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THE ACT OF STATE—FOREIGN DECISIONS
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REBUTTAL AND MEMORANDUM
OF LAW

WILLIAM HARVEY REEVES*

I. INTRODUCTION

Socrates: And what sort of difference creates enmity and anger? Suppose, for example, that you and I, my good friend, differ about a number; do differences of this sort make us enemies and set us at variance with one another? Do we not go at once to arithmetic, and put an end to them by a sum?

Euthyphro: True.

Socrates: Or suppose that we differ about magnitudes, do we not quickly end the difference by measuring?

Euthyphro: Very true.

Socrates: And we end a controversy about heavy and light by resorting to a weighing machine?

Euthyphro: To be sure.¹

If we apply this Socratic admonition to the foreign cases cited in the opinions of the three United States courts in Banco Nacional de Cuba v. Sabbatino,² it will be found that one,³ and only one, of all the foreign cases cited, as bearing upon the act of state doctrine, supported an exception to that doctrine.⁴ All other foreign cases cited not reversed or nationally repudiated, in which the issue arose, recognized the validity of a fully executed act of a foreign state even if that act was found to be contrary to international law. Thus, contrary to what appears to be popular opinion in the United States, if the lower courts' opinions in Sabbatino had been sustained, or if for other reasons that decision should

* Member of the New York Bar. Acknowledgment is made to William H. Buchanan, Jr., Esq., for useful research in the preparation of this article.

1. 2 Dialogues of Plato 81 (3d ed. Jowett 1892).
4. The phrase "act of state" has a well-defined meaning in United States jurisprudence. The legal principles connoted in this phrase and the phrase "act of state doctrine" are well known also in foreign countries, but not always with these designations. For other meanings sometimes found in foreign writings and foreign decisions, see Katz & Brewer, International Transactions and Relations 108-09 (1960). The phrases will be used throughout this article to mean the principles indicated by those phrases as understood in United States jurisprudence.
become a rule of decision in the United States, the United States would be alone among the great trading nations of the world in its refusal to recognize as valid the acts of state of another country for any reason whatsoever.

Before we begin to count—measure—weigh these cases, it is wise first to review briefly the *Sabbatino* case and the decisions of the three United States courts, as each refers to the act of state doctrine.

**II. Brief Review of the *Sabbatino* Case Relating to the Act of State Doctrine**

In the *Sabbatino* case the facts were: two parties each claimed the right to receive a sum of money which was under the control of the court. The money was the contract purchase price for a shipload of sugar. To whom it should be paid depended upon who had held title to the sugar when it was shipped from Cuba on the order of the purchaser. There was but one purchaser, and he was willing to pay—in fact he had paid; but to whom should the money be awarded by the court? To the American-owned, Cuban-incorporated sugar company which had produced the sugar? Or to the representative of Castro's Cuban Government which had nationalized that company and seized its assets in Cuba? The title was determined by decision of the issues whether the nationalization law of Cuba was valid or invalid, and whether the nationalization law and seizures under it—the act of state—transferred title or did not transfer title from the sugar company to the Cuban Government. Should the national act of Cuba be ignored and the case decided as though the act of state had not occurred? The validity or invalidity of an act of state within a country's own national domain was the principal question of law; the facts were undisputed.

All the United States courts recognized that the issue in the *Sabbatino* case was the definition, interpretation, and application of the act of state doctrine.

The question which brought this case here, and is now found to be the dispositive issue, is whether the so-called act of state doctrine serves to sustain petitioner's claims (based on title) in this litigation.5

All the courts understood the act of state doctrine. The court of appeals defined it as follows:

The Act of State Doctrine, briefly stated, holds that American courts will not pass on the validity of the acts of foreign governments performed in their capacities as sovereigns within their own territories.6

5. 376 U.S. at 400. (Parentheses added.)
6. 307 F.2d at 855.
In spite of the lower courts’ interpretation, all three courts cited Mr. Justice Fuller’s opinion in *Underhill v. Hernandez* as indicative of the attitude the United States had previously taken, and two courts quoted it:

Every sovereign State is bound to respect the independence of every other sovereign State, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory.

All the courts found (or did not deny) the Cuban act of state to have been fully executed in Cuba on the property of which the purchase price was in controversy. All found that the Cuban Government had been recognized by the United States; that the national intention of Cuba as to the property in question was fully expressed by legislation; that execution of the intention was by Cuba’s seizure of the property (the sugar) *in Cuba* and the sale of that sugar by an agency of the Cuban Government; that possession of the property was relinquished only on the order of a buyer who by a sales contract had agreed to pay for it, thereby admitting for himself that the seller, an agency of Cuba, had title. All United States courts agreed or assumed that there was no redress in the courts of Cuba.

The district court found that adherence to the act of state doctrine was a limitation on the courts, a limitation which sometimes actually prevented a United States court from rendering justice in a particular case; that United States courts should, therefore, be free to declare a foreign act of state, which the court finds to be in contravention of international law, invalid and to make decisions as though the foreign state had not committed such an act within its own territory. The court of appeals agreed with the district court, as did Mr. Justice White, the one dissenting justice of the Supreme Court.

The Supreme Court reversed both lower courts and affirmed adherence by the United States to the act of state doctrine. Of the three courts, only the Supreme Court, in the final decision on this issue, found that

7. 376 U.S. at 416; id. at 442 n.2 (White, J., dissenting); 307 F.2d at 856; 193 F. Supp. at 380.
8. 165 U.S. 250 (1897).
9. 376 U.S. at 416; 307 F.2d at 856.
11. The Cuban confiscatory decrees did not permit access to Cuban courts. Law of Nationalization No. 851, art. 6, July 6, 1960 provided: “The resolutions jointly issued by the President and the Prime Minister of the Republic in the forced expropriation proceedings instituted hereunder may not be appealed, as no remedial action shall be available thereagainst.”
12. 193 F. Supp. at 381.
13. 307 F.2d at 860-61.
the Cuban act of state was valid in Cuba, that title had been transferred in Cuba from the sugar company to the Government of Cuba, and that in the United States the effect on that property must be recognized.

The decision of the Supreme Court, in which eight justices concurred (one dissented with an opinion), has not settled the matter. Just a few months after the decision of the Supreme Court, a rider (known as the "Hickenlooper Amendment") was added in the United States Senate to the foreign assistance bill pending before Congress. The purpose of this rider, as frankly stated by its proponents, was to overrule the decision of the Supreme Court in *Sabbatino*. In the memorandum submitted in support of the rider, the full opinion of Mr. Justice White was appended; the majority opinion was not included. There was little publicity and there were no public hearings, but the rider became law with the passage of the Foreign Assistance Act of 1964. By its terms the provisions of the rider apply only to cases prior to January 1, 1966. Congress, therefore, must consider renewal, termination or modification. The full text of this rider may be found on page 670 of the Appendix to this article.

III. To Count, to Measure, and to Weigh

To determine what foreign courts do when faced with a foreign act of state contrary to international law, we need only to count, measure, and weigh the foreign cases, as referring to a foreign act of state, cited by the three United States courts in the *Sabbatino* case.

To Count. Thirty-two of these foreign cases were cited by the three United States courts. These comprise one or more decisions of courts of the following countries: Austria, Belgium, France, Germany, Great Britain, Greece, Italy, Japan, The Netherlands, Singapore (formerly in the British Straits Settlements), and the then British Protectorate of Aden.

To Measure. Most of these decisions were in civil law jurisdictions,
Aden, England and Singapore being the only ones which adhere to common-law procedures.

All countries approach legal problems in their own peculiar manner and seek to arrive at a standard of justice, though by different procedures. We must, therefore, have a common denominator—a measuring rod—to apply to these foreign cases. Let our standard of measurement be this: if the facts in each foreign case had been presented to a United States court, would that United States court under United States procedure and in support of the act of state doctrine have come to the same legal conclusion as did the foreign courts?

Our means of measurement cannot be complete unless we define what is necessary to create an act of state as that phrase is defined in United States law and used by United States courts. The Supreme Court said in the Sabbatino case that any foreign act of state to be recognized as valid in the United States must be an executed one. Therefore, one need know what conditions must be met (a) to create a valid act of state, and (b) to execute an act of state on persons and property within a foreign country. These conditions are readily found in decided cases in United States courts.

1. Only an established government can create a valid act of state. Political recognition of a foreign government by the United States Department of State is sufficient to prove that the foreign government is capable of creating such an act. Also, if a foreign government has been firmly established, a de facto government not recognized de jure, a United States court may in its discretion decide that that government is capable of making a valid act of state.

