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International Law-Sovereign Immunity-State Court Authority to Determine Title to Property Under Its Jurisdiction Despite A Department of State Suggestion of Immunity

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INTERNATIONAL LAW—SOVEREIGN IMMUNITY—STATE COURT AUTHORITY TO DETERMINE TITLE TO PROPERTY UNDER ITS JURISDICTION DESPITE A DEPARTMENT OF STATE SUGGESTION OF IMMUNITY—In 1952 plaintiff brought a creditor's action for the appointment of a permanent receiver for the assets of the defendant located in New York. Defendant, Zivnostenska Banka, was a Czechoslovak corporation that had at one time been engaged in banking activities in New York. Plaintiff succeeded in having a re-

ceiver appointed[1] upon proving that defendant had been nationalized, contrary to New York policy and law,[2] by a 1950 decree of the Czechoslovak Government which had merged the defendant and its assets with the State Bank of Czechoslovakia. The instant controversy arose when the receiver attempted to set aside, as a fraud upon creditors, a transfer of funds made by the defendant to the State Bank in accordance with the 1950 nationalization decree. The State Department filed a suggestion of immunity with the lower court in which it "recognized and allowed"[3] that the Czechoslovak Government held title to the disputed property, apparently on the basis that the property was in the name of Czechoslovakia's recognized agent, the State Bank. The lower court did not accept the State Department suggestion and gave judgment for the plaintiff.[4] Upon appeal to the appellate division, *held*, affirmed, one judge dissenting. The determination of title to property in the custody of a state court is a judicial function which is not precluded by a State Department suggestion of immunity "recognizing and allowing" that title is in a foreign sovereign. *Stephens v. Zivnostenska Banka, Nat'l Corp.*, 15 App. Div. 2d 111, 222 N.Y.S.2d 128 (1961).

The decision in the principal case revives the controversy as to the degree of control that the State Department exercises over litigation in which the defendant claims sovereign immunity. In recent years, until the principal case, there had been a general acquiescence by the courts in suggestions of immunity filed by the State Department.[5] This acquiescence had its roots in three opinions by Mr. Chief Justice Stone.[6] He had asserted, in dicta, that a State Department suggestion of immunity which "recognized and allowed" a foreign government's claim to immunity would be conclusive upon the courts.[7] As a result, the courts were to

1 Stephens v. Zivnostenska Banka, Nat'l Corp., 155 N.Y.S.2d 340 (Sup. Ct.), *aff'd*, 2 App. Div. 2d 958, 157 N.Y.S.2d 903 (1956), *aff'd*, 3 N.Y.2d 862, 145 N.E.2d 889, 166 N.Y.S.2d 309 (1957), *appeal dismissed*, 356 U.S. 22 (1958).

2 N.Y. CIV. PRAC. ACT § 977-b; Bollack v. Société Générale, 263 App. Div. 601, 33 N.Y.S.2d 986 (1942).

3 A claim of sovereign immunity can be presented to the court directly by the accredited ambassadorial representative of a foreign government or by the State Department at the request of the foreign government. The State Department has the choice either to present the claim "without comment or argument," or to "recognize and allow" the claim. Only in the case of a recognition and allowance of immunity has it been contended that the suggestion of immunity presented by the State Department would be conclusive on the courts. See generally Lyons, *The Conclusiveness of the Suggestion and Certificate of the American State Department*, 24 BRIT. YB. INT'L L. 116 (1947); Note, 20 U. PITT. L. REV. 126 (1958).

4 Stephens v. Zivnostenska Banka, Nat'l Corp., 23 Misc. 2d 855, 199 N.Y.S.2d 797 (Sup. Ct. 1960), *aff'd on subsequent motions*, 213 N.Y.S.2d 396 (Sup. Ct. 1961).

5 *E.g.*, New York & Cuba M.S.S. Co. v. Republic of Korea, 132 F. Supp. 684 (S.D.N.Y. 1955); Weilamann v. Chase Manhattan Bank, 192 N.Y.S.2d 469 (Sup. Ct. 1959). *But see* Anderson v. N.V. Transandine Handelmaatschappij, 289 N.Y. 9, 43 N.E.2d 502 (1942), and Frazier v. Hanover Bank, 204 Misc. 922, 119 N.Y.S.2d 319 (Sup. Ct. 1953).

6 Republic of Mexico v. Hoffman, 324 U.S. 30 (1945); *Ex parte* Peru, 318 U.S. 578 (1943); Compania Espanola v. The Navemar, 303 U.S. 68 (1938).

