whenever the question was of giving effect to a foreign judgment for money, in a suit in England between the parties, it did not have the weight of a domestic judgment, and could not be considered as a bar, or as conclusive, but only as evidence of the same weight as a simple contract, and the propriety and justice of the judgment might be examined.

In Sinclair v. Fraser, (1771) the appellant, having as attorney in Jamaica made large advances for his constituent in Scotland, and having been superseded in office, brought an action before the Supreme Court of Jamaica, and, after appearance, obtained judgment against him; and afterwards brought an action against him in Scotland upon that judgment. The Court of Session determined that the plaintiff was bound to prove before it the ground, nature and extent of the demand on which the judgment in Jamaica was obtained; and therefore gave judgment against him. But the House of Lords, (in which, as remarked by one reporter, Lord Mansfield was then the presiding spirit, acting in concert with, or for the Lord Chancellor, in disposing of the Scotch appeals,) "ordered and declared that the judgment of the Supreme Court of Jamaica ought to be received as evidence prima facie of the debt; and that it lies upon the defendant to impeach the justice thereof, or to show the same to have been irregularly obtained;" and therefore reversed the judgment of the Court of Session. 2 Paton, ix, 253; S.C. Morison Dict. Dec. 4542; 1 Doug. 5, note.

[*175] Accordingly, in Crawford v. Witten, (1773) **[**148]** a declaration in assumpsit, in an action in England upon a judgment recovered in the Mayor's Court of Calcutta in Bengal, without showing the cause of action there, was held good on demurrer. Lord Mansfield considered the case perfectly clear. Mr. Justice Aston, according to one report, said, "The declaration is sufficient; we are not to suppose it an unlawful debt;" and, according to another report, "They admitted the assumpsit by their demurrer. When an action comes properly before any court, it must be determined by the laws which govern the country in which the action accrued." And Mr. Justice Ashurst said: "I have often known assumpsit brought on judgments in foreign courts; the judgment is a sufficient consideration to support the implied promise." Lofft, 154; S.C. nom. Crawford v. Whittal, 1 Doug. 4, note.

In Walker v. Witter, (1778) an action of debt was brought in England upon a judgment recovered in Jamaica. The defendant pleaded nil debet, and nul tiel record. Judgment was given for the plaintiff, Lord Mansfield saying: "The plea of nul tiel record was improper. Though the plaintiffs had called the judgment a record, yet by the additional words in the declaration, it was clear they did not mean that sort of record to which implicit faith is given by the courts of Westminster Hall. They had not misled the court nor the defendant, for they spoke of it as a record of a court in Jamaica. The question was brought to a narrow point; for it was admitted on the part of the defendant, that indebitatus assumpsit would have lain; and on the part of the plaintiffs, that the judgment was only prima facie evidence of the debt. That being so, the judgment was not a specialty, but the debt only a simple contract debt; for assumpsit will not lie on a specialty. The difficulty in the case had arisen from not fixing accurately what a court of record is in the eye of the law. That description is confined properly to certain courts in England, and their judgments cannot be controverted. Foreign courts, and courts in England not of record, have not that privilege, nor the courts in Wales, etc. But the doctrine in the case of Sinclair v. Fraser was unquestionable. Foreign judgments are **[*176]** a ground of action everywhere, but they are examinable." Justices Willes, Ashurst and Buller concurred, the two latter saying that wherever indebitatus assumpsit will lie, debt will also lie. 1 Doug. 1, 5, 6.

In Herbert v. Cook, (1782) again, in an action of debt upon a judgment of an inferior English court, not a court of record, Lord Mansfield said that it was "like a foreign judgment, and not conclusive evidence of the debt." Willes, 36,

note.

In Galbraith v. Neville, (1789) upon a motion for a new trial after verdict for the plaintiff, in an action of debt on a judgment of the Supreme Court of Jamaica, Lord Kenyon expressed "very serious doubts concerning the doctrine laid down in Walker v. Witter, that foreign judgments are not binding on the parties here." But Mr. Justice Buller said: "The doctrine which was laid down in Sinclair v. Fraser has always been considered as the [***113] true line ever since; namely, that [HN11] the foreign judgment shall be prima facie evidence of the debt, and conclusive till it be impeached by the other party." "As to actions of this sort, see how far the court could go, if what was said in Walker v. Witter were departed from. It was there held, that the foreign judgment was only to be taken to be right prima facie; that is, we will allow the same force to a foreign judgment, that we do to those of our own courts not of record. But if the matter were carried farther, we should give them more credit; we should give them equal force with those of courts of record here. Now a foreign judgment has never been considered as a record. It cannot be declared on as such, and a plea of nul tiel record, in such a case, is a mere nullity. How then can it have the same obligatory force? In short, the result is this; that it is prima facie evidence of the justice of the demand in an action of assumpsit, having no more credit than is given to every species of written agreement, viz. that it shall be considered as good till it is impeached." 1 Doug. 6, note. And the court afterwards unanimously refused the new trial, because, "without entering into the question how far a foreign judgment was impeachable, it was at all events clear that it was prima facie evidence of the debt; and they were of opinion [*177] that no evidence had been adduced to impeach this." 5 East, 475, note.

In Messin v. Massareene, (1791) the plaintiff, having obtained a judgment against the defendants in a French court, brought an action of assumpsit upon it in England, and, the defendants having suffered a default, moved for a reference to a master, and for a final judgment on his report, without executing a writ of inquiry. The motion was denied, Lord Kenyon saying, "This is an attempt to carry the rule farther than has yet been done, and as there is no instance of the kind I am not disposed to make a precedent for it;" and Mr. Justice Buller saying, "Though debt will lie here on a foreign judgment, the defendant may go into the consideration of it." 4 T.R. 493.

In Bayley v. Edwards, (1792) the Judicial Committee of the Privy Council, upon appeal from Jamaica, held that a suit in equity pending in England was not a good plea in bar to a subsequent bill in Jamaica for the same matter; and Lord Camden said: "In Gage v. Bulkeley," (evidently referred to the full report in Ridgeway, above quoted, which had been cited by counsel,) "Lord Hardwicke's reasons go a great way to show the true effect of foreign sentences in this country. And [**149] all the cases show that foreign sentences are not conclusive bars here, but only evidence of the demand." 3 Swanston, 703, 708, 710.

In Phillips v. Hunter, (1795) the House of Lords, in accordance with the opinion of the majority of the judges consulted, and against that of Chief Justice Eyre, decided that a creditor of an English bankrupt, who had obtained payment of his debt by foreign attachment in Pennsylvania, was liable to an action for the money by the assignees in bankruptcy in England. But it was agreed, on all hands, that the judgment in Pennsylvania and payment under it were conclusive as between the garnishee and the plaintiff in that suit. And the distinction between the effect of a foreign judgment which vests title, and of one which only declares that a certain sum of money is due, was clearly stated by Chief Justice Eyre, as follows:

[*178] "This judgment against the garnishee in the court of Pennsylvania was recovered properly or improperly. If, notwithstanding the bankruptcy, the debt remained liable to an attachment according to the laws of that country, the judgment was proper; if, according to the laws of that country, the property in the debt was divested out of the bankrupt debtor, and vested in his assignees, the judgment was improper. But this was a question to be decided, in the cause instituted in Pennsylvania, by the courts of that country and not by us. We cannot examine their judgment, and if we could, we have not the means of doing it in this case. It is not stated upon this record, nor can we take notice, what the law of Pennsylvania is upon this subject. If we had the means, we could not examine a judgment of a court in a foreign State, brought before us in this manner.

[HN12] "It is in one way only, that the sentence or judgment of a court of a foreign state is examinable in our courts,

and that is, when the party who claims the benefit of it applies to our courts to enforce it. When it is thus voluntarily submitted to our jurisdiction, we treat it, not as obligatory to the extent to which it would be obligatory, perhaps, in the country in which it was pronounced, nor as obligatory to the extent to which, by our law, sentences and judgments are obligatory, not as conclusive, but as matter in pais, as consideration prima facie sufficient to raise a promise. We examine it as we do all other considerations or promises, and for that purpose we receive evidence of what the law of the foreign State is, and whether the judgment is warranted by that law." 2 H. Bl. 402, 409, 410.

In Wright v. Simpson, (1802) Lord Chancellor Eldon said: [HN13] "Natural law requires the courts of this country to give credit to those of another for the inclination and power to do justice; but not, if that presumption is proved to be ill founded in that transaction, which is the subject of it; and if it appears in evidence, that persons suing under similar circumstances neither had met, nor could meet, with justice, that fact cannot be immaterial as an answer to the presumption." 6 Ves. 714, 730.

[*179] Under Lord Ellenborough, the distinction between a suit on a foreign judgment in favor of the plaintiff against the defendant, and a suit to recover money which the plaintiff had been compelled to pay under a judgment abroad, was clearly maintained.

In Buchanan v. Rucker, (1807) in assumpsit upon a judgment rendered in the island of Tobago, the defendant pleaded non assumpsit, and prevailed, because it appeared that he was not a resident of the island, and was neither personally served with process nor came in to defend, and the only notice was, according to the practice of the court, by nailing up a copy of the declaration at the court-house door. It was argued that "the presumption was in favor of a foreign judgment, as well as of a judgment obtained in one of the courts of this country." To which Lord Ellenborough answered: " **[***114]** That may be so, if the judgment appears, on the face of it, consistent with reason and justice; but it is contrary to the first principles of reason and justice, that, either in civil or criminal proceedings, a man should be condemned before he is heard." [HN14] "There might be such glaring injustice on the face of a foreign judgment, or it might have a vice rendering it so ludicrous, that, it could not raise an assumpsit, and, if submitted to the jurisdiction of the courts of this country, could not be enforced." 1 Camp. 63, 66, 67. A motion for a new trial was denied. 9 East, 192. And see Sadler v. Robins, (1808) 1 Camp. 253, 256.

In Hall v. Odber, (1809) in assumpsit upon a judgment obtained in Canada, with other counts on the original debt, Lord Ellenborough and Justices Grose, Le Blanc and Bayley agreed that a foreign judgment was not to be considered as having the same force as a domestic judgment, but only that of a simple contract between the parties, and did not merge the original cause of action, but was only evidence of the debt, and therefore assumpsit would lie, either upon the judgment, or upon the original cause of action. 11 East, 118.

In Tarleton v. Tarleton, (1815) on the other hand, the action was brought upon a covenant of indemnity in an agreement for dissolution of a partnership, to recover a sum which the **[*180]** plaintiff had been compelled to pay under a decision in a suit between the parties in the island of Grenada. Such was the case, of which Lord Ellenborough, affirming his own ruling at the trial, said: "I thought that I did not sit at nisi prius to try a writ of error in this case upon the proceedings in the court abroad. The defendant had notice of the proceedings, and should have appeared and made his defence. **[**150]** The plaintiff, by this neglect, has been obliged to pay the money in order to avoid a sequestration." The distinction was clearly brought out by Mr. Justice Bayley, who said: "As between the parties to the suit, the justice of it might be again litigated; but as against a stranger it cannot." 4 M. & S. 20, 22, 23.

In Harris v. Saunders, (1825) Chief Justice Abbott (afterwards Lord Tenterden) and his associates, upon the authority of Otway v. Ramsay, above cited, held that, even since the Act of Union of 39 & 40 Geo. III, c. 67, assumpsit would lie in England upon a judgment recovered in Ireland, because such a judgment could not be considered a specialty debt in England.4 B. & C. 411; S.C. 6 D. & R. 471.

The English cases, above referred to, have been stated with the more particularity and detail, because they directly bear upon the question what was the English law, being then our own law, before the Declaration of Independence. They

demonstrate that by that law, as generally understood, and as declared by Hardwicke, Mansfield, Buller, Camden, Eyre and Ellenborough, and doubted by Kenyon only, a judgment recovered in a foreign country for a sum of money, when sued upon in England, was only prima facie evidence of the demand, and subject to be examined and impeached. The law of England, since it has become to us a foreign country, will be considered afterwards.

The law upon this subject, as understood in the United States, at the time of their separation from the mother country, was clearly set forth by Chief Justice Parsons, speaking for the Supreme Judicial Court, of Massachusetts, in 1813, and by Mr. Justice Story, in his Commentaries on the Constitution of the United States, published in 1833. Both those **[*181]** eminent jurists declared that by the law of England the general rule was that foreign judgments were only prima facie evidence of the matter which they purported to decide; and that by the common law, before the American Revolution, all the courts of the several Colonies and States were deemed foreign to each other, and consequently judgments rendered by any one of them were considered as foreign judgments, and their merits reexaminable in another Colony, not only as to the jurisdiction of the court which pronounced them, but also as to the merits of the controversy, to the extent to which they were understood to be reexaminable in England.And they noted that, in order to remove that inconvenience, statutes had been passed in Massachusetts, and in some of the other Colonies, by which judgments rendered by a court of competent jurisdiction in a neighboring Colony could not be impeached. Bissell v. Briggs, 9 Mass. 462, 464, 465; Mass. Stat. 1773-4, c. 16, 5 Prov. Laws, 323, 369; Story on the Constitution, (1st ed.) §§ 1301, 1302; (4th ed.) §§ 1306, 1307.

It was because of that condition of the law, as between the American Colonies and States, that the United States, at the very beginning of their existence as a nation, ordained that full faith and credit should be given to the judgments of one of the States of the Union in the courts of another of those States.

By the Articles of Confederation of 1777, art. 4, § 3, [HN15] "Full faith and credit shall be given, in each of these States, to the records, acts and judicial proceedings of the courts and magistrates of every other State." 1 Stat. 4. By the Constitution of the United States, art. 4, § 1, [HN16] "Full faith and credit shall be given in each State to the public acts, records and judicial proceedings of every other State; and the Congress may by general laws prescribe the manner in which such acts, records and proceedings shall be proved, and the effect thereof." And the first Congress of the United States under the Constitution, after prescribing the manner in which the records and judicial proceedings of the courts of any State should be authenticated and proved, enacted that "the said [HN17] records and judicial proceedings, authenticated as aforesaid, shall have **[*182]** such faith and credit given to them in every court within the United States, as they have by law or usage in the courts of the State from whence the said records are or shall be taken." Act of May 26, 1790, c. 11, 1 Stat. 122; Rev. Stat. § 905.

The effect of these provisions of the Constitution and laws of the United States was at first a subject of diverse opinions, not only in the courts of the several States, but also in the Circuit Courts of the United States; Mr. Justice Cushing, Mr. Justice Wilson and Mr. Justice Washington holding that judgments of the courts of a State had the same effect throughout the Union as within that State; but Chief **[***115]** Justice Marshall (if accurately reported) being of opinion that they were not entitled to conclusive effect, and that their consideration might be impeached. Armstrong v. Carson, (1794) 2 Dall. 302; Green v. Sarmiento, (1811) 3 Wash. C.C. 17, 21; S.C. Pet. C.C. 74, 78; Peck v. Williamson, (reported as in November, 1813, apparently a mistake for 1812,) 1, Carolina Law Repository, 53.

The decisions of this court have clearly recognized that judgments of a foreign state are prima facie evidence only, and that, but for those constitutional and legislative provisions, judgments of a State of the Union, when sued upon in another State, would have no greater effect.

In Croudson v. Leonard, (1808) in which this court held that the sentence of a foreign court of admiralty in rem, condemning a vessel for breach of blockade, was conclusive evidence of that fact in an action on a policy of insurance, Mr. Justice Washington, after speaking of the conclusiveness of domestic **[**151]** judgments generally, said: "The judgment of a foreign court is equally conclusive, except in the single instance where the party claiming the benefit of it applies to the courts in England to enforce it, in which case only the judgment is prima facie evidence. But it is to be

remarked, that in such a case, the judgment is no more conclusive as to the right it establishes, than as to the fact it decides." 4 Cranch, 434, 442.

In Mills v. Duryee, (1813) in which it was established that, by virtue of the Constitution and laws of the United States, the judgment of a court of one of the States was conclusive **[*183]** evidence, in every court within the United States, of the matter adjudged; and therefore nul tiel record, and not nil debet, was a proper plea to an action brought in a court of the United States in the District of Columbia upon a judgment recovered in a court of the State of New York; this court, speaking by Mr. Justice Story, said: "The pleadings in an action are governed by the dignity of the instrument on which it is founded. If it be a record, conclusive between the parties, it cannot be denied but by the plea of nul tiel record; and when Congress gave the effect of a record to the judgment, it gave all the collateral consequences." "Were the construction contended for by the plaintiff in error to prevail, that judgments of the state courts ought to be considered prima facie evidence only, this clause in the Constitution would be utterly unimportant and illusory. The common law would give such judgments precisely the same effect." 7 Cranch, 481, 484, 485.

In Hampton v. McConnel, (1818) the point decided in Mills v. Duryee was again adjudged, without further discussion, in an opinion delivered by Chief Justice Marshall. 3 Wheat. 234.

The obiter dictum of Mr. Justice Livingston in Hopkins v. Lee, (1821) 6 Wheat. 109. 114, repeated by Mr. Justice Daniel in Pennington v. Gibson, (1853) 16 How. 65, 78, as to the general effect of foreign judgments, has no important bearing upon the case before us.

In McElmoyle v. Cohen, (1839) Mr. Justice Wayne, discussing the effect of the act of Congress of 1790, said, that "the adjudications of the English courts have now established the rule to be, that foreign judgments are prima facie evidence of the right and matter they purport to decide." 13 Pet. 312, 325.

In D'Arcy v. Ketchum, (1850) in which this court held that the provisions of the Constitution and laws of the United States gave no effect in one State to judgments rendered in another State by a court having no jurisdiction of the cause or of the parties, Mr. Justice Catron said: "In construing the act of 1790, the law as it stood when the act was passed **[*184]** must enter into that construction; so that the existing defect in the old law may be seen, and its remedy by the act of Congress comprehended. Now it was most reasonable, on general principles of comity and justice, that, among States and their citizens united as ours are, judgments rendered in one should bind citizens of other States, where defendants had been served with process, or voluntarily made defence. As these judgments, however, were only prima facie evidence, and subject to be inquired into by plea, when sued on in another State, Congress saw proper to remedy the evil, and to provide that such inquiry and double defence should not be allowed. To this extent, it is declared in the case of Mills v. Duryee, Congress has gone in altering the old rule." 11 How. 165, 175, 176.

In Christmas v. Russell, (1866) in which this court decided that, because of the Constitution and laws of the United States, a judgment of a court of one State of the Union, when sued upon in a court of another, could not be shown to have been procured by fraud, Mr. Justice Clifford, in delivering the opinion, after stating that, under the rules of the common law, a domestic judgment, rendered in a court of competent jurisdiction, could not be collaterally impeached or called in question, said: "Common law rules placed foreign judgments upon a different footing, and those rules remain, as a general remark, unchanged to the present time. Under these rules, a foreign judgment was prima facie evidence of the debt, and it was open to examination, not only to show that the court in which it was rendered had no jurisdiction of the subject-matter, but also to show that the judgment was fraudulently obtained." 5 Wall. 290, 304.

In Bischoff v. Wethered, (1869) in an action on an English judgment rendered without notice to the defendant, other than by service on him in this country, this court, speaking by Mr. Justice Bradley, held that the proceeding in England "was wholly without jurisdiction of the person, and whatever validity it may have in England, by virtue of statute law, against property of the defendant there situate, it can have no validity here, even of a prima facie character." 9 Wall. 812, 814.

[*185] In Hanley v. Donoghue, (1885) 116 U.S. 1, 4, and in Wisconsin v. Pelican Ins. Co., (1888) 127 U.S. 265, 292, it was said that judgments recovered in one State of the Union, when proved in the courts of another, differed from judgments recovered in a [***116] foreign country in no other respect than in not being reexaminable on their merits, nor impeachable for fraud in obtaining them, if rendered by a court having jurisdiction of the cause and of the parties.

But neither in those cases, nor in any other, has this court hitherto been called upon to determine how far foreign judgments may be reexamined upon their merits, or be impeached for fraud in obtaining them.

In the courts of the several States, it was long recognized and assumed, as undoubted and indisputable, that by our law, as by the law of England, foreign judgments for debts were not conclusive, but only prima facie evidence [**152] of the matter adjudged. Some of the cases are collected in the margin. [1]

1 Bartlet v. Knight, (1805) 1 Mass. 401, 405; Buttrick v. Allen, (1811) 8 Mass. 273; Bissell v. Briggs, (1813) 9 Mass. 462, 464; Hall v. Williams, (1828) 6 Pick. 232, 238; Gleason v. Dodd, (1842) 4 Met. 333, 336; Wood v. Gamble, (1853) 11 Cush. 8; McKim v. Odom, (1835) 3 Fairf. 94, 96; Middlesex Bank v. Butman, (1848) 29 Maine, 19, 21; Bryant v. Ela, (1815) Smith (N.H.) 396, 404; Thurber v. Blackbourne, (1818) 1 N.H. 242; Robinson v. Prescott, (1828) 4 N.H. 450; Taylor v. Barron, (1855) 10 Foster, 78, 95; King v. Van Gilder, (1791) 1 D. Chip. 59; Rathbone v. Terry, (1837) 1 Rhode Island, 73, 76; Aldrich v. Kinney, (1822) 4 Connecticut, 380, 382; Hitchcock v. Aicken, (1803) 1 Caines, 460; Smith v. Lewis, (1808) 3 Johns. 157, 159; Taylor v. Bryden, (1811) 8 Johns. 173; Andrews v. Montgomery, (1821) 19 Johns. 162, 165; Starbuck v. Murray, (1830) 5 Wend. 148, 155; Benton v. Burgot, (1823) 10 S. & R. 240, 241, 242; Barney v. Patterson, (1824) 6 Har. & Johns. 182, 202, 203; Taylor v. Phelps, (1827) 1 Har. & Gill, 492, 503; Rogers v. Coleman, (1808) Hardin, 413, 414; Williams v. Preston, (1830) 3 J.J. Marsh. 600, 601.

In the leading case of Bissell v. Briggs, above cited, Chief Justice Parsons said: "A foreign judgment may be produced here by a party to it, either to justify himself by the execution of that judgment in the country in which it was rendered, or to obtain the execution of it from our courts." "If the foreign court rendering the judgment had jurisdiction of the cause, yet the courts here will not execute the judgment, without first [*186] allowing an inquiry into its merits. The judgment of a foreign court, therefore, is by our laws considered only as presumptive evidence of a debt, or as prima facie evidence of a sufficient consideration of a promise, where such court had jurisdiction of the cause; and if an action of debt be sued on any such judgment, nil debet is the general issue; or, if it be made the consideration of a promise, the general issue is non assumpsit. On these issues, the defendant may impeach the justice of the judgment, by evidence relative to that point. On these issues, the defendant may also, by proper evidence, prove that the judgment was rendered by a foreign court, which had no jurisdiction; and if his evidence be sufficient for this purpose, he has no occasion to impeach the justice of the judgment." 9 Mass. 463, 464.

In a less known case, decided in 1815, but not published until 1879, the reasons for this view were forcibly stated by Chief Justice Jeremiah Smith, speaking for the Supreme Court of New Hampshire, as follows:

"The respect which is due to judgments, sentences and decrees of courts in a foreign State, by the law of nations, seems to be the same which is due to those of our own courts. Hence the decree of an admiralty court abroad is equally conclusive with decrees of our admiralty courts. Indeed, both courts proceed by the same rule, are governed by the same law -- the maritime law of nations: Coll. Jurid. 100; which is the universal law of nations, except where treaties alter it.

"The same comity is not extended to judgments or decrees which may be founded on the municipal laws of the State in which they are pronounced, Independent States do not choose to adopt such decisions without examination. These laws and regulations may be unjust, partial to citizens, and against foreigners; they may operate injustice to our citizens, whom we are bound to protect; they may be, and the decisions of courts founded on them, just cause of complaint against the supreme power of the State where rendered. To adopt them is not merely saying that the courts have decided correctly on the law, but it is approbating the law itself. [HN18] Wherever, then, the court may have proceeded on municipal [*187] law, the rule is, that the judgments are not conclusive evidence of debt, but prima facie

evidence only. The proceedings have not the conclusive quality which is annexed to the records or proceedings of our own courts, where we approve both of the rule and of the judges who interpret and apply it. A foreign judgment may be impeached; defendant may show that it is unjust, or that it was irregularly or unduly obtained. Doug. 5, note." Bryant v. Ela, Smith (N.H.) 396, 404.

From this review of the authorities, it clearly appears that, at the time of the separation of this country from England, the general rule was fully established that foreign judgments in personam were prima facie evidence only, and not conclusive of the merits of the controversy between the parties. But the extent and limits of the application of that rule do not appear to have been much discussed, or defined with any approach to exactness, in England or America, until the matter was taken up by Chancellor Kent and by Mr. Justice Story.

In Taylor v. Bryden, (1811) an action of assumpsit, brought in the Supreme Court f the State of New York, on a judgment obtained in the State of Maryland against the defendant as indorser of a bill of exchange, and which was treated as a foreign judgment, so far as concerned its effect in New York, (the decision of this court to the contrary in Mills v. Duryee, 7 Cranch, 481, not having yet been made,) Chief Justice Kent said: "The judgment in Maryland is presumptive evidence of a just demand; and it was incumbent upon the defendant, if he would obstruct the execution of the judgment here, to show, by positive proof, that it was irregularly or unduly obtained." "To try over again, as of course, every matter of fact which had been duly decided by a competent tribunal, would be disregarding the comity which we justly owe to the courts of other States, and would be carrying the doctrine of reexamination to an oppressive extent. It would be the same as granting a new trial in every case, and upon every question of fact. Suppose a recovery in another State, or in any foreign court, in an action [***117] for a [*188] tort, as for an assault and battery, false imprisonment, slander, etc., and the defendant was duly summoned and appeared, and made his [**153] defence, and the trial was conducted orderly and properly, according to the rules of a civilized jurisprudence, is every such case to be tried again here on the merits? I much doubt whether the rule can ever go to this length. The general language of the books is that the defendant must impeach the judgment by showing affirmatively that it was unjust by being irregularly or unfairly procured." But the case was decided upon the ground that the defendant had done no more than raise a doubt of the correctness of the judgment sued on. 8 Johns. 173, 177, 178.

Chancellor Kent, afterwards, treating of the same subject in the first edition of his Commentaries, (1827) put the right to impeach a foreign judgment somewhat more broadly, saying: "No sovereign is obliged to execute, within his dominion, a sentence rendered out of it; and if execution be sought by a suit upon the judgment, or otherwise, he is at liberty, in his courts of justice, to examine into the merits of such judgment [for the effect to be given to foreign judgments is altogether a matter of comity, in cases where it is not regulated by treaty]. In the former case, [of a suit to enforce a foreign judgment,] the rule is, that the foreign judgment is to be received, in the first instance, as prima facie evidence of the debt; and it lies on the defendant to impeach the justice of it, or to show that it was irregularly and unduly obtained. This was the principle declared and settled by the House of Lords, in 1771, in the case of Sinclair v. Fraser, upon an appeal from the Court of Session in Scotland." In the second edition, (1832) he inserted the passages above printed in brackets; and in a note to the fourth edition, (1840) after citing recent conflicting opinions in Great Britain, and referring to Mr. Justice Story's reasoning in his Commentaries on the Conflict of Laws, § 607, in favor of the conclusiveness of foreign judgments, he added, "and that is certainly the more convenient and the safest rule, and the most consistent with sound principle, except in cases in which the court which pronounced the judgment has not due jurisdiction of the case, or of the [*189] defendant, or the proceeding was in fraud, or founded in palpable mistake or irregularity, or bad by the law of the rei judicate; and in all such cases the justice of the judgment ought to be impeached." 2 Kent Com. (1st ed.) 102; (later eds.) 120.

Mr. Justice Story, in his Commentaries on the Conflict of Laws, first published in 1834, after reviewing many English authorities, said, "The present inclination of the English courts seems to be to sustain the conclusiveness of foreign judgments" -- to which, in the second edition in 1841, he added, "although certainly there yet remains no inconsiderable diversity of opinion among the learned judges of the different tribunals." § 606.

He then proceeded to state his own view of the subject, on principle, saying: "It is, indeed, very difficult to perceive

what could be done, if a different doctrine were maintainable to the full extent of opening all the evidence and merits of the cause anew on a suit upon the foreign judgment. Some of the witnesses may be since dead; some of the vouchers may be lost or destroyed. The merits of the cause, as formerly before the court upon the whole evidence, may have been decidedly in favor of the judgment; upon a partial possession of the original evidence, they may now appear otherwise. Suppose a case purely sounding in damages, such as an action for an assault, for slander, for conversion of property, for a malicious prosecution, or for a criminal conversation; is the defendant to be at liberty to retry the whole merits, and to make out, if he can, a new case upon new evidence? Or is the court to review the former decision, like a court of appeal, upon the old evidence? In a case of covenant, or of debt or of a breach of contract, are all the circumstances to be reexamined anew? If they are, by what laws and rules of evidence and principles of justice is the validity of the original judgment to be tried? Is the court to open the judgment, and to proceed ex aequo et bono? Or is it to administer strict law, and stand to the doctrines of the local administration of justice? Is it to act upon the rules of evidence acknowledged in its own jurisprudence, or upon those of the foreign jurisprudence? These and many more questions might be put to **[*190]** show the intrinsic difficulties of the subject. Indeed, the rule that the judgment is to be prima facie evidence for the plaintiff would be a mere delusion, if the defendant might still question it by opening all or any of the original merits on his side; for under such circumstances it would be equivalent to granting a new trial. It is easy to understand that the defendant may be at liberty to impeach the original justice of the judgment by showing that the court had no jurisdiction, or that he never had any notice of the suit; or that it was procured by fraud; or that upon its face it is founded in mistake; or that it is irregular and bad by the local law, fori rei judicatoe. To such an extent the doctrine is intelligible and practicable. Beyond this, the right to impugn the judgment is in legal effect the right to retry the merits of the original cause at large, and to put the defendant upon proving those merits." § 607.

He then observed: "The general doctrine maintained in the American courts in relation to foreign judgments certainly is that they are prima facie evidence, but that they are impeachable. But how far and to what extent this doctrine is to be carried does not seem to be definitely settled. It has been declared that the jurisdiction of the court, and its power over the parties and the things in controversy, may be inquired into; and that the judgment may be impeached for **[**154]** fraud. Beyond this no definite lines have as yet been drawn." § 608.

After stating the effect of the Constitution of the United States, and referring to the opinions of some foreign jurists, and to the law of France, which allows the merits of foreign judgments to be examined, Mr. Justice Story concluded his treatment of the subject as follows: "It is difficult to ascertain what the prevailing rule is in regard to foreign judgments in some of the other nations of continental Europe; whether they are deemed conclusive evidence, or only prima facie evidence. **[***118]** Holland seems at all times, upon the general principle of reciprocity, to have given great weight to foreign judgments, and in many cases, if not in all cases, to have given to them a weight equal to that given to domestic judgments, wherever the like rule of reciprocity with regard to Dutch **[*191]** judgments has been adopted by the foreign country whose judgment is brought under review. This is certainly a very reasonable rule, and may perhaps hereafter work itself firmly into the structure of international jurisprudence." § 618.

In Bradstreet v. Neptune Ins. Co., (1839) in the Circuit Court of the United States for the District of Massachusetts, Mr. Justice Story said: "If a civilized nation seeks to have the sentences of its own courts held of any validity elsewhere, they ought to have a just regard to the rights and usages of other civilized nations, and the principles of public and national law in the administration of justice." 3 Sumner, 600, 608, 609.

In Burnham v. Webster, (1845) in an action of assumpsit upon a promissory note, brought in the Circuit Court of the United States for the District of Maine, the defendant pleaded a former judgment in the Province of New Brunswick in his favor in an action there brought by the plaintiff; the plaintiff replied that the note was withdrawn from that suit, by consent of parties and leave of the court, before verdict and judgment; and the defendant demurred to the replication. Judge Ware, in overruling the demurrer, said: "Whatever difference of opinion there may be as to the binding force of foreign judgments, all agree that they are not entitled to the same authority as the judgments of domestic courts of general jurisdiction. They are but evidence of what they purport to decide, and liable to be controlled by counter evidence, and do not, like domestic judgments, import absolute verity and remain incontrovertible and conclusive until reversed." And he added that, if the question stood entirely clear from authority, he should be of opinion that the

plaintiff could not be allowed to deny the validity of the proceedings of a court whose authority he had invoked. 2 Ware, 236, 239, 241.

At a subsequent trial of that case before a jury, (1846) 1 Woodb. & Min. 172, the defendant proved the judgment in New Brunswick. The plaintiff then offered to prove the facts stated in his replication, and that any entry on the record of the judgment in New Brunswick concerning this note was therefore by mistake or inadvertence. This evidence was **[*192]** excluded, and a verdict taken for the plaintiff, subject to the opinion of the court. Mr. Justice Woodbury, in granting a new trial, delivered a thoughtful and discriminating opinion upon the effect of foreign judgments, from which the following passages are taken:

"They do, like domestic ones, operate conclusively, ex proprio vigore, within the governments in which they are rendered, but not elsewhere. When offered and considered elsewhere, they are, ex comitate, treated with respect, according to the nature of the judgment, and the character of the tribunal which rendered it, and the reciprocal mode, if any, in which that government treats our judgments, and according to the party offering it, whether having sought or assented to it voluntarily or not, so as to give it in some degree the force of a contract, and hence to be respected elsewhere by analogy according to the lex loci contractus. With these views, I would go to the whole extent of the cases decided by Lord Mansfield and Buller; and where the foreign judgment is not in rem, as it is in admiralty, having the subject-matter before the court, and acting on that rather than the parties, I would consider it only prima facie evidence as between the parties to it." p. 175.

"By returning to that rule, we are enabled to give parties, at times, most needed and most substantial relief, such as in judgments abroad against them without notice, or without a hearing on the merits, or by accident or mistake of facts, as here, or on rules of evidence and rules of law they never assented to, being foreigners and their contracts made elsewhere, but happening to be travelling through a foreign jurisdiction, and being compelled in invitum to litigate there." p. 177.

"Nor would I permit the prima facie force of the foreign judgment to go far, if the court was one of a barbarous or semibarbarous government, and acting on no established principles of civilized jurisprudence, and not resorted to willingly by both parties, or both not inhabitants and citizens of the country. Nor can much comity be asked for the judgments of another nation, which, like France, pays no respect to those of other countries -- except, as before remarked, on the principle of the parties belonging there, or assenting to a trial there." p. 179.

[*193] "On the other hand, by considering a judgment abroad as only prima facie valid, I would not allow the plaintiff abroad, who had sought it there, to avoid it, unless for **[**155]** accident or mistake, as here. Because, in other respects, having been sought there by him voluntarily, it does not lie in his mouth to complain of it. Nor would I in any case permit the whole merits of the judgment recovered abroad to be put in evidence as a matter of course; but being prima facie correct, the party impugning it, and desiring a hearing of its merits, must show first, specifically, some objection to the judgment's reaching the merits, and tending to prove they had not been acted on; or [as?] by showing there was no jurisdiction in the court, or no notice, or some accident or mistake, or fraud, which prevented a full defence, and has entered into the judgment; or that the court either did not decide at all on the merits, or was a tribunal not acting in conformity to any set of legal principles, and was not willingly recognized by the party as suitable for adjudicating on the merits. After matters like these are proved, I can see no danger, but rather great safety in the administration of justice, in permitting, to every party before us, at least one fair opportunity to have the merits of his case fully considered, and one fair adjudication upon them, before he is estopped forever." p. 180.

In De Brimont v. Penniman, (1873) in the Circuit Court of the United States for the Southern District of New York, Judge Woodruff said: "The principle on which foreign judgments receive any recognition from our courts is one of comity. It does not require, but **[***119]** rather forbids it, where such a recognition works a direct violation of the policy of our laws, and does violence to what we deem the rights of our citizens." And he declined to maintain an action against a citizen of the United States (whose daughter had been married in France to a French citizen) upon a decree of a French court requiring the defendant, then resident in France and duly served with process there, to pay an annuity to

his son-in-law. 10 Blatchford, 436, 441.

Mr. Justice Story and Chancellor Kent, as appears by the passages above, quoted from their commentaries, concurred in [*194] the opinion that, in a suit upon a foreign judgment, the whole merits of the case could not, as matter of course, be reexamined anew; but that the defendant was at liberty to impeach the judgment, not only by showing that the court had no jurisdiction of the case, or of the defendant, but also by showing that it was procured by fraud, or was founded on clear mistake or irregularity, or was bad by the law of the place where it was rendered. Story's Conflict of Laws, § 607; 2 Kent Com. (6th ed.) 120.

The word "mistake" was evidently used by Story and Kent, in this connection, not in its wider meaning of error in judgment, whether upon the law or upon the facts; but in the stricter sense of misapprehension or oversight, and as equivalent to what, in Burnham v. Webster, before cited, Mr. Justice Woodbury spoke of as "some objection to the judgment's reaching the merits, and tending to prove that they had not been acted on;" "some accident or mistake," or "that the court did not decide at all on the merits." 1 Woodb. & Min. 180.

The suggestion that a foreign judgment might be impeached for error in law of the country in which it was rendered is hardly consistent with the statement of Chief Justice Marshall, when, speaking of the disposition of this court to adopt the construction given to the laws of a State by its own courts, he said: "This course is founded on the principle, supposed to be universally recognized, that the judicial department of every government, where such department exists, is the appropriate organ for construing the legislative acts of that government. Thus, no court in the universe, which professed to be governed by principle, would, we presume, undertake to say, that the courts of Great Britain, or of France, or of any other nation, had misunderstood their own statutes, and therefore erect itself into a tribunal which should correct such misunderstanding. We receive the construction given by the courts of the nation as the true sense of the law, and feel ourselves no more at liberty to depart from that construction, than to depart from the words of the statute." Elmendorf v. Taylor, (1825) 10 Wheat. 152, 159, 160.

In recent times, foreign judgments rendered within the dominions [*195] of the English Crown, and under the law of England, after a trial on the merits, and no want of jurisdiction, and no fraud or mistake, being shown or offered to be shown, have been treated as conclusive by the highest courts of New York, Maine and Illinois. Lazier v. Wescott, (1862) 26 N.Y. 146, 150; Dunstan v. Higgins, (1893) 138 N.Y. 70, 74; Rankin v. Goddard, (1866) 54 Maine, 28, and (1868) 55 Maine, 389; Baker v. Palmer, (1876) 83 Illinois, 568. In two early cases in Ohio, it was said that foreign judgments were conclusive, unless shown to have been obtained by fraud. Silver Lake Bank v. Harding, (1832) 5 Ohio, 545, 547; Anderson v. Anderson, (1837) 8 Ohio, 108, 110. But in a later case in that State it was said that they were only prima facie evidence of indebtedness. Pelton v. Platner, (1844) 13 Ohio, 209, 217. In Jones v. Jamison, (1860) 15 La. Ann. 35, the decision was only that, by virtue of the statutes of Louisiana, a foreign judgment merged the original cause of action as against the plaintiff.

The result of the modern decisions in England, after much diversity, not to say vacillation of opinion, does not greatly differ (so far as concerns the aspects in which the English courts have been called upon to consider the subject) from the conclusions of Chancellor Kent and of Justices Story and Woodbury.

[**156] At one time, it was held that, in an action brought in England upon a judgment obtained by the plaintiff in a foreign country, the judgment must be assumed to be according to the law of that country, unless the contrary was clearly proved -- manifestly implying that proof on that point was competent. Becquet v. McCarthy, (1831) 2 B. & Ad. 951, 957; Alivon v. Furnival, (1834) 1 Cr., M. & R. 277, 293; S.C. 4 Tyrwh. 751, 768.

Lord Brougham, in the House of Lords, as well as Chief Justice Tindal and Chief Justice Wilde (afterwards Lord Chancellor Truro) and their associates, in the Common Bench, considered it to be well settled that an Irish or Colonial judgment, or a foreign judgment, was not, like a judgment of a domestic court of record, conclusive evidence, but only, like a [*196] simple contract, prima facie evidence of a debt. Houlditch v. Donegal, (1834) 8 Bligh N.R. 301, 342, 346; S.C. 2 Cl. & Fin. 470, 476-479; Don v. Lipmann, (1837) 5 Cl. & Fin. 1, 20-22; Smith v. Nicolls, (1839) 7 Scott,

147, 166-170; S.C. 5 Bing. N.C. 208, 220-226; 7 Dowl. 282; Bank of Australasia v. Harding, (1850) 9 C.B. 661, 686, 687.

On the other hand, Vice Chancellor Shadwell, upon an imperfect review of the early cases, expressed the opinion that a foreign judgment was conclusive. Martin v. Nicolls, (1830) 3 Sim. 458.

Like opinions were expressed by Lord Denman, speaking for the Court of Queen's Bench, and by Vice Chancellor Wigram, in cases of Irish or Colonial judgments, which were subject to direct appellate review in England. Ferguson v. Mahon, (1839) 11 Ad. & El. 179, 183; S.C. 3 Per. & Dav. 143, 146; Henderson v. Henderson, (1844) 6 Q.B. 288, 298, 299; Henderson v. Henderson, (1843) 3 Hare, 100, 118.

In Bank of Australasia v. Nias, (1851) in an action upon an Australian judgment, pleas that the original promises were not made, and that those promises, if made, were obtained by fraud, were held bad on demurrer. Lord Campbell, in delivering judgment, referred to Story on the Conflict of Laws, and adopted substantially his course of reasoning in § 607, above quoted, with regard to foreign judgments. But he distinctly put the decision upon **[***120]** the ground that the defendant might have appealed to the Judicial Committee of the Privy Council, and thus have procured a review of the colonial judgment. And he took the precaution to say: "How far it would be permitted to a defendant to impeach the competency, or the integrity, of a foreign court from which there was no appeal, it is unnecessary here to inquire." 16 Q.B. 717, 734-737.

The English courts, however, have since treated that decision as establishing that a judgment of any competent foreign court could not, in an action upon it, be questioned, either because that court had mistaken its own law, or because it had come to an erroneous conclusion upon the facts. De Cosse Brissac v. Rathbone, (1861) 6 H. &N. 301; Scott v. Pilkington, **[*197]** (1862) 2 B. & S. 11, 41, 42; Vanquelin v. Bouard, (1863) 15 C.B. (N.S.) 341, 368; Castrique v. Imrie, (1870) L.R. 4 H.L. 414, 429, 430; Godard v. Gray, (1870) L.R. 6 Q.B. 139, 150; Ochsenbein v. Papelier, (1873) L.R. 8 Ch. 695, 701. In Meyer v. Ralli, (1876) a judgment in rem, rendered by a French court of competent jurisdiction, was held to be reexaminable upon the merits, solely because it was admitted by the parties, in the special case upon which the cause was submitted to the English court, to be manifestly erroneous in regard to the law of France. 1 C.P.D. 358.

In view of the recent decisions in England, it is somewhat remarkable that, by the Indian Code of Civil Procedure of 1877, "no foreign judgment" (which is defined as a judgment of "a civil tribunal beyond the limits of British India, and not having authority in British India, nor established by the Governor General in Cuncil") "shall operate as a bar to a suit in British India," "if it appears on the face of the proceeding to be founded on an incorrect view of international law," or "if it is, in the opinion of the court before which it is produced, contrary to natural justice." Piggott on Foreign Judgments, (2d ed.) 380, 381.

It was formerly understood in England that a foreign judgment was not conclusive, if it appeared upon its face to be founded on a mistake or disregard of English law. Arnott v. Redfern, (1825-6) 2 Car. & P. 88, and 3 Bing. 353; S.C. 11 J. B. Moore, 209; Novelli v. Rossi, (1831) 2 B. & Ad. 757; 3 Burge on Colonial and Foreign Laws, 1065; 2 Smith's Lead. Cas. (2d ed.) 448; Reimers v. Druce, (1856) 23 Beavan, 145.

In Simpson v. Fogo, (1860) 1 Johns. & Hem. 18, and (1862) 1 Hem. & Mil. 195, Vice-Chancellor Wood (afterwards Lord Hatherley) refused to give effect to a judgment in personam of a court in Louisiana, which had declined to recognize the title of a mortgagee of an English ship under the English law. In delivering judgment upon demurrer, he said: "The State of Louisiana may deal as it pleases with foreign law; but if it asks courts of this country to respect its law, it must be on a footing of paying a like respect to ours. Any comity between the courts of two nations holding such **[*198]** opposite doctrines as to the authority of the lex loci is impossible. While the courts of Louisiana refuse to recognize a title acquired here which is valid according to our law, and hand over to their own citizens property so acquired, they cannot at the same time expect us to defer to a rule of their law which we are no more bound to respect than a law that any title of foreigners should be disregarded in favor of citizens of Louisiana.The answer to such a

demand must be, that a country which pays so little regard to our laws, as to set aside a paramount title acquired here, must not expect at our hands any greater regard for the competing title so acquired by the citizens of that country." 1 Johns. & Hem. 28, 29. And upon motion for a decree, he elaborated the same view, beginning by saying, "Whether [**157] this judgment does so err or not against the recognized principles of what has been commonly called the comity of nations, by refusing to regard the law of the country where the title to the ship was acquired, is one of the points which I have to consider;" and concluding that it was "so contrary to law, and to what is required by the comity of nations," that he must disregard it. 1 Hem. & Mil. 222-247. See also Liverpool Co. v. Hunter, (1867) L.R. 4 Eq. 62, 68, and (1868) L.R. 3 Ch. 479, 484.

In Scott v. Pilkington, (1862) Chief Justice Cockburn treated it as an open question whether a judgment recovered in New York for a debt could be impeached on the ground that the record showed that the foreign court ought to have decided the case according to English law, and had either disregarded the comity of nations by refusing to apply the English law, or erred in its view of English law. 2 B. & S. 11, 42. In Castrique v. Imrie, (1870) the French judgment which was adjudged not to be impeachable for error in law, French or English, was, as the House of Lords construed it, a judgment in rem, under which the ship to which the plaintiff in England claimed title had been sold. L.R. 4 H.L. 414. In Godard v. Gray, (1870) shortly afterwards, in which the Court of Queen's Bench held that a judgment in personam of a French court could not be impeached because it had put [*199] a construction erroneous, according to English law, upon an English contract, the decision was put by Justices Blackburn and Mellor upon the ground that it did not appear that the foreign court had "knowingly and perversely disregarded the rights given by the English law;" and by Justice Hannen, solely upon the ground that the defendant did not appear to have brought the English law to the knowledge of the foreign court. L.R. 6 Q.B. 139, 149, 154. In Messina v. Petrococchino, (1872) Sir Robert Phillimore, delivering judgment in the Privy Council, said: [HN19] "A foreign judgment of a competent court may indeed be impeached, if it carries on the face of it a manifest error." L.R. 4 P.C. 144, 157.

The result of the English decisions, therefore, would seem to be that a foreign judgment in personam may be impeached for a manifest and wilful disregard of the law of England.

Lord Abinger, Baron Parke and Baron Alderson were wont to say that the judgment of a foreign court of competent jurisdiction for a sum certain created a duty or legal obligation to pay that sum; or, in Baron Parke's words, that the principle on which the judgments of foreign and colonial courts are supported and enforced was, "that where a court of competent jurisdiction has adjudicated a certain sum [***121] to be due from one person to another, a legal obligation arises to pay that sum, on which an action of debt to enforce the judgment may be maintained." Russell v. Smyth, (1842) 9 M. & W. 810, 818, 819; Williams v. Jones, (1845) 13 M. & W. 628, 633, 634.

But this was said in explaining why, by the technical rules of pleading, an action of assumpsit, or of debt, would lie upon a foreign judgment; and had no reference to the question how far such a judgment was conclusive of the matter adjudged. At common law, an action of debt would lie on a debt appearing by a record, or by any other specialty, such as a contract under seal; and would also lie for a definite sum of money due by simple contract. Assumpsit would not lie upon a record or other specialty; but would lie upon any other contract, whether expressed by the party, or implied by law. In an action upon a record, or upon a contract under seal, a lawful consideration was conclusively presumed to exist, and could not be denied; [*200] but in an action, whether in debt or in assumpsit, upon a simple contract, express or implied, the consideration was open to inquiry. A foreign judgment was not considered, like a judgment of a domestic court of record, as a record or specialty. The form of action, therefore, upon a foreign judgment was not in debt, grounded upon a record or a specialty; but was either in debt, as for a definite sum of money due by simple contract, or in assumpsit upon such a contract. A foreign judgment, being a security of no higher nature than the original cause of action, did not merge that cause of action. The plaintiff might sue, either on the judgment, or on the original cause of action; and in either form of suit the foreign judgment was only evidence of a liability equivalent to a simple contract, and was therefore liable to be controlled by such competent evidence as the nature of the case admitted. See cases already cited, especially Walker v. Witter, 1 Doug. 1; Phillips v. Hunter, 2 H. Bl. 402, 410; Bissell v. Briggs, 9 Mass. 463, 464; Mills v. Duryee, 7 Cranch, 481, 485; D'Arcy v. Ketchum, 11 How. 165, 176; Hall v. Odber, 11 East, 118; Smith v. Nicolls, 7 Scott, 147; S.C. 5 Bing. N.C. 208. See also Grant v. Easton, 13 Q.B.D. 302, 303; Lyman v.

Brown, 2 Curtis, 559.

Mr. Justice Blackburn, indeed, in determining how far a foreign judgment could be impeached, either fore error in law, or for want of jurisdiction, expressed the opinion that the effect of such a judgment did not depend upon what he termed "that which is loosely called 'comity,'" but upon the saying of Baron Parke, above quoted; and consequently "that anything which negatives the existence of that legal obligation, or excuses the defendant from the performance of it, must form a good defence to the action." Godard v. Gray, (1870) L.R. 6 Q.B. 139, 148, 149; Schibsby v. Westenholz, (1870) L.R. 6 Q.B. 155, 159. And his example has been followed by some other English judges. Fry, J., in Rousillon v. Rousillon, (1880) 14 Ch. D. 351, 370; North, J., in Nouvion v. Freeman, (1887) 35 Ch. D. 704, 714, 715; Cotton and Lindley, L. JJ., in Nouvion v. Freeman, (1887) 37 Ch. D. 244, 250, 256.

[*201] **[**158]** But the theory that a foreign judgment imposes or creates a duty or obligation is a remnant of the ancient fiction, assumed by Blackstone, saying that "upon showing the judgment once obtained, still in full force, and yet unsatisfied, the law immediately implies that by the original contract of society the defendant hath contracted a debt, and is bound to pay it." 3 Bl. Com. 160. That fiction, which embraced judgments upon default, or for torts, cannot convert a transaction wanting the assent of parties into one which necessarily implies it. Louisiana v. New Orleans, 109 U.S. 285, 288. While the theory in question may help to explain rules of pleading which originated while the fiction was believed in, it is hardly a sufficient guide at the present day in dealing with questions of international law, public or private, and of the comity of our own country, and of foreign nations. It might be safer to adopt the maxim, applied to foreign judgments by Chief Justice Weston, speaking for the Supreme Judicial Court of Maine, judicium redditure in invitum, or, as given by Lord Coke, in proesumptione legis judicium redditur in invitum. Jordan v. Robinson, (1838) 15 Maine, 167, 168; Co. Lit. 248 b.

In Russell v. Smyth, above cited, Baron Parke took the precaution of adding, "Nor need we say how far the judgment of a court of competent jurisdiction, in the absence of fraud, is conclusive upon the parties." 9 M. & W. 819. He could hardly have contemplated erecting a rule of local procedure into a canon of private international law, and a substitute for "the comity of nations," on which, in an earlier case, he had himself relied as the ground for enforcing in England a right created by a law of a foreign country. Alivon v. Furnival, 1 Cr., M. & R. 277, 296; S.C. 4 Tyrwh. 751, 771.

In Abouloff v. Oppenheimer, (1882) Lord Coleridge and Lord Justice Brett carefully avoided adopting the theory of a legal obligation to pay a foreign judgment as the test in determining how far such a judgment might be impeached. 10 Q.B.D. 295, 300, 305. In Hawksford v. Giffard, (1886) in the Privy Council, on appeal from the Royal Court of Jersey, Lord Herschell said: "This action is brought upon an English judgment, which, until a judgment was obtained in Jersey, was in **[*202]** that country no more than evidence of a debt." 12 App. Cas. 122, 126. In Nouvion v. Freeman, in the House of Lords, (1889) Lord Herschell, while he referred to the reliance placed by counsel on the saying of Baron Parke, did not treat a foreign judgment as creating or imposing a new obligation, but only as declaring and establishing that a debt or obligation existed. His words were: "The principle upon which I think our enforcement of foreign judgments must proceed is this: that in a court of competent jurisdiction, where according to its established procedure the whole merits of the case were open, at all events, to the parties, however much they may have failed to take advantage of them, or may have waived any of their rights, a final adjudication has been given that a debt or obligation exists, which cannot thereafter in that court be disputed, and can only be questioned in an appeal to a higher tribunal. In such a case it may well be **[***122]** said that, giving credit to the courts of another country, we are prepared to take the fact that such adjudication has been made as establishing the existence of the debt or obligation." And Lord Bramwell said: "How can it be said that there is a legal obligation on the part of a man to pay a debt, who has a right to say, 'I owe none, and no judgment has established against me that I do?' I cannot see." The foreign judgment in that case was allowed no force, for want of finally establishing the existence of a debt. 15 App. Cas. 1, 9, 10, 14.

In view of all the authorities upon the subject, and of the trend of judicial opinion in this country and in England, following the lead of Kent and Story, we are satisfied that, [HN20] where there has been opportunity for a full and fair trial abroad before a court of competent jurisdiction, conducting the trial upon regular proceedings, after due citation or voluntary appearance of the defendant, and under a system of jurisprudence likely to secure an impartial administration

of justice between the citizens of its own country and those of other countries, and there is nothing to show either prejudice in the court, or in the system of laws under which it was sitting, or fraud in procuring the judgment, or any other special reason why the comity of this nation should not allow it full effect, **[*203]** the merits of the case should not, in an action brought in this country upon the judgment, be tried afresh, as on a new trial or an appeal, upon the mere assertion of the party that the judgment was erroneous in law or in fact. The defendants, therefore, cannot be permitted, upon that general ground, to contest the validity or the effect of the judgment sued on.

But they have sought to impeach that judgment upon several other grounds, which require separate consideration.

It is objected that the appearance and litigation of the defendants in the French tribunals were not voluntary, but by legal compulsion, and therefore that the French courts never acquired such jurisdiction over the defendants, that they should be held bound by the judgment.

Upon the question what should be considered such a voluntary appearance, as to amount to a submission to the jurisdiction of a foreign court, there has been some difference of opinion in England.

In General Steam Naviogation Co. v. Guillou, (1843) in an action at law to recover damages to the plaintiff's ship by a collision with the defendant's ship through the negligence of the master and crew of the latter, the defendant **[**159]** pleaded a judgment by which a French court, in a suit brought by him, and after the plaintiffs had been cited, had appeared, and had asserted fault on this defendant's part, had adjudged that it was the ship of these plaintiffs, and not that of this defendant, which was in fault. It was not shown or suggested that the ship of these plaintiffs was in the custody or possession of the French court. Yet Baron Parke, delivering a considered judgment of the Court of Exchequer, (Lord Abinger and Barons Alderson and Rolfe concurring,) expressed a decided opinion that the pleas were bad in substance, for these reasons: "They do not state that the plaintiffs were French subjects, or resident, or even present in France when the suit began, so as to be bound by reason of allegiance, or domicil, or temporary presence, by a decision of a French court; and they did not select the tribunal and sue as plaintiffs; in any of which cases the determination might have possibly bound them. They were mere strangers, who put forward the negligence **[*204]** of the defendant as an answer, in an adverse suit in a foreign country, whose laws they were under no obligation to obey." 11 M. & W. 877, 894; S.C. 13 Law Journal (N.S.) Exch. 168, 176.

But it is now settled in England that, [HN21] while an appearance by the defendant in a court of a foreign country, for the purpose of protecting his property already in the possession of that court, may not be deemed a voluntary appearance, yet an appearance solely for the purpose of protecting other property in that country from seizure is considered as a voluntary appearance. De Cosse Brissac v. Rathbone, (1860) 6 H. & N. 301; S.C. 20 Law Journal (N.S.) Exch. 238; Schibsby v. Westenholz, (1870) L.R. 6 Q.B. 155, 162; Voinet v. Barrett, (1885) 1 Cab. & El. 554; S.C. 54 Law Journal (N.S.) Q.B. 521, and 55 Law Journal (N.S.) Q.B. 39.

The present case is not one of a person travelling through or casually found in a foreign country. The defendants, although they were not citizens or residents of France, but were citizens and residents of the State of New York, and their principal place of business was in the city of New York, yet had a storehouse and an agent in Paris, and were accustomed to purchase large quantities of goods there, although they did not make sales in France.Under such circumstances, evidence that their sole object in appearing and carrying on the litigation in the French courts was to prevent property, in their storehouse at Paris, belonging to them, and within the jurisdiction, but not in the custody, of those courts, from being taken in satisfaction of any judgment that might be recovered against them, would not, according to our law, show that those courts did not acquire jurisdiction of the persons of the defendants.

