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International Law - The Abrogation of Treaties by War

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INTERNATIONAL LAW—THE ABROGATION OF TREATIES BY WAR—In 1923, the United States and Germany entered into a treaty, one provision of which exempted from taxation the government property of either nation situated in the territory of the other. From the outbreak of World War II in 1941 through 1948 the City and County of San Francisco levied real property taxes on the German Consulate, assuming that this treaty had been abrogated by the outbreak of hostilities between the two nations. The taxes were paid under protest, and the Attorney General, as successor to the Alien Property Custodian, sued and recovered them in the trial court. On appeal, *held,* affirmed. The views of the State Department and the mutuality of the benefits accruing to the signatories require the finding that the treaty provision was not affected by the war. *Brownell v. City and County of San Francisco,* (Cal. App. 1954) 271 P. (2d) 597.

Since the early nineteenth century there has been a marked change in judicial opinion concerning the effect of war in abrogating treaties. Early writers took the position that war automatically terminates all agreements between the hostile parties.[1] This view was rejected by the United States Supreme Court as early as 1823, however, in a case which held that insofar as alien inheritance rights were concerned, the Jay Treaty was not abrogated by the War of 1812.[2] The Court decided that not all treaties are annulled by war, but only those so intended by the contracting parties.[3] After this decision, the question lay dormant for almost a century, and later cases which discuss it evidence no uniformity.[4] In 1920, however, the problem was channelled into a new course by the New York Court of Appeals in *Techt v. Hughes.*[5] This case involved the right of an alien to inherit property under an Austrian treaty

[1] 3 PHILLIMORE, INTERNATIONAL LAW 792 et seq. (1885), and the authorities there cited. Phillimore admits that there are exceptions, however, e.g., when the treaty provides for the outbreak of hostilities. That this rule was never the law is asserted in 1 COL. L. REV. 210 (1901). France adheres to this position at the present time. Rank, "Modern War and the Validity of Treaties," 38 CORN. L.Q. 321 (1953). See also 51 MICH. L. REV. 566 (1953).

[2] Society for the Propagation of the Gospel v. Town of New Haven, 8 Wheat. (21 U.S.) 464 (1823). The same position was taken by the English High Court of Chancery in Sutton v. Sutton, 1 Russ. & M. 663, 39 Eng. Rep. 255 (1830).

[3] Where no intent was expressed, it is often implied from the type of treaty involved; for example, treaties of alliance are presumed to be terminated automatically.

[4] Hutchinson v. Brock, 11 Mass. 119 (1814), follows the view of Phillimore. Fox v. Southack, 12 Mass. 146 (1815), more closely adheres to the decision in the Gospel case, note 2 supra, although not specifically placing its dictum on grounds of intent. Of course, rights vested under a treaty are not divested by its termination. Fiott v. Commonwealth, 53 Va. 564 (1855); McNair v. Ragland, 16 N.C. 516 (1830).

[5] 229 N.Y. 222, 128 N.E. 185 (1920).

claimed to have been rendered nugatory by World War I. The opinion partially abandoned the "intent" rule, and based its finding instead on a determination of "national policy" as indicated by the legislative and executive branches of the government. As stated by Justice Cardozo, "The question is not what states *may* do after war has supervened. . . . The question is what courts are to presume that they have done."[6] In the absence of an indication of what the United States had done, the court presumed that the treaty was still in force. As seen from subsequent cases, the result of this case has served not only to increase the likelihood of upholding treaties, but also to shift reliance in determining their validity to congressional and executive expressions of policy.[7] The old theory of determining the intent of the signatories is not wholly abandoned, however. Present national policy controls only when the words of the agreement or surrounding sources reveal neither an intent to abrogate nor to perpetuate the treaty in time of war.[8] When national policy is the determinant, various sources have been utilized by the courts to ascertain it.[9] It is in this area that the principal case extends *Techt v. Hughes* and the cases following it, by changing the criterion of continued validity from the courts' belief as to what the state has done with the treaty, to the courts' acceptance of the state's present attitude toward the treaty. While some cases had noted prior communications from government sources, the decision here under discussion relies heavily on self-serving statements from officials of the State Department which concern the controversy itself.[10] It is much like the procedure involved when the State

[6] Id. at 242-243.