7 *Ex parte* Peru, *supra* note 6, at 589.

dismiss any pending litigation against a foreign government or its recognized agent if this was urged by the State Department.

It is clear that the considerations behind Stone's position were more political than legal. From the standpoint of legal doctrine, it has been argued that questions of sovereign immunity necessitate interpretations of international law and should, therefore, be confided to the competence of the judiciary.[8] Indeed, the early Supreme Court decisions dealing with sovereign immunity gave no indication that suggestions of immunity from the executive branch were considered to be anything more than attempts to guide the judiciary in applying international law.[9] In one case the Court even refused to accept a State Department suggestion that there should be no immunity because it was not in compliance with what the Court regarded as the then-recognized rule of international law.[10] Nevertheless, Stone was of the opinion that it would be preferable to give the State Department the option to substitute diplomatic negotiations for judicial proceedings whenever there was a possibility that the executive branch would be "embarrassed" in its conduct of foreign affairs.[11] Stone expressed little concern either for the rights of plaintiffs whose suits might be dismissed or for the possibility that the State Department would misinterpret or misapply international law. Instead, questions of sovereign immunity were, in effect, equated to "political questions," *i.e.*, questions dealing with policy areas where political consequences are considered so important that the courts may neither reconsider nor review the decisions of the executive.[12] The apparent result was to concede to the executive branch the power to dispose of any controversy in which questions of sovereign immunity arose.

Until 1952 it had been the policy of the courts, and the Department of Justice, that foreign governments and their agents were entitled to absolute immunity from suit and from execution upon their property.[13] No distinction was drawn between activities which involved governmental functions (*iure imperii*) and those which involved private or commercial functions (*iure gestionis*). The advent of large-scale state trading activity, especially by the socialistic countries, was influential in inducing the State Department to repudiate the "absolute" theory of immunity in favor of

8 Timberg, *Sovereign Immunity, State Trading, Socialism and Self-Deception*, 56 NW. U.L. REV. 109, 115 (1961).

9 Dickinson, *The Law of Nations as National Law: "Political Questions,"* 104 U. PA. L. REV. 451, 471-75 (1956). See The Schooner Exchange v. M'faddon, 11 U.S. (7 Cranch) 116 (1812).

10 Berizzi Bros. Co. v. S.S. Pesaro, 271 U.S. 562 (1926). The State Department position is set out in The Pesaro, 277 Fed. 473, 479-80 (S.D.N.Y. 1921).

11 *Ex parte* Peru, 318 U.S. 578, 588 (1943). The suggestion in the principal case indicated that the United States and Czechoslovakia were negotiating for the settlement of claims arising out of the post-war expropriation of American property and that an adverse judgment would affect final outcome of the negotiations. Principal case at 118-19, 222 N.Y.S.2d at 135-36.

12 Dickinson, *supra* note 9.

13 *Id.* at 472-79.

the "restrictive" immunity approach. The "Tate Letter" of mid-1952 set forth this new policy,[14] indicating that a foreign government or its agent would thereafter be subject to the jurisdiction of American courts for all acts which were *iure gestionis*. However, the effectiveness of this new policy was diminished by a later State Department interpretation of international law rules regarding judicial execution on property. Under that interpretation, courts could allow only attachment of a sovereign's property in order to obtain jurisdiction to determine the rights of the litigants. In the case of a judgment adverse to the sovereign, the attached property could not be levied upon but would have to be released.[15] Apparently ultimate satisfaction of a judgment, if forthcoming at all, would then be dependent upon a negotiated agreement with the sovereign defendant.[16]

With the foregoing as a background, the State Department filed a suggestion of immunity in the principal case, asking that the disputed property be given sovereign immunity and not be subjected to execution. The apparent basis for the suggestion was that the property was in the name of the immune agent of Czechoslovakia, the State Bank, as a result of transfers in accordance with the 1950 nationalization decree, and that the true owner, therefore, was Czechoslovakia.[17] Yet, according to New York law, a transfer of New York property pursuant to foreign nationalization decrees was a fraud upon creditors and could be judicially set aside.[18] Faced with a choice between state law and a Department of State suggestion, the appellate division chose to reject the suggestion. It found that disputes as to the ownership of property within the state had long been recognized as a state problem that was litigable in the state courts.[19] Since the disputed

14 26 DEP'T STATE BULL. 984 (1952). See Bishop, *New United States Policy Limiting Sovereign Immunity*, 47 AM. J. INT'L L. 93 (1953). The Department of State had unsuccessfully advanced this same position as far back as 1918; see 2 HACKWORTH, DIGEST OF INTERNATIONAL LAW 429, 437-40 (1941).

