Rethinking International Bankruptcy Law:

A Critical Study of

the Substantive and Procedural Approaches to its

Current Status

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VOLUME ONE

To

Haifa al-Bashir

my mother

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ABSTRACT

This dissertation is essentially a critical examination of the traditional and reformatory approaches of international bankruptcy law in Canada, England, and the United States. It highlights the shortcomings of the traditional law and the inherent limitations, contradictions, and inconsistencies of its applicable mechanism; the doctrines of private international law. The dissertation further argues that the reform schemes thus far advanced suffer from jurisdictional problems and fall short of ensuring optimal outcomes for international bankruptcy cases. Although some of these reform schemes achieve the desired equality of distribution, they unnecessarily entail a reduction in the value of distributable assets by carrying out piecemeal liquidations of local assets in order to satisfy some local claims. The realization that the suggested reforms carry inefficient distributions calls for a reform scheme which addresses its persistent inefficiency. The compelling rationale of the proposed reform advocated by this author lies in its promise to maximize the value of the bankrupt's realizable estate and to increase returns to general creditors at no cost to other classes of creditors. Furthermore, the suggested reform achieves the sought efficiency without requiring countries to forego jurisdiction and without compromising the locally created claims and entitlements. The originality of this reform scheme derives form the fact that it dissociates the condition of single administration essential for efficiency from unity of jurisdiction which stood as a major obstacle against the acceptance of other efficiency oriented reform schemes.

RÉSUMÉ

Cette thèse contient principalement une étude critique des conceptions traditionnelles et réformatrices de la loi sur la faillite internationale au Canada, en Angleterre et Etats-Unis. Elle éclaire les insuffisances de la loi traditionnelle ausi qua les limitations, contradicitions et incohérences des mécanismes qui lui sont inhérents: les principes du droit international privé. Cette thèse soutient en outre que les plans de la réforme formulés jusque-là sont affectés par des problèmes d'organisation judiciaire et n'aboutissent pas à assurer les meilleurs résultats pour les procédures de faillite internationale. Quoique certains de ces projets de réforme réalisent l'égalité de distribution recherchée , ils entrainent une diminution inutile de la valeur des biens distribuables en provoquant des liquidations fragmentaires de biens situés sur place, en vue de satisfaire certaines réclamations locales. La constatation que les réformes suggérées comportent des distribution inefficaces fait envisager un projet de réforme qui s'attaque a son inéfficacité persistante. La raison d'être impérieuse de la réforme soutenue par p' auteur réside dans son objectif de maximiser la valeur des biens réalisables de la faillite et d'augmenter les versements aux créanciers chirographaires sans coût pour les autres catégories d'ayants - droit. Bien plus, la réforme proposée aboutit à l'efficacité recherchée sans exiger que les pays renoncent à leur juridiction, et sans compromettre les titres et créances cré localement. L'originalité de ce projet de réforme provient du fait qu'il dissocie la condition de l'administration unique, essentielle pour l'efficacité de l'unité de juridiction qui se

présentait comme un obstacle majeur à l'adoption d'autres project de réforme orientés vers l'efficacité.

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INTRODUCTION

Statements such as the "**bankruptcy of bankruptcy law**"[1] and the "**sorry state of bankruptcy law**"[2] express the widespread dissatisfaction among jurists with the treatment of international bankruptcy cases under the current international legal configuration. To be sure, discontent with the outcome of international bankruptcy cases is not new to juristic discourse. Concerns have long since been raised about the difficulties entailed in regulating efficiently and equitably the bankruptcy of a debtor with international assets and creditors, in view of the potential for race of diligence, as well as legal and practical discrimination against distant creditors. In the case of the bankruptcy of the Ammanati bank in 1302, for instance, the Holy Sea felt compelled to interfere to prevent the piecemeal distribution of the debtor's estate, apparently acting on its belief that such interference is necessary to achieve a prompt and equitable distribution of the Bank's assets.[3] The problem of international

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[1] **K. H. Nadelmann, "Rehabilitating International Bankruptcy laws, Lessons Taught by The Herstatt and Company"** (1977) New York University Law Review 1. [hereinafter **Nadelmann, "Rehabilitating International..."**] at 1.

[2] **J. D. Honsberger, "Conflict of Laws and the Bankruptcy Reform Act of 1978"** (1979-1980) 30 Case Western Reserve Law Review 631. [hereinafter **Honsberger, "Conflict of Laws and..."**] at 674.

[3] **K. H. Nadelmann, "Bankruptcy Treaties"** (1944-1945) 93 University of Pennsylvania Law Review 58, reprinted in ***Conflict of laws: International and Interstate: Selected essays***, La Hague: Martinus Nijhoff 1972) at 299. [hereinafter **Nadelmann, "*Bankruptcy Treaties...*"** cited to Selected Essays].

Nadelmann commented on the solution of this case at 300:

(continued...)

bankruptcy, however, assumed a much larger proportion with the dramatic growth and transformation in international commerce in the second half of this century. Such developments are marked by the evolution of international trade from cross border trading to the activity of carrying business simultaneously within different jurisdictions, through multinational enterprises. This heightened the possibility of large scale bankruptcies with powerful ripple effects and ramifications. The several mega-bankruptcies which occurred after the oil crisis in the mid- seventies, and the inadequate manner in which they were handled, sounded the alarm about the crisis of international bankruptcy law, and highlighted the urgency for reform.

This state of affairs has prompted various bilateral and multilateral reform schemes. Although few regional reform schemes have been implemented successfully, the overall success of international bankruptcy reform has been modest to say the least. In a way, this area of law has been rather resistant to reform schemes, especially by comparison to other areas of international law such as international trade and aviation laws. In light of such observations, it seems that there is still the need to gain a deeper understanding of the problematics of international bankruptcies, and of the proposed reform schemes, as a prerequisite for

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[3](...continued)

> **The world-wide financial system of the mediaeval *[sic]* papacy...was used for the transfer of the incoming money to Rome. While an ordinary trustee in bankruptcy would certainly have failed, the Holy Sea succeeded in collecting at least part of the foreign assets for distribution among all creditors because its powers transcended state borders.**

moving forward towards a more acceptable and successful international bankruptcy law.

In this dissertation, I attempt to make a contribution towards this end by undertaking a systematic critical examination of the treatment of international bankruptcy law in the three common law jurisdictions of England, Canada and the United States excluding Quebec.[4] In light of my analysis and findings about the limitations of the traditional approaches and reform schemes of this area of law in these jurisdictions, I will then outline an alternative reform scheme, based upon new better defined criteria and objectives.

Notwithstanding the fact that the jurisdictions under study share a common language, and legal tradition, the outcome of international bankruptcy cases across these jurisdictions were still more often than not considered problematic. This state of affairs has often been the subject of criticism, and proposed reforms. Thus far, only little success has been registered, in modest unilateral legislative and case law reforms, while the only attempt at a multilateral reform between Canada and the United States was abortive. All this suggests that a comparative study of the international bankruptcy law and reform schemes in these jurisdictions may provide us with insights about the ***fundamental*** problems of international bankruptcy cases, and thus may permit us to emerge with newer and better solutions.

[4] The terms "common law " or "Anglo-Saxon law" refer in this dissertation to the laws of English Canada, England, and the United States.

In the first chapter, this dissertation seeks to characterize and examine critically the traditional international bankruptcy case law in each of the jurisdictions. It establishes clearly the territorial origins of the Anglo-Saxon case law, notwithstanding statements to the contrary regarding the Anglo-Canadian case law. From a technical view point, it discusses, on the one hand, the limitations of the assignment approach- and more generally of private international law- in England and to a lesser extent in Canada, and on the other hand, the inconsistent and protectionist applications of comity in American law. Lastly, the chapter highlights the discriminatory and other problematic features of the Anglo-Saxon international bankruptcy law.

In the second chapter, I examine the reform schemes of international bankruptcy law in these jurisdictions. At the level of unilateral reforms, I discuss in detail the ***United States Bankruptcy Reform Act***[5] in view of its relative originality and international significance, although I note that the pragmatic features of the Code are paralleled by the case law developments in Canada and to a lessor extent in England. I then turn to examine the multilateral treaty reform schemes, namely the ***Canada - United States Bankruptcy Treaty***,[6] on the North American side, and in the

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[5] ***Bankruptcy Reform Act of Nov. 6, 1978***, Title I,§ 101 Pub. L. No. 95-598, 92 Stat. 2549, *amended by* Act of Oct 27, 1986, Title II, § 257 (a), Pub. L No. 99-554, 100 Stat. 3114, codified as amended in 11 U.S.C.A. (West 1993). [hereinafter the ***American Bankruptcy Code, 11 U.S.C.A***] §§ 101, 304-306.

[6] ***Draft of United States of America - Canada Bankruptcy Treaty***, of October 29, 1979 published in Appendix D-6A of **J. Dalhuisen**, 2 ***International Insolvency and Bankruptcy***, (New York: Matthew Bender, (continued...)

Draft European Convention on Bankruptcy of 1970,[7] ***and 1982,***[8] and the ***Istanbul Convention,***[9] to which England was a party to negotiations. Although the last two reforms do not represent necessarily the contribution of common law jurists, they have been examined here in so far as they provide instructive examples of models of reform which have been contemplated by common law jurisdictions.

The chapter abandons the conventional characterization of reform approaches in terms of universality and territoriality, as these are considered ambiguous, value laden, and not necessarily helpful characterizations. Instead, it seeks to identify more concrete and specific features of the reform schemes. Therefore, the reforms have been classified with respect to three features: the number of jurisdictions involved in the administration of the estate, the number of laws applied, and the number of the pools of assets involved in the administration. A classification with respect to singularity or multiplicity of jurisdictions places the ***European Draft Convention*** on

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[6](...continued)
1986). [hereinafter **Dalhuisen**, 2 ***International Insolvency***]. [hereinafter ***Canada - United States Bankruptcy Treaty***].

[7] ***Draft Convention on Bankruptcy, Winding-up, Arrangements, Compositions and Similar Proceedings***, Doc 3.327/1/XIV/70-F dated 16 February 1970. An English version came out in August of 1974 published as Doc 3.327/1/XIV/70-E. [hereinafter **1970 Draft**]. Also published in U.K., H.C., **"Report of the Department of Trade Advisory committee"** Cmnd 6602, 1976 (President: Sir K. Cork), [hereinafter **Cork Report**].

[8] ***Draft Convention on Bankruptcy, Winding-up, Arrangements, Compositions and Similar Proceedings***, of 1982 published in Appendix C of **Ian F. Fletcher, *Conflict of laws and the European Community Law***, (Amsterdam: North-Holland Publishing Company, 1982), [hereinafter **1982 Draft**].

[9] ***European Convention on Certain International Aspects of Bankruptcy***, Council of Europe, No. 136, Istanbul, 5 June 1990. [hereinafter the **Istanbul convention**].

one side (single jurisdiction-single law), and the ***Istanbul Convention*** and the American and Anglo-Canadian unilateral reform sachems on the other (multiple jurisdictions-multiple laws). This classification corresponds more or less to that obtained under the rubric of territoriality/universality.

Going beyond this classification to examine the schemes from the view point of choice of law, reveals more significant underlying concerns among the different approaches, which foreshadow, as I argue, their differences with regard to their material effects in international bankruptcy cases. Thus, it shall be seen that, regardless of their designated classification, all these reforms seek to protect local priority and secured claims. Under the ***European Convention***, this end is realized by providing for a choice of law rule to this effect, or even by assigning jurisdiction to the local courts in the case of tax claims, and under the ***Istanbul Convention*** and the American law, this end is upheld by the practice and principle of their refusal to forgo the jurisdiction of the local assets.

Last but not least, it will become clear that none of the reform schemes upholds as a fundamental tenant the singularity of the debtor's pool of assets, or in other words, the consolidated administration of the debtor's estate. While this is obvious in the ***Istanbul Convention***, and to some extent in the multiple jurisdictions-multiple laws approach, it should be emphasized that in the ***European Convention***, **single jurisdiction is not identical with single pool of assets**. In all these approaches, if need be, local assets are liquidated separately from the general pool of

assets in order to satisfy local priority and secured claims. None of the solutions advanced puts primacy upon maintaining the economic integrity and thus, maximizing the value of the debtor's estate. Thus, while the schemes might differ with regard to administrative efficiency, they are all potentially capable of economic inefficiency in the sense of wasting values by the localization and piecemeal liquidation of the debtor's estate.

The conclusion that is drawn from the above feature is that all the reform schemes share one fundamental feature. They seek to vindicate priority and secured creditors, at the expense of general creditors. This does not amount to saying that these solutions are prejudicial only because they vindicate relative entitlements, since relative entitlements are also validly upheld under local bankruptcy laws. Rather, the current solutions are doubly prejudicial against general creditors: first in so far as they do not admit all claims on an equal footing - a fact which is normatively acceptable in most bankruptcy laws-, and secondly and most importantly, in so far as they destroy values that could accrue otherwise to general creditors, by satisfying local preferred claims from local assets. This observation, I shall argue, allows us to see the issue of reforms in international bankruptcy law not in terms of the conflict between the rights of foreign and local creditors, but, in terms of the conflict between different classes of creditors across borders.

Before turning to propose a new reform scheme that transcends the traditional framework of private international law in chapter four, in chapter three, I attempt to

show why private international law is inherently incapable of providing an adequate solution to the complex and challenging problems of international bankruptcy law.

Chapter four outlines a new reform scheme for international bankruptcy law in the three jurisdictions. Towards this end, it first underscores the theoretical deficiency of the current international bankruptcy law and reform schemes. Being indefinite and controversial, universality, territoriality, justice, and equality cannot serve as adequate objectives and guiding principles for international bankruptcy law. Instead, I argue, that efficiency should be adopted as the prime objective of international bankruptcy law because it is a concrete, quantifiable and thus attainable objective. The thesis will then outline the substantive and procedural aspects of a proposal. Moreover, it will argue that this reform proposal is measurably more efficient than the various reforms proposed, in so far as it minimizes administrative costs, and also maximizes value by ensuring a consolidated liquidation or reorganization of the debtor's estate. However, this approach differs from other so-called universalist reform schemes which supposedly uphold efficiency in one crucial respect: It dissociates the singularity of the pool of assets, **which alone is essential for efficiency**, from the singularity of jurisdiction, and thus, of choice of law. Thus, it will be argued that it is possible to maximize the value of the debtor's estate without necessarily subjecting jurisdictions to the determinations of foreign courts, and denying creditors their locally created relative entitlements. Such an approach, it will be argued, is superior to the approaches adopted by the other reform schemes,

because it would maximize values to the general creditors at no cost to local preferred creditors. The proposed approach which takes the form of a treaty, does not require courts to forego jurisdiction over local assets, a fact which renders it more acceptable.

CHAPTER ONE

THE TRADITIONAL APPROACH: HISTORY AND EVOLUTION OF THE ANGLO-SAXON INTERNATIONAL BANKRUPTCY LAW

A. INTRODUCTION

This chapter examines major developments in international bankruptcy law in the three selected common law jurisdictions, from its inception in the middle of the 18th century until the present time.[10] However, it will exclude treaty reforms as well as other reforms and practices which are based on concurrent bankruptcies, such as Section 304 in the United States, and the ancillary winding up in the Anglo-Canadian law, which will be discussed in chapter two. The present chapter illustrates the various problems encountered in international bankruptcy cases, and identifies the "private international law" methods and doctrines employed in solving them. While it is largely expository, the chapter points out some of the evident shortcomings of international bankruptcy law in these jurisdictions. A more systematic critical assessment of the law will be postponed until chapter four, where I define the

[10] International bankruptcy law has been in existence for a long period of time. Literature has recorded a bankruptcy treaty as early as 1204 between Verona and Trent. See, **John D. Honsberger**, **"The Negotiation of a Bankruptcy Treaty"** (1985) Meredith Memorial Lectures, McGill University 287. [hereinafter **Honsberger**, **"The Negotiation of a..."**]at 288; **Nadelmann**, **"Bankruptcy Treaties"**, ***supra*** note 3 at 302. However, the earliest case which I was able to find, which provides for a treatment of a foreign bankruptcy is ***Cleve* v. *Mills*, 1 Cook. B. Laws, 303. 4 edit.** which occurred in the middle of the eighteenth century.

assessment criteria and propose an objective for international bankruptcy law.

B. THE TERRITORIAL ORIGINS OF THE COMMON LAW INTERNATIONAL BANKRUPTCY LAW: THE EARLY CASE LAW

International bankruptcy law, in common law, is largely judge made.[11] The role of legislation in this area has been small in relation to the body of cases. For the most part, the doctrines applied to this area of law were developed in courts. A study of the early international bankruptcy cases shows that it is rooted in a clear territorial tradition. This applies to England as well as to Canada and the United States. The assertion that England and Canada, unlike the United States, have recognized the extraterritorial operation of bankruptcy laws[12] is inaccurate. The Anglo-Canadian courts, like the United States courts, have rejected expressly in the

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[11] **John D. Honsberger, "Canadian Recognition of Foreign Judicially Supervised Arrangements"** (1990) 76 C.B.R. 204 at 204. [hereinafter **Honsberger, "Canadian Recognition of Foreign**] states: **"As Blackstone said,..."The Judges of the several courts are the depositary of our rules of law; the living oracles"".**

[12] **P.M. North & J.J. Fawcett, *Cheshire and North Private International Law***, 12th ed. (London: Butterworths, 1992) at 912. [hereinafter ***Cheshire's Private International Law***, 12th ed.]. state: **"The English Courts have consistently applied the doctrine of *universality*"** Italics in original. This statement, which is found in most English and Canadian authorities, creates a misconception that the Anglo-Canadian law recognizes the extra-territorial effects of bankruptcy. Elsewhere, see **K. H. Nadelmann, "*Solomons* v. *Ross* and International Bankruptcy law"** (1946) 9 Modern Law Review 154. Reprinted in **K. H. Nadelmann, *Conflict of laws: International and Interstate: Selected essays***, La Hague: Martinus Nijhoff 1972), [hereinafter **Nadelmann, "*Solomons* v. *Ross***, cited to **Nadelmann, *Conflict of laws***] at 273 state:

> **Beginning with Savigny,...who relied on Story...for his information, the supporters of the theory that bankruptcy declared at the domicil of the debtor must be recognized everywhere,...have referred to the position taken by the English Courts. Underline added.**

past, and continue to reject today, to various degrees, the notion of an extraterritorial operation of bankruptcy law. These courts have admitted some effects of a foreign bankruptcy and tried to extend some of the effects of their local bankruptcies to persons and property abroad. However, they tried to do so without recognizing in principle the extraterritorial operation of bankruptcy laws. The territorial character of the early Anglo-Saxon international bankruptcy laws is often expressed explicitly by judges, but may also be inferred from their underlying reasoning.

The territoriality of the English bankruptcy law is expressly stated in ***Captain Wilson's case***, which was decided on the sixth of July 1758.[13] The full record of this case is not extant, but its main elements may be reconstructed from several citations in the English jurisprudence. In ***Sill* v. *Worswick***,[14] Lord Mansfield describes the facts of ***Captain Wilson's case*** as follows:

> ***Wilson* a bankrupt had had effects in *Scotland*, and some of his creditors had proceeded against the effects there (there being a custom in *Scotland* analogous to the foreign attachment in**

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[13] 1 H.Bl 691. But see Nadelmann, "***Solomons* v. *Ross***", ***supra*** note 12 at 279 n34, where he states:

> ***Captain Wilson's Case* was before the Courts in England and Scotland shortly before *Solomons* v. *Ross*. Wilson had been declared bankrupt in England. Subsequently, Scottish creditors holding English claims attached assets in Scotland. The Court of Session, by a majority decision, decided in favour of the English trustee in bankruptcy claiming the assets. *Bradshow and Ross, assignees of Wilson* v. *Fairholme*, July 6, 1758, 1 Faculty Collection 200, 1 Kames' Select Decisions 106, *Brown's Supplement to the Dictionary of Decisions*, Vol V, at 283 (Lord Kilkerran), 821, 839 (Lord Monboddo).** Italics in original.

[14] ***Sill* v. *Worswick*** (1791), 1 H.Bl 665, 126 E.R. 379, at 691. Loughborough, L. [hereinafter ***Sill*** cited to H.Bl.]

> ***London*), upon which an application was made to the Lord Chancellor to stay their proceedings (the parties who set such proceedings on foot living in *England*).**[15]

Lord Hardwicke, the judge in ***Captain Wilson's case***, denied the request for staying these individual proceedings and asserted unambiguously that the English bankruptcy law does not operate extraterritorially. He said:

> **it could not be done [staying the proceedings], for our bankrupt laws were not in force there, and therefore the parties had a right to proceed. But he said that if the effects there were not sufficient to satisfy the party's debt, and he applied for a dividend under the commission here, in that case he would postpone him till the other creditors were paid in the same proportions he had received.**[16]

A century and a half later in ***Cook* v. *Charles A. Vogeler Co.***,[17] the House of Lords held that a court in bankruptcy had no jurisdiction to make a receiving order against a foreigner who resides abroad without such a foreigner coming into the jurisdiction. The Court did not consider such a person a "debtor" under the

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[15] ***Sill***, ***supra*** note 14 at 678-9. Italics in original. For an explanation of the concept of "foreign attachments", see **J. Beale**, **"The Exercise of Jurisdiction In Rem to Compel Payment of a Debt"** (1913) 27 Harvard Law Review 107. [hereinafter **Beale**, **"The Exercise of Jurisdiction..."**] at 111-112. Beale traces the historical roots of this practice, and equates a foreign attachment to a garnishment of a debt.

[16] ***Sill***, ***supra*** note 14 at 678-9. Underline added, italics in the original. This judgment establishes the hotch pot rule or the equalization rule as it is called in some writings. Modern authorities on the subject such as ***Cheshire's Private International Law***, 12th ed., ***supra*** note 12 at 908-909 cite ***Banco de Portugal* v. *Waddell*** (1880), 5 App Cas 161. as an authority for the hotch pot rule, where it is also states: **"In this connection [creditors' recoveries abroad] one rule is clearly established, namely, that a creditor, whether British or foreign, will not be allowed to claim in the English bankruptcy for any further debt unless he brings into hotchpot what he has already recovered abroad."**

[17] ***Cook* v. *Charles A. Vogeler Co.***, [1901] A. C. 102. H.L. *sub nom.*, ***Re A. B. & Co.*** in C.A. Earl of Halsbury, Davey, Fry, Managhten, Hereford, Brampton, Robertson, LL., [hereinafter ***Cook***].

Bankruptcy Act of 1883,[18] although he had committed an act of bankruptcy abroad. The fact that the debtor in this case had a business in England through an agent and acquired assets therein was also considered irrelevant to the decision.[19] The Court stated expressly in this regard that "**English legislation is primarily territorial**".[20]

The territorial character of the early bankruptcy law in the United States is evidenced in the Supreme Court's decision in ***Harrison* v. *Sterry***.[21] Harrison, the complainant in this case, was a trustee for several creditors of Robert Bird & Co., which carried business in England and the United States. The House of Bird & Co. faced some financial difficulties, and attempted to raise some capital in America through their partner Robert Bird. In response to this request, Bird executed a trust and transmitted it under seal for the benefit of the sought creditors. Subsequently, and due to its financial difficulties, the House of Bird & Co. was commissioned into bankruptcy in England and the United States. Several attachments were placed on its property in the United States by English and American creditors, in addition to a priority claim on the property laid by the United States government. The assignees under the British and American commissions claimed the property to be distributed

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[18] ***Bankruptcy Act, 1883* (U.K.), 46 & 47 Vict.** [hereinafter ***Bankruptcy Act, 1883* (U.K.)**].

[19] ***Cook*, *supra*** note 17 at 102. This point was corrected in the *Bankruptcy Act 1914* (U.K.), 4 & 5 Geo. V, [hereinafter ***Bankruptcy Act, 1914* (U.K.)**] c. 59, § 1 (2); see ***infra*** note 197 and accompanying text.

[20] ***Cook*, *supra*** note 17 at 107.

[21] ***Harrison* v. *Sterry***, 9 U.S. (5 Cranch) 289, 3 L. Ed. 104 (1809), Marshal, C.J.[hereinafter ***Harrison* v. *Sterry*** cited to U.S]

among the general creditors.[22] This gave rise to the issue of how to distribute the bankrupt's effects.

Marshal, Ch. J., ruled that the United States is to satisfy its claim from the attached effects of the partnership. Moreover, he maintained that since Robert Bird is the Bankrupt in the United States, only his property and interest in the partnership should come under the American commission. Evaluating Bird's interest to be a third of the attached fund, Marshall ruled that the attachments upon this share should be vacated and that the share should go to the assignees.[23] As for the remaining two thirds, he stated that since "**the bankrupt law of a foreign country is incapable of operating a legal transfer of property in the United States the remaining two thirds of the funds are liable to the attaching creditors, according to the legal preference obtained by their attachments.**"[24]

The territoriality of Early Canadian law is well illustrated in the Nova Scotia Court decision in ***Fraser*** **v.** ***Morrow*** in 1858.[25] In this case, the defendant was

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[22] ***Harrison*** **v.** ***Sterry***, ***supra*** note 21 at 289-91.

[23] ***Harrison*** **v.** ***Sterry***, ***supra*** note 21 at 301-2.

[24] ***Harrison*** **v.** ***Sterry***, ***supra*** note 21 at 302. The rule in ***Harrison*** **v.** ***Sterry*** was later modified in ***Ogden*** **v.** ***Saunders***, ***infra*** note 135.

[25] ***Fraser*** **v.** ***Morrow*** (1858), 3 N.S.R. 232 (S.C.). [hereinafter ***Fraser***].Halliburton, C. J. Note that Canada then was still a colony. See also in Quebec, in ***Pacaud*** **v.** ***Tourigny*** (1883) 10 Q.L.R. 54 (Que. C.A.). [hereinafter ***Pacaud***] Casault, J. The Quebec Court of Appeal held that bankruptcy laws are territorial. The Court stated that the power to legislate on bankruptcy and insolvency having been given to the Federal Parliament, provincial statutes dealing with similar matters must be restricted in their operation to the province in which they are made.

In this case, a company was incorporated in Upper Canada and subsequently empowered to do business in Lower Canada. A judgment

(continued...)

indebted to the plaintiff for an amount of money. While the former was outside the court's jurisdiction, the plaintiff attached a debt due to the defendant on November, 23rd 1857, although he had already been declared bankrupt in England on November 17th 1857.[26] The Nova Scotia Court adjudicating this case refused to recognize the English bankruptcy and allowed the creditor to attach the debt due to the bankrupt in Nova Scotia. Denying a motion to set the attachment aside, the Court argued:

> **The English Bankruptcy Act of 12 and 13 Victoria, under which it is contended that the defendants were entirely divested of all their property, does not expressly name the colonies; and therefore, we are not bound by it, nor can judges judicially notice it. The debt accompanies the person of the creditor, and the plaintiff, by our statute, was entitled to attach the debt due by *purvis*. If the English law and our laws conflict, the Provincial Judges are bound by our laws, and not be the English law.**[27]

The Court in this case clearly espoused a territorial doctrine; it refused the extension of the English Bankruptcy law to the colonies, because, as the judge indicated, they were not covered explicitly in English law.[28] In other words, the

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[25](...continued)
creditor of the company in Quebec obtained a *saisie arrest* against one of its debtors. This was contested by the appointed receiver for the company in the Ontario court, who argued that the judgment creditor, having claimed for his debt in the Ontario proceedings, was restricted to his rights there. The Court held that even if the proof of the intervenient's appointment and powers as receiver had been properly made, -which it had not-, this would still not establish the receiver's right to intervene. The manner of seizing goods by execution is governed by the law of the country in which the goods are situate.

[26] ***Fraser***, ***supra*** note 25 at 232. But see, ***Re Eades, infra*** note 32 at 68, where Mathers, J. state that the judgment in ***Fraser*** is the reverse.

[27] ***Fraser***, ***supra*** note 25 at 233. Italics in original, underline is supplied.

[28] But see ***Bankruptcy Act, 1849 (U.K.)***, ***infra*** 169 and accompanying text.

colonies were considered to fall outside the English jurisdiction. Moreover, in order to exclude other arguments, the Court maintained that the debt follows the person of the creditor. The latter assertion is clearly wrong,[29] but, it illustrates powerfully how far the Court was willing to go in order to prevent the extension of the effects of the a "foreign" bankruptcy into its own jurisdiction.

C. DIVERGENT RESPONSES TO THE TERRITORIALITY OF INTERNATIONAL BANKRUPTCY LAW

The Anglo-Canadian courts on the one hand, and the American courts on the other, responded differently to the above discussed territorial character of the law. While none of these jurisdictions departed from the territoriality of the early law, the Anglo-Canadian courts adopted a choice of law approach to the problem, and the American courts based their approach upon comity.

