Case Comments

International Law Cases in National Courts

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Cases with a variety of international aspects have been decided by the courts in recent weeks.

FOREIGN AFFAIRS—DECEDENTS' ESTATES

Zschernig v. Miller, 389 U.S. *429,*
19 L. Ed. 2d 683 (1968).

The sole heirs of a resident of Oregon, who died there intestate in 1962, were residents of East Germany. These relatives, as plaintiffs, brought an action in an Oregon Probate Court for a determination of heirship in their favor. The State Land Board of the State of Oregon petitioned the court for the escheat of the net proceeds of the estate under an Oregon statute which provides for escheat in cases where a nonresident alien claims real or personal property, unless three conditions are proved: (1) the existence of a reciprocal right of a United States citizen to take property on the same terms as a citizen or inhabitant of the foreign country; (2) the right of United States citizens to receive payment here of funds from estates in the foreign country; and (3) the right of the foreign heirs to receive the proceeds of Oregon estates "without confiscation." The Probate Court found that the evidence did not establish the existence of these rights and held that the statute was valid and controlling and that the proceeds of the estate escheated to the State of Oregon. On appeal, the Oregon Supreme Court held that (1) the plaintiffs could take the Oregon realty involved, pointing to Article IV of the 1923 Treaty with Germany (44 Stat. 2132, 2135), but that (2) by reason of the same Article, as construed in *Clark v. Allen,* 331 U.S. 503 (1947), they could not take the personalty.

On appeal, the United States Supreme Court reversed. The majority opinion, written by Justice Douglas, found that, as applied, the Oregon

statute was an invalid intrusion by the State into the field of foreign affairs. Reviewing the Oregon cases, the majority thought that "foreign policy attitudes, the freezing or thawing of the 'cold war' and the like are the real desiderata." The court referred to similar attitudes in decisions in other states. The statute as construed by Oregon courts seemed to make unavoidable judicial criticism of nations established on a more authoritarian basis than the United States.

Justices Stewart and Brennan concurred, but expressed the view that all three of the statutory requirements on their face were contrary to the Constitution. "All three launch the state upon a prohibited voyage into a domain of exclusively federal competence."

Justice Harlan also concurred in the result, but upon the sole ground that the application of the Oregon statute in the case conflicted with the treaty. He read Article IV of the treaty as guaranteeing the citizens of the contracting parties the right to inherit personal property from a decedent who died in his own country, and suggested that cases to the contrary, including *Clark v. Allen,* should be overruled insofar as they held to the contrary.

Justice White dissented, finding no impermissible interference with foreign affairs, a conclusion articulated at some length by Justice Harlan.

Justice Marshall did not participate.

The impact of the decision was felt almost immediately in *Estate of Emilia Lehotzky,* N.Y.L.J., January 29, 1968, at p. 18, in which a New York Surrogate denied a request to pay shares due to Czechoslovakian nationals into the court pursuant to the relevant New York statute, citing, *inter alia,* the *Zschernig* decision.

Treaties—Warsaw Convention

The estates of airline passengers killed in international flights continue, sometimes successfully, to contest the applicability of the Warsaw Convention's limitation upon the carrier's liability. The difficulty of these cases is illustrated by the frequency of split decisions of the courts deciding them.

In *Alitalia-Linee Aeree Italiane, S. p. A. v. Lisi,* 390 U.S. 455, 20 L. Ed. 2d 27 (1968), the United States Supreme Court affirmed by a 4-to-4 vote, Justice Marshall not participating, a 2-to-1 ruling of the Second Circuit to the effect that the airline was not entitled to limited liability because the passengers on its flight that crashed in Ireland in 1960 were not properly informed as to carrier liability. The Court of

Appeals had determined that the printing on the tickets was virtually unreadable.

On the same day the Supreme Court denied certiorari in *Berguido v. Eastern Airlines Inc.*, 390 U.S. 996, 20 L. Ed. 2d 95, thus letting stand a 2-to-1 decision of the Court of Appeals for the Third Circuit upholding the Convention's $8,300 per person limit in connection with a 1955 airplane crash in Florida.* The Court of Appeals held that the District Court's finding that the carrier was not negligent was supported by the record and obviated the necessity for further consideration of claimant's contention that the carrier's tickets did not adequately apprise the deceased of the liability limit.