15 Principal case at 116, 222 N.Y.S.2d at 133; Timberg, *supra* note 8, at 119-22. See Dexter & Carpenter v. Kunglig Jarnavagsstyrelsen, 43 F.2d 705 (2d Cir. 1930), *cert. denied*, 282 U.S. 896 (1931).

16 This position of the State Department has been condemned for replacing a theoretical immunity under the absolute theory with a practical immunity under the restrictive theory. Aron, *State Trading, Commercial Immunity, and the Jurisdictional Risks of International Trade*, in ESSAYS ON INTERNATIONAL JURISDICTION 28 (Falk. ed. 1961).

17 It is difficult to determine the exact basis upon which the State Department considered the title to be in Czechoslovakia. The court indicated in the principal case at 119 (222 N.Y.S.2d at 136) that the suggestion did not "purport to recognize the right of immunity on the part of defendant or in respect of its property." On this basis it is reasonable to assume that Czechoslovakia's title was derived through the State Bank which had the property in its name. It should be pointed out, however, that one of the attorneys for plaintiff in the principal case took a different view of the suggestion. Timberg, *Expropriation Measures and State Trading*, 55 AM. SOC'Y INT'L L. PROC. 113, 116 (1961).

18 N.Y. CIV. PRAC. ACT § 977-b.

19 See United States v. Bank of New York, 296 U.S. 463 (1936); Clark v. Willard, 294 U.S. 211 (1935); Sullivan v. State of Sao Paulo, 122 F.2d 355, 358 (2d Cir. 1941); Banco De Espana v. Federal Reserve Bank, 114 F.2d 438, 442 (2d Cir. 1940) (court not bound by Secretary of the Treasury's interpretation of title question).

property had been in the possession of New York depositaries and was, after attachment, in the custody of the court, it was the court's position that the adjudication of the conflicting claims to the property was a judicial function and was governed by state law.[20] The State Department countered with the proposition that an adjudication which set aside the transfer of property to the State Bank would have the effect of an execution upon the property of a sovereign in violation of international law.[21] The court in turn reasoned that any property ultimately subjected to execution would be property that had been adjudged to belong to defendant, a corporate jural entity separate and distinct from Czechoslovakia,[22] regarding which no suggestion of immunity had been given.[23]

It is clear that the court's rejection of the State Department's suggestion of immunity was not based upon a complete rejection of State Department authority over questions of sovereign immunity. In a companion appeal the same court accepted a suggestion of immunity for the defendant there, the State Bank involved in the principal case, as a political determination binding on the court.[24] Nevertheless, the court indicated that it was unwilling to allow the State Department to dictate the disposition of all the issues in a case just because the executive branch had an acknowledged power over questions of sovereign immunity. The decision in the principal case was therefore directed at the scope of executive power, but not at the existence of the power itself.

Although the extent to which State Department suggestions of immunity are conclusive on the courts has often been debated by legal scholars,[25] it has never been adequately delineated by the courts.[26] As a minimum, it would probably be uncontroverted that the determination of

20 Compare Republic of Mexico v. Hoffman, 324 U.S. 30 (1945) (no possession by sovereign, no recognition and allowance of immunity by the State Department); Loomis v. Rogers, 254 F.2d 941 (2d Cir. 1958), *cert. denied*, 359 U.S. 928 (1959) (no possession by the sovereign and no recognition and allowance by the State Department, but immunity granted because title was clearly in the sovereign); Rich v. Naviera Vacuba S.A., 197 F. Supp. 710 (E.D. Va.), *aff'd*, 295 F.2d 24 (4th Cir. 1961) (possession by sovereign and recognition and allowance of immunity by the State Department).

21 When the doctrine of absolute immunity was in effect the property of a sovereign could not be executed upon, but whether this is still a rule adopted by a majority of countries has been questioned. See RESTATEMENT, FOREIGN RELATIONS LAW § 55, Reporter's Note, at 184 (Tent. Draft No. 2, 1958); Note, 55 AM. J. INT'L L. 167 (1961). *Cf.* Harris & Co. Advertising v. Republic of Cuba, 127 So. 2d 687 (Fla. Dist. Ct. App. 1961). *But see* Setser, *The Immunities of the State and Government Economic Activities*, 24 LAW & CONTEMP. PROB. 291, 308-09 (1959).

