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Reciprocal Influence of British and United States Law

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Reciprocal Influence of British and United States Law: Foreign Sovereign Immunity Law From The Schooner Exchange to the State Immunity Act of 1978

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I. INTRODUCTION

The influence of British and United States courts on each other's statutory and decisional law has been primarily indirect.[1] Although few fundamental differences exist between the legal principles, methods, and concepts of the two major common law jurisdictions,[2] the courts in both countries have resisted the use of the other's case law.[3] This is unfortunate because a United States

1. *See generally*: Kavass, Book Review, 11 VAND. J. TRANSNAT'L L. 853, 864 (1978), (Elkind, ed. THE IMPACT OF AMERICAN LAW ON ENGLISH AND COMMONWEALTH LAW). This review is an excellent discussion of the limited transnational influence of United States law. The book reviewed is a survey of general topics in the subject area.

2. *Id.* at 863.

3. *Id.* at 862-64.

or an English case[4] might provide a fresh perspective for a domestic court that otherwise feels bound by a previous line of reasoning. Since cases from foreign jurisidictions are most relevant in dealing with a question of international or transnational law, it is not surprising that one of the few examples of a direct reciprocal influence between British and American courts is a mixed question of international and domestic law, the problem of sovereign immunity. The development of similar concepts of foreign sovereign immunity law by British and United States courts not only provides a rare example of direct reciprocal influence, but also provides a useful case study in this unusual process. The dual nature of foreign sovereign immunity law at first encouraged British and American courts to draw upon each other's precedents and later, to be more reluctant to use them. Few other areas of British-American legal interaction allow as clear an illustration of interaction's usefulness or difficulties. This note will describe and explain the evolution of Anglo-American foreign sovereign immunity concepts from the first formulation by Chief Justice Marshall in *The Schooner Exchange v. McFadden,*[5] to the final codification of the restrictive theory of immunity[6] in the United States Foreign Sovereign Immunity Act of 1976[7] and the United Kingdom's State Immunity Act 1978.[8] On one hand, this interaction between United States and British law demonstrates that the use of foreign common law precedents by domestic courts can be misleading and can produce wrong conclusions and doctrines. On the other hand, this interaction demonstrates that careful use of another country's common law precedents can provide a fresh perspective on a similar legal doctrine and speed development of the law. The passage into law of the State Immunity Act 1978 pro-

4. I have occasionally used "English," in a more specific sense. The writer is aware that there are two legal systems in the United Kingdom. The term "British" is used more often because it more accurately refers to the constitutional system as a whole and the fact that the English and the Scots are one nation for purposes of foreign relations.

5. 11 U.S. (7 Cranch) 478 (1812).

6. Under the restrictive theory of foreign sovereign immunity, a foreign sovereign has immunity before domestic courts only for public acts or functions. He remains liable for his private or commercial acts. By contrast, under the absolute theory a sovereign has immunity for all acts.

7. 28 U.S.C. § 1330, 1602-1611 (1976).

8. The State Immunity Act, 1978 (c. 33). (Uncodified) *reprinted in* 17 I.L.M. 1123 (1978).

vides a useful vantage point from which to survey the entire process as a study of British-American legal interaction because the act is the most advanced development of Anglo-American foreign sovereign immunity law.

II. The Development of the Concept of Absolute Immunity

A. *The Theory*

The Anglo-American legal conception of foreign sovereign immunity developed from national concepts of sovereignty. These domestic law concepts originally developed from natural law conceptions of the divine right of kings and the ancient maxim that "the king can do no wrong."[9] The king personified the state. Sovereigns could not be impleaded in domestic courts, because the courts acted in the king's name.[10] Positivist philosophy, which played a powerful role in the intellectual world at the time of the formulation of the doctrine of foreign sovereign immunity, contributed to an absolute view of the sovereign as "illimitable" and "indivisible."[11] Both natural law and positivist domestic conceptions of sovereignty had a strong influence on British and American judges, when courts began to regard foreign sovereigns as equally immune from domestic jurisdiction.

The international law of foreign sovereign immunity is premised on a different rationale than domestic sovereign immunity law. While domestic sovereign immunity law is primarily concerned with the status of the sovereign, foreign sovereign immunity law focuses on the practical functions of the sovereign rather than his status.[12] The "theory of diplomatic function,"[13] the preeminent rationale for modern foreign sovereign immunity law,[14]

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9. Pugh, *Historical Approach to the Doctrine of Sovereign Immunity,* 13 La. L. Rev. 476, 477-79 (1953); S. Sucharitkul, State Immunities and Trading Activities in International Law 4 (1959).

10. Sucharitkul, *supra* note 9, at 4.

11. D. O'Connell, II International Law 842, 844 (1970).

12. O'Connell, *supra* note 10, at 843. "The true approach to the question of sovereign immunity, then, is not a theoretical one at all but one of expedience tempered by customary law."

13. *See generally,* Rahimtoola v. Nizam of Hyderabad [1958] A.C. 379. (Opinion of Lord Denning).

14. Many courts would not articulate the rationale as "the theory of diplomatic function." Comity, the equality of sovereigns or some other rationale might be stated, but when courts differentiate between sovereign and non-sovereign functions they are usually applying the theory of diplomatic function to

states that only the sovereign functions of a foreign government should be immune from the jurisidiction of local courts. In disputes arising from sovereign functions of a foreign government, this theory recognizes that the best way to avoid causing embarrassment to the other branches of the domestic government and the foreign sovereign is to handle the matter through diplomatic channels.[15] In controversies arising from commercial and other non-sovereign functions of the foreign sovereign, however, this theory subjects the foreign sovereign to domestic jurisdiction because these functions are similar to those of the private trader and present little possibility of embarrassment. Although the theory of diplomatic function is in accord with modern concepts of government in which a sovereign is usually not a person but an entity with several parts and responsibilities, the courts have had difficulty differentiating between sovereign public acts (*jure imperii*) and non-sovereign private acts (*jure gestionis*).

The absolute doctrine of immunity, which allows the sovereign immunity for almost all acts, is now almost universally viewed as unjust because it enables public merchant ships and traders to avoid the legal duties and responsibilities of the private trader. Under this theory, a sovereign may perform in the same capacity as a private businessman, but if a dispute arises, the sovereign remains immune from suit simply because of his status. Nevertheless, the absolute doctrine of immunity was almost fully embraced by United States and British courts in the 1920s,[16] while most of the world was adopting a restrictive practice.[17] The rationales of the equal independence and dignity of all sovereigns that are the basis of the absolute doctrine of immunity are also underlying rationales for the restrictive approach, but the preeminent restrictive rationale is the practical consideration of avoiding diplomatic embarrassment.

The British and United States doctrines of absolute immunity were misconceptions that developed from the application of domestic sovereignty principles to international disputes involving

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avoid embarrassment to the conduct of foreign relations. Prominent international law scholars such as Professor O'Connell have called the theory of diplomatic function, "the true approach to the question of sovereign immunity." O'CONNELL, *supra* note 10, at 843.

15. *See* [1958] A.C. 379 at 422-23 (Opinion of Lord Denning).

16. *See* The Porto Alexandre [1920] P. 30. *Berrizzi Bros. v. The Steamship Pesaro*, 271 U.S. 562 (1926).

17. Sucharitkul, *supra* note 9, at 162-256.

foreign sovereigns.[18] Without a strong underlying emphasis on diplomatic function, as well as sovereign status, the concept of sovereign immunity was bound to expand. The process was greatly aided by the tendency of British and American courts to misunderstand and misapply each other's precedents.

B. *The Beginning*

The first formulation of an international legal doctrine of sovereign immunity occurred in Chief Justice Marshall's United States Supreme Court opinion in *The Schooner Exchange v. McFadden.*[19] Until recently, almost every British or American foreign sovereign immunity opinion felt obligated to cite *The Schooner Exchange* as the earliest precedent and one of the most important. Although the opinion has been used as authority for an almost absolute doctrine of immunity,[20] a close reexamination of the opinion shows that Marshall applied some very general principles of law to set forth a limited number of cases in which courts should not exercise jurisdiction over foreign sovereigns.[21]

In *The Schooner Exchange,* a vessel owned by a United States citizen was seized in mid-Atlantic by the French government and outfitted in France as a public armed ship. Later, a storm forced the ship into Philadelphia harbor where it was libelled by the former owner. The issue was whether principles of domestic or international law prevent a United States court from exercising jurisdiction over a foreign warship. As the first judge to address this issue, Marshall found it necessary to rely on "general principles" of law as well as cases "in some degree analogous" to the case at bar.[22]

Marshall discovered a set of general principles in the "practice of nations" and the writings of the continental legal theorists, Vattel and Bynkershoek. The only case authority cited by Mar-

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18. "The survival of this archaic practice in international spheres is manifested by the fact that even today English courts still generally refer to sovereigns in their personified form; that is to say, they refer to foreign states as foreign sovereigns . . ." *Id.* at 4.