2. As a corollary to the above, the acts of state of a foreign revolutionary government, committed prior to recognition, are recognized as valid, after recognition of the government, in respect to any controversies which may be adjudicated after recognition, provided, however, possession and control of the property whose title is in question have been retained by the foreign country or by one claiming title under a retroactively recognized act of state.

3. An act of state has no extra-territorial effect. Each sovereign state can determine for itself as to property which has been solely within its own jurisdiction whether the act of state of another country will be permitted to affect such property. Thus, if an act of state of a foreign country is incompatible with the laws of the United States, such an act will affect such property in the United States only by a treaty or executive agreement for this purpose.

4. When a claim is made that property entering the United States has been sub-

23. The decision of each court found that Cuba had physical possession of the sugar. See 376 U.S. at 413 & n.14.


25. Ibid.

jected to a foreign act of state which was in violation of international law, the United States will recognize the intended effect only if that property had been subjected abroad to a fully executed act of state. For a foreign country to execute an act of state, that country must have both jurisdiction over and possession of the property to be affected.\(^27\)

5. Recognition of the validity of an act of state of a foreign country and the effect of its execution on property brought into the United States is not approval of the act, nor admission of its fairness, nor declaration that it conforms to the standards of international law. Furthermore, recognition of the validity and effect of a foreign fully-executed act of state does not relieve the foreign country committing the act from liability for loss or damage caused by the national act.\(^28\)

With this measure—this yardstick—let us then consider the facts and the decisions of each of these thirty-two cases cited by the three United States courts in *Sabbatino*.\(^29\)

*To Weigh.* To weigh any decision, foreign or domestic, is to state the salient facts which were before the court, the basis of the controversy and the reasons for the decision; then to apply the measure.

The complete result of this "weighing" is collected in an Appendix to this article where each case is reviewed in detail. Wherever the statement of the case appears to have been adequate in the digests published in the *International Law Reports* or the *Annual Digest*, these sources have been used. But a number of these cases are not included in these digests of international cases, and in a few other instances the facts given in the digest are not sufficiently complete to make a final determination as to the significance of the case and the decision on the question of a foreign act of state. Thus, where necessary, reference has been made to the

\(^27\) Rose v. Himely, 8 U.S. (4 Cranch) 240 (1808); see Appendix pp. 640-48 infra, regarding the French and Greek cases cited in the *Sabbatino* decisions.


An English definition of act of state may be found in *In re Helbert Wagg & Co.*, [1956] Ch. 323, 344-45: "I start with the elementary proposition that it is part of the law of England, and of most nations, that in general every civilized State must be recognized as having power to legislate in respect of movables situate within that State and in respect of contracts governed by the law of that State, and that such legislation must be recognized by other States as valid and effectual to alter title to such movables and to sustain, modify or dissolve such contracts. The substantial question I have to determine is what limit is to be imposed upon that proposition when the effect of such legislation comes to be debated in the courts of other States. I may note in passing that the modern tendency is to deny extraterritorial validity to legislation, for example, upon movables situate outside the State at the time of the legislation..."

The United States Supreme Court found that the English view of the act of state doctrine was similar to that of the United States. 376 U.S. at 421 n.21. The United States Court of Appeals also found that England had followed the act of state doctrine. 307 F.2d at 855 n.6.
original decision either in the law reports of the country, or in a legal journal if the decision itself was never officially published. In the Appendix to this article, the source of the information as to each case is given with appropriate citations and, where necessary by way of explanation and comparison, there are comments and references to United States policy and law or to decisions of the United States courts. Preceding this Appendix, the thirty-two cases are listed and indexed in two different ways for ready reference: first, under the page number in the Appendix where the review of each case is to be found; and second, under the name of the country in whose court the particular case was decided.

By a review of the foreign cases, the lower courts' reliance on sundry untenable premises becomes apparent.

IV. PREMISES ACCEPTED BY THE LOWER COURTS IN THE Sabbatino DECISIONS

The lower courts relied erroneously on the

PREMISE: That the courts of foreign countries are free to declare and frequently have declared the act of state of another country to be null and void and ineffective within that country when they find such act of state to be contrary to international law.

Of the thirty-two cases cited, with the exception of an unappealed decision of a local court, every case not overruled by a higher court or nationally repudiated, in which the issue is squarely met, can be cited as authority for the Supreme Court's decision in the Sabbatino case; there is no exception to the act of state doctrine. Thus these foreign cases are similar and wholly consistent with decisions of our own courts from the inception of the Republic to the decision of the district court in Sabbatino.

But the premise that foreign courts do not recognize the validity of foreign acts of state if contrary to international law is not the only erroneous premise to be found within the two lower court opinions. Some others may briefly be mentioned:

PREMISE: That no sovereign has the power to create a valid act of state which is contrary to international law.—There is no doubt that this is what the district court and the court of appeals said and held in Sabbatino. The district court said: "There is an end to the right of national sovereignty when the sovereign's acts impinge on international

30. Anglo-Iranian Oil Co. v. Jaffrate (The Rose Mary) [1953] 1 Weekly L.R. 246, [1953] Int'l L. Rep. 316 (Sup. Ct. Aden), Appendix p. 621 infra. (Note: The case of the Confiscation of Property of Sudeten Germans has sometimes been cited as authority that, under German law, German courts refuse to recognize the validity of foreign acts of state which (a) are contrary to international law and (b) are not in accord with German public order. For reasons why this case is not authority or precedent for any principle of German law, see Appendix pp. 653-67 infra.)
The court of appeals stated: "[T]he very proposition that something known as international law exists carries with it the implication that national sovereignty is not absolute but is limited, where the international law impinges, by the dictates of this international law." This, were it true, denies the sovereign power of the United States, reverses many United States courts' decisions, amends the Constitution of the United States and establishes a sort of world federation, setting a precedent under which any court of any country in the world may declare any act of the United States Congress to be null and void and interfere with United States trade on the basis of such a decision. The power of any sovereign—the power of the United States—extends to the making and enforcing within its own territory any law it pleases, whether or not any other foreign sovereign power considers that law to be contrary to international law. "Law is a statement of the circumstances in which the public force will be brought to bear upon men [and property] through the courts." "The very meaning of sovereignty is that the decree of the sovereign makes law."

Many times in the history of the United States foreign countries have declared acts of the United States to be contrary to international law, including England's denunciation of the Monroe Doctrine: "In our opinion, the doctrine propounded in this dispatch is absolutely incompatible with international law." The following quotations clearly demonstrate

31. 193 F. Supp. at 381.
32. 307 F.2d at 860.
34. Id. at 358.
35. Law Officers Report 120 (Gr. Brit. 1895), reprinted in The Foreign Office Confidential Print Series (now available in some public libraries).

This statement was prompted by United States insistence, in 1895, that the Monroe Doctrine required arbitration of a dispute (to which the United States made itself a party) between Great Britain and Venezuela as to the fixation of the boundary between British Guiana and Great Britain. Although this contention was at first rejected, the dispute was settled by arbitration in 1899. See generally 6 Moore, Digest of International Law § 966 (1906).

Very recently, the District Court of Rotterdam held that the action by the United States Government in vesting certain property in the United States, under the Trading with the enemy act, 40 Stat. 416 (1917), as amended, 50 U.S.C. app. § 7 (1958), was an act in violation of international law, and it would not be recognized as valid within The Netherlands for this reason. Bank voor Handel en Scheepvaart, N.V. v. Union Banking Corp., Dist. Ct., Rotterdam, The Netherlands, Dec. 8, 1964. The case has been appealed by the United States. Other incidents in which countries have accused the United States of acts of state in violation of international law include: England—Illegal interference with British shipping in 1861 (The Trent Affair) was settled by returning the persons taken from the British ship. France—Breach of Treaty was settled withdrawing claims against France for its seizure of United States ships in return for France's withdrawing claims against the United States for violation of Treaty. See Gray v. United States, 21 Ct. Cl. 340-78 (1886). Norway—Seizure of Norwegian ships within United States territory without compensation
that United States courts cannot declare invalid acts of Congress because they are contrary to international law.