It is next objected that in those courts one of the plaintiffs was permitted to testify not under oath, and was not subjected to cross-examination by the opposite party, and that the defendants were, therefore, deprived of safeguards which are by our law considered essential to secure honesty and to detect fraud in a witness; and also that documents and papers were admitted in evidence, with which the defendants had no connection, **[*205]** and which would not be admissible under our own system of jurisprudence. But it having been shown by the plaintiffs, and hardly denied by the defendants, that

[HN22] the practice followed and the method of examining witnesses were according to the laws of France, we are not prepared to hold that the fact that the procedure in these respects differed from that of our own courts is, of itself, a sufficient ground for impeaching the foreign judgment.

It is also contended that a part of the plaintiffs' claim is affected by one of the contracts between the parties having been made in violation of the revenue laws of the United States, requiring goods to be invoiced at their actual market value. Rev. Stat. § 2854. [HN23] It may be **[***123]** assumed that, as the courts of a country will not enforce contracts made abroad in evasion or fraud of its own laws, so they will not enforce a foreign judgment upon such a contract. Armstrong v. Toler, 11 Wheat. 258; DeBrimont v. Penniman, 10 Blatchford, 436; Lang v. Holbrook, Crabbe, 179; Story's Conflict of Laws, §§ 244, 246; Wharton's Conflict of Laws, § 656. But as this point does not affect the whole claim in this case, it is sufficient, for present purposes, to say that there does not appear to have been any distinct offer to prove that the invoice value of any of the goods sold by the plaintiffs to the defendants was agreed between them to be, or was, in fact, lower than the actual market value of the goods.

It must, however, always be kept in mind that [HN24] it is the paramount duty of the court, before which any suit is brought, to see to it that the parties have had a fair and impartial trial, before a final decision is rendered against either party.

When an action is brought in a court of this country, by a citizen of a foreign country against one of our own citizens, to recover a sum of money adjudged by a court of that country to be due from the defendant to the plaintiff, and the [HN25] foreign judgment appears to have been rendered by a competent court, having jurisdiction of the cause and of the parties, and upon due allegations and proofs, and opportunity to defend against them, and its proceedings are according to the course of a civilized jurisprudence, and are stated in a clear and formal **[*206]** record, the judgment is prima facie evidence, at least, of the truth of the matter adjudged; and it should be held conclusive upon the merits tried in the foreign court, unless some special ground is shown for impeaching the judgment, as by showing that it was affected by fraud or prejudice, or that, **[**160]** by the principles of international law, and by the comity of our own country, it should not be given full credit and effect.

There is no doubt that both in this country, as appears by the authorities already cited, and in England, a foreign judgment may be impeached for fraud.

Shortly before the Declaration of Independence, the House of Lords, upon the trial of the Duchess of Kingston for bigamy, put to the judges the question whether -- assuming a sentence of the ecclesiastical court against a marriage, in a suit for jactitation of marriage, to be conclusive evidence so as to prevent the counsel for the Crown from proving the marriage upon an indictment for polygamy -- "the counsel for the Crown may be admitted to avoid the effect of such sentence, by proving the same to have been obtained by fraud or collusion." Chief Justice De Grey, delivering the opinion of the judges, which was adopted by the House of Lords, answering this question in the affirmative, said: "But if it was a direct and decisive sentence upon the point, and, as it stands, to be admitted as conclusive evidence upon the court, and not to be impeached from within; yet, like all other acts of the highest judicial authority, it is impeachable from without; although it is not permitted to show that the court was mistaken, it may be shown that they were misled. Fraud is an intrinsic collateral act; which vitiates the most solemn proceedings of courts of justice. Lord Coke says, it avoids all judicial acts, ecclesiastical or temporal." 20 Howell's State Trials, 537, 543, note; S.C. in 2 Smith's Lead. Cas.

All the subsequent English authorities concur in holding that [HN26] any foreign judgment, whether in rem or in personam, may be impeached upon the ground that it was fraudulently obtained. White v. Hall, (1806) 12 Ves. 321, 324; Bowles v. Orr, (1835) 1 Yo. & Col. Exch. 464, 473; Price v. Dewhurst, (1837) 8 Sim. 279, 302-305; Don v. Lippmann, (1837) 5 Cl. & **[*207]** Fin. 1, 20; Bank of Australasia v. Nias, (1851) 16 Q.B. 717, 735; Reimers v. Druce, (1856) 23 Beavan, 145, 150; Castrique v. Imrie, (1870) L.R. 4 H.L. 414, 445, 446; Godard v. Gray, (1870) L.R. 6 Q.B. 139, 149; Messina v. Petrocochino, (1872) L.R. 4 P.C. 144, 157; Ochsenbein v. Papelier, (1873) L.R. 8 Ch. 695.

Under what circumstances this may be done does not appear to have ever been the subject of judicial investigation in

this country.

It has often, indeed, been declared by this court that the fraud which entitles a party to impeach the judgment of one of our own tribunals must be fraud extrinsic to the matter tried in the cause, and not merely consist in false and fraudulent documents or testimony submitted to that tribunal, and the truth of which was contested before it and passed upon by it. United States v. Throckmorton, 98 U.S. 61, 65, 66; Vance v. Burbank, 101 U.S. 514, 519; Steel v. Smelting Co., 106 U.S. 447, 453; Moffat v. United States, 112 U.S. 24, 32; United States v. Minor, 114 U.S. 233, 242. And in one English case, where a ship had been sold under a foreign judgment, the like restriction upon impeaching that judgment for fraud was suggested; but the decision was finally put upon the ground that the judicial sale passed the title to the ship. Cammell v. Sewell, (1858-60) 3 H. & N. 617, 646; 5 H. & N. 728, 729, 742.

But it is now established in England, by well considered and strongly reasoned decisions of the Court of Appeal, that foreign judgments may be impeached, if procured by false and fraudulent representations and testimony of the plaintiff, even if the same question of fraud was presented to and decided by the foreign court.

In Abouloff v. Oppenheimer, (1882) the plaintiff had recovered a judgment at Tiflis in Russia, ordering the defendants to return certain goods or to pay their value. The defendants appealed to a higher Russian court, which confirmed the judgment, and ordered the defendants to pay, besides the sum awarded below, an additional sum for costs and expenses. In an action in the English High Court of **[*208]** Justice upon those judgments, the defendants pleaded that they were obtained by the gross fraud of the plaintiff, in fraudulently representing to the Russian courts that the goods in question were not in her possession when the suit was commenced, and when the judgment was given, and during the whole time the suit was pending; and by fraudulently concealing from those courts the fact that those goods, as the fact was, and as she well knew, were in her actual possession. A demurrer to this plea **[***124]** was overruled, and judgment entered for the defendants. And that judgment was affirmed in the Court of Appeal by Lord Chief Justice Coleridge, Lord Justice Baggallay and Lord Justice Brett, all of whom delivered concurring opinions, the grounds of which sufficiently appear in the opinion delivered by Lord Justice Brett (since Lord Esher, Master of the Rolls), who said: "With regard to an action brought upon a foreign judgment, the whole doctrine as to fraud is English, and is to be applied in an action purely English. I am prepared to hold, according to the judgment of the House of Lords adopting the proposition laid down by De Grey, C.J., that if the judgment upon which the action is brought was procured from the foreign court by the successful fraud of the party who is seeking to enforce it, the action in the English court will not lie. This proposition is absolute and without any limitation, and, as the Lord Chief Justice has pointed out, is founded on the doctrine that no party in an English court shall be able to take advantage of his own wrongful act, or, as it may be stated in other language, that no obligation can be enforced in an English court of justice which has been procured by the fraud of the person relying upon it as an obligation." "I will assume that in the suit in the Russian courts the plaintiff's fraud was alleged **[**161]** by the defendants, and that they gave evidence in support of the charge. I will assume even that the defendants gave the very same evidence which they propose to adduce in this action; nevertheless the defendants will not be debarred at the trial of this action from making the same charge of fraud and from adducing the same evidence in support of it; and if the High Court of Justice is satisfied that the allegations of the defendants are true, and **[*209]** that the fraud was committed, the defendants will be entitled to succeed in the present action. It has been contended that the same issue ought not to be tried in an English court which was tried in the Russian courts; but I agree that the question whether the Russian courts were deceived never could be an issue in the action tried before them." "In the present case, we have had to consider the question fully; and, according to the best opinion which I can form, fraud committed by a party to a suit, for the purpose of deceiving a foreign court, is a defence to an action in this country, founded upon the judgment of that foreign court. It seems to me that if we were to accede to the argument for the plaintiff, the result would be that a plausible deceiver would succeed, whereas a deceiver who is not plausible would fail. I cannot think that plausible fraud ought to be upheld in any court of justice in England.I accept the whole doctrine, without any limitation, that whenever a foreign judgment has been obtained by the fraud of the party relying upon it, it cannot be maintained in the courts of this country; and further, that nothing ought to persuade an English court to enforce a judgment against one party, which has been obtained by the fraud of the other party to the suit in the foreign court." 10 Q.B.D. 295, 305-308.

The same view was affirmed and acted on in the same court by Lords Justices Lindley and Bowen in Vadala v. Lawes, (1890) 25 Q.B.D. 310, 317-320, and by Lord Esher and Lord Justice Lopes in Crozat v. Brogden, (1894) 2 Q.B. 30, 34, 35.

In the case at bar, the defendants offered to prove, in much detail, that the plaintiffs presented to the French court of first instance and to the arbitrator appointed by that court, and upon whose report its judgment was largely based, false and fraudulent statements and accounts against the defendants, by which the arbitrator and the French courts were deceived and misled, and their judgments were based upon such false and fraudulent statements and accounts. This offer, if satisfactorily proved, would, according to the decisions of the English Court of Appeal in Abouloff v. Oppenheimer, Vadala v. Lawes, and Crozat v. Brogden, above cited, [***210**] be a sufficient ground for impeaching the foreign judgment, and examining into the merits of the original claim.

But whether those decisions can be followed in regard to foreign judgments, consistently with our own decisions as to impeaching domestic judgments for fraud, it is unnecessary in this case to determine, because there is a distinct and independent ground upon which we are satisfied that the comity of our nation does not require us to give conclusive effect to the judgments of the courts of France; and that ground is, the want of reciprocity, on the part of France, as to the effect to be given to the judgments of this and other foreign countries.

In France, the Royal Ordinance of June 15, 1629, art. 121, provided as follows: "Judgments rendered, contracts or obligations recognized, in foreign kingdoms and sovereignties, for any cause whatever, shall have no lien or execution in our kingdom. Thus the contracts shall stand for simple promises; and, notwithstanding the judgments, our subjects against whom they have been rendered may contest their rights anew before our judges." Touillier, Droit Civil, lib. 3, tit. 3, c. 6, sect. 3, no. 77.

By the French Code of Civil Procedure, art. 546, "Judgments rendered by foreign tribunals, and acts acknowledged before foreign officers, shall not be capable of execution in France, except in the manner and in the cases provided by articles 2123 and 2128 of the Civil Code," which are as follows: By article 2123, "A lien cannot arise from judgments rendered in a foreign country, except so far as they have been declared executory by a French tribunal; without prejudice to provisions to the contrary which may exist in public laws and treaties." By article 2128, "Contracts entered into in a foreign country cannot give a lien upon property in France, if there are no provisions contrary to this principle in public laws or in treaties." Touillier, ub. sup. no. 84.

The defendants, in their answer, cited the above provisions of the statutes of France, and alleged, and at the trial offered to prove, that, by the construction given to [***211**] these statutes by the judicial tribunals of France, when the judgments of tribunals of foreign countries against the citizens of France are sued upon in the courts of France, the merits of the controversies upon which those judgments are based are examined anew, unless a treaty to the contrary effect exists between the Republic of [*****125**] France and the country in which such judgment is obtained, (which is not the case between the Republic of France and the United States,) and that the tribunals of the Republic of France give no force and effect, within the jurisdiction of that country, to the judgments duly rendered by courts of competent jurisdiction of the United States against citizens of France after proper personal service of the process of those courts has been made thereon in this country. We are of opinion that this evidence should have been admitted.

In Odwin v. Forbes, (1817) President Henry, in the Court of Demerara, which was governed by the Dutch law, and was, as he remarked, "a tribunal foreign to and independent of that of England," sustained a plea of an English certificate in bankruptcy, upon these grounds: "It is [****162**] a principle of their law, and laid down particularly in the ordinances of Amsterdam," "that the same law shall be exercised towards foreigners in Amsterdam as is exercised with respect to citizens of that State in other countries; and upon this principle of reciprocity, which is not confined to the city of Amsterdam, but pervades the Dutch laws, they have always given effect to the laws of that country which has exercised the same comity and indulgence in admitting theirs." "That the Dutch bankrupt laws proceed on the same principles as those of the English; that the English tribunals give effect to the Dutch bankrupt laws; and that, on the principle of reciprocity and mutual comity, the Dutch tribunals, according to their own ordinances, are bound to give effect to the

English bankrupt laws when duly proved, unless there is any express law or ordinance prohibiting their admission." And his judgment was affirmed in the Privy Council on Appeal. Case of Odwin v. Forbes, pp. 89, 159-161, 173-176; S.C. (1818) Buck Bankr. Cas. 57, 64.

[*212] President Henry, at page 76 of his Treatise on Foreign Law, published as a preface to his report of that case, said: "This comity, in giving effect to the judgments of other tribunals, is generally exercised by States under the same sovereign, on the ground that he is the fountain of justice in each, though of independent jurisdiction; and it has also been exercised in different States of Europe with respect to foreign judgments, particularly in the Dutch States, who are accustomed by the principle of reciprocity to give effect in their territories to the judgments of foreign States, which show the same comity to theirs; but the tribunals of France and England have never exercised this comity to the degree that those of Holland have, but always required a fresh action to be brought, in which the foreign judgment may be given in evidence. As this is a matter of positive law and internal policy in each State, no opinion need be given; besides, it is a mere question of comity, and perhaps it might be neither politic nor prudent, in two such great States, to give indiscriminate effect to the judgment of each other's tribunals, however the practice might be proper or convenient in federal States, or those under the same covereign."

It was that statement, which appears to have called forth the observations of Mr. Justice Story, already cited: "Holland seems at all times, upon the general principle of reciprocity, to have given great weight to foreign judgments, and in many cases, if not in all cases, to have given to them a weight equal to that given to domestic judgments, wherever the like rule of reciprocity with regard to Dutch judgments has been adopted by the foreign country whose judgment is brought under review. This is certainly a very reasonable rule, and may perhaps hereafter work itself firmly into the structure of international jurisprudence." Story's Conflict of Laws, § 618.

This rule, though never either affirmed or denied by express adjudication in England or America, has been indicated, more or less distinctly, in several of the authorities already cited.

Lord Hardwicke threw out a suggestion that the credit to be given by one court to the judgment of a foreign court [*213] might well be affected by "their proceeding both by the same rules of law." Otway v. Ramsay, 4 B. & C. 414-416, note.

Lord Eldon, after saying that "natural law" (evidently intending the law of nations) "requires the courts of this country to give credit to those of another for the inclination and power to do justice," added that "if it appears in evidence, that persons suing under similar circumstances neither had met, nor could meet, with justice, that fact cannot be immaterial as an answer to the presumption." Wright v. Simpson, 6 Ves. 714, 730.

Lord Brougham, presiding as Lord Chancellor in the House of Lords, said: "The law in the course of procedure abroad sometimes differs so mainly from ours in the principles upon which it is bottomed, that it would seem a strong thing to hold that our courts were bound conclusively to give execution to the sentence of foreign courts, when, for aught we know, there is not any one of those things which are reckoned the elements or the corner stones of the due administration of justice, present to the procedure in these foreign courts." Houlditch v. Donegal, 8 Bligh N.R. 301, 338.

Chief Justice Smith, of New Hampshire, in giving reasons why foreign judgments or decrees, founded on the municipal laws of the State in which they are pronounced, are not conclusive evidence of debt, but prima facie evidence only, said: "These laws and regulations may be unjust, partial to citizens, and against foreigners; they may operate injustice to our citizens, whom we are bound to protect; they may be, and the decisions of courts founded on them, just cause of complaint against the supreme power of the State where rendered. To adopt them is not merely saying that the courts have decided correctly on the law, but it is approbating the law itself." Bryant v. Ela, Smith (N.H.) 396, 404.

Mr. Justice Story said: "If a civilized nation seeks to have the sentences of its own courts held of any validity elsewhere, they ought to have a just regard to the rights and usages of other civilized nations, and the principles of public and national law in the administration of justice," Bradstreet v. Neptune Ins. Co., 3 Sumner, 600, 608.

[*214] Mr. Justice Woodbury said that judgments in personam, rendered under a foreign government, "are, ex comitate, treated with respect, according to the nature of the judgment, [***126] and the character of the tribunal which rendered it, and the reciprocal mode, if any, in which that government treats our judgments;" and added, "Nor can much comity be asked for the judgments of another nation, which, like France, pays no respect to those [**163] of other countries." Burnham v. Webster, 1 Woodb. & Min. 172, 175, 179.

Mr. Justice Cooley said, "True comity is equality; we should demand nothing more, and concede nothing less." McEwan v. Zimmer, 38 Michigan, 765, 769.

Mr. Wheaton said: [HN27] "There is no obligation, recognized by legislators, public authorities, and publicists, to regard foreign laws; but their application is admitted only from considerations of utility and the mutual convenience of States -- ex comitate, ob reciprocam utilitatem." "The general comity, utility and convenience of nations have, however, established a usage among most civilized States, by which the final judgments of foreign courts of competent jurisdiction are reciprocally carried into execution." Wheaton's International Law, (8th ed.) §§ 79, 147.

Since Story, Kent and Wheaton wrote their commentaries, many books and essays have been published upon the subject of the effect to be allowed by the courts of one country to the judgments of another with references to the statutes and decisions in various countries. Among the principal ones are Foelix, Droit International Prive, (4th ed. by Demangeat, 1866) lib. 2, tits. 7, 8; Moreau, Effets Internationaux des Judgments (1884). Piggott, on Foreign Judgments (2d ed. 1884); Constant, de l'Execution des Jugements Etrangers (2d ed. 1890), giving the text of the articles of most of the modern codes upon the subject, and of French treaties with Italian, German and Swiss States; and numerous papers in Clunet's Journal de Droit International Prive, established in 1874, and continued to the present time. Four the reasons stated at the outset of this opinion, we have not thought in important to state the conflicting theories of continental commentators [*215] and essayists as to what each may think the law ought to be; but have referred to their works only for evidence of authoritative declarations, legislative or judicial, of what the law is.

By the law of France, settled by a series of uniform decisions of the Court of Cassation, the highest judicial tribunal, for more than half a century, no foreign judgment can be rendered executory in France without a review of the judgment au fond -- to the bottom, including the whole merits of the cause of action on which the judgment rests. Pardessus, Droit Commercial, § 1488; Bard, Precis de Droit International, (1883) nos. 234-239; Story's Conflict of Laws, §§ 615-617; Piggott, 452; Westlake on Private International Law, (3d ed. 1890) 350.

A leading case was decided by the Court of Cassation on April 19, 1819, and was as follows: A contract of partnership was made between Holker, a French merchant, and Parker, a citizen of the United States. Afterwards, and before the partnership accounts were settled, Parker came to France, and Holker sued him in the Tribunal of Commerce of Paris. Parker excepted, on the ground that he was a foreigner, not domiciled in France; and obtained a judgment, affirmed on appeal, remitting the matter to the American courts -- obtint son renvoi devant les tribunaux Americains. Holker then sued Parker in the Circuit Court of the United States for the District of Massachusetts, and in 1814 obtained a judgment there, ordering Parker to pay him $ 529,949. (One branch of the controversy had been brought before this court in 1813. Holker v. Parker, 7 Cranch, 436.) Holker, not being able to obtain execution of that judgment in America, because Parker had no property there and continued to reside in Paris, obtained from a French judge an order declaring the judgment executory. Upon Parker's application to nullify the proceeding, the Royal Court of Paris, reversing the judgment of a lower court, set aside that order, assigning these reasons: "Considering that judgments rendered by foreign courts have neither effect nor authority in France; that this rule is doubtless more particularly applicable [*216] in favor of Frenchmen, to whom the King and his officers owe a special protection; but that the principle is absolute, and may be invoked by all persons without distinction, being founded on the independence of States; that the Ordinance of 1629, in the beginning of its article 121, lays down the principle in its generality, when it says that judgments rendered in foreign kingdoms and sovereignties, for any cause whatever, shall have no execution in the Kingdom of France; and that the Civil Code, art. 2123, gives to this principle the same latitude, when it declares that a lien cannot result from judgments rendered in a foreign country, except so far as they have been declared executory by a French tribunal -- which is not a matter of mere form, like the granting in past times of a pareatis from one department to

another for judgments rendered within the kingdom; but which assumes, on the part of the French tribunals, a cognizance of the cause, and a full examination of the justice of the judgment presented for execution, as reason demands, and this has always been practised in France, according to the testimony of our ancient authorities; that there may result from this an inconvenience, where the debtor, as is asserted to have happened in the present case, removes his property and his person to France, while keeping his domicil in his native country; that it is for the creditor to be watchful, but that no consideration can impair a principle on which rests the sovereignty of governments, and which, whatever be the case, must preserve its whole force." The court therefore adjudged that, before the tribunal of first instance, Holker should state the grounds of his action, to be contested by Parker, and to be determined by the court upon cognizance of the whole cause. That judgment was confirmed, upon deliberate consideration, by the Court of Cassation, for the reasons that **[**164]** the Ordinance of 1629 enacted, in absolute terms and without exception, that foreign judgments should not have execution in France; that it was only by the Civil Code and the Code of Civil Procedure that the French tribunals had been authorized to declare them executory; that therefore the Ordinance of 1629 had no application; that the articles of the Codes. **[*217]** referred **[***127]** to, did not authorize the courts to declare judgments, rendered in a foreign country, executory in France without examination; that such an authorization would be as contrary to the institution of the courts, as would be the award or the refusal of execution arbitrarily and at will; would impeach the right of sovereignty of the French government, and was not in the intention of the legislature; and that the Codes made no distinction between different judgments rendered in a foreign country, and permitted the judges to declare them all executory; and therefore those judgments, whether against a Frenchman or against a foreigner, were subject to examination on the merits. Holker v. Parker, Merlin, Questions de Droit, Judgment, § 14, no. 2.

The Court of Cassation has ever since constantly affirmed the same view. Moreau, no. 106, note, citing many decisions; Clunet, 1882, p. 166. In Clunet, 1894, p. 913, note, it is said to be "settled by judicial decisions -- il est de jurisprudence -- that the French courts are bound, in the absence of special diplomatic treaties, to proceed to the revision on the whole merits -- au fond -- of foreign judgments, execution of which is demanded of them," citing, among other cases, a decision of the Court of Cassation on February 2, 1892, by which it was expressly held to result from the articles of the Codes, above cited, "that judgments rendered, in favor of a foreigner against a Frenchman, by a foreign court, are subject, when execution of them is demanded in France, to the revision of the French tribunals, which have the right and the duty to examine them, both as to the form, and as to the merits." Sirey, 1892, 1, 201.

In Belgium, the Code of Civil Procedure of 1876 provides that if a treaty on the basis of reciprocity be in existence between Belgium and the country in which the foreign judgment has been given, the examination of the judgment in the Belgian courts shall bear only upon the questions whether it "contains nothing contrary to public order, to the principles of the Belgian public order;" whether, by the law of the country in which it was rendered, it has the force of res judicata; whether the copy is duly authenticated; whether the **[*218]** defendant's rights have been duly respected; and whether the foreign court is not the only competent court, by reason of the nationality of the plaintiff. Where, as is the case between Belgium and France, there is no such treaty, the Belgian Court of Cassation holds that the foreign judgment may be reexamined upon the merits. Constant, 111, 116; Moreau, no. 189; Clunet, 1887, p. 217; 1888, p. 837; Piggott, 439. And in a very recent case, the Civil Tribunal of Brussels held that, "considering that the right of revision is an emanation of the right of sovereignty; that it proceeds from the imperium, and that, as such, it is within the domain of public law; that from that principle it manifestly follows that, if the legislature does not recognize executory force in foreign judgments where there exists no treaty upon the basis of reciprocity, it cannot belong to the parties to substitute their will for that of the legislature, by arrogating to themselves the power of delegating to the foreign judge a portion of sovereignty." Clunet, 1894, pp. 164, 165.

In Holland, the effect given to foreign judgments has always depended upon reciprocity, but whether by reason of Dutch ordinances only, or of general principles of jurisprudence, does not clearly appear. Odwin v. Forbes, and Henry on Foreign Law, above cited; Story's Conflict of Laws, § 618; Foelix, no. 397, note; Clunet, 1879, p. 369; 1 Ferguson's International Law, 85; Constant, 171; Moreau, no. 213.

In Denmark, the courts appear to require reciprocity to be shown before they will execute a foreign judgment. Foelix, nos. 328, 345; Clunet, 1891, p. 987; Westlake, ub. sup. In Norway, the courts reexamine the merits of all foreign

judgments, even of those of Sweden. Foelix, no. 401; Piggott, 504, 505; Clunet, 1892, p. 296. In Sweden, the principle of reciprocity has prevailed from very ancient times; the courts give no effect to foreign judgments, unless upon that principle; and it is doubtful whether they will even then, unless reciprocity is secured by treaty with the country in which the judgment was rendered. Foelix, no. 400; Olivecrona, in Clunet, 1880, p. 83; Constant, 191; Moreau, no. 222; Piggott, 503; Westlake, ub sup.

[*219] In the Empire of Germany, as formerly in the States which now form part of that Empire, the judgments of those States are mutually executed; and the principle of reciprocity prevails as to the judgments of other countries. Foelix, nos. 328, 331, 333-341; Moreau, nos. 178, 179; Vierhaus, in Piggott, 460-474; Westlake, ub. sup. By the German Code of 1877, "compulsory execution of the judgment of a foreign court cannot take place, unless its admissibility has been declared by a judgment of exequatur;" "the judgment of exequatur is to be rendered without examining whether the decision is conformable to law;" but it is not to be granted "if reciprocity is not guaranteed." Constant, 79-81; Piggott, 466. The Reichsgericht, or Imperial Court, in a case reported in full in Piggott, has held that an English judgment cannot be executed in Germany, because, the court said, the German courts, by the Code, when [**165] they execute foreign judgments at all, are "bound to the unqualified recognition of the legal validity of the judgments of foreign courts," and "it is, therefore, an essential requirement of reciprocity, that the law of the foreign State should recognize in an equal degree the legal validity of the judgments of German courts, which are to be enforced by its courts; and that an examination of their legality, both as regards the material justice of the decision as to matters of fact or law, and with respect to matters of procedure, should neither be required as a condition of their execution, by the court ex officio, nor be allowed by the admission of pleas which might lead to it." Piggott, 470, 471. See also Clunet, 1882, p. 35; 1883, p. 246; 1884, p. 600.

In Switzerland, by the Federal Constitution, civil judgments in one canton are executory throughout the Republic. As to foreign judgments, there is no federal law, each canton [***128] having its own law upon the subject. But in the German cantons, and in some of the other cantons, foreign judgments are executed according to the rule of reciprocity only. Constant, 193-204; Piggott, 505-516; Clunet, 1887, p. 762; Westlake, ub. sup. The law upon this subject has been clearly stated by Brocher, President of the Court of Cassation of Geneva, and professor of law in the university there. In his Nouveau [*220] Traite de Droit International Prive, (1876) § 174, treating of the question whether "it might not be convenient that States should execute, without reviewing their merits, judgments rendered on the territory of each of them respectively," he says: "It would, certainly, be advantageous for the parties interested to avoid the delays, the conflicts, the differences of opinion, and the expenses resulting from the necessity of obtaining a new judgment in each locality where they should seek execution. There might thence arise, for each sovereignty, a juridical or moral obligation to lend a strong hand to foreign judgments. But would not such an advantage be counterbalanced, and often surpassed, by the dangers that might arise from that mode of proceeding? There is here, we believe, a question of reciprocal appreciation and confidence. One must, at the outset, inquire whether the administration of the foreign judiciary, whose judgments it is sought to execute without verifying their merits, presents sufficient guaranties. If the propriety of such an execution be admitted, there is ground for making it the object of diplomatic treaties. That form alone can guarantee the realization of a proper reciprocity; it furnishes, moreover, to each State the means of acting upon the judicial organization and procedure of other States." In an article in the Journal, after a review of the Swiss decisions, he recognizes and asserts that "it comes within the competency of each canton to do what seems to it proper in such matters." Clunet, 1879, pp. 88, 94. And in a later treatise, he says: "We cannot admit that the recognition of a State as sovereign ought necessarily to have as a consequence the obligation of respecting and executing the judicial decisions rendered by its tribunals; in strict right, the authority of such acts does not extend beyond the frontier. Each sovereignty possesses in particular, and more or less in private, the territory subject to its power. No other can exercise there an act of its authority. This territorial independence finds itself, in principle, directly included in the very act by which one nation recognizes a foreign State as sovereign; but there cannot result therefrom a promise to adopt, and to cause to be executed upon the national territory, judgments rendered by [*221] the officials of the foreign State, whoever they may be. That would be an abdication of its own sovereignty; and would bind it in such sort as to make it an accomplice in acts often injurious, and in some cases even criminal. Such obligations suppose a reciprocal confidence; they are not undertaken, moreover, except upon certain conditions, and by means of a system of regulations

intended to prevent or to lessen the dangers which might result from them." 3 Cours de Droit International Prive, (1885) 126, 127.

In Russia, by the Code of 1864, "the judgments of foreign tribunals shall be rendered executory according to the rules established by reciprocal treaties and conventions," and, where no rules have been established by such treaties, are to be "put in execution in the Empire, only after authorization granted by the courts of the Empire;" and, "in deciding upon demands of this kind, the courts do not examine into the foundation of the dispute adjudged by the foreign tribunals, but decide only whether the judgment does not contain dispositions which are contrary to the public order, or which are not permitted by the laws of the Empire." Constant, 183-185. Yet a chamber of the Senate of St. Petersburg, sitting as a Court of Cassation, and the highest judicial tribunal of the Empire in civil matters, has declined to execute a French judgment, upon the grounds that, by the settled law of Russia, "it is a principle in the Russian Empire that only the decisions of the authorities to whom jurisdiction has been delegated by the sovereign power have legal value by themselves and of full right;" and that "in all questions of international law, reciprocity must be observed and maintained as a fundamental principle." Adam v. Schipoff, Clunet, 1884, pp. 45, 46, 134. And Professor Englemann, of the Russian University of Dorpat, in an able essay, explaining that and other Russian decisions, takes the following view of them: "The execution of a treaty is not the only proof of reciprocity." "It is necessary to commit the ascertainment of the existence of reciprocity to the judicial tribunals, **[**166]** for the same reasons for which there is conferred upon them the right to settle all questions incident to the cause to be adjudged. The existence of reciprocity between **[*222]** two States ought to be proved in the same manner as all the positive facts of the case." "It is true that the principle of reciprocity is a principle, not of right, but of policy; yet the basis of the principle of all regular and real policy is also the fundamental principle of right, and the point of departure of all legal order -- the sum cuique. This last principle comprehends right, reciprocity, utility; and reciprocity is the application of right to policy." "Let this principle be applied wherever there is the least guaranty, or even a probability of reciprocity, and the cognizance of this question be committed to the judicial tribunals, and one will arrive at important results, which, on their side, will touch the desired end, international accord. But, for this, it is indispensable that the application of this principle should be entrusted to judicial tribunals, accustomed to decide affairs according to right, and not to administrative authorities, which look above all to utility, and are accustomed to be moved by political reasons, intentions, and even passions." Clunet, 1884, pp. 120-122. But it would seem that no foreign judgment will be executed in Russia, unless reciprocity is secured by treaty. Clunet, 1884, pp. 46, 113, 139, 140, 602.

In Poland, the provisions of the Russian Code are in force; and the Court of Appeal of Warsaw has decided that, where there is no treaty, the judgments of a foreign country cannot be executed, because, "in admitting a contrary conclusion, there would be impugned one of the cardinal principles of international **[***129]** relations, namely, the principle of reciprocity, according to which each State recognizes juridical rights and relations, originating or established in another country, only in the measure in which the latter, in its turn, does not disregard the rights and relations existing in the former." Clunet, 1884, pp. 494, 495.

In Roumania, it is provided by code that "judicial decisions rendered in foreign countries cannot be executed in Roumania, except in the same manner in which Roumanian judgments are executed in the country in question, and provided they are declared executory by competent Roumanian judges;" and this article seems to be held to require legislative reciprocity. **[*223]** Moreau, no. 219; Clunet, 1879, p. 351; 1885, p. 537; 1891, p. 452; Piggott, 495.

In Bulgaria, by a resolution of the Supreme Court, in 1881, "the Bulgarian judges should, as a general rule, abstain from entering upon the merits of the foreign judgment; they ought only to inquire whether the judgment submitted to them does not contain dispositions contrary to the public order, and to the Bulgarian laws." Constant, 129, 130; Clunet, 1886, p. 570. This resolution closely follows the terms of the Russian Code, which, as has been seen, has not precluded applying the principle of reciprocity.

In Austria, the rule of reciprocity does not rest upon any treaty or legislative enactment, but has been long established, by imperial decrees and judicial decisions, upon general principles of jurisprudence. Foelix, no. 331; Constant, 100-108; Moreau, no 185; Weiss, Traite de Droit International, (1886) 980; Clunet, 1891, p. 1003; 1894, p. 908;

Piggott, 434. In Hungary, the same principles were always followed as in Austria; and reciprocity has been made a condition by a law of 1880. Constant, 109; Moreau, no. 186 & note; Piggott, 436; Weiss, ub. sup.

In Italy before it was united into one kingdom, each State had its own rules. In Tuscany, and in Modena, in the absence of treaty, the whole merits were reviewed. In Parma, as by the French Ordinance of 1629, the foreign judgment was subject to fundamental revision, if against a subject of Parma. In Naples, the code and the decisions followed those of France. In Sardinia, the written laws required above all the condition of reciprocity, and, if that condition was not fulfilled, the foreign judgment was reexaminable in all respects. Fiore, Effetti Internazionali delle Sentenze, (1875) 40-44; Moreau, no. 204. In the Papal States, by a decree of the Pope in 1820, "the exequatur shall not be granted, except so far as the judgments rendered in the States of his Holiness shall enjoy the same favor in the foreign countries; this reciprocity is presumed, if there is no particular reason to doubt it." Touillier, Droit Civil, lib. 3, tit. 3, c. 6, sec. 3, no. 93. And see Foelix, no. 343; Westlake, ub. sup. In the Kingdom of Italy, **[*224]** by the Code of Procedure of 1865, "executory force is given to the judgments of foreign judicial authorities by the court of appeal in whose jurisdiction they are to be executed, by obtaining a judgment on an exequatur in which the court examines (a) if the judgment has been pronounced by a competent judicial authority; (b) if it has been pronounced, the parties being regularly cited; (c) if the parties have been legally represented or legally defaulted; (d) if the judgment contains dispositions contrary to public order or to the internal public law of the realm." Constant, 157. In 1874, the Court of Cassation of Turin, "considering that in international relations is admitted the principle of reciprocity, as that which has its foundation in the natural reason of equality of treatment, and, in default thereof, opens the way to the exercise of the right of retaliation;" and that the French courts examine the merits of Italian judgments, before allowing their execution in France; decided that the Italian courts of appeal, when asked to execute a French judgment, ought **[**167]** not only to inquire into the competency of the foreign court, but also to review the merits and the justice of the controversy. Levi v. Pitre, in Rossi, Esecuzione delle Sentenze Straniere, (1st ed. 1875) 70, 284; and in Clunet, 1879, p. 295. Some commentators, however, while admitting that decision to be most authoritative, have insisted that it is unsound, and opposed to other Italian decisions, to which we have not access. Rossi, ub. sup. (2d ed. 1890) 92; Fiore, 142, 143; Clunet, 1878, p. 237; Clunet, 1879, pp. 296, 305; Piggott, 483; Constant, 161.

In the principality of Monaco, foreign judgments are not executory, except by virtue of a special ordinance of the Prince, upon a report of the Advocate General. Constant, 169; Piggott, 488.

In Spain, formerly, foreign judgments do not appear to have been executed at all. Foelix, no. 398; Moreau, no. 197; Silvela, in Clunet, 1881, p. 20. But by the Code of 1855, revised in 1881 without change in this respect, "judgments pronounced in foreign countries shall have in Spain the force that the respective treaties give them; if there are no special treaties with the nation in which they have been rendered, they shall **[*225]** have the same force that is given by the laws of that nation to Spanish executory judgments; if the judgment to be executed proceeds from a nation by whose jurisprudence effect is not given to the judgments pronounced by Spanish tribunals, it shall have no force in Spain;" and "application for the execution of judgments pronounced in foreign countries shall be made to the Supreme Tribunal of Justice; which, after examining an authorized translation of the foreign judgment, and after hearing the party against whom it is directed and the public minister, shall decide whether it ought or ought not to be executed." Constant, 141, 142; Piggott, 499, 500. A case in which the Supreme Court of Spain in 1880 ordered execution of a French judgment, after reviewing its merits, is reported in Clunet, 1881, p. 365. In another case, in 1888, the same court, after hearing the parties and the public minister, ordered execution of a Mixican judgment. The public minister, in his demand for its execution, said: "Our law of civil procedure, inspired, to a certain point, by the modern theories of international law, which, recognizing among civilized nations a true community of right, and considering **[***130]** mankind as a whole in which nations occupy a position identical with that of individuals towards society, gives authority, in Spain, to executory judgments rendered by foreign tribunals, even in the absence of special treaty, provided that those countries do not proscribe the execution there of our judgments, and under certain conditions which, if they limit the principle, are inspired by the wish of protecting our sovereignty and by the supreme exigencies of justice. When nothing appears, either for or against, as to the authority of the judgments of our courts in the foreign country, one should not put an obstacle to the fulfillment, in our country, of judgments emanating from other nations, especially

when the question is of a country which, by its historic origin, its language, its literature, and by almost the identity of its customs, its usages, and its social institutions, has so great a connection with our own -- which obliges us to maintain with it the most intimate relations of friendship and courtesy." And he pointed out that Mexico, by its code, had adopted reciprocity as a fundamental principle. [*226] Among the reasons assigned by the court for ordering the Mexican judgment to be executed was that there exists in Mexico no precedent of jurisprudence which refuses execution to judgments rendered by the Spanish tribunals." Clunet, 1891, pp. 288-292.

In Portugal, foreign judgments, whether against a Portuguese or against a foreigner, are held to be reviewable upon the merits before granting execution thereof. Foelix, no. 399; Clunet, 1875, pp. 54, 448; Moreau, no. 217; Constant, 176-180; Westlake, ub. sup.

In Greece, by the provisions of the Code of 1834, foreign judgments, both parties to which are foreigners, are enforced without examination of their merits; but if one of the parties is a Greek, they are not enforced if found contradictory to the facts proved, or if they are contrary to the prohibitive laws of Greece. Foelix, no. 396; Constant, 151, 152; Moreau, no. 202; Saripolos, in Clunet, 1880, p. 173; Piggott, 475.

In Egypt, under the influence of European jurisprudence, the code of civil procedure has made reciprocity a condition upon which foreign judgments are executed. Constant, 136; Clunet, 1887, pp. 98, 228; 1889, p. 322.

In Cuba and in Porto Rico, the codes of civil procedure are based upon the Spanish code of 1855. Piggott, 435, 503. In Hayti, the code reenacts the provisions of the French code. Constant, 153; Moreau, no. 203; Piggott, 460.

In Mexico, the system of reciprocity has been adopted, by the Code of 1884, as the governing principle. Constant, 168; Clunet, 1891, p. 290.

The rule of reciprocity likewise appears to have generally prevailed in South America. In Peru, foreign judgments do not appear to be executed without examining the merits, unless when reciprocity is secured by treaty. Clunet, 1879, pp. 266, 267; Piggott, 548. In Chili, there appears to have been no legislation upon the subject; but, according to a decision of the Supreme Court of Santiago in 1886, "the Chilian tribunals should not award an exequatur, except upon decisions in correct form, and also reserving the general principle of reciprocity." Clunet, 1889, p. 135; Constant, 131, [*227] 132. In Brazil, foreign [**168] judgments are not executed, unless because of the country in which they were rendered admitting the principle of reciprocity, or because of a placet of the government of Brazil, which may be awarded according to the circumstances of the case. Constant, 124 & note; Moreau, no. 192; Piggott, 543-546; Westlake, ub. sup. In the Argentine Republic, the principle of reciprocity was maintained by the courts, and was affirmed by the Code of 1878, as a condition sine qua non of the execution of foreign judgments, but has perhaps been modified by later legislation. Moreau, no. 218; Palomeque, in Clunet, 1887, pp. 539-558.

It appears, therefore, that there is hardly a civilized nation on either continent, which, by its general law, allows conclusive effect to an executory foreign judgment for the recovery of money. In France, and in a few smaller States -- Norway, Portugal, Greece, Monaco, and Hayti -- the merits of the controversy are reviewed, as of course, allowing to the foreign judgment, at the most, no more effect than of being prima facie evidence of the justice of the claim. In the great majority of the countries on the continent of Europe -- in Belgium, Halland, Denmark, Sweden, Germany, in many cantons of Switzerland, in Russia and Poland, in Roumania, in Austria and Hungary, (perhaps in Italy,) and in Spain -- as well as in Egypt, in Mexico, and in a great part of South America, the judgment rendered in a foreign country is allowed the same effect only as the courts of that country allow to the judgments of the country in which the judgment in question is sought to be executed.

The prediction of Mr. Justice Story (in § 618 of his Commentaries on the Conflict of Laws, already cited,) has thus been fulfilled, and the rule of reciprocity has worked itself firmly into the structure of international jurisprudence.

The reasonable, if not the necessary, conclusion appears to us to be that [HN28] judgments rendered in France, or in any other foreign country, by the laws of which our own judgments are reviewable upon the merits, are not entitled to

full credit and conclusive effect when sued upon in this country, but are prima facie evidence only of the justice of the plaintiffs' claim.

[*228] In holding such a judgment, for want of reciprocity, not to be conclusive evidence of the merits of the claim, we do not proceed upon any theory of retaliation upon one person by reason of injustice done to another; but upon the broad ground that international law is founded upon mutuality and reciprocity, and that by the principles of international law recognized in most civilized nations, and by the comity of our own country, which it is our judicial duty to know and to declare, the judgment is not entitled to be considered conclusive.

By our law, at the time of the adoption of the Constitution, a foreign judgment was considered as prima facie evidence, and not conclusive. There is no statute of the United States, and no treaty of the United States with [***131] France, or with any other nation, which has changed that law, or has made any provision upon the subject. It is not to be supposed that, if any statute or treaty had been or should be made, it would recognize as conclusive the judgments of any country, which did not give like effect to our own judgments. In the absence of statute or treaty, it appears to us equally unwarrantable to assume that the comity of the United States requires anything more.

If we should hold this judgment to be conclusive, we should allow it an effect to which, supposing the defendants' offers to be sustained by actual proof, it would, in the absence of a special treaty, be entitled in hardly any other country in Christendom, except the country in which it was rendered. If the judgment had been rendered in this country, or in any other outside of the jurisdiction of France, the French courts would not have executed or enforced it, except after examining into its merits. The very judgment now sued on would be held inconclusive in almost any other country than France. In England, and in the Colonies subject to the law of England, the fraud alleged in its procurement would be a sufficient ground for disregarding it. In the courts of nearly every other nation, it would be subject to reexamination, either merely because it was a foreign judgment, or because judgments of that nation would be reexaminable in the courts of France.

[*229] For these reasons, in the action at law, the

Judgment is reversed, and the cause remanded to the Circuit Court with directions to set aside the verdict and to older a new trial.

For the same reasons, in the suit in equity between these parties, the foreign judgment is not a bar, and, therefore, the

Decree dismissing the bill is reversed, the plea adjudged bad, and the cause remanded to the Circuit Court for further proceedings not inconsistent with this opinion.

DISSENT BY: FULLER

DISSENT

MR. CHIEF JUSTICE FULLER, with whom concurred MR. JUSTICE HARLAN, MR. JUSTICE BREWER, and MR. JUSTICE JACKSON, dissenting.

Plaintiffs brought their action on a judgment recovered by them against the defendants in the courts of France, which courts had jurisdiction over person and subject-matter, and in respect of which judgment no fraud was alleged, except in particulars contested in and considered by the French courts. The question is whether under these circumstances, and in the absence of a treaty or act of Congress, the judgment is reexaminable upon the merits. This question I regard as one to be determined by the ordinary and settled rule in respect of allowing a party, who has had an opportunity to prove his case in a competent court, to retry it on the merits, and it seems to me that the doctrine [**169] of res judicata applicable to domestic judgments should be applied to foreign judgments as well, and rests on the same general ground of public policy that there should be an end of litigation.

This application of the doctrine is in accordance with our own jurisprudence, and it is not necessary that we should hold it to be required by some rule of international law. The fundamental principle concerning judgments is that disputes are finally determined by them, and I am unable to perceive why a judgment in personam which is not open to question on the ground of want of jurisdiction, either intrinsically or over the parties, or of fraud, or on any other recognized ground of impeachment, should not be held inter partes, though recovered abroad, conclusive on the merits.

[*230] Judgments are executory while unpaid, but in this country execution is not given upon a foreign judgment as such, it being enforced through a new judgment obtained in an action brought for that purpose.

The principle that requires litigation to be treated as terminated by final judgment properly rendered, is as applicable to a judgment proceeded on in such an action, as to any other, and forbids the allowance to the judgment debtor of a retrial of the original cause of action, as of right, in disregard of the obligation to pay arising on the judgment and of the rights acquired by th judgment creditor thereby.

That any other conclusion is inadmissible is forcibly illustrated by the case in hand. Plaintiffs in error were trading copartners in Paris as well as in New York, and had a place of business in Paris at the time of these transactions and of the commencement of the suit against them in France. The subjects of the suit were commercial transactions, having their origin, and partly performed, in France under a contract there made, and alleged to be modified by the dealings of the parties there; and one of the claims against them was for goods sold to them there. They appeared generally in the case, without protest, and by counterclaims relating to the same general course of business, a part of them only connected with the claims against them, became actors in the suit and submitted to the courts their own claims for affirmative relief, as well as the claims against them. The courts were competent and they took the chances of a decision in their favor. As traders in France they were under the protection of its laws and were bound by its laws, its commercial usages and its rules of procedure. The fact that they were Americans and the opposite parties were citizens of France is immaterial, and there is no suggestion on the record that those courts proceeded on any other ground than that all litigants, whatever their nationality, were entitled to equal justice therein. If plaintiffs in error had succeeded in their cross suit and recovered judgment against defendants in error, and had sued them here on that judgment, defendants in error would not have been permitted to say that the judgment in France was **[*231]** not conclusive against them. As it was, defendants in error recovered, and I think plaintiffs in error are not entitled to try their fortune anew before the courts of this country on the same matters voluntarily submitted by them to the decision of the foreign tribunal. We are dealing with the judgment of a court of a civilized country, whose laws and system of justice recognize the general rules in respect to property and rights between man and man prevailing among all civilized peoples. Obviously the last persons who should be heard to complain are those who identified themselves with the business of that country, knowing that all their transactions there would be subject to the local laws and modes of doing business. The French courts **[***132]** appear to have acted "judicially, honestly, and with the intention to arrive at the right conclusion;" and a result thus reached ought not to be disturbed.

The following view of the rule in England was expressed by Lord Herschell in Nouvion v. Freeman, L.R. 15 App. Cas. 1, 9, quoted in the principal opinion: "The principle upon which I think our enforcement of foreign judgments must proceed is this: that in a court of competent jurisdiction, where according to its established procedure the whole merits of the case were open, at all events, to the parties, however much they may have failed to take advantage of them, or may have waived any of their rights, a final adjudication has been given that a debt or obligation exists which cannot thereafter in that court be disputed, and can only be questioned in an appeal to a higher tribunal. In such a case it may well be said that giving credit to the courts of another country we are prepared to take the fact that such adjudication has been made as establishing the existence of the debt or obligation." But in that connection the observations made by Mr. Justice Blackburn in Godard v. Gray, L.R. 6 Q.B. 139, 148, and often referred to with approval, may usefully again be quoted:

"It is not an admitted principle of the law of nations that a state is bound to enforce within its territories the judgments of a foreign tribunal. Several of the continental nations (including France) do not enforce the judgments of other countries, **[*232]** unless where there are reciprocal treaties to that effect. But in England and in those states which are

governed by the common law, such judgments are enforced, not by virtue of any treaty, nor by virtue of any statute, but upon a principle very well stated by Parke, B., in Williams v. Jones, 13 M. & W. at p. 633: 'Where a court of competent jurisdiction had adjudicated a certain sum to be due from one person to another, a legal obligation **[**170]** arises to pay that sum, on which an action of debt to enforce the judgment may be maintained. It is in this way that the judgments of foreign and colonial courts are supported and enforced.' And taking this as the principle, it seems to follow that anything which negatives the existence of that legal obligation, or excuses the defendant from the performance of it, must form a good defence to the action. It must be open, therefore, to the defendant to show that the court which pronounced the judgment had not jurisdiction to pronounce it, either because they exceeded the jurisdiction given to them by the foreign law, or because he, the defendant, was not subject to that jurisdiction; and so far the foreign judgment must be examinable. Probably the defendant may show that the judgment was obtained by the fraud of the plaintiff, for that would show that the defendant was excused from the performance of an obligation thus obtained; and it may be that where the foreign court has knowingly and perversely disregarded the rights given to an English subject by English law, that forms a valid excuse for disregarding the obligation thus imposed on him; but we prefer to imitate the caution of the present Lord Chancellor in Castrique v. Imrie, L.R. 4 H.L. at p. 445, and to leave those questions to be decided when they arise, only observing in the present case, as in that 'the whole of the facts appear to have been inquired into by the French courts, judicially, honestly, and with the intention to arrive at the right conclusion, and having heard the facts as stated before them, they came to a conclusion which justified them in France in deciding as they did decide.'. . . Indeed, it is difficult to understand how the common course of pleading is consistent with any notion that the judgment was only evidence. If that were so, every count on a **[*233]** foreign judgment must be demurrable on that ground. The mode of pleading shows that the judgment was considered, not as merely prima facie evidence of that cause of action for which the judgment was given, but as in itself giving rise, at least prima facie, to a legal obligation to obey that judgment and pay the sum adjudged. This may seem a technical mode of dealing with the question; but in truth it goes to the root of the matter. For if the judgment were merely considered as evidence of the original cause of action, it must be open to meet it by any counter evidence negativing the existence of that original cause of action. If, on the other hand, there is a prima facie obligation to obey the judgment of a tribunal having jurisdiction over the party and the cause, and to pay the sum decreed, the question would be, whether it was open to the unsuccessful party to try the cause over again in a court, not sitting as a court of appeal from that which gave the judgment. It is quite clear that this could not be done where the action is brought on the judgment of an English tribunal; and, on principle, it seems the same rule should apply, where it is brought on that of a foreign tribunal."

In any aspect, it is difficult to see why rights acquired under foreign judgments do not belong to the category of private rights acquired under foreign laws. Now the rule is universal in this country that private rights acquired under the laws of foreign states will be respected and enforced in our courts unless contrary to the policy or prejudicial to the interests of the state where this is sought to be done; and although the source of this rule may have been the comity characterizing the intercourse between nations, it prevails to-day by its own strength, and the right to the application of the law to which the particular transaction is subject is a juridical right.

And, without going into the refinements of the publicists on the subject, it appears to me that that law finds authoritative expression in the judgments of courts of competent jurisdiction over parties and subject-matter.

It is held by the majority of the court that defendants cannot be permitted to contest the validity and effect of this judgment on the general ground that it was erroneous in law **[*234]** or in fact; and the special grounds relied on are seriatim rejected. In respect of the last of these, that of fraud, it is said that it is unnecessary in this case to decide whether certain decisions cited in regard to impeaching foreign judgments for fraud could be followed consistently with our own decisions as to impeaching domestic judgments for that reason, "because there is a distinct and independent ground upon which we are satisfied that the **[***133]** comity of our nation does not require us to give conclusive effect to the judgments of the courts of Fance, and that ground is the want of reciprocity on the part of France as to the effect to be given to the judgments of this and other foreign countries." And the conclusion is announced to be "that judgments rendered in France or in any other foreign country, by the laws of which our own judgments are reviewable upon the merits, are not entitled to full credit and conclusive effect when sued upon in this country, but are prima facie evidence

only of the justice of the plaintiff's claim." In other words, that although no special ground exists for impeaching the original justice of a judgment, such as want of jurisdiction or fraud, the right to retry the merits of the original cause at large, defendant being put upon proving those merits, should be accorded in every suit on judgments recovered in countries where our own judgments are not given full effect, on that ground merely.

I cannot yield my assent to the proposition that because by legislation and judicial decision in France that effect is not there given to judgments recovered in this country [**171] which, according to our jurisprudence, we think should be given to judgments wherever recovered, (subject, of course, to the recognized exceptions,) therefore we should pursue the same line of conduct as respects the judgments of French tribunals. The application of the doctrine of res judicata does not rest in discretion; and it is for the government, and not for its courts, to adopt the principle of retorsion, if deemed under any circumstances desirable or necessary.

As the court expressly abstains from deciding whether the judgment is impeachable on the ground of fraud, I refrain from any observations on that branch of the case.

[*235] MR. JUSTICE HARLAN, MR. JUSTICE BREWER, and MR. JUSTICE JACKSON concur in this dissent.

TAB 3

5 of 5 DOCUMENTS

LAKER AIRWAYS LIMITED, A FOREIGN CORPORATION v. SABENA, BELGIAN WORLD AIRLINES, A FOREIGN CORPORATION KLM, ROYAL DUTCH AIRLINES, A FOREIGN CORPORATION, APPELLANT

Nos. 83-1280, 83-1281

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

731 F.2d 909; 235 U.S. App. D.C. 207; 1984 U.S. App. LEXIS 24811; 1984-1 Trade Cas. (CCH) P65,885; 78 A.L.R. Fed. 751

November 14, 1983, Argued
March 6, 1984, Decided

SUBSEQUENT HISTORY: [**1] As Amended.

PRIOR HISTORY: Appeals from the United States District Court for the District of Columbia.

DISPOSITION: Affirmed

CASE SUMMARY:

PROCEDURAL POSTURE: Appellants challenged a United States District Court for the District of Columbia decision that granted a preliminary injunction restraining appellants from taking part in a concurrent action, designed to prevent the District Court from hearing appellee's antitrust claims, in the High Court of Justice of the United Kingdom.

OVERVIEW: The case at bar involved anti-injunctions designed to preempt the parties' access to the courts of foreign jurisdictions. Appellee brought suit in a United States district court alleging appellants violated United States antitrust law. Appellee sought recovery for injuries allegedly suffered in violation of domestic antitrust laws, and the suit's resolution would further interests protected under United States law. Appellants brought a concurrent action in a foreign country's court to prevent the hearing of the domestic antitrust claims. The district court granted appellee's request for a preliminary injunction to restrain appellants from continuing with their foreign suit. Alleging violations of international comity principles, appellants sought review of the district court's decision. The court affirmed the district court's decision, holding that the principles of comity and concurrent jurisdiction clearly authorized the use of appellee's defensive preliminary injunction to permit its domestic claim to go forward free of foreign interference.

OUTCOME: The court affirmed the district court's decision.

CORE TERMS: injunction, comity, antitrust laws, antitrust, domestic, airline, prescriptive, treaty, air, balancing, nationality, international law, anti-suit, concurrent jurisdiction, sovereign, trading, territorial, concurrent, jurisdictional, territory, antitrust claim, conspiracy, prescribe, carrier, paramount, evasion, principles of comity, enjoin, extraterritorial, reasonableness

LexisNexis(R) Headnotes

Civil Procedure > Jurisdiction > Subject Matter Jurisdiction > General Overview
Civil Procedure > Federal & State Interrelationships > Anti-Injunction Acts > General Overview
International Law > Dispute Resolution > Conflicts of Laws > General Overview
[HN1] Ordinarily anti-suit injunctions are not properly invoked to preempt parallel proceedings on the same in personam claim in foreign tribunals. However, parties do not qualify under this general rule when the foreign action they seek to join is interdictory and not parallel.

International Law > Authority to Regulate > Anticompetitive Activities
International Law > Sources of International Law
International Trade Law > State Legislation > General Overview
[HN2] The British Protection of Trading Interests Act (Act), 1980, ch. 11, authorizes the English Secretary of State to require that any person conducting business in the United Kingdom disobey all foreign orders and cease all compliance with the foreign judicial or regulatory provisions designated by the Secretary of State. The Act authorizes the Secretary of State to prevent United Kingdom courts from complying with requests for document production issued by foreign tribunals, and forbids enforcement of treble damage awards or antitrust judgments specified by the Secretary of State.

International Law > Dispute Resolution > Conflicts of Laws > General Overview
[HN3] The prerogative of a nation to control and regulate activities within its boundaries is an essential, definitional element of sovereignty. Every country has a right to dictate laws governing the conduct of its inhabitants. Consequently, the territoriality base of jurisdiction is universally recognized. It is the most pervasive and basic principle underlying the exercise by nations of prescriptive regulatory power. It is the customary basis of the application of law in virtually every country.