19. 11 U.S. (7 Cranch) 478 (1812).

20. *See, Berizzi Bros. v. The Steamship Pesaro,* 271 U.S. at 574.

21. Marasinghe, *A Reassessment of Sovereign Immunity,* 9 OTT. L. REV. 474, 492 (1977).

22. 11 U.S. (7 Cranch) at 481.

shall was the obscure Netherlands case of *The Spanish Ships*[23] found in Bynkershoek's writings. Although both the writings of the continental theorists and *The Spanish Ships* decision implied a restrictive approach to sovereign immunity with an emphasis on comity and diplomatic function,[24] Marshall's analysis emphasized status over function, but concluded that foreign sovereign immunity was limited to certain exceptions from a general rule of complete domestic sovereignty. These general principles provided that:

> (1) The jurisdiction of the courts is a branch of the nation's jurisdiction as an independent sovereign power; (2) the jurisdiction of the nation is unlimited and absolute within its own territory and any restriction upon it is a diminution of its sovereignty; (3) all exceptions, express or implied, can derive only from the sovereign; (4) all distinct sovereignties in the world have equal rights and equal independence; (5) all nations of the world have consented to relax their complete jurisdiction in certain circumstances, because intercourse between nations has a mutual benefit; and (6) where nations have consented, either explicitly or implicitly, to relax their jurisdiction, subjection to jurisdiction is a violation of international practice and a diminution of sovereignty because it is an affront to the equality and independence of the foreign sovereign.

Applying these principles, Marshall found only three classes of cases in which nations had consented to relax their jurisdiction. In the first instance nations had generally recognized that a sovereign was immune from arrest or detention within a foreign territory. Provided that the foreign sovereign entered the foreign territory with the knowledge or consent of the territorial sovereign, the traditional view stated that the foreign sovereign was immune from the territorial sovereign's jurisdiction because subjection would be a diminution of the foreign sovereign's equality and dignity. In the second class of cases, nations had granted immunity to the diplomats of the foreign sovereign. The territorial sovereign impliedly consents to the foreign diplomats' immunity because the diplomat is a representative of the sovereign. The rationale of comity becomes important here, because subjection might cause the foreign sovereign to extend his jurisdiction over the domestic sovereign's diplomats in his country and the purposes of diplomacy would be impossible to fulfill. The third class

23. *Id.* at 488.

24. *See* Marasinghe, *supra* note 21, at 486.

is where the sovereign consents to cede a portion of his jurisdiction by allowing foreign troops to pass through his dominions. The sovereign's consent implies a freedom from jurisdiction, because subjection would detract from the discipline of the foreign sovereign's troops and the purposes for which immunity had been allowed.

After setting up this framework of analysis containing a group of general principles and a list of exceptions, Marshall applied it to the facts of the case and found *The Schooner Exchange* to be a foreign warship immune from the jurisdiction of United States courts. His method of application, however, is unclear. Marshall appears to have decided that warships were immune by analogizing the facts of the instant case to the third class of exceptions from jurisdiction, the case of foreign armies crossing another sovereignty with consent. At the same time, however, the Chief Justice found that this analogy was not perfect and that a different rule applied: nations have traditionally given foreign warships an implied license to enter their ports with immunity unless prior notice is given. Some analysts have suggested that Marshall was creating a fourth category of exceptions to jurisdiction.[25] Although it is not clear which method Marshall was using, either method of applying his general principles has a tendency to expand the categories of exemption from local jurisdiction.

The general principles and exceptions outlined by Marshall have a tendency toward expansion, because their underlying rationales of the equality and independence of all sovereigns are linked to the personal and status-centered conceptions of domestic sovereign immunity. Marshall's opinion transferred these conceptions into the international law of sovereign immunity. Indications run through the opinion that the theory of diplomatic function was a present, but not clearly articulated, rationale in Marshall's analysis. Diplomatic considerations and practice are part of the manner of determining how exceptions are made, and Marshall stated that subjection of diplomats or foreign armies would frustrate diplomatic or military "purposes" (functions). In addition, the latter part of the opinion asserts that military warships carry out a sovereign function.[26] Despite these references, the predominant impression of Marshall's opinion is that sover-

25. *Id.* at 492.

26. At the end of his lengthy discourse, Marshall accepted the certification of the executive that the French ship was immune.

eignty derives from status and that sovereign status is the preeminent consideration in determining immunity. If Marshall had emphasized the functional diplomatic rationale behind the international law of sovereign immunity, it is possible that these considerations might have checked the expansive principles, exceptions, methods, and underlying rationales of *The Schooner Exchange* from growing toward an absolute doctrine. Also, this emphasis might have checked the tendency of later British and American judges to apply domestic conceptions of sovereignty to foreign sovereigns. It is unfair to be too critical of Marshall since his opinion was the first attempt to formulate a doctrine of foreign sovereign immunity. No one could have foreseen the explosive growth in government shipping and trading that was to begin at the end of the century and, despite this development, Marshall's general principles of immunity are still valid reasons for granting immunity to the sovereign functions of a foreign sovereign.

C. *The Expansion of the Sovereign Immunity Concept*

Eight years after *The Schooner Exchange* was decided, a British court was confronted by a similar set of facts in *The Prins Fredrik*.[27] A Dutch warship was brought into an English port with the assistance of salvors. The salvors had the ship arrested, claiming a right of salvage. The captain asserted that the English courts had no jurisdiction over a foreign warship. There was only one slight difference in the facts: *The Prins Fredrik* was carrying a cargo of spices.[28]

The influence of *The Schooner Exchange* on two of the advocates who argued the case[29] was enormous. Their lines of argument and authorities were admittedly borrowed from Marshall's opinion. Bynkershoek and Vattel were cited and the case of *The Spanish Ships* was the only important precedent besides *The*

27. 165 Eng. Rep. 1543 (1820).

28. This fact was not significantly discussed in the case, but Lord Brett, in *The Parlement Belge*, [1879-80], 5 P.D. 197, may have interpreted this point to mean that a public ship engaged partially in trading activities should have immunity.

29. Prior to 1859, practitioners in the high court of admiralty were distinct from ordinary barristers. The King's Advocate took the place of the attorney general and the admiralty's interest was represented by an Advocate of the Admiralty.

Schooner Exchange. The advocates' arguments were similar in structure to Marshall's argument and they used the same general principles, rationales, and classes of exceptions to jurisdiction.

The Advocate of the Admiralty's argument differed in one significant respect from that of the King's Advocate. His interpretation of foreign sovereign immunity included a category that was broader than any announced by Marshall in *The Schooner Exchange.* In short, the Advocate of the Admiralty argued that a broad class of public property belonging to a foreign sovereign and destined for a public use was exempt from the jurisdiction of the English courts because judicial proceedings would divert them from public uses.[30] The rationale for this category resembles one of Marshall's explanations for his second and third categories of exemption: Foreign diplomats and military forces would be unable to carry out their purposes if they were subjected to local jurisdiction.[31] Nowhere in his opinion did Marshall create as broad a category as "public property destined to public use." The problem with this broader category is the open-endedness of the phrase "destined to a public use." Almost all public property is conceivably immune because all uses are conceivably "public." Thus, although military ships clearly satisfy the requirement of "public property destined to a public use," later courts have also held that government-owned trading ships fit into the same category.

The Advocate of the Admiralty's reference to a category of immune public property might have remained obscure if Sir William Scott, the presiding admiralty judge, had chosen to articulate his reasons for resolving *The Prins Fredrik* by summoning the Dutch

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30. The Advocate stated:

> Now, we submit that there is a class of things which are not subject to the ordinary rules applying to property: which are not liable to the claims or demand of private persons; which are described by civilians whose language and reasoning is frequently adopted by writers on the general law, as *extracommercium* and *quorum non est commercium* and in a general enumeration are denominated *sacra, religiosa, publica-publus usibus destinata.* If a more specific enumeration be made, amongst these will be found the forum, the basilica and walls of a city. The things which are allowed to be and from their nature must be, exempt and free from the claims of individuals: inasmuch as if these claims were allowed against them the arrest, the judicial possession and sale incident to such proceedings would divert them from the public uses to which they are destined.

165 Eng. Rep. 1543 at 1549 (1820).

31. 11 U.S. (7 Cranch) at 482-84.

Ambassador, who voluntarily submitted to the jurisdiction of the court and paid its assessment of the salvor's fees. Sir William Scott may have been impressed with Justice Marshall's reasoning or the concept of "public property destined to a public use." The reasons for his action were not made clear in the record, but it is far more probable that Judge Scott based his opinion on a policy of judicial deference to diplomatic function rather than any of the specific arguments of the advocates. The fact that Judge Scott chose to solve the dispute by diplomatic representation rather than judicial action and the fact that he chose not to explain the reasons for his decision, point to an attitude of judicial deference to a delicate international situation. Nevertheless, later judges assumed that Sir William Scott had based his decision on one or another of the advocate's arguments.