There is no power in this Court to declare null and void a statute adopted by Congress or a declaration included in a treaty merely on the ground that such provision violates a principle of international law.\textsuperscript{36}

Once a policy has been declared in a treaty or statute, it is the duty of the federal courts to accept as law the latest expression of policy made by the constitutionally authorized policy-making authority. \ldots When \ldots a constitutional agency adopts a policy contrary to a trend in international law or to a treaty or prior statute, the courts must accept the latest act of that agency.\textsuperscript{37}

**PREMISE:** That an act of state contrary to international law is illegal.

—There is no such thing as an illegal act of state. The very word "illegality" means contrary to law, but to what law or to whose law? An act of state is an expression of the national will. If an act is promulgated which is not an expression of national will, the courts of the country will correct any action taken under it, because nothing contrary to the national will is or can be the law of a country. These are truisms. To speak of "an illegal act of state" is a contradiction in terms.\textsuperscript{38}

**PREMISE:** That an act of state if contrary to international law is null and void.—No nation has ever adopted such a conclusion of law as part of its national policy. Whenever a court of first instance in any country has looked with favor upon this contention, that court's decision has been overruled or repudiated. The postulate that an act of state of any country violative of international law is \textit{per se} null and void, or ineffectual, or that any court in any country may so declare it, lacks authority

was settled by arbitration and award against the United States, which was paid. See Norwegian Shipowners' Claims, 1 U.N. Rep. Int'l Arb. Awards 307 (1922). Switzerland—Swiss property in the United States was seized without compensation. Switzerland brought suit on behalf of its nationals in the International Court. The United States invoked the Connally Amendment, 61 Stat. 1213 (1946), T.I.A.S. No. 1598 (adopted by the Senate Aug. 2, 1946, 92 Cong. Rec. 10706), to prevent adjudication. See Interhandel Case, [1959] I.C.J. Rep. 6. Continued litigation between the United States and the Swiss company claiming the assets was settled by agreement to return part of the money received for the sale of the assets of the disputed ownership. For discussion of the litigation, see Rogers v. Société Internationale Pour Participations Industrielles et Commerciales, S.A., 278 F.2d 268 (D.C. Cir. 1960).

36. Tag v. Rogers, 267 F.2d 664, 666 (D.C. Cir. 1959), cert. denied, 362 U.S. 904 (1960). See also The Paquete Habana, 175 U.S. 677 (1900); The Over the Top, 5 F.2d 838, 842-43 (D. Conn. 1923).

37. Tag v. Rogers, 267 F.2d at 668.

and is a gratuitous assumption expressed as a conclusion of law. Then, accepting this as a premise, when one finds a law to be contrary to international law, it may be condemned as being null and void. This is argument in a circle.

PREMISE: That civil law countries apply the rule of public order (ordre publique), and when a foreign act of state is found to be contrary to the public order, its effects will not be recognized.—Foreign countries, it is alleged, refuse to recognize the validity of acts of state which are contrary to the local sense of public order. An examination of the thirty-two cases will show that wherever this question has been raised and analyzed, the courts have determined that public order of the country is not offended by anything which occurred outside of the country. Recognition of what has happened outside a country is not offensive to public order inside a country.39

PREMISE: That both the United States decisions and foreign cases support the act of state doctrine without exception, when an act of state contrary to international law adversely affects only the citizens of the country which commits the act of state.—This was the conclusion to which Judge Campbell came in the Rose Mary case.40 But the Court of Chancery in England, commenting on this case in In re Helbert Wagg & Co.41 held that a foreign act of state, though contrary to international law, was valid whether executed on the property of citizens or non-citizens.

The argument in the premise is based upon the observation that if a country commits a wrong against its own citizens, there is no international delinquency involved because the act is not an affront to any foreign government; but that if this same wrong is done against a foreigner or his property, then an international delinquency has occurred because the act is wrongful under international law. The Supreme Court of the United States, however, in Sabbatino agreed with the Court of Chancery of England that no such distinction should be made and that the correct interpretation of the United States cases also was that countries should recognize the validity of a foreign act of state, whether committed on persons and property of that country, or on persons and property of foreigners.42

39. This was specifically discussed by the Japanese and The Netherlands courts. See Appendix pp. 629, 654 infra.
42. 376 U.S. at 421. The decision applied the doctrine to a Cuban company predominately owned by United States nationals after reviewing United States cases, particularly Ricaud v. American Metal Co., 246 U.S. 304 (1918).
While it is true that many of the foreign cases cited by the three United States courts do concern confiscation within the country committing the confiscatory act of state of property of citizens or corporations of that state, nevertheless there are many other cases in which the action was against a foreigner. In short, the cases do not support the contention.

PREMISE: That the United States Department of State has the authority to permit the United States courts to pass upon the validity or invalidity of acts of state of foreign countries, and if such acts be found to be contrary to international law, to ignore them and to refuse to recognize any change of title under such laws. —Fortunately no great research is necessary here to show the incorrectness of this general statement because it is founded upon only one incident—the "Bernstein Letter." In this instance the State Department advised a court in the United States that it was unnecessary to recognize the validity of acts of Nazi officials under the Nuremberg Laws. At this time the Allies were victorious. The Nazi Government which had passed and enforced those laws had ceased to be. A new government, the Allied Occupation (which was recognized as the successor government by the courts of Germany), had announced a new and different national will: the rescission of those laws and the return to the original owners or successors of any identifiable property which had been transferred under these Nuremberg Laws. The successor government had the same jurisdiction as that of the government which had promulgated those laws.

The Nuremberg Laws were famous in their infamy. Truly, when understood, they shocked the conscience of mankind. But, while they

43. For example, in the Iranian oil cases decided by Italian and Japanese courts, the injured party was not an Iranian national. Likewise in the Mexican oil expropriations, the complaining Mexican company was a subsidiary of a Dutch company. See Appendix pp. 623-28, 654-56 infra.

44. Letter From Jack B. Tate, Acting Legal Adviser, Department of State, to Bennett, House, & Couts, Esqs., April 13, 1949, in 20 Dep't State Bull. 592 (1949). This letter advised of the announced policy of the United States and the laws in Germany, having succeeded the Nuremberg Laws, were then in force.

It should be noted that the statement of United States policy and intention, with that of the other Allies, preceded the Allied occupation of Germany. By analogy within the United States, the Emancipation Proclamation preceded the end of the Civil War.

See Bernstein v. N.V. Nederlandsche-Amerikaansche Stoomvaart-Maatschappij, 210 F.2d 375 (2d Cir. 1954) (per curiam), the case for which the State Department's letter was written. The addressees were attorneys for Mr. Bernstein, plaintiff. See also Bernstein v. Van Heyghen Frères Société Anonyme, 163 F.2d 246, 249 (2d Cir.), cert. denied, 332 U.S. 772 (1947).

were the law of the land, their effect within Germany had been recognized by United States courts; now the War had ended and new laws had displaced these laws.

By analogy to American history, one may say that the Civil War was not fought by the North to free the slaves, but rather to preserve the Union. It is, however, inconceivable that that war could have ended successfully, with the preservation of the Union, without the abolition of the institution of slavery. So in regard to the Nuremberg Laws. They were not the political or international reason for the War. It was Germany’s aggression and that of Japan which commenced that war, but it is inconceivable that World War II should have ended successfully, with the unconditional surrender by Germany and the occupation of Germany by the Allies, without efforts being made to repeal those laws and insofar as possible to nullify their effects.

The “Bernstein Letter” can, therefore, be considered as merely a detail in the exercise of the State Department’s prerogative under which it is the authoritative government agency to advise a court as to whether or not a particular acting government is recognized or not recognized by the United States. There, one further step was made to advise the court what law, previously recognized, had ceased to have effect within the territory of the country which had passed it, and what law had succeeded the Nuremberg Laws.46 This is no precedent for the proposition that the State Department at its uncontrolled discretion—willy-nilly—can advise a United States court that it can disregard a law which is in effect in a foreign country, declare it null and void—of no effect—and recognize as valid and effective a law which no longer exists.