[7] Clark v. Allen, 331 U.S. 503, 67 S.Ct. 1431 (1947); The Sophie Rickmers, (D.C. N.Y. 1930) 45 F. (2d) 413, commented upon in 29 MICH. L. REV. 947 (1931); State ex rel. Miner v. Reardon, 120 Kan. 614, 245 P. 158 (1926); Estate of Knutzen, 31 Cal. (2d) 573, 191 P. (2d) 747 (1948); Meier v. Schmidt, 150 Neb. 383, 34 N.W. (2d) 400 (1948); Estate of Meyers, 107 Cal. App. (2d) 799, 238 P. (2d) 597 (1951). Some decisions have indicated more of a tendency to abrogate treaties than might be warranted from the rule of Techt v. Hughes. In Karnuth v. United States, 279 U.S. 231 at 239, 49 S.Ct. 274 (1929), for example, the Supreme Court found that a right to pass freely across the Canadian border was annulled by the War of 1812. The Court determined that the treaty was incompatible with a state of war, without reference to present policy expressions of the government. Cases similarly oriented are Ex parte Zenzo Arakawa, (D.C. Pa. 1947) 79 F. Supp. 468, and McCandless v. United States ex rel. Diabo, (3d Cir. 1928) 25 F. (2d) 71.

[8] Clark v. Allen, note 7 supra. The court in this case admits that there may be an area for judicial determination of national policy solely by inspection of the treaty without reference to present statements of the political branches of the government, and cites Karnuth v. United States, note 7 supra, as authority.

[9] Besides acts of Congress, which themselves may displace an earlier treaty, other sources were employed in the following cases: Clark v. Allen, note 7 supra (executive orders, other contemporary treaties, and a communication of the Secretary of State involving the litigation before the court); Flensburger Dampfercompagnie v. United States, (Ct. Cl. 1932) 59 F. (2d) 464, cert. den. 286 U.S. 564, 52 S.Ct. 645 (1932) (negotiations for the Treaty of Versailles relied on to infer the continued validity of a treaty); The Sophie Rickmers, note 7 supra (commercial practice, reciprocal treaty stipulations and letters of the State Department).

[10] Brownell v. City and County of San Francisco, (Cal. App. 1954) 271 P. (2d) 974 at 977-978. Clark v. Allen, note 7 supra, also referred to a letter of the Secretary of State concerning its position in the case, but the court seemingly placed little reliance on it. In another case not concerned with the effect of war on treaties it has been said that on

Department by certification immunizes property in which a foreign government has sufficient interest, and thus precludes litigants from establishing claims against it.[11] This procedure is binding on the courts.[12] There are two reasons why the court in the principal case was on particularly strong ground in upholding the validity of the treaty provision. First, unlike most of the cases cited, this dispute is not concerned with the rights of nationals of the contracting parties, but rather with rights of the parties themselves. In such a sensitive situation, the views of the State Department should be controlling.[13] Furthermore, a question exists whether property used by foreign governments might be tax exempt even in the absence of a treaty.[14] Despite the peculiar circumstances of the case, however, there is a positive indication that war, in and of itself, has become of decreasing importance as an abrogator of treaties.[15] The acts and intent of the governmental departments which decide national policy, rather than judicial decisions based on vague and elusive touchstones, determine now more than ever whether a treaty survives the outbreak of war. Considering the essentially political nature of the question involved, the opinion can hardly be criticized.

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questions of the termination of treaties, the decisions of the chiefs of state are conclusive or at least weigh very heavily. Ivancevic v. Artukovic, (9th Cir. 1954) 211 F. (2d) 565.

[11] The process is explained in [1947] BRITISH YEARBOOK OF INTERNATIONAL LAW 116 and criticized in Cardozo, "Sovereign Immunity: The Plaintiff Deserves a Day in Court," 67 HARV. L. REV. 608 (1954).

[12] Ex parte Peru, 318 U.S. 578, 63 S.Ct. 793 (1943).

[13] Of course, it could also be argued if the theory of the Karnuth case were accepted, that upon looking at the treaty alone, a tax exemption of foreign government property is less compatible with a state of war than are treaties involving only the rights of nationals.

[14] See Bishop, "Immunity from Taxation of Foreign State-Owned Property," 46 AM. J. INT. L. 239 (1952).

[15] One writer thinks that war is no more than an example of the "changed circumstances" doctrine in its effect on treaties. Rank, "Modern War and the Validity of Treaties," 38 CORN. L.Q. 321, 511 (1953).