1. THE ANGLO-CANADIAN RESPONSE: EXTENDING THE LAW TO PERSONAL PROPERTY AND SUBJECTS ABROAD - THE EARLY SOLUTION

The Anglo-Canadian courts tried to grant effect to certain parts of the

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[29] The same rule is mentioned in ***Hunter v. Potts***, ***infra*** note 34 at 185, where the Court states:

> **And if a foreigner died, leaving property in this country; it would be distributable according to the laws of his own country: he [Lord Hardwicke] also said, that debts followed the *person, not of the debtor, but of the creditor to whom due*: and observed, that the same had been before ruled by him in *Pipon* v. *Pipon*...** (italics supplied)

This rule which clearly applies to assignments upon death is the accepted rule in testamentary cases, as it is stated that upon death the law applicable to succession is that "**of the owner of the purpose of succession**", *i.e.* the creditor. See, ***Cheshire's Private International Law***, 12th ed., ***supra*** note 12 at 26. Judge ***Fraser*** apparently did not distinguish between testamentary and insolvency cases, *i.e.* between assignments upon bankruptcy and assignments upon death.

bankruptcy beyond the jurisdiction of the *forum*. Effects over property and persons were recognized by resorting to technical legal justifications, or as the jurists themselves would concede, to a legal fiction.[30] Whether applied to persons or property, such quick fixes did not constitute an extraterritorial extension of bankruptcy laws, but rather confirmed implicitly the territoriality of the Anglo-Canadian courts' thinking about bankruptcy.

a. THE CASE OF PERSONAL PROPERTY

In order to extend the effects of their bankruptcy to personal property abroad, the Anglo-Canadian courts applied the maxim "*mobilia sequuntur personam*", i.e that personal property is to be governed by the law of the owner's domicile.[31] Consequently, they held that a bankruptcy declared in the bankrupt's domicile governs all his personal property regardless of its actual physical *situs*, since personal property is legally considered to be located in the jurisdiction of the *forum*. This approach is clearly stated in ***re Eades***, regarding which Mathers C.J.K.B states:

> **[N]either can the title to personal property be directly changed or affected by extra-territorial legislation; but, by a benevolent fiction, movable property is in law supposed to follow the domicile of its owner, and to be situate in the country of his domicile, whatever its actual *situs* may be.**[32]

The territoriality of this approach is implicit in the presumption that personal

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[30] See ***infra*** note 32 and accompanying text.

[31] ***Cheshire's Private International Law***, 12th ed., ***supra*** note 12 at 795.

[32] ***Re Eades***, [1917] 2 W.W.R. 65, at 68; 33 D.L.R. 335 (Man.) [hereinafter ***re Eades*** cited to W.W.R.] Mathers, C.J.K.B.

property could be brought under the bankruptcy's effect, only because it is considered to fall within the jurisdiction of the bankruptcy's *forum*.[33]

(1) BANKRUPTCY AS AN ASSIGNMENT AND *THE* PRINCIPLE OF *MOBILIA SEQUUNTUR PERSONAM*

A close examination of *mobilia sequuntur personam* reveals that it does not apply to a bankruptcy *qua* bankruptcy, but only to assignments. In fact, this doctrine was developed in the Anglo-Canadian courts to deal with *inter vivos* dealings in personal property. Its earliest roots could be traced to ***Captain Wilson's case***. As Lord Loughbourough explains:

> **Some of *Wilson's* creditors had assignments of specific debts intimated to the debtors, and completed by that intimation prior to the act of bankruptcy. Others had assignments of debts not intimated before the bankruptcy. Others had arrested the debts due to him subsequent to the bankruptcy, and were proceeding under those arrestments to recover payment of debts. The determination of Lord *Hardwicke* and that of the Court of Session entirely concurred. The first class I have mentioned, namely, the creditors who had specific assignments of specific debts, intimated to the debtors prior to the bankruptcy, were holden by Lord *Hardwicke* to stand in the same situation as creditors claiming by mortgage, antecedent to the bankruptcy. All therefore he would do with respect to them was, that if they recovered under that decree, they could not come in under the commission without accounting to the other creditors for what they had taken under their specific security. With respect to the next class of creditors Lord *Hardwicke* was of opinion, and the Court of Session were of the same opinion, that their title, being a title by assignment, was preferable to the title by arrestment: and they likewise held, that the arrestment, being subsequent to the bankruptcy, were of no avail, the property being by assignment vested in the assignees under the commission. It is in this sense that an expression has been used by Lord *Mansfield*, in one or two cases, in which his language rather than his decision has been quoted with respect to the law of *Scotland*, namely, that the effect of the assignment**

[33] The legal fiction Mathers, J. proposes is not his own invention, as it is suggested in several other cases discussed below; see ***infra*** text between notes 34-62.

> **under a commission of bankrupt was the same as a *voluntary assignment*.**[34]

It is clear from the above quote that for Lord Hardwicke, a bankruptcy assignment is for a valid consideration and should be recognized everywhere, once it has been carried out in the domicile of the bankrupt.[35] Thus, Lord Hardwicke and others perceived bankruptcy as a mechanism of transferring local personal property, regardless of the actual *situs* of this property. This perception is observed by Lord Loughborough, the counsel in ***Solomons* v. *Ross***,[36] who states regarding ***Captain Wilson's Case***, in which this principle was applied: "**[the case] was decided solely on the principle that the assignment of the bankrupt's effects to the curators of the desolate estates in *Holland*, was an assignment for valuable consideration, and therefore acknowledged in this country, agreeable to *Captain Wilson's* case**

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[34] ***Sill***, ***supra*** note 14 at 692-693. Italics in original, underline added.

There seems to be confusion among the late eighteenth century judges and jurists about the *dicta* in ***Captain Wilson's case***, as illustrated by the argument of a litigant in ***Hunter* v. *Potts*** (1791), 4 T. R.182, 100 E. R. 962. Kenyon, L. Ch. J. [hereinafter ***Hunter* v. *Potts***] at 187, who said:

> **it appears that Captain Wilson was domiciled in England, and that the attachment of his debts in Scotland by English creditors was not sustained against the assignees. But it does not appear that the decision of the Court of Session was appealed from in that instance; and what Lord Mansfield is reported to have said of Lord Hardwicke's refusing to admit a creditor who had attached property in Scotland, to prove his debt under the commission here, till the other creditors were put upon an even footing with him, might have been the case of another creditor of Wilson's who had a priority upon immoveable property in Scotland; and then indeed the decision would be right**

[35] See, ***infra*** note 37 and accompanying text.

[36] ***Solomon* v. *Ross*** (1764), 1 H.Bl. 131n, 126 E.R. 79. Bathurst, J. [hereinafter ***Solomon* v. *Ross* cited to H. Bl.**].

in the House of Lords.[37] In other words, according to Loughborough, a Dutch involuntary assignment of personal property actually located in England should be recognized as a Dutch voluntary assignment, which comprises the personal property of the assignor regardless of its *situs*. But does an assignment under bankruptcy constitute a *real* bankruptcy?

The answer is no. Equating an assignment[38] to a bankruptcy is misleading since it entails overlooking other aspects of a foreign bankruptcy, such as the relation back doctrine, effect on bona fide third parties, discharges, and reorganizations.[39] The vital difference between recognizing a bankruptcy as an assignment and recognizing a foreign bankruptcy *qua* bankruptcy, becomes clear by comparing ***Captain Wilson's Case*** to the renown case of ***Solomons v. Ross***.[40]

Decided in 1764,[41] ***Solomons* v. *Ross*** is celebrated as the most significant English international bankruptcy law case. Its facts are as follows:[42] The

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[37] ***Folliot* v. *Ogden*** (1789), 1 H. Bl. 123, 126 E.R. 75. 132-133, Loughborough, L. [hereinafter ***Folliot* cited to H. Bl.**]. Underline added.

[38] For a discussion of the assignment approach, see **J. H. Dalhuisen, *Dalhuisen on International Insolvency and Bankruptcy***, 1 (New York: Matthew Bender, 1986)(lose leaf out of print) at § 2.01[3] p 3-121-ff.[hereinafter ***Dalhuisen on International Insolvency and Bankruptcy***].

[39] For an explanation of the relation back doctrine see ***infra*** note 119 and accompanying text.

[40] ***Solomon s* v. *Ross*, *supra*** note 36 at 131n.

[41] see generally, **Nadelmann, "*Solomons* v. *Ross*, *supra*** note 12.

[42] This appears in Henry Blackstone's Report in a footnote to ***Folliot* v.*Ogden***. This appearance, however, was sketchy and failed to communicate the facts as well as the reasoning of the court at the time. This has affected ***Solomons* v. *Ross's*** authoritative power in

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Deneufvilles, who were merchants and partners in Amsterdam, stopped payment on December 18th, 1759, but it was not before June 1st, 1760, that the chamber of the Desolate estates appointed trustees (curators) to garnish their property. Two days after the Deneufvilles had stopped payments, Ross, an English creditor, garnished from Michael Solomons in London the sum of 1200 Pounds, which was due to the Deneufvilles. The garnishment was executed on March 8, 1760 by a promissory note drawn by Michael Solomon to Ross for the amount of the judgement. Subsequently, the Dutch trustees commenced an action through Israel Solomons to compel, Michael Solomons to pay what he owed the Deneufvilles, and Ross to return the promissory note. Michael Solomons, in turn, commenced an action to obtain an injunction to be at liberty to return the 1200 Pounds to the Dutch trustees and to absolve himself from discharging the promissory note. The Court held that Michael Solomons must pay 1200 to the curators and that Ross must surrender the promissory note to Michael Solomons.[43]

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[42](...continued)
English law. Another report of the case appeared later in the Wallis Report, which provided more information and thus lent more authority to the doctrine applied in ***Solomons* v. *Ross***. At this point, it is fair to say that ***Solomons* v. *Ross*** has more academic than judicial weight.

[43] ***Solomons* v. *Ross***, ***supra*** note 36 at 131n. This record of the case was the main doctrine to be relied upon in the English jurisprudence. See ***Gailbraith*** in H. L, ***infra*** note 323. According to Nadelmann's citation of the Wallis Report in **Nadelmann**, "***Solomons* v. *Ross***, ***supra*** note 12 at 275, the facts and the reasoning are as follows: Before their default, the Deneufvilles had accepted bills drawn upon them by Ross, in the amount of 1200 Pounds. The bills were due on Dec. 19th. On Dec. 14th, the Deneufvilles drew duly accepted bills on Ross in favor of Michael Solomons in the amount of 1300 Pounds payable in February 1760. At the time of the failure of the Deneufvilles, the bills drawn by Ross upon them went back to Ross
(continued...)

There is no detailed exposition of the Court's reasoning in ***Solomons* v. *Ross***.[44] Lord Loughborough states that the case followed ***Captain Wilson's case***,[45] while the Wallis Report adds that it was adjudicated on the proof that the Dutch law admits English creditors equally.[46]

From the above discussion, it is clear that the law as it appears in ***Solomons* v. *Ross***[47] deals with issues other than those dealt with in ***Captain Wilson's Case***. In ***Solomons* v. *Ross***, the Court seems to agree with Lord Hardwicke's reasoning that personal property is governed by the Dutch law, which is the law of the owner's domicile, and therefore, should be vested in the trustee. Thus, this case involved a transfer of property upon bankruptcy. However, the Court here also introduced a new element; it ruled that the right of a foreign bankruptcy trustee overrides that of an English creditor who garnished the bankrupt's assets in England before the

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[43](...continued)
protested. Ross was obliged to pay the amount of 1300 Pounds specified in the protested notes. As soon as Michael Solomons received the money for the use of the Deneufvilles, Ross instituted a case in the Lord Mayor's Court against the Deneufvilles and garnished the amount of 1300 Pounds in Micheal Solomon's hands. Upon Execution, Michael Solomons was not able to pay Ross, so he gave him the 1200 Pounds promissory note. The Dutch trustees of the Deneufvilles bankrupt estate, Jolle Jolles and Johannes Rickvett appointed Israel Levy Solomons, their attorney, to collect the effects of the bankrupt's assets in England. As such he commenced a suit in the Chancery asking that Michael Solomons should account for the promissory note which was in his hands at the time of Deneufvilles' bankruptcy, and that he should pay to the trustees the same amount for the benefit of all the creditors. In addition they asked that Ross should be barred from getting the effects in his hand under the note passed to him by Michael Solomons.

[44] ***Solomons v. Ross***, ***supra*** note 36 at 131n.

[45] See, ***supra*** note 37 and accompanying text.

[46] **Nadelmann**, "***Solomons* v. *Ross***, ***supra*** note 12 at 276-ff

[47] ***Solomons v. Ross***, ***supra*** note 36 at 131n.

appointment of the trustee, but after the stopping of payments.[48] By doing so, the English court applied more than the effect of an assignment. In effect, it admitted a rule of a foreign bankruptcy law, by making the title of the assignees relate back to a time prior to their appointment. In other words, ***Captain Wilson's Case*** gave the foreign creditor parts of the debtor's personal property in England,[49] whereas, in ***Solomons* v. *Ross***, the foreign creditor received, in addition to parts of the property, the protection of the bankruptcy law against single attachments.[50]

Solomons* v. *Ross, in which a foreign bankruptcy was recognized *qua* bankruptcy, remained an isolated precedent in England, and was explicitly discarded in the House of Lords' case of ***Gailbraith* v. *Grimshaw***.[51] Until then, the Anglo-Canadian law ignored the dicta in ***Solomons* v. *Ross***, and continued to decide cases on the basis of the narrow perception of bankruptcy as assignment. A case in point is ***Selkrig* v. *Davis***.[52] This case, which came shortly after ***Solomons* v. *Ross***, was tried in the courts of England and Scotland, and dealt with complicated consecutive bankruptcies and attachments in both jurisdictions. Although this case did not

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[48] This point was later reversed in ***Gailbraith*** in H. L, ***infra*** note 323.

[49] It refused to vacate the attachment prior to the bankruptcy act, see, ***supra*** note 34 and accompanying text.

[50] See at the same note reporting ***Solomons* v. *Ross*** two other relevant decisions, ***Jollet* v. *Deponthieu*** (1769), 1 H.Bl.132n, 126 E.R. 80 L.C. Camden, L.C. [hereinafter ***Jollet* v. *Deponthieu***], and ***Neale* v. *Cottingham*** (1770), 1 H.Bl. 133n, 126 E.R. 80. Lifford, L. J. [hereinafter ***Neale* v. *Cottingham***].

[51] See, ***Gailbraith*** in H. L, ***infra*** note 323.

[52] ***Selkrig* v. *Davis*** (1814), 2 Ros 230; 3 E.R. 848. Eldon, L. C., [hereinafter ***Selkrig* v. *Davis***]

involve the issue of relation back, the Court decreed that personal property passes through the mechanism of assignment. The facts of this case are as follows: Garbett was indebted to Fairholmes who went bankrupt. In 1773, Fairholmes' trustee, Grant, attached Garbett's shares in a firm, an act which was set off by an arrangement with Fairholmes' creditors in 1774. Instead of vacating the attachment properly, the trustee transferred it to the creditors of Garbett's son and son in law, without instituting a process against them. In 1782, Garbett himself was declared bankrupt in England. Selkrig, the Scottish trustee who succeeded Grant, requested to collect the shares because their 1773 attachments had expired by then for lack of renewal. He instituted an action in Scotland for that purpose and attached the shares in 1798. Prior to the latter attachment, Selkrig has applied to prove in the English bankruptcy.[53]

The Court of Session in Scotland ruled unanimously in favor of barring the 1798 attachment, because it involved attaching property which no longer belonged to the debtor, having been already transferred by the English bankruptcy. Selkrig appealed this ruling,[54] but Eldon L. C. affirmed the judgment of the lower Court. Addressing the ramifications of the attachment, he said:

> **But independent of other considerations, if a Scotch creditor thought proper to come in under an English commission, he was to be considered, to all intents and purposes, as an English creditor who must deliver up, for the benefit of the general**

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[53] ***Selkrig*** **v.** ***Davis***, ***supra*** note 52 at 231-2.

[54] ***Selkrig*** **v.** ***Davis***, ***supra*** note 52 at 233-4.

> **creditors, all securities for his debt before he could be permitted to prove. If an English creditor attached the bankrupt's property abroad, he must account to the assignees. This did not rest merely on the principle of equality in the distribution, but on the ground that the law passed the property. The assignees said, "if you claim any thing here, you shall not keep for your own exclusive use what you have got by force of the law of another country". If he refused to prove at all on these terms, the Chancellor could not compel him to do so. Whether the assignees could, by law in another form, get the property out of his hands, was another question.**[55]

The unwarranted prominence accorded to assignment in international bankruptcy cases has not been adequately questioned although some jurists were aware of the profound distinction between bankruptcies and assignments under bankruptcies. For example, Lord Loughborough, the judge in ***Folliot* v. *Ogden***,[56] discerned the real character of bankruptcy law as distinguished from assignments. In attempting to justify the recognition in England of the confiscation laws of the United States after independence, Loughborough drew an analogy between confiscation and bankruptcy laws.[57] Regarding this, he says:

> **The system of bankrupt laws savours of a penal nature, and in no country more than *Holland*; but the bankrupt laws of *Holland* are**

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[55] ***Selkrig* v. *Davis***, ***supra*** note 52 at 249-50. Underline added. It is reported on the authority of **Joseph Story**, "***Commentaries on the Conflict of Laws, Foreign and Domestic***", 2nd ed. (London: Maxwell, 1841). [hereinafter **Story's** 2nd ed.] at 586 that Lord Eldon said in this case: It "**is quite clear, that there is not in any book any dictum or authority that would authorize me to deny, at least in this place, that an English commission passes, as with respect to the bankrupt and his creditors in England, the personal property he has in Scotland, or in any foreign country.**" I was unable to find this quotation in the English Reports edition of this judgement. See also ***Alivon v. Furnival*** (1834), 1 Cr.M & R. 277, 149 E. R. 1084. Barke, J., [hereinafter ***Alivon***]. The Court in this case has affirmed the right of the trustees to claim assets in England.

[56] ***Folliot***, ***supra*** note 37 at 124.

[57] ***Folliot***, ***supra*** note 37 at 124.

> **allowed to take effect here, as divesting all property out of the bankrupt, and vesting debts due to him in *England* in the curators or assignees in that country...: they have been often admitted in the Court of the Mayor of *London*, in cases of foreign attachment, and were recognized in Chancery, in the case of *Solomons* v. *Ross*, 1764.**[58]

Unlike those who treat bankruptcy as an assignment, Lord Loughborough saw, rightly, that "**[t]he system of bankrupt laws savours of a penal nature**".[59] Recognizing a foreign bankruptcy *qua* bankruptcy nullifies the creditors' previous attachments of movables, bringing them to the assignment. Loughborough's assertion that bankruptcy laws operated *outside* their jurisdiction[60] is valid, if viewed in the true spirit of ***Solomons* v. *Ross***. Lord Loughborough and many other jurists, I presume, were aware of the real significance of ***Solomons* v. *Ross***, namely, that it implied the extension of a foreign bankruptcy *qua* bankruptcy. However, the prevalent support for the assignment approach, and the adamant rejection of an extraterritorial operation of bankruptcy law *qua* bankruptcy marginated this early liberal view,[61]delayed the emergence of critical studies, and lead to the common perception of ***Solomons* v. *Ross*** as a case involving the assignment of foreign unattached personal property.[62]

The above discussion sought to underscore the implicit territoriality in the use

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[58] ***Folliot***, ***supra*** note 37 at 131.

[59] ***Folliot***, ***supra*** note 37 at 131.

[60] ***Folliot***, ***supra*** note 37 at 131.

[61] see ***infra*** note 81 and accompanying text.

[62] ***Gailbraith*** in H. L, ***infra*** note 323 at 513.

of *mobilia sequuntur personam* as it applies to international bankruptcies, and to demonstrate its inadequacy for solving the problems entailed in this area of law. Such problems were compounded by the misuse of the term "international bankruptcy law" to designate international assignment law. For example, in 1841, Story summarized the doctrine about international bankruptcy without distinguishing between the assignment and the bankruptcy.[63] Moreover, he enthusiastically endorsed the assignment approach by stating:

> **There is a great wisdom, therefore, in adopting the rule, that an assignment in bankruptcy shall operate as a complete and valid transfer of all his movable property abroad, as well as at home**[64]

It is highly unlikely that English jurists at the time were unaware of the real nature of bankruptcy, and the implications of advocating an extraterritorial operation for bankruptcy laws on real property and the pre-bankruptcy attachments.[65] However Story uncritically said:

> **The true rule is, to follow out the lead of the general principle that makes the law of the owner's domicil conclusive upon the**

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[63] The doctrine as cited by Story may be summarized as follows: (1) An assignment under a foreign bankruptcy law transfers the local bankrupt's title to all personal property, including debts owed to him in England. (2) A subsequent attachment by a local creditor is invalid with or without a notice. (3) The same doctrine applies in the case of an English bankruptcy and foreign personal property. (4) All foreign subsequent attachments are in principle invalid. (5) A British creditor may not hold the debtor's property after the debtor is adjudicated bankrupt by an English court. (6) A foreign creditor can hold such property if the foreign law confers upon him an absolute title. In such a case, the validity of the foreign law is irrelevant. **Story's 2nd. ed.**, ***supra*** note 55 at 588.

[64] **Story's 2nd. ed.**, ***supra*** note 55 at 583.

[65] See ***supra*** text accompanying note 61.

> **disposition of his personal property.**[66]

He also noted that failing to do so, might lead to a situation where;

> **[d]ifferent commissions might issue in different countries, and have concurrent operation *simul et semel* in different countries. And thus it would be in the power of the bankrupt to throw his property under either commission at pleasure, and to give local preference to different creditors, according to his own partialities or prejudices. Such a state of things, and such conflicting systems would lead to great public inconvenience and confusion, and be the source of much fraud and injustice, and disturb the equity of any bankrupt system in any country.**[67]

In the preceding quote, Story asserts unequivocally that the assignment approach averts certain dangers, *i.e* simultaneous proceedings and debtor's favoritism and prejudice. This assertion is not totally correct. The assignment approach does not avert these pitfalls, as the debtor would still be able to favour creditors by arranging for an attachment of his foreign personal and real property. Moreover, the exclusion of real property from the assignment approach makes simultaneous bankruptcies inevitable.[68] Thus, Story's illustration, although helpful, does not go far enough to point out the remaining shortcomings of this area of law, especially in view of the court's decision in ***Solomons* v. *Ross*.**[69]

The previous discussion regarding the assignment approach reveals that jurists equated between a bankruptcy (liquidation) and an assignment. Thus, a foreign trustee is permitted to collect the debtor's unincumbered personal property in

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[66] **Story's 2nd. ed.**, ***supra*** note 55 at 583.

[67] **Story's 2nd. ed.**, ***supra*** note 55 at 582-3.

[68] See, ***infra*** page 117ff.

[69] ***Solomons v. Ross***, ***supra*** note 36 at 131n.

England. The prevalent view was that such a practice does not imply an extension of bankruptcy laws beyond the boarders of the enacting jurisdiction, but is a logical result of considering that personal property is legally located within the jurisdiction of the owner's domicile.

b. THE CASE OF PREVENTING SUBJECTS FROM ATTACHING ABROAD AND RECOVERING SUCH ATTACHMENTS

As we have seen earlier, English law has solved the problem of persons who prove in the English bankruptcy after receiving parts of their debts abroad, through the hotchpot rule.[70] However, English courts tried to go further, as they attempted to extend the effects of their bankruptcy by preventing British subjects from attaching the bankrupt's property abroad, and compelling attachers to refund the property. Here again, they tried to realize their end without recognizing the extraterritorial operation of bankruptcy laws, thus upholding what Lord Hardwicke has said regarding the territoriality of the English bankruptcy law.[71] This could be done, they thought, by arguing that English subjects are governed by English law regardless of their whereabouts. The application of this perceived relation between English laws and English subjects is well illustrated in ***Hunter* v. *Potts***.[72] In this case, the plaintiffs Blanchard and Lewis were indebted to the defendant Potts on a contract made in England. At that time, and until the assignment of the attachment hereafter

[70] See, ***supra*** notes 16, 55 and accompanying text.

[71] See, ***supra*** note 16 and accompanying text.

[72] ***Hunter v. Potts***, ***supra*** note 34.

mentioned, all the parties were resident in England. Knowing of the assignment, the defendant moved through his attorney in Rhode Island to attach the bankrupt's effects there. As a result, the attorney attached certain monies in the hands of J. and W. Russell, which were due to the bankrupt at the time of the bankruptcy. This attachment was executed by judgment and the defendant received the monies.[73]

The plaintiffs commenced in England to recover what the defendant had recovered in North America, an action for money had and received for the assignees' use. Lord Kenyon who delivered the opinion of the Court said:

> **Therefore on the reason of the thing, even without any authorities, we have no difficulty in saying that the title of the plaintiffs must prevail. For it must be remembered, that during the progress of this business all these parties resided in England; that the defendant, knowing of the commission and of the assignment, in order to gain a priority, transmitted an affidavit to Rhode Island to obtain an attachment of the bankrupt's property there, in violation of the rights of the rest of the creditors, which were then vested: but such an attempt cannot be sanctioned in a Court of Law.**[74]

Lord Kenyon justified his decision on the basis of the attaching creditor's place of residence.[75] He argued that the attaching creditor's action was illegal, not

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[73] ***Hunter v. Potts***, ***supra*** note 34 at 183.

[74] ***Hunter v. Potts***, ***supra*** note 34 at 193-194. Underline added.

[75] Although Kenyon, J. declared that no authorities were needed in support of his opinion, he provides other justifications for his decision. After dismissing the writings on the law of nations, he asserted, "**that personal property must be governed by the laws of that country where the owner is domiciled.**" Moreover, he discusses of English bankruptcy law upon personal property outside England, stating that:

> **the bankrupt statute have expressly enacted, that the commissioners may assign all the property of the bankrupt in the most extensive words; and, therefore, on the general reason of the thing, if there be no positive decision to the contrary, no doubt could be entertained, but that, by the laws of this country, uncontradicted by the laws of any other country where personal property may**

(continued...)

only because he attached the bankrupt's personal property abroad, in spite of the local bankruptcy, but also because he was an English "subject" residing in London at the time of the bankruptcy. Thus, Kenyon treated the issue as if it pertained to the relationship between the English court and a British subject, and not between the court and foreign territory.

Kenyon's approach is adopted in ***Sill* v. *Worswick***.[76] In this case, William Skirrow, an Englishman, became bankrupt on January, 2nd 1782. The commission of bankruptcy was issued against him on January 16th. Skirrow was declared bankrupt on January, 28th, and the assignment of his property was made on March, 5th. Before, and at the time of his bankruptcy, Skirrow owed money to Worswick. Both the bankrupt and his creditor Worswick were resident at Lancaster, England, their domicile, at the time of bankruptcy and afterwards. Knowing that Skirrow became bankrupt, Worswick verified and proved his debt before the Mayor of Lancaster. The affidavit was certified and then transmitted to the Island of St. Christopher, then a British Colony. Worswick appointed two attorneys to sue for the recovery of debt in St. Christopher. The court in St. Christopher granted the judgement to Worswick, and his attorneys received the money on May, 14th, 1783. The assignees of the Skirrow's estate requested the refund of the monies, but

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[75](...continued)
happen to be, the commissioners of a bankrupt may dispose of the personal property of a bankrupt resident here, though such property be in a foreign country. *Hunter* v. *Potts*, *supra* note 34 at 192.

[76] ***Sill***, ***supra*** note 14.

Worswick refused and this suit was instituted.

The parties' deliberations and arguments in this case were long and complex, but Loughborough did not consider that "**the decision of this particular case could be attended with any great difficulty**".[77] He asserted categorically that the parties were wrong in treating this case as relating to the: "**operation of the bankrupt laws in countries not subject to the jurisdiction of the courts of this country**".[78] Loughborough saw the issue to be that of the relation between English law and English subjects. For him, the important fact in this case was that "**[t]he Defendant [is] resident in *England*, and a creditor of *Skirrow* in *England*, has received money which was due to *Skirrow* in the Island of *St. Christopher* at the time of the bankruptcy, and which at that time was subject to no lien whatsoever.**"[79] Thus, he makes it clear that his judgement in favor of the assignees is based on the fact of the creditor's residence in England.

It seems that Loughborough was aware of possible objections and misinterpretations of his argument, which, in effect, prevented a creditor who is physically in a foreign country, from attaching the bankrupt's property there. It would have been difficult for the Court in this case to deny the extraterritorial operation of the English bankruptcy law, through *mobilia sequuntur personam.*

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[77] ***Sill***, ***supra*** note 14 at 689.

[78] ***Sill***, ***supra*** note 14 at 689.

[79] ***Sill***, ***supra*** note 14 at 689. Italics in original

Therefore, after asserting that personal property is governed by personal law,[80] Lord Loughborough stated:

> **the law, upon the act of bankruptcy being committed, vests his property [the bankrupt's] upon a just consideration, not as a forfeiture, not on supposition of a crime committed, not as a penalty, and takes the administration of it by vesting it in assignees, who apply that property to the just purpose of the equal payment of his debts.**[81]

and then added,

> **[i]f the Bankrupt happens to have property which lies out of the jurisdiction of the law of *England*, if the country in which it lies proceeds according to the principles of well regulated justice, there is no doubt but it will give effect to the title of the assignees.**[82]

Lord Loughborough denies that his statements imply the extension of British bankruptcy laws to a foreign territory as he states: "**When I have laid this down, it by no means follows that a commission of bankrupt[cy] has an operation in another country against the law of that country.**"[83] Elsewhere, he adds that the problem in this case is "**not a question whether the bankrupt[cy] laws have an operation at *St. Christoper*'s, but whether they operated at *Lancaster*.**"[84]

Deciding this line of cases by focusing on the relationship between the court and the attaching creditor, while totally disregarding the jurisdiction in which the attached property was located did not go unchallenged for long. In fact,

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[80] ***Sill***, ***supra*** note 14 at 690

[81] ***Sill***, ***supra*** note 14 at 691. Underline added.

[82] ***Sill***, ***supra*** note 14 at 691.

[83] ***Sill***, ***supra*** note 14 at 693.