46. See note 44 supra and accompanying text. The relevant parts of the letter are:

1. This Government has consistently opposed the forcible acts of dispossession of a discriminatory and confiscatory nature practiced by the Germans on the countries or peoples subject to their controls. In this connection reference is made to the following:
   a. Inter-Allied Declaration against Acts of Dispossession of January 5, 1943, United States Economic Policy toward Germany (Dep’t State Pub. 2630) 52;
   b. Gold Declaration of February 22, 1944, 9 Fed. Reg. 2096 (1944);
   c. The Potsdam Agreement of August 2, 1945, 13 Dep’t State Bull. 153 (1945);
   d. Directive to the Commander-in-Chief of the United States Forces of Occupation Regarding the Military Government of Germany, April 1945, JCS 1067, paragraphs 4 (d), 48 (e) (2), 13 Dep’t State Bull. 596 (1945);
   e. Directive to the Commander-in-Chief of United States Forces of Occupation Regarding the Military Government of Germany, July 11, 1947, paragraph 17d, 17 Dep’t State Bull. 186 (1947);
   f. Law No. 1 of the Allied Control Council (Off. Gaz. of the Control Council for Germ. No. 1, Oct. 29, 1945);
   g. Military Government Law No. 1 (Mil. Gov. Gaz.-U.S. Zone June 1, 1946);
   h. Military Government Law No. 52, secs. 1(f), 2 (Mil. Gov. Gaz.-U.S. Zone June 1, 1946);
2. Of special importance is Military Government Law No. 59 which shows this Government’s policy of undoing forced transfers and restituting identifiable property to persons wrongfully deprived of such property within the period from January 30, 1933 to May 8,
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PREMISE: That to recognize the effect of a law executed on persons or property outside of the United States is to enforce that law within the United States.—This switch of meaning of the words “enforce” and “recognize” is a serious error and leads to erroneous conclusions. No United States court is required at any time to enforce within the United States any act of state committed anywhere in the world by any foreign government. If that foreign law is not violative of international law and if, further, it is compatible with United States law, not by compulsion, but by comity, it may be enforced. Should any foreign law be found by a United States court to be contrary to international law or violative of United States law, it will not be enforced in the United States; but if a foreign law has been executed upon men and property abroad—men and property within the jurisdiction and under the control or possession of that foreign country, then the act of state doctrine requires that American courts act realistically and, upon due proof, recognize the effects upon men and things which have taken place outside of the United States and within the jurisdiction of that foreign country. This is true even if the property affected by the foreign act of state is later brought into the United States. Reciprocally, the United States expects the validity of its own acts of state within its own domain to be universally recognized. There is no exception to this rule. Such foreign recognition will be accorded to the results of an act of state, whether or not that act of state be violative of international law.

Perhaps an illustration will serve to clarify the matter. Suppose that the oppressive acts of Cuba in retaliation for reduction of the United States sugar quota had not been confiscation of the property of Compañía Azucarera Vertientes-Camaguey de Cuba [hereinafter referred to as C.A.V.] in Cuba, but rather had been conflagration of that property in Cuba—the sugar mill, the warehouses, the very sugar involved in the Sabbatino case had been (we suppose) destroyed by fire—and that this destruction had represented the national will of Cuba. There is no doubt that this destruction would have been an act of state contrary to international law, and there is no doubt the State Department would have concluded that Cuba was liable for this damage to United States property.

1945 for reasons of race, religion, nationality, ideology or political opposition to National Socialism. Article 1 (1). It should be noted that this policy applies generally despite the existence of purchasers in good faith. Article 1 (2).

3. The policy of the Executive, with respect to claims asserted in the United States for the restitution of identifiable property (or compensation in lieu thereof) lost through force, coercion, or duress as a result of Nazi persecution in Germany, is to relieve American courts from any restraint upon the exercise of their jurisdiction to pass upon the validity of the acts of Nazi officials.

20 Dept State Bull. 592-93 (1949).


although no transfer of title was decreed or attempted. Would the courts in the United States, which decided in the *Sabbatino* case that an act of state contrary to international law was of no effect, refuse to recognize that the conflagration had occurred and that this was Cuba’s executed will against United States property and that C.A.V. had suffered wrongful damage, merely because this destruction by fire was contrary to international law? Even more dramatically, would the courts of the United States be willing to administer the assets within the United States of an estate of a United States national who had died in Cuba of natural causes, but refuse to administer the estate of a United States national who, for alleged political reasons and summarily without due process of law, had been executed by a firing squad? The latter death was wrongful, wrongful under international law. The lower courts said in *Sabbatino* that the law was not effective to accomplish its purpose and that the result accomplished (under Cuban law) would not be recognized in the United States.

*An Unanswered Question*

By denying the validity of Cuba’s act of state and holding that there had been no transfer of title to Cuba under Cuban law, the inevitable result of the lower court decisions was that, as a matter of law, all United States nationals who had investment in Cuba still had title to all of their assets. But what is title? The great bulk of the property subject to Cuba’s confiscatory decree was land, buildings, mills, factories and mines. A definition of title to real property, which has been standard for nearly five hundred years, is: “Title is the means whereby the owner of lands has the just possession of his property.”49 Whoever has title to property has the right to possession, unless he himself has alienated the right to possession for the time being.

In determining that Cuba had not acquired title, would the lower courts decide that the owner still had possession or did not have possession? This is not a silly question; the answer must seriously affect the rights of United States investors in Cuba. If the courts were sufficiently realistic to recognize physical acts (seizure of property), even if those courts refused to recognize a legal conclusion (title), then the United States owners have title but no possession. Does a court which determines title have the duty to put the titleholder in possession of his property? If not, the successful litigant has achieved but little, for the value of title is the use of the property and the profits to be obtained from that use. Or perhaps the courts should not have rendered such a decision,

for by so doing they violated the usual rules of jurisdiction that "jurisdiction cannot be justly exercised by a state over property not within the reach of its process, or over persons not owing them allegiance, or not subjected to their jurisdiction, by being found within their limits."\(^{20}\)

This brings us to certain general considerations of law.

V. OBLIGATION AND SANCTION

All laws are of two parts. The first part of any law expresses the obligation or the prohibition. This defines either the anti-social conduct which members of that particular society must avoid—"Thou shalt not!"—or the social conduct which must be observed—"Pay your taxes." "Send your children to school."

The second necessary part of every law is the sanction. This is a statement of what will happen to one who offends the prohibition, or fails to meet the obligation. It is the effort of society by threat to cause persons to conform to the approved pattern of social conduct. It is the punishment imposed or liability incurred if they neglect or refuse to do so.

The law relating to conduct between individuals follows the same pattern. The prohibition, or obligation, is "Commit no tort against your neighbor." "Perform your contracts in good faith." And the sanction is the imposition of liability for failure to conform to this socially approved pattern of conduct toward those among whom one lives and with whom one does business. As stated by Black:

*Sanction*, n. In the original sense of the word, a penalty or punishment provided as a means of enforcing obedience to a law. In jurisprudence, a law is said to have a sanction when there is a state which will intervene if it is disobeyed or disregarded. Therefore international law has no legal sanction.\(^{51}\)

But, every sanction in itself is composed of two elements. In order to execute the laws on the social offender, the court must have jurisdiction and control of the person or custody of the property.

*Sanction in the Sabbatino Case*

International law is a code of conduct which nations observe toward each other and toward each other's nationals. The obligation involved in *Sabbatino* can be stated as follows: No sovereign shall confiscate the property of the nationals of another sovereign. To this obligation, the lower courts in the *Sabbatino* case added a sanction. This sanction had

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50. *Mills v. Duryee*, 11 U.S. (7 Cranch) 481, 486 (1813) (Johnson, J., dissenting). The issue in this case was whether states were required to enforce the proceedings in other states or merely to recognize them. The quoted part comes from the dissent, indicating that independent states will recognize, but enforce only in accord with their own laws. Under the Constitution, all states are within one general sovereignty.

never existed before in United States jurisprudence. There is no evidence that it existed in the jurisprudence of foreign countries. The sanction affects only sovereigns. It is: If any foreign country violates the obligation and passes a confiscatory act purporting to affect the property of the nationals of another country, the courts of any other country may declare such an act of state null and void and seize any property which the sovereign claims to own by reason of such law.

This is not merely a conclusion from what the lower courts did—not a mere inference from statements in the case. The court of appeals, in affirming the district court, characterized its own actions in completely unmistakable terms and said:

Refusal by municipal courts of one sovereignty to sanction [approve] the actions of a foreign state done contrary to the law of nations will often be the only deterrent to such violations. More important, the only relief [sanction] open to persons injured by a confiscation will often be the invalidation of the confiscating country's title to the confiscated goods by decree of a court of another country.52

VI. WHY THE DECISION OF THE LOWER COURT IN 
Sabbatino WAS PRAISED

When the district court decision was handed down, there had been no freezing of Cuban property in the United States; trade was gradually being restricted between the two countries, but no general embargo had been established against trade with Cuba. But by the time the case reached the Supreme Court, Cuba could not bring any further property into the United States; United States citizens could not trade with Cuba. The money paid as the purchase price of the sugar in the Sabbatino case was frozen, along with all other property claimed by the Cuban Government within the United States.53

The district court decided the Sabbatino case in an atmosphere of national outrage. Not only had Cuba seized a billion dollars worth of property of United States nationals, but it had the effrontery to try to sell some of those assets to United States citizens, payment to be made in New York. The appearance in court, to collect the purchase price of the sugar (part of the confiscated property), by an agent of the Cuban Government seemed intolerable. The district court decision was commended, and this commendation related particularly to two features of

52. 307 F.2d at 868.
53. On February 3, 1962, all trade, including tobacco, between the Republic of Cuba and the United States was prohibited, except under license. For the text of the Presidential Proclamation and also for a background of United States trade relations with Cuba under Castro, see N.Y. Times, Feb. 4, 1962, p. 22, cols. 1-3. Restrictions on trade had been commenced as early as the fall of 1960. United States diplomats were withdrawn January 3, 1961. The freezing regulations were imposed by the United States Treasury on July 8, 1963. Federal Reserve Bank Circular 5353; see 31 C.F.R. §§ 515.101-.801 (Supp. 1964).
the decision. First, Cuba did not receive the purchase price; it was awarded to a representative of the company whose property had been confiscated. Second, the decision was considered a notice to the world that the United States market would be closed to the sale of confiscated goods, particularly those seized from nationals of the United States—the United States will not become a "thieves' market."