Lord Brett's 1880 Court of Appeals decision, *The Parlement Belge*,[32] is primarily based on the Admiralty Advocate's argument in *The Prins Fredrik* and the idea that Judge Scott's opinion established a precedent resting on this argument. *The Parlement Belge* was a mail packet that made a regular run between Ostend, Belgium and Dover, England. In addition to mail, the ship carried merchandise, passengers, and luggage for hire. *The Parlement Belge* was also a public vessel owned by the Belgian King and manned by officers of the Belgian Navy. Proceedings were brought against the ship by the owners of an English tug for damages sustained in a collision. The Belgian government requested immunity. Sir Robert Phillimore,[33] the judge of first instance, denied the claim to immunity on the grounds that *The Parlement Belge* was primarily a commercial trading ship performing a public service for the Belgian sovereign.[34] Lord Brett rejected this argument on the basis of his interpretations of *The Schooner Exchange* and *The Prins Frederik* and found *The Parlement Belge* to be immune from the jurisdiction of the English courts. For Lord Brett, the Admiralty Advocate's argument fit neatly into the broad principles of sovereign immunity set down by Marshall.[35]

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32. [1879-80] 5 P.D. 197.

33. In an earlier case, *The Charkieh* (1873) L.R. 4, Sir Robert Phillimore rejected a claim to immunity by the Khedive of Egypt. The decision turned in part on the non-sovereign status of the Khedive and in part on the fact that the vessel was chartered to a British subject and engaged in commerce.

34. *The Parlement Belge* [1879] 4 P.D. 129.

35. In referring to *The Schooner Exchange*, Lord Brett stated:

It is certainly to be remarked that those who conducted this case with

Although he acknowledged that Justice Marshall's final holding was limited to a "public armed ship,"[36] Lord Brett concluded that the general principles must have indicated the boundaries of the Chief Justice's expansive intentions. Lord Brett's awareness of a possible narrow reading of Marshall's principles may have caused him to cite a Massachusetts case, *Briggs v. The Light-Boats*[37] to show that United States law had also made an expansive interpretation of Justice Marshall's general principles to include "public property destined for a public use." *The Light-Boats* concerned an attempt to attach a Massachusetts lien to three nonmilitary vessels belonging to the United States Government. The state court ruled that their immunity arose from their status as "instruments of sovereignty" rather than their status and function as instruments of war. As instruments of sovereignty, they were destined for a public use and could not be attached.[38] In relying on *Light-Boats,* Lord Brett apparently confused domestic sovereign immunity with the international law of sovereign immunity.

Lord Brett began his analysis of *The Prins Fredrik* by calling the Admiralty Advocate's argument, "an argument of the closest and most forcible reasoning, to which we see no anwer."[39] He then quoted the argument and interpreted it to mean that comity required the English courts to grant immunity to all public property destined to a public use. He had no doubts that Sir William Scott based his decisions on the argument.[40] Nevertheless, Lord

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unusual ability, deliberately, in stating the cause of objection rested the claim of exemption not on the fact of the vessel being an armed ship of war but on the fact of her being one of a larger class, namely "a public vessel belonging to a sovereign and employed in the public service." It is upon the suggestion so pleaded that the court gives judgment.

[1879-80] 5 P.D. at 208.

36. *Id.*

37. Briggs v. The Light-Boats, 93 Mass. (11 Allen) 157 (1865).

38. *Id.*

39. [1879-80] 5 P.D. at 209.

40. The point and force of this argument is, that the public property of every state being destined to public uses cannot within reason be submitted to the public courts of such state, because such jurisdiction, if exercised, must divert public property from its destined public uses; and that by international comity, which acknowledges the equality of states, if such immunity grounded on such reasons exist in each state with regard to its own property, the same immunity must be granted by each state to the similar property of all other states. The dignity and independence of each

Brett, acknowledged that the source of his interpretation[41] was the opinion of Lord Campbell in *DeHaber v. Queen of Portugal.*[42] By these questionable interpretations and suggestions,[43] the opinion of a mere Admiralty Advocate was transformed into the basis of foreign sovereign immunity law in the common law world. *The Schooner Exchange* was thereafter seen as authority for the Admiralty Advocate's argument[44] and the argument was enshrined as the basis for Sir William Scott's decision. Thus, *The Parlement Belge* became authority for the broad proposition that "all public property destined for a public use" (including a public trading ship) is immune from the jurisdiction of English courts and, as a result, the expansive principles and domestic sovereignty conceptions of *The Schooner Exchange* continued to grow unchecked by diplomatic function rationales.

The prevailing modern interpretation, however, is that Lord Brett did not advocate a doctrine of absolute immunity and[45] that *The Parlement Belge* is not authority for this doctrine. Almost as an afterthought to his opinion, Lord Brett stated that *The Parlement Belge* should be immune, because its commercial functions were subservient to its main public purpose, the carriage of mail.[46] Lord Brett therefore indicated that he would not exempt a

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state requires this reciprocity. It was this reasoning which induced Sir William Scott to hesitate to exercise jurisdiction and so act as to intimate his opinion could not be controverted.

Id. (opinion of Lord Brett).

41. Some scholars, like Professor O'Connell, *supra* note 10 at 844, believe that Sir William Scott based his decision on *The Schooner Exchange.*

42. In *DeHaber v. Queen of Portugal,* 17 Q.B. 171, at 196, (1851) Lord Campbell interpreted *The Prins Fredrik* as authority for the proposition that a sovereign could not be impleaded without his consent. Marasinghe, *supra* note 21, at 81.

43. Lord Brett stated:

> The case has always been considered as conveying his opinion to have to that effect: Such was the view of Lord Campbell in *DeHaber v. Queen of Portugal* who says that the difficulties suggested by the argument were in the opinion of Sir William Scott, insuperable. But if so, he assented to an argument which embraced in one class "all public property of the state" and treated armed ships of war as a member of that class.

[1879-80] 5 P.D. at 210.

44. D. O'CONNELL, *supra* note 10, at 844.

45. *See,* Compania Naviera Vascongado v. Steamship Cristina (*The Cristina*) [1938] A.C. 485 at 519-20 (opinion of Lord Maugham); Phillipine Admiral (Owners) v. Wallem Shipping (Hong Kong Ltd.) [1977] A.C. 373 at 402.

46. *See* Marasinghe, *supra* note 21, at 483.

ship from jurisdiction when its "public purposes" were purely commercial,[47] but he made jurisdiction difficult by stating that a court could not inquire into the status and purpose of a sovereign ship that was certified by its government to be "public property destined for a public purpose" because this would be an inappropriate assertion of jurisdiction.[48]

D. *The Absolute Doctrine of Immunity*

The two most noted progeny of *The Parlement Belge* were the British Court of Appeal case, *The Porto Alexandre*,[49] and the United States Supreme Court decision, *Berizzi Bros. v. The Steamship Pesaro*.[50] These two cases represent the zenith of absolute immunity thinking in the British[51] and United States courts. Although their doctrines are slightly different, both cases derive their understanding of sovereign immunity from Lord Brett and *The Parlement Belge*.

The Porto Alexandre was a Portuguese government-owned ship used solely for trading purposes. The Portuguese representatives put forth a claim for immunity from salvage charges which stated that the ship and its freight were in the possession and public use of the Portuguese government. In *The Porto Alexandre*, Hill, L.J., set forth a rule that crystallized the British doctrine of sovereign immunity into its most absolute form. Hill found the ship to be immune stating:

> [B]ecause my view is that the law as it now stands, and as laid down in *The Parlement Belge* is that sovereign state cannot be impleaded either directly by being served in person, or indirectly by proceedings against its property and that in applying that principle it matters not how the property was being employed.[52]

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47. "But it is said that the immunity is lost by reason of the ship having been used for trading purposes. As to this, it must be maintained either that the ship has been so used as to have been employed substantially as a mere trading ship and not substantially for national purposes, or a use of her in part for trading purposes takes away the immunity, although she is in possession of sovereign authority and is substantially in use for national purposes." [1874-80] 5 P.D. at 219.

48. *Id.* at 220.

49. [1920] P. 30.

50. 271 U.S. 562 (1926).

51. The cases at note 59, *infra*, demonstrate the trend toward acceptance of the doctrine of absolute immunity in the British courts.

52. [1920] P. at 31.