International Law > Dispute Resolution > Conflicts of Laws > General Overview
[HN4] In the context of remedial international legislation, prohibition of effects is usually indivisible from regulation of causes. Consequently, the principles underlying territorial jurisdiction occasionally permit a state to address conduct causing harmful effects across national borders. Territoriality-based jurisdiction thus allows states to regulate the conduct or status of individuals or property physically situated within the territory, even if the effects of the conduct are felt outside the territory. Conversely, conduct outside the territorial boundary which has or is intended to have a substantial effect within the territory may also be regulated by the state.

International Law > Dispute Resolution > Conflicts of Laws > General Overview
[HN5] Just as the locus of the regulated conduct or harm provides a basis of jurisdiction, the identity of an actor may also confer jurisdiction upon a regulating country. The citizenship of an individual or nationality of a corporation has long been a recognized basis which will support the exercise of jurisdiction by a state over persons. Under this head of jurisdiction a state has jurisdiction to prescribe law governing the conduct of its nationals whether the conduct takes place inside or outside the territory of the state.

Civil Procedure > Jurisdiction > Subject Matter Jurisdiction > Jurisdiction Over Actions > Concurrent Jurisdiction
International Law > Dispute Resolution > Conflicts of Laws > General Overview
[HN6] Because two or more states may have legitimate interests in prescribing governing law over a particular controversy, jurisdictional bases are not mutually exclusive. For example, when the national of one state causes substantial effects in another state, both states may potentially have jurisdiction to prescribe governing law. Thus, under international law, territoriality and nationality often give rise to concurrent jurisdiction. A court faced with assertions of conflicting or inconsistent prescriptive power under facially concurrent jurisdiction must first examine the sufficiency of jurisdictional contacts under each base of jurisdiction to determine whether either claim of jurisdiction is unfounded. If both claims to jurisdiction are legitimately exercised, avenues of conflict resolution must be considered before jurisdiction to prescribe can go forward.

International Law > Dispute Resolution > Conflicts of Laws > General Overview
[HN7] It has long been settled law that a country can regulate conduct occurring outside its territory which causes

harmful results within its territory.

International Law > Authority to Regulate > General Overview
International Law > Dispute Resolution > Conflicts of Laws > General Overview
[HN8] Legislation to protect domestic economic interests can legitimately reach conduct occurring outside the legislating territory intended to damage the protected interests within the territory. As long as the territorial effects are not so inconsequential as to exceed the bounds of reasonableness imposed by international law, prescriptive jurisdiction is legitimately exercised.

Civil Procedure > Jurisdiction > Personal Jurisdiction & In Rem Actions > In Personam Actions > Doing Business
International Law > Authority to Regulate > General Overview
International Law > Dispute Resolution > Conflicts of Laws > General Overview
[HN9] The territorial effects doctrine is not an extraterritorial assertion of jurisdiction. Jurisdiction exists only when significant effects are intended within the prescribing territory. Prescriptive jurisdiction is activated only when there is personal jurisdiction, often referred to as "jurisdiction to adjudicate." A foreign corporation doing business within the United States reasonably expects that its United States operations will be regulated by United States law. The only extraterritoriality about the transactions reached under the territorial effects doctrine is that not all of the causative factors producing the proscribed result may have occurred within the territory. Although some of the business decisions affecting United States operations may be made outside the forum state, the entire transaction is not ordinarily immunized.

Antitrust & Trade Law > International Application of U.S. Law > General Overview
International Law > Authority to Regulate > Anticompetitive Activities
[HN10] A primary objective of antitrust laws is to preserve competition, and thus ultimately protect the interests of American consumers.

Civil Procedure > Jurisdiction > Personal Jurisdiction & In Rem Actions > In Personam Actions > Challenges
International Law > Authority to Regulate > General Overview
International Law > Dispute Resolution > Conflicts of Laws > General Overview
[HN11] The United States has a substantial interest in regulating the conduct of business within the United States. By engaging in commercial business in the United States, foreign corporations subject themselves to the in personam jurisdiction of the host country's courts. They waive either expressly or implicitly other objections that might otherwise be raised in defense. A major reason for this subjection to business regulation is to place foreign corporations generally in the same position as domestic businesses. The equivalency works in both directions. Foreign corporations are privileged to rely on United States law.

Antitrust & Trade Law > International Application of U.S. Law > General Overview
International Law > Authority to Regulate > Anticompetitive Activities
[HN12] Jurisdiction exists under United States antitrust laws whenever conduct is intended to, and results in, substantial effects within the United States. Any agreement in restraint of United States trade made outside of the United States, and any conduct or agreement in restraint of such trade carried out predominantly outside of the United States, is subject to the jurisdiction to prescribe of the United States, if a principal purpose of the conduct or agreement is to interfere with the commerce of the United States, and the agreement or conduct has some effect on that commerce.

Civil Procedure > Jurisdiction > Subject Matter Jurisdiction > Jurisdiction Over Actions > General Overview
International Law > Dispute Resolution > Conflicts of Laws > General Overview
[HN13] Concurrent jurisdiction does not necessarily entail conflicting jurisdiction. The mere existence of dual grounds of prescriptive jurisdiction does not oust either one of the regulating forums. Thus, each forum is ordinarily free to proceed to a judgment.

Civil Procedure > Jurisdiction > Subject Matter Jurisdiction > Jurisdiction Over Actions > Concurrent Jurisdiction

Civil Procedure > Federal & State Interrelationships > Anti-Injunction Acts > General Overview
Civil Procedure > Judgments > Preclusion & Effect of Judgments > Res Judicata
[HN14] It is well settled that English and American courts have power to control the conduct of persons subject to their jurisdiction to the extent of forbidding them from suing in foreign jurisdictions. However, the fundamental corollary to concurrent jurisdiction must ordinarily be respected: parallel proceedings on the same in personam claim should ordinarily be allowed to proceed simultaneously, at least until a judgment is reached in one which can be pled as res judicata in the other. The mere filing of a suit in one forum does not cut off the preexisting right of an independent forum to regulate matters subject to its prescriptive jurisdiction. For this reason, injunctions restraining litigants from proceeding in courts of independent countries are rarely issued.

Civil Procedure > Jurisdiction > Jurisdictional Sources > General Overview
Civil Procedure > Federal & State Interrelationships > Anti-Injunction Acts > General Overview
International Law > Dispute Resolution > Conflicts of Laws > General Overview
[HN15] Injunctions operate only on the parties within the personal jurisdiction of the courts. However, they effectively restrict a foreign court's ability to exercise its jurisdiction. If a foreign court reacts with a similar injunction, no party may be able to obtain any remedy. Thus, only in the most compelling circumstances does a court have discretion to issue an anti-suit injunction.

Civil Procedure > Federal & State Interrelationships > Anti-Injunction Acts > General Overview
[HN16] There are no precise rules governing the appropriateness of anti-suit injunctions. The equitable circumstances surrounding each request for an injunction must be carefully examined to determine whether an injunction is required to prevent an irreparable miscarriage of justice. Injunctions are most often necessary to protect the jurisdiction of the enjoining court, or to prevent a litigant's evasion of the important public policies of the forum.

Civil Procedure > Jurisdiction > Subject Matter Jurisdiction > Jurisdiction Over Actions > Concurrent Jurisdiction
Civil Procedure > Federal & State Interrelationships > Anti-Injunction Acts > General Overview
International Law > Dispute Resolution > Conflicts of Laws > General Overview
[HN17] Courts have a duty to protect their legitimately conferred jurisdiction to the extent necessary to provide full justice to litigants. Thus, when the action of a litigant in another forum threatens to paralyze the jurisdiction of the court, the court may consider the effectiveness and propriety of issuing an injunction against the litigant's participation in the foreign proceedings. These situations may arise either before or after a judgment has been entered. The policies that guide the exercise of discretion vary slightly in each situation. When the injunction is requested after a previous judgment on the merits, there is little interference with the rule favoring parallel proceedings in matters subject to concurrent jurisdiction. Thus, a court may freely protect the integrity of its judgments by preventing their evasion through vexatious or oppressive relitigation.

Civil Procedure > Federal & State Interrelationships > Anti-Injunction Acts > Anti-Injunction Act
[HN18] See 28 U.S.C.S. § 2283.

Civil Procedure > Venue > Forum Non Conveniens
Civil Procedure > Federal & State Interrelationships > Anti-Injunction Acts > General Overview
Governments > Courts > Judicial Comity
[HN19] When a party requests the issuance of an injunction to protect a court's jurisdiction before a judgment has been reached, the issuance rules are not clear. Some courts issue the injunction when the parties and issues are identical in both actions, justifying the injunction as necessary to prevent duplicative and, therefore, "vexatious" litigation. However, this rationale is prima facie inconsistent with the rule permitting parallel proceedings in concurrent in personam actions. The policies underlying this rule, avoiding hardship to parties and promoting the economies of consolidated litigation, are more properly considered in a motion for dismissal for forum non conveniens. They do not outweigh the important principles of comity that compel deference and mutual respect for concurrent foreign proceedings. Thus, the better rule is that duplication of parties and issues alone is not sufficient to justify issuance of an anti-suit injunction.

Civil Procedure > Judgments > Entry of Judgments > Enforcement & Execution > Foreign Judgments
International Law > Dispute Resolution > Comity Doctrine > General Overview
International Law > Dispute Resolution > Conflicts of Laws > General Overview
[HN20] The possibility of an embarrassing race to judgment or potentially inconsistent adjudications does not outweigh the respect and deference owed to independent foreign proceedings. The parallel proceeding rule applies only until a judgment is reached in one of the actions. After that point, the second forum is usually obliged to respect the prior adjudication of the matter. If the rules regarding enforcement of foreign judgments are followed there will seldom be a case where parties reach inconsistent judgments.

Civil Procedure > Federal & State Interrelationships > Anti-Injunction Acts > Anti-Injunction Act
International Law > Dispute Resolution > Comity Doctrine > General Overview
[HN21] The "necessary in aid of its jurisdiction" exception of 28 U.S.C.S. § 2283 does not allow a federal court to enjoin state proceedings merely to protect a judgment that involve issues presented in a federal in personam action. Similarly, permitting the protection or effectuation of judgments under § 2283 does not allow a federal court to enjoin state proceedings to protect a judgment that the federal court may make in the future but has not yet made.

Civil Procedure > Jurisdiction > Subject Matter Jurisdiction > Jurisdiction Over Actions > Concurrent Jurisdiction
Civil Procedure > Jurisdiction > Subject Matter Jurisdiction > Jurisdiction Over Actions > Exclusive Jurisdiction
International Trade Law > Dispute Resolution > Arbitration
[HN22] Just as the parallel proceeding rule counsels against interference with a foreign court's exercise of concurrent jurisdiction, it authorizes the domestic court to resist the attempts of a foreign court to interfere with an in personam action before a domestic court. When the availability of an action in the domestic courts is necessary to a full and fair adjudication of the plaintiff's claims, a court should preserve that forum. Thus, where the foreign proceeding is not following a parallel track but attempts to carve out exclusive jurisdiction over concurrent actions, an injunction may be necessary to avoid the possibility of losing validly invoked jurisdiction. This would be particularly true if the foreign forum does not offer the remedy sought in the domestic forum.

Civil Procedure > Federal & State Interrelationships > Anti-Injunction Acts > General Overview
Civil Procedure > Judgments > Entry of Judgments > Enforcement & Execution > Foreign Judgments
Constitutional Law > Relations Among Governments > Full Faith & Credit
[HN23] Anti-suit injunctions are justified when necessary to prevent litigants' evasion of the forum's important public policies. This principle is similar to the rule that a foreign judgment not entitled to full faith and credit under the Constitution will not be enforced within the United States when contrary to the crucial public policies of the forum in which enforcement is requested. Both rules recognize that a state is not required to give effect to foreign judicial proceedings grounded on policies which do violence to its own fundamental interests.

Civil Procedure > Federal & State Interrelationships > Anti-Injunction Acts > General Overview
International Law > Dispute Resolution > Conflicts of Laws > General Overview
[HN24] The standard for refusing to enforce judgments on public policy grounds is strict; defendants are rarely able to block judgments on these grounds. Enjoining participation in a foreign lawsuit in order to preempt a potential judgment is a much greater interference with an independent country's judicial processes. It follows that an anti-suit injunction will issue to preclude participation in litigation only when the strongest equitable factors favor its use. Both the importance to the forum of the law allegedly evaded, and the identity of the potentially evading party are relevant.

Civil Procedure > Jurisdiction > Subject Matter Jurisdiction > Jurisdiction Over Actions > Concurrent Jurisdiction
Civil Procedure > Jurisdiction > Subject Matter Jurisdiction > Jurisdiction Over Actions > Exclusive Jurisdiction
Civil Procedure > Federal & State Interrelationships > Anti-Injunction Acts > General Overview
[HN25] A forum state may, but need not, stay its own proceedings in response to an anti-suit injunction against a party before the court. This is consistent with the general rule permitting concurrent proceedings on transitory causes of action. In extreme cases it may even be necessary to issue a counterinjunction to thwart another state's attempt to assert exclusive jurisdiction over a matter legitimately subject to concurrent jurisdiction.

Civil Procedure > Federal & State Interrelationships > Anti-Injunction Acts > General Overview
International Law > Dispute Resolution > Comity Doctrine > General Overview
[HN26] Comity is the usual basis for staying a domestic action due to a foreign anti-suit injunction.

Civil Procedure > Jurisdiction > Subject Matter Jurisdiction > General Overview
Constitutional Law > Relations Among Governments > Full Faith & Credit
International Law > Authority to Regulate > General Overview
[HN27] The mandatory policies of the Full Faith and Credit Clause of the Unites States Constitution do not apply to international assertions of exclusive jurisdiction.

International Law > Dispute Resolution > Conflicts of Laws > General Overview
[HN28] Although a court has power to enjoin its nationals from suing in foreign jurisdictions, it does not follow that the United States courts must recognize an absolute right of a foreign government to regulate the remedies that the United States may wish to create for foreign nationals in United States courts. The purported principle of paramount nationality is entirely unknown in national and international law. Territoriality, not nationality, is the customary and preferred base of jurisdiction. Moreover, no rule of international law or national law precludes an exercise of jurisdiction solely because another state has jurisdiction. In fact, international law recognizes that a state with a territorial basis for its prescriptive jurisdiction may establish laws intended to prevent compliance with legislation established under authority of nationality-based jurisdiction.

Civil Procedure > Jurisdiction > Subject Matter Jurisdiction > Jurisdiction Over Actions > General Overview
International Law > Dispute Resolution > Conflicts of Laws > General Overview
[HN29] Nationality of the parties is only one factor to consider, not the paramount or controlling factor, involving conflicts stemming from concurrent jurisdiction.

International Law > Authority to Regulate > Anticompetitive Activities
International Law > Dispute Resolution > Conflicts of Laws > General Overview
[HN30] United States courts must control the access to their forums. No foreign court can supersede the right and obligation of the United States courts to decide whether Congress has created a remedy for those injured by trade practices adversely affecting United States interests.

Governments > Courts > Judicial Comity
International Law > Dispute Resolution > Comity Doctrine > General Overview
International Trade Law > Dispute Resolution > Arbitration
[HN31] Comity summarizes in a brief word a complex and elusive concept, the degree of deference that a domestic forum must pay to the act of a foreign government not otherwise binding on the forum. Since comity varies according to the factual circumstances surrounding each claim for its recognition, the absolute boundaries of the duties it imposes are inherently uncertain. However, the central precept of comity teaches that, when possible, the decisions of foreign tribunals should be given effect in domestic courts, since recognition fosters international cooperation and encourages reciprocity, thereby promoting predictability and stability through satisfaction of mutual expectations. The interests of both forums are advanced, the foreign court because its laws and policies have been vindicated; the domestic country because international cooperation and ties have been strengthened. The rule of law is also encouraged, which benefits all nations.

Governments > Courts > Authority to Adjudicate
Governments > Courts > Judicial Comity
International Law > Dispute Resolution > Comity Doctrine > General Overview
[HN32] Comity compels national courts to act at all times to increase the international legal ties that advance the rule of law within and among nations.

Governments > State & Territorial Governments > Relations With Governments

International Law > Dispute Resolution > Comity Doctrine > General Overview
[HN33] When a foreign act is inherently inconsistent with the policies underlying comity, domestic recognition could tend either to legitimize the aberration or to encourage retaliation, undercutting the realization of the goals served by comity. No nation is under an unremitting obligation to enforce foreign interests which are fundamentally prejudicial to those of the domestic forum. From the earliest times, authorities have recognized that the obligation of comity expires when strong public policies of the forum are vitiated by a foreign act.

Governments > Courts > Judicial Comity
Governments > State & Territorial Governments > Relations With Governments
International Law > Authority to Regulate > Anticompetitive Activities
[HN34] In conducting an inquiry into allegations that application of United States antitrust laws to foreign nationals violates principles of comity, a court must necessarily examine whether the antitrust laws were clearly intended to reach the injury charged in the complaint. If so, allowing a defendant's conduct to go unregulated could amount to an unjustified evasion of United States law injuring significant domestic interests. This is one context in which comity would not be extended to a foreign act. On the other hand, if the anticompetitive aspect of the alleged injury is not appreciable; the contacts with the United States are attenuated; and the actions of foreign governments denote the existence of strong foreign interests, then comity may suggest a lack of Congressional intent to regulate the alleged conduct. In this context, comity may have a strong bearing on whether application of United States antitrust laws should go forward.

Governments > Courts > Judicial Comity
Governments > State & Territorial Governments > Relations With Governments
International Law > Authority to Regulate > Anticompetitive Activities
[HN35] The violation of public policy vitiating comity is not that the evasion of United States antitrust law might injure United States interests, but rather that United States judicial functions have been usurped, destroying the autonomy of the courts.

Civil Procedure > Judgments > Preclusion & Effect of Judgments > Res Judicata
Governments > Courts > Authority to Adjudicate
Governments > Courts > Judicial Comity
[HN36] Comity ordinarily requires that courts of a separate sovereign not interfere with concurrent proceedings based on the same transitory claim, at least until a judgment is reached in one action, allowing res judicata to be pled in defense.

Business & Corporate Law > Foreign Businesses > General Overview
Governments > Legislation > Statutory Remedies & Rights
International Law > Dispute Resolution > Conflicts of Laws > General Overview
[HN37] Congress has specifically authorized treble damage actions by foreign corporations to redress injuries to United States foreign commerce. Equally significant, Congress has designed the private action as a major component in the enforcement mechanism. The treble damage aspect of private recoveries is the centerpiece of that enforcement mechanism.

International Law > Dispute Resolution > Conflicts of Laws > Jurisdiction
[HN38] Most proposals for interest balancing consist of a long list of national contacts to be evaluated and weighed against those of the foreign country. These interests may be relevant to the desirability of allocating jurisdiction to a particular national forum. However, their usefulness breaks down when a court is faced with the task of selecting one forum's prescriptive jurisdiction over that of another. Many of the contacts to be balanced are already evaluated when assessing the existence of a sufficient basis for exercising prescriptive jurisdiction.

International Law > Dispute Resolution > Conflicts of Laws > General Overview
[HN39] Those contacts which do purport to provide a basis for distinguishing between competing bases of jurisdiction,

and which are thus crucial to the balancing process, generally incorporate purely political factors which a court is neither qualified to evaluate comparatively nor capable of properly balancing.

International Law > Dispute Resolution > Conflicts of Laws > General Overview
[HN40] The importance of regulation to the regulating state is a factor on which a court cannot rely to choose between two competing, mutually inconsistent legislative policies.

International Law > Dispute Resolution > Conflicts of Laws > General Overview
[HN41] When push comes to shove, when distinguishing between competing bases of jurisdiction the domestic forum is rarely unseated.

Governments > Courts > Judicial Comity
International Law > Dispute Resolution > Comity Doctrine > General Overview
International Law > Dispute Resolution > Conflicts of Laws > General Overview
[HN42] Despite the real obligation of courts to apply international law and foster comity, domestic courts do not sit as internationally constituted tribunals. Domestic courts are created by national constitutions and statutes to enforce primarily national laws. The courts of most developed countries follow international law only to the extent it is not overridden by national law. Thus, courts inherently find it difficult neutrally to balance competing foreign interests. When there is any doubt, national interests will tend to be favored over foreign interests.

International Law > Authority to Regulate > General Overview
International Law > Dispute Resolution > Conflicts of Laws > Jurisdiction
International Trade Law > General Overview
[HN43] The inherent noncorrelation between the interest balancing formula and the economic realities of modern commerce is a reason which may underlie the reluctance of most courts to strike a balance in favor of nonapplication of domestic law. An assertion of prescriptive jurisdiction should ultimately be based on shared assessments that jurisdiction is reasonable. International law prohibits the assertion of prescriptive jurisdiction unsupported by reasonable links between the forum and the controversy.

Civil Procedure > Jurisdiction > Subject Matter Jurisdiction > Jurisdiction Over Actions > General Overview
International Law > Dispute Resolution > Conflicts of Laws > General Overview
[HN44] It does not necessarily follow, as the use of interest balancing as a method of choosing between competing jurisdictions assumes, that there is a line of reasonableness which separates jurisdiction to prescribe into neatly adjoining compartments of national jurisdiction. There is no principle of international law which abolishes concurrent jurisdiction. Since prescriptive jurisdiction is based on well recognized state contacts with controversies, the reality of the United States' interlocked international economic network guarantees that overlapping, concurrent jurisdiction will often be present. There is, therefore, no rule of international law holding that a more reasonable assertion of jurisdiction mandatorily displaces a less reasonable assertion of jurisdiction as long as both are, in fact, consistent with the limitations on jurisdiction imposed by international law.

COUNSEL: Peter J. Nickles, Eugene D. Gulland, William P. Skinner, for Appellant Sabena in No. 83-1281.

Thomas J. Whalen, Stephen J. Fearon, Lawrence Mentz, for Appellant KLM in No. 83-1280.

Carl W. Schwarz, Robert M. Beckman, Wesley K. Caine, for Appellee in Nos. 83-1280 and 83-1281.

Lloyd N. Cutler, James S. Campbell, Gary D. Wilson, Andrew N. Vollmer, William R. Richardson, Jr., Terrence J. Leahy, Laurance A. Short, William Karas, David H. Coburn, for Amicus Curiae, Deutche Lufthansa Aktiengesellschaft, et al., urging that the preliminary injunction be vacated in Nos. 83-1280 and 83-1281.

JUDGES: Wilkey and Starr, Circuit Judges, and MacKinnon, Senior Circuit Judge. Opinion for the Court filed by

Circuit Judge Wilkey. Dissenting Opinion filed by Circuit Judge Starr.

OPINION BY: WILKEY

OPINION

[*914] OUTLINE OF OPINION FOR THE COURT

2. Judicial Interest Balancing

a. Defects in the Balancing Process

b. Promotion of International Committee

3. Political Compromise

III. CONCLUSION

WILKEY, Circuit Judge:

We review today the limits of a federal court's power to conserve its adjudicatory [*915] authority over a case properly filed with the court when, instead of actively raising all defensive claims in the federal court, the named defendants initiate suits in foreign tribunals for the sole purpose of terminating the federal court's adjudication of the litigation. Three months after Laker Airways, Ltd. ("Laker") filed an antitrust action in United States District Court for [**3] the District of Columbia against several defendants, including domestic, British, and other foreign airlines, the foreign airlines filed suits in the High Court of Justice of the United Kingdom seeking an injunction forbidding Laker from prosecuting its American antitrust action against the foreign defendants. After the High Court of Justice entered interim injunctions against Laker, the Court of Appeal issued a permanent injunction ordering Laker to take action to dismiss its suit against the British airlines. In the meantime, Laker responded by requesting injunctive relief in the United States District Court, arguing that a restraining order was necessary to prevent the remaining American defendants and the additional foreign defendants Laker had named in a subsequent antitrust claim from duplicating the foreign defendants' successful request for an English injunction compelling Laker to dismiss its suit against the defendants.

If these defendants had been permitted to file foreign injunctive actions, the United States District Court would have been effectively stripped of control over the claims -- based on United States law -- which it was in the process of adjudicating. Faced [**4] with no alternative but acquiescence in the termination of this jurisdiction by a foreign court's order, United States District Judge Harold H. Greene granted Laker's motion for a preliminary injunction restraining the remaining defendants from taking part in the foreign action designed to prevent the district court from hearing Laker's antitrust claims.

Two of the defendants enjoined from taking part in the English proceeding, KLM Royal Dutch Airlines ("KLM") and Societe Anonyme Belge d'Exploitation de la Navigation Aerienne ("Sabena") now contend on appeal that the court abused its discretion. Their arguments are essentially two-fold: first, that the injunction tramples Britain's rights to regulate the access of its nationals to judicial remedies; second, that the injunction contravenes the principles of international comity which ordinarily compel deference to foreign judgments and which virtually always proscribe any interference with foreign judicial proceedings.

Our review of the limited available facts strongly suggests that both the United States and Great Britain share concurrent prescriptive jurisdiction over the transactions giving rise to Laker's claim. [HN1] [**5] Ordinarily anti-suit injunctions are not properly invoked to preempt parallel proceedings on the same in personam claim in foreign tribunals. However, KLM and Sabena do not qualify under this general rule because the foreign action they seek to join is interdictory and not parallel. It was instituted by the foreign defendants for the sole purpose of terminating the United States claim. The only conceivable benefit that KLM and Sabena would reap if the district court's injunction were overturned would be the right to attack the pending United States action in a foreign court. This would permit the appellants to avoid potential liability under the United States laws to which their business operations and treaty obligations have long subjected them. In these circumstances there is ample precedent justifying the defensive use of an anti-suit injunction.

The injunction does not transgress either the principles of international comity or nationality-based prescriptive jurisdiction on which KLM and Sabena rely. Limitations on the application of comity dating from the origins of the

doctrine recognize that a domestic forum is not compelled [**6] to acquiesce in pre- or post-judgment conduct by litigants which frustrates the significant policies of the domestic forum. Accession to a demand for comity predicated on the coercive effects of a foreign judgment usurping legitimately concurrent prescriptive jurisdiction is unlikely to foster the processes of accommodation and cooperation [*916] which form the basis for a genuine system of international comity. Similarly, the mere fact of Laker's British juridical status simply does not erase all other legitimate bases of concurrent jurisdiction, as appellants suggest. Thus, the appellants' arguments that the district court abused its discretion fall well short of their mark.

The claims raised by KLM and Sabena do pose serious issues regarding the Judiciary's role in accommodating the conflicting implementation of concurrent prescriptive jurisdiction. We have necessarily inquired into the source of the conflict facing the courts of the United States and United Kingdom, and probed the extent to which the judicial processes may effectively be employed to resolve conflicts like the present one. Given the inherent limitations on the Judiciary's ability to adjust national priorities [**7] in light of directly contradictory foreign policies, there is little the Judiciary may do directly to resolve the conflict. Although the flash point of the controversy has been the anti-suit injunctions, the real powder keg is the strongly mandated legislative policies which each national court is bound to implement. Thus, it is unlikely that the underlying controversy would be defused regardless of the action we take today.

Because the principles of comity and concurrent jurisdiction clearly authorize the use of a defensive preliminary injunction designed to permit the United States claim to go forward free of foreign interference, we affirm the decision of the district court.

I. BACKGROUND

This case raises especially troublesome issues on two different fronts. It represents a head-on collision between the diametrically opposed antitrust policies of the United States and United Kingdom, and is perhaps the most pronounced example in recent years of the problems raised by the concurrent jurisdiction held by several states over transactions substantially affecting several states' interests. These problems are all the more intractable because of the vehicles involved in the [**8] collision: anti-suit injunctions designed to preempt the parties' access to the courts of foreign jurisdictions. The intersection of these issues confronts us with the Herculean task of accommodating conflicting, mutually inconsistent national regulatory policies while minimizing the amount of interference with the judicial processes of other nations that our courts will permit. Resolution of this appeal thus requires a clear grasp of both the underlying factual background of Laker's antitrust claims and the complex sequence of litigation and counterlitigation in which those claims have been asserted by Laker and attacked by the foreign defendants.

A. *Laker's Antitrust Claims*

Accepting the veracity of Laker's allegations for the purposes of this appeal only, [1] we learn that Laker Airways, Ltd. was founded as a charter airline in 1966. It began charter operations between the United States and United Kingdom in 1970. As early as 1971 it sought to branch out into scheduled transatlantic air service. Laker hoped to gain a sizeable share of the transatlantic market by offering only basic air passage with little or no in-flight amenities and non-essential services. Flying [**9] at a reduced cost would enable Laker to set rates much lower than those then charged by existing transatlantic air carriers.

1 The appeal of the preliminary injunction at this early stage of the proceedings has not permitted either findings of fact by the district court or a thorough development of the factual underpinnings of Laker's antitrust action.

Laker's potential competitors allegedly resisted the entry of this new carrier, delaying the commencement of Laker's novel economy service for several years. However, by 1977 Laker obtained the necessary authorizations from the United States and British governments and inaugurated its low cost transatlantic airline service between London and

New York.

The prices for scheduled transatlantic air service are substantially controlled by the International Air Transport Association [*917] ("IATA"), a trade organization of the world's largest air carriers. The IATA meets annually to establish fixed fares for air carriage, which are implemented after authorization [**10] by national governments of the individual carriers. Laker's fares were approximately one-third of the competing fares offered by other transatlantic carriers which were predominately set under the auspices of the IATA. The airline members of IATA allegedly perceived Laker's operations as a threat to their system of cartelized prices. The new competition not only jeopardized the established markets of those carriers operating between the United Kingdom and the United States -- such as British Airways and British Caledonian Airways -- but also affected the demand for services provided by airlines flying direct routes between points in Continental Europe and the United States -- such as Swiss Air Transport ("Swissair"), Lufthansa German Airlines ("Lufthansa"), KLM, and Sabena -- since some passengers allegedly found it cheaper to fly through London on Laker Airways, rather than direct on the other European transatlantic carriers. During meetings of the IATA in July and August 1977 the IATA airlines allegedly agreed to set rates at a predatory level to drive Laker out of business.

Notwithstanding this asserted predatory scheme, up until 1981 Laker managed to operate at a profit. [**11] At its zenith, Laker was carrying one out of every seven scheduled air passengers between the United States and England.

However, during 1981 Laker's financial condition rapidly deteriorated. In mid 1981 the pound sterling declined precipitously. A large segment of Laker's revenues was in pounds, but most of its debts, such as those on its United States financed fleet of DC-10 aircraft, and expenses were in dollars. Already weakened by the asserted predatory pricing scheme, Laker ran into repayment difficulties. Fearing financial collapse, it sought to have its repayment obligations refinanced.

At this point several airlines allegedly conspired to set even lower predatory prices. In October 1981 Pan American Airlines, Trans World Airlines, and British Airways dropped their fares for their full service flights to equal those charged by Laker for its no-frills service. They also allegedly paid high secret commissions to travel agents to divert potential customers from Laker. These activities further restricted Laker's income, exacerbating its perilous economic condition. At IATA meetings in December 1981 at Geneva, Switzerland, and in January 1982 at Hollywood, Florida, [**12] the IATA airlines allegedly laid plans to fix higher fares in the spring and summer of 1982 after Laker had been driven out of business.

IATA members also interfered with Laker's attempt to reschedule its financial obligations. After Laker arranged a refinancing agreement, KLM, Sabena, and other IATA airlines allegedly pressured Laker's lenders to withhold the financing which had previously been promised. As a result of these alleged conspiracies, Laker was forced into liquidation under Jersey law in early February 1982.

B. *Litigation History*

In the aftermath of these asserted conspiracies, Laker, through its liquidator, commenced an action in United States District Court for the District of Columbia to recover for the injuries sustained by the airline as a result of the alleged predatory pricing and unlawful interference with its refinancing arrangements. Laker's complaint filed on 24 November 1982, Civil Action No. 82-3362, alleged two counts: (1) violation of United States antitrust laws, and (2) a common law intentional tort. Named as defendants were four American corporations, Pan American World Airways, Trans World Airlines, McDonnell Douglas Corp., and McDonnell [**13] Douglas Finance Corp., as well as four foreign airlines, British Airways, British Caledonian Airways, Lufthansa, and Swissair.

Fearing that Laker would commence a second antitrust action against it, Midland [*918] Bank, a British corporation involved in Laker's abortive refinancing attempt, filed a preemptive action in the United Kingdom's High Court of Justice on 29 November 1982 seeking to enjoin Laker from naming it as a defendant in any United States antitrust

action. An *ex parte* injunction was issued the same day; this became a more permanent preliminary injunction on 4 February 1983.

Shortly thereafter the four foreign defendants in No. 82-3362 initiated a similar suit in the High Court of Justice. Their writs filed on 21 January 1983 sought (1) a declaration that the four foreign defendants were not engaged in any unlawful combination or conspiracy, and (2) an injunction prohibiting Laker from taking any action *in United States courts* to redress an alleged violation by the defendants *of United States antitrust laws*. The writs specifically sought to compel Laker to dismiss its suit against the foreign defendants in No. 82-3362 and to prohibit Laker from **[**14]** instituting any other proceedings in any non-English forum to redress any alleged violation of English or other laws prohibiting intentional or unlawful commercial injury. [2]

2 Appendix of Record Excerpts Submitted on Behalf of Appellants Sabena and KLM at Tab 5 [hereinafter cited as RE]; Brief of Appellant KLM Royal Dutch Airlines at 5, 6.

The substantive basis for the requested relief was the alleged inapplicability of United States antitrust laws under the Bermuda II Treaty [3] and the British Protection of Trading Interests Act. [4] Shortly thereafter Justice Parker issued an interlocutory injunction preventing Laker from taking any action in the United States courts or elsewhere to interfere with the proceedings the defendants were commencing in the High Court of Justice.

3 Agreement Between the Government of the United States of America and the Government of the United Kingdom of Great Britain and Northern Ireland Concerning Air Services, 23 July 1977, 28 U.S.T. 5367, T.I.A.S. No. 8641. [hereinafter cited as Bermuda II Treaty].
[15]**

4 Protection of Trading Interests Act, 1980, ch. 11, reproduced at RE Tab 9, *supra* note 2.

On 24 January 1983, to avoid being enjoined from continuing to sue the four United States defendants, Laker sought a temporary restraining order from the United States District Court preventing the American defendants from instituting similar preemptive proceedings in England. The order was granted the same day, and later extended pending a hearing on Laker's motion for a preliminary injunction.

Approximately three weeks later, on 15 February 1983, Laker commenced in the district court a second antitrust suit, Civil Action No. 83-0416. Appellants KLM and Sabena were named as defendants. A temporary restraining order was also entered against the appellants, preventing them from taking any action in a foreign court that would have impaired the district court's jurisdiction. This order was extended pending a hearing on Laker's motion for a preliminary injunction.

On 2 March 1983, the British defendants in No. 82-3362 successfully petitioned Justice Parker of the High Court of Justice to grant **[**16]** a second interim injunction against Laker preventing Laker from taking "any further steps" to prosecute its United States claim against the British airlines. Although the injunction was only designed to preserve the status quo pending a ruling by the High Court of Justice on the merits of the British airlines' suit seeking dismissal of No. 82-3362, the injunction prevented Laker from filing any discovery or other motions against British Airways and British Caledonian.

At a hearing held five days later, Laker's motion for a preliminary injunction against the four American defendants, KLM, and Sabena was considered by the United States District Court. By order [5] of 7 March 1983 and memorandum opinion [6] dated 9 March 1983, the district court granted **[*919]** a preliminary injunction. The terms of the injunction were designed only to "protect the jurisdiction of [the district court] over these proceedings" to the extent necessary to

preserve "the rights of the plaintiff under the laws of the United States." The injunction prevented the defendants from taking any action before a foreign court or governmental authority that would interfere with the district court's jurisdiction [**17] over the matters alleged in the complaint. [7] In its memorandum opinion, the court made it clear that it would consider further narrowing the terms of the injunction at the request of any party as long as it would not leave the defendants "free to secure orders which would interfere with the litigation pending" before the district court. [8] The court also consolidated Laker's two antitrust actions, No. 82-3362 and No. 83-0416.

5 RE Tab 1, *supra* note 2.

6 *Laker Airways Ltd. v. Pan American World Airways*, 559 F. Supp. 1124 (D.D.C. 1983) [hereinafter cited as District Court Op.].

7 RE Tab 1, *supra* note 2.

8 District Court Op., 559 F. Supp. at 1139 n. 63.

KLM Royal Dutch Airlines and Sabena Belgian World Airlines, joined by amici curiae Swissair and Lufthansa, now appeal the 7 March 1983 order and 9 March 1983 memorandum of the district court which enjoined KLM and Sabena from seeking an injunction against Laker's antitrust suit in the English courts. **[**18]** However, during the pendency of this appeal, the process of litigation and counterlitigation has continued in the United States and English courts.

On 29 March 1983, Justice Parker vacated his 2 March 1983 injunction against Laker's prosecution of its antitrust suit against the foreign defendants in No. 83-3362. This interim injunction was then reinstated pending appeal.

In April and May 1983 Laker continued its efforts to proceed in its United States antitrust actions while defending itself against the proceedings in the High Court of Justice which were designed to terminate its United States claims. On 26 April 1983 Laker issued a summons in the High Court of Justice seeking a dismissal or stay of the suits initiated by Lufthansa and Swissair. Laker also moved in the High Court of Justice for a discharge of the injunction granted on 21 January 1983. In a motion for partial summary judgment filed in the United States District Court, Laker affirmatively challenged the defendants' contentions that the action should be dismissed on *forum non conveniens* grounds. By an opinion and order dated 3 May 1983 the district court granted Laker's motion and held that the principles **[**19]** of *forum non conveniens* did not require that jurisdiction be relinquished. [9]

9 *Laker Airways Ltd. v. Pan American World Airways*, 568 F. Supp. 811 (D.D.C. 1983).

In a judgment read by Justice Parker on 20 May 1983, the High Court of Justice held that the injunctive relief requested by the British airlines was not justified and terminated claims for relief filed by British Caledonian and British Airways. [10] Justice Parker held that the application of American antitrust laws to companies carrying on business in the United States was not contrary to British sovereignty or the terms of the Bermuda II Treaty, at least while the dormant terms of the British Protection of Trading Interests Act had not been invoked. The judgment did recognize that a determination by the English Secretary of State that Britain's trading interests were negatively implicated by the United States antitrust action could change the result. [11] *However, at this point, before any intervention by the British Executive,* **[**20]** *the British court was willing to hold that Laker could not be prohibited from proceeding with its antitrust claims against British Airways and British Caledonian.* The original interim injunctions were maintained pending an appeal to the Court of Appeal by British Airways and British Caledonian.

10 *British Airways Board v. Laker Airways Ltd.*, [1983] 3 W.L.R. 545, 549 [hereinafter cited as High Court Judgment], *reproduced at* Appendix to Memorandum as to Status of English Proceedings at Tab 5 [hereinafter cited as App.].

11 *Id.* at 568.

[*920] The complexion of the controversy changed dramatically the next month when the British Government invoked the provisions of the British Protection of Trading Interests Act ("Act"). [12] [HN2] Upon a determination that measures taken to regulate international trade outside the United Kingdom "threaten to damage the trading **[**21]** interests of the United Kingdom," the Act authorizes the English Secretary of State to require that any person conducting business in the United Kingdom disobey all foreign orders and cease all compliance with the foreign judicial or regulatory provisions designated by the Secretary of State. The Act authorizes the Secretary of State to prevent United Kingdom courts from complying with requests for document production issued by foreign tribunals, and forbids enforcement of treble damage awards or antitrust judgments specified by the Secretary of State. [13] On 27 June 1983 the Secretary of State for Trade and Industry cited his powers under the Act and issued an order and general directions prohibiting persons who carry on business in the United Kingdom, with the exception of American air carriers designated under the Bermuda II Treaty, from complying with "United States antitrust measures" in the district court arising out of any (1) "agreement or arrangement (whether legally enforceable or not) to which a UK designated airline is a party," or (2) "any act done by a UK designated airline" that relates to the provision of air carriage under the Bermuda II Treaty. [14]

12 *See supra* note 4.

[22]**

13 *Id.* §§ 1, 2, 4, 5, 6.

14 App. Tab 6, *supra* note 10.

Laker applied for judicial review of the validity of the order and directions. The Court of Appeal considered this application with the appeals by British Airways and British Caledonian of Justice Parker's judgment of 20 May 1983.

On 26 July 1983 the Court of Appeal announced its judgment that the order and directions were well within the power of the Secretary of State to issue, and hence valid. Because the order and directions of the British Executive prevented the British airline from complying with any requirements imposed by the United States District Court and prohibited the airlines from relying on their own commercial documents located within the United Kingdom to defend themselves against Laker's charges, the Court of Appeal concluded that the United States District Court action was "wholly untriable" and could only result in a "total denial of justice to" the British airlines. [15] As a result, the Court of Appeal held that Laker must be permanently enjoined from proceeding with its United States antitrust **[**23]** claims against British Airways and British Caledonian.

15 *British Airways Board v. Laker Airways Ltd.*, [1983] 3 W.L.R. 545, 573, 591, *reproduced at* App. Tab 5, *supra* note 10 [hereinafter cited as Court of Appeal Judgment].

After a hearing following judgment, the Court of Appeal granted an injunction (1) restraining Laker from taking any steps against British Airways and British Caledonian in the United States action, and (2) directing Laker to use its best efforts to have British Airways and British Caledonian dismissed from the United States action. The second aspect of the injunction was stayed pending appeal to the House of Lords. [16] Subsequently, on 21 October 1983 Laker's summons to dismiss or stay the Lufthansa and Swissair action issued on 26 April 1983 was also adjourned pending the outcome of

Laker's appeal. [17]

16 App. Tab 7, *supra* note 10.

17 On 10 November 1983 the House of Lords granted Laker's petitions for leave to appeal the judgment of the Court of Appeal. This appeal is currently pending.

[**24] C. *Current Appeal in this Court*

As the litigation now stands, British Airways and British Caledonian have obtained an injunction by the English Court of Appeal restraining Laker from prosecuting its civil antitrust claim against them. Swissair [*921] and Lufthansa have applied for similar relief, but their applications are still pending. However, they are apparently protected by the interim injunctions that prevent Laker from taking any action in United States courts to thwart their 21 January 1983 claim for relief. KLM and Sabena are restrained by the United States District Court from joining the English proceedings.

Supported by amici curiae Swissair and Lufthansa, KLM and Sabena challenge the United States District Court's preliminary injunction on appeal to this court. [18] They claim that the injunction was unnecessary to protect the district court's jurisdiction and violates their right to take part in the "parallel" actions commenced in the English courts. Denial of this opportunity, they assert, flouts international principles of comity. Moreover, they charge that the district court ignored Britain's "paramount right" to apply British law to Laker, which [**25] is a British subject. Appellants and amici request that we overturn the district court's injunction as a clear abuse of discretion.

18 The four American defendants, who were also enjoined by the district court, have not appealed the decision.

II. ANALYSIS

This appeal is the direct result of a clash between two governments asserting jurisdiction to prescribe law over a single series of transactions. The district court's injunction is defended by Laker as necessary to protect the court's jurisdiction. If there is no justification for the court's exercise of jurisdiction, the injunctive relief should necessarily fail. Similarly, if the United Kingdom courts would lack jurisdiction over a claim filed by Sabena and KLM, the district court should be under no obligation to defer to the actions of those foreign tribunals. A true conflict arises only if the national jurisdictions overlap. We must therefore begin our analysis with a review of the recognized bases supporting prescriptive jurisdiction, and then [**26] examine whether the alleged facts of this case satisfy those requirements.

A. *Bases of Concurrent Prescriptive Jurisdiction: Territoriality and Nationality*

1. *Overview*

Territoriality and nationality are the two fundamental jurisdictional bases on which courts of the United States and United Kingdom rely to assert control over the controversy between Laker and the antitrust defendants.

[HN3] The prerogative of a nation to control and regulate activities within its boundaries is an essential, definitional element of sovereignty. Every country has a right to dictate laws governing the conduct of its inhabitants. Consequently, the territoriality base of jurisdiction is universally recognized. It is the most pervasive and basic principle underlying the exercise by nations of prescriptive regulatory power. [19] It is the customary basis of the application of law

in virtually every country. [20]

19 M. MCDOUGAL & W. REISMAN, INTERNATIONAL LAW IN CONTEMPORARY PERSPECTIVE 1295 (1981).

20 *See, e.g., United States v. Mitchell*, 553 F.2d 996, 1001 (5th Cir. 1977); RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 38 (1965) [hereinafter cited as RESTATEMENT (SECOND)].

[**27] [HN4] In the context of remedial legislation, prohibition of effects is usually indivisible from regulation of causes. Consequently, the principles underlying territorial jurisdiction occasionally permit a state to address conduct causing harmful effects across national borders. Territoriality-based jurisdiction thus allows states to regulate the conduct or status of individuals or property physically situated within the territory, even if the effects of the conduct are felt outside the territory. [21] Conversely, [*922] conduct outside the territorial boundary which has or is intended to have a substantial effect within the territory may also be regulated by the state. [22]

21 *See* RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 17 (1965); RESTATEMENT OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES (REVISED) § 402(1)(a), (b) (Tentative Draft No. 2) (1981) [hereinafter cited as RESTATEMENT (REVISED)].

22 *Federal Trade Comm'n v. Compagnie de Saint-Gobain-Pont-A-Mousson*, 205 U.S. App. D.C. 172, 636 F.2d 1300, 1316 (D.C. Cir. 1980); *United States v. Fernandez*, 496 F.2d 1294 (5th Cir. 1974); RESTATEMENT (SECOND) § 18(b), *supra* note 20; RESTATEMENT (REVISED) § 402(1)(c) (Tentative Draft No. 2), *supra* note 21.

[**28] [HN5] Just as the locus of the regulated conduct or harm provides a basis of jurisdiction, the identity of the actor may also confer jurisdiction upon a regulating country. The citizenship of an individual or nationality of a corporation has long been a recognized basis which will support the exercise of jurisdiction by a state over persons. Under this head of jurisdiction a state has jurisdiction to prescribe law governing the conduct of its nationals whether the conduct takes place inside or outside the territory of the state. [23]

23 *See Steele v. Bulova Watch Co.*, 344 U.S. 280, 97 L. Ed. 319, 73 S. Ct. 252 (1952); *Blackmer v. United States*, 284 U.S. 421, 76 L. Ed. 375, 52 S. Ct. 252 (1932); RESTATEMENT (SECOND) § 30(1)(a), *supra* note 20; RESTATEMENT (REVISED) § 402(2) (Tentative Draft No. 2), *supra* note 20.

[HN6] Because two or more states may have legitimate interests in [**29] prescribing governing law over a particular controversy, these jurisdictional bases are not mutually exclusive. For example, when the national of one state causes substantial effects in another state, both states may potentially have jurisdiction to prescribe governing law. [24] Thus, under international law, territoriality and nationality often give rise to concurrent jurisdiction. [25] A court faced with assertions of conflicting or inconsistent prescriptive power under facially concurrent jurisdiction must first examine the sufficiency of jurisdictional contacts under each base of jurisdiction to determine whether either claim of jurisdiction is unfounded. If both claims to jurisdiction are legitimately exercised, avenues of conflict resolution must be considered before jurisdiction to prescribe can go forward.

24 The exercise of prescriptive jurisdiction is, however, subject to the limits of a state's jurisdiction to adjudicate and to enforce its regulations. *See, e.g., Federal Trade Comm'n v. Compagnie de Saint-Gobain-Pont-A-Mousson*, 205 U.S. App. D.C. 172, 636 F.2d 1300, 1316-17 (D.C. Cir. 1980).

[**30]

25 *See* RESTATEMENT (SECOND) § 37, § 30 Comment c, *supra* note 20.

2. *United States Jurisdictional Base*

The prescriptive application of United States antitrust law to the alleged conspiracies between KLM, Sabena, and the other antitrust defendants is founded upon the harmful effects occurring within the territory of the United States as a direct result of the alleged wrongdoing. Before we examine the nature of those effects and consider whether they support the prescriptive jurisdiction over the claimed conspiracies, we wish to make it clear that this aspect of territorial jurisdiction is entirely consistent with nationally and internationally recognized limits on sovereign authority.

[HN7] It has long been settled law that a country can regulate conduct occurring outside its territory which causes harmful results within its territory. [26] The traditional example of this principle is that of the transnational homicide: when a malefactor in State *A* shoots a victim across the border [**31] in State *B*, State *B* can proscribe the harmful conduct. [27] To take a more likely example, embezzlement or unauthorized access to computerized financial accounts can certainly be controlled by the territory where the accounts are located, even though the thief operates by telephone from a distant [*923] territory. Other examples are easily multiplied. [28]

26 *See, e.g., United States v. Aluminum Co. of Am.*, 148 F.2d 416 (2d Cir. 1945); *Strassheim v. Daily*, 221 U.S. 280, 285, 55 L. Ed. 735, 31 S. Ct. 558 (1911); *Deutsche Lufthansa Aktiengesellschaft v. Civil Aeronautics Board*, 156 U.S. App. D.C. 191, 479 F.2d 912, 917 n.9 (D.C. Cir. 1973); *Pacific Seafarers Inc. v. Pacific Far East Line, Inc.*, 131 U.S. App. D.C. 226, 404 F.2d 804, 814-15 (D.C. Cir. 1968), *cert. denied*, 393 U.S. 1093, 21 L. Ed. 2d 784, 89 S. Ct. 872 (1969); *Case of the S.S. "Lotus,"* [1927] P.C.I.J., Ser. A., No. 10 at 18, 2 M. Hudson, World Court Reports 20.

27 *See* RESTATEMENT (SECOND) § 18 Illustration 2, *supra* note 20.

[**32]

28 *See, e.g., United States v. Fernandez*, 496 F.2d 1294 (5th Cir. 1974) (conviction for possessing, uttering, and forging, in a foreign territory, United States Treasury checks which had been stolen in the United States).

Even if invisible, the radiating consequences of anti -competitive activities cause economic injuries no less tangible than the harmful effects of assassins' bullets or thieves' telephonic impulses. [HN8] Thus, legislation to protect domestic economic interests can legitimately reach conduct occurring outside the legislating territory intended to damage the protected interests within the territory. As long as the territorial effects are not so inconsequential as to exceed the bounds of reasonableness imposed by international law, [29] prescriptive jurisdiction is legitimately exercised.

29 *See* RESTATEMENT (REVISED) § 403(1) (Tentative Draft No. 2), *supra* note 21.

[**33] [HN9] The territorial effects doctrine is *not an extraterritorial* assertion of jurisdiction. [30] Jurisdiction exists only when significant effects were intended within the prescribing territory. Prescriptive jurisdiction is activated only when there is personal jurisdiction, often referred to as "jurisdiction to adjudicate." A foreign corporation doing business within the United States reasonably expects that its United States operations will be regulated by United States law. The only extraterritoriality about the transactions reached under the territorial effects doctrine is that not all of the causative factors producing the proscribed result may have occurred within the territory. Although some of the business decisions affecting United States operations may be made outside the forum state, the entire transaction is not ordinarily immunized.

30 *See, e.g.*, "Extraterritoriality and Conflicts of Jurisdiction," U.S. Department of State Current Policy Bulletin No. 481 (15 April 1983).

Certainly the doctrine **[**34]** of territorial sovereignty is not such an artificial limit on the vindication of legitimate sovereign interests that the injured state confronts the wrong side of a one-way glass, powerless to counteract harmful effects originating outside its boundaries which easily pierce its "sovereign" walls, while its own regulatory efforts are reflected back in its face. [31] Unless one admits that there are certain vital interests than can be affected with impunity by careful selection of the decision-making forum, with the result that a country may be forced to rely entirely on the good offices of a foreign state for vindication of the forum's interests -- even when vindication of the forum state's interests would contradict the foreign state's own policies -- then availability of territorial effects jurisdiction must be recognized. For these reasons territorial effects jurisdiction has been implemented by several European forums. [32] Indeed, the British have vigorously legislated on this principle in the Protection of Trading Interests Act.

31 *See* Rahl, *International Application of American Antitrust Laws: Issues and Proposals*, 2 N.W. J. INT'L L. & BUS. 336, 341 (1980); Picciotto, *Jurisdictional Conflicts, International Law and the International State System*, 11 INT'L J. SOC. L. 11, 14-15 (1983).

[35]**

32 These forums include, at least, the Federal Republic of German, Austria, and the European Economic Community. *See* Gerber, *The Extraterritorial Application of the German Antitrust Laws*, 77 AM. J. INT'L L. 756 (1983); Rahl, *International Application of American Antitrust Laws: Issues and Proposals*, 2 N.W. J. INT'L L. 336, 340-41 (1980).

a. *Territorial Contacts Justifying Application of United States Antitrust Law.*

The circumstances of this litigation suggest numerous American interests that would be vindicated if Laker is permitted to proceed with its antitrust claim. Although some of the alleged anti-competitive actions occurred within the United States, [33] most **[*924]** of the conspiratorial acts took place in other countries. This distinction, however, has no overriding significance, since the economic consequences of the alleged actions gravely impair significant American interests. If the only interest involved were that of Laker, a British corporation, then it may very well be that United States jurisdiction to prescribe would not exist. However, **[**36]** Laker is in liquidation. Therefore its interests are only nominal compared to those claiming through it.

33 Laker alleges that acts in furtherance of the unlawful conspiracy occurred at the IATA meeting at Hollywood, Florida in 1981. Complaint para. 22, Civil Action No. 83-0416 (D.D.C. 1983), *reproduced at* RE Tab 3, *supra* note 2. Additionally, secret commissions may have been paid to travel agents within the United States to divert business away from Laker. Complaint para. 28, Civil Action No. 82-3362 (D.D.C. 1982), *reproduced at* App. Tab 5 p. 592, *supra* note 10.

[HN10] A primary objective of antitrust laws is to preserve competition, and thus ultimately protect the interests of American consumers. [34] For decades, a great percentage of passengers on North Atlantic air routes has been United States citizens. [35] The greatest impact of a predatory pricing conspiracy would be to raise fares for United **[**37]** States passengers. No other single nation has nearly the same interest in consumer protection on the particular combination of routes involved in Laker's antitrust claims. Application of antitrust laws would thus directly benefit American consumers.

34 *See Pfizer Inc. v. India*, 434 U.S. 308, 314, 54 L. Ed. 2d 563, 98 S. Ct. 584 (1978).

35 Oral Argument Tr. at 32. *See also* UNITED STATES DEP'T OF TRANSPORTATION, RESEARCH & SPECIAL PROGRAMS ADMIN., U.S. INT'L AIR TRAVEL STATISTICS, Table IIa at 2, 3; Table IId at 2, 3; Table IIIa at 55-57; Table IIId at 46-48; Table IV at 1, 10, 14 (1982).

Because Laker is currently being liquidated, the claims of its creditors are even more directly at stake than consumer interests. Laker is now little more than a corporate conduit through which its assets, including any damages owed Laker, will pass to its creditors. Its antitrust action is primarily an effort to satisfy its creditors, who ultimately bear the brunt of the injury allegedly [**38] inflicted upon Laker.

Although the precipitous actions of the British airline defendants prevented the district court from conducting a thorough inquiry into the underlying facts relevant to this aspect of the litigation, the facts indicate that Laker's principal creditors are Americans. Laker's fleet of American manufactured DC-10 aircraft was largely financed by banks and other lending institutions in the United States. [36] Moreover, a substantial portion of its total debt obligations are likely to have been American, since the bulk of the debts and expenses were payable in American dollars. [37] The actions of the alleged conspirators destroyed the ability of Laker to repay these American creditors; any antitrust recovery will therefore benefit these United States interests.

36 Laker Br. at 4.

37 *See id.* at 5.

In addition to the protection of American consumers' and creditors' interests, [HN11] the United [**39] States has a substantial interest in regulating the conduct of business within the United States. The landing rights granted to appellants are permits to do business in this country. Foreign airlines fly in the United States on the prerequisite of obeying United States law. [38] They have [*925] offices and employees within the United States, and conduct substantial operations here. By engaging in this commercial business they subject themselves to the in personam jurisdiction of the host country's courts. They waive either expressly or implicitly other objections that might otherwise be raised in defense. [39] A major reason for this subjection to business regulation is to place foreign corporations generally in the same position as domestic businesses. [40] Thus, United States creditors are entitled to, and do, rely on their ability to enforce their claims against foreign corporations like the appellants.