The difficulty with the decision of the lower court was that it created a new national policy and a new rule of international relations—an exception to the act of state doctrine. The tripartite division of the functions of our government does not give to the courts the authority to create national policy or rules of international relations.

The efforts of the lower courts, by their decisions, to prevent Cuba from selling confiscated goods in the United States and receiving the money—the two features of their decisions which received such acclaim—thereafter became national policy. There was an embargo against Cuban goods; there was a freezing of Cuba's assets in the United States. Both were accomplished, under authority granted by Congress, by Executive action. Congress can create any national policy it desires, subject only to the limitations imposed on it by the Constitution. An embargo—however obtained—means, as it does here, that no more property from Cuba, confiscated or not, will come into the United States. The courts of the United States will not again have an opportunity to give to former owners any part of the property, or its proceeds, confiscated by Cuba, and, as stated above, Cuba cannot have the use of any of its own property in this country as it has been "frozen."

In Sabbatino, the lower courts attempted to restore $175,000 dollars to an American company whose unexportable confiscated assets of land and buildings in Cuba were worth more than $93,000,000 dollars. This was but 1/50 of one per cent of the value of all United States property seized in Cuba, and even this pittance would go only to one company. How shall this company, C.A.V., seek redress for the $93,000,000 dollars, and how shall all the other corporations and persons whose property has been confiscated in Cuba seek redress for their losses?

The agelong principles subscribed to by the United States and other countries are: Confiscation of the assets of nationals of a country is an affront against the government of that country which, as the representative of its nationals, then seeks to secure redress. A foreign confiscatory act of state is valid; the title to property within the jurisdiction of the confiscating government and under its control has been transferred; and

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54. Ibid.
55. C.A.V. filed a claim with the State Department against Cuba for $93,000,000, the total value of its property in Cuba. See Schwartz v. Compania Azucarera Vertientes-Camaguey de Cuba, 39 Misc. 2d 63, 70-71, 240 N.Y.S.2d 247, 254-55 (Sup. Ct. 1962).
the country owes the value of the confiscated assets. The nationals of any country have never had any other means of redress than through the executive agencies of their own government.

This previously existing method of government-to-government dealing in behalf of each sovereign's nationals now is being presented with a new problem in the form of the rider, known as the Hickenlooper Amendment, to the Foreign Assistance Act of 1964, which is frankly stated to be a law the purpose of which is to overrule the Supreme Court decision in the Sabbatino case and recreate the new interpretation of law laid down by the lower courts in that case:56 that courts are free to declare an act of state of a foreign country which they find contrary to international law to be null and void. Thus, the effects of this intended variation from the doctrine of the act of state must be examined.

VII. EFFECT OF INVALIDATION OF CUBA'S ACT OF STATE ON EFFORTS TO SECURE REDRESS FOR PROPERTY CONFISCATED IN CUBA

The establishment of the principle that the confiscatory acts of Cuba are null and void will be of great disadvantage to all Americans whose property has been seized by Cuba. If it now is the law of the United States that the courts of the United States can invalidate the confiscatory acts of Cuba, then we have substituted for the old rule (that title is transferred) a new rule that United States nationals still own all of their property in Cuba, for Cuba did not acquire title—the title to the property was retained by United States investors in Cuba. Thus they appear to retain individual rights in Cuba against Cuba. But who will sponsor them; who will enforce their right?

Now we may properly ask ourselves a few searching questions as to what our own government can do under the limitation placed upon it by this abolition of the fundamental rule of the act of state doctrine. If United States nationals still own their property in Cuba, it is questionable whether or not as a matter of law the United States can claim an affront to the United States. If the bargaining power of the United States is limited to efforts to induce Cuba to permit United States nationals to occupy the property, title to which is still theirs, has the United States an ultimate duty to place the owners in possession of the property? Certainly the courts of the United States, which under this act could now purport to give continued right to title to United States nationals (as the lower courts did in Sabbatino), can do nothing more. A court can create a sanction, as the lower courts did in Sabbatino and then, outside of the court (but under the court's jurisdiction), invoke whatever force is necessary to make that decision become a reality; it can, and does, do this when it has jurisdiction. But even under the amendment, the courts cannot exercise

56. See notes 15-20 supra and accompanying text.
or invoke any power whatever against a foreign sovereign government. In such a situation could the State Department offer to sell the property to Cuba and give good title—which in Cuba, Cuba already has under Cuban law? In any effort at lump sum settlement, must our Government secure consent of all the United States nationals who still hold title before it can conclude such a settlement? Imagination can propound other questions which would arise under such an unrealistic limitation placed upon the efforts of the United States to secure redress for its nationals.

But this is not all. Under Cuban confiscatory law, Cuba nationalized United States businesses and incorporated them into Cuba's national economy. In so doing, Cuban law provided that Cuba would assume all the liabilities of these businesses in Cuba. Are the United States owners willing to admit their full liabilities for any outstanding commitments in Cuba as of the time of Cuba's confiscatory decrees? If Cuba has no title, could we assume under this United States law that Cuba has nevertheless assumed the liabilities? Also if United States citizens still have title to their property in Cuba, United States nationals still own much of the goods being shipped out of Cuba just as one of them owned the sugar. The United States has been singularly unsuccessful in persuading its neighbors and other allies not to trade with Cuba, so that Cuba now trades with both the Soviet bloc and the Western bloc, although a few neighbors of Cuba have shown some fear of the present regime and willingness to cooperate with the United States. Will the friendly and allied countries who want Cuban products be willing to recognize United States title to them?

Nothing but harm and confusion and loss of dignity to the United States can be achieved by restating the principle that a foreign government cannot commit an act of state in contravention of international law. The rider to the Foreign Assistance Act of 1964, couched in language ontradictory and confusing and not yet interpreted by any court in any case, can lead only to prolonged and expensive litigation. It cannot put anyone in possession of the property in Cuba; it cannot secure compensation for property now occupied by Cuba.

VIII. A PROPOSAL

In adopting the rider to the Foreign Assistance Act of 1964, Congress has overthrown the Supreme Court decision in *Sabbatino*, which continued the act of state doctrine, and has expressed its intention to adopt the reasoning of the lower courts in that case, which created a new theory of law to take the place of the act of state doctrine. This excep-

57. For further discussion of this, see the comments of Professor Louis Henkin, in Act of State: Sabbatino in the Courts and in Congress, 3 Columbia J. Transnational L. 99, 107-15 (1965).
tion, which refuses to recognize change of title when a foreign confiscatory act of state is in violation of international law, puts a severe limitation on negotiations between the United States Government, through the State Department, and the Government of Cuba for one of the two things we can hope to get from Cuba—the return of our nationals' confiscated property, or payment for it by Cuba. If we continue the illusory thesis that we still have title (to which is added the ramification, does title go with or without possession?), how complicated is the argument we give to the State Department seeking either compensation or the return of the property? What defenses do we give to Cuba? And in adopting this new theory of law, we set ourselves quite apart from judicial interpretation in international commercial cases throughout the world.

Instead of this rider, effective action to accomplish the desired result, and avoid complications, indefiniteness and uncertainties, is for Congress to substitute for the amendment a bill, referring not only to Cuba but announcing as a national policy, that it is unlawful to bring into the United States any property the title to which has been acquired directly or indirectly by a confiscatory act of state of any foreign state; and, to anticipate the possibility that some goods might nevertheless be smuggled into the United States and be identified as property previously belonging to a national of the United States, to provide that such contraband goods, the title to which is forfeited to the United States on condemnation as contraband, be re-transferred to the United States national who could prove he was the former owner of them.