Last November, the Court of Appeals for the Fifth Circuit held, in *Block v. Compagnie Nationale Air France,* 386 F. 2d 323 (5th Cir. 1967), that where a carrier entered into a "voyage" charter with a city art association for a flight from the United States to France and return, the carrier was the operator of the plane, the carrier furnished a fully equipped plane and crew, and each passenger was issued a ticket which referred to the Warsaw Convention liability limitation, recoveries of damages in wrongful death actions arising out of the crash of the chartered plane were limited to the amount allowed by the Convention.

Letters Rogatory

In re Letters Rogatory, 385 F. 2d 1017 (2d Cir. 1967).

The narrow point at issue in this appeal was whether the Director of Inspection under the Income Tax Act of India was a "tribunal" of the kind entitled to execution of its letters rogatory in United States federal district courts under 28 U.S.C.A. § 1782, as expanded in 1964. The Court of Appeals, Second Circuit, held that the inspector was not such a "tribunal" and ganted a motion to vacate an order executing certain letters rogatory and to quash a subpoena to produce evidence for use in an investigation before the Indian official. The court contrasted that official with the French *juge d'instruction,* whose letters rogatory are entitled to execution in federal courts, by noting that the Indian Director of Inspection has the sole responsibility for making the government's argument as well as for evaluating it. One useful question in applying the statute, the court felt, is whether there is any

* Under an agreement signed by most major international airlines in 1966, the $8,300 limitation on liability is waived and the signatory airlines accept a $75,000 limitation instead. This and other developments are reviewed in Lacey, *Recent Developments in the Warsaw Convention,* 33 J. AIR L. & COM. 385 (1967).

degree of separation between the prosecutorial and adjudicative functions of the authority issuing the letters rogatory; if not, the letters will ordinarily not be executed by the United States courts.

Criminal Law—Extraterritoriality

United States v. Pizzarusso
388 F. 2d 8 (2d Cir. 1968).

The Second Circuit was faced for the first time with the question of the jurisdiction of the district court to indict and convict a foreign citizen for the crime of knowingly making a false statement under oath in a visa application to an American consular official located in a foreign country. The Court of Appeals sustained the jurisdiction and affirmed the conviction. For the international lawyer, an interesting feature of this opinion, which upheld the district court's jurisdiction, is its discussion of several bases of penal jurisdiction recognized by international law. The court noted that courts have often failed to perceive the distinction between the protective theory, which was controlling in the instant case, and the objective territorial principle. Under the former, said the court, all the elements of the crime occur in the foreign country and jurisdiction exists because these actions have a potentially adverse effect upon security or governmental functions. Under the objective territorial principle, by contrast, acts done outside a jurisdiction but intended to produce and producing detrimental effects within it justify a state in punishing the cause of the harm; that is, the detrimental effects constitute an element of the offense and since they occur within the country, jurisdiction is invoked under the territorial principle.

Act Of State—Powers Of Attorney

Tabacalera Severiano Jorge v. Standard Cigar Co.,
392 F. 2d 706 (5th Cir. 1968).

The proceeds from a sale of tobacco were at issue in this Fifth Circuit decision in which poor draftsmanship, procrastination or inadvertence apparently cost the Cuban Government about $100,000. Appellant was a Cuban citizen and the sole stockholder of a Cuban tobacco trading concern in whose behalf, it was alleged, he had sold substantial quantities of tobacco on account to appellee, a Florida corporation. The tobacco was delivered in July 1960. During July and August appellant, acting under a broad power of attorney from his company, made demands on the Florida corporation for payment of the balance

due. In September the revolutionary government of the Republic of Cuba promulgated a resolution by which it "intervened" the Cuban tobacco industry, including appellant's company. Upon analysis of the actions of the Cuban Government, giving them for the purpose full and complete effect, the Fifth Circuit concluded that through "inadvertence, mistake of purposeful handling of this account," the Cuban Government did not actually interfere with the right of the company to collect the account in the manner which the company, through appellant, pursued: namely, litigation in U.S. courts. Neither the specific terms of the confiscatory resolution, nor any action of the interventor revoked the outstanding power of attorney.