38 *See* Protocol Relating to United States-Netherlands Air Transport Agreement of 1957, 31 March 1978, art. 8(c), 29 U.S.T. 3088, 3098, T.I.A.S. No. 8998 [hereinafter cited as United States-Netherlands Air Transport Treaty]; Protocol Relating to the United States of America-Federal Republic of Germany Air Transport Agreement of 1955, 1 November 1978, arts. 8(c), 9(a), 30 U.S.T. 7323, 7340, T.I.A.S. No. 9591 [hereinafter cited as United States-Germany Air Transport Treaty]. The British Government apparently recognizes this as a general rule, although it argues that immunity from United States antitrust laws follows under the Bermuda II Treaty and that application of those laws is inherently limited by territorial sovereignty. Partially in response to representations by counsel for the British Attorney-General that "Her Majesty's Government has consistently taken the position that British Enterprises engaged in transnational business operations should comply with the laws and governmental policies of the countries in which they transact business," Justice Parker stated: "I would regard it as being inherent in the grant of permission to operate in the United States that the designated airlines comply with United States [antitrust] law." *See* High Court Judgment at 564, 568, *supra* note 10. This position was qualified by the Court of Appeal. *See* Court of Appeal Judgment at 583-84, *supra* note 15.

[**40]

39 *See* Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1602-1611 (1976); Agreement Providing for Nonassertion of Sovereign Immunity from Suit of Air Transport Enterprises, United States-Netherlands, 19 June 1953, 4 U.S.T. 1610, T.I.A.S. No. 2828.

40 *Cf. William Becker Travel Bureau, Inc. v. Sabena Belgian World Airways*, 13 Av. Cas. (CCH) 17,1770 (S.D.N.Y. 1975) (Sabena subject

to nondiscrimination provisions of Federal Aviation Act, 49 U.S.C. § 1374(b) (1976)).

This equivalency works in both directions. Foreign corporations are privileged to, and do, rely on United States law. [41] Consequently, creditors rely on the ability of foreign corporations, not only to be sued, but to sue in courts. Creditors expect to recover claims derivatively when foreign corporations possess a claim. Foreign corporations thus have the same obligation as domestic corporations -- to sue for benefit of creditors when they are financially troubled and need money for satisfaction of creditors' claims. [42]

41 *See, e.g., Pfizer Inc. v. India*, 434 U.S. 308, 54 L. Ed. 2d 563, 98 S. Ct. 584 (1978). *Cf. British Overseas Airways Corp. v. Civil Aeronautics Board*, 113 U.S. App. D.C. 76, 304 F.2d 952 (D.C. Cir. 1962) (action brought by, *inter alia*, KLM and Sabena seeking review of proposed regulations).

[**41]

42 *See Teasdale v. Robinson*, 290 F.2d 108, 114 (8th Cir. 1961) (fiduciary obligations of corporate officers to creditors are enforceable by the trustee in bankruptcy); 4 COLLIER ON BANKRUPTCY para. 704.02 (L. King 15th ed. 1983). *Cf. Landy v. Federal Deposit Insurance Corp.*, 486 F.2d 139, 148 (3d Cir. 1973), *cert. denied*, 416 U.S. 960, 40 L. Ed. 2d 312, 94 S. Ct. 1979 (1974) (stockholder free to initiate derivative action when receiver refuses to initiate suit necessary for protection of creditors).

The United States has an interest in maintaining open forums for resolution of creditors' claims. Just as the appellants are expected to abide by the United States laws governing those who do business here, so is Laker entitled to the protection of those laws. Permitting Laker to maintain its antitrust suit satisfies the legitimate expectations of Laker and its creditors.

b. *Adequacy of United States Territorial Interests*

It is beyond dispute that these contacts support an exercise of jurisdiction under the Sherman and Clayton [**42] Acts. [HN12] Jurisdiction exists under United States antitrust laws whenever conduct is intended to, and results in, substantial effects within the United States. [43] Under the conspiracy alleged by Laker, the intent to affect American commerce is obvious. The asserted predatory pricing of fares and interference with refinancing attempts were designed specifically to drive Laker out of business and eventually to raise the fares paid by transatlantic passengers, the bulk of whom are American.

43 *United States v. Aluminum Co. of Am.*, 148 F.2d 416 (2d Cir. 1945). *See also* RESTATEMENT (REVISED) § 415 (2), *supra* note 21:

> Any agreement in restraint of United States trade made outside of the United States, and any conduct or agreement in restraint of such trade carried out predominantly outside of the United States, is subject to the jurisdiction to prescribe of the United States, if a principal purpose of the conduct or agreement is to interfere with the commerce of the United States, and the agreement or conduct has some effect on that commerce.

(Tentative Draft No. 2).

[**43] Substantial realization of those intended effects has also been alleged by Laker. Laker was forced into liquidation shortly after its refinancing attempts collapsed. Its creditors have not yet been satisfied. The downward pressure on fares induced by Laker's competition, which previously benefitted transatlantic passengers, has [*926] been eliminated. Moreover, providing a forum for Laker's suit would also respect domestic creditors' reliance on the ability of foreign corporations to sue and be sued under the United States laws which ordinarily govern the business operations of foreign corporations within the United States. Thus, significant and long standing American economic interests would be vindicated through a successful antitrust action by Laker.

3. *British Jurisdictional Base*

Some of the British jurisdictional contacts are territorial. The plaintiff did business on routes between the United States and United Kingdom. A number of the purported conspiratorial acts took place in Great Britain. The conspiracy allegedly caused bankruptcy of a corporation operating in Great Britain.

However, the primary base of jurisdiction is the British *nationality* [**44] of the parties involved in the transactions cited in Laker's complaint. [44] Laker itself is incorporated under Jersey law, and is thus a British national for purposes of this litigation. Two of the named defendants, British Airways and British Caledonian, are also incorporated under British law. In addition, the conspiracy may also tangentially implicate the activities of other British entities such as the Bank of England and the Civil Aviation Authority. [45]

44 *See infra* p. 934.

45 *See* Br. of Appellant Sabena at 9.

Regulating the activities of businesses incorporated within a state is one of the oldest and most established examples of prescriptive jurisdiction. [46] We cannot say that these nationality-based jurisdictional contacts would be insufficient to support British jurisdiction over a claim filed by KLM or Sabena, especially when the conspiracy charged does have territorial contacts with the United Kingdom. Thus, existence of British jurisdiction to prescribe is not seriously challenged [**45] by Laker.

46 *See* RESTATEMENT (SECOND) § 27, & *id.* Comment a, *supra* note 20.

4. *Concurrent Jurisdiction*

The sufficiency of jurisdictional contacts with both the United States and England results in concurrent jurisdiction to prescribe. Both forums may legitimately exercise this power to regulate the events that allegedly transpired as a result of the asserted conspiracy.

[HN13] Concurrent jurisdiction does not necessarily entail conflicting jurisdiction. The mere existence of dual grounds of prescriptive jurisdiction does not oust either one of the regulating forums. Thus, each forum is ordinarily free to proceed to a judgment.

In the current situation, appellants charge that the district court abused its discretion by forbidding them from joining the "parallel" proceeding in the English courts. They argue that this result is compelled both by principles of comity and by respect for a country's [**46] paramount interest in controlling the remedies available to its nationals. Before we can fully consider the extent of appellants' rights based on comity and Laker's nationality to participate in the English proceedings, we examine whether the district court's injunction contravenes the well-established limits on the use of in personam injunctions against litigation in foreign jurisdictions.

B. *Propriety of the Antisuit Injunction*

[HN14] It is well settled that English and American courts have power to control the conduct of persons subject to their jurisdiction to the extent of forbidding them from suing in foreign jurisdictions. [47] However, the fundamental corollary to concurrent jurisdiction must ordinarily be respected: parallel proceedings on the same in personam claim should ordinarily be allowed to proceed simultaneously, at least until a judgment is reached in one which [*927] can be pled

as res judicata in the other. [48] The mere filing of a suit in one forum does not cut off the preexisting right of an independent forum to regulate matters subject to its prescriptive [**47] jurisdiction. For this reason, injunctions restraining litigants from proceeding in courts of independent countries are rarely issued. [49]

47 *See, e.g., Cole v. Cunningham*, 133 U.S. 107, 33 L. Ed. 538, 10 S. Ct. 269 (1890). *Cf. Dames & Moore v. Regan*, 453 U.S. 654, 69 L. Ed. 2d 918, 101 S. Ct. 2972 (1981).

48 *Colorado River Water Conservancy Dist. v. United States*, 424 U.S. 800, 817, 96 S. Ct. 1236, 47 L. Ed. 2d 483 (1976); *Princess Lida of Thurn & Taxis v. Thompson*, 305 U.S. 456, 466, 83 L. Ed. 285, 59 S. Ct. 275 (1939); *Kline v. Burke Const. Co.*, 260 U.S. 226, 230, 67 L. Ed. 226, 43 S. Ct. 79 (1922); *Insurance Co. v. Brune's Assignee*, 96 U.S. 588, 24 L. Ed. 737 (1877). However, proceedings *in rem* are usually restricted to one forum. *See Princess Lida of Thurn & Taxis v. Thompson*, 305 U.S. 456, 83 L. Ed. 285, 59 S. Ct. 275 (1939).

49 *See, e.g., Bryant v. Atlantic Coast Line R.R.*, 92 F.2d 569 (2d Cir. 1937); *Blanchard v. Commonwealth Oil Co.*, 294 F.2d 834, 839 (5th Cir. 1961).

The rules against anti-suit injunctions are more relaxed when the injunction runs against concurrent litigation within a single forum. In this situation respect for a co-equal sovereign's jurisdiction is not implicated and is more easily out-weighed by the economies achieved through avoidance of duplicative actions. *See Colorado River Water Conservancy Dist. v. United States*, 424 U.S. 800, 817, 96 S. Ct. 1236, 47 L. Ed. 2d 483 (1976); *Roth v. Bank of the Commonwealth*, 583 F.2d 527, 538 (6th Cir. 1978). When both actions involve the same parties, issues, and underlying transactions the court whose jurisdiction was first invoked may be justified in restraining litigants from prosecuting subsequently filed suits within the same court system. Failure to distinguish between the different policies informing the discretion to issue *intercourt* and *intracourt* injunctions may suggest an inappropriate rule. *See, e.g., Western Electric Co. v. Milgo Electronic Corp.*, 450 F. Supp. 835, 837 (S.D. Fla. 1978) (relying on federal intracourt cases in denying injunctive relief against foreign action). In the intercourt context, similarity of the actions *alone* should not justify an injunction. *See supra* note 48.

[**48] A second reason cautioning against exercise of the power is avoiding the impedance of the foreign jurisdiction. [HN15] Injunctions operate only on the parties within the personal jurisdiction of the courts. However, they effectively restrict the foreign court's ability to exercise its jurisdiction. [50] If the foreign court reacts with a similar injunction, no party may be able to obtain any remedy. [51] Thus, only in the most compelling circumstances does a court have discretion to issue an anti-suit injunction.

50 *See, e.g., Compagnie des Bauxites de Guinea v. Insurance Co. of N. Am.*, 651 F.2d 877, 887 (3d Cir. 1981), *aff'd on other grounds*, 456 U.S. 694, 72 L. Ed. 2d 492, 102 S. Ct. 2099 (1982); *Canadian Filters (Harwich) Ltd. v. Lear-Siegler, Inc.*, 412 F.2d 577, 578 (1st Cir. 1969).

51 *Peck v. Jenness*, 48 U.S. 612, 624-25 (1849).

[HN16] There [**49] are no precise rules governing the appropriateness of anti-suit injunctions. The equitable circumstances surrounding each request for an injunction must be carefully examined to determine whether, in light of the principles outlined above, the injunction is required to prevent an irreparable miscarriage of justice. Injunctions are most often necessary to protect the jurisdiction of the enjoining court, or to prevent the litigant's evasion of the important public policies of the forum. We consider the applicability of each category in turn.

1. *Protection of Jurisdiction*

[HN17] Courts have a duty to protect their legitimately conferred jurisdiction to the extent necessary to provide full justice to litigants. Thus, when the action of a litigant in another forum threatens to paralyze the jurisdiction of the court, the court may consider the effectiveness and propriety of issuing an injunction against the litigant's participation in the foreign proceedings.

These situations may arise either before or after a judgment has been entered. [52] The policies that guide the exercise [*928] [**50] of discretion vary slightly in each situation. When the injunction is requested after a previous judgment on the merits, there is little interference with the rule favoring parallel proceedings in matters subject to concurrent jurisdiction. [53] Thus, a court may freely protect the integrity of its judgments by preventing their evasion through vexatious or oppressive relitigation. [54]

52 *See, e.g.*, 28 U.S.C. § 2283: [HN18] "A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where *necessary in aid of its jurisdiction*, or to *protect or effectuate its judgments*." (emphasis added). This limitation on the authority of the federal courts to enjoin state courts effectuates the strong policies of comity and mutual respect that limit the discretion of courts to interfere with concurrent proceedings. These policies, which find such compelling expression in ordering the intranational affairs of our dual court system, apply *a fortiori* to injunctions affecting the exercise of jurisdiction in foreign countries. *Canadian Filters (Harwich) Ltd. v. Lear-Siegler, Inc.*, 412 F.2d 577, 578 (1st Cir. 1969).

[**51]

53 There is less justification for permitting a second action after a prior court has reached a judgment on the same issues. The parallel proceeding rule applies only until one court reaches a judgment that may be pled as res judicata in the other. *Princess Lida of Thurn & Taxis v. Thompson*, 305 U.S. 456, 466, 83 L. Ed. 285, 59 S. Ct. 275 (1939).

54 *See Bethell v. Peace*, 441 F.2d 495 (5th Cir. 1971); *Scott v. Hunt Oil Co.*, 398 F.2d 810 (5th Cir. 1968). Since res judicata and collateral estoppel may be pled in subsequent actions, a showing of harassment, bad faith, or other strong equitable circumstances should ordinarily be required. *Cf. Donovan v. Dallas*, 377 U.S. 408, 411-12, 12 L. Ed. 2d 409, 84 S. Ct. 1579 (1964) (state court improperly enjoined litigant's suit in federal court after adverse state court judgment since plea of res judicata was for second forum, not first forum, to determine); C. WRIGHT, A. MILLER & E. COOPER, 17 FEDERAL PRACTICE & PROCEDURE § 4226 at 346-50 (1978).

[**52] However, [HN19] when a party requests the issuance of an injunction to protect the court's jurisdiction *before* a judgment has been reached, the rules are less clear. Some courts issue the injunction when the parties and issues are identical in both actions, justifying the injunction as necessary to prevent duplicative and, therefore, "vexatious" litigation. [55] However, this rationale is *prima facie* inconsistent with the rule permitting parallel proceedings in concurrent in personam actions. The policies underlying this rule -- avoiding hardship to parties and promoting the economies of consolidated litigation -- are more properly considered in a motion for dismissal for *forum non conveniens*. [56] They do not outweigh the important principles of comity that compel deference and mutual respect for concurrent foreign proceedings. Thus, the better rule is that duplication of parties and issues alone is not sufficient to justify issuance of an anti-suit injunction. [57]

55 *See, e.g., Seattle Totems Hockey Club, Inc. v. National Hockey League*, 652 F.2d 852, 856 (9th Cir. 1981), *cert. denied*, 457 U.S. 1105, 102 S. Ct. 2902, 73 L. Ed. 2d 1313 (1982); *Cargill, Inc. v. Hartford Accid. & Indem. Co.*, 531 F. Supp. 710, 715 (D. Minn. 1982); *Medtronic, Inc. v. Catalyst Research Corp.*, 518 F. Supp. 946 (D. Minn.), *aff'd*, 664 F.2d 660 (8th Cir. 1981).

[**53]

56 *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 258-61, 70 L. Ed. 2d 419, 102 S. Ct. 252 (1981); *Pain v. United Technologies Corp.*, 205 U.S. App. D.C. 229, 637 F.2d 775, 786-94 (D.C. Cir. 1980).

57 *Compagnie des Bauxites de Guinea v. Insurance Co. of N. Am.*, 651 F.2d 877, 887 (3d Cir. 1981), *aff'd on other grounds*, 456 U.S. 694, 72 L. Ed. 2d 492, 102 S. Ct. 2099 (1982). *See also Kline v. Burke Const. Co.*, 260 U.S. 226, 233, 67 L. Ed. 226, 43 S. Ct. 79 (1922); *Atlantic Coast Line R.R. Co. v. Brotherhood of Locomotive Engineers*, 398 U.S. 281, 295, 26 L. Ed. 2d 234, 90 S. Ct. 1739 (1970) (where two courts have concurrent jurisdiction neither is ordinarily free to prevent either party from simultaneously pursuing claims in both courts).

However, where so many actions have been commenced that there is no advantage to be gained from the multiple actions other than harassment and attrition, circumstances may justify an injunction. *See Sperry Rand Corp. v. Sunbeam Corp.*, 285 F.2d 542 (7th Cir. 1960) (dissolving an anti-suit injunction when the domestic action would not resolve the issues raised in the foreign proceeding and there was no evidence of harassment); *Commercial Acetylene Co. v. Avery Portable Lighting Co.*, 152 F. 642, 647 (E.D. Wis. 1906), *aff'd*, 159 F. 935 (7th Cir. 1908) (the court may prevent oppression through multiple suits brought for "commercial advantage rather than honest

adjudication"). Even in this situation, deference to the foreign proceedings is still an important factor to be considered. *Id.* at 647-48 (enjoining commencement of further patent infringement suits against purchasers when one action against manufacturer would resolve the issue of validity of the patent, but requiring the movant to apply for a stay in ten previously filed federal infringement actions instead of enjoining those actions).

[**54] Similarly, [HN20] the possibility of an "embarrassing race to judgment" or potentially inconsistent adjudications [58] does not [*929] outweigh the respect and deference owed to independent foreign proceedings. [59] The parallel proceeding rule applies only until a judgment is reached in one of the actions. [60] After that point, the second forum is usually obliged to respect the prior adjudication of the matter. [61] If the rules regarding enforcement of foreign judgments are followed there will seldom be a case where parties reach inconsistent judgments.

58 *See supra* note 55.

59 *Colorado River Water Conservancy Dist. v. United States*, 424 U.S. 800, 817, 96 S. Ct. 1236, 47 L. Ed. 2d 483 (1976); *Compagnie des Bauxites de Guinea v. Insurance Co. of N. Am.*, 651 F.2d 877, 887 (3d Cir. 1981), *aff'd on other grounds*, 456 U.S. 694, 72 L. Ed. 2d 492, 102 S. Ct. 2099 (1982). *Cf.* C. WRIGHT, A. MILLER & E. COOPER, 17 FEDERAL PRACTICE & PROCEDURE § 4225 at 336 (1978) [HN21] (The "necessary in aid of its jurisdiction" exception of 28 U.S.C. § 2283 "does not allow a federal court to enjoin state proceedings merely because they "to enjoin state proceedings to protect a judgment that involve issues presented in a federal in personam action."). Similarly, permitting the protection or effectuation of judgments under 28 U.S.C. § 2283 does not allow a federal court to enjoin state proceedings "to protect a judgment that the federal court may make in the future but has not yet made." C. WRIGHT, A. MILLER & E. COOPER, 17 FEDERAL PRACTICE & PROCEDURE § 4226 at 345 (1978).

[**55]

60 *See supra* note 53.

61 *Tahan v. Hodgson*, 213 U.S. App. D.C. 306, 662 F.2d 862, 864 (D.C. Cir. 1981).

There is little, if any, evidence of courts sacrificing procedural or substantive justice in an effort to "race" to a prior judgment. To the extent this slight risk exists it is outweighed by the more important policies favoring respect for concurrent proceedings. In any event, most forums need not fear that their crucial policies would be trampled if a foreign judgment is reached first, since violation of domestic public policy may justify not enforcing the foreign judgment. [62]

62 *Id.*

These and other factors [63] relied upon to support issuance of prejudgment protective injunctions in aid of jurisdiction do not usually outweigh the importance of permitting foreign concurrent actions. Thus, although they suggest possible bases favoring the district court's decision to enjoin [**56] the appellants, we do not find them controlling.

63 For example, the chronological order in which concurrent in personam suits are filed is often cited as a controlling factor. *E.g., Gage v. Riverside Trust Co.*, 86 F. 984 (S.D. Cal. 1898). Taken literally, a general rule permitting the earlier filed action to enjoin all subsequent actions would destroy the principle of concurrent jurisdiction. *Cf. Compagnie des Bauxites de Guinea v. Insurance Corp. of N. Am.*, 651 F.2d 877, 887 (3d Cir. 1981), *aff'd on other grounds*, 456 U.S. 694, 72 L. Ed. 2d 492, 102 S. Ct. 2099 (1982) (injunction refused despite delay of four years in commencing foreign action). However, when substantial time has elapsed between the commencement of the two actions, laches or similar equitable principles make it more appropriate to enjoin the second action. *See Seattle Totems Hockey Club, Inc. v. National Hockey League*, 652 F.2d 852, 855 (9th Cir. 1981), *cert. denied*, 457 U.S. 1105, 102 S. Ct. 2902, 73 L. Ed. 2d 1313 (1982); *United Cigarette Mach. Co. v. Wright*, 156 F. 244 (E.D. N.C. 1907), *aff'd*, 193 F. 1023 (4th Cir. 1912). *Cf. Saeman v. Everest & Jennings, Inc.*, 343 F. Supp. 457, 461-62 (N.D. Ill. 1972) (action stayed pending foreign proceeding filed three years earlier).

[**57] The logical reciprocal of the parallel proceeding rule proves that there must be circumstances in which an anti-suit injunction is necessary to conserve the court's ability to reach a judgment. [HN22] Just as the parallel proceeding rule counsels against interference with a foreign court's exercise of concurrent jurisdiction, it authorizes the domestic court to resist the attempts of a foreign court to interfere with an in personam action before the domestic court. 64 When the availability of an action in the domestic courts is necessary to a full and fair adjudication of the plaintiff's claims, a court should preserve that forum. 65 [*930] Thus, where the foreign proceeding is not following a parallel track but attempts to carve out exclusive jurisdiction over concurrent actions, an injunction may be necessary to avoid the possibility of losing validly invoked jurisdiction. This would be particularly true if the foreign forum did not offer the remedy sought in the domestic forum.

64 *See James v. Grand Trunk Western R.R. Co.*, 14 Ill. 2d 356, 152 N.E.2d 858, *cert. denied*, 358 U.S. 915, 3 L. Ed. 2d 239, 79 S. Ct. 288 . (1958). Compliance with interlocutory orders may be protected from foreign interference as well. *Omnium Lyonnais D'Etancheite et Revetement Asphalte v. Dow Chemical Co.*, 441 F. Supp. 1385 (C.D. Cal. 1977) (enjoining use of discovery materials in foreign proceedings in violation of terms of domestic discovery order).

[**58]

65 *See, e.g., Hyafill v. Buffalo Marine Const. Co.*, 266 F. 553 (W.D. N.Y. 1919). *Cf. State* ex rel., *General Dynamics Corp. v. Luten*, 566 S.W.2d 452 (Mo. 1978) (injunction reversed on grounds, *inter alia*, that party had not demonstrated that the foreign court could not do full justice).

The district court's injunction was clearly proper under these principles. As far as could be determined by the initial pleadings and papers filed, jurisdiction to prescribe was properly exercised. Consequently, the court's ability to render a just and final judgment had to be protected, absent clear evidence that the foreign action could fully consider the litigant's claims.

Appellants characterize the district court's injunction as an improper attempt to reserve to the district court's exclusive jurisdiction an action that should be allowed to proceed simultaneously in parallel forums. Actually, the reverse is true. The English action was initiated for the purpose of reserving exclusive prescriptive jurisdiction to the English courts, even though the English [**59] courts do not and can not pretend to offer the plaintiffs here the remedies afforded by the American antitrust laws.

Although concurrently authorized by overlapping principles of prescriptive jurisdiction, the British and American actions are *not* parallel proceedings in the sense the term is normally used. This is not a situation where two courts are proceeding to separate judgments simultaneously under one cause of action. Rather, the sole purpose of the English proceedings is to *terminate* the American action. The writs filed in the High Court of Justice sought to paralyze or halt the proceedings before the United States District Court. Although they also sought a determination that the defendants had not engaged in any unlawful conduct, the clear thrust of the requested relief was the termination of the United States antitrust claim. 66 Appellants conceded at oral argument that they are not interested in concurrent proceedings in the courts of the United Kingdom -- they want only the abandonment or dismissal of the American action against them. 67 Further proof of this is Judge Greene's offer to draft the injunction more narrowly to permit certain proceedings that [**60] were not inconsistent with the unhindered continuation of the United States antitrust action. 68 That no suggestions were made by the appellants to narrow the injunction indicates that they are only interested in interfering with the antitrust action, and not in adjudicating the existence of an unlawful conspiracy under British law.

66 *See, e.g.*, High Court Judgment at 568, *supra* note 10, where Justice Parker stated "it is common ground that if Lakers are allowed to pursue the American action B.A.'s and B.C.'s actions should be stayed or dismissed. They would serve no useful purpose and would merely

involve both sides in unnecessary expense."

67 Oral Argument Tr. at 17, 19.

68 *See* District Court Op., 559 F. Supp. at 1139 n. 63.

Judge Greene faced the stark choice of either protecting or relinquishing his jurisdiction. Midland Bank had previously obtained a preemptive interim injunction against Laker's naming it as a defendant in a United States antitrust action. **[**61]** Subsequently all of the foreign defendants in No. 82-3362 appeared in the High Court of Justice without notice to either Laker or the United States District Court and obtained interim protection. The remaining defendants, although domestic corporations, had to be restrained from attempting to follow the same path. It was equally clear that appellants also intended to seek English injunctive relief. Due to the lack of any prior notice by the four foreign defendants, the district court was threatened with a potential *fait accompli* by the appellants which would have virtually eliminated **[*931]** the court's effective jurisdiction over Laker's facially valid claim. Given the tensions between the parties, it is likely that the threat worsened every day. Thus, there was nothing improper in the district court's decision to enjoin appellants from seeking to participate in the English proceedings solely designed to rob the court of its jurisdiction.

2. *Evasion of Important Public Policies*

[HN23] Antisuit injunctions are also justified when necessary to prevent litigants' evasion of **[**62]** the forum's important public policies. [69] This principle is similar to the rule that a foreign judgment not entitled to full faith and credit under the Constitution will not be enforced within the United States when contrary to the crucial public policies of the forum in which enforcement is requested. [70] Both rules recognize that a state is not required to give effect to foreign judicial proceedings grounded on policies which do violence to its own fundamental interests. [71]

69 *Cole v. Cunningham*, 133 U.S. 107, 122-23, 33 L. Ed. 538, 10 S. Ct. 269 (1890); *Seattle Totems Hockey Club, Inc. v. National Hockey League*, 652 F.2d 852, 855 (9th Cir. 1981); *Canadian Filters (Harwich) Ltd. v. Lear-Siegler, Inc.*, 412 F.2d 577, 578-79 (1st Cir. 1969). *See also* 1A (Part 2) J. MOORE, W. TAGGART, A. VESTAL & J. WICKER, MOORE'S FEDERAL PRACTICE para..204 (1982) ("a court may enjoin a party from pursuing litigation in another court which circumscribes the policy of the forum issuing the injunction").

70 *See Hilton v. Guyot*, 159 U.S. 113, 164-65, 40 L. Ed. 95, 16 S. Ct. 139 (1895); *Tahan v. Hodgson*, 213 U.S. App. D.C. 306, 662 F.2d 862, 864 (D.C. Cir. 1981); *Sangiovanni Hernandez v. Dominicana de Aviacion C. Por A.*, 556 F.2d 611, 614 (1st Cir. 1977); RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 117 Comment c (1971).

[63]**

71 The specific reason for refusing recognition on public policy grounds may vary. In foreign judgment cases, enforcement is denied because the judgment is predicated on laws repugnant to the domestic forum's conception of decency and justice. In the context of anti-suit injunctions, deference to the foreign proceeding may be denied because of the litigant's unconscionable evasion of the domestic laws, and not necessarily because of the inherent obnoxiousness of the forum laws to which the litigant has resorted.

[HN24] The standard for refusing to enforce judgments on public policy grounds is strict; defendants are rarely able to block judgments on these grounds. [72] Enjoining participation in a foreign lawsuit in order to preempt a potential judgment is a much greater interference with an independent country's judicial processes. It follows that an anti-suit injunction will issue to preclude participation in the litigation only when the strongest equitable factors favor its use. [73] Both the importance **[**64]** to the forum **[*932]** of the law allegedly evaded, and the identity of the potentially evading party are relevant.

72 "Only in clear-cut cases ought it to avail defendant." *Tahan v. Hodgson*, 213 U.S. App. D.C. 306, 662 F.2d 862, 866 n. 17 (D.C. Cir. 1981). *See also* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 117 Comment c (1971).

73 Courts split when identifying those circumstances in which instituting a foreign proceeding constitutes an enjoinable evasion of forum law and policy. The experience of the state courts, where the principle has been more often applied, gives no clear-cut rule. When the primary purpose of the foreign action is to avoid the regulatory effect of the domestic forum's statutes, then an injunction is more readily issued. *See, e.g., Hoover Realty Co. v. American Inst. of Mktg. Syss., Inc.*, 24 Mich. App. 12, 179 N.W.2d 683 (1970); *Sandage v. Studebaker Bros. Mfg. Co.*, 142 Ind. 148, 41 N.E. 380 (1895). On the other hand, merely seeking a remedy not available in the domestic forum may be proper. *Tabor & Co. v. McNall*, 30 Ill. App. 3d 593, 333 N.E.2d 562 (1975); *Lederle v. United Services Auto. Ass'n*, 394 S.W.2d 31 (Tex. Civ. App. 1965), *vacated on other grounds*, 400 S.W.2d 749 (Texas 1966) (injunction not ordinarily granted merely to prevent the invocation of more favorable law unless an actual evasion of the substantive law of the domicile will result). The standard of "unfair or unconscionable advantage" is employed by other courts. *Keisker v. Bush*, 210 Ky. 718, 276 S.W. 815 (1925).

The only guideline which emerges is the necessity of evaluating the merits of each claim in light of the particular equitable circumstances surrounding the dual litigation. It should be clear that the availability of slight advantages in the substantive or procedural law to be applied in the foreign court does not signify an actionable evasion of domestic public policy. *See Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 70 L. Ed. 2d 419, 102 S. Ct. 252 (1981). An impermissible evasion is much more likely to be found when the party attempts to elude compliance with a statute of specific applicability upon which the party seeking an injunction may have relied, and which is designed to effectuate important state policies.

[**65] In this situation, the district court's injunction properly prevented appellants from attempting to escape application of the antitrust laws to their conduct of business here in the United States. KLM and Sabena seek to evade culpability under statutes of admitted economic importance to the United States [74] which are specifically applicable to their activities in the United States, and upon which Laker may have legitimately relied.

74 *United States v. Topco Associates, Inc.*, 405 U.S. 596, 610, 31 L. Ed. 2d 515, 92 S. Ct. 1126 (1972).

Whatever the merits of the British defendants' claims based upon the Bermuda II Treaty, [75] KLM and Sabena have no claim to antitrust immunity under their air service treaties. In fact, far from conferring any immunity, *their treaties contain express language subjecting them to the jurisdiction of the United States over predatory pricing and abuse of monopoly power.* Article Twelve of the United States-Belgium Air Transport Services Agreement provides, [**66]

(1) Each Party shall allow prices for air transportation to be established by each designated airline based upon commercial considerations in the marketplace.

Intervention by the Parties shall be limited to:

(a) *protection of predatory or discriminatory prices or practices*;

(b) *protection of consumers from prices that are unduly high or restrictive because of the abuse of a dominant position*; and

(c) protection of airlines from prices that are artificially low because of direct or indirect governmental subsidy or support. [76]

There is similar language in the United States-Netherlands air service agreement [77] and the United States-Germany [78] air service agreement.

75 The specific terms of this treaty, upon which British Caledonian and British Airways rely to establish their purported immunity from United States antitrust laws, remains unclear. Although the British Government interprets the treaty as conferring immunity, there are no express provisions to this effect. The United States Government has not acceded to this interpretation. Moreover, as the United Kingdom courts recognize, the alleged attempts to interfere with Laker's refinancing arrangements fall outside of the range of tariff setting activities that would be immunized by the Bermuda II Treaty. *See* Court of Appeal Judgment at 589, *supra* note 15 (holding that the refinancing allegations could not proceed independently of the other claims on the ground that the refinancing allegations did not state an independent claim, but not that they were immune under the Bermuda II Treaty); High Court Judgment at 566, *supra* note 10.

[**67]

76 Air Transport Agreement Between the Government of the United States of America and the Government of Belgium, 23 Oct. 1980, art. 12, T.I.A.S. No. 9903 [hereinafter cited as United States-Belgium Air Transport Treaty].

77 United States-Netherlands Air Transport Treaty at art. 6, 29 U.S.T. at 3095, *supra* note 38.

78 United States-Germany Air Transport Treaty at art. 6, 30 U.S.T. at 7334, *supra* note 38.

These provisions were all negotiated recently, at a time when the countries could be expected to have been familiar with the United States' position regarding enforcement of its antitrust laws over foreign corporations operating in the United States. Significantly, in the face of these express treaty provisions appellants have not asserted before the United States courts any claim to immunity under the air service treaties.

In light of these treaty provisions, we find it offensive that KLM and Sabena attempt to ride on the coattails of the British airlines under the Bermuda II Treaty and the *British* Protection of Trading Interest Act, **[**68]** which were respectively intended to regulate British air carriage and to protect primarily the economic interests of British domestic corporations. We do not see how a suit by a British corporation against Dutch and Belgian corporations involving anticompetitive activities allegedly taken by the defendants to protect their United States-Dutch and United States-Belgain **[*933]** air markets adversely implicates *British* trading interests. British interest would be damaged only if a British corporation will have to pay the judgment. Conceivably, British trading interests may even be furthered by retaining KLM, Sabena, and the other non-British parties to the action, since a judgment against any one of them would contribute towards the full satisfaction of the creditors' claims against a British corporation in liquidation.

KLM and Sabena are not less properly enjoined from pursuing the British litigation by virtue of their status as foreign corporations. Because of the inherent interference of an anti-suit injunction, injunctions are occasionally limited to restrain only residents of the forum state from pursuing foreign litigation, and do not necessarily run to all those who **[**69]** would be subject to the forum state's in personam jurisdiction. However, on occasion, circumstances have even permitted restraints on actions by foreign parties in other forums. [79]

79 *E.g., Seattle Totems Hockey Club, Inc. v. National Hockey League*, 652 F.2d 852, 855 (9th Cir. 1981), *cert. denied*, 457 U.S. 1105, 102 S. Ct. 2902, 73 L. Ed. 2d 1313 (1982); *PPG Industries, Inc. v. Continental Oil Co.*, 492 S.W.2d 297 (Tex. Civ. App. 1973).

The propriety of such a restraint should be clear with respect to KLM and Sabena. Foreign corporations doing business in the enjoining forum are expected to abide by the forum's laws. We recognize that the British Government disputes the right of the United States to apply its antitrust laws to British air carriers operating in the United States. However, KLM and Sabena have not argued that their status as air carriers under their air service treaties guarantees them any special status in this regard. Indeed, their **[**70]** treaties permit signatory government intervention to redress predatory prices or abuse of dominant market position. In this situation, KLM and Sabena should be treated as any other resident or corporation operating within this country. They are not permitted to escape forum policies any more than other residents.

Sabena's argument that the district court's anti-suit injunction "compels Britain to acquiesce in conduct by its nationals that may violate its policies disfavoring international application of treble damages laws" [80] is disingenuous. The district court's order does not compel Britain to do anything, but only preserves free access to United States courts. The British Government is free to pursue other sanctions against Laker. [81]

80 Br. for Appellant Sabena at 15.

81 Comity teaches that the sweep of the injunction should be no broader than necessary to avoid the harm on which the injunction is predicated. No injunction should be entered at all when less intrusive measures would redress the injury caused by evasion of the public policies. Thus, although our counterparts on the United Kingdom courts may disagree, the English injunctions against Laker cannot be justified as necessary to prevent Laker's evasion of Britain's important public policy of avoiding foreign remedies that could damage British trading interests. The British injunction is not an anti-suit injunction designed to protect their jurisdiction to proceed with the case. Rather, its only purpose is to destroy the United States District Court's jurisdiction.

This harsh result is entirely unwarranted. Even though we do not approve of them, the terms of the British Protection of Trading Interest Act authorize post judgment sanctions, repayment of litigation costs and damages, and even repayment of judgments. In addition, Laker is subject to criminal sanctions and fines if it violates the Act's prohibitions. These powerful mechanisms appear to be more than adequate to protect whatever British economic interests the Secretary of State determines are adversely affected.

[**71] 3. *Effect of the English Injunctions*

The district court's injunction was within its discretion even though the United Kingdom courts have issued in personam injunctions stopping Laker from proceeding against British Airways and British Caledonian. [HN25] Long experience derived from this country's federal system teaches that a forum state may, [82] but need not, [83] [*934] stay its own proceedings in response to an anti-suit injunction against a party before the court. This is consistent with the general rule permitting concurrent proceedings on transitory causes of action. [84] In extreme cases it may even be necessary to issue a counterinjunction to thwart another state's attempt to assert exclusive jurisdiction over a matter legitimately subject to concurrent jurisdiction. [85]

82 *Blanchard v. Commonwealth Oil Co.*, 294 F.2d 834 (5th Cir. 1961).

83 *Doyle v. Northern Pacific Ry. Co.*, 55 F.2d 708 (D. Minn. 1932). *See also British Transport Comm'n v. United States*, 354 U.S. 129, 142, 1 L. Ed. 2d 1234, 77 S. Ct. 1103 (1957) ("an injunction against suits being filed in foreign jurisdictions would be ineffective unless comity required its recognition"). *Cf. State ex rel. Bossung v. District Court*, 140 Minn. 494, 168 N.W. 589 (1918) (lower court's stay of proceeding due to foreign anti-suit injunction reversed for abuse of discretion).

[**72]

84 [HN26] Comity is the usual basis for staying the domestic action due to a foreign anti-suit injunction. However, comity does not apply to the appeal of KLM and Sabena. *See infra* part II. D.

85 *James v. Grand Trunk Western R.R. Co.*, 14 Ill. 2d 356, 152 N.E.2d 858, *cert. denied*, 358 U.S. 915, 3 L. Ed. 2d 239, 79 S. Ct. 288 (1958) (counterinjunction granted). *But see Bryant v. Atlantic Coast Line R.R.*, 92 F.2d 569 (2d Cir. 1937) (counterinjunction denied).

In suits involving states, even the Full Faith and Credit Clause does not compel recognition of an anti-suit injunction. In *Pacific Employers Insurance Co. v. Industrial Accident Commission* [86] the Supreme Court held that when two states each create an exclusive remedy for a liability which each state has jurisdiction to impose, neither is bound to defer to the other's jurisdiction by enforcing the other jurisdiction's remedy to the exclusion of its own. Although one state may exercise [**73] its prescriptive jurisdiction to create an "exclusive" remedy for an injury, absent some other overriding constitutional stricture, that exclusivity is never so total as to prevent another sovereign from disregarding a foreign remedy in favor of its own administrative scheme tailored to serve its unique needs.

86 *See Pacific Employers Ins. Co. v. Industrial Accid. Comm'n*, 306 U.S. 493, 83 L. Ed. 940, 59 S. Ct. 629 (1939).

The same result is reached here *a fortiori*, since [HN27] the mandatory policies of the Full Faith and Credit Clause do not apply to international assertions of exclusive jurisdiction. The anti-suit injunction was a necessary and proper vehicle to protect the United States District Court's jurisdiction and prevent the evasion by KLM and Sabena of

important domestic laws governing their conduct of business within the United States.

C. *Paramount Nationality*

We turn now **[**74]** to the appellants' argument that Laker's nationality requires the United States District Court to defer to the injunctions issued by the courts of the United Kingdom.

KLM and Sabena do not dispute the power of the United States District Court to issue the injunction. They contend rather that the district court abused its discretion by issuing an anti-suit injunction instead of relinquishing its jurisdiction, staying its proceedings, or adopting some other vehicle of conflict resolution. Appellants are therefore in the contradictory position of supporting the right of English courts to issue an anti-suit injunction, but opposing the United States District Court's issuance of the same kind of injunction. The only way appellants can differentiate between the two injunctions is to focus on the nationality of Laker.

The similarity of the injunctions is underscored by the way Sabena phrased the issue posed by this case: "which sovereign, the United States or Great Britain, has the right to determine whether *British law* permits *Laker* to conduct *private treble damage actions in the United States*." [87] As counsel for Sabena recognized at oral argument, whether British law permits **[**75]** or proscribes certain activities is primarily a matter for the British courts to determine. [88] On parity of reasoning the availability of treble damage actions in **[*935]** United States courts is a question of United States law. Appellants' case thus hinges entirely on the consequences attending the existence in one court of nationality-based jurisdiction over Laker.

87 Sabena Br. at 12 (emphasis added).

88 Oral Argument Tr. at 14-15.

Appellants attempt to prioritize the authority of the courts to proceed in cases of concurrent jurisdiction by arguing that the nationality of the plaintiff gives the plaintiff's state an inherent advantage which displaces all other jurisdictional bases. They label this principle "paramount nationality," and present this as the theory of conflict resolution to be used when concurrent jurisdiction is present: "assuming that two or more states exercise jurisdiction over Laker's allegations, the state with jurisdiction over its national must have the paramount right **[**76]** to determine whether and, if so, where litigation by that national may go forward." [89]

89 Br. of Amici Curiae at 12 (footnote omitted).

We are asked to recognize an entirely novel rule. [HN28] Although a court has power to enjoin its nationals from suing in foreign jurisdictions, it does not follow that the United States courts must recognize an absolute right of the British government to regulate the remedies that the United States may wish to create for British nationals in United States courts. The purported principle of paramount nationality is entirely unknown in national and international law. Territoriality, not nationality, is the customary and preferred base of jurisdiction. [90] Moreover, no rule of international law or national law precludes an exercise of jurisdiction solely because another state has jurisdiction. [91] In fact, international law recognizes that a state with a territorial basis for its prescriptive **[**77]** jurisdiction may establish laws intended to prevent compliance with legislation established under authority of nationality-based jurisdiction. [92]

90 *See* RESTATEMENT (REVISED) § 402 Comment b (Tentative Draft No. 2), *supra* note 21; RESTATEMENT (SECOND) § 30

Comment b, *supra* note 20.

91 RESTATEMENT (SECOND) § 37, *supra* note 20; *id.* § 39 Comment b, at 112. In most situations international law does not provide for choosing among competing bases of jurisdiction to prescribe conduct. *Id.* It follows that no single base is inherently superior to any other, as appellants assert.

92 RESTATEMENT (SECOND) § 30 Comment c, *supra* note 20.

All proposed methods of avoiding conflicts stemming from concurrent jurisdiction indicate that [HN29] nationality of the parties is only one factor to consider, not the paramount or controlling factor. [93] Appellants have not cited any cases where [**78] the principle has been followed as a method of choosing between competing claims of jurisdiction, despite the numerous occasions when the principle could have been decisive. [94] As this paucity of case law implies, significant adverse consequences would attend the adoption of this rule, and we decline to do so.

93 *See, e.g.*, RESTATEMENT (SECOND) § 40, *supra* note 20; RESTATEMENT (REVISED) § 403 (Tentative Draft No. 2), *supra* note 21.

94 *E.g., Pacific Employers Ins. Co. v. Industrial Accid. Comm'n*, 306 U.S. 493, 83 L. Ed. 940, 59 S. Ct. 629 (1939) (Massachusetts not entitled to exclusive jurisdiction over workers compensation claim of Massachusetts resident-employee); *Case of the S.S. "Lotus,"* (1927) P.C.I.J., Ser. A., No. 10 at 18, 2 M. Hudson, World Court Reports 20 (France not entitled to exclusive jurisdiction over prosecution of allegedly negligent French vessel operator).

The rationale behind the claim of paramount nationality seems to be that particularly important [**79] foreign sovereign prerogatives are infringed when a foreign national sues in domestic courts against the wishes of a foreign state. However, this argument ignores the stronger policy interests of the domestic forum. If a country has a right to regulate the conduct of its nationals, then *a fortiori* it has the power to regulate the activities of its *very governmental organizations*, such as its courts, which it establishes and maintains for the purpose of furthering its own public policies.

[HN30] United States courts must control the access to their forums. No foreign court can supersede the right and obligation [*936] of the United States courts to decide whether Congress has created a remedy for those injured by trade practices adversely affecting United States interests. Our courts are not required to stand by while Britain attempts to close a courthouse door that Congress, under its territorial jurisdiction, has opened to foreign corporations. Under the nationality base of jurisdiction, Britain can punish its corporations for walking through that courthouse door, but it cannot [**80] close the American door. Thus, although British courts can sanction their citizens for resorting to United States antitrust remedies, United States courts are not required to cut off the availability of the remedy.

The position advanced by appellant would require United States courts to defer to British policy when there is no statement by Congress that it does not wish the courts to provide the remedy. Appellants' argument that there is no absolute duty to exercise jurisdiction has no merit in this context. [95] It is based on abstention and *forum non conveniens* cases, which in turn are premised on the availability of a second forum that can fully resolve the plaintiff's claims. In this case, the English Court of Appeal has admitted that there is no other forum for Laker's claims.

95 *See* Br. of Appellant Sabena at 16 n.1.

Besides lacking any basis in national or international law, and besides ignoring important domestic interests, the paramount nationality rule would generate more interference [**81] than it would resolve. Legislation based on nationality tends to encourage chauvinism and discrimination without enhancing international comity. [96] The paramount nationality rule would be no exception. Foreign plaintiffs in our courts could routinely face public policy challenges in

their domestic courts, while our courts would be required to stay proceedings pending foreign authorization. On the other hand, as the district court noted, United States courts could use corporate nationality as a pretext to interject themselves in foreign proceedings involving United States corporations and subsidiaries. [97]

96 *See* Davidow, *Extraterritorial Antitrust and the Concept of Comity*, 15 J. WORLD TRADE L. 500, 508 (1981).

97 District Court Op., 559 F. Supp. at 1132.

The paramount nationality rule would also be impractical to administer. It would be difficult or impossible to determine when the nationality of a corporation is sufficiently strong that legitimate territorial contacts [**82] should be nullified. [98] There are at least five competing methods of determining nationality of a corporation. [99] Multiple countries could simultaneously assert controlling jurisdiction over one "national" corporation based, for example, on shareholder nationality, state of incorporation, or other corporate links to a particular forum. There would be no paramount nation in this situation. The conflicts associated with concurrent jurisdiction would continue to confront the courts.

98 Davidow, *Extraterritorial Antitrust and the Concept of Comity*, 15 J. WORLD TRADE L. 500, 508 (1981).

99 P. BLUMBERG, THE LAW OF CORPORATE GROUPS § 20.02 (1983).

Finally, KLM and Sabena are not British nationals. Thus, their claims are fundamentally different from those advanced by British Airways and British Caledonian. Nothing gives KLM or Sabena a supreme right to vindicate the British national interests that may be implicated by Laker's suits. Sabena, at least, is specifically entitled to the protection [**83] of United States antitrust laws under its air services agreement. [100] KLM no doubt would expect the same protection. [101] No rule of paramount nationality should free them from obligation under United States antitrust laws and at the same time protect them from other corporations' violations. Contrary to appellants' arguments, Laker's nationality is [*937] clearly an insufficient basis to reverse the district court.

100 United States-Belgium Air Transport Treaty at art. 11(2), *supra* note 76.

101 *See* United States-Netherlands Air Transport Treaty at arts. 5, 6, 29 U.S.T. at 3094-95, *supra* note 38.

D. *International Comity*

Appellants and amici curiae argue strenuously that the district court's injunction violates the crucial principles of comity that regulate and moderate the social and economic intercourse between independent nations. We approach their claims seriously, recognizing that comity serves our international system like the mortar which cements [**84] together a brick house. No one would willingly permit the mortar to crumble or be chipped away for fear of compromising the entire structure.

[HN31] "Comity" summarizes in a brief word a complex and elusive concept -- the degree of deference that a domestic forum must pay to the act of a foreign government not otherwise binding on the forum. Since comity varies according to the factual circumstances surrounding each claim for its recognition, the absolute boundaries of the duties it imposes are inherently uncertain. [102] However, the central precept of comity teaches that, when possible, the decisions of foreign tribunals should be given effect in domestic courts, since recognition fosters international cooperation and encourages

reciprocity, thereby promoting predictability and stability through satisfaction of mutual expectations. The interests of both forums are advanced -- the foreign court because its laws and policies have been vindicated; the domestic country because international cooperation and ties have been strengthened. The rule of law is also encouraged, which benefits all nations. [**85] [103]

102 *See Hilton v. Guyot*, 159 U.S. 113, 164-65, 40 L. Ed. 95, 16 S. Ct. 139 (1895).

103 *See* Maier, *Extraterritorial Jurisdiction at a Crossroads: An Intersection Between Public and Private International Law*, 76 AM. J. INT'L L. 280, 283 (1982).

Comity is a necessary outgrowth of our international system of politically independent, socio-economically interdependent nation states. As surely as people, products and problems move freely among adjoining countries, so national interests cross territorial borders. But no nation can expect its laws to reach further than its jurisdiction to prescribe, adjudicate, and enforce. Every nation must often rely on other countries to help it achieve its regulatory expectations. [HN32] Thus, comity compels national courts to act at all times to increase the international legal ties that advance the rule of law within and among nations.

[**86] However, there are limitations to the application of comity. [HN33] When the foreign act is inherently inconsistent with the policies underlying comity, domestic recognition could tend either to legitimize the aberration or to encourage retaliation, undercutting the realization of the goals served by comity. No nation is under an unremitting obligation to enforce foreign interests which are fundamentally prejudicial to those of the domestic forum. Thus, from the earliest times, authorities have recognized that the obligation of comity expires when the strong public policies of the forum are vitiated by the foreign act. [104] [*938] Case law on the subject is extensive and recognizes the current validity of this exception to comity. [105]

104 *See Hilton v. Guyot*, 159 U.S. 113, 164, 40 L. Ed. 95, 16 S. Ct. 139 (1895); Maier, *Extraterritorial Jurisdiction at a Crossroads: An Intersection Between Public and Private International Law*, 76 AM. J. INT'L 280, 282 (1982) (quoting U. HUBER, DE CONFLICTU LEGUM). In his classic COMMENTARIES ON THE CONFLICT OF LAWS 30, 32-33 (1834) (Arno Press ed. 1972), Joseph Story also recognized that foreign laws ought to be given force in domestic forums only "so far as they do not prejudice the power or right of other governments, or of their citizens." This principle, he stated,

> seems irresistibly to flow from the right and duty of every nation to protect its own subjects against injuries resulting from the unjust and prejudicial influence of foreign laws; and to refuse its aid to carry into effect any foreign laws, which are repugnant to its own interests and polity.
>
> It is difficult to conceive, upon what ground a claim can be rested, to give any municipal laws an extraterritorial effect, when those laws are prejudicial to the rights of other nations, or their subjects. It would at once annihilate the sovereignty and equality of the nations, which should be called upon to recognize and enforce them; or compel them to desert their own proper interest and duty in favor of strangers, who were regardless of both. A claim, so naked of principle and authority to support it, is wholly inadmissible.

See also id. at 37.

[**87]

105 *E.g., Tahan v. Hodgson*, 213 U.S. App. D.C. 306, 662 F.2d 862, 864, 866 (D.C. Cir. 1981); *Clarkson Co., Ltd. v. Shaheen*, 544 F.2d 624, 629 (2d Cir. 1976); *Somportex Ltd. v. Philadelphia Chewing Gum Corp.*, 453 F.2d 435, 440 (3d Cir.), *cert. denied*, 405 U.S. 1017, 31 L. Ed. 2d 479, 92 S. Ct. 1294 (1971); *Kenner Prods. Co. v. Societe Fonciere et Financiere Agache-Willot*, 532 F. Supp. 478, 479; *Sumitomo Corp. v. Parakopi Compania Maratima, S.A.*, 477 F. Supp. 737, 742 (S.D. N.Y. 1979), *aff'd*, 620 F.2d 286 (2d Cir. 1980); *Duplan Corp. v. Deering Milliken, Inc.*, 397 F. Supp. 1146 (D.S.C. 1975).

Opinions vary as to the degree of prejudice to public policy which should be tolerated before comity will not be

followed, but by any definition the injunctions of the United Kingdom courts are not entitled to comity. This is because the action before the United Kingdom courts is specifically intended to interfere with and terminate Laker's United States antitrust [**88] suit.

The district court's anti-suit injunction was purely *defensive* -- it seeks only to preserve the district court's ability to arrive at a final judgment adjudicating Laker's claims under United States law. This judgment would neither make any statement nor imply any views about the wisdom of British antitrust policy. In contrast, the English injunction is purely *offensive* -- it is not designed to protect English jurisdiction, or to allow English courts to proceed to a judgment on the defendant's potential liability under English anticompetitive law free of foreign interference. Rather, the English injunction seeks only to quash the practical power of the United States courts to adjudicate claims under United States law against defendants admittedly subject to the courts' adjudicatory jurisdiction. The Court of Appeal itself recognized that there is no other forum available for resolution of Laker's claims.

It is often argued before United States courts that the application of United States antitrust laws to foreign nationals violates principles of comity. Those pleas are legitimately considered. [106] [**89] [HN34] In conducting this inquiry, a court must necessarily examine whether the antitrust laws were clearly intended to reach the injury charged in the complaint. [107] If so, allowing the defendant's conduct to go unregulated could amount to an unjustified evasion of United States law injuring significant domestic interests. This is one context in which comity would not be extended to a foreign act. On the other hand, if the anticompetitive aspect of the alleged injury is not appreciable; the contacts with the United States are attenuated; and the actions of foreign governments denote the existence of strong foreign interests, then comity may suggest a lack of Congressional intent to regulate the alleged conduct. [108] In this context, comity may have a strong bearing on whether application of United States antitrust laws should go forward. [109]

106 *Pacific Seafarers, Inc. v. Pacific Far East Line, Inc.*, 131 U.S. App. D.C. 226, 404 F.2d 804, 814 n.31 (D.C. Cir. 1968), *cert. denied*, 393 U.S. 1093, 21 L. Ed. 2d 784, 89 S. Ct. 872 (1969) (principles of comity are appropriately considered when construing antitrust laws). [**90]

107 *See National Bank of Canada v. Interbank Card Ass'n*, 666 F.2d 6, 8 (2d Cir. 1981).

108 *See, e.g., Lauritzen v. Larsen*, 345 U.S. 571, 582-83, 592-93, 97 L. Ed. 1254, 73 S. Ct. 921 (1953); *United States v. Aluminum Co. of Am.*, 148 F.2d 416, 443 (2d Cir. 1945).

109 In this case, the injuries alleged in Laker's complaints are clearly within the scope of the antitrust laws; the interests at stake in Laker's action here are primarily those of United States consumers and lenders; and Congress has expressly allowed foreign corporations to sue for violations of the Sherman and Clayton Acts. *See Pfizer Inc. v. India*, 434 U.S. 308, 312, 98 S. Ct. 584, 54 L. Ed. 2d 563 n.9 (1978). Regulation of the appellants' conduct is entirely consistent with their treaty obligations to conduct business here without participating in predatory or discriminatory pricing practices. Thus, "it is the Sherman Act's applicability, rather than its inapplicability, that is supported by consideration of the 'comity' factors." *Pacific Seafarers, Inc. v. Pacific Far East Line, Inc.*, 131 U.S. App. D.C. 226, 404 F.2d 804, 814 n.31 (D.C. Cir. 1968), *cert. denied*, 393 U.S. 1093, 21 L. Ed. 2d 784, 89 S. Ct. 872 (1969).

[**91] [*939] However, the appellants' plea to comity is fundamentally different. KLM and Sabena contend that comity compels us to recognize a decision by a *foreign* government that *this court* shall not apply its own laws to corporations doing business in this country. [HN35] Thus, the violation of public policy vitiating comity is not that the evasion of United States antitrust law might injure United States interests, but rather that United States judicial functions have been usurped, destroying the autonomy of the courts. Under the position advanced by appellants, the United States District Court would no longer be free to rule that comity prevented the United States from exercising prescriptive jurisdiction over the defendants, since that determination would be made as of right by a separate forum. [110]

110 A defendant's claims that foreign law forbids a foreign national from prosecuting a United States antitrust action should be made initially in the United States District Court free from the coercive threat of a possible anti-suit injunction. If justified by principles of comity or the lack of sufficient implication of United States interests, that claim could be granted. In making such a ruling the district court would not necessarily be required to resolve unsettled questions of foreign law, such as whether the foreign plaintiff would violate foreign law by suing under United States antitrust claims, since the district court would have discretion to stay the action pending a special proceeding in the foreign court brought for the limited purpose of resolving that issue, if the status of the foreign law were unclear. *See Lehman Bros. v. Schein*, 416 U.S. 386, 389-91, 40 L. Ed. 2d 215, 94 S. Ct. 1741 (1974). *Cf. Louisiana Power & Light Co. v. City of Thibodaux*, 360 U.S. 25, 3 L. Ed. 2d 1058, 79 S. Ct. 1070 (1959) (federal district court properly stayed federal proceedings pending the initiation and resolution of a state court action to construe an uninterpreted state statute).

[92]** In this latter context we cannot rule that the district court abused its discretion to protect its jurisdiction. Between the state courts, the Full Faith and Credit Clause has not been held to compel recognition of an anti-suit injunction. [111] *A fortiori*, the principles of comity do not prevent proceeding in the face of a foreign injunction.