[84] ***Sill***, ***supra*** note 14 at 690. Italics in original.

disagreement over this approach led to the division in ***Phillips* v. *Hunter***.[85] In this case, Phillips, a British subject, was a partner in a firm in England, but resided in America for the purposes of collecting the firm's debts there. After learning that a bankruptcy proceeding had been instituted against one of the firms debtors (Blanchard), Phillips sued and attached a debt owing to his debtor in the courts of Pennsylvania. The British assignees in the bankruptcy (Hunter and others), sued in the Court of the King's Bench to recover the money as money had and received for their use.[86] The King's Bench ruled in favor of the assignees without argument. The Court based its judgement on the authority of ***Hunter* v. *Potts***.[87]

As delivered by Brooke J., the judgment of the Appellate Court affirmed the judgment of the lower Court.[88] Quoting with approval the lower Court's reasoning, Brooke said:

> **Blanchard and Lewis the bankrupts were *English* traders, that the [d]efendants were partners in an *English* house, that the debt from the bankrupts to the [d]efendants was contracted in *England*, that the bankrupts as well as the [d]efendants were resident in *England*, and that *Crammond*, who on this verdict must also be taken to be an *English* subject, went from this kingdom to *America*, for the special and temporary purpose of transacting business for the *English* house at *Manchester*, in which he continued to be a partner. That house was the only one the [d]efendants had, it not being found that they had any house in *America*. All these facts appearing on the record, this case must be argued as arising between *English* subjects upon *English***

[85] ***Philips* v. *Hunter*** (1795), 2 H. Bl. 402, 126 E. R. 618. Thompson, Heath, Perryn, Hotham, and Macdonald, L. Ch. B., Eyre, L. Ch. B. dissenting. [hereinafter ***Philips* v. *Hunter*** cited to H.Bl.].

[86] ***Philips* v. *Hunter*, *supra*** note 85 at 409.

[87] ***Hunter* v. *Potts*, *supra*** note 34.

[88] ***Philips* v. *Hunter*, *supra*** note 85 at 409.

property[89]

Brooke, J. does not justify his decision on technical legal basis only, but also appeals to principles of justice by explaining the detrimental effects that would result if the attaching creditor is not stripped of his advantage. Regarding this he says:

> **If the bankrupt laws were circumscribed by the local situation of the property, a door would be open to all the partiality and undue preference which they were framed to prevent; it being easy to foresee how frequently property would be sent abroad with that unjust view, immediately previous to, and in contemplation of an act of bankruptcy. If the personal property of merchants employed in the course of their dealings in foreign countries, were to be taken by and individual creditor going from hence for that purpose, and not to be distributable among the creditors at large, such merchants would be materially affected in their credit at home.**[90]

The extraterritorial aspect of Brooke's decision is evidenced in his last statement. Brooke was apparently aware of the contradictions in his argument, but unable to reconcile them. In concluding his argument, he asserts that the laws of the British Parliament bind all British subjects regardless of their residence.[91] In the next breath, however, he says that while the English bankruptcy law does not extend outside England, it does for all its civil purposes, which are not repugnant to the local laws of the foreign country![92] The same proposition was stated in the argument of one of the parties in ***Hunter* v. *Potts;***

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[89] ***Philips* v. *Hunter***, ***supra*** note 85 at 405-6. Underline supplied. The page numbering between English Reports and Blackstone's do not always match with each other.

[90] ***Philips* v. *Hunter***, ***supra*** note 85 at 406.

[91] ***Philips* v. *Hunter***, ***supra*** note 85 at 408.

[92] ***Philips* v. *Hunter***, ***supra*** note 85 at 409.

> **[i]f it be contended that the bankrupt laws are penal in their nature, and that the penal laws of one country are not recognized in another..., it may be answered, that the operation of the bankrupt laws is twofold; and this action is brought to enforce the civil, not the criminal, provisions of those statutes; the former of which only attach upon the property of the bankrupt, to whom, as well as to the creditors, their operation is beneficial; and the law of nations, recognizing the lex domicilii as the governing rule with respect to movables, with the exception above-mentioned, has been adopted by the Courts of Judicature in this country.**[93]

Lord Chief Justice Eyre, the dissenting judge in this case, delivered his decision in strong and unequivocal language. Eyre maintained that a competent court should be respected regardless of its nationality, and that the American Court's judgment had to be respected, even if considered wrong. More significantly, he observed that the majority's reasoning is ultimately prejudiced against the English creditors it sought to protect, since it penalized those creditors for their diligence, while leaving the American arena open to American attaching creditors.[94] Criticizing the Court's majority doctrine, Eyre said:

> **As a proposition in ethics, I have no objection to it, but considered as a proposition of law, it is too general, concluding, as I have before observed, in nothing. Lord Mansfield tried what he could make of this proposition, that a British subject should not be allowed to contravene the statute law of the land, in one of the strongest cases that can be imagined of wilful contravention, the case of marriage contracted abroad..., by English subjects withdrawing themselves from England, for the express purpose of contravening the statute law respecting marriages, and he failed all together. This should teach us not to hazard any thing upon so general a proposition, which breaks under us as often as we attempt to support any particular conclusion upon it. The**

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[93] ***Hunter v. Potts***, ***supra*** note 34 at 184-185.

[94] ***Philips v. Hunter***, ***supra*** note 85 at 411.

> **proposition as applied to this particular case is as inconvenient, impolitic and unjust, as it is unfounded. It was well said in the argument, you admit that an American might in this case have pursued his legal diligence in the courts of his own country notwithstanding our bankrupt laws, and that you could not have taken the money recovered from him, and given it to the assignees; will you then compel the British subject to sit still, and see the foreigner exhaust that fund which might have satisfied his debt, and so far relieved the fund for the creditors at home?**[95]

In conclusion, Eyre notes that the English bankruptcy laws should not be applied abroad selectively. They should either be allowed to operate in America and work against Americans and English alike, or should be restricted to England, without biasing the situation in favour of any nationals.[96] Eyre's observation is quite perceptive and points to a dilemma in international bankruptcy. By applying a universalist doctrine of bankruptcy unilaterally, a jurisdiction may end up prejudicing its own subjects.

The above discussion of the early English case law leaves unsolved problems, namely, the controversy raised in ***Phillips* v. *Hunter,***[97] and the problem of attaching

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[95] ***Philips* v. *Hunter*, *supra*** note 85 at 411-412. Underline added.

[96] ***Philips* v. *Hunter*, *supra*** note 85 at 418.

[97] See, ***supra*** note 55 and the underlined accompanying text. There is a controversy in English jurisprudence whether a foreigner could be forced to disgorge its foreign recoveries. While ***Cheshire's Private International Law***, 12th ed., ***supra*** note 12 at 910 argues it cannot, **Lawrence Collins, 2 *Dicey and Morris on the Conflict of Laws***, 11th ed. (London: Stevens, 1987). [hereinafter ***Dicey's Conflict of Laws***, 11th ed.] at 1111 argues that it can on the basis of the three cases enumerated under the current subheading. It seems to me that, with the introduction of extraterritorial statutes, a foreign creditor can be forced to disgorge the attached property. This solves the problem of foreign personal property recoveries, but not that of the enforceability of the decree's of English courts upon persons not amenable to the courts' jurisdiction.

real property abroad. ***Selkrig* v. *Davis***,[98] which deals with the hotchpot rule, does not solve the problem of attaching property abroad entirely, as it is limited strictly to personal property. Real property is not covered by the assignment since it does follow the owner's domicile. English case law has no clear basis for barring a creditor from attaching the bankrupt's real property abroad.[99] Moreover, it does not cover the case of creditors amenable to the jurisdiction of English courts, who attach foreign property belonging to the bankrupt's estate and decide to abstain from participating in the bankruptcy. Indeed, there is no law to force such a creditor to disgorge the attached property.[100]

Mobilia sequuntur personam of the English international bankruptcy case law applies to Canada by virtue of the unity of origin of their jurisprudence, as evidenced by the early Canadian case of ***Jenks* v. *Doran.***[101] In this case, the defendant made a promissory note in Ontario, payable there on October 4th. In August, the payee absconded and went to Michigan, taking the note with him. In September, a writ of attachment in insolvency was issued against the payee in Ontario. However, later on, the payee endorsed the note for value in Michigan to plaintiffs who took it in good faith. The plaintiffs sued the maker of the note and claimed that, under Michigan

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[98] ***Selkrig* v. *Davis***, ***supra*** note 52.

[99] Note that, up till now, English law still has no clear basis for assigning foreign real property. See ***infra*** note 189 and accompanying text.

[100] ***Cheshire's Private International Law***, 12th ed., ***supra*** note 12 at 910.

[101] ***Jenks* v. *Doran*** (1880), 5 O.A.R. 558, Paterson, J.A. [hereinafter ***Jenks***].

law, they received good title to the note.[102] The Court dismissed the action and said that Michigan law did not govern, arguing that, since the note was an asset of the payee at the time of his insolvency, it was vested in the assignee in bankruptcy. The endorsement was therefore ineffective to transfer the note to the plaintiffs.[103] Interestingly, the plaintiffs in this case argued that the bankruptcy laws do not work outside the jurisdiction of the court to divest the payee of his title. Moreover, Paterson, J.A. agreed that Michigan law stated that a foreign bankruptcy law is inoperative in Michigan. However, he considered this irrelevant to this case because the promissory note was not property in Michigan.[104] Thus the judge did not contest the argument that Canadian Bankruptcy law extends outside the boarders of jurisdiction, but argued instead that the property under discussion was in Canada.

Arguably, our discussion could have been carried out more simply under the rubric of the vested rights theory, since the Anglo-Canadian law, at least in its early inception, applied this theory to international bankruptcy cases.[105] However, although, the Anglo-Canadian applicable law is derived from this theory, this theory alone does not reveal the intricacies involved in the Anglo-Canadian judicial treatment of international bankruptcies. The area of international bankruptcy law is

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[102] ***Jenks***, ***supra*** note 101 at 558-559.

[103] ***Jenks***, ***supra*** note 101 at 568-570.

[104] ***Jenks***, ***supra*** note 101 at 569.

[105] ***Re Eades***, ***supra*** note 32 and accompanying text. For a good summary of this theory see **J. G. Castel**, ***Canadian Conflict of Laws***, 3rd ed. (Toronto: Butterworths, 1994). [hereinafter **Castel**, ***Canadian Conflict of Laws***, 3rd ed.] at 25-29.

plagued with the imposition of theories that do not suit this area of law. Our discussion has shown that domestic bankruptcy law is perceived quite differently than international bankruptcy law, as evidenced by the fact that an international bankruptcy is dwarfed to the level of an assignment. Accordingly, I submit that the problem of international bankruptcy law does not lie in the lack of the faithful application of a given theory, but rather in the unwarranted imposition of such theories.

2. THE UNITED STATES RESPONSE: THE OPPOSING CREDITOR'S CASE

As we have seen, the early international bankruptcy cases in the United States were also dealt with on an explicitly territorial basis.[106] ***Harrison* v. *Sterry***,[107] which states that "**the bankrupt law of a foreign country is incapable of operating a legal transfer of property in the United States**",[108] became the authoritative precedent for later cases in which the issue of the effect of a foreign bankruptcy was raised.[109] Further down, I examine developments in the United States Law when it comes to dealing with the effect of foreign bankruptcy, highlighting the centrality of the doctrine of comity to their treatment. At this point, I shall single out a few of the early cases which came before the United States courts involving English or

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[106] ***Harrison* v. *Sterry***, ***supra*** note 21.

[107] ***Harrison* v. *Sterry***, ***supra*** note 21.

[108] ***Harrison* v. *Sterry***, ***supra*** note 21 at 302.

[109] See ***infra*** cases following note 112.

Canadian international bankruptcy cases where the doctrine of *mobilia sequuntur personam* and the notion of assignment are invoked.[110] The United States courts' response to the Anglo-Canadian approach is significant in its own right, but more so, because it represents a test of the practical workability of the Anglo-Canadian approach.[111]

One such early case is ***Milne* v. *Moreton***.[112] In this case, the issue was whether the plaintiff (Moreton), who was American, could hold the British bankrupt's (Topham) effects in the United States against the claims of assignees under an English bankruptcy.[113] The defendants argued that the assignment transfers the bankrupt's title to personal property to the assignees.[114] Tilghman, C.J. acknowledged that an assignment is effectual on the basis of *mobilia sequuntur personam* which stipulates that personal property has no locality and is always presumed to be located in the owner's domicile. However, he argues that this rule should be suspended in circumstances in which the disposition of such property is better regulated by the actual *situs*,[115] as evidenced by the United States' doctrine, which upholds a creditor's rights to the insolvent's estate according to the law of the

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[110] See ***supra*** note 33 and cases therein.

[111] For example see the criticism of the Anglo-Canadian approach ***infra*** note 120 and accompanying text.

[112] ***Milne* v. *Moreton***, 6 Binn 353. (S.C. Penn 1814), Tilghman, C.J. [hereinafter ***Milne* v. *Moreton***].

[113] ***Milne* v. *Moreton***, ***supra*** note 112 at 359

[114] ***Milne* v. *Moreton***, ***supra*** note 112 at 359.

[115] ***Milne* v. *Moreton***, ***supra*** note 112 at 361.

situs, before administering the balance under the law of the intestate's domicile.[116] Tilghman, J. was aware that the United States courts seemed to uphold two different doctrines regarding the recognition of a foreign bankruptcy assignment: The Massachusetts courts are reported to have recognized a foreign bankruptcy assignment as equal to a voluntary one, while Maryland courts denied any validity to a foreign bankruptcy assignment against the attaching creditors.[117] However, he rejected the Massachusetts courts' doctrine, as he failed to find grounds for justifying the principle of relation back,[118] according to which **"the property is divested from the bankrupt and vested in the commissioners from the time of the commission of the act of bankruptcy"**.[119] In other words, Tilghman could not find a justification for extending the English bankruptcy law to the bankrupt's estate abroad, and thus, for rendering inoperative the United States laws which protect local creditors.

Yeates, J. concurred with Tilghman's judgment, saying:

> **It is one thing to assert, that assignees of bankrupts under foreign institutions, should be allowed by the courtesy of nations to support suits, as the representative of such bankrupts, for debts due to them; and it is another thing to give efficacy to those institutions, to cut out attaching creditors, although posterior in point of time, who have commenced their proceedings under the known laws of the government to which they owed allegiance, and from whom they were entitled to protection**[120]

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[116] ***Milne v. Moreton***, ***supra*** note 112 at 361.

[117] ***Milne v. Moreton***, ***supra*** note 112 at 363.

[118] ***Milne v. Moreton***, ***supra*** note 112 at 363.

[119] ***Milne v. Moreton***, ***supra*** note 112 at 364.

[120] ***Milne v. Moreton***, ***supra*** note 112 at 369.

There was, however, a call in the United States to adopt the English doctrine which vests the bankrupt's personal property in the trustee, regardless of opposing creditors. In 1820, Chancellor Kent argued elaborately, but unsuccessfully, in favour of adopting this doctrine in ***Holmes* v. *Remsen***.[121] In this case, the representatives of Mullett, an English bankrupt, brought an action to recover a debt from the executrix of a deceased Englishman. The amount of the debt had already been attached by Mullett's assignees under the bankruptcy. Thus, the defendants pleaded that the debt was paid since it had been attached by the assignees who, by the virtue of the bankruptcy in England, had title to all their testator's personal property.[122]

The Court defined the issue in this case as that of determining "**whether that recovery [the attachment by Mullett's assignees] of the debt is not a conclusive bar to the claim set up by [this bill?]**"[123] Regarding this, it stated that, if the proceeding under which the debt was attached is recognized, it would constitute a good defense.[124] Basing his reasoning on the notion that personal property has no locality, Chancellor Kent asserted that the rule regarding the "**disposition of personal property, is [to be] regulated by the law of the owner's domicile...**".[125]

Moreover, in further support of his argument, Chancellor Kent discussed in

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[121] ***Holmes* v. *Remsen*** (1820) 4 John.Ch.R 484. Kent Chancellor, [hereinafter ***Holmes* v. *Remsen*** (1820)].

[122] ***Holmes* v. *Remsen*** (1820), ***supra*** note 121 at 466.

[123] ***Holmes* v. *Remsen*** (1820), ***supra*** note 121 at 467.

[124] ***Holmes* v. *Remsen*** (1820), ***supra*** note 121 at 467.

[125] ***Holmes* v. *Remsen*** (1820), ***supra*** note 121 at 469.

great detail the English precedents for this case.[126] Yet, while the cases cited provided enough authorities in support of the doctrine of ***mobilia sequuntur personam***, Kent still had to deal with ***Harrison* v. *Sterry***.[127] Kent dismisses this case saying:

> **[T]he position, that in the distribution of bankrupts' effects in this country, the *United States* are entitled to a preference; because, this preference is given by a positive law, and the attaching creditors were likewise entitled to a preference, if their attachment was prior to the assignment under the *British* commission. But the latter part of the decree touching the distribution of the surplus fund wants explanation; and we do not know the grounds of the decision. It is never, however, to be presumed, that any Court intends either to establish, or reject a litigated point of law, of great importance, merely by a dry decision, unaccompanied with argument or illustration.**[128]

Chancellor Kent's judgment forced the other United States courts to address the legal basis for rejecting the application of the Anglo-Canadian doctrines to international bankruptcies. As it turned out, these courts rejected in principle the authoritativeness of the English international bankruptcy law, but were also clearly acting on protectionist motives, rather than on purely doctrinal grounds. This protection was justified in terms of the doctrine of comity, which for them did not entail sacrificing the rights of their local creditors. Thus, when the Supreme Court of New York had another chance at discussing the issue in ***Holmes* v. *Remsen*** in 1822,

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[126] ***Holmes* v. *Remsen*** (1820), ***supra*** note 121 at 472-484. He discussed ***Solomons* v. *Ross***, ***supra*** note 36; ***Jollet* v. *Deponthieu***, ***supra*** note 50; ***Neale* v. *Cottingham***, ***supra*** note 50; and other cases applying the law of the owner's domicile from Ireland, Scotland and France.

[127] ***Harrison* v. *Sterry***, ***supra*** note 21.

[128] ***Holmes* v. *Remsen*** (1820), ***supra*** note 121 at 488-489.

the Court went the other way.[129] In this case, which involved the same parties and the same question as ***Holmes* v. *Remsen*** of(1820), Platt, J. stated:

> **But however fit and convenient such a rule [Chancellor Kent's decision] might be for the general interest and security of commerce, yet, so long as the evil passions and infirmities of our nature remain, I fear it is rather to be desired than expected. To be practicable and just, the rule must not only be reciprocal and universal, but it must be administered everywhere, with a liberal equity and an enlightened impartiality, that would inspire universal confidence; and which, I fear, cannot reasonably be expected, from the variously modified organs of judicial power in different countries.**[130]

Platt, J. distinguished the English precedents upon which Chancellor Kent based his judgment as applications of comity, which did not constitute binding precedents for American judges.[131] Moreover, he deemed it improper in this case to establish a rule of comity following the English doctrine, as this would have entailed a large measure of complexity and difficulty, as well as numerous hardships on American creditors, by forcing them to lodge their claims under foreign bankruptcy commissions. If there are any advantages to such a comity, he maintained, they should be the subject of legislation or a treaty.[132] In the end, in the aforementioned precedents, Platt found the English *dicta* binding to the American judge in:

> **the case of *Cleve* v. *Mills*, (1 Cook. B. Laws, 303. 4 edit.)[There] *Lord Mansfield* held, "that the statutes of bankrupts [sic]do not extend to the colonies; but the assignments under such commissions are considered as voluntary; and, as such, take place**

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[129] ***Holmes* v. *Remsen***, 20 John.R 258. (S.C. Ny. 1822). Platt, J.[hereinafter ***Holmes* v. *Remsen* of 1822**].

[130] ***Holmes* v. *Remsen* of 1822**, ***supra*** note 129 at 254.

[131] ***Holmes* v. *Remsen* of 1822**, ***supra*** note 129 at 255.

[132] ***Holmes* v. *Remsen* of 1822**, ***supra*** note 129 at 265.

> **between the assignees and the bankrupt, but do not affect the rights of any other creditors.**[133]

Besides all the above, Platt J. observed that the English bankruptcy laws are penal laws, and thus have to be restricted to the territory of their jurisdiction.[134] As such, he saw the British approach, regardless of how it was presented, as an attempt at the extraterritorial application of British bankruptcy law.

In 1827, the same issue was addressed by the Supreme Court of the United States in ***Ogden* v. *Saunders***.[135] Seeking to clarify the Supreme Court's rule in ***Harrison* v. *Sterry***,[136] Johnson, explained:

> **I think it, then, fully established, that in the United States a creditor of the foreign bankruptcy may attach the debt due the foreign bankrupt, and apply the money to the satisfaction of his peculiar debt, to the prejudice of the rights of the assignees or other creditors.**[137]

Justice Story who participated in ***Ogden* v. *Saunders***, but did not deliver his opinion on the specific issue of foreign bankruptcies, construed the judgments of the Supreme Court in ***Harrison* v. *Sterry***[138] and ***Ogden* v. *Saunders***[139] to mean that foreign bankruptcies in the United States are dealt with through national comity. For

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[133] ***Holmes* v. *Remsen* of 1822**, ***supra*** note 129 at 255. Italics in original. See the same in ***Hunter* v. *Potts***, ***supra*** note 34 at 186.

[134] ***Holmes* v. *Remsen* of 1822**, ***supra*** note 129 at 260.

[135] ***Ogden* v. *Saunders***, 25 (12 Wheat 213), 6 L.Ed. 605. (1827) Washington, Johnson, Thompson, Trimble, Story, JJ., and Marshall,C.J.[hereinafter ***Ogden* v. *Saunders***].

[136] ***Harrison* v. *Sterry***, ***supra*** note 21.

[137] ***Ogden* v. *Saunders***, ***supra*** note 135 at 364.

[138] ***Harrison* v. *Sterry***, ***supra*** note 21.

[139] ***Ogden* v. *Saunders***, ***supra*** note 135.

Story, comity entailed granting effect to foreign bankruptcies, provided this did not impair the rights and securities afforded to the American citizens.[140] This definition of comity became the *dicta* to be relied upon in the American courts.[141] Thus, the United States courts did not consider that comity required them to prevent local creditors from pursuing their individual remedies. That is to say, they did not consider that the foreign assignee's title vested in him *ipso jure* the property of the debtor, but that the assignee might obtain title to this property by declaration of court, in the absence of an opposing local creditor. The courts based their position primarily on the same considerations taken into account by Platt J.[142]; *i.e.* preventing the disadvantaging of American creditors. They considered that permitting a foreign assignee to remove local assets would disadvantage local creditors by forcing them to incur travel costs to the jurisdiction of the bankruptcy in order to lodge their claim, without being certain that they could realize all their claims anyway.[143]

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[140] **J. Story, *Commentaries on the Conflict of Laws, Foreign and Domestic, in Regard to Contracts, Rights, and Remedies, and Especially in Regard to Marriages, Divorces, Wills, Successions and Judgments***, 5th ed. (Boston: Little, Brown and Co., 1857). [hereinafter **Story's *Commentaries on the Conflict of Laws*** 5th ed.] at § 414., see, ***Ogden* v. *Saunders***, ***supra*** note 135 at 364.

[141] **Honsberger**, "**Conflict of Laws and...**", ***supra*** note 2 at 635-6.

[142] See ***supra*** note 132 and accompanying text.

[143] ***Ogden* v. *Saunders***, ***supra*** note 135 at 364. But see, ***Abraham* v. *Plestoro***, 3 Wenddell's Rep. 538, where it was suggested that a foreign trustee cannot sustain his title against the bankrupt himself. This doctrine has been modified later in ***Re Waite***, 99 N. Y. 433. (Supreme Court) in which the Court permitted an English trustee to recover from a bankrupt who is a resident of New York debts he had recovered in England. The Court stated at 439:

> **We have not a case here where there is a conflict between the foreign trustee and domestic creditors. So far as appears no injustice whatever will be done to any of our own citizens, or to any one else, by allowing the transfer**

(continued...)

Some protectionist tendencies may be read in the above judgment, however, they are hidden by the fact that the United States courts dealt with foreign bankruptcies as bankruptcies. This fact is evidenced from their discussions of the relation back[144] doctrine and the penal character of bankruptcy law.[145] The courts conclusion, in this regard, was that a foreign bankruptcy could only be recognized under comity.[146] However, the United States Courts did not perceive that comity required them to interfere to prevent creditors from pursuing their individual remedies.[147] This doctrine is plausible if assessed in light of traditional private international law reasoning, and is also easily justifiable from a technical point of view.[148] Thus, it is not surprising that it was met with universal acceptance in all of

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[143](...continued)
to have full effect here. Indeed justice seems to require that this money should be paid to the foreign trustee for distribution among the foreign creditor [*sic*] of the bankrupt.

[144] See ***supra*** note 119 and accompanying text.

[145] See ***supra*** note 134 and accompanying text.

[146] ***Ogden v. Saunders***, ***supra*** note 135.

[147] ***Miliken v. Aughenbaugh***, 1 Penn. R. 117 at 125. Gibson, C. J. and some times in extreme cases, as in ***Taylor v. Columbian Ins. Co.***, 14 Allen 353 (Mass. 1864). This was a case of a corporation being liquidated for the benefit of all its creditors in New York. Meanwhile, a creditor sued in Massachusetts and obtained a garnishment of his debt. The bankrupt argued that he was under bankruptcy and that this is debt was proved in it. However, the court in Massachusetts held the local creditor's attachment. This doctrine was modified in ***Dawes*** v. ***Head***, 3 Pick 128. There, the Supreme Court of Massachusetts gave the attaching creditor a share equal to that of other non-attaching creditors, taking into account the full amount of assets and debts locally and elsewhere.

[148] In The United States, until the early seventies, cases were decided squarely on the basis of comity, more precisely, Hubert's view of this doctrine, according to which "**every sovereign admits that a law which has already operated in the country of its origin shall retain its force everywhere, provided that this will not prejudice the subjects of the sovereign by whom its recognition is sought.**"
(continued...)

the United States. In the Supreme Court of Massachusetts' judgment of ***Blake* v. *Williams***,[149] the Court observed that the question,

> **Does...a commission of bankruptcy in England and an assignment of the bankrupt's effects under it, so transfer a debt due to the bankrupt from a citizen of this State to the assignees, [and] that another citizen who is a creditor of the bankrupt cannot seize it on a trustee process and secure it for himself?**[150]

has been answered in the negative in almost every state in the Union.[151] Parker, C.J. justified the judgment of the Supreme Court in ***Harrison* v. *Sterry***,[152] by citing Lord Mansfield's ruling in ***Cleve* v. *Mills***,[153] which remained the *dicta* binding to the courts in North America up to the revolution.[154] Moreover, he asserted, and rightly so, that since ***Solomons* v. *Ross***,[155] and ***Jollet* v. *Deponthieu***[156] are based on comity, they are not binding precedents to the American courts. In other words, by recognizing a foreign bankruptcy *qua* bankruptcy, these courts were applying a notion of comity which is not binding to American courts.[157] Parker, J., however,

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[148](...continued)
Cheshire's Private International Law, 12th ed., ***supra*** note 12 at 21. Underline added.

[149] ***Blake* v. *Williams***, 24 Mass. (6 Pick. R.) 312. (Mass. 1828). Parker, C.J. [hereinafter ***Blake* v. *Williams***].

[150] ***Blake* v. *Williams***, ***supra*** note 149 at 304.

[151] ***Blake* v. *Williams***, ***supra*** note 149 at 304.

[152] ***Harrison* v. *Sterry***, ***supra*** note 21.

[153] See ***Cleve* v. *Mills***, ***supra*** note 10; and ***supra*** note 133 and accompanying text.

[154] See, ***supra*** note 133 and accompanying text.

[155] ***Solomons* v. *Ross***, ***supra*** note 36.

[156] ***Jollet* v. *Deponthieu***, ***supra*** note 50.

[157] ***Blake* v. *Williams***, ***supra*** note 149 at 313. Please see the discussion of ***Solomons* v. *Ross*** ***supra*** text between notes 41-51.

disregards ***Captain Wilson's Case***, by saying that until 1768, the law in England was the *dicta* in ***Cleve* v. *Mills***.[158] This exclusion, though, does not undermine the validity of his assertion about ***Cleve* v. *Mills***, since the American law deals with a foreign bankruptcy *qua* bankruptcy.

It should be observed that the United States upholds a consistent territorial doctrine *vis a vis* foreign real property in a locally declared bankruptcy, as well illustrated in ***Oakey* v. *Bennett***.[159] In this case, the debtor who had been declared bankrupt in the United States under the Bankruptcy Act of 1841,[160] had real property in Texas, which at the time was an independent state. After Texas had joined the United States, the Supreme Court was called upon to decide the fate of the bankrupt's real property there, and it declared that the United States bankruptcy law does not govern such foreign property.[161] That is to say, the United States Supreme Court held that their bankruptcy law does not operate in foreign lands to assign real property to the trustee.[162]

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[158] ***Blake* v. *Williams***, ***supra*** note 149 at 310. Note that the judge considered that the law of the United States up until 1768 was that of England.

[159] ***Oakey* v. *Bennett***, 52 U.S. 33; 13 L. Ed. 593; 11 How. Pr. 33, (1850). [hereinafter ***Oakey* v. *Bennett*** cited to U.S.].

[160] **5 Stat.544 (U.S.)(1841)**

[161] ***Oakey* v. *Bennett***, ***supra*** note 159.

[162] ***Oakey* v. *Bennett***, ***supra*** note 159 at 44. It seems that the American case law permitted the bankruptcy trustee to collect the bankrupt's foreign personal property. **K. H. Nadelmann, "The National Bankruptcy Act and the Conflicts of Laws"** (1946) 59 Harvard Law Review 1025 at 1028. [hereinafter **Nadelmann, "The National Bankruptcy Act..."**] cites ***Phelps* v. *McDonald***, 99 U. S. 298 (1878) as an authority for this proposition.

