Michigan Law Review

Volume 41 | Issue 4

1943

CONFLICT OF LAWS-REFUGEE GOVERNMENT PROPERTY CONSERVATION DECREES IN THE COURTS OF THE UNITED STATES

Robert D. Ulrich
University of Michigan Law School

CONFLICT OF LAWS — REFUGEE GOVERNMENT[1] PROPERTY CONSERVATION DECREES IN THE COURTS OF THE UNITED STATES — The historical setting for the present discussion has been concisely set forth by Justice Shientag in a leading case:[2]

> "On May 10, 1940, the territory of the Netherlands in Europe was invaded by Germany and thereafter was occupied by and has since then remained under the hostile occupation of the German military forces. The Royal Netherlands Government, in order to carry on the functions of government free of German

[1] Oppenheimer, "Governments and Authorities in Exile," 36 AM. J. INT. L. 568, note (1942), criticizes the term "refugee" or "exiled." "The term 'exiled' or 'refugee' government—although well-known today—is not very appropriate since it does not express clearly that such government is the only *de jure* sovereign power of the country, the territory of which is under belligerent occupation, but no better term has yet been coined. 'Authority' is used in the English war legislation as referring to the Free French." This very readable article is recommended.

See also various articles on legislation in exile, 24 J. COMP. LEG. & INT. L. 57 (Poland), 120 (Czechoslovakia), 125 (Norway) (1942).

[2] Anderson v. N. V. Transandine Handelmaatschappij, (Sup. Ct. N. Y. County, May 22, 1941) 28 N. Y. S. (2d) 547 at 550.

domination, thereafter moved from The Hague in the Netherlands to London, England. The Government of the United States continues to recognize this government as the government of the Kingdom of the Netherlands and this government is also so recognized by the British Government. . . .

"In order to prevent the foreign resources of Netherlands companies and of Netherlands individuals, domiciled in the occupied territory of the Netherlands, from being used by the enemy of the Netherlands, the Netherlands Government took certain protective measures. The first and basic step in this program was the adoption of the Netherlands Royal Decree of May 24, 1940.[3] The Royal Decree vested in the State of Netherlands title to assets such as here sought to be attached, namely, cash accounts and securities belonging to natural and legal persons domiciled in the occupied territory of the Netherlands and deposited with American corporations and firms."

Does such a decree have any operative effect in the United States?[4] If so, what is the scope of operation?—to what extent is it effective to vest title in the state of The Netherlands? The first question was answered affirmatively in *Anderson v. N. V. Transandine Handelmaatschapij*.[5] In that case, a damage action was brought by Anderson, a resident of the state of New York, against the defendant Netherlands corporation, and certain subjects of the Netherlands. The corporation and the individuals were domiciled in the Netherlands at the time of the German occupation, and have remained there domiciled. The court was careful to point out that although the plaintiff was a resident of New York, he was what is commonly known as an assignee for collection; the alleged assignment having been made solely for the purpose of making him, instead of his assignor, the plaintiff in this action. The plaintiff's assignor was a nonresident alien, a citizen of a country of Europe, and understood to be then resident in Cuba. It also should be noted that the alleged cause of action arose outside the United States. The complaint alleged that the plaintiff's assignor had

[3] The decree is set forth in 3 C. C. H., WAR LAW SERVICE, "Foreign Supplement," ¶ 67,150. It is to be noted that "proprietary rights vested in the state of The Netherlands, by virtue of the preceding paragraphs, shall only be exercised for the conservation of the rights of the former owners." The courts please to refer to it as a "conservatory" rather than a "confiscatory" decree.

[4] Questions of Dutch constitutional law have been considered supra, p. 644 ff., by Landheer, "The Legal Status of the Netherlands."

[5] (Sup. Ct. N. Y. County, May 22, (1941) 28 N. Y. S. (2d) 547, noted 19 N. Y. UNIV. L. Q. REV. 71 (1941), affirmed 263 App. Div. 705, 31 N. Y. S. (2d) 194 (Nov. 14, 1941); motion to appeal granted, 263 App. Div. 858, 32 N. Y. S. (2d) 1014 (Jan. 16, 1942), affd. 289 N. Y. 9, 43 N. E. (2d) 502 (July 29, 1942).

deposited cash and securities with the defendants in the Netherlands; that he had demanded their return prior to the invasion of the Netherlands; that the defendant failed to return them.

Subsequent to the promulgation of the Netherlands decree, the plaintiff attached property of the defendants in a New York depositary, and the defendants, appearing specially, moved to vacate the attachment on the ground that the property sought to be attached belonged to the state of The Netherlands; the state of The Netherlands intervened specially for the purpose of moving to vacate the attachment on the same ground. The Supreme Court, New York County, granted the motion to vacate the attachment.