111 *See, e.g., Pacific Employers Ins. Co. v. Industrial Accid. Comm'n*, 306 U.S. 493, 83 L. Ed. 940, 59 S. Ct. 629 (1939); *James v. Grand Trunk Western R.R. Co.*, 14 Ill. 2d 356, 152 N.E.2d 858, *cert. denied*, 358 U.S. 915, 3 L. Ed. 2d 239, 79 S. Ct. 288 (1958).

[HN36] Comity ordinarily requires that courts of a separate sovereign not interfere with concurrent proceedings based on the same transitory claim, at least until a judgment is reached in one action, allowing res judicata to be pled in defense. The appeal to the **[**93]** recognition of comity by the American court in order to permit the critical issues to be adjudicated in England, which is the plea made by appellants here, thus comes based on a very strange predicate. Since the action seeking to determine Laker's right to recover for anticompetitive injuries was first instituted in the United States, the initial opportunity to exercise comity, if this were called for, was put to the United Kingdom courts. No recognition or acceptance of comity was made in those courts. The appellants' claims of comity now asserted in United States courts come burdened with the failure of the British to recognize comity.

Although reciprocity may no longer be an absolute prerequisite to comity, [112] certainly our law has not departed so far from common sense that it is reversible error for a court not to capitulate to a foreign judgment based on a statute like the British Protection of Trading Interests Act, designed to prevent the court from resolving legitimate claims placed before it. We cannot forget that the foreign injunction which creates an issue of comity or forbearance was generated by the English Executive's deliberate interference with a proceeding **[**94]** which had been ongoing in the American courts for over six months. Deference to the English courts is now asked in a situation in which all the English courts are doing is supporting and acquiescing in the action taken by their executive. There never would have been any situation in which comity or forbearance would have become an issue if some of the defendants involved in the American suit **[*940]** had not gone into the English courts to generate interference with the American courts.

112 *Tahan v. Hodgson*, 213 U.S. App. D.C. 306, 662 F.2d 862, 864, 867-68 (D.C. Cir. 1981).

There is simply no visible reason why the British Executive, followed by the British courts, should bar Laker's assertion of a legitimate cause of action in the American courts, except that the British government is intent upon frustrating the antitrust policies of the elective branches of the American government. The effort of the British therefore is not to see that justice is done anywhere, either in the United **[**95]** States or British courts, but to frustrate the enforcement of American law in American courts against companies doing business in America. Absent a clear treaty concluded by the United States Executive Branch, this simply cannot be agreed to by the courts of the United States.

Nothing in the British Executive order and directions suggests that they are entitled to comity. The order and directions purport to counteract United States regulation of international trade outside its territorial jurisdiction. [113] The Protection

of Trading Interests Act and the order govern "any person in the United Kingdom who carries on business there." [114] They forbid any person in the United Kingdom from furnishing "any commercial document *in the United Kingdom*," or "any commercial information [apparently *regardless of location*] which relates to the said Department of Justice investigation or the grand jury or the District Court proceedings." [115] Even United States airlines would be swept within these broad directives, but for the directions' specific exclusion of United States carriers.

113 *See* App. Tab 6, *supra* note 10.

[96]**

114 *Id.*; Protection of Trading Interests Act § 1, *supra* note 4.

115 App. Tab 6, *supra* note 10 (emphasis added).

The English Executive has thus issued an order to every airline in the world doing business in England to refuse to submit to the jurisdiction of the American court and not to submit any documents from England pursuant to an order of the American court. If the exercise of "extraterritorial" jurisdiction under United States antitrust laws can ever be described as arrogant, the order and directions issued by the British Government certainly bear the same characteristic. United States antitrust laws are enforced where there is an impact in the United States, but only after an adjudication in the United States courts of a violation. Here the English Executive has presumed to bar foreigners from complying with orders of an American court before there is an adjudication by a court on the merits of the dispute.

Moreover, since oral argument before this court, the English Secretary of State has interpreted the order and directions to bar the furnishing of any "commercial **[**97]** information," even that located exclusively within United States territory. [116] On the basis of this interpretation the British Government has refused to permit Laker's use of commercial information contained in documents situated in the United States to respond to interrogatories propounded by Trans World Airlines. The orders thus interfere with any attempt by Laker to use any commercial information, *whether located in the United Kingdom or the United* **[*941]** *States*, to proceed against any of the defendants, *whether British or American.*

116 Letter from Peter J. Nickels to Clerk George A. Fisher, with attachment (5 Jan. 1984); letter from Carl W. Schwartz to Clerk George A. Fisher, with attachments (12 Jan. 1984) (*see* letters from Durrant Piesse to R. J. Ayling, Esq., of The Solicitor's Office, Dept. of Trade and Industry (20 Sept. 1983, 3 Oct. 1983, 16 Nov. 1983, 12 Dec. 1983) [requesting permission to use commercial information in responding to interrogatories served by TWA]; letters from R. J. Ayling to Durrant Piesse (21 Oct. 1983, 9 Dec. 1983, 15 Dec. 1983) [denying permission based on interpretation by the Secretary of State of the order and directions]). Apparently Laker argued to the Secretary of State that the order and directions do not bar Laker from producing documents located in the United States and should therefore not be interpreted to prevent Laker from answering interrogatories based on information contained in those documents. The Secretary of State interpreted the order and directions literally, concluding that Laker's answers to interrogatories may not disclose commercial information regardless of whether the information was derived from documents that could be produced. *Id.*

[98]** This development completely undermines the appellants' strongest argument in favor of the application of comity -- namely, that all United States interests protected under the antitrust laws could be adequately enforced through means other than a treble damage suit, such as a civil or criminal action brought by the Government, [117] or a creditors' class action. [118] Since the British Government is refusing to permit Laker to proceed with its suit even insofar as it relates to American defendants, it is clear that it would prevent Laker's participation in any proceeding designed to vindicate United States interests allegedly harmed as a result of injuries suffered by Laker and its customers. [119] Thus, Laker would be hampered in assisting the plaintiffs in any alternative action. Without crucial information provided by the injured party, Laker, any other suit would be procedurally doomed to failure, regardless of its merits. *Therefore, comity can not be extended on the grounds that the British directions protect solely British interests while permitting the*

United States to vindicate its own policies; the truth, the reality, is far different.

117 A grand jury investigation may be pending. We are uninformed as to its current status.

[**99]

118 Oral Argument Tr. at 26-37. As a general rule, the stockholders and creditors of corporations injured by antitrust violations do not have standing to vindicate the injury. However, this rule is based on the fact that the direct victim of the injury -- the corporation -- is ordinarily capable of protecting the creditors' private interest and the public's general interest in effective antitrust enforcement. P. AREEDA & D. TURNER, II Antitrust Law § 336(c) (1982). As in any derivative action, the case for creditor or stockholder standing would be stronger when the corporation could not enforce its own rights. *See, e.g., Loeb v. Eastman Kodak Co.*, 183 F. 704, 709 (3d Cir. 1910) (denying standing to a creditor of a bankrupt corporation, but stating a creditor should be permitted to sue in the name of the bankruptcy trustee if the latter were barred). In view of our disposition of this case, we need not decide whether Laker's American creditors would have standing to redress Laker's alleged antitrust injuries.

119 For example, the directions issued pursuant to the order state in the broadest possible terms that Laker shall not "comply, or cause or permit compliance, whether by themselves, their officers, servants or agents, *with any requirement to produce or furnish to the United States' Department of Justice, the grand jury or the District Court* any document in the United Kingdom *or any commercial information which relates to the said Department of Justice investigation or the grand jury or District Court proceedings." See* App. Tab 6, *supra* note 10.

[**100] If we are guided by the ethical imperative that everyone should act as if his actions were universalized, then the actions of the British Executive in this particular matter scarcely meet the standard of Kant. [120] For, if the United States and a few other countries with major airlines enacted and enforced legislation like the Protection of Trading Interests Act, the result would be unfettered chaos brought about by unresolvable conflicts of jurisdiction the world over. If we were to forbid every American airline and every foreign airline doing business in the United States from producing documents in response to the summons of an English court, or a French court, or a German court, and the French and the German governments were to enact and enforce similar legislation, there could be no complete resolution of any legal dispute involving airlines around the world. The operations of the airlines would be snarled in a criss -cross of overlapping and tangled restrictions to the extent that no airline could be certain of its legal obligations anywhere. Thus, even the practical consequences that would flow from a grant of comity counsel against deferring to the British injunctions [**101] triggered by the Protection of Trading Interests Act. [121]

120 *See* J. WATSON, THE PHILOSOPHY OF KANT 230-31 (1901).

121 Of course, the British government does not intend to invoke the Protection of Trading Interests Act to bar all jurisdiction exercised by United States courts over foreign airlines -- just that necessary to provide a forum for the enforcement of American antitrust laws. This illustrates that the conflict here is between deeply felt and long held economic and political policies of both the United States and the British governments, and that the courts of the respective jurisdictions are in no position to resolve that dispute by conceding comity to the decrees of the other. The comity we are asked to invoke is thus comity for the British Executive -- and that is something better left to the American Executive to negotiate. Conceding comity to the actions of the British courts, which were brought about and directed rather specifically by the actions of the British Executive, and whose sole purpose is the unilateral subjugation of United States interests to those of Great Britain, would require the American judges to abdicate their oath of office to uphold the laws of the United States. This we cannot conscientiously do, however much we understand and respect the position that our English judicial peers are in. See *infra* parts II. F. 1 and II. F. 3.

[**102] [*942] There is nothing in the nature of the parties which suggests comity should be exercised. Laker appears before the court as a voluntary plaintiff, under no compulsion to sue. Laker prosecutes its action here subject to sanctions that may be issued against it in the United Kingdom. Thus, there is no suggestion that comity should be exercised to avoid hardship to a party who might otherwise be caught between the inconsistent imperatives of two forums.

No facts have been presented here suggesting that the antitrust suit adversely affects the operations of foreign governments. Laker is a privately owned airline. To the extent KLM and Sabena are governmentally owned, they are non-British. The ownership of these airlines implicates no significant interests of Britain as a state. The parties have not seriously asserted otherwise.

Similarly, the parties have not invoked either the sovereign immunity doctrine or the act of state doctrine, which insulate from review those foreign governmental actions which are not compatible with judicial scrutiny in our domestic courts. That neither of these doctrines even arguably would apply here is further evidence that no significant **[**103]** British or other governmental interest would be violated by Laker's suit.

Although unlikely, it may subsequently be shown that there was sufficient foreign governmental involvement that enforcement of United States antitrust laws is not appropriate. [122] In that event, any of several other well-established principles could be invoked in favor of the defendant. [123] However, these are hurdles that are more appropriately cleared at later stages in the proceeding when the facts are fully developed.

122 Sabena has suggested that the alleged conspiracies may implicate the involvement of several British governmental authorities, including the Department of Trade, Civil Aviation Authority, and Bank of England. Br. of Appellant Sabena at 9.

123 *See generally*, J. ATWOOD & K. BREWSTER, 1 ANTITRUST AND AMERICAN BUSINESS ABROAD §§ 8.02, 8.12-8.14 (1981) (discussing applicability of *Parker v. Brown*, 317 U.S. 341, 87 L. Ed. 315, 63 S. Ct. 307 (1943); *Noerr/Pennington* doctrine; and defense of foreign governmental compulsion).

[104]** Finally, we note that the district court did grant comity to the English orders and proceedings to the extent it could do so consistently with its duty to defend its jurisdiction. The court offered to narrow the scope of its preliminary injunction if KLM or Sabena would submit language permitting the defendants to proceed in Great Britain without leaving them free to secure orders which would interfere with the district court's pending litigation. [124] KLM and Sabena ignored this invitation precisely because their sole purpose is the interference with this action. KLM and Sabena cannot now argue that the district court abused its discretion by entering an overly restrictive injunction in violation of comity.

124 District Court Op., 559 F. Supp. at 1139 n. 63. *See also Cargill v. Hartford Acc'd & Indem. Co.*, 531 F. Supp. 710, 715 (D. Minn. 1982) (refusing to enjoin commencement of suits not directly related to the domestic proceedings); *Medtronic, Inc. v. Catalyst Research Corp.*, 518 F. Supp. 946, 954, 957 (D. Minn.), *aff'd*, 664 F.2d 660 (8th Cir. 1981) (limiting injunction to bar only foreign injunctive relief, but permitting continuation of foreign damage actions based on same claim).

[105]** Now a word about the position of our dissenting colleague. We submit that the dissent relies on a skewed view of comity, ignoring the significant prejudice to the **[*943]** administration of justice in our courts under United States laws in order to accommodate the strongly asserted views of the British Executive and Judiciary. However laudatory the impulse to adjust and compromise, we are unable to plunge ahead as the dissent advocates. The path to "the seemly accommodation of . . . competing national interests" eked out by the dissent [125] turns comity into quicksand, snares the district court in the very pitfalls which it attempted to avoid, and leads the parties and the district court to a result so vague and ill-defined that it cannot possibly solve the problems raised by the actions of the two governments. This position is neither legally tenable nor pragmatically dictated by the extraordinary circumstances of this litigation.

125 Dissent Op. at 6.

The interpretation of international comity **[**106]** propounded by the dissent is a weak reed indeed under the aggravated facts of this case; it does not rest upon any legal precedent, and ignores the previously recognized limits on the doctrine. The central authority quoted, *Hilton v. Guyot*, recognizes that comity never *obligates* a national forum to ignore "the *rights of its own citizens* or of *other persons who are under the protection of its laws*." [126] Laker's United States creditors and consumers are entitled to the protection of United States antitrust laws. Furthermore, although not a United States citizen, as a corporation operating within the United States, Laker qualifies as an "other person" entitled to the protection of United States law. Heretofore comity has never been thought to require mandatory deferral to a foreign action primarily intended to cut off these domestic interests.

126 159 U.S. 113, 164, 16 S. Ct. 139, 40 L. Ed. 95 (1895) (emphasis added).

The dissent reaches this tenuous legal conclusion by attempting **[**107]** to discern the implications of *Dames & Moore v. Regan*, which suggests that a national government may prohibit its nationals from suing in national or other forums. [127]

127 453 U.S. 654, 101 S. Ct. 2972, 69 L. Ed. 2d 918 (1981).

However, in *Dames & Moore*, the action taken by our government preserved the United States claims and established a remedy for enforcing them against the previously blocked assets of a foreign country -- hence against that foreign country. In contrast, the British government, insofar as British corporations are concerned, would just cancel the entire claim -- without even permitting single damages. Thus, because *Dames & Moore* allowed a substitute procedure for enforcing the claims, we cannot equate it with the British position here, even against its own British corporations.

Additionally, this is not a suit against a government, but a private action against a private corporation on a claim based on monopolistic practices. The instant facts are thus so **[**108]** far removed from *Dames & Moore* that it cannot be said that there is anything in the spirit of *Dames & Moore* which is being violated by the court's injunction.

Dames & Moore is silent about the limits on the enforcement of a prohibition against suing in a particular forum. Although a United States citizen would violate United States law by suing in a foreign court in violation of executive agreements similar to those in *Dames & Moore*, the United States could enforce its own interests without interfering with the autonomy of the foreign judiciary or course of the foreign proceeding. On need look no further than the Protection of Trading Interests Act for any number of remedies: the foreign award could be subject to callbacks in United States courts, and criminal penalties or fines could be levied. Other civil sanctions could be exacted, such as revocation of business licenses and operating permits. Clearly the United States could enforce its own treaty obligations or domestic interests without taking the initiative to interfere with a foreign jurisdiction. Thus, there is nothing in *Dames & Moore* which suggests that a district court may not exercise **[*944]** **[**109]** its discretion to enjoin a foreign action when necessary to preserve its jurisdiction.

Moreover, where in *Dames & Moore* the vigorously asserted position of the Executive Branch was a crucial factor in favor of upholding restricted access to domestic forums, here it is the *inaction and silence* of the Executive Branch which is said to shut off the availability of the United States forum. Only a very small percentage of private antitrust actions are graced by the intervention of the Antitrust Division of the Department of Justice. This has never before been a prerequisite to maintaining a private antitrust claim. If we were to hold that the absence of this intervention indicated

a weakness in Laker's case, or prevented it from going forward, we would be making new antitrust law indeed -- law which would directly contravene the congressional purposes in establishing a private right of action.

There are other weighty reasons why the absence of any current expression of affirmative United States interest should not be fatal to Laker's antitrust action. The American Executive has been in contact with the British Executive seeking to iron out differences under the Bermuda II **[**110]** Treaty. [128] It may very well be that since the State Department is seized with the responsibility for negotiations with the British it has advised the Antitrust Division that it would be inappropriate for that division to take an adversary position in the ongoing private civil suit at this time.

128 *See infra* note 177.

The sensitive status of current negotiations may even preclude the Department of State from actively participating in this litigation. Significantly, the British Government is not involved in this litigation either, presumably confining itself to consultation and to the creation and interpretation of the executive orders giving rise to the controversy. This counsels against inviting the Executive to present the views of the United States on remand. Unless and until the views of the American Executive are made known, the absence of any Executive expression of United States sovereign or other interests should not be a bar to proceeding with Laker's suit, or to the protection of jurisdiction [**111] to hear the claim.

Putting aside the lack of any clear basis in comity, the result reached by the dissent would reverse the district court for abuse of discretion, although the district court has attempted to do what the dissent chastizes the court for omitting. The request for preliminary injunctive relief required immediate action; the dissent itself recognizes that the injunction was "fashioned under the strain of critical moments." [129] Because it was not precisely clear how broadly the injunction needed to be drafted, the court erred on the side of caution, but without prejudice to the rights of the defendants to move to narrow the injunction subsequently. It thus sought to preserve comity by protecting its jurisdiction while permitting foreign proceedings consistent with that jurisdiction.

129 Dissent Op. at 958.

The parties made no request to narrow that injunction. This omission is relevant, not as a waiver of their right to make further requests, but as evidence that there is no narrow relief [**112] which can be drafted to protect the admittedly legitimate United States jurisdiction while permitting participation in a British proceeding intended to terminate the American action. It is incongruous to suggest that comity requires a reversal of the district court so that the court can renew its previous offer.

In fact, the dissent offers no practical guidance about how the district court's jurisdiction can be guaranteed under the microscopic range of discretion apparently contemplated in the "further proceedings aimed at narrowing the injunction." [130] It states only that the injunction could be narrowed to allow KLM and Sabena to "follow" Swissair and Lufthansa in bringing declaratory judgment actions, barring only "countersuit injunctive relief *pendente* **[*945]** *lite*." [131] This is no protection at all for the district court. Swissair and Lufthansa do not seek a declaratory judgment that British law does not permit Laker to sue in American courts. If this were the only request made by Swissair and Lufthansa, then it might very well be permitted. [132]

130 *Id.* at 958.

131 *Id.* at 958.

[**113]

132 *See supra* note 110.

Instead, Lufthansa and Swissair seek a declaration that they did not breach English and other laws regulating restrictive practices. The writs specifically exclude any requests for a declaratory judgment concerning whether *United States* antitrust laws are violated. However, *the accompanying request for relief*, which it must be assumed they intend to seek if they succeed in obtaining a favorable declaratory judgment, *is not so limited: it seeks an injunction against any action in United States courts based on United States antitrust laws.* [133] The breadth of the relief requested is all the more unusual since the declaratory aspect of the writs exclude consideration of the United States antitrust law. By suggesting that KLM and Sabena should be permitted to seek this sort of a declaratory judgment, and, implicitly, obtain the requested relief, the dissent cannot seriously intimate that the district court would effectively protect its jurisdiction.

133 *See* App. Tab 2, *supra* note 10.

[**114] To the extent the dissent would permit the district court to preserve its jurisdiction under the terms of a more limited injunction along the lines contemplated by the district court's proposal, the net result on the desired remand would not be much different from that reached by the majority. There is nothing in our opinion which prevents KLM and Sabena from reconsidering their position or proposing a modification of the district court's order if anything less than complete frustration of the district court's jurisdiction would satisfy the appellants' objective.

F. *Judicial Reconciliation of Conflicting Assertions of Jurisdiction*

We recognize that the district court's injunction, precipitated as it was by preemptive interim injunctions in the High Court of Justice, unfortunately will not resolve the deadlock currently facing the parties to this litigation. We have searched for some satisfactory avenue, open to an American court, which would permit the frictionless vindication of the interests of both Britain and the United States. However, there is none, for the British legislation defines the British interest solely in terms of preventing realization of United States [**115] interests. The laws are therefore contradictory and mutually inconsistent.

1. *Nature of the Conflict*

The conflict faced here is not caused by the courts of the two countries. Rather, its sources are the fundamentally opposed national policies toward prohibition of anticompetitive business activity. These policies originate in the legislative and executive decisions of the respective counties.

[HN37] Congress has specifically authorized treble damage actions by foreign corporations to redress injuries to United States foreign commerce. [134] Equally significant, Congress has designed the private action as a major component in the enforcement mechanism. The treble damage aspect of private recoveries is the centerpiece of that enforcement mechanism. [135]

134 *Pfizer Inc. v. India*, 434 U.S. 308, 314, 54 L. Ed. 2d 563, 98 S. Ct. 584 (1978).

135 *See Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134, 139, 20 L. Ed. 2d 982, 88 S. Ct. 1981 (1968); *Westinghouse Electric Corp. v. City of Burlington*, 122 U.S. App. D.C. 65, 351 F.2d 762, 770 (D.C. Cir. 1965); P. AREEDA & D. TURNER, II ANTITRUST LAW § 331 at 149-150 (1982).

[**116] We find no indication in either the statutory scheme or prior judicial precedent that jurisdiction should not be exercised. Legitimate United States interests in protecting consumers, providing for vindicating creditors' rights, and regulating economic consequences of those doing substantial [*946] business in our country are all advanced under the congressionally prescribed scheme. These are more than sufficient jurisdictional contracts under *United States v. Aluminum Co. of America* [136] and subsequent case law to support the exercise of prescriptive jurisdiction in this case. Congress has been aware of the decades-long controversy accompanying the recurrent assertion of jurisdiction over foreign anticompetitive acts and effects in the United States dating back nearly forty years but has, with limited exceptions, [137] not yet chosen to limit the laws' application or disapprove of the consistent statutory interpretation reached by the courts. Thus, aside from the unprecedented foreign challenge to the application of the antitrust laws, there is noting in either the facts alleged in the complaint or the circumstances of the litigation which suggests jurisdiction should [**117] not be exercised in Laker's suit.

136 148 F.2d 416 (2d Cir. 1945).

137 *See* The Foreign Trade Antitrust Improvements Act of 1982, 96 Stat. 1246, 15 U.S.C.A. §§ 6a, 45(a)(3) (1982). In passing this Act, which clarifies the applicability of United States antitrust laws to export trade, Congress did not change either (1) the ability of the courts to exercise comity or otherwise recognize the peculiar problems associated with antitrust actions involving international transactions, or (2) the application of antitrust laws to conduct producing the requisite effect in United States territory. *See* Foreign Trade Antitrust Improvements Act of 1982, 97th Cong., 2d Sess., H. REP. 686 at 13 (1982).

The English courts have indicated that they, too, have acted out of the need to implement their mandatory legislative policy, and not out of any ill will towards our courts or the substantive law we are bound to follow. Although the injunctive relief sought by British Airways [**118] and British Caledonian set the stage for a direct conflict of jurisdiction, until action by the political branches of the English Government the English courts remained largely acquiescent to Laker's invocation of United States jurisdiction. Justice Parker's well reasoned judgment initially denied the injunctive relief sought by British Airways and British Caledonian. That judgment was rendered even after the district court issued the injunction under appeal here.

However, the government of the United Kingdom is now and has historically been opposed to most aspects of United States antitrust policy insofar as it affects business enterprises based in the United Kingdom. The British Government objects to the scope of the prescriptive jurisdiction invoked to apply the antitrust laws; the substantive content of those laws, which is much more aggressive than British regulation of restrictive practices; and the procedural vehicles used in the litigation of the antitrust laws, including private treble damage actions, and the widespread use of pretrial discovery. These policies have been most recently and forcefully expressed in the Protection of Trading Interests Act. [138]

138 Although we take issue with the combative, intrusive method of frustrating United States jurisdiction through which the British Executive has exported these policies, contrary to the implications of the dissent we do not find the British views to be inherently distasteful or unreasonable. Dissent Op. at 957.

We reject any suggestion that the standard of justice under British antitrust laws, which provide only for single damages, is inferior to the treble damage provisions of United States laws. Both sets of laws are designed to provide full justice to litigants, although the particular form and availability of remedies differs somewhat due to the divergent legislative intent behind the laws. We are not asked and do not purport to pass judgment on the British attitude, but only resolve the extent of the United States District Court's discretion to execute its duty of upholding United States laws in the instant circumstances.

[**119] The nature of the direct conflict between the political-economic policies of the two countries is put into focus

by considering whether the British Government would have been likely to attempt to stop Laker from suing in United States courts if Laker brought a suit other than an antitrust action. If Laker had sued the American defendants for fraud, or on a contract claim for failure of performance, the British would not have been at all interested in intervening, irrespective of the financial [*947] condition of Laker at the time it brought the suit. The indifference would not lessen whether British Airways and British Caledonian were included in the group sued by Laker in the United States court. It is the hated application of United States antitrust laws to conduct involving British corporations that has triggered the involvement of the British Government, and ultimately, the British courts.

Under the provisions of the Protection of Trading Interests Act, *after Justice Parker refused relief*, the English Secretary of State issued an order and directions prohibiting all those carrying on business in the United Kingdom, with the exception of United States designated [**120] air carriers, from complying with United States antitrust measures arising out of the provision of air carriage by United Kingdom designated airlines under the terms of the Bermuda II Treaty. Because these directions reflected the firm conclusion of the British Executive Branch that British trading interests were being threatened by Laker's antitrust claim, they presented an entirely different situation to the Court of Appeal than that which Justice Parker had faced. [139] The restrictions placed on the British airlines by these orders "fundamentally altered" the perceived ability of the Court of Appeal to permit concurrent actions. [140] Because *the directions of the British Executive* blocked British Caledonian and British Airways from complying with Laker's discovery requests, the court concluded that the British airlines could not thereafter adequately defend themselves. According to the Court of Appeal, this rendered Laker's claim "wholly untriable" and was therefore "decisive." [141]

139 Court of Appeal Judgment at 574, *supra* note 15. Thus, the Court of Appeal found it unnecessary to consider the correctness of the judgment of the High Court of Justice. *Id.*

[**121]

140 *Id.* at 584.

141 *Id.* at 591. It is not at all clear to us that the English courts were bound to uphold the Secretary's orders under the reasoning relied upon. We are not informed as to the exact scope of the English courts' authority to review actions of the executive for conformity to treaties or other governing law. Consequently we would never criticize or second guess the decision of the Court of Appeals to affirm the Secretary's order. However, it does not necessarily follow from the obligation of the English court to sustain its Executive that the English court must consider that the two British defendants would be unjustly treated in the American courts because they were unable to make a proper defense, since their production of documents has been by the *British* Executive order, *not* by any American act. If, because of their handicap in proof, these two defendants ultimately were to be unjustly treated in the American courts, then the complaint of injustice should be frankly made by the British court to its own Executive, which is solely responsible for creating the British defendants' disability. Although it sustained the validity of the order and directions issued by the British Executive, the court was free to point out that the problem of the two British defendants arose because of the act of the British Executive in denying them access to their defensive proof, not because of any violation of due process or injustice created by this particular American court or the American court system. Nor should it be presumed that the American court would be oblivious to the handicap imposed on the British defendants, if such exists, or powerless to take procedural steps to equalize matters.

Neither is it immediately apparent why the English injunction is necessary to protect the British defendants from suffering injustice in the United States courts. The orders apparently apply equally to Laker, preventing it from furnishing documents in the United Kingdom or any commercial information relating to the district court proceedings. As the Secretary of State's refusal to permit Laker to use commercial information in response to interrogatories served by the American defendants demonstrates, Laker is severely hampered in the advancement of its claims. The British parties appear to be on an equal footing.

If there is any injustice created in the proceedings, it is between Laker and the American defendants. The order and directions have been interpreted to bar only Laker's production of documents and commercial information -- the United States airlines are untouched. These defendants are free to assert defenses, make discovery requests against Laker, and seek penalties for non-compliance. Laker responds only at the risk of incurring British sanctions under the order and directions. The order and directions thus leave one group of parties -- the American defendants -- free to conduct their litigation -- while hampering the other party -- the plaintiff. *See also* Reply of Amici Curiae to Appellee's Memorandum as to Status of English Proceedings at 4: "Lufthansa and Swissair are advised, however, that the Directions do prevent U.K. nationals [e.g. *Laker*] . . . from complying with discovery demands by parties to the U.S. action (*including Lufthansa and Swissair*)." (emphasis added). This is an impairment to justice as objectionable as that complained of by the Court of Appeal.

We also note that the Court of Appeal may have temporarily lapsed from its resolve not to speculate about the merits of Laker's antitrust

claims under United States law when, to justify its conclusion that Laker's entire claim arose out of conduct related to the Bermuda II Treaty, the court concluded that the alleged impedance of the financial rescue operation was such an insignificant aspect of the alleged conspiracy that this assertion alone could not state a cognizable antitrust claim. Court of Appeal Judgment at 589, *supra* note 15. We raise these points not to suggest that the Court of Appeal's decision was wrongly decided under English law, but only to demonstrate the extreme degree of deference which that court felt obliged to grant to the legislative policies implemented in the Secretary of State's order and directions.

[122]** **[*948]** Thus, to a large extent the conflict of jurisdiction is one generated by the political branches of the governments. There is simply no room for accommodation here if the courts of each country faithfully carry out the laws which they are entrusted to enforce. The Master of the Rolls expressed hope that "the courts of the two countries will . . . never be in conflict. The conflict, if there be conflict, will be purely one between the laws of the two countries, for which neither court is responsible." [142] We echo that hope.

142 *British Airways Board v. Laker Airways Ltd. & Others* (Judgment of 30 March 1983) at 7, *reproduced* at App. Tab 4, *supra* note 10.

2. *Judicial Interest Balancing*

Even as the political branches of the respective countries have set in motion the legislative policies which have collided in this litigation, they have deprived courts of the ability meaningfully to resolve the problem. The American and English courts are obligated to attempt to reconcile **[**123]** two contradictory laws, each supported by recognized prescriptive jurisdiction, one of which is specifically designed to cancel out the other.

The suggestion has been made that this court should engage in some form of interest balancing, permitting only a "reasonable" assertion of prescriptive jurisdiction to be implemented. [143] However, this approach is unsuitable when courts are forced to choose between a domestic law which is designed to protect domestic interests, and a foreign law which is calculated to thwart the implementation of the domestic law in order to protect foreign interests allegedly threatened by the objectives of the domestic law. [144] Interest balancing in this context is hobbled by two primary problems: (1) there are substantial limitations on the court's ability to conduct a neutral balancing of the competing interests, and (2) the adoption of interest balancing is unlikely to achieve its goal of promoting international comity.

143 *See, e.g.*, RESTATEMENT (REVISED) § 403 (Tentative Draft No. 2), *supra* note 21.

144 *See Natural Resources Defense Council v. Nuclear Regulatory Comm'n*, 208 U.S. App. D.C. 216, 647 F.2d 1345, 1357 (D.C. Cir. 1981): "Some balancing, or *recognition of latent conflict of laws*, would seem judicious to reconcile the separate *but not inconsistent* national interests. . . ." (emphasis respectively added and original).

[124]** a. *Defects in the Balancing Process*

[HN38] Most proposals for interest balancing consist of a long list of national contacts to be evaluated and weighed against those of the foreign country. These interests may be relevant to the desirability of allocating jurisdiction to a particular national forum. However, their usefulness breaks down when a court is faced with the task of selecting one forum's prescriptive jurisdiction over that of another.

Many of the contacts to be balanced are already evaluated when assessing the existence of a sufficient basis for exercising prescriptive jurisdiction. [145] Other factors, **[*949]** such as "the extent to which another state may have an interest in regulating the activity," and "the likelihood of conflict with regulation by other states" [146] are essentially neutral in deciding between competing assertions of jurisdiction. Pursuing these inquiries only leads to the obvious conclusion that jurisdiction could be exercised or that there is a conflict, but does not suggest the best avenue of conflict

resolution. These types of factors are not [**125] useful in resolving the controversy.

145 Id. § 403(2) (a), (b). *See also Timberlane Lumber Co. v. Bank of America*, 549 F.2d 597, 614 (9th Cir. 1976) ("relative significance of effects in the United States;" "the extent to which there is explicit purpose to harm or affect American commerce;" "the foreseeability of such effect;" "the relative importance to the violations charged of conduct within the United States as compared with conduct abroad;" nationality or principal business locations of the parties); *Mannington Mills, Inc. v. Congoleum Corp.*, 595 F.2d 1287, 1297 (3d Cir. 1979) ("Nationality of the parties," "Existence of intent to harm or affect American commerce and its foreseeability").

146 RESTATEMENT (REVISED) § 403(a) (g), (h) (Tentative Draft No. 2), *supra* note 21. *See also Timberlane Lumber Co. v. Bank of America*, 549 F.2d 597, 614 (9th Cir. 1976) ("degree of conflict with foreign law or policy"); *Mannington Mills, Inc. v. Congoleum Corp.*, 595 F.2d 1287, 1297 (3d Cir. 1979) (same).

[**126] [HN39] Those contacts which do purport to provide a basis for distinguishing between competing bases of jurisdiction, and which are thus crucial to the balancing process, generally incorporate purely political factors which the court is neither qualified to evaluate comparatively nor capable of properly balancing. One such proposed consideration is "the degree to which the *desirability of such regulation* [of restrictive practices] is *generally accepted.*" [147] We doubt whether the legitimacy of an exercise of jurisdiction should be measured by the substantive content of the prescribed law. Moreover, although more and more states are following the United States in regulating restrictive practices, and even exercising jurisdiction based on effects within territory, [148] *the differing English and American assessment of the desirability of antitrust law is at the core of the conflict. An English or American court cannot refuse to enforce a law its political branches have already determined is desirable and necessary.*

147 RESTATEMENT (REVISED) § 403(2) (c) (Tentative Draft No. 2), *supra* note 21.

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148 *See* Picciotto, *Jurisdictional Conflicts, International Law and the International State System*, 11 INT'L J. SOC. L. 11, 23-26 (1983); Davidow, *Extraterritorial Antitrust and the Concept of Comity*, 15 J. WORLD TRADE L. 500, 500-02 (1981); Rahl, *International Application of American Antitrust Laws: Issues and Proposals*, 2 N.Y. J. INT'L & BUS. 336, 340-41 (1980).

The court is also handicapped in any evaluation of "the existence of *justified* expectations that might be protected or hurt by the regulation in question." [149] In this litigation, whether the reliance of Laker and its creditors on United States antitrust laws is justified depends upon whether one accepts the desirability of United States anti -trust law. Whether the defendants could justifiably have relied on the inapplicability of United States law to their conduct alleged to have caused substantial effects in the United States is based on the same impermissible inquiry. The desirability of applying ambiguous legislation to a particular transaction may imply the presence or absence of legislative intent. However, [**128] once a decision is made that the political branches intended to rely on a legitimate base of prescriptive jurisdiction to regulate activities affecting foreign commerce within the domestic forum, the desirability of the law is no longer an issue for the courts.

149 RESTATEMENT (REVISED) at § 403(2)(d) (Tentative Draft No. 2), *supra* note 21 (emphasis added).

[HN40] The "importance of regulation to the regulating state" [150] is another factor on which the court cannot rely to choose between two competing, mutually inconsistent legislative policies. We are in no position to adjudicate the relative importance of antitrust regulation or nonregulation to the United States and the United Kingdom. It is the crucial importance of these policies which has created the conflict. A proclamation by judicial fiat that one interest is

less "important" than the other will not erase a real conflict.

150 *Id.* § 403(2) (c).

[**129] Given the inherent limitations of the Judiciary, which must weigh these issues in the limited context of adversarial [*950] litigation, we seriously doubt whether we could adequately chart the competing problems and priorities that inevitably define the scope of any nation's interest in a legislated remedy. This court is ill-equipped to "balance the vital national interests of the United States and the [United Kingdom] to determine which interests predominate." [151] When one state exercises its jurisdiction and another, in protection of its own interests, attempts to quash the first exercise of jurisdiction "it is simply impossible to judicially 'balance' these totally contradictory and mutually negating actions." [152]

151 *In Re Uranium Antitrust Litigation*, 480 F. Supp. 1138, 1148 (N.D. Ill. 1978).

152 *Id.* We note that under the Tentative Drafts of the RESTATEMENT (REVISED) the reasonableness balancing could easily be circumvented. Section 415(2) permits the assertion of jurisdiction without a specific examination into reasonableness under § 403(2) and (3) when there was a "principal purpose" to affect United States commerce. *Compare* § 415(2) with § 415(3). Since a principal purpose is often found whenever there are effects on United States commerce, the reasonableness text of § 403(2) will often be superfluous.

[**130] Besides the difficulty of properly weighing the crucial elements of any interest balancing formula, one other defect in the balancing process prompts our reluctance to adopt this analysis in the context of preservation of jurisdiction. Procedurally, this kind of balancing would be difficult, since it would ordinarily involve drawn-out discovery and requests for submissions by political branches. There was no time for this process in the present case. Either jurisdiction was protected or it was lost. It is unlikely that the employment of a hasty and poorly informed balancing process would have materially aided the district court's evaluation of the exigencies and equities of Laker's request for relief.

b. *Promotion of International Comity*

We might be more willing to tackle the problems associated with the balancing of competing, mutually inconsistent national interests if we could be assured that our efforts would strengthen the bonds of international comity. However, the usefulness and wisdom of interest balancing to assess the most "reasonable" exercise of prescriptive jurisdiction has not been affirmatively demonstrated. This approach has not gained more than a temporary [**131] foothold in domestic law. Courts are increasingly refusing to adopt the approach. [153] Scholarly criticism has intensified. [154] Additionally, there is no evidence that interest balancing represents a rule of international law. Thus, there is no mandatory rule requiring its adoption here, since Congress cannot be said to have implicitly legislated subject to these international constraints. [155]

153 *National Bank of Canada v. Interbank Card Ass'n*, 666 F.2d 6 (2d Cir. 1981); *In re Uranium Antitrust Litigation*, 617 F.2d 1248 (7th Cir. 1980).

154 *See, e.g.*, Maier, *Interest Balancing and Extraterritoria l Jurisdiction*, 31 AM. J. COMP. L. 579 (1983); Grippando, *Declining to Exercise Extraterritorial Antitrust Jurisdiction on Grounds of International Comity: An Illegitimate Extension of the Judicial Abstention Doctrine*, 23 VA. J. INT'L L. 394 (1983); Kadish, *Comity and the International Application of the Sherman Act: Encouraging Courts to Enter the Political Arena*, 4 N.W. J. INT'L L. & BUS. 130 (1982); Rahl, *International Application of American Antitrust Laws: Issues and Proposals*, 2 N.W. J. INT'L & BUS. 336, 362-64 (1980). *Cf.* Juenger, *Conflict of Laws: A Critique of Interest Analysis*, 32 AM. J. COMP.

L. 1 (1984).

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155 Congress is presumed to legislate within the constraints of international law, unless it expressly manifests a contrary intent. *Natural Resources Defense Council v. Nuclear Regulatory Comm'n*, 208 U.S. App. D.C. 216, 647 F.2d 1345, 1357 (D.C. Cir. 1981); *Federal Trade Comm'n v. Compagnie de Saint-Gobain-Pont-a-Mousson*, 205 U.S. App. D.C. 172, 636 F.2d 1300, 1315 (D.C. Cir. 1980); RESTATEMENT (REVISED) § 134 (Tentative Draft No. 1) (1980), *supra* note 21; RESTATEMENT (SECOND) § 3(3), *supra* note 20.

If promotion of international comity is measured by the number of times United States jurisdiction has been declined under the "reasonableness" interest balancing approach, then it has been a failure. Implementation of this analysis has not resulted in a significant number of conflict resolutions favoring a foreign jurisdiction. A pragmatic assessment of those decisions adopting an interest balancing approach indicates *none where United States jurisdiction* [*951] *was declined* when there was more than a *de minimis* United States interest. [**133] [156] Most cases in which use of the process was advocated arose before a direct conflict occurred when the balancing could be employed without impairing the court's jurisdiction to determine jurisdiction. [157] [HN41] When push comes to shove, the domestic forum is rarely unseated. [158]

156 *See, e.g., Montreal Trading Ltd. v. Amax, Inc.*, 661 F.2d 864, 870 (10th Cir. 1981), *cert. denied*, 455 U.S. 1001, 71 L. Ed. 2d 868, 102 S. Ct. 1634 (1982) (effects were so "speculative and insubstantial" that "neither the Constitution nor the Sherman Act was intended" to reach the challenged conduct); *Vespa of Am. Corp. v. Bajaj Auto Ltd.*, 550 F. Supp. 224, 229 (N.D. Cal. 1982) (no effects); *Conservation Council of W. Australia v. Aluminum Co. of Am.*, 518 F. Supp. 270 (W.D. Pa. 1981) (no effects). Where there are only insubstantial or nonexistent effects on United States commerce, no interest balancing is necessary to conclude that jurisdiction does not exist. Indeed, application of interest balancing may obscure an accurate evaluation of the alleged effects resulting in an unwarranted extension of jurisdiction. *See National Bank of Canada v. Interbank Card Ass'n*, 507 F. Supp. 1113 (S.D. N.Y. 1980) (applying interest balancing and concluding that jurisdiction should be exercised), *reversed*, 666 F.2d 6 (2d Cir. 1981) (alleged effects were not sufficiently anticompetitive to come within purview of antitrust laws; no need to balance interests).

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157 *See, e.g., Wells Fargo & Co. v. Wells Fargo Express Co.*, 556 F.2d 406 (9th Cir. 1977); *Timberlane Lumber Co. v. Bank of America*, 549 F.2d 597 (9th Cir. 1976); *Mannington Mills, Inc. v. Congoleum Corp.*, 595 F.2d 1287 (3d Cir. 1979).

158 *See Industrial Development Corp. v. Mitsui & Co.*, 671 F.2d 876, 884-85 (5th Cir. 1982), *vacated on other grounds*, 460 U.S. 1007, 103 S. Ct. 1244, 75 L. Ed. 2d 475 (1983) (applying interest balancing to conclude that lower court erred in dismissing on jurisdictional grounds); *United States v. Vetco, Inc.*, 691 F.2d 1281 (9th Cir.), *cert. denied*, 454 U.S. 1098, 70 L. Ed. 2d 639, 102 S. Ct. 671 (1981); *Daishowa Int'l v. North Coast Export Co.*, 1982-2 Trade Cas. para. 64,774 (N.D. Cal. 1982). This result has been predicted. *See* Davidow, *Extra-territorial Antitrust and the Concept of Comity*, 15 J. WORLD TRADE L. 500, 513 (1981).

[**135] [HN42] Despite the real obligation of courts to apply international law and foster comity, domestic courts do not sit as internationally constituted tribunals. Domestic courts are created by national constitutions and statutes to enforce primarily national laws. [159] The courts of most developed countries follow international law only to the extent it is not overridden by national law. [160] Thus, courts inherently find it difficult neutrally to balance competing foreign interests. [161] When there is any doubt, national interests will tend to be favored over foreign interests. [162] This partially explains why there have been few times when courts have found foreign interests to prevail. [163]

159 Of course, international law forms a part of United States laws, and is enforced in United States courts. *See, e.g., The Paquete Habana*, 175 U.S. 677, 700, 44 L. Ed. 320, 20 S. Ct. 290 (1900); RESTATEMENT (REVISED) § 131, *supra* note 18.

160 *See* J. SWEENEY, C. OLIVER & N. LEECH, THE INTERNATIONAL LEGAL SYSTEM 14-23 (1981).

161 *See* Maier, *Interest Balancing and Extraterritorial Jurisdiction*, 31 AM. J. COMP. L. 579, 593-95 (1983).

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162 "In the conflict of laws it must often be a matter of doubt which should prevail; . . . whenever a doubt does exist, the court, which decides, will prefer the laws of its own country to that of the stranger." *Hilton v. Guyot*, 159 U.S. 113, 165, 40 L. Ed. 95, 16 S. Ct. 139 (1895).

163 Recognition of this fact in no way derogates from the status of international law, since in questions of conflict between the substantive goals of nations asserting concurrent jurisdiction to prescribe international law is generally neutral. *See* RESTATEMENT (SECOND) § 39 Comment b, *supra* note 20.

[HN43] The inherent noncorrelation between the interest balancing formula and the economic realities of modern commerce is an additional reason which may underlie the reluctance of most courts to strike a balance in favor of nonapplication of domestic law. An assertion of prescriptive jurisdiction should ultimately be based on shared assessments that jurisdiction is reasonable. [164] Thus, international **[**137]** law prohibits the assertion of prescriptive jurisdiction **[*952]** unsupported by reasonable links between the forum and the controversy. [165]

164 Maier, *Interest Balancing and Extraterritorial Jurisdiction,* 31 AM. J. COMP. L. 579, 584-85 (1983).

165 *See* RESTATEMENT (REVISED) § 403(1) (Tentative Draft No. 2), *supra* note 21. *Compare* RESTATEMENT (SECOND) OF THE CONFLICT OF LAWS § 9 (1971): "A court may not apply the local law of its own state to determine a particular issue unless such application of this law would be reasonable in the light of the relationship of the state and of other states to the person, thing or occurrence involved."

However, [HN44] it does not necessarily follow, as the use of interest balancing as a method of choosing between competing jurisdictions assumes, that there is a line of reasonableness which separates jurisdiction to prescribe into neatly adjoining **[**138]** compartments of national jurisdiction. There is no principle of international law which abolishes concurrent jurisdiction. [166] Since prescriptive jurisdiction is based on well recognized state contacts with controversies, the reality of our interlocked international economic network guarantees that overlapping, concurrent jurisdiction will often be present. [167] There is, therefore, no rule of international law holding that a "more reasonable" assertion of jurisdiction mandatorily [168] displaces a "less reasonable" assertion of jurisdiction as long as both are, in fact, consistent with the limitations on jurisdiction imposed by international law. [169] That is the situation faced in this case: the territoriality and nationality bases of jurisdiction of the United Kingdom and the United States are both unimpeached.

166 *See* M. WHITEMAN, 5 DIGEST OF INTERNATIONAL LAW 218-19 (1965).

167 Picciotto, *Jurisdictional Conflicts, International Law and the International State System*, 11 INT'L J. SOC. L. 11, 14, 25 (1983).

168 Of course, there is no requirement that the forum with jurisdiction exercise it to the fullest extent possible. RESTATEMENT (SECOND) § 40, *supra* note 20.

[139]**

169 An interest evaluation conducted through the *balancing* of competing interests can only function as an effective method of choosing between potential forums to the extent the less reasonable assertion is characterized as "unreasonable." Thus, Section 403(2) of the RESTATEMENT (REVISED) (Tentative Draft No. 2) appears to deny the existence or even the theoretical necessity of concurrent prescriptive jurisdiction.

However, read narrowly, Section 403 does not require this result. The terms of Section 403(1) suggest that an *evaluation of interests* is essential in determining whether there are sufficient ("reasonable") national contacts with the underlying transaction to allocate prescriptive jurisdiction to a forum. This examination of the reasonableness of the domestic forum's contacts, without explicitly balancing the weight of other foreign contracts, satisfies the prohibition of international law against unreasonable assertions of prescriptive jurisdiction. *See also* RESTATEMENT (REVISED) § 441 (Tentative Draft No. 2), *supra* note 21 (defining jurisdiction to adjudicate on the basis of reasonableness without referring to or balancing the reasonableness of a second forum's adjudicatory contacts).

Because Congress and the Executive can neither anticipate nor resolve all conflicts with foreign prescriptive jurisdiction, they legitimately expect the full participation of the Judiciary in minimizing conflicts of jurisdiction. *See* "Extraterritoriality and Conflicts of Jurisdiction," U.S. Department of State Current Policy Bulletin No. 481 at 4 (15 April 1983). Evaluating the strength of the United States interests in a particular transaction to determine the reasonableness of an assertion of jurisdiction is consistent with those expectations and assures that concurrent jurisdiction will never be lightly assumed.

[**140] In our federal system of parallel sovereign courts, several lines of cases recognize that prescriptive jurisdiction is often shared among several forums. [170] Those forums may participate in interforum compacts that provide a basis for allocating jurisdiction to one forum over another. [171] **[*953]** Similarly, the problems associated with overlapping bases of national taxation in international law are directly addressed by numerous bilateral and multilateral treaties rather than a judicially developed rule of exclusive jurisdiction grounded in a prioritization of the relative reasonableness of links between the state and the taxed entity. [172] Because we see no neutral principles on which to distinguish judicially the reasonableness of the concurrent, mutually inconsistent exercises of jurisdiction in this case, we decline to adopt such a rule here. [173]

170 *See Cory v. White*, 457 U.S. 85, 89, 72 L. Ed. 2d 694, 102 S. Ct. 2325 (1982); *Pacific Employers Ins. Co. v. Industrial Accident Comm'n*, 306 U.S. 493, 83 L. Ed. 940, 59 S. Ct. 629 (1939); *Texas v. Florida*, 306 U.S. 398, 410, 83 L. Ed. 817, 59 S. Ct. 563 (1938); *Kline v. Burke Construction Co.*, 260 U.S. 226, 43 S. Ct. 79, 67 L. Ed. 226 (1922).

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171 In some contexts, the Due Process Clause serves this function in the state and federal courts of the United States. *E.g., Texas v. New Jersey*, 379 U.S. 674, 678, 13 L. Ed. 2d 596, 85 S. Ct. 626 (1965); *Hartford Accid. & Indem. Co. v. Delta Pine & Land Co.*, 292 U.S. 143, 149, 78 L. Ed. 1178, 54 S. Ct. 634 (1934).

The actions of the British Government in this case indicate that Britain regards the Bermuda II Treaty as just such an interforum agreement, dislocating the application of the antitrust laws from the conduct challenged in Laker's complaint. However, since a dispute exists between the two governments, we can only assume that the United States Executive Branch does not interpret the agreement to confer an antitrust exemption on United Kingdom air carriers.

172 *See, e.g.*, RESTATEMENT (REVISED) §§ 412, 413 (Tentative Draft No. 2) *supra* note 21; RESTATEMENT (SECOND) § 37 Reporters' Note 1, *supra* note 20.

173 It may be that a rule of law should be developed allocating exclusive prescriptive jurisdiction to the forum with the most significant nexus to the underlying conduct. Given the inherent difficulty of administering an interest balancing formula, it is doubtful that a rule of exclusive jurisdiction based on a common conception of reasonableness will be developed by national courts. The current litigation underscores this point: in the decades since the United States began applying its antitrust laws to overseas conduct substantially affecting its territorial interests, neither the United States' nor United Kingdom's courts have accepted the other courts' definition of the legitimate scope of prescriptive jurisdiction in the antitrust area. It is to be hoped that the political branches of government will eventually negotiate practical solutions, such as those undergirding the area of international taxation, which, through their reciprocal ordering of national regulation, render academic the issue of whether a country would otherwise have the sovereign right to exert its authority in a particular manner.

[**142] 3. *Political Compromise*

The district court could capitulate to the British attacking law, at the cost of losing its jurisdiction to implement the substantive policies established by Congress. Alternatively it can act to preserve its jurisdiction, running the risk that counterinjunctions or other sanctions will eventually preclude Laker from achieving any remedy, if it is ultimately entitled to one under United States law. In either case the policies of both countries are likely to be frustrated at the cost of substantial prejudice to the litigants' rights.

We unhesitatingly conclude that United States jurisdiction to prescribe its antitrust laws must go forward and was therefore properly protected by the district court. Despite the contrary assertions of the British government, there is no indication in this case that the limits of international law are exceeded by either country's exercise of prescriptive jurisdiction. But even so, application of national law may go forward despite a conflict with international law. Both

Britain and the United States recognize this rule. [174] It follows *a fortiori* that national laws do not evaporate when counteracted by the legislation **[**143]** of another sovereign.

174 *See* RESTATMENT (REVISED) § 135(2) (Tentative Draft No. 1) (1980), *supra* note 20; J. SWEENEY, C. OLIVER, N. LEECH, THE INTERNATIONAL LEGAL SYSTEM 22 (1981).

Although, in the interest of amicable relations, we might be tempted to defuse unilaterally the confrontation by jettisoning our jurisdiction, we could not, for this is not our proper judicial role. The problem in this case is essentially a political one, arising from the vast difference in the political-economic theories of the two governments which has existed for many years. Both nations have jurisdiction to prescribe and adjudicate. Both have asserted that jurisdiction. However, this conflict alone does not place the court in a position to initiate a political compromise based on its decision that United States laws should not be enforced when a foreign jurisdiction, contrary to the domestic court's statutory duty, attempts to eradicate the domestic jurisdiction. Judges are not politicians. The courts are not **[**144]** organs of political compromise. It is impossible in this case, with all the good will manifested by the English Justices and ourselves, to negotiate an extraordinarily long arms-length agreement on the respective impact of our countries' policies regulating anti-competitive business practices.

It is permissible for courts to disengage when judicial scrutiny would implicate inherently **[*954]** unreviewable actions, such as conduct falling within the act of state or sovereign immunity doctrines. But both institutional limitations on the judicial process and Constitutional restrictions on the exercise of judicial power make it unacceptable for the Judiciary to seize the political initiative and determine that legitimate application of American laws must evaporate when challenged by a foreign jurisdiction. [175]

175 We disagree with the dissenting opinion precisely because it comes to rest at this untenable position. The "dissent" actually agrees with much of this opinion: it recognizes the legitimacy of the jurisdictional base to Laker's suit; it confirms the authority of the district court to issue a protective injunction; and it would not preclude the district court from issuing a more limited injunction on remand. It is only the "form" of the injunction drafted by the district court which the dissent finds so objectionable that reversal is advocated.

The dissent reaches this conclusion under the guise of "comity." However, the legal basis for this interpretation of comity is nonexistent. *See supra* pp. 942-944. Comity would be a more significant factor if the two appealing parties were British corporations, but they are not. KLM and Sabena are Dutch and Belgian entities. They are attempting to use the law and courts of a third country, Britain, to frustrate a previously commenced action in the United States. KLM and Sabena have made no request to resort to their own courts in reliance on their own air service agreements or relevant domestic legislation (*e.g.*, Law of 27 March 1969, as Amended on 21 June 1976, and Royal Decree of 6 February 1979 Concerning the Regulation of Marine and Air Transport, at *Bulletin Usuel des Lois et Arretes*, 1969, No. 723; *id.*, 10 September 1976, No. 1490, *id.*, 1979, No. 464). We can only assume that they do not intend to do so.

The real motivation for the dissent's position is the desire to avoid further conflict with the laws of our close friends and allies about the application of domestic United States law. This is apparent from the dissent's concern that an affirmance of the injunction would be regarded as "parochial," and from its charge that the injunction obstructs the functioning of our two countries' judicial system.

We share the same concerns. However, a reversal would not restore the "orderly operation" of our two nation's courts. Instead, it could permit one court entirely to shut down its autonomous sister courts. This certainly does not seem likely to foster parallel respect.

Moreover, the existence of conflict alone does not establish the judicial perogative to relinquish prescriptive jurisdiction. Any legitimate assertion of prescriptive jurisdiction seeks to advance the national interests undergirding the jurisdiction; an assertion of that prescriptive power in an area of concurrent jurisdiction may give rise to allegations of parochialism. Protecting the prescriptive jurisdiction of the United States, which the dissent admits is legitimate, can hardly be more "parochial" than the British attempts to destroy that jurisdiction by knowingly issuing interdictory prohibitions and orders, worldwide in scope, after the United States District Court was fully seized of jurisdiction and well on its way in the treatment of Laker's antitrust suit.

Finally, we must remember that it is American *statutory* law which is challenged, not law made by the courts. These antitrust laws date back nearly one hundred years, when Congress began legislating to advance competition and consumer well-being in the United States. Up to now, the courts and the Executive have had no choice but to follow the mandate of Congress. Critics concerned with parochialism should

direct those attacks to that Branch, not to the Judiciary.

[**145] Unilateral abandonment by the Judiciary of legitimately prescribed national law in response to foreign counter-legislation would not materially advance the principles of comity and international accommodation which must form the foundation of any international system comprised of coequal nation states. The British Government's invocation of the Protection of Trading Interest Act to foreclose any proceeding in a non-English forum brought to recover damages for trade injuries caused by unlawful conspiracies is a naked attempt exclusively to reserve by confrontation an area of prescriptive jurisdiction shared concurrently by other nations. This assertion of interdictory jurisdiction propels into the courts a controversy whose eventual termination is restricted to two unsatisfactory alternatives: (1) either one state or the other will eventually capitulate, sacrificing its legitimate interests, or (2) a deadlock will occur to the eventual frustration of both the states' and the litigants' interests. The underlying goal of the legislation is apparently to compel the United States to cede its claims to regulate those aspects of its domestic economy deemed objectionable by the United [**146] Kingdom. However, the possibility of a cooperative, mutually profitable compromise by all affected countries is [*955] greatly restricted. Granting recognition to this form of coercion will only retard the growth of international mechanisms necessary to resolve satisfactorily the problems generated when radically divergent national policies intersect in an area of concurrent jurisdiction.