Our discussion makes it clear that the early Anglo-Saxon international bankruptcy case law was consistently or doctrinally territorial.[163] The jurisdictions under study applied the doctrine of territoriality equally to foreign as well as local bankruptcies. Therefore, one cannot say that such territoriality is induced by protectionism, except perhaps to a small extent in the United States.[164]

However, this strict adherence to territoriality posed significant problems. As seen earlier, the common law jurisdictions faced some problems with respect to the equalization rule or the "hotch pot rule",[165] and the issue of the trustee's rights over the bankrupt's foreign real property.[166] Case law cannot solve such problems due to

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[163] The Anglo-Saxon early case law may be explained by the middle ages "statute theory". ***Cheshire's Private International Law***, 12th ed., ***supra*** note 12 at 19. There it is stated:

> **[A]ll statutes are either real, personal or mixed. A real statute is one whose principal object is to regulate things; a personal statute is one that chiefly concerns persons; while a mixed statute is one that concerns acts, such as the formation of contract, rather than a person or a thing....[T]hese three categories of statute [*sic*] differ in their field of application. Real statutes are essentially territorial. Their application is restricted to the territory of the enacting sovereign.[Statutes relating to movables were personal *mobilia sequuntur personam*]. Personal statutes, on the other hand, apply only to persons domiciled within the territorial jurisdiction of the enacting sovereign, but they remain so applicable even within the jurisdiction of another territorial sovereign.** Text between brackets is note 19 in the original.

[164] See, ***supra*** text after note 143.

[165] See ***supra*** note 99 and accompanying text.

[166] See ***supra*** note 162 and accompanying text. Although, I was not able to find a case in English law which clarifies the treatment of foreign real property in local bankruptcies, it can be safely asserted, in light of the pervious discussion, that local bankruptcies

(continued...)

difficulty in presenting a legal justification for the operation of the *forum's* bankruptcy laws beyond the borders of the enacting jurisdiction. Therefore, without legislation, it was not possible to empower bankruptcy laws with extraterritorial effects beyond their borders.

D. THE EFFECT OF STATUTES ON INTERNATIONAL BANKRUPTCY LAW: THE OPERATION OF A LOCAL BANKRUPTCY ABROAD

Several legislative enactments relating to international bankruptcy were introduced in common law jurisdictions beginning in the first quarter of the 19th century. Legislation affected bankruptcy laws in three ways: (1) It provided a statutory basis for extending the operation of bankruptcy law to the bankrupt's real and personal property abroad, thus, improving their trustee's ability to recover larger parts of bankrupt's estate abroad. (2) Moreover, the statutes clarified the basis of the courts' jurisdiction. (3) As a result of their one sided treatment, however, the legislative enactments created a double standard in the treatment of foreign and local bankruptcy.

1. SOLVING THE PROBLEM OF THE ASSIGNMENT OF THE REAL AND PERSONAL PROPERTY ABROAD

The Bankruptcy Act of 1824, which is the first English legislative enactment

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[166](...continued)
could not assign foreign real property. This proposition is supported by the careful characterizations used by the English judges to describe the extra-territorial application of the English bankruptcy law, and by the hesitant inclusion of foreign real property outside the commonwealth in local bankruptcy assignments. See ***infra*** note 169 and accompanying text.

regarding international bankruptcy,[167] states that the personal and real property of the bankrupt within the United Kingdom and abroad vests in the assignees.[168] Interestingly, the subsequent English Bankruptcy Acts of 1825 and 1849 limited the trustees' powers outside the British Empire to personal property.[169] The Act of 1869 was totally silent on the issue of the trustee's powers on foreign property,[170] but the limitation on the trustee's power outside the empire was removed in the Bankruptcy Acts of 1883[171] and 1914, and the Insolvency Act of 1986.[172] Additionally, the last two Acts also had provisions in aid of the assignment, requiring bankrupts to execute transfers of their property abroad to trustees.[173] The most recent edition of Dicey's Private International Law, rule 161 states:

> **An assignment of a bankrupt's property to the trustee in bankruptcy under either the Bankruptcy Act 1914 or the Insolvency Act 1986... is, or operates as, an assignment of the bankrupt's**
> **(1) immovables (land)**
> **(2) movables**

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[167] **Nadelmann**, **"The National Bankruptcy Act..."**, ***supra*** note 162 at 1032.

[168] ***Bankruptcy Act 1824* (U.K.), 5 Geo. IV**, [hereinafter ***Bankruptcy Act, 1824* (U.K.)**]c. 98, § 61.

[169] ***Bankruptcy Act 1825 (U.K.)*, 6 Geo. IV,** [hereinafter ***Bankruptcy Act, 1825* (U.K.)**]c. 16, §§ 63, 64; ***Bankruptcy Act, 1849* (U.K.)**, 12 & 13 Vict.[hereinafter ***Bankruptcy Act, 1849* (U.K.)**], c. 17, §§ 141, 142.

[170] ***Bankruptcy Act, 1869 (U.K.)*, 32 & 33 Vict.** [hereinafter **Bankruptcy Act, 1869 (U.K.)**] c. 71, § 22.

[171] ***Bankruptcy Act, 1883* (U.K.)**, ***supra*** note 18 §§ 44, 168.

[172] ***Bankruptcy Act, 1914* (U.K.)**, ***supra*** note 19 §§ 18, 53, 167; ***Insolvency Act* (U.K.)**, 1986 [hereinafter ***Insolvency Act* 1986 (U.K.)**] §§ 283, 306, 436. Under these Acts, an adjudication of bankruptcy in an English court vests in the trustee the real and personal property of the bankrupt wherever located.

[173] ***Bankruptcy Act, 1914* (U.K.)**, ***supra*** note 19 § 53.

> **whether situate in England or elsewhere.**[174]

Similar enactments were introduced in Canada,[175] the last of which provided:

> **The trustee shall, as soon as possible, take possession of the deeds, books, records and documents and all property of the bankrupt and make an inventory...**[176]

and

> **"property"-includes money, goods, things in action, land and every description of property, whether real or personal, legal or equitable, and whether situated in Canada or elsewhere...**[177]

These two sections were also part of the previous Canadian Bankruptcy Act 1949.[178]

In the United States, the two short lived Bankruptcy Acts of 1841,[179] and 1867,[180] did not have rules regarding international bankruptcy law. Traces of such rules, however, may be found in the Bankruptcy Act of 1898.[181] Without specifically

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[174] ***Dicey's Conflict of Laws***, 11th ed, ***supra*** note 97 at 1103.

[175] The first of which was **I Rev. Stat. of Canada, 1927, c. II §§ 23, 2(ff)**, [hereinafter Canadian Bankruptcy Act of 1927].

[176] **The Bankruptcy and Insolvency Act, R.S.C. 1985, chapter B-3**, as amended by R.S.C. 1985, c. 31 (1st Supp.); R.S.C. 1985, c. 27 (2nd Supp.); S.C. 1990, c. 17; S.C. 1991, c.46; S.C., c. 1; S.C. 1992, c. 27. § 16. [hereinafter **The Canadian Insolvency and Bankruptcy Act**].

[177] The **Canadian Insolvency and Bankruptcy Act**, ***supra*** note 176 § 2.

[178] **J. S. Ziegel**, "**Canadian Perspectives on Transborder Insolvencies (Transnational Insolvency: A Multinational View of Bankruptcy)**" (1991) 17 Brooklyn Journal of International Law 539 at 546. [hereinafter **Ziegel**, "**Canadian Perspectives...**"].

[179] **Bankruptcy Act of 1841, 5 Stat. 440 (1841).**

[180] **Bankruptcy Act of 1867, 14 Stat. 517 (1867).**

[181] ***Bankruptcy Act of July,1 1898***, 30 Stat. 544, *amended by* Act of July 7, 1952, Pub. L No. 82-456, 66 Stat. 420, *amended by* Act of Sept. 25, 1962, 76 Stat 570, *codified as amended 11 U.S.C.A (1976 West)* § I *et seq. repealed by* Pub. L. No. 95-598. [hereinafter the ***American***

(continued...)

mentioning property abroad,[182] the Act provided that the trustee is vested, by operation of law, with all the bankrupt's property.[183] It also explicitly requires bankrupts to execute deeds transferring property abroad to the trustee.[184] In 1952, the Bankruptcy Act was amended to include such foreign property.[185]

The Bankruptcy Reform Code of 1978,[186]which repealed the 1898 Bankruptcy Act and its amendments, provides that all the bankrupt's property locally and abroad would constitute an estate to be administered by the trustee:

> **(a) The commencement of a case under sections 301, 302, or 303 of this title creates an estate. Such estate is comprised of all the following property, wherever located and by whomever held:...**[187]

The legislative enactments, which empower the trustee to collect all the bankrupt's property wherever located, eliminated the problem raised in ***Hunter* v. *Potts***,[188] namely, that of the selective application of the local bankruptcy law abroad,

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[181](...continued)
Bankruptcy Act of 1898], See, **Nadelmann, "The National Bankruptcy Act..."**, ***supra*** note 162 at 1029; **Honsberger, "Conflict of Laws and..."**, ***supra*** note 2 at 660.

[182] **Nadelmann, "The National Bankruptcy Act..."**, ***supra*** note 162 at 1029.

[183] ***American Bankruptcy Act of 1898***, ***supra*** note 181 § 70 (a) (5).

[184] ***American Bankruptcy Act of 1898***, ***supra*** note 181 § s. 7 (a)(4).

[185] ***American Bankruptcy Act of 1898***, ***supra*** note 181 § 7a(5); see generally, **K. H. Nadelmann, "Revision of Conflicts Revisions in the American Bankruptcy Act"** (1952) 1 International and Comparative Law Quarterly 484.[hereinafter **Nadelmann, "Revision of Conflicts**].

[186] ***American Bankruptcy Code, supra note 5 11 U.S.C.A*** § 101-ff.

[187] ***American Bankruptcy Code, supra note 5 11 U.S.C.A*** § 541.

[188] ***Hunter* v. *Potts***, ***supra*** note 34.

depending on the nationality of the attaching creditor.[189] With such enactments, the courts could restrict creditors from recovering both personal and real property without resorting to the legal fiction of *mobilia sequuntur personam*,[190] but rather on the basis of express extraterritorial legislation. The theoretical justification however remained the same; a creditor cannot attach property belonging to the bankrupt abroad because, by the operation of law, the bankrupt does not own property anywhere. Applying this rule to foreigners, however, required establishing a jurisdictional basis over the creditor.

2. SOLVING THE PROBLEM OF COURT JURISDICTION

The legislative enactments also served to regulate and define the basis of the court's jurisdiction in international bankruptcy cases. In the Anglo-Canadian law, the court *could* adjudicate a person bankrupt if:[191] (1) The person was a debtor, and (2) the person has committed an act of bankruptcy.[192] Before the British Bankruptcy Act of 1914, a foreigner who did not reside in England was immune from the British bankruptcy jurisdiction.[193] This loophole was covered in the bankruptcy Act of 1914, which defined a debtor as a person who (1) was personally in England, (2) ordinarily resided or had a place of residence in England, (3) carried business in England

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[189] See, ***supra*** page 39.

[190] See, ***supra*** note 97 and accompanying text

[191] ***Bankruptcy Act, 1914 (U.K.)***, ***supra*** note 19.

[192] see ***Bankruptcy Act, 1914 (U.K.)***, ***supra*** note 19 § 1(1) and 1(2), also see ***Dicey's Conflict of Laws***, 11th ed, ***supra*** note 97 at 1108.

[193] ***Dicey's Conflict of Laws***, 11th ed, ***supra*** note 97 at 1099; see also, ***Cook***, ***supra*** note 17.

personally, through an agent, or manager, or (4) was a member of a firm or partnership which carried on business in England.[194]

The scope of the court's jurisdiction was further expanded in the Insolvency Act of 1986[195] which gives the English court jurisdiction over any debtor who: (1) is domiciled in England, (2) is present in England on the day of the petition, (3) has been an ordinary resident or had a place of resident in the period of three years ending on the day the petition was presented, (4) carried on business in England, personally or by means of an Agent or manger, at any time within the period of three years ending on the day the petition was presented, or (5) was a member of a firm or partnership which has carried on business in England as such, or by the means of an agent or manager at any time within the period of three years ending on the day on which the petition was presented. Notably, the Insolvency Act of 1986, unlike the Bankruptcy Act of 1914, does not stipulate that the debtor has to have committed an "act of bankruptcy" in order to fall under the court's jurisdiction. Rather, it leaves the court to interfere at discretion.[196] By contrast, according to the Bankruptcy Act

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[194] ***Bankruptcy Act, 1914*** **(U.K.),** ***supra*** note 19 § 1(2); also ***Dicey's Conflict of Laws***, 11th ed, ***supra*** note 97 at 1088. Later on, the House of Lords held in ***Re Bird***, [1962] 1 W.W.R 686 (C.A.); that a person who ceases to carry business in England and leaves the country is still deemed to carry on business in England if he leaves unpaid debts there. Such debts were construed to include unpaid taxes also.

[195] ***Insolvency Act, 1986*** **(U.K.),** ***supra*** note 172 § 265.

[196] ***Insolvency Act, 1986*** **(U.K.),** ***supra*** note 172 § 265; ***Dicey's Conflict of Laws***, 11th ed, ***supra*** note 97 at 1089. for a full discussion of the basis of jurisdiction under the English Insolvency Act of 1986, see ***Dicey's Conflict of Laws***, 11th ed, ***supra*** note 97 at 1096-1097; also ***Cheshire's Private International Law***, 12th ed., ***supra*** note 12 at 905-906; and **Philip St. J. Smart**, ***Cross-Border Insolvency*** (London: Butterworths, 1991) in chapters 1-3.

of 1914, a debtor is considered to have committed an act of bankruptcy if:

> **(a) in England or elsewhere he makes a conveyance or assignment of his property to a trustee or trustees for the benefit of his creditors generally;**
> **(b) in England or elsewhere he makes a fraudulent conveyance gift, delivery, or transfer of his property or any part thereof;**
> **(c) in England or elsewhere he makes any conveyance or transfer of his property or any part thereof or creates any charge thereon, which would, under the Bankruptcy Act 1914 or any other Act, be void as a fraudulent preference, if he were adjudged bankrupt;**
> **(d) with intent to defeat or delay his creditors he does any of the following things, namely, departs out of England, or being out of England remains out of England, or departs from his dwelling-house, or otherwise absents himself, or begins to keep house;**
> **(e) execution against him has been levied by seizure of his goods under process in an action in any court, or in any civil proceeding in the-High Court, and the goods have been either sold or held by the sheriff for twenty-one days;**
> **(f) he files in the court a declaration of his inability to pay his debts or presents a bankruptcy petition against himself;**
> **(g) he fails to comply with a bankruptcy notice issued by a judgment creditor requiring him to pay the judgment debt;**
> **(h) he gives notice to any of his creditors that he has suspended, or that he is about to suspend, payment of his debts.**[197]

In Canada, the Bankruptcy Act of 1985 assumes jurisdiction over the debtor who resides or carries business within Canada and who

> **in Canada or elsewhere: he or she makes an assignment of his or her property to a trustee for the benefit of his or her creditors generally, whether it is an assignment authorized by the Act or not;...or makes a fraudulent conveyance, gift, delivery, or transfer of his or her property or any part thereof, or any conveyance or transfer of his or her property or any part thereof, or creates any charge thereon that would under the Act be void as a fraudulent preference..**[198]

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[197] ***Bankruptcy Act, 1914*** **(U.K.),** ***supra*** note 19 § (1)(1).

[198] **Castel,** ***Canadian Conflict of Laws,*** 3rd ed., ***supra*** note 105 at 523.

In the United States, Section 1471 (a) and (b) of the Judicial Code grants the bankruptcy courts original and exclusive jurisdictions over all voluntary bankruptcy cases, *i.e* arising under chapter 11.[199] Moreover, under the United States Bankruptcy Code, any person (1) who resides, or has a (2) domicile, (3) a place of business, or (4) property in the United States, or is a (5) municipality, qualifies as a debtor.[200]

Moreover, an involuntary petition, *i.e.* a petition under chapter seven proceeding, may be presented against a debtor who:

1- is generally not paying its debts as they become due.

2- whose property was within 120 days before the date of the filing of the petition taken in possession by a custodian, other than a trustee, a receiver, or agent appointed or authorized, for the purposes of enforcing a lien against such property.[201]

Thus, the United States courts assume jurisdiction on both *in personam* (first three) and *in rem* (the fourth) basis.[202] Both types of jurisdiction are extended to

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[199] **Ingo A. Klocker, "Foreign Debtors and Creditors under United States and West German Bankruptcy Laws: An analysis and Comparison"** (1985) 20 Texas International Law Journal 55 at 58. [hereinafter **Klocker, "Foreign Debtors..."**].

[200] ***American Bankruptcy Code, supra note 5 11 U.S.C.A*** § 109(a); **Klocker, "Foreign Debtors..."**, ***supra*** note 199 at 59.

[201] ***American Bankruptcy Code, supra note 5 11 U.S.C.A*** § 303(h). See generally **Honsberger, "Conflict of Laws and..."**, ***supra*** note 2 at 640-646.

[202] **Klocker, "Foreign Debtors..."**, ***supra*** note 199 at 59. **Beale, "The Exercise of Jurisdiction..."**, ***supra*** note 15 at 109, offers the following justification for the *in rem* jurisdiction:

> **This power over things has always been exercised by courts for the enforcement of the obligations of absent owners. It is so palpably unjust that a debtor should be able, by putting his property outside the jurisdiction of the courts of his own**

(continued...)

assets located outside the United States,[203] since jurisdiction in bankruptcies based on Sections 301, 302, and 303 of the bankruptcy code, create an estate of all the debtor's assets wherever located.[204]

The aforementioned basis of jurisdiction were part of the 1898 Bankruptcy Act and its amendments. The notable difference between the Act and the Code of 1978, however, lies in the fact that the latter grants a foreign representative the right to institute an ancillary bankruptcy in the United States under Section 304.[205] The conditions for such an action will be discussed in the next chapter.

3. CREATING A DOUBLE STANDARD

Legislative enactments provided Canada, England and the United States with the statutory basis to extend the operation of their bankruptcy proceedings to all kinds of property, real and personal wherever located.[206] Bankruptcy trustees in these

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[202](...continued)
> **domicil[e], to escape the compulsion of the courts forcing him to discharge his obligation.** Underline supplied.

[203] **Klocker**, "**Foreign Debtors...**", ***supra*** note 199 at 60.

[204] ***American Bankruptcy Code, supra note 5 11 U.S.C.A*** §§ 301, 302, 303; United States Judicial code, 28 U.S.C. s 1471(e); Klocker, "**Foreign Debtors...**", ***supra*** note 199 at 60.

[205] ***American Bankruptcy Code, supra*** *note 5 11 U.S.C.A* § 304.

[206] **K. H. Nadelmann**, "**International Bankruptcy Law, Its Present Status**" (1943-1944) 5 University of Toronto Law Journal 324 at 325-6. [hereinafter **Nadelmann**, "**International Bankruptcy Law...**"]; **D. M. Glosband & C. T. Katucki**, "**Claims and Priorities in Ancillary Proceedings Under Section 304. (Transnational Insolvency: A Multinational View of Bankruptcy)**" (1991) 17 Brooklyn Journal of International Law 477 at 482. [hereinafter **Glosband & Katucki**, "**Claims and Priorities...**"]; **Honsberger**, "**Conflict of Laws and...**", ***supra*** note 2 at 634,636.

jurisdictions are empowered by the laws of their respective countries to collect or administer all kinds of the bankrupt's property locally and abroad. Such powers are granted to the trustee automatically upon bankruptcy by operation of law, with no need for a court proceeding or a domestication process. In so far as the foreign trustees were not granted similar powers, the legislations created a double standard. For example, none of the three jurisdictions recognizes the foreign trustee's right to collect real property,[207] at least not without a court proceeding.[208] In this regard, Silverman rightly observes that "**most states would export their local laws to creditors and assets in other states but severely limit the recognition of foreign bankruptcy laws [and proceedings] when the local creditors and local assets of a foreign debtor are involved.**"[209] And this is because, "**[i]t is more blessed to receive than to give**".[210]

This change in the Anglo-Saxon international bankruptcy law treatment of

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[207] See ***infra*** page 87.

[208] As in the United States under Section 304 discussed in chapter two.

[209] **R. J. Silverman, "Decision-Making under Section 304 of the Bankruptcy Code: The Necessity for a Balanced Approach"** (1992) 7 Connecticut Journal of International Law 395 at 396. [hereinafter **Silverman, "Decision-Making..."**]. Originally ***Dalhuisen on International Insolvency and Bankruptcy***, ***supra*** note 38 at 2.03(3); **Glosband & Katucki, "Claims and Priorities..."**, ***supra*** note 206 at 482; **Honsberger, "Conflict of Laws and..."**, ***supra*** note 2 at 636; **T. E. Powers & R.R. Mears, "Protecting a U. S. Debtor's Assets in International Bankruptcy: A Survey and Proposal for Reciprocity"** (1985) 10 North Carolina Journal of International Law and Comparative Regulations 303 at 306. [hereinafter **Powers & Mears, "Protecting a U. S...."**].

[210] **I. F. Fletcher, "Cross-Border Cooperation in Cases of International Insolvency: Some Recent Trends Compared"** (1991) 6 Tulane Civil Law Forum 171. [hereinafter **Fletcher, "Cross-Border Cooperation..."**] at 173,n 5.

local bankruptcies eliminated the doctrinal coherency which characterized their earlier application of the law. This makes it easier to characterize the practice of restricting the effect of a foreign bankruptcy in the jurisdictions under study, especially, in the United States, as protectionist.

E. THE ANGLO-SAXON INTERNATIONAL BANKRUPTCY LAW AS APPLIED TO A FOREIGN PROCEEDING: LATER CASES

The effect of foreign bankruptcies locally was not regulated by legislation, except for Section 304 in the United States[211] and the Imperial Statute in Canada.[212] In England, and Canada -outside the realm of the Imperial Statute- the effect of foreign bankruptcies is regulated strictly by case law. In what follows, we shall see how these jurisdictions continued to deal with the effect of foreign bankruptcies in their jurisdictions, in the absence of legislation comparable to that applied to local bankruptcies abroad, and in view of the territorial character of their early case law.

1. CONDITIONS

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[211] ***American Bankruptcy Code, supra*** *note 5 11 U.S.C.A* § 304.

[212] It has been observed in Dicey that:

> **In the past the view of English judges [and other judges in the Empire] has been that the sections of the 1914 Act [and previous enactments] occurring as they do in an Act of what used to be called the Imperial Parliament *(i.e.* the Parliament at Westminster), are binding on and form part of the law of all countries of the Commonwealth overseas as well as the United Kingdom.... This may have been true in constitutional theory so far as English law is concerned. But it must be remembered that any independent country of the Commonwealth has power to repeal any enactment of the Imperial Parliament so far as the same is part of the law of that country. Even in the absence of such a repeal, it may be doubted whether some of the independent countries of the Commonwealth would admit that the "Imperial" Act of 1914 still formed part of their law. In any event it is manifest that no such arguments as these may be applied to bankruptcies under the Insolvency Act 1986.**

Dicey's Conflict of Laws, 11th ed, ***supra*** note 97 at 1104. By the passage of the **Statute of Westminster (U.K) 1931**, s.2, the dominions were free to repeal any part of the English Imperial Acts.

The three jurisdictions stipulate the same general conditions for considering a foreign bankruptcy adjudication, which are: (1) The foreign court should have a proper jurisdiction and (2) the foreign law should empower the trustee to collect assets located beyond the jurisdiction.

a. PROPER JURISDICTION

In Anglo-Canadian law, a proper jurisdiction is based on domicile,[213] submission to the foreign jurisdiction,[214] appearance in the foreign proceeding,[215] or carrying on business there.[216] England and Canada do not recognize a foreign *in rem* jurisdiction.[217]

In the United States, under the Bankruptcy Act of 1898, a foreign trustee did not have consistent standing in the American courts, because of the requirement that three local creditors should petition in bankruptcy.[218] This condition is relaxed in the Bankruptcy Code of 1978, which only requires that a "foreign representative" be duly selected. This entails, in addition to meeting the formal rules of attestation by an

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[213] See ***Re Blithman***, ***infra*** note 240.

[214] ***Re Davidson's Settlement Trust***, ***infra*** note 247.

[215] *Re Anderson* (1911), [1911] 1 K.B. 896. Phillimore J. [hereinafter ***Anderson***].

[216] *Dicey's Conflict of Laws*, 11th ed, ***supra*** note 97 at 1115.

[217] Dalhuisen, 1 ***International Insolvency***, ***supra*** note 38 at § 2.04[3] pp 3-245, 3-247; **A. D. Grace, "Law of Liquidation: The Recognition and Enforcement of Foreign Liquidation Orders in Canada and Australia - A Critical Comparison"** (1986) 35 International and Comparative Law Quarterly 644. [hereinafter **Grace, "Law of Liquidation..."**] at 667. The English courts' use of *in rem* jurisdiction to wind up foreign companies will be discussed ***infra*** in chapter two.

[218] Honsberger, **"Conflict of Laws and..."**, ***supra*** note 2 at 644-645.

American Consul, establishing that the appointing jurisdiction has substantial connections with the debtor.[219]

b. THE FOREIGN LAW SHOULD EMPOWER THE TRUSTEE TO COLLECT FOREIGN ASSETS

The condition that the foreign law should empower the trustee to collect foreign assets is stated clearly, though without authority in Dicey, according to which: "**The assignment only takes place [be recognized in England] if under the law of the foreign bankruptcy provision is made for the extraterritorial effect of the bankruptcy.**"[220] With regards to the United States law, Nadelmann asserts the same, also without authority.[221] However, Dalhuisen cites ***Macaulay* v. *Guaranty***,[222] as an authority for the need to empower a foreign law to collect the personal property of the bankrupt in England, as a prerequisite for recognizing foreign trustees.[223] In this case it was reported that Clauson J.

> **felt justified in making the order, [admitting the right of foreign trustee to claim a debt due to the bankrupt] having regard to the decision of Baron Parake in *Alivon* v. *Furnival*...That was an authority for the proposition that, if receivers or assignees in bankruptcy had, according to the law of the country in which they had been appointed, a right to sue in their own names for a *chose in action* due to a body or person in respect of whose property they had been appointed receivers or assignees, that gave them a**

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[219] ***American Bankruptcy Code, supra note 5 11 U.S.C.A*** § 101(9); see also Honsberger, "**Conflict of Laws and...**", ***supra*** note 2 at 645.

[220] ***Dicey's Conflict of Laws***, 11th ed, ***supra*** note 97 at 1119.

[221] Nadelmann, "**The National Bankruptcy Act...**", ***supra*** note 162 at 1026.

[222] ***Macaulay* v. *Guaranty*** 1927, 44 T.L.R 99 (Ch. Div.)(Clauon, J). [hereinafter ***Macaulay***].

[223] ***Dalhuisen on International Insolvency and Bankruptcy, supra*** note 38 at 3-140 n59.

> **right which this country, by the comity of nations, would treat as though it were a right of action at common law...**[224]

In Canada, a recent case demonstrates the above point. In ***Orient Leasing,***[225] the Canadian Court refused to recognize a Japanese arrangement, because the Japanese law does not profess that arrangements bind property located abroad.[226] Considering the opinions of Dicey and Nadelmann stated above,[227] it seems that the judgment in ***Orient Leasing***[228] is not an isolated judgment.

Upon close study, it becomes clear that the cases cited as authorities for the doctrine discussed here are misinterpreted. In fact these cases have no bearing on the trustee's right to personal property. In ***Macaulay***,[229] and ***Alivon* v. *Furnival***,[230] the issue was the right of the trustee to sue in English courts[231] In ***Alivon***, the Court on the evidence of French law, stated that two out of three appointed syndics, have

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[224] ***Macaulay***, ***supra*** note 222 at 100. Italics in original.

[225] See, ***Orient Leasing***, ***infra*** note 389.

[226] ***Orient Leasing***, ***infra*** note 389 at 681.

[227] See, ***supra*** note 221 and accompanying text. Interestingly, Nadelmann stated this proposition as early as 1943 and based it upon a logical argument, as evidenced in **Nadelmann, "International Bankruptcy Law..."**, ***supra*** note 206 at 325. There he stated: **"A foreign trustee in bankruptcy cannot, <u>of course</u>, claim assets outside of his country if his domestic law does not vest him with such right"**. Underline added.". Furthermore, he cited the Japanese law as an example of laws which restrict the power of their own trustee to local assets. ***Ibid*** at 325n6.

[228] ***Orient Leasing***, ***infra*** note 389.

[229] ***Macaulay***, ***supra*** note 222 at.

[230] ***Alivon***, ***supra*** note 55.

[231] ***Alivon***, ***supra*** note 55 at 286, 294.

the right to sue in England.[232] Thus, the discussion in the case was concerned with the French test of the *quorum* to sue in England. Lastly, the Canadian Court's judgment in the ***Orient Leasing*** also raises serious questions.[233] In this case, the Court decreed that since the Japanese arrangements does not extend outside Japan, the attachment of the ship in Canada should be valid. This judgment is wrong because it disregards the rule that movables are regarded as situated in the country of the owner's domicile, regardless of their actual physical situs.[234] Since the ship is deemed to be located in Japan, it should be governed by Japanese law, whether or not Japanese bankruptcy law extends outside Japan.[235] By acting on this condition, the Canadian Court failed to recognize an assignment of foreign personal property, in a clear contradiction of the premise of the Anglo-Canadian international bankruptcy law.[236]

Apart from their agreements about the general conditions for a foreign

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[232] ***Alivon***, ***supra*** note 55 at 277.

[233] ***Orient Leasing***, ***infra*** note 389.

[234] See, ***supra*** note 32 and accompanying text, also, ***supra*** note 104 and accompanying text.