Hill, L.J., based his interpretation on some confusing language at the end of Lord Brett's decision. Near the end of his opinion, Lord Brett commented that since an action *in rem* against public property is really an indirect action *in personam,* an action against public property is an action inconsistent with the dignity and equality of the foreign state.[53] What Lord Brett intended by this statement is not clear because it cannot be reconciled with Lord Brett's immediately following assessment that, the mere fact of the ship being used subordinately and partially for trading purposes does take away the general immunity.[54] This, along with his earlier indication that a purely commercial public ship would not be exempt, implies that a public trading ship could be sued if no contrary representation was made by diplomatic representatives. Hill's opinion thus established that a sovereign state can never be sued, regardless of its failure to make diplomatic representations.

In the second stage of the appeal, all three judges affirmed Hill's decision. Warrington, L.J., based his opinion on his own finding that the ship was being used for a "public purpose." The other two judges, Scutton, L.J., and Bankes, L.J., however, found no distinction between public and commercial acts in *The Parlement Belge* and did not dispute Hill's broad expression of an absolute immunity doctrine.[55] The Court of Appeal's unanimous approval of the expansive concept of immunity in *The Parlement Belge* and its indifference to the extreme interpretation of Lord Brett's opinion given by Hill, encouraged the view that *The Parlement Belge* and *The Porto Alexandre* were precedents for an absolute doctrine of foreign sovereign immunity.

Five years after the British Court of Appeal's decision in *The Porto Alexandre,* the United States Supreme Court adopted a similar doctrine of absolute immunity in *Berizzi Bros.*[56] Although more than a century elapsed between the first significant Supreme Court opinion on sovereign immunity, *The Schooner Exchange,* and the second, *Berizzi Bros.,* this period of inactivity is more understandable when it is realized that government-owned merchant fleets and trading organizations began to appear in

53. [1874-80] 5 P.D. at 220.
54. *Id.*
55. [1920] P. at 34, 37.
56. 271 U.S. 562.

great number only at the beginning of the twentieth century.[57] When the *Berizzi Bros.* Court was confronted by the problem of jurisdiction over merchant ships owned by sovereigns, the only available precedents were *The Schooner Exchange* and domestic sovereign immunity cases such as *The Light-Boats.*[58] The age of Marshall's opinion and the lack of United States authorities caused the United States Supreme Court to turn to British precedents for an interpretation of the case that had provided a beginning for the sovereign immunity law of both countries.

Justice Van Devanter's unanimous opinion in *Berizzi Bros.* drew heavily on the expansive interpretation of the principles of *The Schooner Exchange* that was made in *The Parlement Belge* and *The Prins Fredrik.* Like Lord Brett, Justice Van Devanter used the domestic case, *The Light-Boats,* as a tool to expand Justice Marshall's general principles. Not only was Lord Brett's interpretation of *The Schooner Exchange* quoted at length, but a number of British cases that followed *The Parlement Belge,* including *The Porto Alexandre,* were cited.[59] Justice Van Devanter's opinion brought the United States law of foreign sovereign immunity to the full expansion reached by British law five years earlier by stating that *The Pesaro,* a government-owned merchant ship, was used for a public purpose because "the maintenance and advancement of the economic welfare of a people in time of peace" was as much a "public purpose" as the maintenance of naval ships.[60] The *Berizzi Bros.* doctrine of sovereign immunity, however, differed slightly from that of *The Porto Alexandre.* By following the language at the end of *The Parlement Belge,* Hill, L.J., had found that any action against a foreign sovereign was impossible because the mere bringing of a suit would be an affront to his dignity and quality. By following Lord Brett's main line of analysis, Justice Van Devanter set down a rule that made a suit against a sovereign or his property almost impossible, because it allowed an extremely expansive interpretation of the "public purpose" of a sovereign's property. It is clear that the *Berrizi Bros.* Court had little use for diplomatic function ratio-

57. *See generally,* Compania Naviera Vascongado v. Steamship Cristina [1938] A.C. 485 at 521-22 (opinion of Lord Maugham).

58. 93 Mass. (11 Allen) 157 (1865).

59. Young v. Scotia [1903] A.C. 501; The Jassy [1906] P.D. 270; The Gagara [1919] P.D. 95; The Jupiter [1924] P.D. 236.

60. 271 U.S. at 574.

nale behind the international law of sovereign immunity, since the State Department had refused to recognize the immunity of *The Pesaro.*

Berizzi Bros. marked the end of an Anglo-American interchange that illustrates the problems that accompany the use of one common law country's precendents by the courts of another common law country. Because courts consistently confused international and domestic rationales for the idea of foreign sovereign immunity, the result was the misapplication of the expansive principles and rationales of *The Schooner Exchange* by courts on both sides of the Atlantic. Although Marshall envisioned a restricted concept of immunity that was limited to a few exempt categories, the Advocate of the Admiralty's argument in *The Prins Fredrik* expanded Marshall's general principles to "all public property destined for public use." British jurists, most prominently Lord Campbell and Lord Brett, then interpreted Sir William Scott's action to be based on the Admiralty Advocate's argument.

Subsequently, Lord Brett's expansive interpretation was understood by Hill, L.J., in *The Porto Alexandre* to mean that any jurisdiction over a sovereign or his property would be an affront to his sovereignty. Finally, Justice Van Devanter interpreted *The Schooner Exchange* by looking at *The Parlement Belge.* As a result, Justice Van Devanter, in *Berizzi Bros.*, applied a "public purpose" concept borrowed from British law that was so expansive that almost every use is conceivably "public." The common flaw running through all of these cases was the failure to effectively examine and emphasize the diplomatic function rationale of the international law of sovereign immunity. An emphasis on function as well as status would have set a limit to Marshall's general principles and rationales.

By this long process, British and American courts developed an absolute concept of foreign sovereign immunity that most of the world was rejecting. Soon after *Berizzi Bros.* a number of British and United States jurists recognized this problem and initiated a reversing trend. After a century of development, however, the judicial erosion and legislative replacement of the doctrine of absolute immunity would require another fifty years.

III. The Movement Toward a Restrictive Doctrine in the Civil Law Countries

At the time of *The Porto Alexandre* and *Berizzi Bros.* most of

the civil law countries had either adopted the restrictive doctrine of immunity or were moving in that direction.[61] The distinction between public and private (or commercial) acts has always had more importance in civil law jurisdictions.[62] Although many civil law countries recognized an almost unrestricted doctrine of sovereign immunity in the past,[63] the movement toward a restrictive doctrine in these countries roughly paralleled the growth of state shipping and commercial activities. Italy has always had a restrictive view of sovereign immunity.[64] Belgium adopted a restrictive practice in the mid-nineteenth century.[65] French courts had adopted a restrictive view of sovereign immunity by the 1920's.[66] German courts began to move in the same direction after the Brussels Convention of 1926.[67] The Netherlands was also moving toward a restrictive practice in the 1920's.[68] By the time that the Tate Letter[69] was first circulated in 1952, most of the major nations had accepted the restrictive practice. The only nations still adhering to the absolute doctrine were the United States, the United Kingdom, Czechoslovakia, Estonia and Poland.[70]

Although most of the world has now accepted the restrictive doctrine of foreign sovereign immunity, problems still remain because there has been a disagreement about which acts should be characterized as sovereign and immune from jurisdiction. Different conceptualizations in the laws of the civil law countries have

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61. *See* SUCHARITKUL, *supra* note 10, at 162-256. *See generally* Lauterpacht, *The Problem of Jurisdictional Immunities of Foreign States,* 28 BRIT. Y.B. INT'L L. 220, 251-72 (1951).

62. In traditional civil law countries such as France, there are several types of courts, and their respective jurisdictions depend upon the exact type of act involved in a dispute.

63. *See generally* Schmitthoff and Woolridge, *The Nineteenth Century Doctrine of the Growth of State Trading,* 2 DEN. J. INT'L L. AND POLICY 199 (1972).

64. *Id.* at 11.

65. *Id.* at 242-51. *See generally* Bachrach, *Sovereign Immunity in Belgium,* 10 INT'L LAW 459 (1976).

66. *See* Romania v. Pascaler [1923-24], A.D. 68 and Chaliapinne v. Representation Commerciale de URSS et Société Brenner [1932-34], D.P.I. 139.

67. *See* Sucharitkul, *supra* note 9, at 84-85.

68. *See* Van Heemstra, *Sovereign Immunity and Remedies Against the Netherlands Government,* 10 INT'L LAW 441 (1976).

69. 26 DEPT. STATE BULL. 984 (1952).

70. *Id.* The position of the socialist countries is unclear. While some authorities state that the Soviet Union and Eastern European countries still adhere to the absolute doctrine (Schmitthoff and Woolridge, *supra* note 61, at 201), their attitude in practice has not been consistent.

resulted in different and elaborate characterizations of certain acts as *jure gestionis* or *jure imperii.*[71] Often, there has been disagreement among the courts of a single state about the characterization problem.