Rather than legitimizing the interference and stultifying effects that would follow widespread acceptance of interdictory jurisdiction, we prefer to permit Laker's suit, based as it is on well recognized prescriptive jurisdiction, to go forward as free as possible from the interference caused by foreign antisuit injunctions.

III. CONCLUSION

The conflict in jurisdiction we confront today has been precipitated by the attempts of another country to insulate its own business entities from the necessity of complying with legislation of our country designed to protect this country's domestic policies. At the root of the conflict are the fundamentally opposed policies of the United States and Great Britain regarding the desirability, scope, and implementation of legislation controlling anticompetitive [**147] and restrictive business practices.

No conceivable judicial disposition of this appeal would remove that underlying conflict. Because of the potential deadlock that appears to be developing, the ultimate question is not *whether* conflicting assertions of national interest must be reconciled, but the *proper forum* of reconciliation. The resources of the Judiciary are inherently limited when faced with an affirmative decision by the political branches of the government to prescribe specific policies. Absent an explicit directive from Congress, this court has neither the authority nor the institutional resources to weigh the policy and political factors that must be evaluated when resolving competing claims of jurisdiction. In contrast, diplomatic and executive channels are, by definition, designed to exchange, negotiate, and reconcile the problems which accompany the realization of national interests within the sphere of international association. [176] These forums should and, we hope, will be utilized to avoid or resolve conflicts caused by contradictory assertions of concurrent prescriptive jurisdiction. [177]

176 *See*, Maier, *Interest Balancing and Extraterritorial Jurisdiction*, 31 AM. J. COMP. L. 579, 584-85 (1983). Although this process may always be necessary on an ad hoc basis in response to specific suits, anticipatory arrangements could go far in avoiding the problems we are confronted with today. *E.g.*, Agreement Relating to Cooperation on Antitrust Matters, U.S.-Australia, 29 June 1982, T.I.A.S. No. 10365, *reprinted at* 43 Antitrust & Trade Reg. Rep. (BNA), No. 1071, at 36 (1 July 1982).

[**148]

177 In this case the Bermuda II Treaty calls for negotiation and arbitration of disputes regarding its terms. Bermuda II Treaty, art. 17, 28 U.S.T. 5382-83, *supra* note 3. Although some consultations may have occurred regarding the problems associated with the litigation and counterlitigation now pressed in the United States and United Kingdom, apparently neither government has yet invoked its right to call for an arbitrated resolution of the scope of the Bermuda II Treaty's immunization from United States antitrust laws. It may be that further efforts

> by the governments of both countries could help resolve the deadlock which appears to be developing to the detriment of the litigants' interests and the ultimate frustration of the national policies of the United States and Great Britain.

However, in the absence of some emanation from the Executive Branch, [178] Laker's suit may go forward against appellants. Laker seeks to recover for injuries it allegedly sustained as a result of the defendants' conduct in violation of United States antitrust laws. The complaint alleges [**149] a conspiracy to drive out of business a corporation permitted by United States treaty to operate within the United States and conducting substantial business here. If Laker's allegations are proved, the intended and actual effect in the United States are [*956] clear since Laker, which was carrying up to one out of every seven transatlantic passengers, was subsequently forced into liquidation. Resolution of Laker's lawsuit would further the interests protected under United States law, since American creditors' interests in open forums, and consumers' interests in free competition may be vindicated.

> 178 If the United States Executive interpreted the Bermuda II Treaty to waive both the *obligation* of United Kingdom air carriers to comply with antitrust laws, and the *right of those carriers to rely on the protection of those laws*, then Laker's claim against the foreign airlines would probably fail. Of course, if only the British airlines' duty of *compliance* were ceded by the treaty, then nothing would prevent Laker from continuing its suit against KLM and Sabena.

[**150] Under these circumstances, judicial precedent construing the prescriptive jurisdiction of the United States antitrust laws unequivocally holds that the antitrust laws unequivocally holds that the antitrust laws should be applied. That jurisdiction is well within the bounds of reason imposed by international law. Because the factual circumstances of this case made a preliminary injunction imperative to preserve the court's jurisdiction, and because that injunction is not proscribed by the principles of international comity, the district court acted within its discretion.

The decision of the district court is therefore

Affirmed.

DISSENT BY: STARR

DISSENT

STARR, Circuit Judge, dissenting:

It is with reluctance that I am constrained to dissent, for there is much in the majority's thorough opinion with which I fully agree. The majority's opinion demonstrates persuasively that the jurisdictional basis for Laker's action in the United States District Court is firmly established under settled principles of United States and international law. Judge Wilkey's scholarly analysis further demonstrates that it is not at all unusual for a court vested with jurisdiction to issue appropriate [**151] orders to vindicate that jurisdiction, even when such orders arrest the prosecution of actions in the courts of another sovereign.

But it is my judgment that principles of comity among the courts of the international community counsel strongly against the injunction in the form issued here. The concept of comity of nations, a "blend of courtesy and expedience," 1 was defined by the Supreme Court in *Hilton v. Guyot* as

> the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws.

159 U.S. 113, 164, 16 S. Ct. 139, 40 L. Ed. 95 (1895).

1 *Canadian Filters (Harwich) Ltd. v. Lear-Siegler, Inc.*, 412 F.2d 577, 578 (1st Cir. 1969).

The difficulty in applying this open-ended idea stems from the fact that "'comity,' in the legal sense, **[**152]** is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other." *Id.* at 163-64. Few hard-and-fast rules or talismanic tests are to be found. Nonetheless, it is clear that under appropriate circumstances, United States courts will invoke the principle of comity in recognition of the interests of another sovereign.

In light of these principles, it is important to note that this is, at bottom, a private antitrust action filed in a United States court by a foreign litigant against, among others, four United States corporate defendants. This is plainly not an action informed with a public interest beyond that implicated by any private litigant enforcing admittedly important congressionally granted rights. Not only is the instant action not brought by the United States to vindicate sovereign United States interests, but no evidence has been manifested of any sovereign United States interest in the present suit. For whatever reason, and I do not pretend to powers of divination as to why, the Executive has been silent as to what, if any, public interests are touched by Laker's antitrust suit.

In stark contrast, it is clear beyond **[**153]** cavil that the British Executive is emphatically interested in this suit brought by a British subject in United States courts. This sovereign interest articulated by representatives of Her Majesty's government, premised upon British disaffection for the operation and reach of United States antitrust laws, is one that I cannot in conscience **[*957]** reasonably discount. After all, Laker is a British subject which carried on its operations as a heavily regulated air carrier under United Kingdom law. Its routes to and from the United States were established under the umbrella of the Bermuda II Treaty between the United Kingdom and the United States. The United Kingdom thus possesses a clear governmental interest in the activities of a now defunct but once heavily regulated British concern.

To be sure, Laker's status as a British subject, without more, does not mean that United States courts must unalterably bow to the rulings of British courts in actions filed after the instant suit was in progress. The majority has indeed persuasively demonstrated that no principle of "paramount nationality" is recognized in international law. But I am persuaded that it is not at all incompatible **[**154]** with our oath of office for United States judges to recognize the practical reality that the United Kingdom may in fact ultimately have power to prevent Laker's maintaining any United States antitrust action. And the exercise of such a power should not automatically, without benefit of the views of either the British or United States Executive, be deemed violative of United States public policy. For it seems to me that, while the facts of the case are indeed distinguishable, the spirit of the Supreme Court's ruling in *Dames & Moore v. Regan*, 453 U.S. 654, 69 L. Ed. 2d 918, 101 S. Ct. 2972 (1981), suggests strongly that a sovereign government can prohibit one of its nationals from proceeding in a particular forum, and indeed can require actions to be brought in a specific forum which may not at all be to the citizen's liking. It would appear, albeit from a vantage point from which I confess the players and movements can be perceived only dimly, that the British Executive is moving toward the exercise of precisely the power recognized unanimously as to the Presidency by the United States Supreme Court in *Dames & Moore*.

Admittedly, *Dames & Moore* was grounded **[**155]** upon the President's foreign relations power, and evidenced the United States judiciary's appropriate and understandable reluctance to take actions that would disrupt or unwind the foreign policy actions of the Executive, particularly in connection with a matter of such moment as the implementation of accords effecting the extrication of American hostages from Tehran. Here, in contrast, the British Executive appears to be proceeding not from the compelling circumstances of a hostage crisis but from its antipathy toward United States antitrust laws. But it is, in my judgment, not for me to say whether the British Executive's attitude in this respect is reasonable or unreasonable. With all respect to the majority, I am not endowed with sufficient knowledge or

information on the limited record before us to pass judgment on the British views that my brethren find so distasteful. It may be that the application of United States antitrust laws under the circumstances of Laker's transatlantic traffic is eminently sound and reasonable under principles governing the regulation of trade that is both within and beyond national borders. But today's decision will not settle the raging debate [**156] across the Atlantic, and indeed throughout much of the industrialized world, about the application of domestic United States law.

The injunction sustained today is, I am thus constrained to conclude, unduly sweeping in light of considerations of comity. To be sure, as the majority quite properly notes, KLM and Sabena failed to avail themselves of the District Court's invitation for suggestions to narrow the injuction's sweep. But failure to seek a narrowing of the order, while reducing the foreign airlines' equities in this court, does not end the issue for me. We take the injunction as we find it, and it cannot reasonably be maintained that the foreign airlines have waived any objection to the order. Indeed, Laker does not so argue, and the majority quite rightly does not ground its result on any such principle.

And so we face the injunction itself. By its terms, the District Court's order quite literally forbids the foreign airlines from entering any court in the world, including [*958] courts of their own respective nations, to contest Laker's right to maintain the instant action. This approach, fashioned under the strain of critical moments when it reasonably appeared [**157] to the learned trial judge that jurisdiction over important defendants might irrevocably be lost, is simply too broad to sustain, in light of the countervailing considerations of comity among nations. [2]

2 It is far from clear to me that a refusal by the District Court to grant the injunctive relief requested by Laker as to the foreign defendants would have sounded the death knell of Laker's antitrust action, inasmuch as the American defendants would remain before the court in any event.

Thus, I would favor vacating the present injunction and remanding the case to the District Court for consideration of narrowing its order. The District Court might well decide to enjoin KLM and Sabena only from seeking countersuit injunctive relief *pendente lite* in the English courts, thus allowing them to follow the example of Lufthansa and Swissair in bringing declaratory judgment actions. This would allow two or more related actions -- Laker's antitrust suit and the foreign defendants' declaratory judgment action [**158] in foreign court -- to proceed simultaneously, without any direct interference from the other sovereign's courts. This type of injunction seems clearly preferable on comity grounds. [3]

3 Evidencing comparable concern for principles of comity, the court in *Medtronic, Inc. v. Catalyst Research Corp.*, 518 F. Supp. 946 (D. Minn. 1981), *aff'd* 664 F.2d 660 (8th Cir. 1981), granted a narrow injunction preventing defendant from seeking an injunction against plaintiff's continued manufacture of a product which was the subject of a patent suit. The court specifically noted that the relief would "in no way interfere with" defendant's foreign patent infringement and validity actions in foreign courts.

A foreign court would thus be allowed to adjudicate the status of the parties before it under that nation's laws and regulatory provisions, including any applicable aviation treaties. If both the United States and foreign actions proceeded to judgment, choice of law questions would [**159] likely be presented in the execution of the judgments and would be considered at that stage of the litigation. However, several developments in this matter could moot this potential conflict, including a negotiated settlement of the inter-governmental dispute over the scope and applicability of United States antitrust laws; a decision against Laker on the merits in the United States District Court; or a judicial decision against the foreign defendants in the foreign court. A narrow injunction would thus preserve the possibility that the ultimate conflict-of-laws questions would be mooted, either through diplomatic channels or a defeat either for Laker or the foreign airlines in their respective actions. The narrower injunction would result in substantially less interference with foreign courts, with no "surrender" of the jurisdiction of the United States over Laker's antitrust claims.

I would further suggest that in the exercise of its sound discretion the District Court invite the Executive to present the views of the United States. Those views might well have an important bearing upon the extent of the sovereign interests of the United States, if any, in this action. [4]

4 The possible usefulness of Executive guidance in this matter has appropriately been recognized by the district court. On November 17, 1983, Judge Greene appointed *amicus curiae* in this case to "assist the Court in determining what action by the Court is required or appropriate in light of the decisions of the English authorities. . . ." Judge Greene suggested, among other things, that *amicus* "consider what relationship, if any, should be established with the Department of Justice or the Department of State to enlist their cooperation or assistance."

[160]** A tempest has been brewing for some time among the nations as to the reach of this countries antitrust laws, and today's decision strikes a strong blow in favor of what will be viewed by many of our friends and allies as a rather parochial American outlook. But whether that blow is well conceived, it is, with all respect, at tension with the orderly operation of our two nations' respective judicial systems. As both the majority and the District Court recognize, **[*959]** it is serious business to issue an injunction against proceedings in a sister nation. This is most keenly true with respect to a nation from which we inherited so much of our legal system. Inasmuch as only extraordinary reasons justify the issuance of such an injunction, I would remand the case to the District Court for further proceedings aimed at narrowing the injunction, consistent with the principles of comity that inform the seemly accommodation of sharply divergent and competing national interests.

TAB 4

4 of 5 DOCUMENTS

In Re: MAXWELL COMMUNICATION CORPORATION plc, by Andrew Mark Homan, Colin Graham Bird, Jonathan Guy Anthony Phillips and Alan Rae Dalziel Jamieson, its Joint Administrators, Debtor. MAXWELL COMMUNICATION CORPORATION plc, by Andrew Mark Homan, Colin Graham Bird, Jonathan Guy Anthony Phillips and Alan Rae Dalziel Jamieson, its Joint Administrators, Plaintiff-Appellant, RICHARD A. GITLIN, Examiner, Intervenor-Plaintiff-Appellant, v. SOCIETE GENERALE, BARCLAYS BANK plc, NATIONAL WESTMINSTER BANK plc, Defendants-Appellees.

Docket Nos. 95-5076, 95-5078, 95-5082, 95-5084, 95-5086

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

93 F.3d 1036; 1996 U.S. App. LEXIS 21388; 29 Bankr. Ct. Dec. 788

May 10, 1996, Argued
August 21, 1996, Decided

PRIOR HISTORY: [**1] Plaintiff administrators of debtor in Chapter 11 adversary proceedings appeal from an order of the United States District Court for the Southern District of New York (Scheindlin, J.) affirming the dismissal of three adversary complaints against defendant foreign banks by the Bankruptcy Court (Brozman, B.J.) on the grounds that §§ 502(d) and 547 of the Bankruptcy Code are inapplicable.

DISPOSITION: Affirmed.

CASE SUMMARY:

PROCEDURAL POSTURE: Plaintiffs, administrators of a bankruptcy estate, appealed a judgment of the United States District Court for the Southern District of New York, which denied their application to recover funds deposited in foreign banks shortly before the bankruptcy was sought.

OVERVIEW: Plaintiffs, administrators of a bankruptcy estate seeking adversary relief under Chapter 11 of the Bankruptcy Act, 11 U.S.C.S. § 101 et seq., sought to recover funds deposited in three foreign banks shortly before the bankruptcy petition was filed. The trial court dismissed claims, and plaintiffs appealed. The appellate court affirmed, holding that (1) the binding effect of bankruptcy confirmation order did not preclude banks from challenging the applicability of the Bankruptcy Code's avoidance rules; (2) given the unique case involving cooperative parallel bankruptcy proceedings seeking to harmonize two nations' insolvency laws for the common benefit of creditors, the doctrine of international comity precluded application of American avoidance law to transfers in which foreign country's interest was primacy; (3) the question of whether presumption against extraterritoriality compelled the conclusion that the Bankruptcy Code did not reach pre-petition transfers need not be reached; and (4) defendant banks' claims against the estate need not be disallowed under 11 U.S.C.S. § 502(d), given the requirements of § 547.

OUTCOME: The court affirmed the judgment.

CORE TERMS: comity, administrators, avoidance, examiner, confirmation, insolvency, choice-of-law, pre-petition,

overdraft, cooperation, injunction, present case, reorganization, international law, adversary proceedings, anti-suit, binding, plc, bankruptcy proceedings, banks' claims, notice of claim, extraterritoriality, disallowance, transferred, subsidiary, transferee, avoidable, bankruptcy filing, insolvency proceedings, general words

LexisNexis(R) Headnotes

Bankruptcy Law > Case Administration > Examiners, Officers & Trustees > Preferential Transfers > Elements > Preference Periods
Bankruptcy Law > Case Administration > Examiners, Officers & Trustees > Voidable Transfers > General Overview
[HN1] Under 11 U.S.C.S. § 547(b), a Chapter 11 bankruptcy trustee may avoid certain transfers to outside creditors made within 90 days before the filing of the petition.

Bankruptcy Law > Conversion & Dismissal > General Overview
Bankruptcy Law > Practice & Proceedings > General Overview
Environmental Law > Solid Wastes > Disposal Standards
[HN2] A district court's disposition of an appeal from a bankruptcy court is subject to plenary review, and a federal appellate court therefore analyzes the bankruptcy court's decision by the same standards the district court followed. When complaints are dismissed for failure to state a cause of action upon which relief may be granted, such dismissals are ordinarily subject to de novo review. In evaluating an order granting dismissal of an action, the non-movant's factual allegations are taken as true and all permissible inferences are drawn in their favor; dismissal is warranted only if it plainly appears that the non-movant can prove no set of facts in support of his claim which would entitle him to relief.

Civil Procedure > Pleading & Practice > Defenses, Demurrers & Objections > Affirmative Defenses > General Overview
Civil Procedure > Appeals > Reviewability > Preservation for Review
[HN3] A litigant on appeal is estopped from relying on a factual allegation directly contrary to representation made to trial court in prior proceeding.

Bankruptcy Law > Claims > Allowance
Bankruptcy Law > Discharge & Dischargeability > Reorganizations
Bankruptcy Law > Reorganizations > Plans > Postconfirmation > Revocation of Confirmation
[HN4] Confirmation of a bankruptcy plan under Chapter 11 of the Bankruptcy Code, 11 U.S.C.S. § 101 et seq., will ordinarily discharge pre-existing debts whether or not they are allowed, but 11 U.S.C.S. § 1141(d)(1)(A) predictably does not grant debtors such relief where a plan or confirmation order provides otherwise. In other words, discharge under § 1142 does not hinge on whether a claim is allowed.

Bankruptcy Law > Case Administration > Examiners, Officers & Trustees > Duties & Functions > Reorganizations
Bankruptcy Law > Case Administration > Examiners, Officers & Trustees > Eligibility & Qualifications
Bankruptcy Law > Claims > Proof > Effects & Procedures
[HN5] When the administrators of a bankruptcy estate are required to file in the United States copies of notices of claim received from claimants in England, this is sufficient to constitute the filing of a proof-of-claim under 11 U.S.C.S. § 501. Under 11 U.S.C.S. § 502(a), if a proof of claim is filed, it is deemed allowed unless there is a timely objection by a party in interest.

Bankruptcy Law > Claims > Objections
Civil Procedure > Jurisdiction > Subject Matter Jurisdiction > Jurisdiction Over Actions > Concurrent Jurisdiction
International Law > Dispute Resolution > Conflicts of Laws > General Overview
[HN6] Although a British court may have jurisdiction to decide objections to the allowance of claims against the bankruptcy estate of an American corporation which transferred funds to foreign banks before the estate became bankrupt, equity does not permit administrators to litigate objections in an American bankruptcy court when doing so conflicts with a basic assumption of the plan and scheme.

Constitutional Law > Relations Among Governments > Full Faith & Credit
Governments > Courts > Judicial Comity
International Law > Dispute Resolution > Comity Doctrine > General Overview
[HN7] "Comity," in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws.

Admiralty Law > Personal Injuries > Maritime Workers' Claims > Jones Act > Procedure > Choice of Law
Governments > Courts > Judicial Comity
International Law > Dispute Resolution > Comity Doctrine > General Overview
[HN8] International law -- including questions arising under what is usually called private international law, or the conflict of laws, and concerning the rights of persons within the territory and dominion of one nation, by reason of acts, private or public, done within the dominions of another nation -- is part of American law. The doctrine does not impose a limitation on the sovereign power to enact laws applicable to conduct occurring abroad. Instead, it guides judicial interpretation of statutes that might otherwise be read to apply to such conduct. When construing a statute, the doctrine of international comity is best understood as a guide where the issues to be resolved are entangled in international relations.

Governments > Courts > Judicial Precedents
Governments > Legislation > Interpretation
International Law > Dispute Resolution > Conflicts of Laws > General Overview
[HN9] A statute ought never to be construed to violate the law of nations, if any other possible construction remains. Courts are not to read general words without regard to the limitations customarily observed by nations upon the exercise of their powers; limitations which generally correspond to those fixed by the "Conflict of Laws."

Governments > Legislation > Interpretation
International Law > Dispute Resolution > Comity Doctrine > Procedures > General Overview
International Law > Dispute Resolution > Conflicts of Laws > General Overview
[HN10] International comity is a separate notion from the presumption against extraterritoriality, which requires a clear expression from Congress for a statute to reach non-domestic conduct.

Civil Procedure > Jurisdiction > Jurisdictional Sources > General Overview
Governments > Courts > Judicial Comity
International Law > Dispute Resolution > Comity Doctrine > General Overview
[HN11] Because the principle of comity does not limit the legislature's power and is, in the final analysis, simply a rule of construction, it has no application where Congress has indicated otherwise.

Civil Procedure > Jurisdiction > Jurisdictional Sources > General Overview
Governments > Courts > Judicial Comity
International Law > Dispute Resolution > Comity Doctrine > General Overview
[HN12] "International comity" may describe two distinct doctrines: as a canon of construction, it might shorten the reach of a statute; second, it may be viewed as a discretionary act of deference by a national court to decline to exercise jurisdiction in a case properly adjudicated in a foreign state, the so-called comity among courts.

Governments > Courts > Judicial Comity
International Law > Dispute Resolution > Comity Doctrine > General Overview
International Law > Dispute Resolution > Conflicts of Laws > Choice of Law
[HN13] Comity is exercised with reference to prevalent doctrines of international law. States normally refrain from prescribing laws that govern activities connected with another state when the exercise of such jurisdiction is unreasonable. Whether so legislating would be unreasonable is determined by evaluating all relevant factors, including,

where appropriate, such factors as the link between the regulating state and the relevant activity, the connection between that state and the person responsible for the activity (or protected by the regulation), the nature of the regulated activity and its importance to the regulating state, the effect of the regulation on justified expectations, the significance of the regulation to the international system, the extent of other states' interests, and the likelihood of conflict with other states' regulations.

Governments > Courts > Judicial Comity
Governments > Legislation > Interpretation
International Law > Dispute Resolution > Comity Doctrine > General Overview
[HN14] Comity is a doctrine that takes into account the interests of the United States, the interests of the foreign state, and those mutual interests the family of nations have in just and efficiently functioning rules of international law.

Governments > Legislation > Interpretation
Governments > State & Territorial Governments > Relations With Governments
International Law > Dispute Resolution > Comity Doctrine > Areas of Law > Bankruptcy
[HN15] Because Congress legislates against a backdrop that includes those international norms that guide comity analysis, absent a contrary legislative direction the doctrine may properly be used to interpret any statute.

Governments > Courts > Judicial Comity
Governments > Legislation > Interpretation
International Law > Dispute Resolution > Comity Doctrine > General Overview
[HN16] International comity comes into play only when there is a true conflict between American law and that of a foreign jurisdiction.

Bankruptcy Law > Case Administration > Examiners, Officers & Trustees > Preferential Transfers > General Overview
Bankruptcy Law > Reorganizations > Debtors in Possession > General Overview
[HN17] 11 U.S.C.S. § 547 does not reach the pre-bankruptcy petition fund transfers to foreign banks.

Bankruptcy Law > Practice & Proceedings > Appeals > Standards of Review > Abuse of Discretion
Bankruptcy Law > Practice & Proceedings > Appeals > Standards of Review > De Novo Review
Governments > Courts > Judicial Comity
[HN18] A federal district court ought not review a bankruptcy court's ruling on the issue of comity only for an abuse of discretion, since the doctrine in theory is relevant to construing a statute's reach, de novo review of the bankruptcy court's decision is in order.

Bankruptcy Law > Practice & Proceedings > Appeals > Standards of Review > De Novo Review
International Law > Dispute Resolution > Comity Doctrine > Areas of Law > Bankruptcy
International Law > Dispute Resolution > Comity Doctrine > Procedures > Discretion
[HN19] It is appropriate as a matter of law to analyze the Bankruptcy Code, 11 U.S.C.S. § 101 et seq., in light of international comity.

Bankruptcy Law > Case Administration > Examiners, Officers & Trustees > Preferential Transfers
Bankruptcy Law > Claims > Allowance
International Law > Dispute Resolution > General Overview
[HN20] When there is a parallel insolvency proceeding taking place in another country, a federal court's failure to apply 11 U.S.C.S. §§ 547 and 502(d) does not free creditors from the constraints of avoidance law, nor does it severely undercut the policy of equal distribution.

Bankruptcy Law > Reorganizations > General Overview
Civil Procedure > Jurisdiction > Subject Matter Jurisdiction > Supplemental Jurisdiction > General Overview

International Law > Dispute Resolution > Comity Doctrine > Areas of Law > Commerce
[HN21] Bankruptcy courts may best be able to effectuate the purposes of the bankruptcy law by cooperating with foreign courts on a case-by-case basis. Congress contemplated this approach when it provided for "ancillary" proceedings under 11 U.S.C.S. § 304.

Bankruptcy Law > Case Administration > Examiners, Officers & Trustees > Preferential Transfers > General Overview
Bankruptcy Law > Claims > Allowance
[HN22] 11 U.S.C.S. § 502(d) provides that a federal court shall disallow any claim of any entity that is a transferee of a transfer avoidable under 11 U.S.C.S. § 547.

Bankruptcy Law > Practice & Proceedings > General Overview
Civil Procedure > Appeals > Reviewability > Preservation for Review
Governments > Courts > Authority to Adjudicate
[HN23] A federal appellate court has the discretion to entertain an unpreserved issue when it is one of law, it was clearly presented in the adversary complaints, it was argued before and decided by the district court, and the transcript of hearing indicates that the lower court was quite aware of the relevant statute.

Bankruptcy Law > Case Administration > Examiners, Officers & Trustees > Preferential Transfers
Bankruptcy Law > Claims > Allowance
Governments > Legislation > Statutory Remedies & Rights
[HN24] 11 U.S.C.S. § 502(d) does not apply to avoidable transfers in a bankruptcy case since 11 U.S.C.S. § 547 does not apply to pre-petition transfers at all.

Bankruptcy Law > Case Administration > Examiners, Officers & Trustees > Preferential Transfers
Governments > Legislation > Statutes of Limitations > General Overview
International Law > Dispute Resolution > Comity Doctrine > General Overview
[HN25] The doctrine of comity leads to the conclusion that 11 U.S.C.S. § 547 does not apply to the pre-bankruptcy petition transfers at all. Consequently, the transfers cannot in any way be included among the "transfers avoidable" listed in 11 U.S.C.S. § 502(d). In addition, because §§ 502(d) and 547 apply to the same types of transfers and serve similar purposes, the former is inapplicable.

Bankruptcy Law > Case Administration > Notice
Bankruptcy Law > Claims > General Overview
Bankruptcy Law > Liquidations > Estate Property Distribution > Distributions Among Unsecured Classes
[HN26] Creditor's decision to lodge notices of claim in England, rather than filing proofs of claim with American bankruptcy court, cannot be construed to mean that they have not submitted "claims" for purposes of Bankruptcy Code, 11 U.S.C.S. § 101 et seq. To be eligible for distributions under a bankruptcy plan, 11 U.S.C.S. § 726(a) declares, a creditor must submit claims which must be allowed. When a bankruptcy plan requires the administrators of an estate to pass along to the bankruptcy court notices of claim filed in England, the plan and scheme comply with the Bankruptcy Code's requirement that a proof of claim be filed with the bankruptcy court. Such claims are allowed under 11 U.S.C.S. § 502(a) if they are accepted without objection by the administrators or liability is established by adjudication in the appropriate court (which may be the bankruptcy court or the English court depending upon the circumstances).

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JUDGES: Before: CARDAMONE, ALTIMARI, and PARKER Circuit Judges.

OPINION BY: CARDAMONE

OPINION

[*1039] CARDAMONE, *Circuit Judge*:

The demise of the late British media magnate Robert Maxwell and that of the corporation **[*1040]** bearing his name, the Maxwell Communication Corporation plc, followed a similar and scandalous path, spawning civil and criminal litigation in England and around the world. This case illustrates that some positive consequences have resulted from these parallel demises. From Maxwell's mysterious death, which forced his international corporation into bankruptcy, was born a unique judicial administration of the debtor corporation by parallel and cooperative proceedings in the courts of the United States and England aimed at harmonizing the laws of both countries and also aimed at maximizing the benefits to creditors and the prospects of rehabilitation.

We have before us a small but significant piece of the swirling legal controversy that followed the collapse of Robert Maxwell's media empire. The question to be addressed is whether Maxwell Communication, [**3] as a debtor estate in Chapter 11, may recover under American law millions of dollars it transferred to three foreign banks shortly before declaring bankruptcy. It has sought such relief in adversary proceedings in the bankruptcy court under those sections of the United States Bankruptcy Code, 11 U.S.C. §§ 101-1330 (1994) (Bankruptcy Code or Code), providing for what is known as "avoidance" of pre-petition transactions. Because, in our view, the doctrine of international comity supports deferring to the courts and laws of England, we affirm the dismissal of the Chapter 11 debtor's complaints.

BACKGROUND

The facts underlying this appeal have been described in the opinions of the bankruptcy court, *see Maxwell Communication Corp. v. Barclays Bank plc (In re Maxwell Communication Corp.)*, 170 Bankr. 800, 801-07 (Bankr. S.D.N.Y. 1994) (Brozman, B.J.) (*Maxwell I*), and the district court, *see Maxwell Communication Corp. v. Societe Generale (In re Maxwell Communication Corp.)*, 186 Bankr. 807, 812-15 (S.D.N.Y. 1995) (Scheindlin, J.) (*Maxwell II*), and we assume the readers' familiarity with them. For purposes of clarity, we highlight those background aspects most helpful to understanding [**4] this appeal.

A. Events Preceding the Dual Filings

The debtor was originally incorporated in England over 60 years ago as a limited company. Robert Maxwell acquired control of this limited company 15 years ago. The following year, the company was re-registered under English law as a public limited company and, in 1987, it became Maxwell Communication Corporation plc (hereafter Maxwell or the debtor). Before filing for bankruptcy protection, Maxwell functioned as a holding company for Robert Maxwell's "public side" holdings -- as distinguished from Maxwell's private holdings, which at one time included the *New York Daily News* -- and controlled a variety of media-related companies. Although Maxwell was headquartered and managed in England and incurred most of its debt there, approximately 80 percent of its assets were located in the United States,

most notably its subsidiaries Macmillan, Inc. and Official Airlines Guide, Inc.

Maxwell alleges that in the fall of 1991, less than 90 days before its Chapter 11 filing, it made several transfers -transfers it now seeks to avoid -- to three European banks (collectively, the banks) with whom it had credit arrangements. Two of these [**5] banks are Barclays Bank plc (Barclays) and National Westminster Bank plc (National Westminster), both of which have their headquarters in London and maintain an international presence, with branches in New York and elsewhere. The other bank is Societe Generale, a French Bank headquartered in Paris with offices, among other places, in London and New York.

From 1985 until 1991 Maxwell obtained credit from Barclays under the terms of a credit arrangement known in England as an "overdraft facility." This written agreement, negotiated in London, stated that any disputes arising under it would be governed by English law. Maxwell drew $ 30 million under the overdraft facility, none of which had been repaid on November 24, 1991, the agreed-upon maturity date. Two days later, under pressure from Barclays' banking director in London, Maxwell repaid the $ 30 million from the proceeds of the sale of Que Computer Books, Inc. (Que), a subsidiary of Macmillan in New York. The Que proceeds [*1041] had originally been deposited in a Maxwell account at the New York branch of National Westminster and subsequently credited to Maxwell's U.S. dollar account with National Westminster in London. On November 26, [**6] 1991 repayment was effected by transferring $ 30 million from Maxwell's dollar account in London to Barclays' New York branch, which was then credited the following day against the balance in the appropriate Maxwell overdraft account at Barclays in London. In addition to this transfer from the Que proceeds, Maxwell alleged in its amended complaint that 11 other transfers of funds were made to Barclays during the 90 days preceding Maxwell's bankruptcy filing, amounting to a total of $ 2,110,970 (net of various payments by Barclays to or on behalf of Maxwell during the same period). No connection between these other transfers and the United States was alleged in the complaint.

National Westminster's relationship with the debtor began in the 1930s and continued through the bankruptcy filing. As of late 1991 Maxwell maintained several accounts with National Westminster, with overdraft facilities to help it meet its cash needs. These arrangements were similar to those it had with Barclays in that they were negotiated in England and provided for the governance of English law. In October 1991 Maxwell received $ 145 million from the sale of Macmillan Directories, Inc. (another Macmillan [**7] subsidiary in the United States) and used the proceeds -- which had been paid into a Maxwell account at Citibank in New York and thereafter credited to an account at Citibank in London -- to purchase British pounds. Maxwell then paid # 15 million from these proceeds to an account it maintained at National Westminster's London branch. Maxwell then applied the # 15 million to satisfy an overdraft balance with National Westminster.

In November 1991 Maxwell converted a portion of the $ 157.5 million of Que proceeds (originally deposited in National Westminster's New York branch but then transferred to its London branch) into # 27.5 million. It used this sum to cover its overdraft balances in National Westminster's London branch. The purchase of pounds sterling and subsequent credits to the National Westminster overdraft accounts occurred in London. Maxwell also alleges it made eight other transfers to National Westminster from accounts at Midland Bank in London shortly before Maxwell's bankruptcy filing, payments which amounted to # 29,046,738 (net of payments by National Westminster to Maxwell during the same period).

Societe Generale also extended credit to Maxwell under an agreement [**8] negotiated and administered in England. On October 7, 1991, in satisfaction of principal and interest on a $ 10 million loan extended under that credit arrangement, Maxwell made a payment of roughly # 5.765 million to Societe Generale. The funds were transferred from an account Maxwell maintained at Marine Midland Bank in London to Societe Generale's London branch. Although the debtor did not allege that the transfer was connected to the United States, the district court assumed for purposes of its decision that the funds came from the sale of Macmillan Directories because that sale also occurred on October 7, 1991. *See Maxwell II*, 186 Bankr. at 814.

B. ***The Dual Insolvency Proceedings***

On December 16, 1991 Maxwell filed a petition for reorganization under Chapter 11 of the United States Bankruptcy Code in the Bankruptcy Court for the Southern District of New York. The next day, it petitioned the High Court of Justice in London for an administration order. Administration, introduced by the Insolvency Act 1986, is the closest equivalent in British law to Chapter 11 relief. Acting under the terms of the Insolvency Act, Justice Hoffman, then of the High Court (now a member of the House of Lords), **[**9]** appointed members of the London office of the accounting firm of Price Waterhouse as administrators to manage the affairs and property of the corporation.

Simultaneous proceedings in different countries, especially in multi-party cases like bankruptcies, can naturally lead to inconsistencies and conflicts. To minimize such problems, Judge Brozman appointed Richard A. Gitlin, Esq. as examiner, pursuant to 11 U.S.C. § 1104(c), in the Chapter 11 proceedings. **[*1042]** The order of appointment required the examiner, *inter alia*, to investigate the debtor's financial condition, to function as a mediator among the various parties, and to "act to harmonize, for the benefit of all of [Maxwell's] creditors and stockholders and other parties in interest, [Maxwell's] United States chapter 11 case and [Maxwell's] United Kingdom administration case so as to maximize [the] prospects for rehabilitation and reorganization."

Judge Brozman and Justice Hoffman subsequently authorized the examiner and the administrators to coordinate their efforts pursuant to a so-called Protocol, an agreement between the examiner and the administrators. In approving the Protocol, Judge Brozman recognized **[**10]** the English administrators as the corporate governance of the debtor-in-possession. As the bankruptcy judge later explained, this recognition was motivated not only by the need for coordination but also because Maxwell was "incorporated in England and run . . . by [Maxwell] executives out of Maxwell House in London subject to the direction of an English board of directors." *Maxwell I*, 170 B.R. at 817. Justice Hoffman reciprocated, granting the examiner leave to appear before the High Court in England.

These joint efforts resulted in what has been described as a "remarkable sequence of events leading to perhaps the first world-wide plan of orderly liquidation ever achieved." Jay Lawrence Westbrook, *The Lessons of* Maxwell Communication, 64 Fordham L. Rev. 2531, 2535 (1996). The administrators, the examiner, and other interested parties worked together to produce a common system for reorganizing Maxwell by disposing of assets as going concerns and distributing the proceeds to creditors. *Maxwell I*, 170 B.R. at 802. The mechanism for accomplishing this is embodied in a plan of reorganization and a scheme of arrangement, which are interdependent documents and were filed by **[**11]** the administrators in the United States and English courts respectively.

The reorganization plan incorporates the scheme and makes it binding on Maxwell and its creditors. The plan and scheme thus constitute a single and integrated system for realizing the value of Maxwell's assets and paying its creditors. As was set forth in a letter from the administrators to Maxwell's creditors, the proposal was to pay in full all holders of secured claims and of claims enjoying preferential status under United States or English law. The plan and scheme treat all of Maxwell's assets as a single pool and leave them under Maxwell's control for distribution to claimants. They allow any creditor to submit a claim in either jurisdiction. And, in addition to overcoming many of the substantive differences in the insolvency laws of the two jurisdictions, the plan and scheme resolve many procedural differences, such as the time limits for submitting claims.

Following the requisite creditor voting in the United States and England, the plan was approved in the United States and the scheme was approved in England. Judge Brozman entered an order confirming the plan -- and, by implication, the scheme incorporated **[**12]** therein -- on July 14, 1993. Justice Hoffman thereafter entered an order sanctioning the scheme under § 425 of the Companies Act 1985 on July 21, 1993. Barclays, National Westminster, and Societe Generale each filed a notice of claim with the administrators, seeking *pro rata* distributions on various unsecured claims against Maxwell.

Despite the unusual degree of cooperation and reconciliation of the laws of the two forums, the plan and scheme predictably did not resolve all the problems that might arise from the concurrent proceedings. For example, these documents did not specify which substantive law would govern the resolution of disputed claims by creditors. More importantly, they did not address the instant dispute regarding the debtor's ability to set aside pre-petition transfers to

certain creditors.

C. *British Denial of Anti-Suit Injunction*

In July 1992 Barclays faced the possibility that the administrators would institute litigation in the bankruptcy court to recover the $ 30 million it had received from Maxwell on November 26, 1991. Barclays therefore obtained an *ex parte* order in the High Court (not from Justice Hoffman) barring the commencement of such an **[**13]** action. In seeking to **[*1043]** prevent litigation in the bankruptcy court, Barclays was apparently motivated by a difference in the American and British "avoidance" rules. Rules governing avoidance generally allow the estate to recover certain pre-petition transfers of property to creditors occurring within a defined period of time. Such rules are sometimes referred to as the law of preferences because such transfers, left unchecked, may put transferees in a better position than other creditors if the debtor becomes insolvent.

Thus, [HN1] under 11 U.S.C. § 547(b), a trustee may avoid certain transfers to outside creditors made within 90 days before the filing of the petition. The corresponding provision in English law is § 239 of the Insolvency Act 1986. That section is in many respects similar to the American law, but the British law imposes an additional condition -- it limits avoidance to those situations where placing the transferee in a better position was something the debtor intended. *See* Insolvency Act 1986 § 239(5). This seemingly innocuous subjective intent requirement in English law apparently would be a significant or insurmountable obstacle for the administrators were they to **[**14]** litigate the preferences question in London under English law. For obvious reasons, they opposed the anti-suit injunction sought by Barclays, that is, they wanted this issue litigated in the Southern District bankruptcy court.

Following a hearing, Justice Hoffman vacated the *ex parte* order Barclays had obtained. *Re Maxwell Communications Corp. (Barclays Bank plc v. Homan)*, [1992] BCC 757 (Ch.) (*Homan*), *aff'd*, [1992] BCC 767 (C.A.). The British judge declined to interfere with the American court's determination of the reach of our avoidance law. He cited the British presumption that in such a situation the foreign judge is normally in the best position to decide whether proceedings are to go forward in the foreign court, and the rule that anti-suit injunctions will issue only where an assertion of jurisdiction in the foreign court would be "unconscionable." *Id.* at 761-63.

In so doing, Justice Hoffman noted the cooperative course of the parallel insolvency proceedings. *Id.* at 760. He distinguished recent cases involving the extraterritorial application of American antitrust law, reasoning that injunctive relief is available only if it appears that a foreign **[**15]** court is likely to assert jurisdiction in a manner "contrary to accepted principles of international law." *Id.* at 762. The High Court's decision did not pass judgment on the merits of whether the application of American law would violate such norms. *Id.* at 767. It did assume, however, that the bankruptcy court would dismiss the anticipated suit if it found that there was an insufficient connection with the United States. *Id.* This ruling was affirmed by the Court of Appeal, and leave for further review by the House of Lords was denied.

D. *The Adversary Complaints and the Bankruptcy and District Court Decisions*

Freed from the constraints of an anti-suit injunction, the administrators commenced adversary proceedings in the bankruptcy court against Barclays, National Westminster, and Societe Generale. The complaints sought the recovery of the above-described transfers to the banks on the theory that they were avoidable preferences under 11 U.S.C. § 547(b) and therefore recoverable under 11 U.S.C. § 550(a)(1). In addition, each complaint sought the disallowance under 11 U.S.C. § 502(d) of any claims made by the defendant, unless the defendant first returns to the debtor **[**16]** the transferred funds, with interest. This subject is discussed and resolved in Part IV, *infra*. The examiner joined the administrators in instituting these adversary proceedings against National Westminster and intervened in the proceeding against Barclays; he is not a party in Maxwell's suit against Societe Generale.

Defendants filed motions for dismissal under Fed. R. Civ. P. 12(b)(6) (made applicable in adversary bankruptcy proceedings by Bankr. R. 7012(b)) asserting, *inter alia*, that applying § 547 of the Bankruptcy Code to these

transactions would violate the "presumption against extraterritoriality" and that dismissal was also warranted on grounds of international comity. The bankruptcy court granted the motions, holding that the transfers were extraterritorial and that the Bankruptcy **[*1044]** Code does not apply to these transfers, whose "center of gravity" lies outside the United States and, in the alternative, that international comity precluded the application of the Code in this instance. *Maxwell I*, 170 B.R. at 808-18.

Treating comity as a "canon of statutory construction," the bankruptcy court emphasized choice-of-law principles and asked "which jurisdiction's laws **[**17]** and policies are implicated to the greatest extent." *Id.* at 814, 816. The answer, the court found, was England. *Id.* at 817-18. It also noted Maxwell's insolvency did not jeopardize United States interests because its holdings were sold as going businesses, because most of its creditors were not residents of the United States, and because the two countries' preference laws in any event serve similar ends, and that England had a greater interest in applying its own laws. *Id.* at 818.

The district court affirmed on both the extraterritoriality and comity grounds. On the latter question, it held that the "bankruptcy court did not abuse its discretion in finding that traditional choice of law principles 'point decidedly towards the application of U.K. law.'" *Maxwell II*, 186 Bankr. at 822. The district court's analysis of the relative interests was substantially similar to that of the bankruptcy court, but it also underscored the cooperation between the courts of the two countries and found that deference would comport with the previous efforts by both courts to harmonize the dual proceedings. *Id.* at 823. Judge Scheindlin believed this to be "the unique aspect and the most **[**18]** important feature of this case." *Id.* at 813.

Maxwell and the examiner appealed. We consolidated the three cases on January 15, 1996 and now address the merits.

DISCUSSION

[HN2] A district court's disposition of an appeal from a bankruptcy court is subject to plenary review, *Air Line Pilots Ass'n v. Shugrue (In re Ionosphere Clubs, Inc.)*, 22 F.3d 403, 406 (2d Cir. 1994), and we therefore analyze the bankruptcy court's decision by the same standards the district court followed. The complaints were dismissed for failure to state a cause of action upon which relief may be granted, and such dismissals are ordinarily subject to *de novo* review. *Valley Disposal v. Central Vt. Solid Waste Mgt. Dist.*, 31 F.3d 89, 93 (2d Cir. 1994). In evaluating an order granting dismissal of an action, the non-movants' factual allegations are taken as true and all permissible inferences are drawn in their favor; dismissal is warranted only if it plainly appears that the non-movant "can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46, 2 L. Ed. 2d 80, 78 S. Ct. 99 (1957). With those rules in mind, we examine the propriety of the order of dismissal.

I **[**19]** *Res Judicata*

The administrators' first contention is that the July 14, 1993 confirmation order precludes the banks from challenging the application of the Bankruptcy Code to the present proceedings. In so arguing, they rely primarily on § 10.01 of the plan, which provides that "notwithstanding confirmation and consummation of the Plan, the US Court shall exclusively retain such jurisdiction as it had prior to confirmation and consummation . . . (e) to determine any and all avoidance or similar actions brought, or which may be brought, under the US Bankruptcy Code, by or on behalf of the Company, including actions pursuant to sections 510, 542, 543, 544, 545, 546, 547, 548, 549, 550, and 553." The administrators assert that the plan, which was made binding upon all creditors by the confirmation order, in that way vested sole and exclusive jurisdiction in the bankruptcy court to decide avoidance actions.

This argument has a superficial plausibility, but upon analysis it lacks substance. An order of confirmation concededly binds the debtor and its creditors whether or not they have accepted the confirmed plan. Thus, it has preclusive effect. *See* 11 U.S.C. § 1141(a); *Sure-Snap* **[**20]** *Corp. v. State Street Bank & Trust Co.*, 948 F.2d 869, 873 (2d Cir. 1991) (*res judicata* bars any attempt by parties to reorganization hearing to relitigate matters raised or that could have been raised). But the scope of that preclusive effect is limited by the content of the reorganization **[*1045]** plan and the

confirmation order. Here the order and plan do not address the specific issue presented, namely, whether the debtor may maintain an avoidance action in the bankruptcy court to recover the pre-petition transfers to the defendant banks.

Section 10.01 of the plan is not helpful to the administrators because it simply assures that confirmation will not reduce the bankruptcy court's jurisdiction over certain matters. The provision does not expand the court's jurisdiction, nor does it purport to give the court exclusive jurisdiction -or any jurisdiction, for that matter -- over avoidance actions that are *not* governed by the Bankruptcy Code. Because the banks prevailed in the bankruptcy and district courts on the theory that the Bankruptcy Code's substantive law does not govern these adversary proceedings, the retention of jurisdiction in § 10.01 is not relevant.

Moreover, the **[**21]** administrators' argument is inconsistent with the position they adopted at the confirmation hearing. On the day of the hearing, Barclays had already made its Rule 12(b)(6) motion in the adversary proceeding, and apparently had threatened to object to confirmation unless its arguments for dismissal were preserved. To avoid this possible difficulty, administrators' counsel stated on the record that "with regard to . . . the Barclays Bank objection to confirmation . . . we are pleased to represent to the Court, that the provisions of the Plan in Article 10 . . . [were] not intended to prejudice the merits of the arguments presented by Barclays in their adversary proceeding." Under these circumstances, the administrators are estopped from asserting the contrary. *Cf. Hurd v. DiMento & Sullivan*, 440 F.2d 1322, 1323 (1st Cir.) (per curiam) ([HN3] litigant estopped from relying on factual allegation directly contrary to representation made to trial court in prior proceeding), *cert. denied*, 404 U.S. 862, 30 L. Ed. 2d 105, 92 S. Ct. 164 (1971).

The administrators assert further that clause 11 of the scheme of arrangement expressly entitles them to object to claims of creditors in the jurisdiction which they select. **[**22]** That clause, which applies only to notices of claim filed with the administrators -- not proofs of claim filed with the bankruptcy court -- does allow the administrators to object "for any reason under any applicable law." Contrary to the administrators' assertion, however, the document does not permit the administrators to select the forum for resolving such a dispute; in fact, clause 11.6 provides that the dissatisfied *creditor* -not the administrators -- must apply "to the Court" to ascertain liability. The scheme's definition of "the Court," found in Annexure 1 -- "the English Court or the US Court, as is the more appropriate forum in the particular case" -- is not helpful to the administrators, nor does the scheme explain which law is the "applicable" one. The cited portion of the scheme therefore supplies only vague choice-of-forum and choice-of-law rules. Obviously, it does not grant the administrators authority to decide which court is "more appropriate" in the given case, or which law is "applicable." These are matters entrusted to the courts to decide.

The administrators' final contention concerning the binding effect of the plan is that the banks' remaining claims against **[**23]** the debtor will be discharged pursuant to § 1141(d) if the claims are not allowed under § 502 of the Code, because this is a Chapter 11 proceeding and the estate property is subject to the bankruptcy court's jurisdiction. The argument appears to be that Maxwell will be absolved automatically from making any distributions to the banks unless the banks' claims are adjudged "allowed" by the bankruptcy court. We reject this contention as well. First, [HN4] confirmation of a Chapter 11 plan will ordinarily discharge pre-existing debts whether or not they are "allowed," but the Code predictably does not grant debtors such relief where a plan or confirmation order provides otherwise. *See* 11 U.S.C. § 1141(d)(1)(A). In other words, discharge under § 1142 does not hinge on whether a claim is "allowed."

Second, even assuming it is relevant whether a claim is "allowed," we believe the banks' claims will be "allowed" if the provisions of the plan are followed. A review of the plan is instructive in this regard. Under § 6.06 of the plan, [HN5] the administrators are to **[*1046]** file in the U.S. copies of notices of claim received from claimants in England. This is sufficient to constitute the filing of a proof-of-claim **[**24]** under 11 U.S.C. § 501. *See Liona Corp. v. PCH Assocs. (In re PCH Assocs.)*, 949 F.2d 585, 605 (2d Cir. 1991) (explaining that purpose of notice of claims rules is to keep all parties informed). Under § 502(a), if a proof of claim is filed, it is "deemed allowed" *unless* there is a timely objection by a party in interest. But here, under the right circumstances, there can be no such objection. Clause 11.6 of the scheme quite clearly states that a creditor filing a notice of claim in England may resort to "the Court" for a determination of liability if the administrators object to the claim. Where "the Court" is the court in England, *i.e.*, where that forum is

"the more appropriate" one, clause 11.6 provides that the *English* court will "determine the amount of the [liability]." If the claimant prevails, the scheme further provides in clause 5 that the creditor will receive a distribution from the estate on a *pari passu* basis.

Hence, the plan requires claims such as the banks' -assuming the English court is the "appropriate" one, a question that is left for case-by-case determination -- to be paid regardless of whether the bankruptcy court *adjudicates* the claim [**25] as "allowed" or "disallowed" under § 502(b). The reorganization plan -- which is binding upon the administrators and Maxwell's creditors -- states that certain claims will be adjudicated in England under "applicable law," and the administrators are therefore estopped from objecting to such claims in the bankruptcy court. Such objections are utterly inconsistent with the plan negotiated by the parties and the collective action necessary for its successful implementation.

The estate would be free to urge before Judge Brozman that the bankruptcy court is the "appropriate" forum and that American law is "applicable," as the choice of the appropriate forum is a case-specific inquiry. But given the terms of the plan they could not seek disallowance in the bankruptcy court under United States law where the plan contemplates that liability is to be determined elsewhere under different law. *Cf. First Union Commercial Corp. v. Nelson, Mullins, Riley and Scarborough (In re Varat Enters.)*, 81 F.3d 1310, 1316 (4th Cir. 1996) (party-in-interest's failure to object before confirmation of Chapter 11 plan barred post-confirmation objection; claim was deemed allowed under § 502(a)). This [**26] is true despite the fact that the bankruptcy court retains concurrent jurisdiction over claims disputes under § 10.02 of the plan. [HN6] That court has jurisdiction to decide objections to the allowance of claims, but equity does not permit the administrators to litigate objections in the bankruptcy court when doing so conflicts with a basic assumption of the plan and scheme. Thus, the banks' claims may be "allowed" despite the absence of a hearing and decision under § 502.

Third, the banks' claims -- if the English court is the proper forum for determining their validity -- are not automatically discharged by § 1141(d) of the Code because, as our foregoing analysis makes clear, the plan provides they must be paid if validated in England. For all these reasons, the confirmation order, binding though it may be, does not preclude the banks from seeking dismissal of Maxwell's complaints.

II International Comity

A. *The Doctrine*

Analysis of comity often begins with the definition proffered by Justice Gray in *Hilton v. Guyot*, 159 U.S. 113, 163-64, 40 L. Ed. 95, 16 S. Ct. 139 (1895): [HN7] "'Comity,' in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, [**27] upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws." Although *Hilton* addressed the degree to which a foreign judgment is conclusive in a court of the United States, the principle expressed is one of broad application.

Whether a court is applying the common law, as in *Hilton*, or applying a [*1047] statute enacted by Congress, as in the present case, [HN8] "international law, . . . including . . . questions arising under what is usually called private international law, or the conflict of laws, and concerning the rights of persons within the territory and dominion of one nation, by reason of acts, private or public, done within the dominions of another nation -- is part of our law." *Hilton*, 159 U.S. at 163; *see Romero v. International Terminal Operating Co.*, 358 U.S. 354, 382-83, 3 L. Ed. 2d 368, 79 S. Ct. 468 (1959) (applying choice-of-law principles to claims asserted under the Jones Act). The doctrine does not impose a limitation on the sovereign power [**28] to enact laws applicable to conduct occurring abroad. *E.g.*, *Lauritzen v. Larsen*, 345 U.S. 571, 581-82, 97 L. Ed. 1254, 73 S. Ct. 921 (1953); *cf. Hilton*, 159 U.S. at 166. Instead, it guides our interpretation of statutes that might otherwise be read to apply to such conduct. When construing a statute, the doctrine of international comity is best understood as a guide where the issues to be resolved are entangled in international

relations.

In *Murray v. The Charming Betsy*, 6 U.S. (2 Cranch) 64, 118, 2 L. Ed. 208 (1804), Chief Justice Marshall said that [HN9] a statute "ought never to be construed to violate the law of nations, if any other possible construction remains." And, as Judge Learned Hand observed in *United States v. Aluminum Co. of Am.*, 148 F.2d 416, 443 (2d Cir. 1945) (*Alcoa*), "we are not to read general words . . . without regard to the limitations customarily observed by nations upon the exercise of their powers; limitations which generally correspond to those fixed by the 'Conflict of Laws.'" *See also Societe Nationale Industrielle Aerospatiale v. District Court*, 482 U.S. 522, 543-44, 96 L. Ed. 2d 461, 107 S. Ct. 2542 (1987) (analyzing treaty in light of "concept of international comity").

Moreover, [HN10] international comity **[**29]** is a separate notion from the "presumption against extraterritoriality," which requires a clear expression from Congress for a statute to reach non-domestic conduct, *see Kollias v. D & G Marine Maintenance*, 29 F.3d 67, 73 (2d Cir. 1994), *cert. denied*, 130 L. Ed. 2d 1061, 115 S. Ct. 1092 (1995). Hence, comity was applied to preclude the application of the Jones Act in *Romero*, where the conduct at issue was otherwise clearly subject to that statute because it occurred in waters of the United States. *See Romero*, 358 U.S. at 383; *see also Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 815-16, 125 L. Ed. 2d 612, 113 S. Ct. 2891 (1993) (Scalia, J., dissenting) (presumption against extraterritoriality was inapplicable to *Romero*).

[HN11] Because the principle of comity does not limit the legislature's power and is, in the final analysis, simply a rule of construction, it has no application where Congress has indicated otherwise. *See Romero*, 358 U.S. at 382 (principle applies "in the absence of a contrary congressional direction"); *cf. Hartford Fire*, 509 U.S. at 797-99 & nn.24-25 (majority opinion) (noting that "international comity" may be viewed as relevant to whether court should decline to exercise jurisdiction **[**30]** or as a tool for ascertaining the scope of jurisdiction in the first place). We realize that [HN12] "international comity" may describe two distinct doctrines: as a canon of construction, it might shorten the reach of a statute; second, it may be viewed as a discretionary act of deference by a national court to decline to exercise jurisdiction in a case properly adjudicated in a foreign state, the so-called comity among courts. Whether these are two distinct doctrines -- and we need not decide that question -- in the context of this case the concepts are not two inconsistent propositions.