The first question that confronted the court was whether promulgation of the decree at London, England instead of at The Hague rendered it invalid. Associated with this geographical question is the further complication that the offices and personnel of the refugee government in England differed from that of the former The Hague government.[5a] That is, is this decree an act of the state of The Netherlands? The court cites *Guaranty Trust Co. v. United States*,[6] and quotes therefrom: "What government is to be regarded here as representative of a foreign sovereign state is a political rather than a judicial question, and is to be determined by the political department of the government." From this, the court reasons that, "The circumstance that the Royal Netherlands Decree of May 24, 1940, was promulgated in London, England, rather than at The Hague, is immaterial, in view of the fact that our government has officially recognized the Netherlands Government since its temporary residence in London."[7]

Assuming the decree to be a valid exercise of the sovereign power of the Netherlands, and that it covers the property here sought to be attached, is it operative in the courts of the United States? On this point, the court said that a right acquired under foreign law is, by comity, recognized and enforced by our courts unless against the public policy of the forum.[8] It cited the *Belmont* case[9] as authority for the proposition that a confiscatory decree of a foreign government operating upon property in this country belonging to its nationals is not opposed to the public policy of this country nor of the state of New York.

The legal arguments do not tell the whole story; the case also has

[5a] See Landheer, "The Legal Status of the Netherlands," supra, at pp. 646-647.

[6] 304 U. S. 126 at 137, 58 S. Ct. 785 (1938).

[7] 28 N. Y. S. (2d) 547 at 551-552.

[8] Generally, on the propositions embraced in the two foregoing paragraphs, see annotations: 37 A. L. R. 726 (1925); 41 A. L. R. 745 (1925); 65 A. L. R. 1494 (1930); 139 A. L. R. 1209 (1942).

[9] United States v. Belmont, 301 U. S. 324, 57 S. Ct. 758 (1937).

a practical, nonlegal aspect. The purpose of the decree is to prevent Germany from siphoning the holdings of Netherlands corporations and individuals, domiciled in the occupied territory, which holdings are outside the occupied territory. How is this property to be conserved for the benefit of the rightful owners, and prevented from falling into German hands as an aid to their war effort? [10] The court said,

> ". . . If the title of the Netherlands Government under the Decree is superior to such claims [those of nonresident aliens based on a foreign cause of action], Netherlands assets in the United States are protected. If the contrary is held, then American courts will be made the forum for the determination of much of the litigation of a war-torn world and the assets of Netherlands nationals here will be one of the important stakes sought." [11]

The court clearly reserved the question of the right of a citizen of the United States, acting for himself, to attach property covered by the Netherlands decree. In the Court of Appeals, the Attorney General of the United States submitted a statement of policy prepared by the State Department.[12] This statement likewise was limited to the policy involved in the instant case. If the so-called practical argument motivated the court to subordinate the claim of the nonresident alien based on a foreign cause of action, it is submitted that there is an indication in the case that the claim of a United States citizen or a resident alien based on a cause of action arising in this country might call for a different result. The supreme court said:

> "If this claimant's assignor is recognized as having a right superior to that of the State of the Netherlands under the decree,

[10] Query: Is the danger of siphoning assets from this country belonging to persons domiciled in occupied territory a real one in view of the United States "freezing orders"? See Executive Order No. 8389 set forth in 12 U. S. C. (Supp. 1941), § 95, note, and 1 C. C. H., WAR LAW SERVICE, "Statutes," ¶ 14,351.

[11] 28 N. Y. S. (2d) 547 at 558.

[12] 289 N. Y. 9, 43 N. E. (2d) 502 (July 29, 1942); 36 AM. J. INT. L. 651 (1942).

German orders in the Netherlands have been denied operative effect by our courts. Koninklijke Lederfabriek "Oisterwijp" N. V. v. Chase National Bank of New York, 177 Misc. 186, 30 N. Y. S. (2d) 518 (Sept. 26, 1941) affd. 263 App. Div. 815, 32 N. Y. S. (2d) 131 (Dec. 19, 1941) motion for leave to appeal denied 263 App. Div. 857, 32 N. Y. S. (2d) 784 (Jan. 16, 1942); Amstelbank, N. V. v. Guaranty Trust Co. of New York, 177 Misc. 548, 31 N. Y. S. (2d) 194 (Nov. 28, 1941); Van Der Veen v. Amsterdamsche Bank, 178 Misc. 668, 35 N. Y. S. (2d) 945 (June 22, 1942).

In the Koninklijke case the court expresses the opinion that the defendant bank would not be subjected to double liability should it be adjudicated that it pay over the balance to the present plaintiff, and should it happen that ultimately recognition be accorded the present de facto German government of the Netherlands territory in Europe.