[235] See ***Simpson v. Fogo***, 32 L. J. Ch. 249; 1 H. & M. 195. There, Lord Hatherely refused to recognize a Louisiana judgment, which was declared on the basis of the attachment of a ship in New Orleans, against its mortgagors of the ship, who obtained their mortgage under English law, which is the law of the owner's domicile.

[236] See, ***supra*** note 104 and accompanying text. One might argue that since the trustee was absent from the Canadian proceeding, it would be practically difficult to assign the ship to the Japanese proceeding. However, this reasoning does not take into consideration the importance of barring attachments for the success of the Japanese arrangement. It would be in the best interest of the debtor and the creditors to bring the ship to the arrangement, especially, since the ship will be returning to Japan anyway.

bankruptcy, the Anglo-Canadian law and the United States law deal with foreign bankruptcies quite differently, mainly due to the difference in their doctrines about foreign assignments; the Anglo-Canadian law applies mostly choice of law rules in international bankruptcy cases, whereas, the American law applies the doctrine of comity.[237]

2. THE ANGLO-CANADIAN APPROACH: A DIVIDED APPLICATION OF CHOICE OF LAW RULES

Anglo-Canadian law does not deal with international bankruptcy cases as a coherent unit. Rather it deals with each aspect of the effects of a foreign bankruptcy differently according to its respective choice of law rule. Thus, while the effect of a foreign bankruptcy on personal property is recognized under Anglo-Canadian law, this is not necessarily the case with regards to real property, the relation back doctrine, the law of priorities, discharge and reorganization. The divisive character of the Anglo-Canadian approach is a combined result of the identification of bankruptcy with assignment, and of the practice of *dépeçage* in private international law.[238]

a. PERSONAL PROPERTY

As shown earlier, Anglo-Canadian law, in principle, recognizes the effects of a foreign bankruptcy adjudication on local personal property, through the use of

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[237] For the difference between vesting the property of the bankrupt *ipso jure* and vesting it through comity, see ***infra*** text after note 242.

[238] For the meaning of "*dépeçage*" and its relevance in international bankruptcy law, see ***infra*** note 1223.

mobilia sequuntur personam.[239] Although, this principle is quite simple, its application was not consistent. (1) English courts departed from this rule on several occasions without providing a convincing substitute. (2) The Canadian courts, on the other hand, often confused this doctrine with the notion of comity, which they interpreted inconsistently. In Canada, comity was sometimes applied progressively to recognize the effect on local personal property of a foreign bankruptcy which is not in the bankrupt's domicile, notwithstanding *mobilia sequuntur personam.* On the other hand, it was also interpreted sometimes in a rather protectionist way, as in American jurisprudence, to limit effect of on personal property.

(1) THE ENGLISH LAW: THE PROBLEM OF *MOBILIA SEQUUNTUR PERSONAM*

In ***re Blithman,***[240] an English judge distinguished between the principle of *mobilia sequuntur personam* and comity, and applied the former accurately. In this case, a debtor was adjudged bankrupt in Australia. Thus, according to Australian Bankruptcy law, his property was vested in his assignees by virtue of their appointment. Prior to his bankruptcy, however, the debtor was entitled to a revisionary interest in some stocks bequeathed to him by his mother in England. Upon his subsequent death, both the assignees and his executrix claimed his interest in the fund.[241]

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[239] See ***supra*** note 32 and accompanying text.

[240] ***Re Blithman*** (1866), L.R. 2 Eq. 23, 35 Beav. 219, Romilly, J.[hereinafter ***Re Blithman*** cited to Beav.].

[241] ***Re Blithman***, ***supra*** note 240 at 221-222.

In deciding the case, Romilly J. linked the allocation of funds to the issue of determining whether the bankrupt is domiciled in England or Australia; (which apparently was not clear). He ruled that the funds would go to the assignees, if the domicile proved to be Australian and to the executrix, otherwise.[242] Significantly, though, Romilly maintained that if the domicile proved to be English, the Assignees could still claim the fund on the basis of comity, as he says:

> **It was argued that if the domicile were English still, nevertheless, that, on the principle of the comity of nations, this insolvency was in the nature of a foreign judgment, and that this Court would give effect to it against the property in this country, and several cases were cited for this proposition. I am disposed to assent to that argument, but with this qualification:- I think that the legal personal representative would be entitled to receive the money, and that the assignees can only obtain payment here by suing for the amount as in an ordinary case.**[243]

Thus Romilly, unlike some later judges, distinguished clearly between the effect of choice of law rules, and that of comity in international bankruptcy cases. The judge evidently considered that the choice of law rule of *mobilia sequuntur personam* would be applicable only when the foreign bankruptcy law is the law of the bankrupt's domicile, in which case the bankrupt's property would be vested *ipso jure* in the assignees. On the other hand, he maintained that while, an assignee not appointed by the debtor's law of domicile would not have an *ipso jure* entitlement to the bankrupt property, he could sue to acquire the bankrupt's property abroad on the

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[242] ***Re Blithman***, ***supra*** note 240 at 222. Domicile is critical to the applicability of ***mobilia sequuntur personam***.

[243] ***Re Blithman***, ***supra*** note 240 at 222.

basis of the comity of nations.[244] This understanding of comity is very accurate; if the bankruptcy is in the debtor's domicile, then, technically speaking, the debtor's personal property cannot be considered to be located outside the domicile. However, if the bankruptcy occurs outside the domicile, then recognizing it under comity is a matter that is left to the courts' discretion.[245] The courts' failure to follow this notion of comity when dealing with personal property in international bankruptcy cases created a gap between the theory and practice of *mobilia sequuntur personam.*

The principle of *mobilia sequuntur personam* upheld in ***re Blithman***[246] was undermined shortly afterwards in ***re Davidson's Settlement Trust.*** In this case, W. Davidson, who settled in Australia, was declared bankrupt there at his own request. After receiving his bankruptcy certificate, he visited England in 1868, where he died intestate, leaving behind a widow and unpaid creditors in Australia. In 1869, W. Davidson's father died and left a fund to be divided equally among the children. The official Australian assignees sued for this fund.[247]

The judge in this case set aside ***re Blithman***, as he considered the bankrupt's domicile to be immaterial.[248] Rather, the decisive factor for him was the debtor's voluntary submission to the bankruptcy court, ruling accordingly, that the fund

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[244] ***Re Blithman***, ***supra*** note 240 at 222.

[245] For the juristic evaluation of the role of comity in English jurisprudence see ***infra*** note 264.

[246] ***Re Blithman***, ***supra*** note 240.

[247] ***Re Davidson's Settlement Trust*** (1873), L.R. 15 eq. 383. at 383-384, James, L.J.[hereinafter ***Re Davidson's Settlement Trust***].

[248] ***Re Davidson's Settlement Trust***, ***supra*** note 247 at 385.

should go to the trustee and that neither the bankrupt's representative nor the next in kin would be entitled to any part of it before the payments of the debts.[249] He justified his decision on the basis of the need to recognize the decisions of foreign courts, saying:

> **I may add that it would be impossible to carry on the business of the world if Courts refused to act upon what had been done by other Courts of competent jurisdiction...**[250]

Re Davidson's Settlement Trust[251] itself was dismissed as an non-authoritative precedents in ***re Hayward***, in which the issue of domicile was raised.[252] In this case, the defendant's mother, made a will granting him a life interest which was however to be suspended by bankruptcy or alienation. After the mother's death in 1892, the defendant went to New Zealand where he was declared bankrupt in 1895. The bankruptcy was annulled after payment of 30 Pounds by the trustees of the will.[253] The issue raised in this case was whether the defendant's entitlements under the will would be suspended under the effect of the New Zealand bankruptcy,

In deciding the case, Kekewich, J. dismissed "the unfortunate"[254] precedent of

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[249] ***Re Davidson's Settlement Trust***, ***supra*** note 247 at 385-386.

[250] ***Re Davidson's Settlement Trust***, ***supra*** note 247 at 386. James, J's language entails the recognition of a foreign judgment rather than an application of a choice of law rule. The theoretical justification of this judgment is subject to interpretation which will be discussed later. See, ***infra*** note 261 and accompanying text.

[251] ***Re Davidson's Settlement Trust***, ***supra*** note 247.

[252] ***Re Hayward, Hayward v. Hayward*** (1897), [1897] 1 Ch. 905. Kekewich J. [hereinafter ***re Hayward***].

[253] ***Re Hayward***, ***supra*** note 252 at 905-906.

[254] ***Re Hayward***, ***supra*** note 252 at 909.

re Davidson's Settlement Trust,[255] and upheld ***Re Blithman***[256] as the valid and binding precedent.[257] Regarding this he said:

> **I must decide this case upon the authority of *In re Blithman*... if that decision is wrong it must be overruled. It is a decision by Lord Romilly of long standing, and ought not to be departed from by a judge of first instance. In my opinion I must accept it as binding on me, and say that, this domicile being English, the adjudication in bankruptcy in New Zealand did not operate to vest in the trustee or assignee property which, if the adjudication had taken place in England, would have been payable to the trustee here, or property which but for that adjudication would have been payable to Mr. Hayward for life. There must, therefore, be a declaration that the life interest has not determined.**[258]

Jurists responded to the problems raised in the above three cases by providing a broad rule, under which, both the domicile's law as well as the law of the court to which the debtor submits, are recognized as affecting an assignment of the bankrupt's property wherever located. This is made clear in Dicey:

> **Rule 164. (1) English courts will not question the jurisdiction of a Scottish or Northern Irish court to adjudicate a debtor bankrupt.**
> **(2) English courts will recognize that the courts of any other foreign country to have jurisdiction over a debtor if--**
> **(a) he was domiciled in that country at the time of the presentation of the petition...; or**
> **(b) he submitted to the jurisdiction of its courts, whether by himself presenting the petition... or by appearing in the proceedings.**[259]

English jurists sought justification for the new rule which empowers a competent court other than that of domicile to vest the bankrupt's foreign property in

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[255] ***Re Davidson's Settlement Trust***, ***supra*** note 247.

[256] ***Re Blithman***, ***supra*** note 240.

[257] ***Re Hayward***, ***supra*** note 252 at 909.

[258] ***Re Hayward***, ***supra*** note 252 at 910.

[259] ***Dicey's Conflict of Laws***, 11th ed, ***supra*** note 97 at 1115.

its trustee. Nadelmann and Blom-Cooper provided a tautological justification on the grounds of estoppel, *i.e.* they argued that the non domicile court derives its power from the fact that the debtor voluntarily submitted to its jurisdiction.[260] On the other hand, a Canadian court considered ***re Davidson's settlement Trusts***[261] and ***re Anderson***[262] authorities on the comity of nations, which is perhaps the most appropriate characterization,[263] but one which English courts were reluctant to adopt.[264] Thus, in view of the fact that English jurists dismissed comity, English

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[260] **Nadelmann**, "**International Bankruptcy Law...**", ***supra*** note 206 at 340; **L. J. Blom-Cooper**, **Bankruptcy in Private International Law**, (London: The Eastern Press, 1954) at 97. [hereinafter **Blom-Cooper**, **Bankruptcy in Private...**"]. It should be noted, however, that most authorities report the doctrine that a bankruptcy adjudication by a competent court vests the debtor's property in his assignees without stressing the importance of domicile. For example, see ***Cheshire's Private International Law***, 12th ed., ***supra*** note 12 at 913.

[261] ***Re Davidson's Settlement Trust***, ***supra*** note 247.

[262] ***Re Anderson***, ***supra*** note 215.

[263] ***Re Eades***, ***supra*** note 32 at 76.

[264] Comity is conspicuously absent in private international law books mainly because it was not particularly appreciated by the deans of private international law in England, many of whom considered it "**either meaningless or misleading**". *Cheshire's Private International Law*, 12th ed., ***supra*** note 12 at 4. See also, **Sarah Harding**, "**Re Sefel Geophysical Ltd.: A Canadian Approach to Some Specific Problems in the Adjudication of International Insolvencies**" (1989) 12 Dalhousie Law Journal, 412. [hereinafter **Harding "Re Sefel: A Canadian Approach**"] at 426 citing **Graveson**, "**Philosophical Aspects of the English Conflict of Laws**" (1962) 78 L.Q. Rev. 337 at 344; **A. V. Dicey**, ***A Digest of the Law of England, with Reference to the Conflict of Laws***, 3rd ed. by A. V. Dicey & A. Berriedale Keith (London: Stevens, 1922). [hereinafter ***Dicey's Conflict of Laws***, 3rd ed.] at 10 states:

> **If the assertion that the recognition or enforcement of foreign law depends upon comity means only that the law of no country can have effect as law beyond the territory of the sovereign by whom it was imposed, unless by permission of the State where it is allowed to operate, the statement expresses though obscurely a real important fact. If on the other hand, the assertion that the recognition or enforcement of foreign laws depends upon**

(continued...)

practice was left without a convincing legal justification.[265]

The former developments in English law seriously undermined the significance of *mobilia sequuntur personam* in the English jurisprudence,[266] leaving the bankruptcy's effect over the assignment without an adequate theoretical justification. This is especially true in light of the fact that the Privy Council ruled that the maxim *mobilia sequuntur personam* does not mean that movables are deemed to be located in the domicile of the owner, but that the disposition of these

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[264](...continued)

> **comity is meant to imply that, to take a concrete case, when English judges apply French law they do so out of courtesy to the French republic, then the term comity is used to cover a view which if really held by any serious thinker affords a singular specimen of confusion of thought produced by laxity of language....The application of foreign law is not a matter of caprice or option, it does not arise from the desire of the sovereign of England or any other sovereign show courtesy to other states. It flows from the impossibility of otherwise determining whole classes of cases without gross inconvenience and injustice to litigants whether native or foreigners.**

[265] English case law touched on the subject of comity in later cases, but those did not deal with the issue of vesting the personal property in the trustees. See for example, ***Gailbraith* v. *Grimshaw*** in H. L, ***infra*** note 323 at 513. In this case, Dundin, L.J. says that declining jurisdiction is a matter of comity.

[266] **Raeburn, "Application of the Maxim Mobilia Sequuntur Personam to Bankruptcy in Private International Law"** (1949) British Year Book of International Law 177. [hereinafter **Raeburn, "Application of the Maxim**], especially 186-187. In a recent article **P. St. John Smart, "Carrying on Business as a Basis of Recognition of Foreign Bankruptcies in English Private International Law"** (1989) 9 Oxford Journal of Legal Studies 557. [hereinafter **Smart, "Carrying on Business..."**], argues that English courts recognize a foreign bankruptcy proceeding if the foreign court's jurisdiction was assumed on basis of carrying on business.

movables upon the owner's death is governed by his personal law.[267]

(2) THE CANADIAN LAW: THE PROBLEM OF COMITY

In some early cases, Canadian courts applied the doctrine of ***mobilia sequuntur personam*** straightforwardly as illustrated by ***Pickford* v. *Atlantic Transportation***,[268] in which, the Court of Nova Scotia departed from the territorial judgment of ***Fraser* v. *Morrow*** discussed above.[269] In this case,[270] the defendant was a company incorporated under the laws of the State of New Jersey. This company was under receivership by the judgement of the New Jersey court, and according to the evidence, the laws of that state provided that all the property of the company became vested in the receivers upon their appointment. The plaintiff attached property of the defendant company in Nova Scotia, for a debt owing to him, with the attachment made after the date of the receiving order. In deciding the case, the Court held that the property having been vested in the receivers, could not be attached as property of defendant company. Thus, the Court recognized the effect of

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[267] ***Alberta Provincial Treasurer* v. *Kerr***, [1933] A. C. 710. P.C. at 721. [hereinafter ***Alberta Provincial***] at 721.

[268] ***Pickford* v. *Atlantic Transportation*** (1899), 40 N.S.R. 237 (C.A.). Graham, J. [hereinafter ***Pickford***]. In this case, the defendant company was incorporated under the laws of the State of New Jersey. The Chancery Court of New Jersey appointed receivers of the company, and, according to the evidence, the laws of that state provided that all the property of the company became vested in the receivers upon their appointment. The plaintiff attached property of the defendant company in Nova Scotia for a debt owing to him. The attachment was made after the date of the receiving order. The Court held that the property having vested in the receivers, could not be attached as property of defendant company.

[269] ***Fraser***, ***supra*** note 25.

[270] ***Pickford***, ***supra*** note 268.

the New Jersey receivership over the personal property actually located in Nova Scotia.

In ***Brand v. Green***,[271] the Canadian Court confused comity with ***mobilia sequuntur personam***. In this case, Congdon, a Manitoba resident owed money payable in New York to the defendant, a New York corporation under an interim receiver, but not yet in bankruptcy. The plaintiffs, merchants in Boston, instituted an action in Manitoba to recover a debt arising from a previous transaction between themselves and the defendant. The statement of the claim alleged that the defendant had property in Manitoba, assets comprising Congdon's debt to the defendant in the amount of several thousand dollars.[272]

The defendants argued that the Manitoba court had no jurisdiction, since the cause of action arose outside Manitoba, and since also they had no assets in Manitoba.[273] The Court concurred as Killman J. asserted that the bankruptcy proceedings in New York, the defendant's domicile, affected the defendant's personal property everywhere, including the asset in Manitoba.[274] More pertinent to our point, however are the remarks of Bain, J who states on the one hand that "**the effect of**

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[271] ***Brand v. Green*** (1900), 13 Man. R. 101 (C.A.). [hereinafter ***Brand***]. Killman, C.J., Bain, and Richards, JJ.

[272] ***Brand***, ***supra*** note 271 at 119.

[273] ***Brand***, ***supra*** note 271 at 102. See also, ***Pickford***, ***supra*** note 268.

[274] ***Brand***, ***supra*** note 271 at 118. *Mobilia sequuntur personam* was applied in this case although the bankruptcy proceeding had not actually, at the date when this action was commenced, vested the defendant's assets in the receiver.

foreign laws beyond their own jurisdiction depends wholly on principles of international comity".[275] Yet, on the other hand, he also explains that it is firmly established in English law that a bankruptcy assignment in the bankrupt's domicile transfers to the trustees title to all the bankrupt's personal property situated in England.[276] It should be evident then that, in effect, Bain, J. failed to distinguish between comity and ***mobilia sequuntur personam***.

In ***Bank of N.S.* v. *Booth***,[277] which is a case of receivership, the Court clearly distinguished between ***mobilia sequuntur personam*** and comity, but explicitly rejected the application of the *lex domicilii* in favor of comity.[278] Moreover, comity here was understood in the American sense, as indicated by the court's statement that: "**It being the policy of every government to retain in its own hands the property of a debtor until all domestic claims against it have been satisfied**".[279] In justification of its decision, the Court had to distinguish ***Brand* v. *Green***.[280] In

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[275] ***Brand***, ***supra*** note 271 at 121.

[276] ***Brand***, ***supra*** note 271 at 121-124.

[277] ***Bank of Nova Scotia* v. *Booth*** (1910) 19 Man. R. 471, affirming 10 W.L.R. 313 (C.A.). [hereinafter ***Bank of Nova Scotia***]. Richards, Perdue, Cameron, JJ.A. The facts of the case are the following: The defendant, an Illinois company, was resident in Illinois and had assets within Manitoba. The defendant went into bankruptcy in Illinois. The bankruptcy Court there appointed a receiver to collect the defendant's assets and forbade the defendant, or anyone else, to interfere with the assets. The plaintiff sued in Manitoba, and applied for an order for service out of the jurisdiction. The Manitoba Rules permit such proceedings if the defendant has assets within Manitoba.

[278] ***Bank of Nova Scotia***, ***supra*** note 277 at 474.

[279] ***Bank of Nova Scotia***, ***supra*** note 277 at 477.

[280] ***Brand***, ***supra*** note 271.

this regard Macdonald, J. stated:

> **[T]hat case [*Brand* v. *Green*], however, is distinguishable from the one under consideration. There the parties to the action were all non-resident, citizens of the United States, without any business interest in this Province...**[281]

Re Eades, is perhaps the only case which has provided a valid synthesis of the doctrines and mechanisms applicable in international bankruptcy cases, namely, the Imperial Statute, ***mobilia Sequuntur personam***, and comity.[282] In this case, an Englishman went into bankruptcy in England while domiciled there. Before being discharged from the English bankruptcy, he left for Canada where he eventually became domiciled, acquired new property, and subsequently died. The English bankruptcy trustee claimed the Canadian after-acquired property, against the counterclaims of the bankrupt's heirs, on the ground that the bankrupt was not discharged. In what seemed to be a literal application of *mobilia sequuntur personam,* the Court held that the bankrupt's property acquired before the Canadian domicile vests in the trustee, while that acquired after the change of domicile should be administered according to the deceased will's. Mathers, J. clearly distinguished between ***mobilia sequuntur personam*** and comity. For, on the one hand, he states explicitly that personal property passes to the trustee according to the principle of *mobilia sequuntur personam* when the bankruptcy is carried in the domicile of the

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[281] ***Bank of Nova Scotia, supra*** note 277 at 475.

[282] ***Re Eades, supra*** note 32 at 68.

bankrupt.[283] However, on the other hand, he maintains that, when the bankrupt's domicile is other than that of the bankruptcy's *forum*, the bankrupt's local personal property *may* pass to the bankruptcy trustee through comity. Mathers, however, would grant comity only "**subject to the claims of local creditors**",[284] maintaining also that "**the demands of international courtesy do not require that property created upon the credit of local creditors should be taken from them without allowing them even a *pro rata* share in its distribution...**[285]

The Canadian courts' confusion as to the nature of the mechanism applicable to international bankruptcy cases persisted notwithstanding Mathers synthesis. In ***Williams* v. *Rice***, the Court brought a new meaning to the term comity. [286] In this case, the plaintiff, a trustee in bankruptcy of an Arizona company, brought an action in Manitoba to recover funds paid to Rice, a resident of Manitoba, and to a corporation controlled by him.[287] The monies had originated from the "French

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[283] See, ***supra*** note 32 and accompanying text.

[284] ***Re Eades, supra*** note 32 at 89.

[285] ***Re Eades, supra*** note 32 at 90. Italics in Original. In assessing whether the English Bankruptcy Act of 1883 applies to Manitoba, the Court conceded that the Imperial Parliament has the authority to legislate for the Dominions, and that real property is governed by *lex loci rei sitae*. Therefore, the Imperial Parliament cannot transfer real property in a foreign jurisdiction. ***Re Eades, supra*** note 32 at 67. As for real property within the Empire, the rule is that it is affected by the Imperial Parliament only if it is in a colony which does not have legislative powers of its own, or unless it is stated in express language or necessary intendment. ***Re Eades, supra*** note 32 at 69; [also ***Callender* v. *Lagos Colonial Secretary*** [1891] A.C. 460; 60 L.J.P.C. 33. P.C. Hobhouse, L. [hereinafter ***Lagos***].

[286] ***Williams* v. *Rice*** (1926), 7 C.B.R. 699, [1926] 2 W.W.R. 192, [1926]. [hereinafter ***Williams* v. *Rice***], Dysart, J.

[287] ***Williams* v. *Rice***, ***supra*** note 286 at 700.

Shop", a bankrupt company, with its head office and place of business in Arizona.[288] This company was adjudged bankrupt in the United States and the plaintiff was appointed trustee, who then[289] sued for property fraudulently transferred to Canada.

The defense denied that the United States Bankruptcy Act gives the plaintiff a title to the bankrupt's property outside the United States, and argued that even if it did, the Canadian court should not recognize this entitlement.[290] Dysart, J. rejected this assertion. He maintained that an adjudication in bankruptcy is equivalent to a judgment, and that such judgments should not be questioned except with regards to court competence and due process. Without further explanation, Dysart cites ***Brand* v. *Green*** as his authority.[291] Additionally, he states that his court applied the United States Bankruptcy Act, which vests all the bankrupt's property in the bankruptcy trustee. Dysart explains that, although this Act does not define precisely what constitutes property, it could be interpreted to cover the moneys in question here, since none of these monies were "exempt" within the meaning of the Act.[292] Significantly, Dysart acknowledged that the United States' Bankruptcy Act could not, of its own force, operate beyond the confines of the United States. However, he maintained that private international law and the comity of nations would recognize

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[288] ***Williams* v. *Rice*, *supra*** note 286 at 700.

[289] ***Williams* v. *Rice*, *supra*** note 286 at 700.

[290] ***Williams* v. *Rice*, *supra*** note 286 at 703.

[291] ***Williams* v. *Rice*, *supra*** note 286 at 705.

[292] ***Williams* v. *Rice*, *supra*** note 286 at 705-706.

the extra-territorial effect of such a statute, so far at least as it dealt with personal property.[293] This was especially so since the American Act extended to "all property", a term which Dysart understood in light of English law to encompass foreign property.[294]

The decision in ***Williams* v. *Rice*** is actually unique in that the judge recognizes, using the mechanism of comity, a foreign bankruptcy *qua* bankruptcy, and not as an assignment, since he applied the American bankruptcy law to avoid fraudulent preferences. Significantly, the Judge distinguishes his case from ***Gailbraith* v. *Grimshaw***,[295] the famous case in English law which reversed ***Solomons* v. *Ross***, thus rejecting the validity of the extraterritorial operation of a foreign bankruptcy. Dysart, J., however, did not see the issue in ***Gailbraith* v. *Grimshaw*** to be the validity of recognizing a foreign bankruptcy judgement, since he considered that the court's decision only involved weighing between the rights of the assignee and those of the attaching creditor, as indicated in his statement that:

> **The payment of the $2,500 note was a fraudulent preference, and so is voidable by the plaintiff. Nor has the defendant any lien, or charge, or equity against the money, because of his fraud. He is not at all in the position of the defendant in *Gailbraith v.***

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[293] ***Williams* v. *Rice***, ***supra*** note 286 at 707.

[294] ***Williams* v. *Rice***, ***supra*** note 286 at 707-708. It seems strange that the Court applied the American law to determine what is a fraudulent conveyance. However, it borrowed the English conception of property which includes both local and foreign property, while the American Bankruptcy Act at the time did not specifically cover property abroad. See ***supra*** note 182 and accompanying text. But see, ***Orient Leasing***, ***infra*** note 389.

[295] ***Gailbraith* in H. L**, ***infra*** note 323.

Grimshaw...[296]

Thus, Dysart's decision actually amounted to the recognition of a foreign bankruptcy judgement and a foreign bankruptcy law. Unfortunately, Dysart himself minimized the significance and uniqueness of his decision by mistakenly assimilating it to other decisions of English and Canadian courts, as he states in its justification: "**[w]e have no inclination, I take it, to set up any interpretation of the comity of nations in this respect different from that adopted by the highest Courts in the mother country.**"[297] This assimilation is clearly incongruous in view of the tendency of English courts to treat foreign bankruptcies as assignments, and of Canadian courts to apply the American restrictive conception of comity.

Although it did not distinguish clearly between comity and the traditional English assignment approach, ***Williams* v. *Rice*** facilitated the recognition of an American Chapter 11 reorganization scheme in ***Pitts* v. *Hill and Hill Truck Line, Inc.***[298] In this case, the Alberta Court applied ***Williams* v. *Rice*** to recognize an American reorganization, thus preventing an unsecured creditor from "**bolstering**"[299] its position after the reorganization. The facts leading to this case are the following: In 1980, the plaintiff to be, had successfully sued the defendant in Texas. In July of 1983, the defendant petitioned for the United States chapter 11 reorganization

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[296] ***Williams* v. *Rice***, ***supra*** note 286 at 710.

[297] ***Williams* v. *Rice***, ***supra*** note 286 at 709.

[298] ***Pitts* v. *Hill and Hill Truck Line, Inc.*** (1987), 66 C.B.R. 273 (Alberta Queen's Bench) Master Funduk [hereinafter ***Pitts* v. *Hill***].

[299] ***Pitts* v. *Hill***, ***supra*** note 298 at 279.

scheme. In August, the plaintiff sued again in Alberta on the same cause of action as in the Texas case, and then in the same year also proved as unsecured creditor in the United States bankruptcy proceeding. In December, he obtained a judgment from the Alberta Court, and in 1986 seized some of the defendant company's shares. Lastly, in the case at hand, he applied for an order to remove and sell the seized shares,[300] but his application was dismissed by Funduk J. of the Alberta Queen's Bench.

Although progressive, the decision in this case failed to distinguish between comity and *mobilia sequuntur personam*, and as a result entailed flawed implications. In justifying its reasoning, the Court quoted from Dysart, J's decision in ***Williams* v. *Rice*** that "**[a]n adjudication of bankruptcy is equivalent to a judgment...**",[301] and that "**[b]y almost universal law, movable property is administered by the law of the domicil of the owner thereof.**"[302] Accordingly, the Judge concluded that the "shares" fell within the American proceeding,[303] and that comity prevents their attachment subsequent to the bankruptcy because the "**relevant time should be the *date* of bankruptcy**".[304]

The Court's decision in this case is valid, but its reasoning is problematic.

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[300] ***Pitts* v. *Hill*, *supra*** note 298 at 274-275.

[301] ***Pitts* v. *Hill*, *supra*** note 298 at 277.

[302] ***Pitts* v. *Hill*, *supra*** note 298 at 277.

[303] ***Pitts* v. *Hill*, *supra*** note 298 at 279.

[304] ***Pitts* v. *Hill*, *supra*** note 298 at 279. Italics in original.

Funduk J. implicitly suggests that the effects of a foreign reorganization should be limited to the unencumbered local personal property - *i.e*, the seized shares in this case. As we have seen, under Anglo-Canadian law, a foreign bankruptcy (liquidation) is equated with a voluntary assignment which affects the personal property unencumbered at the time of bankruptcy.[305] Yet, since in this case, the foreign proceeding is a reorganization process which does not entail a technical assignment, the rule which restricts the effect of a foreign bankruptcy to movables is irrelevant.[306] Instead, the relevant rule is comity, which the Court has applied in this case, by noting that a procedurally fair foreign judgment should be recognized by a local court without questioning irregularities and insufficiency of evidence,[307] and - one might add- the kind of local property involved. Thus, although, the Anglo-Canadian law does not deal with foreign bankruptcies as judgments, Funduk J. chose rightly to do so. This helped in dismissing the plaintiff's application on basis of *estoppel*; as the judge considered that the plaintiff had participated in the American proceeding, and thus, should refrain from individual pursuit of a remedy.[308]

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[305] See ***supra*** text after note 69.