[HN13] Comity is exercised with reference to "prevalent doctrines of international law." *Lauritzen*, 345 U.S. at 577. The management of transnational insolvencies is concededly underdeveloped. However, certain norms shared among nations are relevant to the present case and have guided the choice-of-law analysis in such cases as *Lauritzen* and *Romero*. *See also Alcoa*, 148 F.2d at 443 (referring to similar norms). The same principles are set forth in § 403(1) of the *Restatement (Third) of Foreign Relations* (1986), which provides that states normally refrain from prescribing laws that govern **[*1048]** activities **[**31]** connected with another state "when the exercise of such jurisdiction is unreasonable." *See also United States v. Javino*, 960 F.2d 1137, 1142-43 (2d Cir.) (applying § 403 in ascertaining scope of National Firearms Act), *cert. denied*, 506 U.S. 979, 121 L. Ed. 2d 383, 113 S. Ct. 477 (1992); *United States v. Vasquez-Velasco*, 15 F.3d 833, 840 (9th Cir. 1994) (applying § 403 to determine reach of federal racketeering law).

Whether so legislating would be "unreasonable" is determined "by evaluating all relevant factors, including, where appropriate," such factors as the link between the regulating state and the relevant activity, the connection between that state and the person responsible for the activity (or protected by the regulation), the nature of the regulated activity and its importance to the regulating state, the effect of the regulation on justified expectations, the significance of the regulation to the international system, the extent of other states' interests, and the likelihood of conflict with other states' regulations. *Restatement* § 403(2).

The factors enumerated in the *Restatement* correspond to familiar choice-of-law principles. *See, e.g., Romero*, 358 U.S. at 383 (interacting **[**32]** interests of our own and foreign countries are the controlling considerations); *Lauritzen*, 345 U.S. at 582; *Koreag, Controle et Revision S.A. v. Refco F/X Assocs. (In re Koreag, Controle et Revision S.A.)*, 961 F.2d 341, 350 (2d Cir.) ("rule is to apply the law of the jurisdiction having the greatest interest in the litigation"), *cert. denied*, 506 U.S. 865, 121 L. Ed. 2d 132, 113 S. Ct. 188 (1992). The analysis must consider the international system as

a whole in addition to the interests of the individual states, because the effective functioning of that system is to the advantage of all the affected jurisdictions. *See Societe Nationale*, 482 U.S. at 555 n.11 (Blackmun, J., dissenting) ("Choice-of-law decisions . . . reflect the needs of the system as a whole as well as the concerns of the forums with an interest in the controversy."). [HN14] Comity is a doctrine that takes into account the interests of the United States, the interests of the foreign state, and those mutual interests the family of nations have in just and efficiently functioning rules of international law. *Id.* at 555.

B. ***Applicability of the Doctrine to the Case at Hand***

[HN15] Because Congress legislates against a backdrop that includes those **[**33]** international norms that guide comity analysis, absent a contrary legislative direction the doctrine may properly be used to interpret any statute. Comity is especially important in the context of the Bankruptcy Code for two reasons. First, deference to foreign insolvency proceedings will, in many cases, facilitate "equitable, orderly, and systematic" distribution of the debtor's assets. *Cunard S.S. Co. v. Salen Reefer Servs. AB*, 773 F.2d 452, 458 (2d Cir. 1985) ("American courts have consistently recognized the interest of foreign courts in liquidating or winding up the affairs of their own domestic business entities."); *Victrix Steamship Co., S.A. v. Salen Dry Cargo A.B.*, 825 F.2d 709, 713 (2d Cir. 1987) ("American courts have long recognized the particular need to extend comity to foreign bankruptcy proceedings."). Second, Congress explicitly recognized the importance of the principles of international comity in transnational insolvency situations when it revised the bankruptcy laws. *See* 11 U.S.C. § 304; *see* S. Rep. No. 989, 95th Cong., 2d Sess. 35, *reprinted in* 1978 U.S.C.C.A.N. 5787, 5821 (explaining § 304).

The examiner contends the doctrine is inapplicable **[**34]** to the present case because Congress has "conclusively resolved" whether the preference law applies "by legislative direction." Although such a direction would obviously make it easier to decide this case, the examiner has not pointed us to a statutory section that supports his contention. Instead, he relies on § 103(a), which simply states that the provisions of Chapter 5 of the Bankruptcy Code, including § 547 and § 502(d), "apply in a case under chapter . . . 11." But § 103(a) contains only "general words," which we have held must be read with regard to the traditional limitations states impose on the exercise of their power to prescribe laws. *Alcoa*, 148 F.2d at 443; *see also Lauritzen*, 345 U.S. at 581 **[*1049]** (Congress was on notice that "generality of language" in Jones Act would lead courts to apply it with reference to international maritime law). Such general words do not limit the application of international comity, nor do they "conclusively resolve" this issue. The same is true of other statutory provisions relied upon by the examiner. *See* § 303(b)(4) (permitting "foreign representative of the estate in a foreign proceeding" to file involuntary petition); § 109(a) **[**35]** (limiting "debtor" status).

The plaintiffs cite a variety of other Code sections that purportedly direct courts not to apply comity principles. For example, the examiner suggests that because Congress, in § 304 of the Code, established a flexible procedure for conducting a proceeding "ancillary" to a foreign proceeding, it must have intended to prohibit such flexibility in ordinary Chapter 11 proceedings. But, as we have previously noted, the inclusion of § 304 in the Code and the explicit reference in it to "comity" should not be read "to overrule in foreign bankruptcies well-established principles based on considerations of international comity." *Cunard*, 773 F.2d at 456. We are unable to conclude from § 304 that it was Congress' purpose that courts ignore principles of comity when deciding whether to apply the avoidance law. The provision in § 304 has even less significance than the general words interpreted in *Lauritzen* and *Alcoa*. Similarly, the Code provisions referring to "applicable law" or "applicable nonbankruptcy law" cited by the administrators, *see* 11 U.S.C. §§ 363(f)(1), 365(c)(1)(A), 510(a), 541(c)(2), 544(b), 1126(b)(1), afford no statutory basis **[**36]** for ignoring comity considerations.

Nor are we persuaded by the examiner's conclusory assertion that the Bankruptcy Code always applies, comity notwithstanding, when a bankruptcy case has been properly commenced, and that choice-of-law analysis is never appropriate in a bankruptcy case. The examiner relies heavily on *Nolte v. Hudson Navigation Co.*, 31 F.2d 527 (2d Cir. 1929), an equity receivership case holding that the measure of unsecured bondholders' provable claims was governed by the law of the forum rather than the state in which the debtor was incorporated. Rejecting the rule proffered by the unsecured creditors, Judge Swan reasoned that the proceeding was not a winding-up proceeding governed by the law of

the state of incorporation, but was in the nature of an "equitable execution," -- "a remedy accorded creditors by the law of the forum, in order to reach their debtor's property and apply it in satisfaction of their claims." *Id.* at 529.

Assuming *arguendo* that bankruptcy proceedings are among those remedies *Nolte* referred to -- those accorded to creditors by the law of the forum -- the rationale in *Nolte* is nonetheless inapposite. There a receiver had [**37] been appointed in New York to dispose of property in that state. Here, to maximize the return to creditors, there are two concurrent proceedings involving property in two jurisdictions. Thus, to say that the law of "the forum" governs begs the question, and our refusal in *Nolte* to apply the law of the debtor's state of incorporation can give plaintiffs no comfort. Indeed, the difference between that case and the present one -- here, there are two forums -- illuminates why resort to choice-of-law principles is necessary. For the same reason, the examiner's citation to *Prudential Ins. Co. of Am. v. Land Estates, Inc.*, 110 F.2d 617 (2d Cir. 1940), another receivership case, which held only that New York law provided for the application of the forum state's law, is unpersuasive. Neither *Nolte* nor *Prudential* points to any statutory basis for ignoring comity principles in analyzing the Bankruptcy Code. We therefore are unable to accept plaintiffs' contention that the terms of the statute preclude us from giving effect to comity.

C. *True Conflict*

We move next to plaintiffs' argument that the use of the doctrine is improper because there is no conflict between the Bankruptcy [**38] Code and English law. [HN16] International comity comes into play only when there is a true conflict between American law and that of a foreign jurisdiction. *Hartford Fire*, 509 U.S. at 798; *Societe Nationale*, 482 U.S. at 555 (Blackmun, J., dissenting) (existence of a true conflict is a "threshold question"). **[*1050]** Plaintiffs maintain there is no true conflict between American and English avoidance rules because English law does not require conduct that violates American law. They insist, in addition, that the English courts' decision not to enjoin the debtor's estate from bringing the instant avoidance action against Barclays suggests there is no conflict between the two countries' laws. These propositions are unpersuasive. We believe there is a true conflict necessitating the application of comity principles to ascertain the compass of the Code.

In *Hartford Fire*, 509 U.S. at 798-99, the Supreme Court held that international comity provided no basis for limiting a district court's employment of American antitrust law against boycotting activities undertaken by British reinsurers doing business in the United Kingdom. The Court reasoned that although the reinsurers' conduct -- alleged [**39] to violate the Sherman Act -- was consistent with comprehensive regulations established by the British Parliament, this difference between the two laws did not amount to a conflict. *Id.* Instead, what was required to establish a true conflict was an allegation that compliance with the regulatory laws of both countries would be impossible. *Id.* at 799.

The conclusion that American and British avoidance law conflict comports with *Hartford Fire*. As we have previously noted, *Hartford Fire* recognized that "other concerns" might be implicated if the context were different. *Sterling Drug, Inc. v. Bayer AG*, 14 F.3d 733, 747 (2d Cir. 1994) (citing *Hartford Fire*, 509 U.S. at 799). In *Sterling Drug* those "other concerns" were present in the context of a dispute over the scope of an extraterritorial injunction under the Lanham Act. The instant dispute over the applicability of the avoidance provision of the Bankruptcy Code is also significantly different from the circumstances confronting the Supreme Court in *Hartford Fire*, a Sherman Act case. This difference compels a different conclusion.

There are several reasons for this. First, avoidance rules do not regulate [**40] conduct in the same fashion as do prohibitions against anti-competitive conspiracies. Avoidance rules do not criminalize transfers of property, nor do they impose liability automatically for any such transfer. Instead, such rules, in adjusting the allocation of assets once held by the debtor, require courts to scrutinize a debtor's actions prior to its bankruptcy filing and, under certain circumstances, to nullify those actions. Liability for a transfer is contingent on the subsequent commencement of insolvency proceedings. Thus, it may be seen that although avoidance rules unquestionably aim to influence pre-petition conduct, *see, e.g., Union Bank v. Wolas*, 502 U.S. 151, 161, 116 L. Ed. 2d 514, 112 S. Ct. 527 (1991), a conflict between two avoidance rules exists if it is impossible to distribute the debtor's assets in a manner consistent with both rules. Second, although our allusions to English law should not be understood as an attempt to prejudice the outcome of

any future litigation on that subject in British courts, the parties in the present actions have assumed that the "intent" requirement in the English law would dictate a different distributional outcome than would United States law. Consequently, [**41] it is not possible to comply with the rules of both forums and the threshold requirement of a true conflict exists for purposes of comity analysis.

Nor is it relevant in this regard that Justice Hoffman -- in a decision affirmed on appeal -- refused to issue an anti-suit injunction prohibiting the administrators from instituting the present action against Barclays. Plaintiffs seize on his finding that there is nothing "oppressive" about the difference between the American and English avoidance laws. Contrary to plaintiffs' assertion, this finding did not imply that there is no conflict between the two laws -- it meant simply that the conflict was not so severe as to warrant the extraordinary remedy of an anti-suit injunction. Moreover, the High Court proceeded on the assumption that the American court would evaluate the strength of the American connection to the alleged transfers. *Homan*, [1992] BCC at 767. Such an approach is in substance the same as the "international comity" doctrine described in this opinion.

[*1051] III Propriety of Dismissal by the Bankruptcy Court

A. ***Standard of Review***

Having established that the doctrine of comity applies, we now explain why we think dismissal [**42] was warranted, that is to say, why [HN17] the statute was properly construed not to reach the pre-petition fund transfers to the defendant banks. [HN18] The district court reviewed the bankruptcy court's ruling on the comity issue for abuse of discretion. *See Maxwell II*, 186 Bankr. at 822. Because the doctrine in theory is relevant to construing a statute's reach, one might expect that *de novo* review of the bankruptcy court's decision would have been in order. *See, e.g., Koreag*, 961 F.2d at 347-48 (review of statutory interpretation is a matter of law). The banks declare, however, that under *Allstate Life Ins. Co. v. Linter Group Ltd.*, 994 F.2d 996, 999 (2d Cir.), *cert. denied*, 510 U.S. 945, 114 S. Ct. 386, 126 L. Ed. 2d 334 (1993), the bankruptcy court's application of the comity doctrine is reviewed for an abuse of discretion. Although plaintiffs do not dispute this, the examiner contends that we must decide anew whether the bankruptcy court applied the correct legal standard, that is, whether the comity doctrine applied in the first place.

Ascertaining the relevant standard need not detain us overly long. [HN19] It was appropriate as a matter of law to analyze the Bankruptcy Code in light of international comity. [**43] Moreover, even though plaintiffs apparently concede that an abuse-of-discretion standard applies once the doctrine's threshold requirements have been satisfied, we nonetheless would hold that dismissal on comity grounds was appropriate even were our review of this case *de novo*. We need not on this appeal decide therefore which standard applies. Regardless of the applicable standard, we agree with the lower courts that English law governs resolution of this litigation.

B. ***Primacy of English Law***

England has a much closer connection to these disputes than does the United States. The debtor and most of its creditors -- not only the beneficiaries of the pre-petition transfers -- are British. Maxwell was incorporated under the laws of England, largely controlled by British nationals, governed by a British board of directors, and managed in London by British executives. These connecting factors indicated what the bankruptcy judge called the "Englishness" of the debtor, which was one reason for recognizing the administrators -- who are officers of the High Court -- as Maxwell's corporate governance. *Maxwell I*, 170 B.R. at 817 n.23. These same factors, particularly the fact that [**44] most of Maxwell's debt was incurred in England, show that England has the strongest connection to the present litigation.

Although an avoidance action concededly affects creditors other than the transferee, because scrutiny of the transfer is at the heart of such a suit it is assuredly most relevant that the transfers in this case related primarily to England. The $ 30 million received by Barclays came from an account at National Westminster in London and, while it was routed through Barclays' New York branch like all payments received in U.S. dollars, it was immediately credited to an overdraft account maintained in England. Plaintiffs claim no particular United States connection to the other alleged

transfers to Barclays, all of which were denominated in the amended complaint in pounds sterling. Similarly, the transfers to National Westminster and Societe Generale were made to and from accounts maintained in Great Britain.

Further, the overdraft facilities and other credit transactions between the transferee banks and the debtor resulted from negotiations that took place in England and were administered primarily there. English law applied to the resolution of disputes arising [**45] under such agreements. We recognize that some of the money transferred to the banks came from the proceeds of the sale of Maxwell subsidiaries in the United States, which is a subject we discuss in a moment. In almost all other respects, however, the credit transactions were centered in London and the fund transfers occurred there.

C. *Relative Interests of Forum and Foreign States*

Given the considerably lesser American connection to the dispute, the bankruptcy [*1052] court believed its forum's interests were "not very compelling." *Maxwell I*, 170 B.R. at 818. Virtually the only factor linking the transfers to the United States -- that the sale of certain Maxwell subsidiaries in the United States provided the source of some of the funds -- is not particularly weighty because those companies were sold as going concerns. Hence, the potential effect that such sales might have had on local economies is not here implicated.

The examiner warns that dire consequences would result from a failure to enforce the Code's avoidance provision. The first one he mentions is that such a course ignores § 103(a) of the Code. This contention is one we have already addressed and rejected. The examiner [**46] next urges that the purposes underlying § 547 and § 502(d) would be thwarted unless both of these provisions were applied in all Chapter 11 proceedings. Although the non-application of these or other Bankruptcy Code provisions certainly might detract from the Code's policies in other cases, here the negative effects are insubstantial. The principal policies underlying the Code's avoidance provisions are equal distribution to creditors and preserving the value of the estate through the discouragement of aggressive pre-petition tactics causing dismemberment of the debtor. *Wolas*, 502 U.S. at 161. These policies are effectuated, although in a somewhat different way, by the provisions' British counterpart. *See Maxwell I*, 170 Bankr. at 818.

In the present case, in which [HN20] there is a parallel insolvency proceeding taking place in another country, failure to apply § 547 and § 502(d) does not free creditors from the constraints of avoidance law, nor does it severely undercut the policy of equal distribution. All avoidance laws are necessarily limited in scope because time limits and other conditions are imposed on the voidability of transactions. Although a different result might be [**47] warranted were there no parallel proceeding in England -- and, hence, no alternative mechanism for voiding preferences -- we cannot say the United States has a significant interest in applying its avoidance law. Moreover, as noted, international comity is a policy that Congress expressly made part of the Bankruptcy Code, and a decision consistent with comity therefore furthers the Code's policy.

Because of the strong British connection to the present dispute, it follows that England has a stronger interest than the United States in applying its own avoidance law to these actions. Its law implicates that country's interest in promoting what Parliament apparently viewed as the appropriate compromise between equality of distribution and other important commercial interests, for instance, ensuring potentially insolvent debtors' ability to secure essential ongoing financing. In addition, although complexity in the conduct of transnational insolvencies makes choice-of-law prognostication imprecise, we agree with the lower courts that English law could have been expected to apply. *See Maxwell II*, 186 Bankr. at 823; *Maxwell I*, 170 B.R. at 818; *see also Canada S. Ry. v. Gebhard*, [**48] 109 U.S. 527, 537-38, 27 L. Ed. 1020, 3 S. Ct. 363 (1883) (domestic creditors of foreign bankrupts "presumed to have contracted with a view to . . . laws of the [foreign] government").

The administrators further declare that the English court's decision vacating the *ex parte* anti-avoidance suit order established that the application of our preference law by the Southern District courts would not violate the law of nations, and that American courts should not use comity as a reason to decline to assert jurisdiction under section § 547. The decision in the English court implied nothing of the kind. Instead, that court ruled that Barclays could not obtain an

injunction because an expression of the principle of comity that relied on the good sense of the bankruptcy court outweighed the risk that it would assume jurisdiction in violation of international law. *Homan*, [1992] BCC at 762.

Rather than take a confrontational posture by enjoining this litigation and prejudice the cooperation which has thus far prevailed between the Chapter 11 and the English administration, *id.* at 767, the High Court left the merits of the question for the American courts to decide. Thus, the English court's decision affords [**49] no basis for concluding that England's interests are insubstantial.

[*1053] D. *Cooperation and Harmonization: Systemic Interest*

In addition to the relative strength of the respective jurisdictional interests of England and the United States, there is a compelling systemic interest pointing in this instance against the application of the Bankruptcy Code. These parallel proceedings in the English and American courts have resulted in a high level of international cooperation and a significant degree of harmonization of the laws of the two countries. The affected parties agreed to the plan and scheme despite differences in the two nations' bankruptcy laws. The distribution mechanism established by them -- beyond addressing some of the most obvious substantive and procedural incongruities -- allowed Maxwell's assets to be pooled together and sold as going concerns, maximizing the return to creditors. And, by not requiring a creditor to file its claim in both forums, the arrangement eliminated many of the inefficiencies usually attendant in multi-jurisdiction proceedings.

Taken together, these accomplishments -- which, we think, are attributable in large measure to the cooperation between [**50] the two courts overseeing the dual proceedings -- are well worth preserving and advancing. This collaborative effort exemplifies the "spirit of cooperation" with which tribunals, guided by comity, should approach cases touching the laws and interests of more than one country. *See Societe Nationale*, 482 U.S. at 543 n.27 (1987). Where a dispute involving conflicting avoidance laws arises in the context of parallel bankruptcy proceedings that have already achieved substantial reconciliation between the two sets of laws, comity argues decidedly against the risk of derailing that cooperation by the selfish application of our law to circumstances touching more directly upon the interests of another forum.

It should be remembered that the interest of the system as a whole -- that of promoting "a friendly intercourse between the sovereignties," *Hilton*, 159 U.S. at 165 -- also furthers American self-interest, especially where the workings of international trade and commerce are concerned. *See, e.g., Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 629, 87 L. Ed. 2d 444, 105 S. Ct. 3346 (1985) (international policy favors deferral to transnational tribunals); *Wildenhus's Case*, 120 [**51] U.S. 1, 12, 30 L. Ed. 565, 7 S. Ct. 385 (1887) (interest in promoting commerce produced rule that law of nation to which vessel belonged generally governed conduct aboard ships).

We recognize that forbearance and goodwill in the conduct of international bankruptcies is an ideal not easily achieved in the near-term. Many commentators advocate centralized administration of each insolvency under one country's laws, which could require a multi-lateral treaty or, even, a greater degree of harmonization of the commercial laws throughout the world. *See, e.g.*, Douglass G. Boshkoff, *Some Gloomy Thoughts Concerning Cross-Border Insolvencies*, 72 Wash. U. L.Q. 931, 931-36 (1994). In the meanwhile, [HN21] bankruptcy courts may best be able to effectuate the purposes of the bankruptcy law by cooperating with foreign courts on a case-by-case basis. Congress contemplated this approach when it provided for "ancillary" proceedings under 11 U.S.C. § 304. Although comity analysis admittedly does not yield the commercial predictability that might eventually be achieved through uniform rules, it permits the courts to reach workable solutions and to overcome some of the problems of a disordered international system. Given that [**52] the scheme and plan in this case did not clearly address the choice-of-law and choice-of-forum questions that have generated this litigation, resort to comity and choice-of-law principles should naturally have been foreseen. Consequently, the interests of the affected forums and the mutual interest of all nations in smoothly functioning international law counsel against the application of United States law in the present case.

IV Denial of Distributions Under 11 U.S.C. § 502

The final issue to be resolved is the plaintiffs' contention that even if the pre-petition transfers to the banks may not be recovered under § 547 for comity reasons or otherwise, the administrators are nevertheless entitled **[*1054]** under § 502(d) to deny distributions to the banks as unsecured creditors. Section 502(d) [HN22] provides in relevant part that "the court shall disallow any claim of any entity . . . that is a transferee of a transfer avoidable under section . . . 547 of this title."

The district court turned this challenge aside on two separate grounds. It held that § 502 is inapplicable because § 547 does not govern the avoidance action by the administrators and the transfers are therefore not "avoidable" **[**53]** under § 547. *Maxwell II*, 186 Bankr. at 824. Further, it stated that the banks have not filed "claims" under § 502(d) because they have never submitted themselves to the bankruptcy court's jurisdiction. Defendants declare that this argument was waived because it was not submitted to the bankruptcy court. [HN23] We nonetheless exercise our appellate discretion to entertain the issue because it is one of law, it was clearly presented in the adversary complaints, it was argued before and decided by the district court, and the transcript of hearing on the Rule 12(b)(6) motions indicates the bankruptcy court was quite aware of the relevant statute.

We hold that § 502(d) [HN24] does not apply, but for reasons slightly different than those expressed by the district court. The plaintiffs strongly urge that the district court conflated § 547 and § 502(d) by reading the words "transfer avoidable" in the latter to mean any transfer that actually could be recovered by the estate under the former. They rely on cases holding that disallowance is required under § 502(d) even where a transfer may not affirmatively be recovered because the limitations period for such recovery has expired. *See, e.g.*, **[**54]** *United States Lines, Inc. v. United States (In re McLean Indus.)*, 184 Bankr. 10, 16 (Bankr. S.D.N.Y. 1995), *aff'd*, 196 Bankr. 670 (S.D.N.Y. 1996).

The rule that § 502(d) disallowance is not precluded by the expiration of the limitations period governing recovery under § 547, however sound it may be, does not control in this case. Where a transfer could be avoided under § 547 but for the running of the statute of limitations, disallowance may be warranted because the substantive provisions of § 547, as opposed to the time-limit set forth in § 546(a), still apply to the transfer at issue. *See McLean*, 184 Bankr. at 15 (§ 502(d) refers to § 547, not § 546). But in the present case, [HN25] the doctrine of comity leads to the conclusion that § 547 does not apply to the pre-petition transfers at all. Consequently, the transfers cannot in any way be included among the "transfers avoidable" listed in § 502(d). In addition, because § 502(d) and § 547 apply to the same types of transfers and serve similar purposes, the former is inapplicable to the present case for the reasons discussed in Part III of this opinion.

With respect to the district court's alternative ground for denying **[**55]** relief under § 502(d), we must agree with [HN26] the administrators that the banks' decision to lodge notices of claim in England, rather than filing proofs of claim with the bankruptcy court, cannot be construed to mean that they have not submitted "claims" for purposes of the Bankruptcy Code. To be eligible for distributions under the plan, the banks had to submit "claims," which must be "allowed." *See* 11 U.S.C. § 726(a).

As observed in our discussion of *res judicata*, Part I *supra*, by requiring the administrators to pass along to the bankruptcy court notices of claim filed in England, the plan and scheme comply with the Code's requirement that a proof of claim be filed with the bankruptcy court. Such claims are "allowed" under the Code, *see* § 502(a), if they are accepted without objection by the administrators or liability is established by adjudication in the appropriate court, which may be the bankruptcy court or the English court depending upon the circumstances. We are therefore unable to agree with the district court's conclusion that § 502(d) is inapplicable because the banks have not submitted "claims."

CONCLUSION

In sum, we hold that the binding effect of **[**56]** the confirmation order does not preclude the banks from challenging the applicability of the Bankruptcy Code's avoidance rules to these actions brought by the administrators. Further, in this unique case involving cooperative parallel bankruptcy proceedings seeking **[*1055]** to harmonize two nations' insolvency laws for the common benefit of creditors, the doctrine of international comity precludes application of the

American avoidance law to transfers in which England's interest has primacy. We decline to decide whether, setting aside considerations of comity, the "presumption against extraterritoriality" would compel a conclusion that the Bankruptcy Code does not reach the pre-petition transfers at issue. Thus, we express no view regarding the banks' contention that the Bankruptcy Code *never* applies to non-domestic conduct or conditions. Finally, we reject plaintiffs' argument that the defendant banks' claims against the estate must be disallowed under § 502(d) notwithstanding the non-applicability of § 547.

Accordingly, for the reasons stated, the order appealed from is affirmed.

TAB 5

1 of 1 DOCUMENT

OVERSEAS INNS S.A. P.A., Plaintiff-Appellant, v. UNITED STATES of America, Defendant-Appellee

No. 89-1691

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

911 F.2d 1146; 1990 U.S. App. LEXIS 16414; 90-2 U.S. Tax Cas. (CCH) P50,506; 66 A.F.T.R.2d (RIA) 5648; 20 Bankr. Ct. Dec. 1665; 17 Fed. R. Serv. 3d (Callaghan) 1057

September 19, 1990

SUBSEQUENT HISTORY: [**1] Rehearing Denied October 22, 1990, Reported at: 1990 U.S. App. LEXIS 19628.

PRIOR HISTORY: Appeal from the United States District Court for the Northern District of Texas. No. CA 3-87-0007-D; Sidney A. Fitzwater, Judge.

CASE SUMMARY:

PROCEDURAL POSTURE: Appellant foreign company sought review of a decision of the United States District Court of the Northern District of Texas, which granted summary judgment in favor of appellee United States and declined extending comity to appellant.

OVERVIEW: Appellant foreign corporation was successor to a foreign corporation that had failed to file United States tax returns. Appellant challenged the deficiency in tax court and also filed for bankruptcy in another country. This resulted in a determination that the Internal Revenue Service (IRS) was an unsecured creditor and only a portion of the money owed was given. The district court granted the government summary judgment holding that the IRS would not have received comparable treatment during similar proceedings in the United States and that the IRS's acceptance of the money did not constitute consent to the foreign bankruptcy decree. The court affirmed finding that the district court did not err in denying comity to the foreign bankruptcy ruling.

OUTCOME: Summary judgment in favor of appellee United States affirmed because the denial of comity to the foreign bankruptcy decision was proper so that the United States tax revenues were not adversely affected.

CORE TERMS: comity, summary judgment, amend, tax liability, bankruptcy proceedings, unsecured creditors, accorded, decree, owed, income taxes, public policies, reorganization, comparable, collected, notice, leave to amend, predecessor, bankruptcy law, failed to provide, notice of intent, secured creditor, genuine issue, material fact, de novo, abuse of discretion, exclusive method, post-seizure, compromised, prejudicial, contending

LexisNexis(R) Headnotes

Civil Procedure > Summary Judgment > Appellate Review > Standards of Review
Civil Procedure > Summary Judgment > Standards > Genuine Disputes
Civil Procedure > Summary Judgment > Standards > Materiality
[HN1] A district court shall grant summary judgment if "there is no genuine issue as to any material fact and the

moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c).

Governments > Courts > Judicial Comity
International Law > Dispute Resolution > Comity Doctrine > General Overview
[HN2] Comity is a recognition which one nation extends within its own territory to the legislative, executive, or judicial acts of another. It is not a rule of law, but one of practice, convenience, and expediency. Comity should be withheld only when its acceptance would be contrary or prejudicial to the interest of the nation called upon to give it effect.

International Law > Dispute Resolution > Comity Doctrine > General Overview
[HN3] Granting comity to a foreign bankruptcy proceeding may enable the debtor's assets to be disbursed in an "equitable, orderly, and systematic manner, rather than in a haphazard, erratic or piecemeal fashion."

International Law > Dispute Resolution > Comity Doctrine > General Overview
Tax Law > Federal Income Tax Computation > Retirement Plans > Tax-Sheltered Annuities (IRC sec. 403)
[HN4] Comity does not reach so far as to allow one country to adversely affect another's tax revenues.

Civil Procedure > Pleading & Practice > Pleadings > Amended Pleadings > Leave of Court
Civil Procedure > Pleading & Practice > Pleadings > Rule Application & Interpretation
Criminal Law & Procedure > Search & Seizure > Warrantless Searches > Consent to Search > Sufficiency & Voluntariness
[HN5] After service of a responsive pleading, a party may amend his complaint "only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires." Fed. R. Civ. P. 15(a).

COUNSEL: William D. Jordan, Jackson & Walker, Jack Pew, Jr., Dallas, Texas, for Plaintiff-Appellant.

Marvin Collins, USA, Dallas, Texas, Gary R. Allen, Chief, Appellate Sec., Tax Div., Dept. of Justice, Joan Oppenheimer, David English Cormack, Washington, District of Columbia, for Defendant-Appellee.

JUDGES: Thornberry, Gee, and Barksdale, Circuit Judges.

OPINION BY: BARKSDALE

OPINION

[*1147] BARKSDALE, Circuit Judge.

Overseas Inns S.A. P.A. (Overseas), seeks to recover income taxes assessed and collected by the IRS, primarily contending that comity should be extended to a Luxembourg [**2] court approved plan of reorganization which treated the IRS as a general, rather than a priority, creditor. The district court declined to do so and granted the United States summary judgment. Finding no error, we AFFIRM.

I.

The parties stipulated in district court to the facts. Overseas, a Luxembourg corporation, is the successor to a foreign corporation which failed to file United States tax returns for the years 1960 through 1962. The IRS contended that Overseas' predecessor had engaged in trade or business in the United States during those years and had derived income from United States sources. In 1973, Overseas filed the returns for the years in question but asserted that its predecessor did not owe any taxes. The IRS disagreed and issued a notice of deficiency for those years.

Overseas challenged the deficiency in the United States Tax Court. Overseas and the IRS compromised the deficiency determination; and in January 1978, the tax court entered a deficiency judgment for income taxes for 1960, 1961, and 1962 in the respective amounts of $ 103,358.43, $ 206,811.36 and $ 197,174.04, not including interest.

While the Tax Court proceeding was pending, Overseas filed for [**3] bankruptcy in December 1976, in Luxembourg. In March 1978, the Luxembourg court-appointed commissaires proposed a plan of reorganization (the plan), because a financial group was willing to invest enough capital to pay Overseas' sole secured creditor in full and the general unsecured creditors in part. Under the plan, the unsecured creditors would receive 23.49% of their claims. The plan characterized the IRS as an unsecured creditor; therefore, the IRS would receive only $ 231,475. [1] The IRS would have been a priority creditor in a similar proceeding in the United States.

1 As of that date, the deficiency was $ 1,003,724.61, consisting of $ 507,343.83 in taxes and $ 496,380.78 in interest.

The IRS received a copy of the plan; but its policy was not to participate in such foreign bankruptcy proceedings, because it usually received less than the amount owed. It did not enter an appearance in the Luxembourg proceeding, file a proof of claim or object to the plan. The Luxembourg court approved the plan; and [**4] it became final in February 1979. When Overseas mailed the first check to the IRS under the plan, the IRS returned it, because it was in Belgium francs, not United States dollars. Overseas' yearly payments under the plan to the IRS in 1979-1983, totaling $ 179,135.76, were accepted. [2]

2 Overseas' payment in 1984 was placed in escrow.

In June 1981, Overseas agreed to sell 19% of its Eagle International stock to New Trails, Inc., a United States corporation. At the time of the bankruptcy, the stock had no market value. New Trails paid part of the purchase price, with the balance to be paid in installments. In 1983 and 1984, the IRS levied on the payments for application against Overseas' tax liability in issue; and consequently, New Trails made the installment payments of $ 247,605.48, $ 236,295.89, and $ 223,868.85 directly to the IRS. The IRS denied Overseas' timely claims for refund of the levied payments.

In November 1986, Overseas brought this action, contending that the IRS had collected $ 919,835.79 [**5] to which it was not entitled. Overseas moved for summary [*1148] judgment, asserting that the Luxembourg judgment was binding on the IRS and that it had satisfied its obligation to the United States by paying $ 179,135.76 in accordance with that judgment. The district court denied the motion, holding that Overseas had failed to prove that the IRS would have received comparable treatment under United States law. *Overseas Inns S.A. P.A. v. United States*, 685 F. Supp. 968, 975 (N.D.Tex. 1988). [3]

3 The court noted that Overseas had $ 22.5 million in assets at the time of the reorganization and that the IRS, as a first or even fourth priority claimant, could have collected approximately $ 1 million. 685 F. Supp. at 975.

The government moved for summary judgment in December 1988. Several months later, Overseas moved to amend its complaint to allege that the IRS had failed to provide the required notice of intent to levy and post-seizure notice. The motion was denied.

In [**6] May 1989, the district court granted the government summary judgment, holding that the IRS would not have received comparable treatment in similar proceedings in the United States and that the IRS's acceptance of Overseas' checks did not constitute consent to the Luxembourg decree. Overseas timely appealed.

II.

Overseas contends that the district court erred in granting summary judgment because (1) comity should be accorded the Luxembourg plan; and (2) alternatively, the IRS accepted the Luxembourg judgment by knowingly accepting its benefits. Overseas also contends that the district court erred by denying Overseas leave to amend its complaint.

A.

[HN1] A district court shall grant summary judgment if "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). We apply the same standard, *de novo*, on appeal. *Puckett v. Rufenacht, Bromagen & Hertz, Inc.*, 903 F.2d 1014, 1015-16 (5th Cir. 1990). As stated, there is no genuine issue as to any material fact; the facts were stipulated.

1.

" [HN2] Comity is a recognition which one nation extends within its own territory to the legislative, **[**7]** executive, or judicial acts of another. It is not a rule of law, but one of practice, convenience, and expediency." *Somportex Ltd. v. Philadelphia Chewing Gum Corp.*, 453 F.2d 435, 440 (3rd Cir. 1971) *cert. denied*, 405 U.S. 1017, 92 S. Ct. 1294, 31 L. Ed. 2d 479 (1972). "Comity should be withheld only when its acceptance would be contrary or prejudicial to the interest of the nation called upon to give it effect." *Id.* The Supreme Court, in *Hilton v. Guyot*, 159 U.S. 113, 205-06, 16 S. Ct. 139, 159-60, 40 L. Ed. 95 (1895), enunciated the standard for extending comity:

> When an action is brought in a court of this country, by a citizen of a foreign country against one of our own citizens . . . and the foreign judgment appears to have been rendered by a competent court, having jurisdiction of the cause and of the parties, and upon due allegations and proofs, and opportunity to defend against them, and its proceedings are according to the course of a civilized jurisprudence, . . . the judgment is prima facie evidence, . . . of the truth of the matter adjudged; and it should be held conclusive upon the merits tried in the foreign **[**8]** court, unless some special ground is shown for impeaching the judgment, as by showing that it was affected by fraud or prejudice, or that by the principles of international law, and by the comity of our own country, it should not be given full credit and effect. [4]

4 The government asserts that the standard of review is abuse of discretion, but the cases cited are inapposite. *See, e.g., Remington Rand Corp. v. Business Systems, Inc.*, 830 F.2d 1260, 1266 (3rd Cir. 1987) (abuse of discretion standard applied in reviewing trial court's decision on the merits). Here, the district court declined to extend comity on a motion for summary judgment; and we review appeals from summary judgment on a *de novo* basis. Therefore, although for our purposes it is not necessary to decide the issue, whether to grant comity appears to be a mixed question of law and fact, in accordance with the above quoted standard in *Hilton v. Guyot. See also, Somportex Ltd. v. Philadelphia Chewing Gum Corp.*, 453 F.2d at 440-41, also quoted above.

[9]** [HN3]

[*1149] Granting comity to a foreign bankruptcy proceeding may enable the debtor's assets to be disbursed in an "equitable, orderly, and systematic manner, rather than in a haphazard, erratic or piecemeal fashion." *Cunard S.S. Co. v. Salen Reefer Serv. AB*, 773 F.2d 452, 458 (2d Cir. 1985). "Consequently, American courts have consistently recognized the interest of foreign courts in liquidating or winding up the affairs of their own domestic business entities." *Id.*

Accordingly, comity is more likely to be accorded foreign bankruptcy decrees when the foreign law is comparable to United States law. *See, e.g., Cunard S.S. Co.*, 773 F.2d at 459 ("principles of Swedish bankruptcy law are not dissimilar to those of our Bankruptcy Code"). [5] Concomitantly, American courts have declined to accord comity to such decrees when it would prejudice American interests or policies. *Laker Airways, Ltd. v. Sabena, Belgian World Airlines*, 235 U.S. App. D.C. 207, 731 F.2d 909, 937 & n. 104 (D.C. Cir. 1984) ("authorities have recognized that the obligation of comity expires when the strong public policies of the forum are vitiated by the **[**10]** foreign act"); *see also, Hilton,*

159 U.S. at 205-06, 16 S. Ct. at 159; *Cunard S.S. Co.*, 773 F.2d at 459 ("comity would not be granted if it would result in prejudice to United States citizens"); *Banque de Financement, S.A. v. First Nat'l Bank of Boston*, 568 F.2d 911, 921 (2d Cir. 1977) ("in exercising its discretion the district court is to guard against forcing American creditors to participate in foreign proceedings in which their claims will be treated in some manner inimical to this country's policy of equality").

5 "Transnational insolvency cases have been rarely submitted for formal adjudication in U.S. courts [and] the law in this complex field remains underdeveloped and inconsistent at best." Morales & Deutcsh, Bankruptcy Code Section 304 and U.S. Recognition of Foreign Bankruptcies: The Tyranny of Comity, 39 Bus. Law. 1573, 1575 (1984). Recognition of foreign bankruptcy decisions is based on one of two doctrines. Some consider the "universality" theory the modern trend in recognizing foreign bankruptcy proceedings. Gitlin & Flaschen, The International Void in the Law of Multinational Bankruptcies, 42 Bus. Law. 307, 309 (1987). This subjects all of the debtor's assets to the jurisdiction of the bankruptcy court and is a movement away from the old "territorial" approach, which held that bankruptcy proceedings had no power beyond the borders of the country which granted the decree. *Id.*

[**11] As noted by the district court in denying Overseas' summary judgment motion, "it is beyond peradventure that there is, in the United States, an inexpugnable public policy that favors payment of lawfully owed federal income taxes." *Overseas Inns S.A. P.A.*, 685 F. Supp. at 972. This strong public policy applies to taxpayers in bankruptcy. *See* H.R. Conf. Rep. No. 841, 99th Cong. 2d Sess. II-777, *reprinted in* 1986 U.S.Code Cong. & Ad.News 4075, 4865; *see also* S.Rep. No. 989, 95th Cong., 2d Sess. 1, 13-15, *reprinted in* 1978 U.S. Code Cong. & Ad. News 5787, 5799, 5799-5801. [6] [HN4] Comity does not reach so far as to allow one country to adversely affect another's tax revenues. Under the plan, the IRS was treated as an unsecured creditor. In contrast, under United States bankruptcy law, the IRS was a secured creditor and had priority status. Bankruptcy Act of 1898, ch. 541, 30 Stat. 544 (repealed by the Bankruptcy Code which took effect October 1, 1979). The Luxembourg judgment, therefore, unfairly prejudices the United States.

6 "In a broad sense, the goals of rehabilitating debtors and giving equal treatment to private voluntary creditors must be balanced with the interests of governmental tax authorities who, if unpaid taxes exist, are also creditors in the proceeding. Since tax authorities are creditors of practically every taxpayer, another important element is that tax collection rules for bankruptcy cases have a direct impact on the integrity of the Federal, State and local tax systems. These tax systems, generally based on voluntary assessment, work[] to the extent that the majority of taxpayers think they are fair. This presumption of fairness is an asset which should be protected and not jeopardized by permitting taxpayers to use bankruptcy as a means of improperly avoiding their tax debts. To the extent that debtors in a bankruptcy are freed from paying their tax liabilities, the burden of making up the revenues thus lost must be shifted to other taxpayers." S.Rep. No. 989, 1978 U.S. Code Cong. & Ad. News at 5799-5800.

[**12] [*1150] Moreover, not only is the Luxembourg judgment inconsistent with United States laws and policies; but also, because Overseas' predecessor availed itself of the benefits of the United States business climate, it should not now be allowed to escape the corresponding tax burden. Luxembourg's law is dissimilar and prejudicial. The district court held properly that comity should not be accorded.

2.

As an alternative to comity being accorded, Overseas contends that because the IRS knowingly accepted the benefits of the Luxembourg judgment, it is bound by that judgment. The district court held that the IRS' acceptance did not estop the IRS from seeking to collect the balance of the tax liability. *See, e.g., Botany Worsted Mills v. United States*, 278 U.S. 282, 288-89, 49 S. Ct. 129, 131, 73 L. Ed. 379 (1929). In its Reply Brief and at oral argument, Overseas stated that it is not relying on estoppel.

In addition, the district court noted that Congress has mandated by statute, 26 U.S.C. § 7122, the exclusive method for

compromising tax liability. No offer in compromise was submitted or accepted, as required by the statute and regulations. [**13] *See* Treas.Reg. § 301.7122-1. Overseas admits both that the procedures of § 7122 were not followed and that those procedures control in the case of a compromise.

Instead, Overseas bases error on the argument that the acceptance was "an acquiescence in a judgment," not a "compromise," and that therefore, section 7122 does not control. It contends that the IRS acquiesced by failing to challenge the plan and by accepting payments which the IRS knew were made pursuant to the plan; that when one accepts the benefits of a judgment, one also accepts its burdens.

This argument is without merit. Overseas owed a fixed amount to the IRS and attempted to satisfy that amount by repaying only 23.49% of it. This, therefore, is an attempted compromise, seeking to reduce the amount of taxes owed. Accordingly, the exclusive statutory procedure would apply.

For example, an oral agreement between the IRS and the taxpayer was held to be an attempted compromise in *Botany Worsted Mills*, 278 U.S. at 288-89, 49 S. Ct. at 131. In rejecting the argument that the agreement bound the Government, even though the statutory formalities had not been complied with, the Supreme Court stated: [**14]

> We think that Congress intended by the statute to prescribe the exclusive method by which tax cases could be compromised, requiring therefor the concurrence of the Commissioner and the Secretary, and prescribing the formality with which, as a matter of public concern, it should be attested in the files of the Commissioner's office.

Id.

Therefore, the IRS' acceptance of Overseas' checks did not preclude it from seeking full recovery.

B.

Overseas contends that the district court erred in not allowing it to amend its complaint to allege that the IRS had failed to provide the required notice of intent to levy and post-seizure notice. [HN5] After service of a responsive pleading, a party may amend his complaint "only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires." Fed. R. Civ. P. 15(a).

Whether such an amendment should be granted is within the district judge's discretion, *Foman v. Davis*, 371 U.S. 178, 182, 83 S. Ct. 227, 230, 9 L. Ed. 2d 222 (1962); *Union Planters Nat. Leasing v. Woods*, 687 F.2d 117, 121 (5th Cir. 1982); and the ruling is reversible only [**15] for abuse of that discretion. *Union Planters Nat. Leasing*, 687 F.2d at 121; *Gregory v. Mitchell*, 634 F.2d 199, 203 (5th Cir. 1981). In exercising its discretion, the district court may consider such factors as "undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of [*1151] allowance of the amendment, futility of amendment, etc. . . ." *Foman*, 371 U.S. at 182, 83 S. Ct. at 230.

Here, the district court noted:

> This case is unlike the usual one in which leave to amend is freely to be given. Extensive prelawsuit and pretrial proceedings have taken place. More importantly, the government has already filed a summary judgment motion based on the current pleadings. To grant Overseas leave to amend is potentially to undermine the government's right to prevail on a motion that necessarily was prepared without reference to an unanticipated amended complaint. The summary judgment procedure has built-in protections against premature judgments. A party should not, without adequate grounds, be [**16] permitted to avoid summary judgment by the expedient of amending its complaint.

The court noted that Overseas commenced this action in November 1986, and did not seek to amend until March 1989, some two and a half years later.

Furthermore, in the interim, Overseas moved in 1987 for summary judgment. Accordingly, that motion represented "that the case was fully at issue, that all theories of liability and all defenses had been presented, and that the case was ripe for summary treatment." *Pharo v. Smith*, 621 F.2d 656, 664 (5th Cir.), *reh'g granted cause remanded on other grounds*, 625 F.2d 1226 (1980) (motion to amend denied because filed nine months after a motion for summary judgment).

It was not an abuse of discretion for the district court to deny the motion.

III.

For the foregoing reasons, the judgment of the district court is

AFFIRMED.

TAB 6

3 of 5 DOCUMENTS

IN RE: OWENS CORNING, a Delaware Corporation CREDIT SUISSE FIRST BOSTON, as Agent for the prepetition bank lenders, Appellant

No. 04-4080

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

419 F.3d 195; 2005 U.S. App. LEXIS 17150; Bankr. L. Rep. (CCH) P80,343; 45 Bankr. Ct. Dec. 36

February 7, 2005, Argued
August 15, 2005, Filed

SUBSEQUENT HISTORY: As Amended, October 12, 2005.

As Amended, September 2, 2005.
Amended by In re Owens Corning, 2005 U.S. App. LEXIS 18043 (3d Cir. Del., Aug. 23, 2005)
US Supreme Court certiorari denied by McMonagle v. Credit Suisse First Boston, 547 U.S. 1123, 126 S. Ct. 1910, 164 L. Ed. 2d 685, 2006 U.S. LEXIS 3492 (2006)
US Supreme Court certiorari denied by Official Representatives of the Bondholders & Trade Creditors of Debtor Owens Corning v. Credit Suisse First Boston, 547 U.S. 1123, 126 S. Ct. 1910, 164 L. Ed. 2d 685, 2006 U.S. LEXIS 3493 (2006)
Amended by In re Owens Corning, 2007 U.S. App. LEXIS 25525 (3d Cir. Del., Nov. 1, 2007)

PRIOR HISTORY: [**1] On Appeal from the United States District Court for the District of Delaware. (D.C. Civil Action No. 00-cv-03837). District Judge: Honorable John P. Fullam.
In re Owens Corning, 316 B.R. 168, 2004 Bankr. LEXIS 1838 (Bankr. D. Del., 2004)

DISPOSITION: The district court's judgment was reversed, and the matter was remanded.

CASE SUMMARY:

PROCEDURAL POSTURE: Appellant, the agent for a syndicate of banks that extended a $ 2,000,000,000 loan to debtor and certain of its subsidiaries, appealed a judgment of the United States District Court for the District of Delaware, which granted a motion to consolidate the assets and liabilities of the borrowers and guarantors in anticipation of a plan of reorganization.

OVERVIEW: The credit was enhanced in part by guarantees made by some subsidiaries of the debtor. The instant court concluded that no principled reason existed to undo the debtor's and the banks' arms-length negotiation and lending arrangement, especially when to do so punished the very parties that conferred the prepetition benefit--a $ 2,000,000,000 loan unsecured by the debtor and guaranteed by others only in part. To overturn this bargain, set in place by the debtor's own pre-loan choices of organizational form, would have caused chaos in the marketplace. There was no evidence of the prepetition disregard of the borrowing entities' separateness; the debtor negotiated the transaction premised on the separateness of all debtor affiliates. There also was no meaningful evidence postpetition of hopeless

commingling of the entities' assets and liabilities; there was no question which entity owned which principal assets and has which material liabilities. Other considerations also counseled strongly against consolidation, e.g., holding out the possibility of later giving priority to the banks on their claims did not cure an improvident grant of substantive consolidation.

OUTCOME: The district court's judgment was reversed, and the matter was remanded.

CORE TERMS: consolidation, subsidiary, entity, proponent, separateness, guarantor, accounting, equitable, reorganization, prepetition, consolidated, commingling, non-debtor, asbestos, confirmation, separate entity, equitable remedy, intercompany, consolidate, transferred, financing, hopeless, billion, inter alia, fraudulent transfers, consolidating, postpetition, finality, survivor, royalty

LexisNexis(R) Headnotes

Bankruptcy Law > Practice & Proceedings > Appeals > Jurisdiction
Civil Procedure > Appeals > Appellate Jurisdiction > Final Judgment Rule
[HN1] 28 U.S.C.S. § 1291, rather than 28 U.S.C.S. § 158(d), applies when the reference to a bankruptcy court is withdrawn.

Bankruptcy Law > Practice & Proceedings > Appeals > Jurisdiction
Civil Procedure > Appeals > Appellate Jurisdiction > Final Judgment Rule
[HN2] The United States Court of Appeals for the Third Circuit applies a broader concept of "finality" when considering bankruptcy appeals under 28 U.S.C.S. § 1291 than the court does when considering other civil orders under the same section. Issues central to the progress of the bankruptcy petition, those likely to affect the distribution of the debtor's assets, or the relationship among the creditors, should be resolved quickly.

Bankruptcy Law > Practice & Proceedings > Appeals > Jurisdiction
Civil Procedure > Jurisdiction > Jurisdictional Sources > General Overview
Civil Procedure > Appeals > Appellate Jurisdiction > Final Judgment Rule
[HN3] The United States Court of Appeals for the Third Circuit considers four factors in determining whether it should exercise jurisdiction over a bankruptcy appeal: (1) the impact on the assets of the bankrupt estate; (2) the necessity for further fact-finding on remand; (3) the preclusive effect of the court's decision on the merits of further litigation; and (4) the interest of judicial economy. All four factors weigh heavily in favor of the court's jurisdiction to consider the appeal of an order granting substantive consolidation.

Bankruptcy Law > Practice & Proceedings > Appeals > General Overview
Bankruptcy Law > Practice & Proceedings > Jurisdiction > General Overview
Bankruptcy Law > Reorganizations > Plans > Contents > General Overview
[HN4] The United States Court of Appeals for the Third Circuit generally has jurisdiction to review appeals of substantive consolidation orders.

Bankruptcy Law > Case Administration > General Overview
Bankruptcy Law > Reorganizations > Plans > Contents > General Overview
Civil Procedure > Federal & State Interrelationships > Federal Common Law > General Overview
[HN5] Substantive consolidation, a construct of federal common law, emanates from equity. It treats separate legal entities as if they were merged into a single survivor left with all the cumulative assets and liabilities (save for inter-entity liabilities, which are erased). The result is that claims of creditors against separate debtors morph to claims against the consolidated survivor. Consolidation restructures (and thus revalues) rights of creditors and for certain creditors this may result in significantly less recovery.

Bankruptcy Law > Reorganizations > Plans > Contents > General Overview

Civil Procedure > Judgments > Entry of Judgments > Enforcement & Execution > Fraudulent Transfers
Real Property Law > Purchase & Sale > Fraudulent Transfers
[HN6] Substantive consolidation goes in a direction different (and in most cases further) than any of these remedies; it is not limited to shareholders, it affects distribution to innocent creditors, and it mandates more than the return of specific assets to the predecessor owner. It brings all the assets of a group of entities into a single survivor. Indeed, it merges liabilities as well. The result is that claims of creditors against separate debtors morph to claims against the consolidated survivor. The bad news for certain creditors is that, instead of looking to assets of the subsidiary with whom they dealt, they now must share those assets with all creditors of all consolidated entities, raising the specter for some of a significant distribution diminution.

Bankruptcy Law > Case Administration > General Overview
Bankruptcy Law > Reorganizations > Plans > Contents > General Overview
[HN7] The United States Court of Appeals for the Third Circuit has adopted an intentionally open-ended, equitable inquiry to determine when substantively to consolidate two entities.

Bankruptcy Law > Case Administration > General Overview
Bankruptcy Law > Reorganizations > Plans > Contents > General Overview
[HN8] Mere benefit to the administration of the case (for example, allowing a court to simplify a case by avoiding other issues or to make postpetition accounting more convenient) is hardly a harm calling substantive consolidation into play.

Bankruptcy Law > Case Administration > General Overview
Bankruptcy Law > Reorganizations > Plans > Contents > General Overview
[HN9] Because substantive consolidation is extreme (it may affect profoundly creditors' rights and recoveries) and imprecise, this "rough justice" remedy should be rare and, in any event, one of last resort after considering and rejecting other remedies (for example, the possibility of more precise remedies conferred by the Bankruptcy Code).

Bankruptcy Law > Case Administration > General Overview
Bankruptcy Law > Reorganizations > Plans > Contents > General Overview
[HN10] While substantive consolidation may be used defensively to remedy the identifiable harms caused by entangled affairs, it may not be used offensively (for example, having a primary purpose to disadvantage tactically a group of creditors in the plan process or to alter creditor rights).

Bankruptcy Law > Case Administration > General Overview
Bankruptcy Law > Reorganizations > Plans > Contents > General Overview
[HN11] In the United States Court of Appeals for the Third Circuit what must be proven (absent consent) concerning the entities for whom substantive consolidation is sought is that (i) prepetition they disregarded separateness so significantly their creditors relied on the breakdown of entity borders and treated them as one legal entity, or (ii) postpetition their assets and liabilities are so scrambled that separating them is prohibitive and hurts all creditors. Proponents of substantive consolidation have the burden of showing one or the other rationale for consolidation. The second rationale needs no explanation. The first, however, is more nuanced. A prima facie case for it typically exists when, based on the parties' prepetition dealings, a proponent proves corporate disregard creating contractual expectations of creditors that they were dealing with debtors as one indistinguishable entity. Proponents who are creditors must also show that, in their prepetition course of dealing, they actually and reasonably relied on debtors' supposed unity. Creditor opponents of consolidation can nonetheless defeat a prima facie showing under the first rationale if they can prove they are adversely affected and actually relied on debtors' separate existence.

Bankruptcy Law > Case Administration > General Overview
Bankruptcy Law > Reorganizations > Plans > Contents > General Overview
[HN12] Commingling justifies substantive consolidation only when separately accounting for the assets and liabilities of the distinct entities will reduce the recovery of every creditor--that is, when every creditor will benefit from the consolidation. Moreover, the benefit to creditors should be from cost savings that make assets available rather than from

the shifting of assets to benefit one group of creditors at the expense of another. Mere benefit to some creditors, or administrative benefit to the court, falls far short.

Bankruptcy Law > Case Administration > General Overview
Bankruptcy Law > Reorganizations > Plans > Contents > General Overview
[HN13] Neither the impossibility of perfection in untangling the affairs of the entities nor the likelihood of some inaccuracies in efforts to do so is sufficient to justify substantive consolidation.

Bankruptcy Law > Case Administration > General Overview
Bankruptcy Law > Reorganizations > Plans > Contents > General Overview
Real Property Law > Purchase & Sale > Fraudulent Transfers
[HN14] Substantive consolidation should be used defensively to remedy identifiable harms, not offensively to achieve advantage over one group in the plan negotiation process (for example, by deeming assets redistributed to negate plan voting rights), nor a "free pass" to spare debtors or any other group from proving challenges, like fraudulent transfer claims, that are liberally brandished to scare yet are hard to show.

Bankruptcy Law > Case Administration > General Overview
Bankruptcy Law > Reorganizations > Plans > Contents > General Overview
[HN15] Substantive consolidation at its core is equity. Its exercise must lead to an equitable result. "Communizing" assets of affiliated companies to one survivor to feed all creditors of all companies may to some be equal (and hence equitable). But it is hardly so for those creditors who have lawfully bargained prepetition for unequal treatment by obtaining guarantees of separate entities.

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JUDGES: Before: ROTH, AMBRO and FUENTES, Circuit Judges.

OPINION BY: AMBRO

OPINION

[*199] OPINION OF THE COURT

AMBRO, Circuit Judge

We consider under what circumstances a court exercising bankruptcy powers may substantively consolidate affiliated entities. Appellant Credit Suisse First Boston ("CSFB") is the agent for a syndicate of banks (collectively, the "Banks") 1 that extended in 1997 a $ 2 billion unsecured loan to Owens Corning, a Delaware corporation ("OCD"), and certain of its subsidiaries. This credit was enhanced in part by guarantees made by other OCD subsidiaries. The District Court granted a motion to consolidate the assets and liabilities of the OCD borrowers [2] and guarantors in anticipation of a plan of reorganization.