Moreover, the court, holding for appellant, concluded that, since the government of Cuba did not have physical control over the species of property represented by the claim, it would not be a violation of the act of state doctrine to hold that, even had the Cuban Government taken all the steps that its unlimited power would have permitted it to take, such conduct would not be recognized by the United States courts.

The action was instituted in 1960 and had gone to the United States Supreme Court which remanded it for further consideration in light of its *Sabbatino* decision.* The Fifth Circuit, however, distinguished *Sabbatino,* pointing principally to the fact that the subject of the expropriation in the instant case was a credit owed to a Cuban corporation by an American corporation domiciled in Florida, whereas in *Sabbatino* it had been tangible personal property physically present in Cuba's territorial waters. "The situs of intangible property is about as intangible a concept as is known to the law," said the court, and in fashioning a federal rule fixing the situs of an indebtedness for the limited purpose of deciding whether it is property within Cuba's own territory, U.S. courts may fix that situs outside Cuba where the facts indicate that Cuba has no physical control over the funds owed.

International Law—War

United States v. Berrigan,
283 F. Supp. 336 (D. Md. 1968).

The district court rejected defendants' contention that their destructive acts protesting the war in Vietnam were justified because the United States was waging a war of aggression and thus committing a

* Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964). [For further proceedings in this case, *see* 2 INTERNATIONAL LAWYER 361 (1968).].

crime against peace. This so-called "Nuremberg defense," the court felt, suffered from its dependence upon the resolution of a uniquely political questions of foreign relations, one of the kind that has traditionally and necessarily been left to other departments of the government, free from interference by the judiciary.

Taxation—Treaties—Sovereignty Over Antarctica

Larry R. Martin v. Commissioner, 50 T.C. No. 9 (April 15, 1968).

Plaintiff, an auroral physicist, lived at Byrd Station, Antarctica throughout 1962. He was outside the United States for at least the statutory 510 days during a period of 18 months, and he claimed that his earnings from services rendered in Antarctica were exempt from United States tax.

The Tax Court noted that, although seven nations (Argentina, Australia, Chile, France, New Zealand, Norway and the United Kingdom) have laid claim to certain portions of the Antarctic continent, the United States has never recognized any such claim, and in fact the seven claimant nations, as well as the United States and the USSR, are parties to an international treaty (12 U.S.T. 794), effective in 1961, which provides, among other things, that territorial claims are put in abeyance at least during the 30 year period over which the treaty continues in effect. The Court further found that Byrd Station does not appear to be claimed by any government. In view of these facts, the Court found that petitioner had not been present in a "foreign country" within the meaning intended by the Internal Revenue Code and Section 1.911-1(b)(7) of the Income Tax Regulations and, therefore, that he was not entitled to the tax exemption sought.

Warsaw Convention

Egan v. Kollsman Instrument Corp.,
21 N.Y.2d 160, 234 N.E.2d 199, 287 N.Y.S.2d 14 (1967),
cert. denied 88 S. Ct. 1636 (1968).

The New York Court of Appeals held that the issuance of a round trip ticket to an airline passenger on an international flight, containing a statement of Warsaw Convention limitation of liability in 4½ point type which in effect was virtually unnoticeable and unreadable, failed in its purpose and function of affording notice, and could not be accepted as a statement required by the Convention in order to limit the carrier's liability. The United States Supreme Court denied certiorari.

Extraterritorial Judicial Proceedings

Sorge v. City of New York,
288 N.Y.S. 2d 787 (Sup. Ct., 1968).

A motion to dismiss the complaint was granted by a New York court in this action for slander and libel against New York City and two of its police officers growing out of their testimony concerning the plaintiff before an Italian judge at a hearing conducted at the Italian Consulate in New York. The Executive branch of the United States Government had the competence to, and did, confer on the Consul the power to administer the oath and the Consul thereby became a magistrate as if he were acting for the United States. The proceeding was thus a judicial proceeding and the testimony was privileged.