[306] *I.e. mobilia sequuntur personam.* The fact that the Court did not discuss the implications of domicile on after acquired property confirms its irrelevance to the case. See ***Pitts v. Hill***, ***supra*** note 298 at 276. Moreover, the Court does not determine the defendant's domicile anywhere in this case.

[307] ***Pitts v. Hill***, ***supra*** note 298 at 277. See also, ***Brand***, ***supra*** note 271 at ; and ***Williams v. Rice***, ***supra*** note 286 at 705.

[308] ***Pitts v. Hill***, ***supra*** note 298 at 279. There the Court stated: **"The plaintiff took the benefits of the United States Bankruptcy Code. He must accept its burdens, one of which is that he cannot take any proceeding against the defendant."**

However, it does not follow from such a choice, neither theoretically nor by case law,[309] that a foreign reorganization's effect takes place only with regard to unencumbered personal property as of the date of bankruptcy.

The confusion in the Canadian concept of comity was observed by Forsth J. in the recent case of ***re Sefel***.[310] Noting rightly that comity plays an insignificant role in the English jurisprudence, and unable to derive a systematic understanding of comity from the Anglo-Canadian tradition of cases, Justice Forsyth in ***re Sefel*** turns to American law for a clearer application of this doctrine.[311] Regarding this he states:

> **A general observation that can be made is that the comity doctrine appears to be more commonly applied in the United States. Examples of cases that have considered comity principles in a bankruptcy context include *Cunard Steamship Co. Ltd.* v. *Salen Reefer Services*, A.B., 773 F. (2d) 452 (U.S.C.A. 1985), *Cornfeld* v. *Investors Overseas Services Ltd.*, 34 C.B.R. (N.S.) 124, 471 F. Supp. 1255 (U.S.D.C. 1979), and *Drexel Burnham Lambert Group***

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[309] Although the decision of ***Bank of Nova Scotia*** seems to point in this direction, see ***supra*** note 279 and accompanying text, Master Funduk distinguished this judgement as inapplicable. See, ***Pitts v. Hill***, ***supra*** note 298 at 278.

[310] ***Re Sefel Geophysical Ltd.*** (1988), 54 D.L.R. (4th) 117, 70 C.B.R. (N.S.) 97, [1989] 1 W.W.R. 251 (Alta. Q.B.) Forsyth J. [hereinafter ***Re Sefel*** cited to C.B.R.]. The facts of this important case are as follows: In 1985, an order was made under the ***Companies' Creditors Arrangement Act***, staying proceedings by creditors of Sefel Ltd in Canada. The American courts, acting on the assumption that the Canadian bankruptcy court will treat American and Canadian creditors alike, issued a similar order, staying the proceedings of the United States creditors. However, the arrangement failed and a receiving order was issued for distribution. The bulk of the assets available for distribution came from the United states.

In deciding the case, Forsyth, J. explains why he did not resort to comity, notwithstanding its sensibility and compelling force, -i.e. its highly equitable nature- on the grounds that "**[c]omity does not allow ...[the court] to alter priorities set out in the Bankruptcy Act...**". ***Ibid*** at 107. Underline added.

[311] ***Re Sefel***, ***supra*** note 310 at 103-104.

***Inc.* v. *Galadari*, 610 F. Supp. 114 (D.C.N.Y. 1985).**[312]

From the above discussion regarding the effect of foreign bankruptcies on personal property in Canada and England, it becomes clear that the two jurisdictions are in agreement that a foreign assignment encompasses the locally situated personal property. The Canadian courts, however, used comity, in addition to *mobilia sequuntur personam*, to rationalize the effects of a foreign bankruptcy locally. As seen, however, both mechanisms suffer from conceptual problems.

b. REAL PROPERTY

When it comes to real property in international bankruptcy situations, England and Canada apply the choice of law rule which states that real property is governed by the *lex situs*. Thus, a foreign bankruptcy has no effect on real property in their jurisdiction,[313] as illustrated well in ***Macdonald* v. *Georgian Bay Lumber*.**[314] In this case, a land owner in Ontario (Anson) who went into bankruptcy in the United States, executed under the United States laws[315] a deed conveying to the trustee in bankruptcy all his property, without however mentioning land specifically in the

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[312] ***Re Sefel***, ***supra*** note 310 at 103-104. Ultimately, Forsyth based his judgment on the doctrine of unjust enrichment. ***Re Sefel***, ***supra*** note 310 at 108-ff.

[313] ***Dicey's Conflict of Laws***, 11th ed, ***supra*** note 97 at 1117 1121-1122.

[314] ***Macdonald* v. *Georgian Bay Lumber*** (1878), 2 S.C.R. 364, affirming Ontario Court of Appeal, June 18, 1877 (unreported), which reversed 24 Gr. 356. [hereinafter ***Macdonald* v. *Georgian***]. William Buell Richards, C.J., and Ritchie, Strong, Taschereau, Fournier, and Henry, J.J.

[315] **The American Bankruptcy Act of 1867**, ***supra*** note 180.

deed. Meanwhile, the respondent, Georgian Bay Co., obtained judgment against Anson in Ontario, and issued execution against the land. Later on, Anson issued another deed in favor of the trustee, by way of further assurance, conveying specifically and in proper form the Ontario land, and thus giving the trustee possession. The latter deed was registered in Ontario on the grounds that the first deed was not in registrable form. The trustee sued for a declaration stating that his title was not subject to the execution. The issue that arose in this case was whether Anson had interest in the disputed land at the time when the execution was issued against it by Georgian Bay.[316]

The Court unanimously disfavored the trustee's claim to the attached land. Ritchie J. explained the court's decision on the grounds that[317] the only law applicable to real property, by universal consensus of jurists, and American and English case law, is that "**real estate or immovable property is exclusively subject to the laws of the Government within whose territory it is situate**".[318] Accordingly, a trustee in bankruptcy has no legal rights to real property outside the jurisdiction of his *forum*.[319]

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[316] ***Macdonald v. Georgian***, ***supra*** note 314 at 364-365, 372-376.

[317] ***Macdonald v. Georgian***, ***supra*** note 314 at 376

[318] ***Macdonald v. Georgian***, ***supra*** note 314 at 377.

[319] See also, ***Barends v. Green*** (1911) 16 W.L.R. 422, 16 B.C.R. 433. [hereinafter ***Barends v. Green***], Gregory, J.

In ***re Kooperman***,[320] however, the English Court did permit a foreign trustee to collect and sell the real estate of a foreign bankrupt corporation. In this case, Astubry, J., appointed the curator under a Belgian Bankruptcy adjudication to collect and sell the real property of a Russian national in England in his capacity as a Belgian trustee. The Court here made an order similar to those orders under Section 122 of the Bankruptcy Act of 1914, without relying on that Act. Section 122, of the Bankruptcy Act of 1914, empowers the British courts to act in aid of each others in matters of bankruptcy. In relation to this, the author in Dicey's Conflict of Laws argues that there is no reason why the provisions of Section 426 of the Insolvency Act 1986 could not produce the same result.[321]

c. RELATION BACK

Like most other bankruptcy laws, Anglo-Canadian law contains rules for reviewing prior transactions in bankruptcy cases. These rules vest the bankrupt's property in the trustee from the actual date of the bankruptcy on the basis of the relation back doctrine. This doctrine, as it may be recalled, was upheld in the renown *international* bankruptcy case of ***Solomon* v. *Ross***. However this case was gradually undermined and finally decisively dismissed in ***Gailbraith* v. *Grimshaw***, in which the applicability of the relation back doctrine to foreign bankruptcy cases was

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[320] See, ***Re Kooperman*** (1928), 13 B. & C.R. 49. Astubry, J. [hereinafter ***Re Kooperman***]; also **Nadelmann, "International Bankruptcy Law..."**, ***supra*** note 206 at 341.

[321] ***Dicey's Conflict of Laws***, 11th ed, ***supra*** note 97 at 1122.

explicitly rejected.[322]

In ***Gailbraith* v. *Grimshaw***, Grimshaw and another obtained in Scotland a judgement against Merrens & Sons, which they extended to England through the Judgment Extension Act.[323] Shortly after the attachment, Merrens & Sons went into sequestration in Scotland, with Gailbraith appointed as the trustee. The latter sued in the lower court and obtained a judgment to vacate the earlier attachment. The attachment creditors appealed and reversed the lower Court's judgment.[324] Gailbraith then unsuccessfully appealed to the House of Lords.[325] In delivering the House of Lord's judgment, Loreburn, J. stated explicitly that the English law of relation back only applied to English bankruptcies, and that an attachment prior to the bankruptcy date is not affected by the title of *foreign bankruptcy* trustee.

Loreburn, L. was aware that his judgement entailed a departure from ***Solomons* v. *Ross***, which he dismissed as a sketchily reported case, thus a non-authoritative precedent.[326] Moreover, he argued that the foreign law in ***Gailbraith v. Grimshaw*** has no operation in England since it relates the trustee's title back to transactions which the debtors themselves could not have disturbed anyway.

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[322] But see, ***Solomon v. Ross***, ***supra*** note 36.

[323] ***Gailbraith v. Grimshaw*** (1910), [1910] A.C. 508, at 508. H.L. Loreburn, L.C., Macnaghten, James, Dunedin, L. JJ. [hereinafter ***Gailbraith*** in H. L.].

[324] ***Gailbraith v. Grimshaw*** (1910), 1 K.B. 339. C.A. Ridley J. [hereinafter ***Gailbraith*** in appeal].

[325] ***Gailbraith* in H. L**, ***supra*** note 323 at 508-509.

[326] ***Gailbraith* in H. L**, ***supra*** note 323 at 511.

Thus, in effect, Loreburn, L. did not see any distinction between the foreign trustee's powers prior to the official declaration of bankruptcy and those of the debtor.[327] This dismissal of the foreign relation back doctrine was echoed in Mancnagten, L.J's statement that "**a creditor of the bankrupt having duly obtained an attachment in England before the date of the sequestration cannot, I think, be deprived of the fruits of his diligence.**"[328] Mancnagten did not consider that the court's decision conflicted with any aspect of the British Bankruptcy law. He argued that Section 122 of the English Bankruptcy Act does not enjoin that a Scottish bankruptcy should have the same effect as an English bankruptcy and *visa versa.* Rather, it only states that the courts of the different parts of the United Kingdom should severally act and be auxiliary to each others in matters of bankruptcy.[329] Macnaghten also could not find a binding precedent which enjoins the application of the relation back doctrine on the grounds of comity and considered that the extension of the relation back doctrine to a foreign bankruptcy trustee in this case would entail numerous and unnecessary complications.[330]

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[327] ***Gailbraith* in H. L, *supra*** note 323 at 511. Loreburn, L. was aware of the problematic feature of the Anglo-Canadian law regarding the inapplicability of the relation back doctrine. He acknowledged that in cases such as ***Gailbraith*, "the trustee may find himself falling between two stools."** see, ***Gailbraith*** in H. L, ***supra*** note 323 at 510.

[328] ***Gailbraith* in H. L, *supra*** note 323 at 511. But see, ***Solomon v. Ross*, *supra*** note 36 at 131n.

[329] ***Gailbraith* in H. L, *supra*** note 323 at 512.

[330] ***Gailbraith* in H. L, *supra*** note 323 at 512.

The same rule is presumed to apply in Canada,[331] with two notable exceptions: the judgement of ***Williams* v. *Rice***[332] and ***re Premium Plywood Products***.[333] In the latter case, the Supreme Court of British Columbia applied the American bankruptcy law to impeach a transaction prior to the assignment, without however, discussing the private international law issues. The fact of the case are the following: Premium Plywood Products Inc. was a company incorporated and having its principal place of business in Oregon. It was declared bankrupt in the United States in 1971. The American trustee raised this action here and alleged that Premium had preferential transfers to a British Columbia company.[334] In adjudicating the case, Gould J. states without qualification that: "**[b]oth counsel agreed, as do I, that the applicable law is that of Oregon.**"[335] Any consideration of private international law or comity of nations is absent from this decision. In the end, the Court in this case dismissed the application because the plaintiff failed to prove that the recipient of the payment believed or should have believed on reasonable cause that the debtor company was insolvent, which in fact and in law it was.[336] This test

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[331] **Grace**, "**Law of Liquidation...**", ***supra*** note 217 at 652-ff; **Ziegel**, "**Canadian Perspectives...**", ***supra*** note 178 at 554-556; **Castel**, ***Canadian Conflict of Laws***, 3rd ed., ***supra*** note 105 at 530-531.

[332] ***Williams* v. *Rice***, ***supra*** note 286.

[333] ***Williams* v. *Meeker Cedar Products*** *(1967)*; ***Re Premium; Plywood Products*** (1973), 19 C.B.R. (N.S.) 76 (B.C.). [hereinafter ***Re Premium***], Gould, J.

[334] ***Re Premium***, ***supra*** note 333 at 76-77.

[335] ***Re Premium***, ***supra*** note 333 at 77.

[336] ***Re Premium***, ***supra*** note 333 at 79.

is an American law test.

The failure of the judges in ***re Premium*** and ***Williams* v. *Rice***[337] to discuss the intricate private international law issue of applying the foreign relation back doctrine, undermines in my opinion, the precedential value of these two cases. Thus, the Canadian law, notwithstanding these two cases, remains in line with the English precedent of ***Gailbraith v. Grimshaw***.

d. THE LAW APPLICABLE TO PRIORITIES AND DISTRIBUTION

Anglo-Canadian courts do not recognize the foreign rules deciding priorities and modes of distribution, but rather apply the choice of law rule which states that priorities are governed by the law of the *forum*, as illustrated in ***re Melbourne***.[338] In this case, a couple were married under the Dutch Indian law, with a pre-nuptial agreement by which they maintained separate property. Moreover, according to this contract, the husband became indebted to his wife for a certain amount of money. Later on, the couple came to England were the husband went into bankruptcy. This case was to contest the wife's eligibility to prove her debt, especially that the debt was not promptly registered as the Dutch Indian law requires.[339]

In deciding the case, Mellish, L.J. said:

> **Now, there seems no doubt at all that in the case of bankruptcy the question of priority of the different creditors *inter se* must be governed by the law of the country where the bankruptcy takes**

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[337] ***Williams* v. *Rice***, ***supra*** note 286.

[338] ***Re Melbourne*** (1870), L.R. 6 Ch app 64, Mellish, L.J. [hereinafter ***Re Melbourne***].

[339] ***Re Melbourne***, ***supra*** note 338 at 64.

> **place, and where the assets of the debtor are being administered. The question then is, does this affect the contract itself?**[340]

The answer to this question was negative. The wife was entitled to prove her debt, but the priority of the debt was to be decided by the English law.[341]

The issue of foreign priority rights in Canada was the crux of what might be the most difficult case of international bankruptcy law. In ***re Sefel***, the Court ignored the English precedents upholding a foreign priority right. However, in view of the peculiar facts of this case, it did not apply the private international law rules commonly applied to priority rights in international bankruptcy cases. The Court argued that, since the estate of the bankrupt was enriched by the recoveries of the bankrupt's property located in the United States, stripping the American creditors from their priorities would unjustly enrich the Canadian creditors. To justify his decision to grant United States creditors the preferred status under the Canadian Bankruptcy Act, Forsyth, J. had to go elsewhere, namely to the doctrine of unjust enrichment. He Stated:

> **The United States creditors are entitled to rank as equal to Canadian creditors with respect to that fund [separate fund established from the assets in the United States] because it is that fund which has enriched the bankrupt's estate.**[342]

In this case, the judge restricted his ruling to a separate estate comprising the United

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[340] ***Re Melbourne, supra*** note 338 at 69.

[341] ***Re Melbourne, supra*** note 338 at 70.

[342] ***Re Sefel, supra*** note 310 at 111.

States assets.[343]

e. DISCHARGE

A discharge works to release a bankrupt debtor from obligations incurred prior to the discharge order.[344] In domestic bankruptcies, it effectively bars actions raised against a discharged bankrupt regarding debts proved in the bankruptcy. A discharge by a foreign court is not recognized in England except regarding debts incurred in contracts concluded under the law of the bankruptcy's *forum*. This private international law rule was adopted as early as 1800 in ***Smith* v. *Buchanan***.[345] In this case, the Court ruled unanimously that the defendants who had become bankrupt under the laws of the State of Maryland, and were subsequently discharged there of their obligations, were still liable for English creditors with regards to debts incurred in contracts concluded in England. Kenyon C. J., who delivered the Court's judgement, stated:

> **It is impossible to say that a contract made in one country is to be governed by the laws of another. It might as well be contended that if the State of Maryland had enacted that no debts due from its own subjects to the subjects of England should be paid, the plaintiff would have been bound by it. This is a case of a contract lawfully made by a subject in this country, which he resorts to a Court of Justice to enforce; and the only answer given is that a law has been made in a foreign country to discharge these defendants from their debts on condition of their having relinquished all their property to their creditors. But how is that an answer to a subject of this country suing on a lawful contract**

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[343] ***Re Sefel***, ***supra*** note 310 at 111.

[344] ***Cheshire's Private International Law***, 12th ed., ***supra*** note 12 at 916.

[345] ***Smith* v. *Buchanan*** (1800), 1 East 6, 102 E.R. 3. Kenyon, Lawrence, Grose, and Le Blanc, L. JJ., [hereinafter ***Smith* v. *Buchanan***].

> **made here? how can it be pretended that he is bound by a condition to which he has given no assent either express or implied? It is true that we so far give effect to foreign laws of bankruptcy as that assignees of bankrupts deriving titles under foreign ordinances are permitted to sue here for debts due to the bankrupts' estates: but that is, because the right to personal property must be governed by the laws of that country where the owner is domiciled**[346]

In ***Potter* v. *Brown***,[347] which came shortly after ***Smith* v. *Buchanan***,[348] the Court recognized a discharge by a United States court upon debts which had been concluded there. Ellenborough's C.J. ruled that the Maryland discharge bars the action in England, arguing that:

> **if the bankruptcy and certificate would have been a discharge of the debt in America, which it clearly would, it must by the comity of the law of nations, recognized in the cases I have mentioned, be the same here. It is in every day's experience to recognize the laws of foreign countries as binding on personal property**[349]

By recognizing the U.S. court's discharge, The English Court was not recognizing the extraterritorial operation of a bankruptcy law, but applying a choice of law rule to *lex contractus*.

The above rule was not followed in ***Quelin* v. *Moisson*.**[350] In this case which involved a promissory note, which originated in France but was assigned prior to the bankruptcy, the English court recognized without qualification that a discharge under

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[346] ***Smith* v. *Buchanan***, ***supra*** note 345 at 10-11.

[347] ***Potter* v. *Brown*** (1804), 5 East 124, 102 E.R. 1016. Ellenborough J. [hereinafter ***Potter* v. *Brown***].

[348] ***Smith* v. *Buchanan***, ***supra*** note 345.

[349] ***Potter* v. *Brown***, ***supra*** note 347 at 131.

[350] ***Quelin* v. *Moisson*** (1828), 1 Knapp 265, 12 E.R. 320, P.C. [hereinafter ***Quelin* v. *Moisson***]

the Imperial Bankruptcy Act has an extraterritorial extension. The Privy Council ruled that a foreign bankruptcy constituted a bar for ***all*** actions in the British dominions concerning debts contracted prior to the bankruptcy, without restricting the ruling to contracts concluded in the bankruptcy's *forum*. Thus, it overruled a judgment by the Royal court of Jersey, which had dismissed Quelin's plea that he was declared bankrupt in France, and had assigned his property therein before he absconded to Jersey. The Privy council granted the French discharge order on proof that (1) the French law, after bankruptcy, bars actions by creditors against the bankrupt regardless of whether the creditor has proved his debt or not and (2) that the fraudulent bankruptcy judgment against Quelin does not give rise to a new right of action.[351] ***Quelin* v. *Moisson***, however, remained an isolated precedent, and the approach adopted in earlier cases continued to prevail afterwards.[352] This approach is clearly summed up in ***Gibbs v. Societe Industrielle et Commerciale des Metaux***,[353] which can be considered representative of the English law today. In this case, the defendants plead their discharge by a French bankruptcy judgment to a contract governed by the English Courts.[354] The Court rejected their plea, asserting that no foreign discharge should be recognized unless it is a discharge under the law of the

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[351] ***Quelin* v. *Moisson***, ***supra*** note 350 at 266.

[352] This is indicated by Lord Esher's statement in ***Gibbs and Sons***, ***infra*** note 353 at 408.

[353] ***Gibbs and Sons v. Societe Industrielle et Commerciale des Metaux*** (1890), 24 Q.B.D. 399 C.A., Lord Esher M.R., Lindley and Lopes, L,JJ. [hereinafter ***Gibbs and Sons***].

[354] ***Gibbs and Sons***, ***supra*** note 353 at 399-ff.

contract.[355]

Notably, the English law does not restrict the effect of its own discharge orders to those debts governed by English law. A discharge order under the English Imperial Act works as a discharge all over the British dominions. The Privy Council in ***Edwards* v. *Ronald***[356] decided that an English certificate of discharge is a bar to an action in the East Indies, regardless of the law of the contract.[357]

The Canadian courts' treatment of discharge by a foreign bankruptcy court is quite inconsistent. The first Canadian court case dealing with a foreign discharge order manifested absolute territoriality; the Canadian court did not recognize such an order even with regards to contracts concluded under the law of discharge. In ***Brown* v. *Hudson***,[358] the defendant was arrested in Upper Canada, on the basis of a contract concluded in New York, although he had already been discharged from imprisonment under an insolvent law in the State of New York. Furthermore, the Court of the King's Bench denied the defendant's subsequent application for release in upper Canada, justifying its refusal by distinguishing between the case where a debt is extinguished, and the case at hand in which the debt's mode of recovery is modified by the laws of a foreign country. The Court argued that in the latter case

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[355] ***Gibbs and Sons***, ***supra*** note 353 at 409.

[356] ***Edwards* v. *Ronald*** (1830), 1 Knapp 259; 12 E.R. 317, P.C. Lyndhurst, L. Ch. [hereinafter ***Edwards***]

[357] ***Edwards***, ***supra*** note 356 at 265.

[358] ***Brown* v. *Hudson*** (1826), Taylor 390 (U.C. C.A.). [hereinafter ***Brown* v. *Hudson***].

creditors are allowed to recover their debts in Canada through the mode prescribed by Canadian laws.[359]

A different approach to foreign discharge was upheld in ***Weatherbie* v. *Green***.[360] In this case, the plaintiff sued in Prince Edward Island on a debt contracted in New Brunswick, where the defendant had gone into bankruptcy and obtained a certificate of discharge. The Prince Edward Court dismissed the action, arguing that contracts are governed by the *lex loci* and thus that a discharge under the contract law bars the debt.[361] In ***Mills* v. *Smith***,[362]yet another approach was adopted. In this case, a British subject residing in England was arrested in Nova Scotia on a capias for a debt declared to be due to a resident of the United States. The defendant having been previously adjudged bankrupt in England, was already discharged there from his debts. Moreover, the debt for which he was arrested in Nova Scotia had been provable in the English bankruptcy. The Court in this case did not consider the origin of the contract to be the decisive factor for recognizing discharge, but rather held that a foreign discharge is valid in Canada, if the debt sued upon there was provable in the foreign bankruptcy. Thus, it maintained that the defendant was entitled to be discharged, although the contract in question did not fall

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[359] ***Brown* v. *Hudson***, ***supra*** note 358 at 360-ff.

[360] ***Weatherbie* v. *Green*** (1853), 1 P.E.I. 97, Peters 68. [hereinafter ***Weatherbie***].

[361] ***Weatherbie***, ***supra*** note 360.

[362] ***Mills* v. *Smith*** (1866), 6 N.S.R. 328 (C.A.). [hereinafter ***Mills* v. *Smith***].

under the discharge law, and regardless of whether or not the terms of the English Bankruptcy Act were wide enough to cover the case. The Nova Scotia Court in this case stated that it must interfere, in the spirit of the English Act, to prevent its own process from violating the debtors rights to which he was entitled by the express provisions of the Act.[363]

After 1918, the Canadian courts adopted consistently the English doctrine with regards to foreign discharge, as illustrated in ***International Harvester* v. *Zarbok***.[364] In this case, the defendant had gone into bankruptcy in North Dakota where he obtained a discharge from all his debts. Prior to his bankruptcy, the debtor had issued some promissory notes. Later on in Canada he issued renewals of all but one of the old notes. The plaintiff who was the holder, in due course, of the renewed notes and also of the one old note which was not renewed sued in Saskatchewan. The defendant pleaded the discharge in bankruptcy.[365] The Court's ruling was a straight forward application of the English doctrine of discharge. It held that the old note which was not renewed, and, whose *lex loci contractus* was therefore North Dakota, was discharged. As for the notes renewed in Canada, the Court decreed that they were not discharged. These notes remained good consideration for a new promise to pay, and the plaintiff was thus able to recover on

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[363] ***Mills* v. *Smith***, ***supra*** note 362.

[364] ***International Harvester* v. *Zarbok***, [1918] 3 W.W.R. 38, 11 Sask. L.R. 354 (K.B.). [hereinafter ***International Harvester***], Bigelow, J.

[365] ***International Harvester***, ***supra*** note 364 at 38-39.

them. [366] Quoting Halisbury in justification of his decision, the ruling judge in the case stated:

> **A discharge in bankruptcy under the law of a foreign country, which is the proper law of the contract, operates as a discharge from liability under the contract in England, and conversely, a discharge under the law of a country, which is not the proper law of a contract, will not be effective in England. The domicile of the defendant is immaterial.**[367]

The treatment of discharge in Anglo Canadian law could result in a contradictory solutions to bankruptcy cases. For, as has been seen, England and Canada generally do not recognize a foreign discharge when the bankruptcy law is other than the law of the contract. Yet, they consider that a debtor's property passes entirely upon bankruptcy to the foreign bankruptcy trustee.[368] This creates a situation whereby a debtor in a foreign bankruptcy is held liable to satisfy specific debts, even after being divested from all his/her property.

f. REORGANIZATION

Liquidations in bankruptcy is being increasingly substituted by reorganizations,[369] or compositions, or arrangements[370] as they are called sometimes.

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[366] ***International Harvester***, ***supra*** note 364 at 39-41.

[367] ***International Harvester***, ***supra*** note 364 at 40-41.

[368] ***Cheshire's Private International Law***, 12th ed., ***supra*** note 12 at 918. But see, **K. H. Nadelmann**, **"The Recognition of American Arrangements Abroad"** (1941-1942) 90 University of Pennsylvania Law Review 780 at 784.. [hereinafter **Nadelmann**, **"The Recognition of American..."**], where he says that such interdependence exists in some jurisdictions, without however specifying where or providing a source.

[369] See generally, **K. H. Nadelmann**, **"Compositions-Reorganizations and Arrangements- in the Conflict of Laws"** (1947-1948) 61 Harvard Law Review 804. [hereinafter **Nadelmann**, **"Compositions-Reorganizations..."**].

This fact causes a problem in international bankruptcy cases especially under the Anglo-Canadian law, primarily because of the lack of a workable choice of law characterization which facilitates the extra-territorial recognition of latter schemes. A reorganization scheme is not characterized as an assignment since it does not entail a transfer of the debtor's property to the trustee. Rather, it is considered that "**[a] debtor as a result of the arrangement [reorganization] is no longer in default with his creditors.**"[371] Thus, in a reorganization, no assignment takes place, and the debtor does not cease to be the beneficiary of its property. This point was confirmed with regard to the United States reorganizations in ***Felixstowe Dock***, where an English Court concluded that under a United States chapter 11 proceeding, the debtors "**remain in beneficial ownership of their assets**",[372] as dictated by the United States Supreme Court's decision in ***Bildisco***.[373] As a result, Hirst, J. dismissed the assignment argument and moved to discuss the case as a matter of comity and discretion.[374] However, as we have already observed, absent a technical

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[370](...continued)

[370] See generally, **Honsberger**, "**Canadian Recognition of Foreign**, ***supra*** note 11.

[371] **Honsberger**, "**Canadian Recognition of Foreign**, ***supra*** note 11 at 206.

[372] ***Felixstowe Dock***, ***infra*** note 964 at 113. But see, **Honsberger**, "**Canadian Recognition of Foreign**, ***supra*** note 11 at 207 where he seems to subscribe to the "new entity" interpretation of an arrangement. See also, ***Modern Terminal (Breth 5) Ltd v. States Steamship Co.*** [1979] H.K.L.R. 512 Trainor, J. summarized in ***Felixstowe Dock***, ***infra*** note 964 at 113, where the Hong Kong court subscribes also to the "new entity" interpretation of the United States Chapter 11 proceeding.

[373] ***National Labor Relations Board v. Bildisco & Bildisco***, 465 U. S. 513 (1984). [hereinafter ***Bildisco***].

[374] ***Felixstowe Dock***, ***infra*** note 964 at 113-114.

assignment, English courts are reluctant to apply comity to recognize a foreign bankruptcy's effect. The fact that at the time of this proceeding there was no English winding up proceeding,[375] and the assets were personal property (cash in Citi-Bank)[376] did not change the Court's position.