1 Though CSFB is the named appellant, the real parties in interest are the Banks (which include CSFB). Thus, unless the context requires otherwise, CSFB and the Banks are referred to interchangeably in this opinion.

[**5]

2 For ease of reference, we refer hereinafter solely to OCD as the borrower.

The Banks appeal and argue that the Court erred by granting the motion, as it misunderstood the reasons for, and standards for considering, the extraordinary remedy of substantive consolidation, and in any event did not make factual determinations necessary even to consider its use. Though we reverse the ruling of the District Court, we do so aware that it acted on an issue with no opinion on point by our Court and differing rationales by other courts.

While this area of law is difficult and this case important, its outcome is easy with the facts before us. Among other problems, the consolidation sought is "deemed." Should we approve this non-consensual arrangement, the plan process would proceed as though assets and liabilities of separate entities were merged, but in fact they remain separate with the

twist that the guarantees to the Banks are eliminated. From this we conclude that the **[*200]** proponents of substantive consolidation request it not to rectify the seldom-seen situations that call for this last-resort remedy **[**6]** but rather as a ploy to deprive one group of creditors of their rights while providing a windfall to other creditors.

I. Factual Background and Procedural History

A. Owens Corning Group of Companies

OCD and its subsidiaries (which include corporations and limited liability companies) comprise a multinational corporate group. Different entities within the group have different purposes. Some, for example, exist to limit liability concerns (such as those related to asbestos), others to gain tax benefits, and others have regulatory reasons for their formation.

Each subsidiary was a separate legal entity that observed governance formalities. Each had a specific reason to exist separately, each maintained its own business records, and intercompany transactions were regularly documented. [3] Although there may have been some "sloppy" bookkeeping, two of OCD's own **[*201]** officers testified that the financial statements of all the subsidiaries were accurate in all material respects. Further, through an examination of the subsidiaries' books, OCD's postpetition auditors (Ernst & Young) have eliminated most financial discrepancies, particularly with respect to the larger guarantor subsidiaries. [**7]

3 For example, Owens-Corning Fiberglass Technology, Inc. ("OCFT") was created as an intellectual property holding company to which OCD assigned all of its domestic intellectual property. OCFT licensed this intellectual property back to OCD in return for royalty payments. OCFT also entered into licensing agreements with parties outside of the OCD family of companies. This structure served to shield OCD's intellectual property assets (valued at over $ 500 million) from liability. OCFT operated as an autonomous entity. It prepared its own accounting and financial records and paid its own expenses from its separate bank accounts. OCFT had its own employees working at its Summit, Illinois plant, which contained machinery and equipment for research and development.

IPM, Inc. ("IPM") was incorporated as a passive Delaware investment holding company by OCD to consolidate the investments of its foreign subsidiaries. IPM shielded the foreign subsidiaries' investments from OCD liability and likewise shielded OCD from the liability of those foreign subsidiaries. OCD transferred ownership of its foreign subsidiaries to IPM and entered into a revolving loan agreement under which IPM loaned dividends from those subsidiaries to OCD. OCD paid interest on this revolving loan. IPM, like OCFT, entered into agreements with parties unaffiliated with the OCD group and operated as an autonomous entity. IPM also prepared its own accounting and financial records and paid its own expenses from its separate bank accounts. IPM's officers oversaw all investment activity and maintained records of investment activity in IPM subsidiaries.

Both OCFT and IPM operated outside of OCD's business units. Neither company received administrative support from OCD and both paid payroll and business expenses from their own accounts. Although summaries of their accounting ledgers were entered into OCD's centralized cash management system, the underlying records were created and maintained by the subsidiaries, not OCD. OCFT and IPM even had their own company logos and trade names.

Integrex was formed by OCD as an asbestos liability management company. For OCD's asbestos liability, Integrex ultimately processed only settled asbestos claims. The company also provided professional services (such as litigation management and materials testing) to the public. It had its own trade name and trademarked logo, its own business unit and its own financial team for business planning, and began several startup businesses that ultimately failed.

As discussed at Section I(B), infra, in 1997 OCD acquired Fibreboard Corporation. Subsequently, OCD formed Exterior Systems, Inc. ("ESI") as a separate entity after several subsidiaries of Fibreboard merged in 1999 in order to shield itself from successor liability for Fibreboard's asbestos products. Although the directors and managers of ESI and OCD overlapped, ESI observed corporate formalities in electing its directors and appointing its officers. In addition, it filed its own tax returns and kept its own accounting records. ESI held substantial assets, including over $ 1 billion in property, 20 factories, and between 150 and 180 distribution centers.

[**8] B. The 1997 Credit Agreement

In 1997 OCD sought a loan to acquire Fibreboard Corporation. At this time OCD faced growing asbestos liability and a

poor credit rating that hindered its ability to obtain financing. When CSFB was invited to submit a bid, it included subsidiary guarantees in the terms of its proposal. The guarantees gave the Banks direct claims against the guarantors for payment defaults. They were a "credit enhancement" without which the Banks would not have made the loan to OCD. All draft loan term sheets included subsidiary guarantees.

A $ 2 billion loan from the Banks to OCD closed in June 1997. The loan terms were set out primarily in a Credit Agreement. Among those terms were the guarantee provisions and requirements for guarantors, who were defined as "present or future Domestic Subsidiaries . . . having assets with an aggregate book value in excess of $ 30,000,000." Section 10.07 of the Agreement provided that the guarantees were "absolute and unconditional" and each "constituted a guarantee of payment and not a guarantee of collection." [4] A "No Release of Guarantor" provision in § 10.8 stated that "the obligations of each guarantor . . . shall not be [**9] reduced, limited or terminated, nor shall such guarantor be discharged from any such obligations, for any reason whatsoever," except payment and performance in full or through waiver or amendment of the Credit Agreement. Under § 13.05 of the Credit Agreement, a guarantor could be released only through (i) the unanimous consent of the Banks for the guarantees of Fibreboard subsidiaries or through the consent of Banks holding 51% of the debt for other subsidiaries, or (ii) a fair value sale of the guarantor if its cumulative assets totaled less than 10% of the book value of the aggregate OCD group of entities.

4 This standard guarantee term means simply that, once the primary obligor (here OCD) defaults, the Banks can proceed against the guarantors directly and immediately without first obtaining a judgment against OCD and collecting against that judgment to determine if a shortfall from OCD exists.

CSFB negotiated the Credit Agreement expressly to limit the ways in which OCD could deal with its subsidiaries. [**10] For example, it could not enter into transactions with a subsidiary that would result in losses to that subsidiary. Importantly, the Credit Agreement contained provisions designed to protect the separateness of OCD and its subsidiaries. The subsidiaries agreed explicitly to maintain themselves as separate entities. To further this agreement, they agreed to keep separate books and financial records in order to prepare separate financial statements. The Banks were given the right to visit each subsidiary and discuss business matters directly with that subsidiary's management. The subsidiaries also were prohibited from merging into OCD because both entities were required to survive a transaction under § 8.09(a)(ii)(A) of the Credit Agreement. This provision also prohibited guarantor subsidiaries from merging with other subsidiaries unless there would be no effect on the guarantees' value.

C. Procedural History

On October 5, 2000, facing mounting asbestos litigation, OCD and seventeen of its [*202] subsidiaries (collectively, the "Debtors") filed for reorganization under Chapter 11 of the Bankruptcy Code, 11 U.S.C. § 1101 et seq. [5] Twenty-seven months later, [**11] the Debtors and certain unsecured creditor groups (collectively, the "Plan Proponents") proposed a reorganization plan (as amended, the "Plan") predicated on obtaining "substantive consolidation" of the Debtors along with three non-Debtor OCD subsidiaries. [6] Typically this arrangement pools all assets and liabilities of the subsidiaries into their parent and treats all claims against the subsidiaries as transferred to the parent. In fact, however, the Plan Proponents sought a form of what is known as a "deemed consolidation," under which a consolidation is deemed to exist [7] for purposes of valuing and satisfying creditor claims, voting for or against the Plan, and making distributions for allowed claims under it. Plan § 6.1. Yet "the Plan would not result in the merger of or the transfer or commingling of any assets of any of the Debtors or Non-Debtor Subsidiaries, . . . [which] will continue to be owned by the respective Debtors or Non-Debtors." Plan § 6.1(a). Despite this, on the Plan's effective date "all guarantees of the Debtors of the obligations of any other Debtor will be deemed eliminated, so that any claim against any such Debtor and any guarantee thereof . . . will [**12] be deemed to be one obligation of the Debtors with respect to the consolidated estate." Plan § 6.1(b). Put another way, "the Plan eliminates the separate obligations of the Subsidiary Debtors arising from the guarantees of the 1997 Credit Agreement." Plan Disclosure Statement at A-9897.

5 For convenience we refer hereinafter simply to "Bankruptcy Code § " when citing to a Code section.

6 As the Plan's consolidation provisions affected so significantly voting on the Plan and the manner of proceeding at any confirmation hearing, the Plan Proponents filed a motion for a ruling on consolidation in anticipation of those events. "While not a routine procedure, it is not at all unusual for a plan proponent, or a plan opponent, to seek a determination prior to the plan confirmation hearing as to the legitimacy of a particular provision of a proposed plan." In re Stone & Webster, Inc., 286 B.R. 532, 542 (Bankr. D. Del. 2002) (Walsh, J.).

7 "All assets and liabilities of each Subsidiary Debtor . . . *will be treated as though* they were merged into and with the assets and liabilities of OCD . . . ." Plan § 6.1(b) (emphasis added).

[**13] The Banks objected to the proposed consolidation. Judge Alfred Wolin held a hearing on this objection. [8] He was subsequently recused from the Debtors' bankruptcy proceedings in light of In re Kensington Int'l Ltd., 368 F.3d 289 (3d Cir. 2004), and Judge John Fullam was designated by the Chief Judge of our Court to replace him. Judge Fullam reviewed the transcripts and exhibits of the hearing, ordered additional briefing and on October 5, 2004, granted the consolidation motion in an order accompanied by a short opinion. In re Owens Corning, 316 B.R. 168 (Bankr. D. Del. 2004).

8 Pursuant to 28 U.S.C. § 157(d), Judge Wolin withdrew the reference of, inter alia, the consolidation motion to the Bankruptcy Court, thus making the District Court the judicial forum for the motion to proceed.

Judge Fullam concluded that there existed "substantial identity between . . . OCD and its wholly-owned subsidiaries." Id. at 171. He further determined [**14] that "there [was] simply no basis for a finding that, in extending credit, the Banks relied upon the separate credit of any of the subsidiary guarantors." Id. at 172. In Judge Fullam's view, it was "also clear that substantive consolidation would greatly simplify and expedite the successful completion of this entire bankruptcy proceeding. [*203] More importantly, it would be exceedingly difficult to untangle the financial affairs of the various entities." Id. at 171. As such, he held substantive consolidation should be permitted, as not only did it allow "obvious advantages . . . [, but was] a virtual necessity." Id. at 172. In any event, Judge Fullam wrote, "the real issue is whether the Banks are entitled to participate, pari passu, with other unsecured creditors, or whether the Banks' claim is entitled to priority, in whole or in part, over the claims of other unsecured creditors." Id. But this issue, he stated, "cannot now be determined." Id.

CSFB appeals on the Banks' behalf.

II. Appellate Jurisdiction

The Plan Proponents moved to dismiss the appeal of the District Court's order granting consolidation on the [**15] ground that it is not a "final decision" from which an appeal may be taken pursuant to 28 U.S.C. § 1291. [9] We denied that motion prior to oral argument in this case and noted that our reasoning would follow in this opinion.

9 [HN1] This provision, rather than 28 U.S.C. § 158(d), applies when the reference to a bankruptcy court is withdrawn.

Recognizing the "protracted nature of many bankruptcy proceedings, and the waste of time and resources that might result if immediate appeal [is] denied," United States Trustee v. Gryphon at the Stone Mansion, Inc., 166 F.3d 552, 556 (3d Cir. 1999), [HN2] "we apply a broader concept of 'finality' when considering bankruptcy appeals under § 1291 than

we do when considering other civil orders under the same section." In re Marvel Entm't Group, Inc., 140 F.3d 463, 470 (3d Cir. 1998). See also Buncher Co. v. Official Comm. of Unsecured Creditors of GenFarm Ltd. P'ship IV, 229 F.3d 245, 250 (3d Cir. 2000) **[**16]** (noting that we impose a "relaxed standard" of finality because of unique considerations in bankruptcy cases); 16 Charles A. Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice & Procedure § 3926.2 at 274 (2d ed. 1996) (describing the "Third Circuit's especially flexible approach to bankruptcy finality"). Particularly relevant to our case is that "to delay resolution of discrete claims until after final approval of a reorganization plan . . . would waste time and resources, particularly if the appeal resulted in reversal of a bankruptcy court order necessitating re-appraisal of the entire plan." Clark v. First State Bank (In re White Beauty View, Inc.), 841 F.2d 524, 526 (3d Cir. 1988). We have also stressed that "issues central to the progress of the bankruptcy petition, those 'likely to affect the distribution of the debtor's assets, or the relationship among the creditors,' should be resolved quickly." Century Glove, Inc. v. First Am. Bank, 860 F.2d 94, 98 (3d Cir. 1988) (quoting Southeastern Sprinkler Co. Inc. v. Meyertech Corp. (In re Meyertech), 831 F.2d 410, 414 (3d Cir. 1987)).

[HN3] We consider four factors **[**17]** in determining whether we should exercise jurisdiction over a bankruptcy appeal: "(1) the impact on the assets of the bankrupt estate; (2) [the] necessity for further fact-finding on remand; (3) the preclusive effect of [the Court's] decision on the merits of further litigation; and (4) the interest of judicial economy." Buncher, 229 F.3d at 250. All four factors weigh heavily in favor of our jurisdiction to consider the appeal of an order granting substantive consolidation. We thus join the four Courts of Appeal that have exercised jurisdiction in this context. Alexander v. Compton (In re Bonham)), 229 F.3d 750, 762 (9th Cir. 2000); First Nat'l Bank of El **[*204]** Dorado v. Giller (In re Giller), 962 F.2d 796, 797-98 (8th Cir. 1992); Eastgroup Properties v. Southern Motel Assoc., Ltd., 935 F.2d 245, 248 (11th Cir. 1991); and Union Sav. Bank v. Augie/Restivo Baking Co., Ltd. (In re Augie/Restivo Baking Co., Ltd.), 860 F.2d 515, 516-17 (2d Cir. 1988).

First, substantive consolidation has a profound effect on the assets of the consolidated entities. See, e.g., Nesbit v. Gears Unlimited, 347 F.3d 72, 86-87 (3d Cir. 2003). **[**18]** Second, there is no need for additional fact-finding to assess the propriety of an order granting substantive consolidation. In this case, for example, Judge Fullam reached his decision after a thirteen-day evidentiary hearing was held by Judge Wolin, and after Judge Fullam reviewed "the transcript of the testimony, and . . . the voluminous documentary record compiled in the course of the hearing, and [had] the benefit of post-trial briefing and argument." In re Owens Corning, 316 B.R. at 169. Third, a substantive consolidation order clearly has a preclusive effect on the merits of further litigation. In this case, the order precludes at least the Banks from asserting any right compromised or eliminated by virtue of the substantive consolidation. Last, the interests of judicial economy are best served by an immediate review of a substantive consolidation order. A later reversal of such an order risks rendering meaningless any proceedings premised on the viability of a plan that calls for a consolidation (even if for only a temporary period).

Having concluded that [HN4] we generally have jurisdiction to review appeals of substantive consolidation **[**19]** orders, we inquire whether anything is "different" about this case. The Plan Proponents argue that

> the District Court Order lacks finality because it will be implemented, if at all, only following approval of a disclosure statement, the solicitation and vote of creditors as to the terms of the Proposed Plan, and, assuming the requisite vote, final confirmation of the Proposed Plan, before which creditors other than the Bank Debt Holders shall be given the opportunity to contest substantive consolidation. [Bankruptcy Code] § 1129. Thus, the District Court Order is conditioned upon plan confirmation . . . . The District Court Order has no present impact on the Debtors' estates and does not change the status quo.

Plan Proponents' Mot. to Dismiss at 10. In support of this contention, the Plan Proponents rely primarily on In re A.S.K. Plastics, Inc., 2004 U.S. Dist. LEXIS 16922, No. Civ. A. 04-2701, 2004 WL 1903322 (E.D. Pa. Aug. 24, 2004). Yet the conclusion that the Court lacked jurisdiction in A.S.K. Plastics was premised on the fact that "under no reasonable construction of the law could the Order's *conditional* consolidation be viewed as effecting **[**20]** a 'practical termination' of anything." Id. 2004 U.S. Dist. LEXIS 16922, at [WL] *2 (emphasis in original). That order "emphasized [that] . . . when a final reorganization plan [was] submitted to the Bankruptcy Court, [the party appealing the order] [was] free to object to consolidation." Id. In effect, the A.S.K. Plastics order was designed to postpone consideration of the substantive consolidation issue until the plan confirmation stage.

That is not our case. For the Banks the District Court's determination is hardly conditional. It concluded "that substantive consolidation should be permitted." In re Owens Corning, 316 B.R. at 172. It made no provision for the Banks to reassert their objection to substantive consolidation at the plan confirmation stage; the order is final against them and is thus a practical termination of the substantive consolidation litigation.

[*205] Lastly, we address the Plan Proponents' argument that a substantive consolidation order must immediately take effect in order to be final for purposes of our jurisdiction. What they ignore is that the order approving substantive consolidation is the foundation on which the Plan is built. To assert that the actual [**21] substantive consolidation can only be implemented in conjunction with the effectiveness of an approved plan puts form over function. As the Banks point out, "there is no support for the proposition that final orders lose their finality because of a delay in implementation." CSFB Opp'n to Mot. to Dismiss at 13. Certainly, decisions resolving most disputes (notably, disputes over the validity and value of claims) are not implemented until a plan is confirmed and payment under the plan becomes obligatory. Yet we exercise jurisdiction to review many of these decisions before that "final" order issues. See, e.g., Hefta v. Official Comm. of Unsecured Creditors (In re Am. Classic Voyages Co.), 405 F.3d 127 (3d Cir. 2005). No reason exists for us to vary that routine here.

We conclude readily that we have appellate jurisdiction to consider the Banks' appeal under 28 U.S.C. § 1291.

III. Substantive Consolidation

[HN5] Substantive consolidation, a construct of federal common law, emanates from equity. It "treats separate legal entities as if they were merged into a single survivor left with all the cumulative assets and liabilities (save [**22] for inter-entity liabilities, which are erased). The result is that claims of creditors against separate debtors morph to claims against the consolidated survivor." Genesis Health Ventures, Inc. v. Stapleton (In re Genesis Health Ventures, Inc.), 402 F.3d 416, 423 (3d Cir. 2005). Consolidation restructures (and thus revalues) rights of creditors and for certain creditors this may result in significantly less recovery.

While we have not fully considered the character and scope of substantive consolidation, we discussed the concept in Nesbit, 347 F.3d at 86-88 (surveying substantive consolidation case law for application by analogy to the Title VII inquiry of when to consolidate employers for the purpose of assessing a discrimination claim), and In re Genesis Health Ventures, 402 F.3d at 423-24 (examining, inter alia, whether a "deemed" consolidation for voting in connection with, and distribution under, a proposed plan of reorganization is a substantive consolidation for purposes of calculating U.S. Trustee quarterly fees under 28 U.S.C. § 1930(a)(6)). Other courts, including the Supreme Court itself [**23] in an opinion that spawned the concept of consolidation, have holdings more on point than heretofore have we. We begin with a survey of key cases, drawing from them when substantive consolidation may apply consistent with the principles we perceive as cabining its use, and apply those principles to this case.

A. History of Substantive Consolidation

The concept of substantively consolidating separate estates begins with a commonsense deduction. Corporate disregard [10] as a fault may lead to corporate disregard as a remedy.

10 A term used by Mary Elisabeth Kors in her comprehensive and well-organized article entitled Altered Egos: Deciphering Substantive Consolidation, 59 U. Pitt. L. Rev. 381, 383 (1998) (hereinafter "Kors").

Prior to substantive consolidation, other remedies for corporate disregard were (and remain) in place. For example, where a subsidiary is so dominated by its [*206] corporate parent as to be the parent's "alter ego," the "corporate veil" of the subsidiary can be ignored [**24] (or "pierced") under state law. Kors, supra, at 386-90 (citing as far back as I. Maurice Wormser, Piercing the Veil of Corporate Entity, 12 Colum. L. Rev. 496 (1912)). Or a court might mandate that

the assets transferred to a corporate subsidiary be turned over to its parent's trustee in bankruptcy for wrongs such as fraudulent transfers, Kors, supra, at 391, in effect bringing back to the bankruptcy estate assets wrongfully conveyed to an affiliate. If a corporate parent is both a creditor of a subsidiary and so dominates the affairs of that entity as to prejudice unfairly its other creditors, a court may place payment priority to the parent below that of the other creditors, a remedy known as equitable subordination, which is now codified in § 510(c) of the Bankruptcy Code. See generally id. at 394-95.

Adding to these remedies, the Supreme Court, little more than six decades ago, approved (at least indirectly and perhaps inadvertently) what became known as substantive consolidation. [11] Sampsell v. Imperial Paper & Color Corp., 313 U.S. 215, 85 L. Ed. 1293, 61 S. Ct. 904 (1941). In Sampsell an individual in bankruptcy **[**25]** had transferred assets prepetition to a corporation he controlled. (Apparently these became the corporation's sole assets.) When the bankruptcy referee ordered that the transferred assets be turned over by the corporation to the individual debtor's trustee, a creditor of the non-debtor corporation sought distribution priority with respect to that entity's assets. In deciding that the creditor should not be accorded priority (thus affirming the bankruptcy referee), the Supreme Court turned a typical turnover/fraudulent transfer case into the forebear of today's substantive consolidation by terming the bankruptcy referee's order (marshaling the corporation's assets for the benefit of the debtor's estate) as "consolidating the estates." Id. at 219.

11 The actual term was not used until 1967. In re Commercial Envelope Mfg. Co., 1977 Bankr. LEXIS 15, 3 Bankr. Ct. Dec. 647, 648 (Bankr. S.D.N.Y. 1977) (Babitt, J.).

Each of these remedies has subtle differences. "Piercing the corporate **[**26]** veil" makes shareholders liable for corporate wrongs. Equitable subordination places bad-acting creditors behind other creditors when distributions are made. Turnover and fraudulent transfer bring back to the transferor debtor assets improperly transferred to another (often an affiliate). [HN6] Substantive consolidation goes in a direction different (and in most cases further) than any of these remedies; it is not limited to shareholders, it affects distribution to innocent creditors, and it mandates more than the return of specific assets to the predecessor owner. It brings all the assets of a group of entities into a single survivor. Indeed, it merges liabilities as well. "The result," to repeat, "is that claims of creditors against separate debtors morph to claims against the consolidated survivor." In re Genesis Health Ventures, 402 F.3d at 423. The bad news for certain creditors is that, instead of looking to assets of the subsidiary with whom they dealt, they now must share those assets with all creditors of all consolidated entities, raising the specter for some of a significant distribution diminution.

Though the concept of consolidating estates had Supreme Court **[**27]** approval, Courts of Appeal (with one exception) were slow to follow suit. Stone v. Eacho (In re Tip Top Tailors, Inc.), 127 F.2d 284 (4th Cir. 1942), cert. denied, 317 U.S. 635, 87 L. Ed. 512 (1942), was the first to **[*207]** pick up on Sampsell's new remedy. [12] Little occurred thereafter for more than two decades, until the Second Circuit issued several decisions-- Soviero v. Franklin Nat'l Bank, 328 F.2d 446 (2d Cir. 1964); Chemical Bank New York Trust Co. v. Kheel (In re Seatrade Corp.), 369 F.2d 845 (2d Cir. 1966); Flora Mir Candy Corp. v. R.S. Dickson & Co. (In re Flora Mir Candy Corp.), 432 F.2d 1060 (2d Cir. 1970); and Talcott v. Wharton (In re Continental Vending Machine Corp.), 517 F.2d 997 (2d Cir. 1975)--that brought substantive consolidation as a remedy back into play and premise its modern-day understanding.

12 Another case oft-mentioned, and preceding both Sampsell and Stone, is Fish v. East, 114 F.2d 177 (10th Cir. 1940). Determining that a corporate subsidiary was simply the parent's "instrumentality," id. at 191, the Tenth Circuit affirmed the turnover of the subsidiary's assets to the parent. Though asserting that a "corporate entity may be disregarded where not to do so will defeat public convenience, justify wrong or protect fraud," id., "consolidation" was not mentioned. Indeed, as creditors of the subsidiary in Fish were given first priority as to its assets, id., a complete consolidation did not occur. Accord Kors, supra, at 391 ("true consolidation" occurs only when creditors of consolidated entities share pari passu).

A case from our Court - In re Pittsburgh Rys., 155 F.2d 477 (3d Cir. 1946), cert. denied sub nom. Philadelphia Co. v. Pittsburgh, 329 U.S. 731, 67 S. Ct. 90, 91 L. Ed. 632 (1946) - cited Stone, id. at 484-85 n.15, in granting the request of the City of Pittsburgh to exercise bankruptcy jurisdiction over non-debtor companies controlled by the debtor Pittsburgh Railways Company. While guided by the practical need to "strip[] off" corporate "cloak[s]," id. at 484, in reorganizing Pittsburgh's transportation system, our Court pointed out that "[t]he reorganization court cannot indefinitely be called upon to provide . . . unification," id. at 481. In so doing, it emphasized that "we are in no way passing upon the fairness of any plan [of reorganization]." Id. at 485; see also id. at 481.

[**28] Other Circuit Courts fell in line in acknowledging substantive consolidation as a possible remedy. See, e.g., FDIC v. Hogan (In re Gulfco Inv. Corp.), 593 F.2d 921, 927-28 (10th Cir. 1979); Pension Benefit Guar. Corp. v. Ouimet Corp., 711 F.2d 1085, 1092-93 (1st Cir. 1983), cert. denied, 464 U.S. 961 (1983); Drabkin v. Midland-Ross Corp. (In re Auto-Train Corp.), 258 U.S. App. D.C. 151, 810 F.2d 270, 276 (D.C. Cir. 1987); Eastgroup, 935 F.2d at 248; In re Giller, 962 F.2d at 799; First Nat'l Bank of Barnesville v. Rafoth (In re Baker & Getty Fin. Servs., Inc.), 974 F.2d 712, 720 (6th Cir. 1992); Reider v. FDIC (In re Reider), 31 F.3d 1102, 1106-07 (11th Cir. 1994); and In re Bonham, 229 F.3d at 771.

The reasons of these courts for allowing substantive consolidation as a possible remedy span the spectrum and often overlap. For example, Stone and Soviero followed the well-trod path of alter ego analysis in state "pierce-the-corporate-veil" cases. Stone, 127 F.2d at 287-89; Soviero, 328 F.2d at 447-48. Accord [**29] In re Gulfco Inv. Corp., 593 F.2d at 928-29. Kheel dealt with, inter alia, the net-negative practical effects of attempting to thread back the tangled affairs of entities, separate in name only, with "interrelationships . . . hopelessly obscured." 369 F.2d at 847. See also, e.g., In re Augie/Restivo, 860 F.2d at 518-19. In re Continental Vending Machine balanced the "inequities" involved when substantive rights are affected against the "practical considerations" spawned by "accounting difficulties (and expense) which may occur where the interrelationships of the corporate group are highly complex, or perhaps untraceable." 517 F.2d at 1001. See also, e.g., In re Auto-Train, 810 F.2d at 276; Eastgroup, 935 F.2d at 249; In re Giller, 962 F.2d at 799; In re Reider, 31 F.3d at 1107-08. See generally Kors, supra, at 402-06.

Ultimately most courts slipstreamed behind two rationales--those of the Second Circuit in Augie/Restivo and the D.C. Circuit in Auto-Train. The former found that the competing "considerations are merely [**30] variants on two critical factors: (i) whether creditors dealt with the entities as a single economic unit and did not rely on their separate identity in extending credit, [*208] . . . or (ii) whether the affairs of the debtors are so entangled that consolidation will benefit all creditors . . . ." In re Augie/Restivo, 860 F.2d at 518 (internal quotation marks and citations omitted). Auto-Train touched many of the same analytical bases as the prior Second Circuit cases, but in the end chose as its overarching test the "substantial identity" of the entities and made allowance for consolidation in spite of creditor reliance on separateness when "the demonstrated benefits of consolidation 'heavily' outweigh the harm." In re Auto-Train, 810 F.2d at 276 (citation omitted).

Whatever the rationale, courts have permitted substantive consolidation as an equitable remedy in certain circumstances. [13] No court has held that substantive consolidation is not authorized, [14] though there [*209] appears nearly unanimous consensus that it is a remedy to be used "sparingly." In re Augie/Restivo, 860 F.2d at 518; see also In re Bonham, 229 F.3d at 767 [**31] (explaining that "almost every other court has noted [that substantive consolidation] should be used 'sparingly'") (citing In re Flora Mir, 432 F.2d at 1062-63). [15]

13 Indeed, they have not restricted the remedy to debtors, allowing the consolidation of debtors with non-debtors, see, e.g., In re Bonham, 229 F.3d at 765 (explaining that "courts have permitted the consolidation of non-debtor and debtor entities in furtherance of the equitable goals of substantive consolidation") (citing In re Auto-Train, 810 F.2d at 275; In re Tureaud, 59 B.R. 973, 974, 978 (N.D. Okla. 1986); In re Munford, Inc., 115 B.R. 390, 395-96 (Bankr. N.D. Ga. 1990)); Soviero, 328 F.2d 446, and in some cases consolidation retroactively (known also as nunc pro tunc consolidation), see, e.g., In re Bonham, 229 F.3d at 769-71; In re Baker & Getty Fin. Servs., 974 F.2d at 720-21; Kroh Bros. Development Co. v. Kroh Bros. Management Co. (In re Kroh Bros. Dev. Co.), 117 B.R. 499, 502 (W.D. Mo. 1989); see also Auto-Train, 810 F.2d at 277 (acknowledging that nunc pro tunc consolidations can occur, though not in that case).

In addition, though we do not permit the consolidation sought in this case, no reason exists to limit it under the right circumstances to any

particular form of entity. (Indeed, this case involves corporations and limited liability companies.) Accord 2 Collier on Bankruptcy P 105.09[1][c] (15th rev. ed. 2005).

[32]**

14 See In re Bonham, 229 F.3d at 765 (explaining that "the equitable power [of substantive consolidation] undoubtedly survived enactment of the Bankruptcy Code" and noting that "no case has held to the contrary"); but see In re Fas Mart Convenience Stores, Inc., 320 B.R. 587, 594 n.3 (Bankr. E.D. Va. 2004) (noting "there is persuasive academic argument that there is no authority in bankruptcy law for substantive consolidation") (citing Daniel B. Bogart, Resisting the Expansion of Bankruptcy Court Power Under Section 105 of the Bankruptcy Code: The All Writs Act and an Admonition from Chief Justice Marshall, 35 Ariz. St. L.J. 793, 810 (2003); J. Maxwell Tucker, Grupo Mexicano and the Death of Substantive Consolidation, 8 Am. Bankr. Inst. L. Rev. 427 (2000) (hereinafter "Tucker")).

Since the Supreme Court's decision in Grupo Mexicano Desarrollo, S.A. v. Alliance Bond Fund, Inc., 527 U.S. 308, 144 L. Ed. 2d 319, 119 S. Ct. 1961 (1999) (federal district courts lack the equitable power to enjoin prejudgment transfers of assets, as such an equitable remedy did not exist at the time federal courts were created under the Judiciary Act of 1789), some argue that substantive consolidation, judge-made law not expressly codified in the Bankruptcy Code adopted in the late 1970s, does not qualify as an available equitable remedy. See, e.g., Tucker, supra at 442-45. This argument has two facets. The first is that bankruptcy courts are limited to exercising only the equitable remedies extant at the time of the adoption of the Judiciary Act of 1789. As substantive consolidation is a relatively recent remedy nowhere contemplated in 1789, Grupo Mexicano by analogy bars substantive consolidation just as it does prejudgment preliminary injunctions forbidding asset transfers. Id. The second (and corollary) facet of the argument is that, as substantive consolidation is not specifically authorized in the Bankruptcy Code, authority to confer it can exist, if at all, only in § 105(a) of the Bankruptcy Code (bankruptcy courts "may issue any order, process or judgment that is necessary or appropriate to carry out the provisions of this title"). Even if § 105(a) "constitutes a direct, fresh grant of supplemental power to the bankruptcy courts, independent of the judicial power granted to the federal courts under title 28 [of the United States Code]," id. at 447, it can only implement powers already expressed in the provisions of the Bankruptcy Code. Id. at 447-48. See In re Combustion Eng'g, Inc., 391 F.3d 190, 236 (3d Cir. 2004) ("The general grant of equitable power contained in § 105(a). . . must be exercised within the parameters of the Code itself."); In re Kmart Corp., 359 F.3d 866, 871 (7th Cir. 2004) ("[T]he power conferred by § 105 is one to implement rather than to override."). But for joint spouse estates in Bankruptcy Code § 302, consolidation is permitted only in the context of a confirmed plan of reorganization and the requirements that entails. Tucker, supra, at 449 (citing to, inter alia, Bankruptcy Code § 1123(a)(5)(C)).

The first facet of the argument is, at the outset, premature. Consolidating estates (indeed, consolidating debtor and non-debtor entities) traces to the Supreme Court's Sampsell decision in 1941. 313 U.S. at 219. What the Court has given as an equitable remedy remains until it alone removes it or Congress declares it removed as an option. See In re Stone & Webster, 286 B.R. at 540 (quoting Official Comm. of Asbestos Claimants v. G-I Holdings, Inc. (In re G-I Holdings, Inc.), 2001 Bankr. LEXIS 2029, Adv. No. 01-3065 (RG) (Bankr. D.N.J. March 12, 2001) (Hearing Tr. at 71-2)).

In addition, at the core of Grupo Mexicano was the extent of general, unarticulated equity authority in the federal courts (which, the Court held, can only be justified by reference to 1789 equity authority). It was *not* a bankruptcy case. The extensive history of bankruptcy law and judicial precedent renders the issue of equity authority in the bankruptcy context different to such a degree as to make it different in kind. Notably, in the only two instances in which the word "bankruptcy" appears in Justice Scalia's majority opinion in Grupo Mexicano, he uses the *existence* of court authority in the bankruptcy context as a reason to support the conclusion that the district court did not have the authority under generalized equity powers to implement the remedy it imposed. First, he pointed out that "*the law of fraudulent conveyances and bankruptcy was developed to prevent [the] conduct [at issue]*; an equitable power to restrict a debtor's use of his unencumbered property before judgment was not." Grupo Mexicano, 527 U.S. at 322 (emphasis added). Second, he stressed that finding the authority to justify the District Court's remedy in generalized equity power would "add[], through judicial fiat, a new and powerful weapon to the creditor's arsenal[;] the new rule could radically alter the balance between debtor's and creditor's rights *which has been developed over centuries through many laws--including those relating to bankruptcy, fraudulent conveyances, and preferences*." Id. at 331 (emphasis added).

In short, the Court's opinion in Grupo Mexicano acknowledged that bankruptcy courts *do* have the authority to deal with the problems presented by that case. One way to conceptualize this idea is to recognize that, had the company in Grupo Mexicano been in bankruptcy, the bankruptcy court would have had the authority to implement the remedy the district court lacked authority to order under general equity power outside the bankruptcy context.

As for the argument's second facet, it begins with a concession. Bankruptcy Code § 1123(a)(5)(C)'s very words allow for "consolidation of the debtor with one or more persons" pursuant to a plan "notwithstanding any otherwise applicable non-bankruptcy law." Accord Tucker, supra, at 448-49. See also In re Stone & Webster, 286 B.R. at 540-43. Whether § 105(a) allows consolidation outside a plan is an issue we need not address--though that arguably is what the Plan Proponents propose by moving for a "deemed" consolidation--because, as we note below, consolidation, no matter how it is packaged, cannot pass muster in this case.

In this context, we also need not address the argument, made in the Amicus Curiae Brief of the Commercial Finance Association, that substantive consolidation fails the "best interests test" of Bankruptcy Code § 1129(a)(7) (a requirement for plan confirmation that each creditor that does not vote to accept the plan must receive or retain property under the plan at least equal to its recovery in a Bankruptcy Code Chapter 7 liquidation). See generally In re Stone & Webster, 286 B.R. at 544-46.

[33]**

15 Thus we disagree with the assertion of a "liberal trend" toward increased use of substantive consolidation--e.g., Eastgroup, 935 F.2d at 248 (describing "a 'modern' or 'liberal' trend toward allowing substantive consolidation") (citing In re Murray Indus., Inc., 119 B.R. 820, 828 (Bankr. M.D. Fla. 1990); In re Vecco Constr. Industries, Inc., 4 B.R. 407, 409 (Bankr. E.D. Va. 1980)).

[*210] B. Our View of Substantive Consolidation

Substantive consolidation exists as an equitable remedy. But when should it be available and by what test should its use be measured? As already noted, we have commented on substantive consolidation only generally in Nesbit, 347 F.3d at 86-88, and In re Genesis Health Ventures, 402 F.3d at 423-24. The latter nonetheless left little doubt that, if presented with a choice of analytical avenues, we favor essentially that of Augie/Restivo. Id. at 423. The Auto-Train approach (requiring "substantial identity" of entities to be consolidated, plus that **[**34]** consolidation is "necessary to avoid some harm or realize some benefit," 810 F.2d at 276) adopts, we presume, one of the Augie/Restivo touchstones for substantive consolidation while adding the low bar of avoiding some harm or discerning some benefit by consolidation. To us this fails to capture completely the few times substantive consolidation may be considered and then, when it does hit one chord, it allows a threshold not sufficiently egregious and too imprecise for easy measure. For example, we disagree that "if a creditor makes [a showing of reliance on separateness], the court may order consolidation . . . if it determines that the demonstrated benefits of consolidation 'heavily' outweigh the harm." Id. at 276 (citation omitted); see also Eastgroup, 935 F.2d at 249. If an objecting creditor relied on the separateness of the entities, consolidation cannot be justified vis-a-vis the claims of that creditor. [16]

16 This opens the question whether a court can order partial consolidation (such a consolidation order "could provide that . . . [a creditor relying on separateness] would receive a distribution equal to what [it] would have received absent consolidation and that the remainder of the assets and liabilities be consolidated.") Kors, supra, at 450-51. Because this theoretical issue is not before us--and in any event (i) facts bringing it to the fore are unlikely, id. at 451 ("If circumstances lead one party to rely on the single status of the one debtor, it is unlikely that other creditors are relying on the joint status of the two entities, especially as reliance must be reasonable."), and (ii) may present practical concerns depending on the facts of a particular case--we do not decide it in this case.

[35]** In assessing whether to order substantive consolidation, courts consider many factors (some of which are noted in Nesbit, 347 F.3d at 86-88 nn. 7 & 9). They vary (with degrees of overlap) from court to court. Rather than endorsing any prefixed factors, in Nesbit [HN7] we "adopted an intentionally open-ended, equitable inquiry. . . to determine when substantively to consolidate two entities." Id. at 87. While we mentioned that "in the bankruptcy context the inquiry focuses primarily on financial entanglement," id., this comment primarily related to the hopeless commingling test of substantive consolidation. But when creditors deal with entities as an indivisible, single party, "the line between operational and financial [factors] may be blurred." Id. at 88. We reiterate that belief here. Too often the factors in a checklist fail to separate the unimportant from the important, or even to set out a standard to make the attempt. Accord Br. of Law Professors [17] as Amici Curiae at 11-12. This often results in rote following of a form containing factors where courts tally up and spit out a score without an eye on the principles **[**36]** that give the rationale for substantive consolidation (and why, as a result, it should so seldom be in play). Id. **[*211]** ("Differing tests with . . . agreed . . . factors run the risk that courts will miss the forest for the trees. Running down factors as a check list can lead a court to lose sight of why we have substantive consolidation in the first instance . . . and often [to] fail [to] identify a metric by which [it] can . . . [assess] the relative importance among the factors. The . . . [result is] resort to ad hoc balancing without a steady eye on the . . . [principles] to be advanced . . . .").

17 They are Robert K. Rasmussen of Vanderbilt Law School, Barry Adler of the NYU School of Law, Susan Block-Leib of Fordham University School of Law, G. Marcus Cole of Stanford Law School, Marcel Kahan of the NYU School of Law, Ronald J. Mann of the University of Texas Law School, and David A. Skeel, Jr. of the University of Pennsylvania School of Law.

What, then, are those principles? We perceive them [**37] to be as follows.

> (1) Limiting the cross-creep of liability by respecting entity separateness is a "fundamental ground rule[]." Kors, supra, at 410. As a result, the general expectation of state law and of the Bankruptcy Code, and thus of commercial markets, is that courts respect entity separateness absent compelling circumstances calling equity (and even then only possibly substantive consolidation) into play.
>
> (2) The harms substantive consolidation addresses are nearly always those caused by *debtors* (and entities they control) who disregard separateness. [18] Harms caused by creditors typically are remedied by provisions found in the Bankruptcy Code (e.g., fraudulent transfers, §§ 548 and 544(b)(1), and equitable subordination, § 510(c)).
>
> (3) [HN8] Mere benefit to the administration of the case (for example, allowing a court to simplify a case by avoiding other issues or to make postpetition accounting more convenient) is hardly a harm calling substantive consolidation into play.
>
> (4) Indeed, [HN9] because substantive consolidation is extreme (it may affect profoundly creditors' rights and recoveries) and imprecise, this "rough justice" remedy should be [**38] rare and, in any event, one of last resort after considering and rejecting other remedies (for example, the possibility of more precise remedies conferred by the Bankruptcy Code).
>
> (5) [HN10] While substantive consolidation may be used defensively to remedy the identifiable harms caused by entangled affairs, it may not be used offensively (for example, having a primary purpose to disadvantage tactically a group of creditors in the plan process or to alter creditor rights).

18 Though creditors conceivably can cause debtors to conflate separate organizational forms, the specter of lender liability (which came to the fore in only the last two decades) makes this theoretical possibility all the more remote.

The upshot is this. [HN11] In our Court what must be proven (absent consent) concerning the entities for whom substantive consolidation is sought is that (i) prepetition they disregarded separateness so significantly their creditors relied on the breakdown of entity borders and treated them as one legal entity, [19] [**39] or (ii) postpetition their assets and liabilities are so scrambled that separating them is prohibitive and hurts all creditors. [20]

19 This rationale is meant to protect in bankruptcy the prepetition expectations of those creditors. Accord Kors, supra, at 419. The usual scenario is that creditors have been misled by debtors' actions (regardless whether those actions were intentional or inadvertent) and thus perceived incorrectly (and relied on this perception) that multiple entities were one.

20 This rationale is at bottom one of practicality when the entities' assets and liabilities have been "hopelessly commingled." In re Gulfco Inv. Corp., 593 F.2d at 929; In re Vecco Constr. Indus., 4 B.R. at 410. Without substantive consolidation all creditors will be worse off (as Humpty Dumpty cannot be reassembled or, even if so, the effort will threaten to reprise Jarndyce and Jarndyce, the fictional suit in Dickens' Bleak House where only the professionals profited). With substantive consolidation the lot of all creditors will be improved, as consolidation "advance[s] one of the primary goals of bankruptcy-enhancing the value of the assets available to creditors . . .-often in a very material respect." Kors, supra, at 417 (citation omitted).

[**40] [*212] Proponents of substantive consolidation have the burden of showing one or the other rationale for consolidation. The second rationale needs no explanation. The first, however, is more nuanced. A prima facie case for it typically exists when, based on the parties' prepetition dealings, a proponent proves corporate disregard creating contractual expectations of creditors [21] that they were dealing with debtors as one indistinguishable entity. Kors, supra, at 417-18; Christopher W. Frost, Organizational Form, Misappropriation Risk, and the Substantive Consolidation of Corporate Groups, 44 Hastings L.J. 449, 457 (1993). Proponents who are creditors must also show that, in their prepetition course of dealing, they actually and reasonably relied on debtors' supposed unity. Kors, supra, at 418-19.

Creditor opponents of consolidation can nonetheless defeat a prima facie showing under the first rationale if they can prove they are adversely affected and actually relied on debtors' separate existence. [22]

21 "Tort and statutory claimants, who, as involuntary creditors, by definition did not rely on anything in becoming creditors," Kors, supra, at 418, are excluded, leaving only those creditors who contract with an entity for whom consolidation is sought.

[**41]

22 As noted already, supra n.16, we do not decide here whether such a showing by an opposing creditor defeats totally the quest for consolidation or merely consolidation as to that creditor.

C. Application of Substantive Consolidation to Our Case

With the principles we perceive underlie use of substantive consolidation, the outcome of this appeal is apparent at the outset. Substantive consolidation fails to fit the facts of our case and, in any event, a "deemed" consolidation cuts against the grain of all the principles.

To begin, the Banks did the "deal world" equivalent of "Lending 101." They loaned $ 2 billion to OCD and enhanced the credit of that unsecured loan indirectly by subsidiary guarantees covering less than half the initial debt. What the Banks got in lending lingo was "structural seniority"--a direct claim against the guarantors (and thus against their assets levied on once a judgment is obtained) that other creditors of OCD did not have. This kind of lending occurs every business day. To undo this bargain is a demanding task.

1. NO PREPETITION DISREGARD OF CORPORATE [**42] SEPARATENESS

Despite the Plan Proponents' pleas to the contrary, there is no evidence of the prepetition disregard of the OCD entities' separateness. To the contrary, OCD (no less than CSFB) negotiated the 1997 lending transaction premised on the separateness of all OCD affiliates. Even today no allegation exists of bad faith by anyone concerning the loan. [23] In this context, OCD and the other Plan Proponents cannot now ignore, or have us ignore, the very ground rules OCD put in place. Playing by these rules means that obtaining the guarantees of separate entities, made separate [*213] by OCD's choice of how to structure the affairs of its affiliate group of companies, entitles a lender, in bankruptcy or out, to look to any (or all) guarantor(s) for payment when the time comes. As such, the District Court's conclusions of "substantial identity" of OCD and its subsidiaries, and the Banks' reliance thereon, are incorrect. For example, testimony presented by both the Banks and the Debtors makes plain the parties' intention to treat the entities separately. CSFB presented testimony from attorneys and bankers involved in negotiating the Credit Agreement that reflected their assessment of the [**43] value of the guarantees as partially derived from the separateness of the entities. As OCD concedes, these representatives "testified that the guarantees were . . . intended to provide 'structural seniority' to the banks," and were thus fundamentally premised on an assumption of separateness. Debtors Ans. Br. at 26.

23 The bondholders do claim certain Banks misled them in purchasing OCD debt subsequent to the 1997 loan. But we know of no claim of wrong by the Banks in connection with the 1997 transaction.

In the face of this testimony, Plan Proponents nonetheless argue that the Banks intended to ignore the separateness of the entities. In support of this contention, they assert, inter alia, that because the Banks did not receive independent financial statements for each of the entities during the negotiating process, they must have intended to deal with them as a unified whole. Because the Banks were unaware of the separate financial makeup of the subsidiaries, the argument goes, they could not have relied [**44] on their separateness. [24]

24 Debtors make a similar argument on the basis of the Banks' failure to exercise their right to monitor the entities independently. For much the same reasoning that follows in the text, we reject that argument as well.

We reject outright Debtors' claim that the Banks' alleged reliance on corporate separateness fails because they did not obtain a third-party legal opinion from counsel that substantive consolidation was unlikely to occur were OCD or the guarantors subject to bankruptcy. By custom and practice this type of counsel opinion is requested and given for newly formed entities whose "special purpose" is to obtain structured financing (i.e., where "a defined group of assets . . . [are] structurally isolated, and thus serve as the basis of a financing . . . ." Committee on Bankruptcy and Corporate Reorganization of The Association of the Bar of the City of New York, Structured Financing Techniques, 50 Bus. Law. 527, 529 (1995)). It is customarily not given (nor even requested) for entities in existence for any significant period of time or set up for other than a structured financing transaction. See Tribar Opinion Committee, Opinions in the Bankruptcy Context: Rating Agency, Structured Financing, and Chapter 11 Transactions, 46 Bus. Law. 717, 726 & n.42 (1991).

[45]** This argument is overly simplistic. Assuming the Banks did not obtain separate financial statements for each subsidiary, they nonetheless obtained detailed information about each subsidiary guarantor from OCD, including information about that subsidiary's assets and debt. Moreover, the Banks knew a great deal about these subsidiaries. For example, they knew that each subsidiary guarantor had assets with a book value of at least $ 30 million as per the terms of the Credit Agreement, that the aggregate value of the guarantor subsidiaries was over $ 900 million and that those subsidiaries had little or no debt. Additionally, the Banks knew that Fibreboard's subsidiaries (including the entities that became part of ESI) had no asbestos liability, would be debt-free post-acquisition and had assets of approximately $ 700 million.

Even assuming the Plan Proponents could prove prepetition disregard of Debtors' corporate forms, we cannot conceive of a justification for imposing the rule that a creditor must obtain financial statements from a debtor in order to rely reasonably on the separateness of that debtor. Creditors are free to employ whatever metrics **[*214]** they believe appropriate in deciding **[**46]** whether to extend credit free of court oversight. We agree with the Banks that "the reliance inquiry is not an inquiry into lenders' internal credit metrics. Rather, it is about the *fact* that the credit decision was made in reliance on the existence of separate entities . . . ." CSFB Opening Br. at 31 (emphasis in original). [25] Here there is no serious dispute as to that fact.

25 Further, a creditor's lack of diligence is relevant only insofar as it bears on the credibility of its assertion of reliance on separateness.

2. NO HOPELESS COMMINGLING EXISTS POSTPETITION

There also is no meaningful evidence postpetition of hopeless commingling of Debtors' assets and liabilities. Indeed, there is no question which entity owns which principal assets and has which material liabilities. Likely for this reason little time is spent by the parties on this alternative test for substantive consolidation. It is similarly likely that the District Court followed suit.

The Court nonetheless erred in concluding that the **[**47]** commingling of assets will justify consolidation when "the affairs of the two companies are so entangled that consolidation *will be beneficial.*" In re Owens Corning, 316 B.R. at 171 (emphasis added). As we have explained, [HN12] commingling justifies consolidation only when separately accounting for the assets and liabilities of the distinct entities will reduce the recovery of *every* creditor--that is, when every creditor will benefit from the consolidation. Moreover, the benefit to creditors should be from cost savings that make assets available rather than from the shifting of assets to benefit one group of creditors at the expense of another. Mere benefit to some creditors, or administrative benefit to the Court, falls far short. The District Court's test not only fails to adhere to the theoretical justification for "hopeless commingling" consolidation--that no creditor's rights will be impaired--but also suffers from the infirmity that it will almost always be met. That is, substantive consolidation will

nearly always produce some benefit to some in the form of simplification and/or avoidance of costs. Among other things, following such a path misapprehends the [**48] degree of harm required to order substantive consolidation.

But no matter the legal test, a case for hopeless commingling cannot be made. Arguing nonetheless to the contrary, Debtors assert that "it would be practically impossible and prohibitively expensive in time and resources" to account for the voluntary bankruptcies of the separate entities OCD has created and maintained. Debtors Ans. Br. at 63. In support of this contention, Debtors rely almost exclusively on the District Court's findings that

> it would be exceedingly difficult to untangle the financial affairs of the various entities . . . [and] there are . . . many reasons for challenging the accuracy of the results achieved [in accounting efforts thus far]. For example, transfers of cash between subsidiaries and parent did not include any payment of interest; and calculations of royalties are subject to question.

In re Owens Corning, 316 B.R. at 171. Assuming arguendo that these findings are correct, they are simply not enough to establish that substantive consolidation is warranted.

[HN13] Neither the impossibility of perfection in untangling the affairs of the entities nor the likelihood [**49] of some inaccuracies in efforts to do so is sufficient to justify consolidation. We find R 2 Investments, LDC v. World Access, Inc. (In re World Access, Inc.), 301 B.R. 217 (Bankr. [*215] N.D. Ill. 2003), instructive on this point. In World Access the Court noted that the controlling entity "had no uniform guidelines for the recording of intercompany interest charges" and that the debtors failed to "allocate overhead charges amongst themselves." Id. at 234. The Court held, however, that those accounting shortcomings were "merely imperfections in a sophisticated system of accounting records that were conscientiously maintained." Id. at 279. It ultimately concluded that "all the relevant accounting data . . . still existed," that only a "reasonable review to make any necessary adjustments [was] required," and, thus, that substantive consolidation was not warranted. Id.

The record in our case compels the same conclusion. At its core, Debtors' argument amounts to the contention that because intercompany interest and royalty payments were not perfectly accounted for, untangling the finances of those entities is a hopeless endeavor. [**50] Yet imperfection in intercompany accounting is assuredly not atypical in large, complex company structures. For obvious reasons, we are loathe to entertain the argument that complex corporate families should have an expanded substantive consolidation option in bankruptcy. And we find no reason to doubt that "perfection is not the standard in the substantive consolidation context." Id. We are confident that a court could properly order and oversee an accounting process that would sufficiently account for the interest and royalty payments owed among the OCD group of companies for purposes of evaluating intercompany claims--dealing with inaccuracies and difficulties as they arise and not in hypothetical abstractions.

On the basis of the record before us, the Plan Proponents cannot fulfill their burden of demonstrating that Debtors' affairs are even tangled, let alone that the cost of untangling them is so high relative to their assets that the Banks, among other creditors, will benefit from [**51] a consolidation. [26]

> 26 For example, we simply cannot imagine that it would cost Debtors even 1 of the Banks' asserted $ 1.6 billion claim to account for the allegedly incalculable intercompany interest and royalty payments.

3. OTHER CONSIDERATIONS DOOM CONSOLIDATION AS WELL

Other considerations drawn from the principles we set out also counsel strongly against consolidation. First of all, holding out the possibility of later giving priority to the Banks on their claims does not cure an improvident grant of substantive consolidation. Among other things, the prerequisites for this last-resort remedy must still be met no matter the priority of the Banks' claims.

Secondly, [HN14] substantive consolidation should be used defensively to remedy identifiable harms, not offensively

to achieve advantage over one group in the plan negotiation process (for example, by deeming assets redistributed to negate plan voting rights), nor a "free pass" to spare Debtors or any other group from proving challenges, like fraudulent transfer **[**52]** claims, that are liberally brandished to scare yet are hard to show. If the Banks are so vulnerable to the fraudulent transfer challenges Debtors have teed up (but have not swung at for so long), then the game should be played to the finish in that arena. [27]

27 The same sentiment applies to the argument of the bondholders that, subsequent to the 1997 loan to OCD, the Banks defrauded them in connection with a prospectus distributed with respect to a sale of OCD bonds underwritten by some of the Banks. If the bondholders have a valid claim, they need to prove it in the District Court and not use their allegations as means to gerrymander consolidation of estates.

[*216] But perhaps the flaw most fatal to the Plan Proponents' proposal is that the consolidation sought was "deemed" (i.e., a pretend consolidation for all but the Banks). If Debtors' corporate and financial structure was such a sham before the filing of the motion to consolidate, then how is it that post the Plan's effective date this structure stays **[**53]** largely undisturbed, with the Debtors reaping all the liability-limiting, tax and regulatory benefits achieved by forming subsidiaries in the first place? In effect, the Plan Proponents seek to remake substantive consolidation not as a remedy, but rather a stratagem to "deem" separate resources reallocated to OCD to strip the Banks of rights under the Bankruptcy Code, favor other creditors, and yet trump possible Plan objections by the Banks. Such "deemed" schemes we deem not Hoyle.

IV. Conclusion

[HN15] Substantive consolidation at its core is equity. Its exercise must lead to an equitable result. "Communizing" assets of affiliated companies to one survivor to feed all creditors of all companies may to some be equal (and hence equitable). But it is hardly so for those creditors who have lawfully bargained prepetition for unequal treatment by obtaining guarantees of separate entities. Accord Kheel, 369 F.2d at 848 (Friendly, J., concurring) ("Equality among creditors who have lawfully bargained for different treatment is not equity but its opposite . . . ."). No principled, or even plausible, reason exists to undo OCD's and the Banks' arms-length negotiation and lending **[**54]** arrangement, especially when to do so punishes the very parties that conferred the prepetition benefit--a $ 2 billion loan unsecured by OCD and guaranteed by others only in part. To overturn this bargain, set in place by OCD's own pre-loan choices of organizational form, would cause chaos in the marketplace, as it would make this case the Banquo's ghost of bankruptcy.

With no meaningful evidence supporting either test to apply substantive consolidation, there is simply not the nearly "perfect storm" needed to invoke it. Even if there were, a "deemed" consolidation--"several zip (if not area) codes away from anything resembling substantive consolidation," In re Genesis Health Ventures, 402 F.3d at 424--fails even to qualify for consideration. Moreover, it is here a tactic used as a sword and not a shield.

We thus reverse and remand this case to the District Court.