As more and more nations adopted a restrictive doctrine or practice and the need for a uniform characterization became apparent, there was movement toward the international codification of a uniform restrictive practice. Numerous bilateral treaties have been concluded.[72] The most serious multilateral efforts have been the Convention for the Unification of Certain Rules Relating to the Immunity of State-owned Vessels, of 1926 (the Brussels Convention)[73] and the European Convention on State Immunity of 1972.[74] Although the Brussels Convention reflected the growing desire of nations to make the restrictive doctrine, with its distinctions between private and public acts, the accepted international legal doctrine, most of the signatories, including the United Kingdom, have not ratified it. In addition, the United Kingdom has not yet ratified the European Convention, a general treaty between European states that makes uniform distinctions between immune and non-immune acts. Ratification of both these documents is expected soon, however, since the United Kingdom has codified the restrictive practice in its domestic statutes. The reluctance of United States and British courts to accept the restrictive doctrine was a barrier to a universal multilateral sovereign immunity treaty. With the erosion of the absolute concept by the courts of both countries and its replacement by codified restrictive doctrines, a multilateral sovereign immunity treaty is now possible.

IV. THE DECLINE OF THE ABSOLUTE DOCTRINE AND ITS

71. "There are no universally accepted canons for the characterization of activity. In some systems the characterization is a constitutional one. In others it is theoretical. In the result one state might regard running a railway as a public function, while another may regard it as a private law one." D. O'CONNELL, *supra* note 10, at 845.

72. *See* Schmitthoff, *The Claim of Sovereign Immunity in the Law of International Trade,* 7 INT'L & COMP. L.Q. 452, 452-53 (1958).

73. Hudson, INT. LEG., Vol 3, p. 1897 (1931).

74. European Convention on State Immunity (CMnd 5081). *See* Sinclair, *The European Convention on State Immunity,* 22 I.C.L.Q. 254 (1973).

REPLACEMENT BY THE RESTRICTIVE DOCTRINE

A. *Beginnings in The Cristina*

The erosion of the absolute doctrine by British and United States courts and its replacement by the restrictive doctrine occurred through a process in reverse order to the absolute doctrine's development. The process began with a British case. A restrictive doctrine was developed in the United States courts. Then the British courts, which had lagged behind the American example, finally adopted a similar doctrine. The lesson of this process is also the obverse of that gained from a study of the absolute doctrine's development. Here the careful use of foreign common law precedents provided fresh insight into a common legal problem which enhanced the rapid development of new law.

The process of judicial erosion of the absolute doctrine began with a 1938 House of Lords decision, *Compania Naviera Vascongade v. Steamship Cristina.*[75] In the *Cristina,* the Law Lords began to express their doubts about the absolute doctrine of immunity founded on *The Parlement Belge* and *The Porto Alexandre.* Although the Court held that a Spanish merchant ship, requisitioned by and in the possession of the Spanish government was immune from a suit *in rem* by the former owners, several of the Lords indicated that *The Parlement Belge* and the doctrine of absolute immunity should be reconsidered. The opinion of Lord Maugham was the most forceful:

> My Lords, I cannot myself doubt that if *The Parlement Belge* had been used solely for trading purposes, the decision would have gone the other way. Almost every line of the judgment would have been otiose if the view of the court had been that all ships belonging to a foreign Government, even if used purely for commerce, were entitled to immunity and the same is true of the judgment of the Supreme Court U.S.A.[76] (Referring to *The Exchange.*)

Lord Maugham agreed that immunity should be allowed on the facts of this particular case because the facts precluded an overturning of the conventional interpretation of *The Parlement Belge* or a dissent of precedential value. The acceptance of the rule of *stare decisis* by later courts allowed *The Parlement Belge* to remain as an important barrier to change for the next forty

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75. [1938] A.C. 485.
76. *Id.* at 519.

years. Nevertheless, the opinions of Lord Maugham and the other skeptical Lords created doubt in the minds of other English jurists[77] and re-emphasized the importance of comity and diplomatic function in deciding a rule of international law.[78] The doubts of Lord Maugham were not lost on members of the United States Supreme Court; especially Justice Frankfurter, who later referred to Lord Maugham's viewpoint in his concurring opinion in *Republic of Mexico v. Hoffman.*[79]

B. *The Development of the Restrictive Doctrine in United States Courts*

In two cases in the 1940's, *Ex Parte Republic of Peru*[80] and *Republic of Mexico v. Hoffman,*[81] the Supreme Court began to shift the rationales behind the doctrine of absolute immunity. Pragmatic considerations of comity, diplomacy, deference, and separation of powers were elevated to preeminence. Person and status linked rationales such as the equality, dignity, and independence of all sovereigns were given an underlying importance. The overall result was that United States courts were able to move toward a restrictive practice of immunity by following the lead of the executive branch of government.

At the time of *The Cristina,* the primary defense to the absolute immunity claim in admiralty cases before American and British courts was that a vessel libeled *in rem* was not in the possession, control, or use of the foreign state. *The Cristina* was decided on this ground.[82] In *Ex Parte Republic of Peru,*[83] however, the

77. Marasinghe, *supra* note 21, at 486.

78. Lord Maugham made the extent of his disapproval clear:

> My Lords, I am far from relying merely on my own opinion as to the absurdity of the position which our own courts are in if they must continue to disclaim jurisdiction in relation to commercial ships owned by foreign governments. The matter has been considered over and over again of late years by foreign jurists, by English lawyers, and by businessmen and with practical unanimity, they are of the opinion that if governments or corporations formed by them choose to navigate and trade as ship-owners, they ought to submit to the same legal actions as any other ship owner.

[1938] A.C. at 522.

79. Republic of Mexico v. Hoffman, 324 U.S. 30, 41 (1944) (Frankfurter, J.).

80. 318 U.S. 578 (1943).

81. 324 U.S. 30 (1945).

82. [1938] A.C. 485.

83. 318 U.S. at 588 (1943).

Supreme Court accepted a State Department pronouncement on the immunity of the party before the court, without regard to any findings on possession, use, and control. The Court held that a friendly foreign sovereign who wished to claim immunity had two alternatives: first, it could appear and raise the claim as a defense to the libel; or second, it could present the claim to the Department of State. If the State Department allowed the claim of immunity and the Attorney General certified its action to the court, the Court was required to recognize the immunity of the sovereign.

Although the Supreme Court did not propose "a theory of diplomatic function," the decision represented a shift in emphasis toward that theory. This shift was a major change from the views of the Court in *Berizzi Bros.*, which, in failing to take account of the State Department's position, had seen the concept of "the equality and dignity of all sovereigns" as more important than the diplomatic rationale behind the international concept of sovereignty. The Court made its acceptance of the preeminence of a diplomatic rationale clear by stating that the policy recognized by both the State Department and the courts was that the national interest would be better served by diplomatic proceedings rather than judicial compulsions.[84]

Ex parte Republic of Peru, however, did not prescribe the role of the courts when the State Department refuses to take a position on the immunity of the sovereign. This was the primary issue in *Republic of Mexico v. Hoffman.*[85] In *Hoffman,* a ship was owned by the Mexican government but was not in its possession or public service. A lien was brought *in rem* against the ship in a California district court. The State Department did not take a position on the immunity of the ship. Instead, it submitted two cases that indicated that no immunity has been allowed when a vessel was not in the possession or the public service of the sovereign at the time of its libel.

The Supreme Court affirmed the district court's decision to deny immunity. Justice Stone's majority opinion traced his policy of judicial deference back to Justice Marshall's acceptance of State Department certification of immunity in *The Schooner Exchange,* but it was clear that Justice Stone was also giving the courts a certain amount of freedom to determine immunity. The

84. *Id.* at 589.
85. 324 U.S. 30 (1945).

"guiding principle" in determining whether a court should exercise its jurisdiction was, according to Justice Stone, "that the courts should not so act as to embarrass the executive arm in its conduct of foreign affairs."[86] Under Justice Stone's analysis, the courts may decide for themselves when there is "an absence of recognition of immunity" by the State Department. Furthermore, the court's decision must be made "in conformity to the principles accepted by the department of government charged with the conduct of our foreign relations."[87] Thus, in the instant case, Justice Stone determined that the ship was not immune because past State Department policy had never allowed immunity on the grounds of ownership alone and the courts have always required a public use.