22 Principal case at 118, 222 N.Y.S.2d at 135. See Hannes v. Kingdom of Roumania Monopolies Institute, 260 App. Div. 189, 20 N.Y.S.2d 825 (1940).

23 Principal case at 120, 222 N.Y.S.2d at 137.

24 Wolchok v. Statni Banka Ceskoslovenska, 15 App. Div. 2d 103, 222 N.Y.S.2d 140 (1961).

25 *E.g.*, Lyons, *supra* note 3; Jessup, *Has the Supreme Court Abdicated One of Its Functions?*, 40 AM. J. INT'L L. 168 (1946).

26 *Compare* Republic of Mexico v. Hoffman, 324 U.S. 30 (1945), *with* United States of Mexico v. Schmuck, 294 N.Y. 265, 62 N.E.2d 64 (1945) *and* Frazier v. Hanover Bank, 204 Misc. 422, 119 N.Y.S.2d 319 (Sup. Ct. 1953).

the status of a foreign state or government is a "political question" properly left to the executive branch.[27] Hence, if the State Department were to limit its suggestions to a recognition of a sovereign government's immunity, it is likely that its role would be accepted. When the State Department attempts to go beyond this and determine if a *particular defendant* is the agent of a recognized sovereign government, so as likewise to be entitled to immunity, the courts and the legal scholars begin to question its authority.[28] In the principal case the State Department not only determined that Czechoslovakia was entitled to sovereign immunity and that the State Bank was Czechoslovakia's agent, but it attempted to go one step farther and determine that the disputed property in the name of the State Bank was the property of Czechoslovakia. It was the last step that the court was unwilling to accept. Had the State Department been able to determine conclusively that the property belonged to Czechoslovakia, it would have been effectively able to negate the law of New York concerning nationalized property. While the Constitution, laws, treaties and even executive agreements of the United States are the supreme law of the land and may override state policy and law,[29] it would be unwarranted to give the State Department the power to override state law by the mere means of a suggestion of immunity. Yet this would have been the effect of the suggestion, if the court in the principal case had not rejected it. Although the State Department and the Czechoslovak government had been involved in negotiations with a view toward settling claims of United States citizens whose property had been confiscated after World War II,[30] these negotiations had not ripened into a settlement which affected the title to the property in question. Had there been an executive agreement or a treaty, the State Department would have had a stronger basis for pre-empting the court in its disposition of the case. But in the absence of a formal treaty or executive agreement dealing with title to property,[31] there would seem to be no constitutional basis for giving effect to the State Department suggestion.[32]

The result in the principal case is an exemplary attempt to erect a judicial limitation on the State Department's control of litigation through the device of suggestions of immunity. In cases of infringement on areas definitely within state courts' competence, the State Department should be foreclosed, unless it speaks with the authority of "supreme" federal law. Pragmatically, such limitations on State Department power would be

27 See Mann, *Judiciary and Executive in Foreign Affairs*, 29 GROTIUS SOC'Y TRANS. 143 (1944); Dickinson, *supra* note 9, at 470-79.

28 JESSUP, THE USES OF INTERNATIONAL LAW 79-84 (1959); Cardozo, *Sovereign Immunity: The Plaintiff Deserves a Day in Court*, 67 HARV. L. REV. 608 (1954).

29 U.S. CONST. art. VI; United States v. Pink, 315 U.S. 203 (1942); Missouri v. Holland, 252 U.S. 416 (1920).

30 Principal case at 118-19, 222 N.Y.S.2d at 135-36.

31 See United States v. Pink, 315 U.S. 203 (1942).

32 See Note, 48 COLUM. L. REV. 890, 899 n.60 (1948).

well-advised, since the Department is procedurally ill-equipped to handle involved problems of fact or law by means of full-scale hearings.[33] Moreover, its preoccupation with questions of foreign policy could result in a misapplication of the very principles of international law which it espouses.[34] If the boundaries erected by the court in the principal case are accepted, the way may then be open for a consideration of the question whether the State Department's inappropriateness as an adjudicatory body should also preclude it from determinations of particular defendants' rights to the claim of sovereign immunity.

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[33] Cardozo, *supra* note 28.

[34] Drachsler, *Some Observations on the Current Status of the Tate Letter*, 54 AM. J. INT'L L. 790 (1960).