Then, as in past time, the United States Government, through the State Department, would be free to bargain with Cuba for redress, for return of property, for compensation for losses caused by confiscation and, in efforts to attain this end, to place upon Cuba such economic and political pressure as may properly be used in the national interest.

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The British Protectorate of Aden


We may properly commence the weighing of cases with the one case, the Rose Mary case, which alone supported an exception to the act of state doctrine—that if the act of state of a foreign state is contrary to international law, it may be and should be declared null and void, and it is not valid to transfer title in spite of the sovereign's intention to do so.

Facts. In the year 1933, the Government of Iran, a country formerly known as Persia and still frequently referred to as Persia, granted certain concessions to a corporation, predominately British, known as the Anglo-Iranian Oil Company. The concession gave to this company the right to explore for oil within a large area of the country and to extract and refine the oil it found. A schedule was made for payments to the Iranian Government depending in amount, of course, upon the success of the venture. The concession agreement contained various clauses among which were that it was not to be abrogated by legislation and was to continue until December 31, 1993. Pursuant to the agreement, the company explored, found oil, extracted it, built refineries, sold oil and paid the necessary amounts under the agreement to the Iranian Government. The company profitably exercised its rights under the concession agreement until the year 1951 when, under the aging and unstable Premier Mossedagh, the Iranian Government by legislation abrogated the agreement and nationalized the oil fields and the facilities for extracting and refining oil and set up a government bureau to carry on this work. The government bureau took over the operations and sold oil thereafter.

In 1952, an Italian company purchased oil from this Iranian Government bureau and directed a shipload of the oil to be carried to Bari, Italy, where it was to be re-shipped at the direction of a Swiss purchaser. While the ship was at sea on this voyage from Iran to Italy, the captain of the ship received conflicting orders from the owners of the ship and the charterers. An English army airplane circled the ship one day, and forty miles outside the port of Aden, the ship was met by a tug with an agent of the owners of the ship on board who directed the captain to deviate from his voyage and come into the harbor of Aden, disregarding any contrary orders. This he did. Immediately, the Anglo-Iranian Oil Company, as the holders of the concession in Iran, claimed
title to the oil in the ship and brought suit in Aden, placing the oil under judicial restraint pending determination of title.

Aden occupies a strategic position geographically on the Gulf of Aden, commanding entrance to the Red Sea. Aden at that time was a British protectorate and the court was presided over by a British judge. There was no appeal court in Aden, appeal then having to be made to the British court sitting at Nairobi; and if further review was necessary in a case, the review would come before the English Privy Council.

Contention and Decision. The purchasers of the oil interposed two defenses to the claim of the Anglo-Iranian Oil Company: one, that the court lacked jurisdiction. The argument here was that the ship was on a voyage which did not include entrance to the port of Aden; the cargo of the ship, the oil, was destined for Italy. The captain testified concerning the conflicting and confused orders he had received and the fact he was met at sea by a representative of the owners of the ship; he stated that one of his principle reasons for diverting the ship from its course to Aden was fear of being bombed by a British R.A.F. plane. The court brushed aside his objections to jurisdiction, and particularly as to the airplane incident, saying:

"As to his fear of the aeroplane, it seems to me very unlikely that this really existed. No reasonable man could think it likely that Her Majesty's Government in the year 1952 would try to resolve a commercial dispute by what would be little short of an act of war."\(^5\)

The second defense was that purchase of the oil had been made from the Bureau of the Iranian Government which had acquired title to the oil under the Nationalization Law of Iran, and physical seizure of the properties under the concession.

The decision of the Aden court was that the abrogation of the concession was an act contrary to international law and held that, therefore, the act was invalid. The Aden court decided that the Anglo-Iranian Oil Company was still the owner of all of the oil coming out of Iran.

The following cases (these cases were also among the thirty-two cited by the three United States courts in the Sabbatino case) were cited by the Aden court for its authority in holding that an act of state contrary to international law was invalid, and that this abrogation of the concession and seizure of the concession property did not transfer title to any of the oil produced from that concession.

Aksionarnoye Obschestvo A.M. Luther v. James Sagor & Co. (Eng.)\(^59\)
Princess Paley Olga v. Weisz (Eng.)\(^60\)
Wolf v. Oxholm (Eng.)\(^61\)

\(^{59}\) Appendix p. 632 infra.
\(^{60}\) Appendix p. 633 infra.
\(^{61}\) Appendix p. 637 infra.
These six cases cited by the Court of Aden will be reviewed later to show (a) that the first two English cases were reviewed by the Chancery Court of England in another case which found that the Aden court had misconstrued these cases in refusing to hold that recognition of the act of state doctrine was the law of England. (b) The next two listed English cases show the same principles as certain leading United States cases and, therefore, are not authority for abrogation of, or exception to, the act of state doctrine as they accord with United States law. (c) Finally, the two French cases did not involve an executed act of state and are, therefore, irrelevant and do conform to the act of state doctrine.

Let us now follow more shipments of that oil from the nationalized Iranian oil fields and observe the legal results in other countries where there was controversy.

The Italian Cases

Five ships had been loaded with Iranian oil and had headed for Italy. One of these, the ship mentioned above—the Rose Mary, was the one diverted to Aden. However, the four other ships loaded with oil from these same Iranian fields had also been sold to an Italian concern and did arrive in Italy.


Facts. The Anglo-Iranian Oil Company instituted proceedings in Italian courts as to the cargo of each of these ships, as it had done in Aden, claiming ownership of the oil, and applied to the Court in Venice for judicial sequestration, pending the final hearing and determination of its claim of title to this oil. The oil from Iran, brought in the ship Miriella, was in storage in Venice.

Contention and Decision. The Anglo-Iranian Oil Company contended that title to this oil had not passed to the Government of Iran, nor to any of its agents, by the Nationalization Law of Iran, because that law was contrary to inter-

62. Appendix p. 638 infra.
63. Appendix p. 641 infra.
64. Appendix p. 640 infra.
national law and therefore invalid. The court refused to grant the application and in a relatively brief opinion, after stating the facts and the contentions of the parties, said:

"According to the most authoritative writers and case-law, it would appear redundant to enquire whether the principles adopted by a foreign Legislature are contrary to those adopted by our Legislature if the acts contrary to public order have taken place in a foreign country, seeing that the proceedings before the Italian Court deal only with the juridical consequences of these acts, the acts themselves having—from a legal point of view—been finally concluded abroad.

"The oil which forms the subject of the present dispute was taken by the Persian Government in Persia by virtue of the Nationalization Law, and in Persia it was disposed of in favour of S.U.P.O.R by a contract of sale: all this was in conformity with the judicial system of the Persian Government, on whose territory these acts (expropriation and sale and purchase) took place, with the legal and material consequences flowing therefrom. The recognition in Italy of the validity of the effects which these acts had already had in Persia cannot be termed co-operation to make them become effective; it constitutes no more than an acknowledgment that the effects have indeed taken place, i.e., accepting the effects produced, which in themselves—and considered separately from their cause—are in no way contrary to public order. The Nationalization Law should not, therefore, be examined from the point of view of public order.

"If, however, the question is tested by examining the Nationalization Law in regard to public order, which has been referred to at some length in the contentions put forward on behalf of A.I.O.C., the claim of ownership appears unjustified, which supports the rejection of the request for sequestration."

Clearly the court's decision supported the act of state doctrine.


Facts. This same case was then considered by the Civil Court of Rome and a decision was handed down by that court about a year later. The Civil Court of Rome at the same time and in the same opinion considered, in addition to the claim for oil brought to Venice in the above-mentioned ship, Miriella, the claim of title to oil brought from Iran in the three other ships, the Alba, the Brezza, and the Salso.

Contention and Decision. The court at Rome affirmed the court of Venice, holding that the Anglo-Iranian Oil Company was not the owner, but instead that the purchaser, who bought the oil from the National Iranian Oil Company, the government agency of Iran, held good title.