Justice Frankfurter, in a concurring opinion, urged a larger role for the courts. In the absence of an explicit statement from Congress or the State Department, Frankfurter contended that the courts should always exercise jurisidiction over foreign sovereigns. Frankfurter, in conclusion, asserted that "The Department of State, in acting upon views such as those expressed by Lord Maugham, should no longer be embarrassed by having the decision in *The Pesaro [Berrizzi Bros.]* remain unquestioned, and the lower courts should be relieved from the duty of drawing distinctions that are too nice to draw."[88]

The *Hoffman* decision left the American courts in an awkward position. On one hand, the likelihood of conflict with the executive branch created by *Berrizzi Bros.'* expansive definition of immunity was diminished. On the other hand, in situations in which the State Department refused to take a position, the courts had to determine past State Department policy on a particular type of immunity case. The State Department has often taken contradictory positions on similar cases, or refused to act, for political reasons.[89] The ironic result of Justice Stone's decision was that an American court might be placed in the accidental policy-maker role by its stand on immunity in a particular case.

In May 1952, the State Department attempted to rescue the courts from their difficulties by providing guidelines in the fa-

86. *Id.* at 35.
87. *Id.*
88. *Id.* at 41.
89. Maier, *The Proposed Sovereign Immunities Act: Its Effect on Judicial Deference*, 70 PROC. AM. SO. INT'L L. 48, 50 (1976).

mous Tate Letter.[90] The State Department's Acting Legal Adviser, in a letter to the Acting Attorney General, advocated a restrictive theory of immunity. The Tate Letter provided that the State Department would no longer recognize immunity for private acts (*jure gestionis*), but it would continue the practice of granting immunity to public acts (*jure imperii*). The letter signalled Executive acceptance of a functional rather than a status oriented approach to foreign sovereign immunity. Combined with the Supreme Court's recognition that the preeminent rationales behind the foreign sovereign immunity concept were diplomatic, the American theory of foreign sovereign immunity had begun to resemble "the theory of diplomatic function."

Although inquiry into immunity now focused on the function or the act, the State Department did not give the courts clear guidance on two important questions: first, which act should the courts examine, the transaction or the breach?; and second, how should the courts distinguish between a public and a private act? The Supreme Court also offered little guidance,[91] and the lower courts struggled to answer these questions. The best effort was made by the Second Circuit in *Victory Transport v. Comissaria General,*[92] in which the court delineated five categories of immune acts.[93] Nevertheless, the inconsistency of the State Department's immunity recommendations continued.[94] Increasing congressional recognition of these problems and the desire of the State Department to abandon its role led to the enactment of the Foreign Sovereign Immunities Act of 1976.[95] The statute attempts to describe the acts over which the court has jurisdiction, but

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90. *Supra* note 69, at 984.

91. The Supreme Court's only opinion on the subject between The Tate Letter, *supra,* note 69, and the Passage of the Foreign Sovereign Immunities Act was National City Bank v. Republic of China, 348 U.S. 356 (1954) which concerned only the issue of whether a suit by a sovereign rendered him liable to a counterclaim.

92. 336 F.2d 354, *cert. denied* 381 U.S. 934 (1965).

93. These five categories were internal administrative acts, legislative acts, acts concerning the armed forces, acts concerning diplomatic activity, and public loans.

94. The case that best illustrates the role of the State Department and the difficulties it posed for the courts is Rich v. Naviera Vacuba S.A., 295 F.2d 24 (1961). Other relevant cases include Chemical Resources Inc. v. Venezuela, 420 Pa. 134 (1966); Isbrantsen Tankers v. President of India, 446 F.2d 1198 (2d Cir. 1971); and Spacil v. Crowe, 489 F.2d 614 (5th Cir. 1974).

95. 28 U.S.C. §§ 1330, 1602-1611 (1976).

many of its definitions are vague and the courts are still required to make important interpretations and distinctions.

C. *The Erosion of the Absolute Immunity Concept in the United Kingdom*

The new questions raised by *Hoffman, Ex Parte Peru,* and the Tate Letter had negative influence on the receptivity to changes in foreign sovereign immunity law of British judges and lawyers. Many probably preferred to adhere to the absolute doctrine, despite the fact that the United Kingdom was now almost alone in its acceptance of the doctrine, because a change in the law would have required a confrontation with these questions and the American courts were still in confusion about how to deal with them. In addition, there were two more formidable barriers to British use of the recent American decisions to bring about changes in the law.

The first barrier was the British perception that the shift of rationale in the American cases was based solely on the clear separation of powers theory in the United States Constitution and the more independent role of the American judiciary. The United States decisions may have seemed irrelevant and this viewpoint would not be surprising. Despite striking similarities between the law of the two countries, the two countries have similar but different constitutional frameworks. Both nations have a separation of powers but the United States system is clearly defined in a written document. By contrast, the branches frequently intermingle in the British constitutional system.[96] The Law Lords, for example, are also members of the House of Lords. As a consequence, the British system has not had the same tension that has characterized the efforts of the American courts to stay free of the roles of the "political branches" of government. The British courts have been more highly deferential and are less often accused of "judicial activism" or "judicial legislation."[97] The British courts' strong deference, flows from the doctrine of parliamentary sovereignty or the idea that the "Queen in Parliament" is supreme and the judiciary should not oppose legislation as unconstitutional.[98] While these deferential attitudes may seem similar

96. S. DE SMITH, CONSTITUTIONAL AND ADMINISTRATIVE LAW 39-41 (1973).

97. *See generally,* J. ELKIND, THE IMPACT OF AMERICAN LAW ON ENGLISH AND COMMONWEALTH LAW 288-97 (1978).

98. DE SMITH, *supra* note 96, at 67.

to the role Justice Stone assigned to the United States courts in *Hoffman,* the deep reluctance of British courts to interfere in matters touching on foreign affairs is a traditional role rather than an announced judical policy of self restraint.[99]

With these differences in mind, *Hoffman, Peru,* The Tate Letter, and the cases that followed can be seen as uniquely United States decisions flowing from the Supreme Court's preoccupation with the need to stay clear of the exclusive "foreign affairs power"[100] of the executive and legislative branches. However, it is wrong to assume that the United States cases were irrelevant simply because they seemed to be premised on a different constitution. The misapprehension here is that a case is not relevant because it is not directly on point. A case may contain useful material or viewpoints that may be indirectly relevant to the exact issue before the court. In a number of British cases during the period from *Hoffman* to the mid-1970's,[101] United States cases could have been useful in two respects.

First, and most important, the United States cases undermined the old status and personality linked rationales behind the absolute doctrine of sovereign immunity. *Hoffman* and *Peru* held that foreign sovereign immunity is not an absolute privilege corresponding to the immunity of the domestic personal sovereign. Instead, it is a matter of executive or legislative discretion to be decided in accordance with comity, diplomacy, and the law of nations.[102] If British jurists had seen the United States cases as important in this sense, and had looked at the Anglo-American doctrine of absolute immunity as a common error of the two systems, then more rapid evaluation of the British law of foreign sovereign

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99. Foreign Affairs have been regarded as a Perrogative, or a matter for the crown. Questions touching on foreign affairs are seen as "politically sensitive" matters and the courts have especially avoided them. *See* Mighell v. Sultan of Johore, [1894] 2 Q.B. 149.

100. *See generally,* United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936) and Mackenzie v. Hare, 239 U.S. 299 (1915).

101. Cases in which United States authorities might have been useful or were underused include: Krajina v. Tass Agency [1949] W.N. 309; Johore (sultan of) v. Abakar Tunku Aris Benahara [1952] A.C. 318; United States v. Dollfus Meig et Cie S.A. and Bank of England [1952] A.C. 582; Ysmael Juan & Co. v. Government of Indonesia [1955] A.C. 72; Baccus SRL v. Servicio Nacional del Trigo [1957] 1 Q.B. 438; Mellenger v. New Brunswick Corp. [1971] 1 W.L.R. 274; Swiss Israel Bank v. Government of Salta [1972] 1 Lloyds Rep. 497.

102. This fact is evident because of Justice Stone's constant references "to the branch of government entrusted with the conduct of our foreign affairs."

immunity would have been possible.

A second way in which the United States cases were relevant was to illustrate the origins and evolution of the doctrine of absolute immunity and the departure of United States law from its former course. Later, in *The Phillipine Admiral Owners v. Wallem Shipping Ltd.*,[103] Lord Cross demonstrated that a foreign case concerning a similar concept of law need not always have direct relevance in an area where the development of the two nations' legal concepts is interrelated. The different concepts of separation of powers and other constitutional differences should not be a barrier where the goal is to illustrate a trend, explore a fresh perspective, or investigate the changing rationales or values behind the law.