> then there is nothing to prevent any other alien, including alien enemies of the Netherlands who may have real or fancied grievances based upon transactions abroad with Netherlands nationals, from assigning their claims to New York residents for collection. How will a court be able to judge whether the testimony given or the affidavits furnished by persons in the occupied territory represent the true state of affairs or are statements and admissions wrung from a reluctant person by force and duress? There is the possibility of preference and discrimination, the possibility of judgment on the basis of inadequate facts, and, finally, the possibility that the American-held assets of Netherlands companies and individuals will be so dissipated that the purposes of the Netherlands Decree for a fair restitution at the close of the war will be completely frustrated."[13]

In a suit by a United States citizen, or a resident alien, acting in his own right, to attach property covered by a refugee government decree, the court may judge the facts as well as it can in any normal American case. The probabilities of coercion and duress by Germany are eliminated.

Koninklijke Lederfabriek Oisterwijk N. V. v. Chase National Bank of New York,[14] and *Amstelbank, N. V. v. Guaranty Trust Co. of New York*[15] direct our attention to another Netherlands decree. In anticipation of the German invasion, the Netherlands Parliament enacted a law authorizing Netherlands corporations to change their "seat" (which the court says apparently means more than principal office, and seems to be substantially in the nature of domicile) from the territory of the Netherlands in Europe to other Netherlands territory. In each of these cases, the plaintiff corporation took the prescribed steps for effecting such a change. On June 7, 1940, in order to protect Netherlands assets abroad from being used for the benefit of the invading forces through duress exercised on persons in the occupied area, the Netherlands Government in London promulgated a decree which purports to make null and void any claim or instruction emanating from occupied territory of the Netherlands respecting assets of Netherlands corporations outside such territory.

In each of these cases, the plaintiff was a Netherlands corporation which had changed its seat, suing to recover the balance of a bank deposit. In each case, the defendant filed a motion for an order pursuant to the New York Civil Practice Act, section 51-a, permitting it

[13] 28 N. Y. S. (2d) 547 at 558.

[14] 177 Misc. 186, 30 N. Y. S. (2d) 518 (Sept. 26, 1941), affd. 263 App. Div. 815, 32 N. Y. S. (2d) 131 (Dec. 19, 1941), motion for leave to appeal denied 263 App. Div. 857, 32 N. Y. S. (2d) 784 (Jan. 16, 1942).

[15] 177 Misc. 548, 31 N. Y. S. (2d) 194 (Nov. 28, 1941).

to give notice to an alleged adverse claimant to the balance. Both alleged adverse claims emanated from occupied Netherlands territory. In the *Koninklijke* case the communication was from a "fiduciary" of defendant's depositor appointed as such by the Commissioner of the Reich for the occupied territory; in the *Amstelbank* case, the claim was evidenced by a letter from the corporation in the occupied territory and one from the *"Beheerder"* appointed by the Germans. In each case the motion was denied. The court, however, was not called upon to decide whether the plaintiff's claim was valid.

The *Amstelbank* case made an interesting commentary on the attitude of the courts toward these legal conflicts between the refugee government and the invader:

> "In approaching the decision of this motion, the existence of certain factors must be acknowledged. If this court should decide that a mere notice emanating from a person in German occupied territory, where individuals are completely under the control of the invading force, constitutes a claim under Section 51-a, there would be placed in the hands of the invader an effective means to block individuals and corporations otherwise entitled thereto from obtaining their property in this country. By thus tying up the funds or property for at least a year, another facility for practicing duress and oppression would be placed at the disposal of those who have demonstrated their resourcefulness along those lines. If possible then, a determination should be reached which would avoid such a palpable injustice, and also be consistent with our laws."[16]

Although not a refugee government in the same sense as those functioning in London, the French government has promulgated confiscatory decrees[17] more or less similar. Two decisions are set forth without comment.

In the *Feuchtwanger* case,[18] a French government decree of April 24, 1940, as amended May 10, 1940, defined as prohibited exportation of capital "the acts of allowing to remain outside of French territory, or keeping in foreign exchange or foreign currencies, or of not collecting within the territories fixed by decree or instruction of the Minister of Finance, all or part of the proceeds of the exportation of merchandise, or of the remuneration for services, as well as all or part of all proceeds or income abroad."

[16] Id., 31 N. Y. S. (2d) at 197-198.

[17] For text of decree, see 3 C. C. H., WAR LAW SERVICE, "Foreign Supplement," ¶ 67,099.

[18] Feuchtwanger v. Central Hanover Bank & Trust Co., (Sup. Ct. Spec. Term, N. Y. County, May 12, 1941) 27 N. Y. S. (2d) 518.