The opinion of the Civil Court of Rome was lengthy and analytical and in some instances hypothetical. First, the court endeavored to indicate the

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66. Since the Rome court reviewed additional claims as well as that claim decided by the Venice court, these two Italian decisions are counted as two cases out of the total thirty-two listed in this article.
meaning of "public order" as the concept indicated by those words was known and enforced in Italy. The court indicated the difference between enforcement of an act in Italy which was contrary to public order and the mere recognition of the legal results of an act taken outside of Italy which, had it occurred in Italy, would have been against public order. To clarify this distinction, the court gave the following illustration:

"It may thus happen that, in Italy, inheritance rights of the mother and son of a polygamous marriage are recognized, although such a marriage would not be recognized in Italy as being contrary to our public policy; it nevertheless has produced its effects abroad."67

Having satisfied itself as to the facts, the meaning of this law in Iran, and its "legality" there (i.e., validity in Iran under Iranian law), the court was then in position to make its findings which in brief, and as numbered in the opinion, were:

1. The Iranian Nationalization Laws of 1951 and 1952 cannot be said to be contrary to the Persian (Iranian) constitution.
2. The Iranian Nationalization Laws are not contrary to Italian public policy.
3. The existence of an economic public interest in the expropriation prevents the (Italian) court from regarding the oil nationalization law as being of a political nature so as to exclude its application in Italy or from regarding the law as discriminatory in the sense of incompatibility with international law.
4. The oil nationalization law was not contrary to the generally accepted rules of international law.68

Both the Court of Venice and the Court of Rome recognized the validity of the Iranian nationalization laws. The Court of Rome was convinced that courts of other countries also supported this doctrine, and said:

"The judgment of the Civil Court of Antwerp of February 21, 1939,69 relating to the same question, that of the Court of Appeal of Arnhem of June 12, 1939,70 and that of the District Court of New York (Southern District) of April 13, 1939,71 definitely deny that any foreign court is entitled to decide on the lawfulness of an expropriation carried out by a foreign Government; the same conclusion was reached

68. Id. at 36-42.
Yet quotations from this decision of the Court of Rome were cited by the district court in *Sabbatino* in support of the proposition on which it decided the *Sabbatino* case. But to the contrary, the Rome Court had decided: (1) the Iranian confiscation of the Anglo-Iranian Oil concession was not contrary to international law; (2) that the Nationalization Law transferred title; and (3) that this title would be recognized in Italy as valid. It remains, therefore, to place the quotations from the Italian case in their immediate context and consider them against the background of the whole Italian opinion. The quotations from the Court of Rome opinion used by the United States District Court are indicated by italics in the following excerpts from the decision of the Court of Rome:

"The Court recalls that the rules of foreign private international law and foreign political laws cannot be applied in Italy independently of the effects produced by them and independently of any consideration regarding their relation to international public policy.

"Whether or not provisions of foreign laws are applicable in Italy depends on the nature of those provisions. If the laws have been enacted for reasons of political racial hatred, then the principle of 'non-intervention' in the domestic policy of a foreign country, the consideration of the nature of such laws, and especially whether they are contrary to international public policy, and the sovereignty of the national State in the territory of which it is sought to apply them, prevent, according to the accepted doctrine, such laws from having extra-territorial effect. Thus, discriminatory laws enacted out of hatred, against aliens or against persons of any particular race or category or against persons belonging to specified social or political groups, cannot be applied in Italy because they run counter to the internationally accepted principle of the equality of individuals before the law.

"Such principles, developed by international doctrine, are generally accepted by the jurisprudence of the various countries. However, as has been noted, no such predominantly political and persecutory purpose as characterizes the political, racial, expulsory laws which have been met with elsewhere is found in the Persian nationalizing legislation."

"As has been stated above, however, this Court holds that the Italian courts have the right and the duty to examine a foreign Law, from the point of view of its legality, so as to establish whether it is contrary to the Constitution of the foreign country concerned or to international public policy or to any generally accepted principles of international law, and this on the basis of Article 31 of the Preliminary Rules to the Italian Civil Code and Article 10 of our Constitution. In consequence,

72. See note 70 supra.
73. [1955] Int'l L. Rep. at 41-42. Note that the four cases cited, notes 69-72 supra, supported the act of state doctrine.
74. 193 F. Supp. at 384 n.22, 385 n.25.
the Italian courts must refuse to apply in Italy any foreign Law which decrees an expropriation, not for reasons of public interest but for purely political, persecutory, discriminatory, racial and confiscatory motives. Furthermore, the Italian courts must refuse to apply in Italy such foreign Laws as may, even for non-political and non-persecutory motives, decree expropriation of the property of any foreign national without compensation.

"The Court holds that in this particular case the Iranian Oil Nationalization Laws of 1951-1952 may, in accordance with the principles which have been mentioned, be applied in Italy as they are not contrary either to the Iranian Constitution or to international public policy or to any generally accepted principles of international law, since they decree by statute expropriation for reasons of the public interest of Iran and not for motives of persecution or confiscation or for political or discriminatory motives, and since they recognize the right of the expropriated foreign nationals to compensation." 

What do the italicized parts of these quotations mean? Why did the Court of Rome insert such thought? The obvious meaning of the first quotation when read in context is that the courts of Italy will give no extraterritorial effect to foreign acts of state which are contrary to or incompatible with Italian law, acts which would not be tolerated in Italy. This is what the court said. But this is exactly the position taken by the American courts which support the act of state doctrine.

The exact wording of the first quotation, as well as the second, should perhaps be read against an even broader background than this one case. This was a decision of an Italian court, a court of a country which had but lately been fascist, an ex-ally of the inhuman Hitler. Italy had good reason to know what the Allies thought of the Nuremberg laws, laws which only the victorious conclusion of the most extensive and bloody war in history could erase, laws which after they had been erased were not recognized either in Germany or in the United States. By this explanation, this defense, this apology, the Italian court marked out this one type of law and assured itself and the world that by recognizing the validity of the Iranian seizures, the court was not giving support to law similar to those other infamous laws.

One may properly question the probative value in the Sabbatino case of either of these obiter dicta from the opinion of the Court of Rome. The district court, court of appeals and the one dissenting opinion of the Supreme Court quoted one or the other or both of them. In each instance their conclusion was that the Cuban law was invalid, and the obvious inference from these quotations was that Italian courts would not recognize the validity of such a law. But the Italian courts did recognize, in Italy, the change of title decreed by Iran in its confiscatory law nationalizing the oil concessions of a foreigner. Not only did Italy

76. Id. at 42.
recognize the validity of the Iranian law but held it was not contrary to international law. If any part of the opinion of the Court of Rome is to be used to support an opinion that the Cuban confiscation law is invalid, it would seem reasonable to require an explanation why the Iranian law did not offend the principles expressed in the obiter dicta quoted, but why the Cuban law does offend. Of course every confiscation followed its own pattern and the compensation offered in each case differed, but in each instance their victim considered that the suggested compensation was wholly inadequate. Certainly when obiter dicta is employed as proof of a principle of law and no case whatever is cited from that same jurisdiction which has been decided on the principles expressed in the obiter dicta, one may naturally surmise there is no decided case supporting the principle, else such a case would have been cited.

The Japanese Case


Facts. A Japanese company also had purchased oil in Iran from the Iranian Government agency, and had transported that oil to Japan in its own tanker, Nissho Maru. The Anglo-Iranian Oil Company once again asserted title to the oil from Iran. This time the Anglo-Iranian Oil Company asked a Tokyo District Court to place the oil in the custody of the court preliminary to a decision on the company's claim that it had title to the oil. This was the same form of relief the company had asked from the Italian Court of Venice.

Contention and Decision. The Anglo-Iranian Oil Company claimed in this case, as it had claimed before, that since it was a concessionaire for the extraction and refining of oil in Iran, the Nationalization Law of Iran, abrogating that concession, therefore, being a breach of the concession agreement, did not transfer title to the oil to the Iranian Government. The District Court of Tokyo dismissed the application of the Anglo-Iranian Oil Company as the Italian court had done; it held that the Nationalization Law was valid; that the applicants had lost all their rights and interest under the concession and did not have title to the oil in dispute. The case was then appealed. The decision was confirmed by the higher court, also in Tokyo.