Even if British jurists had cited these cases more frequently in the courtroom and in law writings, another formidable barrier to a change in the law would have emerged: the doctrine of *stare decisis*. This doctrine has always been more rigidly followed by British judges[104] and the result is a legal system that is more formalistic than the United States legal process. Although the House of Lords is not bound by its own precedents,[105] lower courts, especially the Court of Appeals, traditionally follow their own decisions.[106] Despite slowly changing attitudes,[107] the doctrine of *stare decisis* has required an emphasis on direct line of precedent, and for this reason foreign cases are often ignored or wrongly regarded as irrelevant. *The Parlement Belge* and *The Porto Alexandre*, along with the House of Lord's failure to overrule these cases in *The Cristina*, had a power of precedent that lower British courts felt bound to uphold. The British judiciary was compelled to find a way around *The Parlement Belge* or wait for the House of Lords or Parliament to change the law. United States cases were useful in helping Lord Cross to reinterpret *The Parlement Belge* and in enabling Lord Denning (later in *Trendtex Shipping v. Central Bank of Nigeria*) to illustrate a changed rule of international law. Naturally, United States cases cannot be substitutes

103. The Phillipine Admiral Owners v. Wallem Shipping [1977] A.C. 373.

104. J. ELKIND, *supra* note 97, at 263.

105. *See* Practice Statement [1966] 1 W.L.R. 1234.

106. J. ELKIND, *supra* note 97, at 263.

107. "A number of English writers on precedent have welcomed signs of departure from a rigid doctrine of precedent and have urged even greater liberality in the future." J. ELKIND, *supra* note 97, at 267.

for British precedents, but they can aid the skillful lawyer or judge in reinterpreting old authorities or undermining their basis.

Major differences, such as the importance of the doctrine of *stare decisis* and different constitutional emphases, make the direct use of authorities and attempts to transfer whole similar legal concepts difficult. These differences proved too formidable to most British jurists of the 1950's and 1960's, even though the earlier development of the absolute doctrine demonstrated that British courts of the nineteenth century were willing to give a strong importance to United States cases. As a result, some British judges looked for a way around *The Parlement Belge* in distinctions about possession, control, and waivers, or, like Lord Denning, in British authorities that predate *The Exchange.*

In 1958, Lord Denning tried to shift the rationales behind the British absolute immunity doctrine in *Rahimtoola v. Nizam of Hyderabad.*[108] Lord Denning rediscovered the origins of British sovereign immunity law in a line of cases stretching back to the 1793 decision of *Nabob of Carnatic v. East India Company.*[109] These cases concerned disputes between the princely states of India and various local bodies over the privileges of sovereign status. The view Lord Denning discerned in this line of cases was the "theory of diplomatic function." He took the position that the dignity of the sovereign is not involved in a dispute about a non-sovereign function and that in these disputes the sovereign should not be immune. Lord Denning found that courts must make a determination of the nature of a dispute and should grant immunity only when an attribute of sovereignty is involved. With his revival of an obscured diplomatic function rationale, Lord Denning made the British legal establishment more aware of the pre-eminent rationale of the international law of sovereign immunity. Although the United States cases, with their emphasis on the diplomatic rationale, and the Tate Letter, with its emphasis on private and public acts, were more relevant than ever, they continued to be neglected. In a number of cases of this era, judges regretfully endorsed the doctrine of absolute immunity, basing

108. [1958] A.C. 379.

109. (1) The Ex-Rajh of Coorg v. The East India Co., 29 Beav. 300 (Ch. 1960); (2) Secretary of State for India v. Khan [1941] A.C. 356; (3) Civilian War Claimants v. The Kind [1932] A.C. 14; (4) Secretary of State for India v. Shahaba, 13 Moo P.C. 22 [1859]; (5) Nabob of Carnatic v. East India Co., 2 Ves Jun. 56 (Ch. 1793).

their doubts on Lord Maugham's opinion in *The Cristina* or Lord Denning's opinion in *Rahimtoola. The Parlement Belge* and *The Porto Alexandre* stood, and a way had to be found around them.[110] *Thai Europe Tapioca Service v. The Government of Pakistan*[111] was the last of these decisions and symbolizes the sovereign immunity cases of the period.

In this case, Lawton and Scarman, L.J.J., held that they were bound by *The Parlement Belge* and *The Porto Alexandre* to find immunity in a case involving a commercial transaction, despite a changed world opinion. Lord Denning agreed to uphold the immunity of a Pakistani government department but he based his decision on different grounds.[112] In a move characteristic of Lord Denning, he set up four categories of exemptions from immunity and found that the defendant did not fit into any of them. He added that "some [of these exceptions] are already recognized: others are coming to be recognized."[113] The fourth category, the non-immunity of a sovereign when he enters into a commercial transaction with a British trader and a dispute arises that is within the territorial jurisdiction of the courts, was only recognized insofar as Denning had, himself, introduced the principle in *Rahimtoola.*[114] Lord Denning was again endeavouring to change the law, although he found that the facts of this particular dispute had no connection with English territorial jurisdiction and that the defendant was not within the fourth exception.

On November 5, 1976, in *The Phillipine Admiral,*[115] the Privy Council began an historic process which eventually led to the legislative adoption of the restrictive doctrine of immunity exactly two years later, by accepting jurisdiction *in rem* over a trading vessel owned by the Phillipine Government and used solely for trading purposes. The case was on appeal from the Supreme Court of Hong Kong.[116] The decision of Justice Higgins of that

110. *See* Swiss Israel Bank v. Government of Salta, [1972] 1 Lloyds Rep. 497. The Privy Council denied the more extreme interpretation of *The Parlement Belge* that a mere assertion by a sovereign of an interest in property had to be accepted by a court as conclusive, but did not disturb the absolute doctrine. Ysmael (Juan) & Co. v. Government of Indonesia, [1955] A.C. 72.

111. [1975] 1 W.L.R. 1485.

112. [1975] 3 All E.R. 961-67.

113. *Id.* at 965-66.

114. [1958] A.C. 379.

115. [1977] A.C. 373.

116. *Id.* at 584.

court was strongly influenced by both *Hoffman* and *Rahimtoola* and he had concluded that the case did not involve a sovereign function of the Republic of the Phillipines. Justice Higgins noted that:

> The true foundation is the consent and usage of independent states, which have universally granted this exception from local jurisdiction in order that the functions of the representative of the sovereign of a foreign state may be discharged with dignity and freedom, unembarrassed by any of the circumstances to which litigation might give rise.[117]

Justice Higgins decided that "something more" was required for immunity than the "mere possibility" that the ship might be used for public purposes in the future.[118]

On appeal, Lord Cross gave the unanimous opinion of the Privy Council that *The Porto Alexandre* and the absolute doctrine of sovereign immunity were based on an erroneous interpretation of *The Parlement Belge*.[119] The court found that the immunity doctrine of *The Parlement Belge* did not extend to public vessels engaged solely in trading purposes. Lord Cross leaned heavily on two policy grounds for the decision: first, the overwhelming trend of world opinion outside the Commonwealth was against absolute immunity, and second, it was unfair to allow the United Kingdom government to be sued in its own courts, while foreign sovereigns were able to plead immunity in them. A good portion of Lord Cross' opinion was an explication of the interwoven British and United States case law on sovereign immunity.[120] Lord Cross then used *Hoffman* and the Tate Letter to demonstrate the trend of United States law away from the old Anglo-American doctrine and toward the restrictive practice. Lord Cross' only other authorities for demonstrating "the trend of world opinion" were two Canadian cases[121] and a brief reference to the recent European Convention[122] and the Brussels Convention of 1926.[123]

Lord Cross was careful to limit a new restrictive approach to

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117. *Id.* at 579.
118. [1974] Lloyds Rep. 568.
119. [1977] A.C. 394.
120. [1977] A.C. 391-400.
121. The Canadian Conqueror, 34 D.L.R.2d 628 (1962); Republic of Congo v. Venne, 22 D.L.R.3d 669 (1971).
122. *Supra,* note 74.
123. *Supra,* note 73.

actions *in rem* because the Privy Council felt that past British precedents would not allow the Council to extend it to actions *in personam*. Since many non-admiralty contract actions are *in personam, The Phillipine Admiral* decision still left sovereigns immune in a vast area of possible suits. Lord Cross went on to say: "It is no doubt open to the House of Lords to decide otherwise but it may fairly be said at the least unlikely to do so."[124]

Two months later in *Trendtex Trading Corporation, Ltd. v. Central Bank of Nigeria,*[125] the Court of Appeal refused to grant immunity in an *in personam* case. Lord Denning demonstrated the trend toward restrictive immunity in most of the countries of the world. Although he cited the European Community Law,[126] recent treaties and a German decision,[127] Lord Denning placed emphasis on the Tate Letter and a recent Supreme Court decision when he stated: "Great impetus was given in 1952 in the famous Tate Letter in the United States. . . . Most authoritative of all is the opinion of the Supreme Court of the United States in *Alfred Dunhill of London Inc. v. Republic of Cuba.*"[128] Lord Denning also cited the recent Foreign Sovereign Immunity Act of 1976 as evidence of the change in both international opinion and international law. Although Lord Denning referred to his own earlier holding in *Rahimtoola* as a rule of English law, his opinion in *Trendtex* was based primarily on the theory that a changed rule of international law is automatically incorporated into English law.[129] Since the principle of restrictive immunity has been adopted by the majority of the nations, Lord Denning found that international law had changed and a similar change had occured in English law. Shaw, L.J., agreed with Denning on this point, but Stephenson, L.J., insisted that the rule of *stare decisis* bound the Court of Appeal until the House of Lords decided that absolute sovereign immunity was no longer a rule of international law.