The decision in ***Felixstowe Dock*** illustrates the restrictive influence that the doctrine of assignment continues to have on English courts until now. The Court in this case did not accord any effect to the foreign reorganization, since it was not characterized as an assignment.[377] It did not take into account the fundamental similarity between liquidations and reorganizations, in so far as they both seek to satisfy the debtor's liabilities. Moreover, it ignored the fact that ***Gailbraith* v. *Grimshaw***,[378] was applied to a French bankruptcy, under which the bankrupt retains the beneficial ownership of its property[379]

Instead of characterizing a foreign reorganization as an assignment, English law equated it to a discharge. This equation is inaccurate, since a discharge in bankruptcy differs significantly from a reorganization scheme. The former extinguishes the debt completely, whereas the latter modifies it.[380] A reorganization

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[375] ***Felixstowe Dock***, ***infra*** note 964 at 133.

[376] ***Felixstowe Dock***, ***infra*** note 964 at 133.

[377] See, ***Pitts* v. *Hill***, ***supra*** note 298.

[378] ***Gailbraith in H. L.*** ***supra*** note 323.

[379] See Fry, J's discussion in ***Re Artola Hermanos***, ***infra*** note 460 and accompanying text.

[380] **Honsberger**, **"Canadian Recognition of Foreign**, ***supra*** note 11 at 206.

amounts to a "**bargained release**"[381] which is sanctioned by the bankruptcy court, and whose workability, therefore depends on its universal acceptance. This distinction was not observed in the English treatment of foreign reorganization schemes. In ***New Zealand Loan and Mercantile Agency Co. Ltd. v. Morrison***,[382] a case which involved an appeal from an Australian court, the Privy Council held that a scheme of arrangement sanctioned by an English court does not bind non-assenting creditors residing outside England.[383] The Australian court had maintained that a debt payable in Australia is not affected by an English reorganization carried out under the English ***Joint Stock Arrangement Act***.[384]

Lord Davey, who delivered the opinion of the Court, argued that since the Act does not expressly extend to Australia,[385] the arrangement would not constitute a bar in the colonies, although the company's constitution stipulated that it could be discharged by an order of an English court.[386] The company's constitution, the Court maintained, is only applicable as far as the court's jurisdiction extends.[387] Thus,

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[381] **Nadelmann**, "**Compositions-Reorganizations...**", ***supra*** note 369 at 823.

[382] ***New Zealand & Mercantile agency v. Morrison*** (1897), [1898] A.C. 349. P.C. Watson, Hobhouse, Davey, and Richard, L.JJ. [hereinafter ***New Zealand***].

[383] ***New Zealand, supra*** note 382 at 349.

[384] ***Joint Stock Arrangement Act*** (1870), 33 & 34 Vict., c 104.

[385] ***New Zealand***, ***supra*** note 382 at 357-358.

[386] Lord Davey dismissed the analogy between bankruptcy and winding up since the former assigns the bankrupt's property, while in the latter the property remains in the corporation for distribution, ***New Zealand***, ***supra*** note 382 at 358.

[387] ***New Zealand***, ***supra*** note 382 at 359.

clearly, the Privy Council considered a foreign arrangement scheme as a foreign bankruptcy judgement, which could not be recognized under English law. However, it seems that an English court will recognize a foreign reorganization if the creditor submitted to the jurisdiction of the bankruptcy court, or if the reorganization is effectual under the law of the contract.[388]

In Canada, the doctrine regarding foreign reorganizations is inconsistent, yet, relatively more progressive. In ***Orient Leasing Co.* v. *"Kosei Maru"***,[389] the Court followed the Privy Council's decision in ***New Zealand,***[390] thus denying recognition for a Japanese arrangement. In this case, a Japanese ship was arrested in a Canadian port by a Japanese mortgagee. The ship's owners pleaded that their company is undergoing reorganization in Japan, but the Court held that this reorganization does not bind property outside Japan, since Japanese law does not forbid realization on security situated outside Japan.[391] In deciding the applicable law to the reorganization the Court stated:

> **There is also no dispute between the parties that the validity of the substantive right the plaintiff purports to assert depends solely upon the applicable Japanese law. The parties are Japanese and the action is based on contracts that were entered into between**

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[388] See, **Nadelmann**, "**Compositions-Reorganizations...**", ***supra*** note 369 at 824-825. Nadelmann there discusses the implication of ***Gibbs and Sons***, ***supra*** note 353 for the judgment in this case. I tend to agree with Nadelmann on basis of the English Court's judgement in ***Re Davidson's Settlement Trust***, ***supra*** note 247.

[389] ***Orient Leasing Co. v. "Kosei Maru"***, [1979] 1 F.C. 670, 94 D.L.R. (3d) 658. [hereinafter ***Orient Leasing*** cited to F.C.], Marceau, J.

[390] ***New Zealand, supra*** note 382

[391] ***Orient Leasing***, ***supra*** note 389 at 670-617.

> **them in Japan: these contracts are undoubtedly governed by Japanese law.**[392]

Subsequently, the Court sought to answer the sole issue in this case, namely, whether the Japanese Corporate Reorganization Law affects a Japanese ship in a Canadian port?,[393] seeking for this the testimony of Japanese law experts. The Court found that the Japanese law is "territorial",[394] since neither its explicit language or perceived intent extend a reorganization scheme to assets abroad. Accordingly, the attachment was permitted.[395] The Plaintiff objected that the Court should apply to the case the Canadian understanding of reorganization, *i.e.* it should apply the Japanese law as it applies the Canadian law. The Court, however, insisted that the case should be decided on basis of the self imposed territorial language of the Japanese law.[396]

In later cases, the Canadian courts departed from the English doctrine upheld in ***New Zealand***.[397] In ***re Borden and Elliott and Winston Industrial Inc.,***[398] the

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[392] ***Orient Leasing***, ***supra*** note 389 at 673-674.

[393] ***Orient Leasing***, ***supra*** note 389 at 676.

[394] ***Orient Leasing***, ***supra*** note 389 at 681.

[395] ***Orient Leasing***, ***supra*** note 389 at 684-685. The Court in ***re Borden*** apparently first examined whether the American Bankruptcy law extends outside the United States. See, **Honsberger**, "**Canadian Recognition of Foreign**, ***supra*** note 11 at 212 who states in conjunction with his discussion of this case:

> **The United States Bankruptcy Code, 11 U.S.C., s. 541(a), defines property of the debtor to be property "wherever located and by whomever held" and the presumption would be that the stay authorized by the Code was intended to be broad enough to reach all of the property of the debtor wherever located.**

[396] ***Orient Leasing***, ***supra*** note 389 at 677.

[397] ***New Zealand***, ***supra*** note 382

Ontario Supreme Court recognized an automatic stay of proceedings which was imposed by the United States Chapter 11, thus prohibiting Canadian creditors from attaching the American debtor's assets in Canada.[399] This was also the case in ***Mithras Management Ltd.* v. *New Visions Entertainment Corp.***[400] In this case, the respondent New Visions Entertainment Corporation (NVEC) supported by others, petitioned for an order setting aside an order of the lower court, in so far as it appoints McCarthy & Tetrault as custodian of 1.6 million common shares of Cineplex Odeon Corporation, which were owned by (NVEC) or, in the alternative, requesting a further order releasing McCarthy & Tetrault from its obligation to serve as custodian of the Cineplex shares. The order of the lower court was issued in conjunction with complicated proceedings in California and Ontario regarding film distribution. The basis of the petition was the existence of a chapter 11 reorganization plan of NVEC in the United States, which institutes a world-wide stay

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[398](...continued)

[398] **Honsberger**, **"Canadian Recognition of Foreign**, ***supra*** note 11, also ***re Borden & Elliot and Winston Industries Inc.***, Ont. S.C., November 1, 1983, O'Leary J. (unreported), cited in **John D. Honsberger**, **"Canadian Recognition of Foreign Judicially Supervised Arrangements"** (1990) 76 C.B.R. 204.

[399] **Honsberger**, **"Canadian Recognition of Foreign**, ***supra*** note 11 at 212.

[400] ***Mithras Management Ltd.* v. *New Visions Entertainment Corp.*** (1992) 90 D.L.R. (4th) 726, Ontario Court (General Division), Craig J. See **Honsberger**, **"Canadian Recognition of Foreign**, ***supra*** note 11 at 737 who states:

> **It is not significant in the circumstances, too, that in the very few Canadian cases on the effect of foreign arrangements, the *New Zealand Loan* case has neither been mentioned nor has there been any attempt to apply the English conflict of laws rules for the recognition of foreign arrangements.**

Moreover, it should be noted that the Court in ***Mithras Management Ltd.* v. *New Visions Entertainment Corp.***, apparently adopted Honsberger's position as it relied on this article as an authority for its judgment.

of proceedings.

In delivering his judgment, Craig J. stated that:

> **The Ontario courts are not obliged to recognize United States bankruptcy law but as a matter of comity, especially in the circumstances of this case, it would be appropriate to stay Mithras' proceedings and allow the Cineplex shares to be transferred to California.**[401]

The judge in this case did not present any argument, but only cited some authorities for his opinion.[402] However, apparently, he did not seem to think this was sufficient justification for his decision, since he went to great length after that in order to establish the merit of the *forum non convenience* doctrine.

3. THE CHARACTERISTICS OF THE UNITED STATES INTERNATIONAL BANKRUPTCY LAW

The United States law, as discussed earlier, applies comity when dealing with foreign bankruptcies, discharges, and reorganizations.[403] The uniformity of the applied mechanism, "comity", makes the treatment granted by United States courts to foreign bankruptcies more coherent than that of the Anglo-Canadian courts. Therefore, our discussion of the American law will not be divided as to what part of the bankruptcy is sought to be recognized, but focuses on the swaying notion of comity applied in American international bankruptcy cases.

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[401] ***Mithras Management Ltd.***, ***supra*** note 400 at 737.

[402] ***Mithras Management Ltd.***, ***supra*** note 400 at 737 where the Court cited **Honsberger**, **"Canadian Recognition of Foreign**, ***supra*** note 11.

[403] See generally, **Nadelmann**, **"Compositions-Reorganizations..."**, ***supra*** note 369; **Nadelmann**, **"The National Bankruptcy Act..."**, ***supra*** note 162.

a. LATE DEVELOPMENTS IN THE US CASE LAW: INCONSISTENT APPLICATIONS OF COMITY

The United States courts' application of comity[404] in international bankruptcy cases produced divergent outcomes, ranging from the liberal to the strictly territorial. In fact, the case law prior to Section 304, especially after the last quarter of the 19th century, is marked by remarkable swaying between the narrow protectionist interpretations of comity-admittedly more prevalent- and other reluctantly more liberal interpretations. In ***Canada Southern Ry.* v. *Gebhard***[405] which was decided in 1883, a liberal interpretation of comity was first adopted, thus marking a significant departure from the territorialism which characterized the case law since ***Harrison* v. *Sterry***.[406] In this case, an American court recognized a reorganization plan of a railway Company, which was imposed by the Canadian Parliament, notwithstanding opposition by a local creditor.[407] The Court stayed the opposing creditors' action to

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[404] See generally cases listed in **Harding "Re Sefel: A Canadian Approach**, ***supra*** note 264; **D. G. Boshkoff, "United States Judicial Assistance in Cross Boarder Insolvencies"** (1987) 36 International and Comparative Law Quarterly 729. [hereinafter **Boshkoff, "United States Judicial..."**]. Also M. E. Knecht, **"The "Drapery of Illusion" of Section 304 - What Lurks Beneath: Territoriality in the Judicial Application of Section 304 of the Bankruptcy Code"** (1992) 13 University of Pennsylvania Journal of International Business Law 287, 292 [hereinafter **Knecht, "The "Drapery of Illusion"..."**].; **U. Huber, "Creditor Equality in Transnational Bankruptcies: The United States Position"** (1986) 19 Vanderbilt Journal of Transnational Law 741. [hereinafter **Huber, "Creditor Equality in..."**] at 575.

[405] ***Canada Southern Ry.*** v. ***Gebhard***, 109 U. S. 527 (1883). Waite, C.J. and Harlan, J. dissenting., [hereinafter ***Canada Southern Ry.* v. *Gebhard***].

[406] ***Harrison* v. *Sterry***, ***supra*** note 21.

[407] ***Canada Southern Ry.* v. *Gebhard***, ***supra*** note 405 at 539.

collect his entire debt.[408] Although the creditor had not voted on the plan, the court did not grant him a separate proceeding, since it considered that he could participate in the Canadian proceeding on the same footing with other creditors.[409] Moreover, while it acknowledged that the *laws* of a given country have no extraterritorial effect, the court held that *rights and legal positions* created under such a law may have effects in other countries. More specifically, it argued that since a corporation "**must dwell in the place of its creation, and cannot migrate to another sovereignty**",[410] it carries its character, with all the powers and restrains it entails, wherever it carries business.[411] Thus, the Court held that "**every person who deals with a foreign corporation impliedly subjects himself to such laws of the foreign government, affecting the powers and obligations of the corporation with which he voluntary contracts, as the known and established policy of that government authorizes.**"[412] Accordingly, a person contracting with such corporation is presumed to have assented to such laws "**because the corporation must of necessity be controlled by them, and it has no power to contract with a view to any others law with which they are not in entire harmony**".[413]

More significant for our purposes is the fact that, in justifying his decision to

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[408] ***Canada Southern Ry.*** v. ***Gebhard***, ***supra*** note 405 at 531.

[409] ***Canada Southern Ry.*** v. ***Gebhard***, ***supra*** note 405 at 539.

[410] ***Canada Southern Ry.*** v. ***Gebhard***, ***supra*** note 405 at 537.

[411] ***Canada Southern Ry.*** v. ***Gebhard***, ***supra*** note 405 at 537.

[412] ***Canada Southern Ry.*** v. ***Gebhard***, ***supra*** note 405 at 537.

[413] ***Canada Southern Ry.*** v. ***Gebhard***, ***supra*** note 405 at 538.

consider a foreign reorganization binding upon the non-assenting creditor, C.J. Waite explicitly espoused a very pragmatic and liberal interpretation of comity. Regarding this he says:

> **Unless all parties in interest, wherever they reside, can be bound by the arrangement which it is sought to have legalized the scheme may fail. All home creditors can be bound. What is needed is to bind those who are abroad. Under these circumstances the true spirit of international comity requires that schemes of this character, legalized at home, should be recognized in other countries.**[414]

Waite's C.J., interpretation of comity is clearly different from Justice Story's interpretation in ***Ogden* v. *Saunders***.[415] As it may be recalled, Story would grant effect to a foreign bankruptcy through comity, only if this does not impair the rights and securities afforded to American citizens.[416] It should be noted, however, that ***Canada Southern Ry.* v. *Gebhard*** seems to have been unduly overrated by jurists, in view of the fact that in this case, Waite, J. was one of three participating judges, of whom one was absent and the other held a dissenting opinion. Harlan, J., based his dissent on the ground that the American creditor did not assent to the laws of Canada.[417] Moreover, he argued elaborately that the constitutional restriction which prohibits congress to pass any legislation impairing the obligations of contracts applied to foreign parliaments as well.[418] Accordingly, Harlan J. declared that the

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[414] ***Canada Southern Ry.*** v. ***Gebhard***, ***supra*** note 405 at 539.

[415] ***Ogden* v. *Saunders***, ***supra*** note 135.

[416] See ***supra*** note 140 and accompanying text.

[417] ***Canada Southern Ry.*** v. ***Gebhard***, ***supra*** note 405 at 541.

[418] ***Canada Southern Ry.*** v. ***Gebhard***, ***supra*** note 405 at 542.

discharge in Canada by a statute of the foreign railway company had no extraterritorial effect in the United States, especially not upon a person residing abroad and not assenting to the judgement.[419]

Shortly after ***Canada Southern Ry.* v. *Gebhard***, a narrow definition of comity was adopted again, and thus a more protectionist stance emerged.[420] In ***Hilton* v. *Guyot***,[421] the court asserted that the discretionary extension of foreign bankruptcy laws by comity is permitted only if this would not violate the policies of the United States. Regarding this, the court stated:

> **"Comity", in the legal sense, is neither a matter of absolute obligation, on 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 law**[422]

In addition, the ***Hilton* v. *Guyot*** judgment assigned importance to reciprocity. As the Court stated:

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[419] ***Canada Southern Ry.*** v. ***Gebhard***, ***supra*** note 405 at 549.

[420] It seems that ***Canada Southern Ry.*** v. ***Gebhard*** is unduly over rated in the American jurisprudence. In **Nadelmann**, "**Compositions-Reorganizations...**", ***supra*** note 369 at 812 states: "**At the 1931 meeting of the American Law Institute [the body in charge of drafting the American Conflict of Laws Restatement], the chief reporter, professor Beale, informed the members that some of the advisors did not believe that the rule [in the Gebhard case] as stated was a principle of any general bearing and that they were either unwilling to have the drafters state it as a principle or, if it was stated as a principle, were unwilling to have the Comment which,...[as professor Beale said], "is a modification of it which gives some comfort to the bond holders"...**"

[421] ***Hilton* v. *Guyot***, 159 U. S. 113 (1895),[hereinafter ***Hilton* v. *Guyot***].

[422] ***Hilton* v. *Guyot***, ***supra*** note 421 at 163-164.

> **The reasonable, if not the necessary, conclusion appears to us 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 effects when sued upon in this country, but are *prima facie* evidence only of the justice of the plaintiffs' claim.**
> **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.**[423]

A similar restricted interpretation of comity also prevailed in ***Disconto Gesellschaft*** v. ***Umbreit***.[424] In this case, a German bankrupt deposited assets he carried from Germany in a Wisconsin bank. One of the bankrupt's creditors, a banking corporation in Berlin, Germany, instituted an action against the bankrupt in the Circuit Court of Milwaukee in Wisconsin, and attached at the same time a debt due to him from the First National Bank of Milwaukee. Umbreit, the defendant, intervened on the grounds that "**the law of Wisconsin does not sustain, against local creditors, rights of a foreign trustee in bankruptcy to local property**",[425] and argued that this rule should apply to a creditor acting to the benefit of a trustee. The Supreme court of Wisconsin ruled that the attached fund could not be used to pay debts due to the foreign corporation, against the claims of a local citizen,

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[423] ***Hilton v. Guyot***, ***supra*** note 421 at 227-228.

[424] ***Disconto Gesellschaft*** v. ***Umbreit***, 208 U. S. 570 (1907). Day, J.[hereinafter ***Disconto Gesellschaft*** v. ***Umbreit***].

[425] **Nadelmann, "Foreign and Domestic Creditors..."**, ***supra*** note 546 at 604.

although such claims arose after the attachment.[426] This judgement was later upheld by the Supreme Court of the United States. In justifying his decision, Day, J. explained that the policy and practice of the United States courts permit alien citizens to resort to the courts for protection of their right. However, he maintained, that the ranking of creditors, and the possibility of removal of local property beyond the borders of each state is a matter to be governed by the comity of nations.[427] Endorsing the restricted definition of comity in ***Hilton* v. *Guyot***, Day, J. states:

> **The result of the discussion [regarding comity] shows that how far foreign creditors will be protected and their rights enforced depends upon the circumstances of each case, and that all civilized nations have recognized and enforced the doctrine that international comity does not require the enforcement of judgement in such wise as to prejudice the rights of local creditors and the superior claims of such creditors to assert and enforce demands against property within the local jurisdiction. Such recognition is not inconsistent with that moral duty to respect the rights of foreign citizens which inheres in the law of nations.[428]**

In ***Waxman* v. *Kealoha***,[429] the pendulum swayed back to a more liberal interpretation of comity. In this case, the District Court of Hawaii decided to recognize the foreign trustee's rights to collect some unclaimed assets belonging to the debtor. These assets comprised unpaid stock subscriptions in the bankrupt company, which was incorporated and carried business in Hawaii, but declared bankrupt in Canada.

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[426] ***Disconto Gesellschaft* v. *Umbreit*, *supra*** note 424 at 578.

[427] ***Disconto Gesellschaft*** v. ***Umbreit*, *supra*** note 424 at 578-579.

[428] ***Disconto Gesellschaft*** v. ***Umbreit*, *supra*** note 424 at 579.

[429] ***Waxman* v. *Kealoha***, 962 F. Supp. 1190 (D. Hawaii 1969).[hereinafter ***Waxman* v. *Kealoha***].

A similar rule was adopted in ***Clarkson Co.* v. *Shaheen.***[430] In this case, a Canadian bankruptcy trustee applied to have the court (1) require former officers and directors of two bankrupt Canadian corporations to turn over their company's corporate records and (2) restrain the officers and directors from disposing of, or concealing any of the corporations property.[431] The United States Circuit Court for the Southern District of New York affirmed the lowers court's decision in granting the application on basis of the conception of comity in ***Hilton* v. *Guyot.***[432] However, the Court added:

> **These exceptions [exceptions to granting comity in *Hilton* v. *Guyot*] are construed especially narrowly when the alien jurisdiction is, like Canada, *a sister common law jurisdiction* with procedures akin to our own.**[433]

In reaching its decision, the court took into account that the foreign court had jurisdiction over the bankrupt, and that the foreign proceeding would not result in injustice to New York citizens, prejudice to the creditors' statutory remedies, or violation of the laws or public policy of the state.[434] Notably, the Court in this judgment indicated that the appellants were unable to provide proof casting doubt on

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[430] ***Clarkson Co.* v. *Shaheen*** (1976), 23 C.B.R. (N.S.) 278 (U.S. C.A.), 544 F.2d. 624 (2d Cir 1976). [hereinafter ***Shaheen*** cited to F.2d], Smith, Oakes, and Meskill, JJ.

[431] ***Shaheen*, *supra*** note 430 at 626-627.

[432] ***Shaheen*, *supra*** note 430 at 629 citing ***Hilton* v. *Guyot*, *supra*** note 421 and accompanying text.

[433] ***Shaheen*, *supra*** note 430 at 629-630. Italics added.

[434] ***Shaheen*, *supra*** note 430 at 631.

the fairness of the Canadian judgment.[435] Moreover, it stated that a foreign judgment cannot be attacked on basis of "errors in fact or law",[436] leaving due process as the only possible successful plea.

Lastly, in ***Cornfeld***,[437] the District Court of Southern New York accorded comity to a Canadian insolvency proceeding, thus, barring a suit brought in New York against the foreign insolvent company. The action brought in New York was to indemnify the plaintiff Cornfeld for expenses he had incurred in litigation which involved the insolvent Canadian company in New York.[438] The central issue in this case was whether the foreign insolvency judgment is entitled to comity, thus, barring all actions against the Canadian insolvent corporation.

Analyzing comity, the Court cited ***Hilton* v. *Guyot*** and ***Shaheen's*** conception of comity[439] and concluded that:

> **New York has narrowly construed the exceptions to the comity doctrine: "[F]oreign-based rights should be enforced unless the judicial enforcement of such a [right] would be the approval of a transaction which is inherently vicious, wicked or immoral, and shocking to the prevailing moral sense." *International Hotels corp.* v. *Golden*, 15 N.Y. 2d 9, 13, 254 N.Y. S 2d 527, 529, 203 N.E.2d 210, 212 (1964)....**[440]

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[435] ***Shaheen***, ***supra*** note 430 at 631.

[436] ***Shaheen***, ***supra*** note 430 at 631.

[437] ***Cornfeld v. Investors Overseas Services Ltd.***, 471 F.Supp 1255 (S.D.N.Y. 1979) Werker, J. [hereinafter ***Cornfeld***].

[438] ***Cornfeld***, ***supra*** note 437 at 1257-1258.

[439] ***Cornfeld***, ***supra*** note 437 at 1259 citing ***Hilton v. Guyot***, ***supra*** note 421. and ***Shaheen***, ***supra*** note 430.

[440] ***Cornfeld***, ***supra*** note 437 at 1259.

Thus, having in mind the above conception of comity, together with the fact that Canada "is a sister common law country", the Court concluded that it should recognize the Canadian bankruptcy proceeding.[441]

The Court's decision in ***Cornfeld*** is interesting in two other respects. The Court took into consideration Sections 304 and 305 which came into effect 5 months after the Court's judgment.[442] Moreover, it applied the ***Canada Southern Ry.*** v. ***Gebhard***[443] analysis to ***Cornfeld***,[444] stating that the two are "**virtually indistinguishable**".[445]

F. SIMULTANEOUS PROCEEDINGS

The three common law jurisdictions do not recognize the effects of a foreign bankruptcy's stay of proceeding *ipso jure*, as they allow creditors to institute individual actions against the bankrupt's real property, and even to petition for another local bankruptcy. The Anglo-Saxon courts however have the discretionary power to stay such proceedings. Section 266(1) of the English insolvency Act of 1986 gives the court a general power to dismiss a bankruptcy petition or to stay bankruptcy proceedings and cites the debtor's bankruptcy abroad as a valid ground

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[441] ***Cornfeld***, ***supra*** note 437 at 1262.

[442] ***Cornfeld***, ***supra*** note 437 at 1260.

[443] ***Canada Southern Ry.*** v. ***Gebhard***, ***supra*** note 405.

[444] ***Cornfeld***, ***supra*** note 437 at 1260-1261.

[445] ***Cornfeld***, ***supra*** note 437 at 1260.

for exercising this power.[446] The Canadian bankruptcy and Insolvency Act states:

> **The court may for other sufficient reason make an order staying the proceedings under a petition, either altogether or for a limited time, on such terms and subject to such conditions as the court may think just.**[447]

This article may be construed to grant discretionary powers to the Canadian courts. In the United States, the courts are granted the same powers and the law states explicitly that a foreign bankruptcy is indeed a basis for ordering a stay of proceedings in the United States. This was enacted in Section 2(a)(22), in rule 119 later,[448] and finally under Section 305.[449]

In practice, the three jurisdictions applied their ***discretionary*** power to dismiss a simultaneous bankruptcy very scarcely, in very particular cases involving little cost to their creditors, as in ***re Behrends***.[450] In this case, Behrends submitted a petition to declare himself bankrupt in England. On the day of his final examination, it became apparent that Behrends was adjudicated bankrupt in Germany, that the majority of his creditors resided in Hamburg, that his principle place of business, and that he had no

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[446] ***Dicey's Conflict of Laws***, 11th ed, ***supra*** note 97 at 1102; ***Insolvency Act, 1986 (U.K.)***, ***supra*** note 172 § 266 (1); ***Bankruptcy Act, 1914 (U.K.)***, ***supra*** note 19 § 12 also empowers the court to rescind a receiving order or dismiss the petition if it appears that a majority of the creditors in number and value are resident in Scotland or Northern Ireland, and that, from the situation of the debtor's property or other causes, his estate and assets ought to be distributed under the bankruptcy law in Scotland or Northern Ireland.

[447] **Canadian Insolvency and Bankruptcy Act**, ***supra*** note 176 § 46(11).

[448] See, ***infra*** note 577 and accompanying text.

[449] ***American Bankruptcy Code, supra note 5 11 U.S.C.A*** § 305.

[450] ***Re Behrends*** (1865), 12 L. T, 149, Winslow, J. [hereinafter ***re Behrends***].

property in England. Behrend's petition in England was opposed by the German creditors.[451] Winsolow, J. dismissed the claim that Behrends petition amounted to fraud. However, taking into account the facts enumerated above, he deferred his judgment until Behrends dealt with his creditors in Germany, at which point he would be entitled to apply for discharge in England.[452]

A different situation presented itself in the English Court's judgement of ***re Artola Hermanos***.[453] Artola Hermanos went into bankruptcy in Paris where it had its head office. Subsequently, a petition was submitted in England to declare bankrupt a branch of Artola Hermanos there. The French syndic applied in England to discharge the receiving order and stay all further proceedings on the basis of the existence of a French proceeding.[454] Lord Coleridge rejected outright the petition to discharge the receiving order, arguing that the French syndic had no power in England and could not interfere in the operation of English law. On the other hand, the Chief Justice deliberated over the issue of stay of proceeding.[455] In deciding this issue, Coleridge J. took into consideration the distinction between obligatory and discretionary stay of proceedings, stating:

> **This is an application [to stay the proceeding], therefore, not to the jurisdiction of the Court, but to the discretion of the Court in**

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[451] ***Re Behrends***, ***supra*** note 450 at 149.

[452] ***Re Behrends***, ***supra*** note 450 at 150.

[453] ***Re Artola Hermanos*** (1890), 24 Q.B.D, 640 C.A., Coleridge, C.J. and Fry, J.[hereinafter ***re Artola Hermanos***].

[454] ***Re Artola Hermanos***, ***supra*** note 453 at 640-641.

[455] ***Re Artola Hermanos***, ***supra*** note 453 at 644.

> **the exercise of that jurisdiction...**[456]

Although he took into account the size and magnitude of Artola Hermanos, as well as the difficulties resulting from concurrent bankruptcies, Coleridge did not consider these sufficient grounds for ordering a discretionary stay of proceeding.[457] This, together with the fact that the Court was unable to establish Artola's domicile, lead the Chief justice to turn down the petition for a stay of proceeding.[458]

In his concurrent judgement, Fry L. J. discussed whether the lower court should have acted on the notion that a single court should determine all aspects of an international bankruptcy, saying:

> **Another rule which has been suggested is this, that every other forum shall yield to the forum of the domicile, that the forum of every foreign country, every country not of the domicile, shall act only as accessory and in aid of the forum of the domicile. That, it is said, is the *forum concursus*, to which all persons interested in the administration of the estate are bound to have recourse. No doubt there is a great deal in point of law and principle to be said in favor of that view, and there is certainly some convenience in it.**[459]

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[456] ***Re Artola Hermanos***, ***supra*** note 453 at 644.

[457] ***Re Artola Hermanos***, ***supra*** note 453 at 646.

[458] ***Re Artola Hermanos***, ***supra*** note 453 at 646.