In May 1939, plaintiff, then a resident of France, purchased a number of United States Federal Reserve Notes in Canada, and directed that they be transferred to defendant Banque Jordaan, a French banking corporation. Jordaan directed that they be transmitted to defendant Hanover for deposit to Jordaan's credit. When the plaintiff learned of this, he brought this action to impress the deposit with a trust in his favor. In June, 1940, the plaintiff fled from France, and was residing in this country at the time of the litigation. Hanover pleaded that the decree of the French government prohibited a recovery by the plaintiff.

The court construed the decree set forth above to be inapplicable to the plaintiff's bank notes, but said:

> "Even if it be assumed that the French decrees did purport to make it unlawful for the plaintiff to hold foreign currency abroad, they cannot be given extraterritorial effect. The Federal Reserve notes were either in Canada or in the United States at all times since the enactment of these French decrees; and they were the property of the plaintiff under the laws of Canada and the United States during that entire period. The French decrees could not validly operate to prevent Canadian or United States banks holding the plaintiff's funds from turning them over to him, regardless of what crimes, if any, plaintiff may be guilty of under French law."[19]

The case was affirmed (in the Appellate Division)[20] and Hanover appealed on the ground that the case was not a proper one for exercise of jurisdiction in rem by way of constructive service, on the absent Banque Jordaan. The Court of Appeals also affirmed.[21]

In the *Bollack* case,[22] the complaint alleged that on January 16, 1940, the plaintiff caused to be delivered to the defendant, a French corporation doing business in the state of New York, various securities, and that after a number of prior demands, the defendant on March 19, 1941 expressly repudiated the agreement of bailment and refused to act upon any instructions from the plaintiff with respect to the securities or any part of them. It was further alleged that there had been a wrongful detainer, and the plaintiff demanded the value of the securities plus damages for the detention.

The answer admitted that the securities were delivered and that

[19] Id. at 521-522.

[20] 31 N. Y. S. (2d) 671 (1941).

[21] 288 N. Y. 342, 43 N. E. (2d) 434 (July 29, 1942).

[22] Bollack v. Societe Generale pur Favoriser le Development du Commerce et de l'Industrie en France, 177 Misc. 136, 30 N. Y. S. (2d) 83 (Sept. 3, 1941), reversed 263 App. Div. 601, 33 N. Y. S. (2d) 986 (Mar. 27, 1942).

they were to be held for the account of the plaintiff subject to his exclusive direction and control. An affirmative defense was set up, pleading that on October 29, 1940, the plaintiff was a national and citizen of France and as such he was deprived of his French nationality by a decree of the French Government duly enacted on or about October 29, 1940, which decree confiscated the assets of the plaintiff including the securities specified in the complaint. The Supreme Court, Special Term,[23] denied the motion to strike the affirmative defense.

On appeal, [24] a motion to strike this defense was granted on the ground that it is against the public policy of the state of New York to enforce foreign confiscatory decrees. The court distinguished this case from the Russian cases,[25] on the ground that here the public policy of the state of New York did not collide with federal policy. Not only is the decree arbitrary and confiscatory, but it is also penal (state courts do not give effect to the penal statutes and decrees of other states) and ex post facto. Neither the *Feuchtwanger* case nor the cases of the refugee government conservatory decrees were cited or discussed.

Although this discussion does not purport to treat the English cases involving the decrees of refugee governments,[26] but only the American ones, a complete discussion necessitates the inclusion of *Lorentzen v. Lyddon & Co.*[27] There the *Anderson* case[28] was not only cited as authority for the decision, but favorably quoted at length and commented upon. A decree of the refugee Norwegian government requisitioned all ships registered in Norway or belonging to a port there and situated outside the area in Norway occupied by an enemy power and which are owned by persons or companies carrying on business there. The decree also appointed a curator of all assets outside the occupied areas to the exclusion of the right of the owner in the occupied territory. It was held that by operation of the refugee government decree the curator could sue in England on a contract claim of a shipowner in the occupied territory.

Robert D. Ulrich

[23] 177 Misc. 136, 30 N. Y. S. (2d) 83 (Sept. 3, 1941).

[24] 263 App. Div. 601, 33 N. Y. S. (2d) 986 (Mar. 27, 1942).

[25] See 33 N. Y. S. (2d) at 989 for citations and discussion.

[26] For a scholarly discussion of the English cases, see Lachs, "Allied Governments in Exile; The Effect of Allied Legislation in Britain," 92 L. J. 275 (1942).

[27] (K. B. Dec. 2, 1941) 71 Lloyd's List L. R. 197. See also Re Amand, [1942] 1 All. Eng. Rep. Ann. 236.

[28] Anderson v. N. V. Transandine Handelmaatschappij, (Sup. Ct. N. Y. County, May 22, 1941) 28 N. Y. S. (2d) 547.