The rapid fire decisions in *The Phillipine Admiral* and *Trendtex* left British courts in much the same state of confusion as that of the United States courts before the enactment of the

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124. [1977] A.C. 402.

125. [1977] 1 Q.B. 529.

126. Treaty Establishing the European Economic Community, entered into force Jan. 1, 1968, art. 3(h), 298 U.N.T.S. 3.

127. Youssef M. Nada Establishment v. Central Bank of Nigeria (District Court Frankfurt M, File No. 3/8 014176).

128. 98 S.C. 1854 (1976).

129. This is known as the incorporation theory.

Foreign Sovereign Immunities Act of 1976. Like the American courts, the British courts were faced with the same questions of whether the transaction or the breach was the sovereign act, and the problem of distinguishing between private and public acts.[130] The problems in the English courts were worse because the appeal of the *Trendtex* decisions was never heard by the House of Lords and it was uncertain whether the doctrine of absolute immunity *in personam* remained.[131]

This state of confusion, the United States experience with a similar state of confusion in its courts, the continuing damage of the absolute immunity doctrine to British commerce, and the fear of the City of London that it would be put at a disadvantage to New York as a consequence of the Foreign Sovereign Immunities Act of 1976, all contributed to the quick passage of the State Immunity Act 1978,[132] and its enactment on November 22 of that year.

In certain general respects the State Immunity Act 1978 resembles the Foreign Sovereign Immunities Act of 1976.[133] In other respects, it is similar to the European Convention on State Immunity of May 1972.[134] The British statute is an improvement on both the United States Act and the European Convention, and it is the most advanced codification of sovereign immunity law in existence.[135]

The main similarities between the British statute and the United States Act are in its general concept and common drafting technique.[136] Both acts begin with the premise that immunity is the rule, subject to a number of enumerated exceptions. By contrast, the European Convention treats sovereign immunity as a purely residual concept that may be claimed when a case does not fit into one of the listed situations where there is no immunity.[137]

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130. *See* 1° Congresso del Partido, unreported: For a full description and analysis *see* Higgins, *Recent Developments in the Law of Sovereign Immunity in the United Kingdom*, 71 AM. J. INT'L L. 423, 431-437.

131. *Id.* at 429.

132. *See generally* Statement of the Solicitor General, H.C. DEB VOL. 949 col. 412 (May 4, 1978).

133. Delaume, The State Immunity Act of the United Kingdom, 73 AM. J. INT'L L. 185, 199 (1979).

134. *Id.*

135. *Id.* at 199.

136. *Id.* at 186.

137. *Id.*

This common feature is probably a product of the lingering influences of the absolute doctrine of immunity and "illimitable" concepts of the domestic sovereign in both countries. The common drafting technique consists in making what was recently called "exceptions to exceptions to the immunity rule,"[138] restoring immunity in certain instances. This use of a similar concept and drafting technique demonstrates the continuing influence of the Anglo-American development of the concept of sovereign immunity and of United States law.

The influence of the United States Act is even more striking if it is considered that one of the main purposes of the Act was to enable the United Kingdom to ratify the European Convention on State Immunity. Its reference to "State Immunity" rather than "sovereign immunity" is deliberate and in keeping not only with the intention of ratifying the Convention but with the United Kingdom's new role in the European Community. There are several aspects in which it is markedly different from the United States Act. Among the most prominent are its use of diplomatic channels to serve process rather than the detailed procedures of the United States Act[139] and the fact that each article of the British statute has been written so that the language corresponds to a similar article of the European Convention.

The most important influence of the Foreign Sovereign Immunities Act of 1976 on the State Immunity Act of 1978 is not in the statute's concept or drafting technique, but in improvements over both the United States law and the European Convention. These improvements consist primarily in improved definitions of crucial concepts such as "commercial transactions." With these more explicit definitions there is more certainty of result under the State Immunity Act 1978[140] than under the Foreign Sovereign Immunities Act of 1976[141] which leaves many crucial determinations to the courts.[142] In this respect, the State Immunity Act of 1978 illustrates one of the enduring characteristics of the common law:

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138. *Id.*

139. *Id.* at 185-86.

140. For further analyses of the British statute, *see,* Delaume, *supra* note 141 at 185; White, *The State Immunity Act* 1978, 42 MOD. L.R. 72 (1979).

141. For excellent anaylses of the American Act, *see* Von Mehren, *Foreign Sovereign Immunities Act 1976,* 17 COLUM. J. TRANSNAT'L L. 33 (1978) and Weber, *The Foreign Sovereign Immunities Act 1976: Its Origin, Meaning and Effect,* 3 YALE STUD. IN WORLD PUB. ORD. 1 (1976).

142. Delaume, *supra* note 133 at 190-91.

its ability to develop indirectly from other jurisdictions' precedents and experiences. The post-Tate Letter struggle of the United States courts with the problems of differentiating between sovereign and non-sovereign functions, along with the brief difficulties of British courts with these problems helped convince Parliament that stronger definitions of these functions would be needed than those provided by the United States Act.

The State Immunity Act of 1978 brought an end to the period in which British and United States courts developed a doctrine of absolute foreign sovereign immunity through mutual interaction and then eroded the doctrine and replaced it with a restricitve theory. The State Immunity Act of 1978 may not be the end of this process: the statute may serve as a model for future changes in the Foreign Sovereign Immunities Act of 1976 or for a new multilateral treaty on sovereign immunity. The State Immunity Act 1978 will remain a symbol of the dynamic transnational common law process of change that created it. The influence of United States law on this statute was largely indirect, as part of a long history, interwoven with British law and experience. Parliament chose not to adopt a United States foreign sovereign immunities statute but to adapt certain of its aspects, modifying them to suit British experience and circumstance. In the legislature, as well as on the bench, this approach to transnational common law development has always proved to be most successful.

V. Conclusion

The influence of British and United States courts on each other's case and statute law has been primarily indirect because the use of one nation's precedents by another is full of difficulties. Methods and concepts, though similar, do not always translate or are misunderstood by one court, and the misunderstanding is passed along to another. The expansive misinterpretation of *The Schooner Exchange* by courts on both sides of the Atlantic provides one example. The inability of British lawyers to translate *Hoffman, Peru,* and other United States cases into relevant British terms provides another. There are slight differences in legal concepts or practices that pose seemingly insurmountable barriers to British-American legal interaction, such as differences in separation of powers theory or the rigidity of the doctrine of *stare decisis.*

Despite these differences, the fundamental values, rationales, and traditions behind the law remain essentially similar. The do-

mestic sovereign immunity concept derived from ancient times and more recent positivist thinking has not been expunged from the Anglo-American mind. The concept influenced the reciprocal development of similar absolute immunity concepts in the United Kingdom and the United States. Problems in developing a doctrine of absolute immunity by a reciprocal process, and the later difficulties in using United States precedents to erode the doctrine suggest that the reluctance of British and United States judges and lawyers to use each other's case law is probably a wise practice.

Nevertheless, Lord Cross[143] and Lord Denning[144] have shown that United States precedents can be skillfully used to emphasize trends and recent or needed changes in the law. By illustrating an interconnecting past history of British and United States influence and a new United States approach, Lord Cross made clear the obsolesence of the absolute concept and the need for a similar change in British law. In an approach that concentrated on a more recent case, Lord Denning did the same. United States courts will find that many recent British precedents and statutes offer a fresh or different perspective on a similar concept of law.[145] When these authorities are used in a comparative, illustrative, or other indirect sense, the cases will probably be more useful than if they are used more directly, without a full understanding of the complexities and subtleties in the law. United States cases were especially useful in changing British foreign sovereign immunities law, because the concept has both a domestic and an international character, but there is no reason why methods similar to those of Lord Cross or Lord Denning cannot be almost equally useful in illustrating a different approach or a need for a change in completely domestic fields of law. The careful use of United States and British law will further the progressive growth of the law in both countries. The two distinct, but closely related systems, will continue to grow and develop in their separate ways.

Clark C. Siewert

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143. *Id.*

144. [1977] 1 Q.B. 584.

145. Kavass, *supra* note 1 at 864, uses Espinosa v. Farah Manufacturing, 414 U.S. 86 (1973) as an example. In interpreting the meaning of nation or nationality under the Civil Rights Act of 1964, the United States Supreme Court could have profitably examined Ealing London Borough Council v. Race Relations Board [1972] 2 W.L.R. 71.