[459] ***Re Artola Hermanos***, ***supra*** note 453 at 648.(Emphasis added). He also dismisses the proposition that a Court should yield to the court which first asserted jurisdiction, as he says:

> **That doctrine appears to me to be an entirely unreasonable one. There is this broad difference between yielding to the forum of the domicile and yielding to the forum of the first country which happens to pronounce a man bankrupt:- personal property is said to follow the person, and from that it follows that the forum of domicile has, by what has been sometimes called the fiction of law, a right by judgement against a bankrupt to divest him of all personal property and vest it in his assignees, and by the fiction to which I have referred that judgement, pronounced by the forum of the domicile, is said to have universal validity, and to be capable of transferring personal property locally situate beyond the jurisdiction of that forum. The forum, not of the domicile but of the country in which**

(continued...)

Fry, J. however, would not depart from the doctrines of private international law, as he argues that since the foreign trustee is able to claim local personal assets on the basis the *lex domicilii*, there was no need for a stay of proceeding.[460]

In Canada this issue was examined in ***re Stewart & Matthews***,[461] which dealt with a company incorporated in 1906 under the ***Manitoba Joint Stock Companies Act***. The company's head office was in Winnipeg. However, the company carried its business in St. Paul, Minnesota where it also kept its banking records, contracts, and documents. In 1914, the company was adjudicated bankrupt in Minnesota upon its own petition and a receiver was appointed. In 1915, a petition to wind up the company was presented to the Court by a Quebec shareholder in that company.[462] The Court stayed the proceeding notwithstanding the fact that the bulk of the Company's assets was real estate in Saskatchewan.[463] In reaching its decision, the Court took into account that: 1) real property is exclusively subject to the laws of the government within whose territory it is situated, and the bankruptcy order did not vest the land in the bankruptcy trustee and that 2) any creditor who recovered a judgment against the company in Saskatchewan could enforce it against the land,

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[459](...continued)
> **the debtor may have assets, has no such right to claim universal obedience to its judgement; it has no right to pronounce judgment which will extend beyond the personal assets locally situate within its jurisdiction.**

[460] ***Re Artola Hermanos***, ***supra*** note 453 at 650. cite for U.S.A and Canada.

[461] ***Re Stewart & Matthews*** (1916), 10 W.W.R. 1154, 26 Man. R. 277 (K.B.), Mathers, C.J.K.B. [hereinafter ***Stewart & Matthews***].

[462] ***Stewart & Matthews***, ***supra*** note 461 at 154-155.

[463] ***Stewart & Matthews***, ***supra*** note 461 at 159.

notwithstanding the bankruptcy order. On the other hand, the Court recognized that the Minnesota Court could restrain United States citizens from individual recoveries by an ***in personam*** order.[464] The decisive factor for the Court was apparently the fact that all the Canadian creditors and shareholder knew of, and participated in, the American bankruptcy.[465] The company's strong connections with the Minnesota Jurisdiction also played a significant role.[466] With these two considerations in mind, the Court addressed the motion of staying the present proceeding, saying:

> **The total value of the assets of the Company is estimated to be $144,463,14, and the total liabilities are $130,437,83, showing a nominal surplus of the shareholders of $13,975,31. It must be manifest to the most sanguine that the prospect of the shareholder realizing anything upon their shares is extremely gloomy. Under the circumstances, their position will not be improved by burdening the estate with the costs of dual winding up, nor will that of the creditors.**[467]

In ***re E.H. Clarke & Co.***,[468] the Supreme Court of Ontario ignored the previous judgment completely. In this case, E. H. Clarke & Co. in Canada, a branch of the house of E. H. Clarke & Co. New York, wired the Royal bank in New York to pay an amount of money to its home office in New York. However, the wire arrived after banking hours. Meanwhile, the firm in New York went into

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[464] ***Stewart & Matthews***, ***supra*** note 461 at 157-158.

[465] ***Stewart & Matthews***, ***supra*** note 461 at 156.

[466] ***Stewart & Matthews***, ***supra*** note 461 at 155.

[467] ***Stewart & Matthews***, ***supra*** note 461 at 159.

[468] ***Re E.H. Clarke & Co., Trustee v. Royal Bank of Canada*** (1923), 3 C.B.R. 593, 23 O.W.N. 277, 569 [1923] 1 D.L.R. 716 (Ont. S.C.), Fisher, J. [hereinafter ***re Clarke***].

bankruptcy, and its Canadian Branch made an authorized assignment under Canadian law. The issue which arose was which trustee was entitled to the wired amount of money.

Fisher, J. presumed that both the New York Bankruptcy Court and the Canadian Bankruptcy court had jurisdiction in this case, and moved to decide which of the two trustees would be entitled to the disputed amount of money transferred from Canada to the United States.[469]

As stated above, Fisher, J. did not question the jurisdiction of either court. Accordingly, he declared that there are two bankruptcies and two domiciles in New York and in Toronto.[470] Moreover, he said:

> **It would appear where there are concurrent bankruptcies each trustee should administer the assets locally within its jurisdiction. If E. H. Clarke & Co., Toronto, were not debtors carrying on business in Canada, as defined by our act, then the laws of Canada, under the comity of nations, would protect and turn over the assets to a foreign receiver...No question arises, on the facts in this case, as to the application of private international law**[471]

Finally, since Fisher, J. considered that the wired money to be still in Canada, he ruled that the Canadian trustee was entitled to it.[472]

The above cases indicate that a stay of proceedings may be ordered in Anglo-Saxon law only when a concurrent local bankruptcy is deemed to be useless, either because there are no assets in the local jurisdiction, or because the second bankruptcy

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[469] ***Re Clarke***, ***supra*** note 468 at 569.

[470] ***Re Clarke***, ***supra*** note 468 at 569.

[471] ***Re Clarke***, ***supra*** note 468 at 597.

[472] ***Re Clarke***, ***supra*** note 468 at 598.

would not affect the mode of distribution, which is rarely the case. As we have seen, under the traditional international bankruptcy law in the jurisdictions studied, a significant part of the foreign bankrupt's property may fall outside the realm of its domiciliary bankruptcy, since they only recognizes the effects of a foreign proceeding on unencumbered personal property.[473] Property falling outside the reach of a foreign bankruptcy may include.

(1) any property attached, before the appointment of the trustee in England and Canada, or at any time in the United States,

(2) all the bankrupt's assets, in cases where the foreign bankruptcy jurisdiction is not recognized,

(3) real property,

(4) all the bankrupt's property, if the foreign law is construed not to empower the trustee to collect assets abroad.[474]

Therefore, the adjudication of a debtor bankrupt outside England, Canada, or the United States, does not rule out the availability of assets in these jurisdictions to be administered under a second bankruptcy.[475]

This state of affairs begs the question: what happens to the bankrupt's property in the case of simultaneous bankruptcies?

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[473] In the case of the United States, such property should be unencumbered. In England and Canada, an attachment is recognized if it takes place prior to the bankruptcy.

[474] See, **Dalhuisen**, 1 ***International Insolvency***, ***supra*** note 38 at § 2.02[1] p 3-142-f.

[475] See, ***Dicey's Conflict of Laws***, 11th ed, ***supra*** note 97 at 1102.

In common law jurisdictions, the answer to this question is quite complex. In principle, a bankruptcy creates a worldwide estate subject to its administration, but in practice each bankruptcy administers the assets within its actual reach. However, under the Anglo-Canadian law, it is possible to grant an earlier bankruptcy some effects in the jurisdiction of a later bankruptcy, depending on when the bankrupt is perceived to have ceased to submit to the earlier bankruptcy's jurisdiction. A case at hand is ***re Eades***,[476] in which, the Canadian Court gave the after acquired property to the Canadian (later) bankruptcy, because it considered the English court had no jurisdiction over the person or the property of the bankrupt after he had changed domicile to Canada.[477]

However, in ***re Temple***,[478] the English Court approached this problem differently without following the reasoning of ***re Eades***.[479] In this case, the debtor was adjudicated bankrupt in England in 1927 without being discharged. In 1942 he was declared bankrupt again in Bombay, India. In 1943, upon the death of his mother, the debtor was entitled to some property in England. This raised the question as to which trustee is entitled to this property?[480]

In deciding the case, Romer, J. noted the lack of a statutory provision dealing

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[476] ***Re Eades, supra*** note 32 at 86.

[477] ***Re Eades, supra*** note 32 at 86.

[478] ***Re Temple, The Official Receiver v. The Official assignee of Bombay*** (1947), [1947] 1 Ch. 345, Romer and Roxburaph JJ. [hereinafter ***Re Temple***].

[479] ***Re Eades, supra*** note 32 at 86.

[480] ***Re Temple, supra*** note 478 at 345-346

with successive bankruptcies in different jurisdictions.[481] However, he apparently favoured the English trustee, as he stated:

> **I am quite unable myself to see on what principle this court should direct the transmission to India of this fund, knowing, as it does that there are English debts in the first bankruptcy which are unsatisfied.**[482]

G. SUMMARY AND CONCLUSION:

Several conclusions may be drawn from the above discussion:

(1) In dealing with bankruptcies involving a foreign element, Anglo-Saxon courts started (historically) from the notion that bankruptcy law is by nature a territorial law, which cannot operate out of its own force outside the *forum's* jurisdiction. The territorialism of early bankruptcy law, especially in England, was genuinely doctrinal and was applied consistently to both foreign and local bankruptcies, at times, even to the detriment of local creditors.[483] Yet, this territorialism could prove quite costly especially to a country with extensive international trading activity such as Great Britain in the 18th and 19th century. English bankruptcy law responded to this economic reality, by abandoning the pure and consistent territorial stance of ***Cleve* v. *Mills***.[484] Thus, English law, and by consequence Canadian law, permitted a foreign bankruptcy to affect the rights of

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[481] ***Re Temple***, ***supra*** note 478 at 345.

[482] ***Re Temple***, ***supra*** note 478 at 348.

[483] ***Captain Wilson's case***, ***supra*** note 15 and accompanying text; see also ***Cleve* v. *Mills***, ***supra*** note 10; ***supra*** note 133 and accompanying text; ***Philips* v. *Hunter***, ***supra*** note 85; ***Oakey* v. *Bennett***, ***supra*** note 159.

[484] See, ***supra*** note 133 and accompanying text.

creditors who attached local personal property after the bankruptcy on the grounds of ***mobilia sequuntur personam***. Moreover, England also took the lead of enacting legislation that extended the powers of it bankruptcy trustee to personal and real property abroad.[485] The double standard with regards to treatment of foreign and local bankruptcy created by the enactments suggests that English legislators were not particularly concerned with doctrinal consistency or with providing a comprehensive solution to the problem of international bankruptcy. Rather, they were primarily interested in protecting English commerce and local creditors.

This correspondence between economic needs and the law is observed by jurists. For example in ***Sill* v. *Worswick***,[486] the plaintiff maintained that in answering the question, "**whether an assignment under the bankrupt laws, does not operate as fully as such an assignment by the bankrupt himself?**",[487] one should take into consideration the nature of English commerce, arguing that:

> **[t]he Court will, if possible, put this construction [the assignment by the debtor] on the assignment by the commissioners, because the persons who are most likely to become the subjects of those laws, namely, traders of the most extensive dealings and connections, have in general, great part of their property abroad, which justice requires should be divided among their creditors.**[488]

This proposition was expressly endorsed by judges, such as justice Brooke

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[485] ***Bankruptcy Act, 1824* (U.K.)**, ***supra*** note 168; and subsequently, ***Bankruptcy Act, 1883* (U.K.)**, ***supra*** note 18; ***Bankruptcy Act, 1914* (U.K.)**, ***supra*** note 19; ***Insolvency Act, 1986* (U.K.)**, ***supra*** note 172.

[486] ***Sill***, ***supra*** note 14.

[487] ***Sill***, ***supra*** note 14 at 668.

[488] ***Sill***, ***supra*** note 14 at 668.

who stated:

> **This protection afforded to the property of a resident subject, which is situated in a foreign country, is not imaginary, but real. The executive power of this kingdom protects the trade of its subjects in foreign countries, facilitates the recovery of their debts, and if justice be delayed or denied, the King by the intervention of his ambassadors demands and obtains redress....The property which this country protects it has a right to regulate. And in fact our bankrupt laws have made such regulation. The statute 13 Eliz. c. 7, enables the commissioners to take the bankrupt's money, goods, chattels, wares, merchandizes and debts, wheresoever they may be found or known. This expression is very extensive, and seems to look beyond the debts and effects of a trader locally situated in this kingdom. In a country, a great part of whose commercial capital is employed abroad, it is peculiarly proper that such capital over which the trader has a disposing power, although situated out of the kingdom, should be considered as referable to the domicilium of the owner**[489]

Brooke's explanation was well understood to the Americans. In ***Ogden* v. *Saunders***, Justice Johnson says regarding the considerations behind the rule of the foreign discharge in the English law:

> **It was all important to a great commercial nation [that is England], the creditors of all the rest of the world, to maintain the doctrine as one of universal obligation, that the assignment of the bankrupt's effects, under a law of the country of the contract, should carry the interest in his debts, wherever his debtor may reside; and that no foreign discharge of his debtor should operate against debts contracted with the bankrupt in his own country.**[490]

Johnson, J. here did not intend to endorse the English doctrine, but only to explain its rationale with reference to British interests, and to argue conversely that since the United States did not have a similar commercial leverage, it did not need to assume a liberal notion in international bankruptcy cases. In fact, this perception of

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[489] ***Philips* v. *Hunter***, ***supra*** note 85 at 405-406.

[490] ***Ogden* v. *Saunders***, ***supra*** note 135 at 360.

the English law's underlying rationale, led the United States to deny recognition for English trustees within their jurisdiction. In ***Milne* v. *Moreton***, Yeates J. states that he would not grant protection to the English assignees who preferred to commence a proceeding under English law, because it is the law "**of the government to which they owe allegiance, and from whom they were entitled to protection.**"[491] Thus, for Yeates, J. the issue of recognizing foreign bankruptcies in the United States is not one of conflict of laws, but of underlying policy. In this vein, Lowell states:

> **It is, therefore, not quite accurate to treat this point as one of conflict between the law of the foreign debtor's domicile and the law of the *situs* of his property here. We have no law of the *situs* giving preference to our creditors, but simply refuse to interfere and aid the foreign trustee against the legal diligence of our creditors who may have the good fortune to be able to attach or take in execution the effects here before the trustee has removed them.**[492]

The United States international bankruptcy law, in turn, reflects developments in its commercial history. The United States engaged significantly in world trade only in the beginnings of this century. Therefore, its jurisprudence in the 18th and 19th century, especially in the area of international bankruptcy, reflected its protectionist stance.[493] ***Harrison* v. *Sterry***,[494] came shortly after independence, when

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[491] ***Milne* v. *Moreton*, *supra*** note 112 at 369.

[492] **J. Lowell, "Conflict of Laws as Applied to Assignments of Creditors"** (1887-1888) 1 Harvard Law Review 259 at 261. [hereinafter **Lowell, "Conflict of Laws as Applied..."**]. Italics in the original.

[493] **W. Rose, "Extraterritorial Action by Receivers"** (1933) 17 Minnesota Law Review 704 at 733. [hereinafter **Rose, "Extraterritorial Action..."**] wrote *a propos* the need to change the doctrine applicable to assignments in the United States:

> **The present doctrine, which at one time may**

(continued...)

the United States overriding concern was to assert its sovereignty and protect its jurisdiction from the remnants of the British Colonialism.[495] Moreover, it is notable that the United States did not definitively enact legislations extending its trustees powers worldwide before the second half of the century,[496] when it emerged as a significant actor in world commerce.

(2) In dealing with foreign bankruptcies, Anglo-Canadian law operated strictly within the framework of private international law. By treating a bankruptcy as an assignment of personal property, and applying to it ***mobilia sequuntur personam,*** England and Canada could only recognize a foreign assignment originating from the debtor's domicile. Thus, before this rule was modified,[497] the Anglo-Canadian international bankruptcy law was well justified by the legal theories of private international law. However, this theoretical consistency was lost with the judgment of ***Re Davidson's Settlement Trust***. It is true, that the decisions in ***re Davidson's***

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[493](...continued)

> **have served a political and economic need, has little except short-sighted selfishness to recommend it today, when the conditions upon which it was founded are matters only of history and reminiscence. As the law stands it is an archaic survival of a provincial culture - redolent of the past, symbolic of an individualistic, pioneer society.**

[494] ***Harrison v. Sterry***, ***supra*** note 21.

[495] This attitude is confirmed in ***Folliot***, ***supra*** note 37.

[496] In 1952, the Bankruptcy Act was amended specifically to include the foreign bankrupt's property in the estate. See, ***supra*** note 181.

[497] ***Re Davidson's Settlement Trust***, ***supra*** note 247.

Settlement Trust, and other similar cases such as ***re Blithman***,[498] ***Gailbraith* v. *Grimshaw***,[499] and ***re Eades***[500] justify the use of comity in international bankruptcy cases.[501] Justice Romilly explains that a foreign judgement may be recognized if the foreign court is assessed to have international jurisdictions..[502] Yet, so construed, comity should not be restricted to personal property. Upholding such an understanding of comity, and at once also, the application of *lex situs* on real property, entails a stark theoretical contradiction.

Against this background, it can be easily maintained that the divisive and dwarfed treatment of foreign bankruptcies gained normative status in Anglo-Canadian law. This is true, notwithstanding the few cases such as ***Solomons* v. *Ross***,[503] ***re Kooperman***,[504] ***William* v. *Rice***,[505] and ***re Sefel***,[506] which recognize a foreign bankruptcy *qua* bankruptcy. All these cases represent departures from the accepted doctrines of private international law, and were decided according to their special

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[498] ***Re Blithman***, ***supra*** note 240. See specifically, note 244 and accompanying text.

[499] ***Gailbraith*** in H. L, ***supra*** note 323. See specifically note 330 and accompanying text.

[500] ***Re Eades, supra*** note 32. See also, ***supra*** note 263 and accompanying text.

[501] See also, ***re Anderson***, ***supra*** note 215, and ***supra*** note ? and accompanying text..

[502] See, ***supra*** note 243 and accompanying text.

[503] ***Solomon v. Ross***, ***supra*** note 36 at 131n.

[504] ***Re Kooperman***, ***supra*** note 320.

[505] ***Williams* v. *Rice***, ***supra*** note 286.

[506] ***Re Sefel***, ***supra*** note 310.

circumstances. Moreover, since they were not adequately justified, they failed to formulate a new doctrine which will insure the systematic application of similar results in future cases. In other words, these cases failed to be insitutionlized at the doctrinal level and thus to modify, much less replace the prevailing practice. Thus, for example, in ***Solomons* v. *Ross***,[507] the first and arguably most significant case in English law, the Court applied a foreign relation back doctrine, and in effect, recognized a foreign bankruptcy rule, thereby departing from the traditional notion of assignment. In doing so, the Court also went against basic principles of private international law, especially, in view of Lord Loughbouroghs's statement that "**[t]he system of bankrupt laws savours of a penal nature**".[508] Thus, it is understandable that in ***Gailbraith* v. *Grimshaw***,[509] the Court refused to follow the reasoning of ***Solomons* v. *Ross***. The Court in ***Solomons* v. *Ross*** had to acknowledge and justify elaborately its implementation of a foreign penal rule. Without such a justification, it could not become authoritative.

Such a justification was also lacking in ***Re Kooperman***,[510] in which as one might recall, the English Court granted a Belgian trustee the right to collect British real property, thereby going against the *lex situs* rule in private international law.[511]

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[507] ***Solomon v. Ross***, ***supra*** note 36 at 131n.

[508] See, ***supra*** note 58 and accompanying text.

[509] See, ***Gailbraith in H. L***, ***supra*** note 323.

[510] ***Re Kooperman***, ***supra*** note 320.

[511] ***Macdonald v. Georgian***, ***supra*** note 314.

Since the judgment was not adequately justified, it remained an isolated precedent.[512] Admittedly, it could be said that the Court in ***re Kooperman*** set a precedent by basing its judgement upon discretion.[513] However, its reasoning was not followed in any of the long list of authoritative cases on international bankruptcy.

The Canadian courts came very close to departing from the traditional norms of international bankruptcy law. Several Canadian international bankruptcy cases, such as ***Re Stewart & Matthew,***[514] ***Brand* v. *Green,***[515] ***Williams* v. *Rice,***[516] **and** ***re Premium Plywood***[517] applied a rather liberal interpretation of comity. Unfortunately, however, the traditional approach continued to prevail and like ***Solomons* v. *Ross***, the former Canadian cases did not gain authoritative stature. The Canadian liberal applications of comity, cited tersely in justification of the decisions, could not substitute the prevalent traditional notions of private international law and comity

Moreover, two recent cases, ***Orient Leasing*** and ***re Sefel*** attest forcefully that the Canadian international bankruptcy law did not succeed in incorporating a new and more liberal application of comity at the doctrinal level. In the former, the Court entirely ignored the Canadian liberal cases in international bankruptcy, and

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[512] But see, ***supra*** note 321 and accompanying text.

[513] ***Cheshire's Private International Law***, 12th ed., ***supra*** note 12 at 914 n20.

[514] ***Stewart & Matthews***, ***supra*** note 461.

[515] ***Brand***, ***supra*** note 271.

[516] ***Williams v. Rice***, ***supra*** note 286.

[517] ***Re Premium***, ***supra*** note 333.

espoused a strict territorial stand by refusing to recognize the Japanese reorganization plan. ***Re Sefel,*** on the other hand, in effect destroyed the embryo of a real Canadian comity-driven doctrine for international bankruptcy. In this case, much as it would have liked to, the Court was unable to find a basis in comity or any other private international law doctrine that would allow it to recognize a foreign priority.[518] Thus, the Court had to resort to a justification completely external to the framework of private international law, making the case of marginal importance to that tradition.

Furthermore, the cases which recognize foreign bankruptcies *qua* bankruptcies, do not represent a flexible application of private international law,[519] but rather reveal a genuine effort by the judges to address the deficiencies evident in this area of law. They also testify to the judges' willingness to reject the accepted private international law doctrines as outdated and unjust, thus, sending a clear signal that it is time to move forward in the law applicable to international bankruptcies. In

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[518] ***Re Sefel***, ***supra*** note 310 at 107.

[519] But see, Honsberger, "**Canadian Recognition of Foreign**, ***supra*** note 11 at 213-214, where he argues that Private international law is flexible, stating:

> **Conflict of laws rules are not a procrustean bed that cannot be changed. There must be flexibility. Situations vary and cannot always be solved by one rigid rule and when a rule is applied it must be applied with "common sense": *Charron v. Montreal Trust Co.*, [1958] O.R. 597, 15 D.L.R. (2d) 240 at 244 (C.A.). Moreover, the rules do and must keep changing for as Lord Denning has said (*Trendtex Trading Corp. v. Central Bank of Nigeria*, [1977] Q.B. 529, [1977] 2 W.L.R. 356, [1977] 1 All E.R. 881 at 889 (C.A.):**
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> > **It is certain that international law does change. I would use of international law the words Galileo used of the earth: "But it does move." International law does change, and the courts have applied the changes without the aid of any Act of Parliament.**

this vein, Forsyth, J. comments that ***re Sefel*** **"illustrate[s] how the realities of modern day commerce may require amendments to the bankruptcy Act."**[520]

In the United States, dealing with foreign bankruptcies through the notion of comity, allowed a more unified treatment of bankruptcy *qua* bankruptcy. The U.S. courts, in theory, were less resistant to the ***idea*** of recognizing a foreign bankruptcy judgement *per se*. However, in practice, the protectionist interpretation of comity rarely permitted this to happen. The few cases which recognized a foreign bankruptcy rule, notwithstanding opposition by local creditors,[521] were ultimately rejected as unacceptable departures from the norm.[522]

In addition to its theoretical and doctrinal problems, the traditional approach in Anglo-Saxon international bankruptcy law suffers from other major shortcomings:

1- Inefficiency: Since the traditional international bankruptcy law permits individual attachments, race of diligence and simultaneous bankruptcies, it does not ensure maximizing the value of the bankrupt's estate through an efficient consolidated administration.

2- Costly: The law allows for simultaneous bankruptcies. Although local concurrent bankruptcies may help to prevent individual attachments- absent the possibility of recognizing a foreign bankruptcy- they almost invariably raise administrative cost substantially, thus diminishing the residual assets available for

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[520] ***Re Sefel***, ***supra*** note 310 at 107.

[521] ***Canada Southern Ry. v. Gebhard***, ***supra*** note 405.

[522] See, ***supra*** note 420.

distribution.

3-Discriminatory: The traditional law could discriminate between creditors for various reasons. In United States, under the traditional international bankruptcy law, the doctrine of the opposing creditors allows for preferential attachments of local property, including personal property. Justice Lowell comments in this regard that :

> **a decree in a foreign country or a sister State by which the property of the bankrupt resident in such country or State has been taken from him and vested in trustees for his creditors, will not receive recognition in our Courts [the United States courts] as against the attachments of creditors who are citizens of the *forum* of the attachment, even when the decree precedes the attachment.**[523]

Moreover, he even contended that "**[a] few decisions were supposed to go even further, and to hold that a trustee thus appointed [under a foreign bankruptcy law]had no standing in our Courts; and that his title could not even prevail against that of the bankrupt himself**"[524]

The traditional Anglo-Saxon law also produces discriminatory results since it does not recognize a foreign relation back doctrine. Thus, creditors who execute individually on the bankrupt's personal property prior to trustee's appointment, are entitled to retain the fruit of their diligence to the detriment of other creditors.[525] This goes against the objectives of collective bankruptcy proceedings, disregards the

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[523] Lowell, "**Conflict of Laws as Applied...**", ***supra*** note 492 at 260.

[524] Lowell, "**Conflict of Laws as Applied...**", ***supra*** note 492 at 260; see also ***supra*** note 143 which lists the cases holding this proposition.

[525] ***Nadelmann***, "***Solomons v. Ross***, ***supra*** note 12 at 280. He based his assertion on ***Gailbraith in H. L***, ***supra*** note 323.

basic aim of equality in bankruptcies, and favors the race of diligence which bankruptcy law has always tried to prevent. As many cases illustrate,[526] the race of diligence in an international bankruptcies permits the swiftest, best informed and most diligent creditors to attach the debtor's assets abroad.[527] Moreover, unless a local bankruptcy is promptly declared, an open race of diligence is instigated over the bankrupt's real property, which does not come in any way under the foreign bankruptcy's effect. Although these features of the law which allow for a race of diligence are not deliberately intended to discriminate legally against the foreign creditor *per se*, in practice they mainly affect foreign creditors because of the so called "**underhand preference**".[528] Distant creditors, face technical difficulties when they try to share in the bankrupt's assets.[529] Furthermore, creditors in general vary in their likelihood for receiving payments from the assets of the bankrupt which are not subject to the bankruptcy jurisdiction, depending on their legal and financial powers. Those who have the requisite information, finances, and legal resources are better equipped to trace the bankrupt's assets and ensure repayment of their debts, to the detriment of other less fortunate ones who may be unaware of the asset's existence

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[526] *E.g.*, ***Israel-British Bank (London) Ltd***, ***infra*** note 579; also ***Herstatt***, ***infra*** note 531.

[527] **K. H. Nadelmann**, "**Legal Treatment of Foreign and Domestic Creditors**" (1945-1946) 11 Law and Contemporary Problems 698 at 698. [hereinafter **Nadelmann**, "**Legal Treatment of Foreign...**"].

[528] **Lowell**, "**Conflict of Laws as Applied...**", ***supra*** note 492 at 266.

[529] **Nadelmann**, "**Legal Treatment of Foreign...**", ***supra*** note 527 at 697.

or may not have the resources to satisfy their claims from the assets. This leads to discrimination against some foreign creditors, especially so because the jurisdictions under study do not recognize a foreign reorganization or discharge schemes, or have different rules for cases when a given foreign reorganization or discharge does not constitute a bar to actions against the bankrupt. Indeed, in many cases, such schemes bind local creditors and property only, leaving creditors outside the reorganizing or discharging jurisdiction free to satisfy their debts from the foreign assets. This enables creditors who have the means to attach the bankrupt's effects abroad where the arrangement is not recognized to receive more than other creditors under the arrangement.[530] Commenting on this aspect of the law, Nadelmann quotes with approval Henry Brinklow who "**called "the rich" the beneficiaries of priority system: "For lyghtly *[sic]* the rich have the first knowledge of soch *[sic]* things**".[531]

5-Allowability of Fraud: The law does not serve particularly well to prevent cross border fraudulent transaction because it does not recognize foreign voidance

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[530] **Nadelmann**, "**Compositions-Reorganizations...**", ***supra*** note 369 at 829.

[531] **Nadelmann**, "**Legal Treatment of Foreign...**", ***supra*** note 527 at 698-699. This statement has been confirmed recently with the collapse of the Herstatt Bank where the Bank's biggest creditors were the first to attach. See, ***infra*** text after note 594; see also, ***Israel-British Bank (London) Ltd***, ***infra*** note 579; ***Banque de Financement***, ***infra*** note 591; **Honsberger**, "**Conflict of Laws and...**", ***supra*** note 2 at 635; **Joseph Becker**, "**International Insolvency: The Case of Herstatt**" (1976), 62 American Bar Association Journal 1290 at 1992 [hereinafter **Becker, International Insolvency**]; **Stefan A. Riesenfeld**, "**The Status of Foreign Administrators of Insolvent Estates: A Comparative View**" (1976) 24 American Journal of Comparative Law 288, 288-90. [hereinafter **Riesenfeld, The Status of Foreign Administrators**].

rules.

6- The traditional laws of the studied jurisdictions may subject the debtor to excessive hardship since the foreign discharge rule is not always recognized. Thus, a debtor might be required to pay a debt after being totally divested of property, and although its ability to execute local arrangements may be totally impaired.[532]

[532] Nadelmann, "**The Recognition of American...**", ***supra*** note 368 at 782.