The District Court in Tokyo said:

"It cannot be denied that there exists a rule of international law which makes an act of confiscating without compensation a foreign interest in a country a wrongful act under international law. As a result of that rule, a foreigner who suffers from such an act of confiscation, or his own Government acting in his interests, will naturally demand, and press the confiscating Government for payment of compensation. However, the question whether or not the courts of a third State have power to declare such an act of another State invalid, or to deny the effect of the act, is quite a different
proposition. This Court is not convinced that there exists a universally established principle of international law which answers the question in the affirmative.\textsuperscript{77}

One new factor raised in the Japanese courts in this case was Law No. 10 of 1898, known as the \textit{Hōrei}, which embodies the rules of private international law recognized in Japan. Article 30 of Law No. 10 reads:

"In the application of foreign law—by virtue of preceding articles of this law—provisions thereof which are against public order and good morals shall not be applied."\textsuperscript{78}

In regard to this, the Appeal Court in Japan said:

"The appellants claim that to recognize the effect of the Nationalization Law or hold that the appellants have lost their rights in the oil in question would infringe the terms of Article 30 of the \textit{Hōrei}; but as explained above, the Nationalization Law cannot simply be regarded as a law by which the rights of foreign nationals are confiscated. And the present Court, which has failed to find any established rules of international law governing the matter, has confined itself to taking the attitude that it is impossible to pass on the validity or invalidity of the said Law and has not concluded positively that the Law is valid. This has had indirectly the same effect as if we recognized the Nationalization Law as valid; and that has resulted in our denying the appellants' ownership of the oil in question. We do not, however, think that these matters are contrary to the public policy of this country."\textsuperscript{79}

Thus, the courts of Japan adopted a rule of restraint and refused to decide whether the Nationalization Law of Iran was valid or not; in short, refused to "sit in judgment" on the validity of a foreign act of state. The result of this was that the Nationalization Law was deemed to be valid; its effect was recognized in Japan. Thus, the decisions of both Japanese courts recognized the act of state doctrine. Since the Nationalization Law of Iran was treated as valid, the conclusion of the court was that the Japanese company in purchasing the oil from the Government of Iran received good title.

B. Attitude of the United States Government Toward the Iranian Oil Seizures\textsuperscript{80}

While the cases above cited were being instituted in various countries and taking their judicial way towards judgment, British interests involved in the Iranian confiscation indicated their concern that some of this oil could be sold in the United States. Obviously they hoped that

\textsuperscript{77} [1953] Int'l L. Rep. at 309.
\textsuperscript{78} Id. at 306 n.2.
\textsuperscript{79} [1953] Int'l L. Rep. at 316.
\textsuperscript{80} The statement of United States attitude toward the Iranian oil seizures is based on the article by Stanley D. Metzger, The Act of State Doctrine and Foreign Relations, 23 U. Pitt. L. Rev. 831 (1962). Professor Metzger was formerly Assistant Legal Adviser, United States Department of State.
the United States would prevent the sale of any of this Iranian oil within this country. The obvious purpose here was to put economic pressures upon Iran. Here we can observe that the judicial argument about international law and exceptions to the act of the state doctrine is not primarily to recover any of the confiscated property; little, if any, would be recovered—the refusal to recognize judicially the validity of any foreign act of state contrary to international law is to put economic pressure on the country committing the act of state, usually a confiscation, to cause that country to reconsider its action. The economic pressure is intended to be achieved by depriving the confiscating country of its customary markets. Application of economic pressures on a foreign country is, however, not a judicial, but a political matter. It is to create an embargo.

The United States Government treated these suggestions with sympathy but with understanding of the world situation. Of course, the United States desired to maintain friendly relations with Great Britain and desired to do what it might to discourage confiscation and desired to see fair treatment of the British-dominated oil companies. But the political situation was not wholly simple, and a satisfactory solution was difficult because of the political situation in Iran. The political departments of our Government were confident that Mossedagh, the spokesman for his country, though he may have been little more than a figurehead, was, in spite of his confiscatory decrees, more friendly to the West than to the East. However, there were powerful parties or cliques favorable to the Soviet bloc which only awaited the fall of this aged, and perhaps incompetent, person. If he was deprived of all of his markets as desired by the Anglo-Iranian Oil Company, the United States feared, with good reason, that Mossedagh would fall because of the resulting financial crisis; the Communists would take over and one more country would slip behind the Iron Curtain.

The United States, therefore, toyed with the suggestion which was to prevent the sale of oil within the United States. It was announced that the United States Navy would not buy oil from Iran. However, the United States Government permitted all United States corporations who wished to buy oil from Iran to do so. They could sell it in the United States if they wished. If litigation resulted, that was a business risk, but in this the United States relied upon a policy of adherence to the act of state doctrine, not then believing that any court of the United States would interject itself into such political matters of national policy adopted by the executive branch.

The United States used its political power wisely. It added somewhat
to the economic pressure upon Mossedagh. However, permitting some of the confiscated oil to be purchased by United States companies was a factor enabling him to maintain some markets and receive some national revenue; and he remained in power until a government favorable to the West could succeed him by taking over the control of that unhappy country. Later, a settlement was made between the Government of Iran and the Anglo-Iranian Oil Company.

C. English Cases Interpreted Erroneously in the *Rose Mary* Case

The *Rose Mary* case is indeed cited by all of those who support the desirability of an exception to the act of state doctrine—that if the act is contrary to international law, its effect will not be recognized. Well may those who support this new doctrine cherish the one case of the trial court of the British Protectorate of Aden, for it is the only case on which they can rely. But let us look further to the authorities on which the court of Aden itself relied. Two of the English cases on which the court of Aden principally relied were later reviewed by the English Court of Chancery in deciding another case, *In re Helbert Wagg & Co.*, which found that the Aden judge who decided the *Rose Mary* case had misinterpreted these two English cases. The significance of *In re Helbert Wagg & Co.* thus rests principally on the comment therein about these two English cases cited by the Aden judge in the *Rose Mary* case, and which that Aden judge had held were not precedent to prevent an exception to the act of state doctrine. The English Court of Chancery found the statement of facts in the *Rose Mary* case correct, but disagreed with the court of Aden in its interpretation of applicable law. Of this, the English Court of Chancery in the *Wagg* case said:

I do not challenge the correctness of the decision in the *Rose Mary* case upon the facts of that case, but Campbell J. [judge of the trial court of the British Protectorate of Aden] came to the conclusion that the authorities both of this and other countries justified the formulation of a more general principle, namely: (1) all legislation that expropriates without compensation is contrary to international law; and (2) that such law is incorporated in the domestic law of Aden and accordingly such legislation will not be recognized as valid in the courts of Aden. Unless the law of England takes a different view of international law from the law of Aden, the judge's conclusions can only be correct if his interpretation of *Aksionairnye Obshchestvo A.M. Luther v. James Sagor & Co.* and *Princess Palcy Olga v. Weiss* is correct.

The English Court of Chancery then proceeded to find that the Aden judge's interpretation of these two cases (*Aksionairnye Obshchestvo*...
A.M. Luther v. James Sagor & Co. and Princess Paley Olga v. Weisz was incorrect. With due judicial courtesy, but no less emphatically, Judge Upjohn, speaking for the Court of Chancery of England, continued:

With all respect to Campbell J., I think Luther v. Sagar and Princess Paley Olga v. Weisz laid down principles of general application not limited to nationals of the confiscating State.

Michael Mann, a writer on legal topics, placed the argument of the Court of Chancery of England—in relation to its comment on the reasoning of Judge Campbell—in the form of a syllogism as follows:

In fact, as the learned judge appreciated, The Rose Mary was decided upon a syllogism which can be stated as follows:

(i) It is contrary to International Law to expropriate an alien's property without compensation.
(ii) International Law is part of the law of England.
(iii) Therefore when the deprived person is, say, a British subject and compensation has been neither paid nor offered, an English court cannot recognise the expropriation since it has been illegally effected.

Both major and minor premise may be correct, but the inference has been debated on the ground that the rule of International Law does not deal with questions of title but merely provides that certain expropriations give rise to an internationally valid demand for compensation. It is said that the actual taking is not impugned, and that the international delinquency is only committed thereafter upon failure to pay any or any adequate compensation.

English law, thus, is: an act of state of a foreign country contrary to international law will be recognized as valid in that foreign country. This is true, regardless of the nationality of the person injured by the act of state. When a foreign country confiscates property of any foreigner, that country becomes liable to the foreigner's country.


Facts. The plaintiff, formerly a Russian company, had operated a factory in Russia which made veneer and plywood. On June 20, 1918, a confiscatory decree was passed by the Soviet, which took possession of the factory sometime later. When the factory ceased operating under Luther in 1919, there had been on hand a large stock of manufactured boards stamped with the trade name of the foreign company on whose order they had been made. Sometime in 1920, a representative of the trade mission of the new Soviet Government, then

83. Appendix p. 632 infra.
84. Appendix p. 633 infra.
85. [1956] Ch. at 348-49.
unrecognized by England, made a contract in England with Sagor and Company
to sell lumber, and the readily identifiable boards were sent to England in
satisfaction of this contract. Luther, the previous owner, now outside of Russia,
immediately claimed the boards as his property.

Contention and Decision. In the lower court in England, the decision was in
Luther's favor, the court holding that the confiscation of the Luther plant and
its stocks was not an act of state since the Government of Russia had not been
recognized by England, and only a recognized government can commit an act
of state. On appeal, however, this decision was reversed and the title of Sagor,
based upon the sale to him by Russia, was upheld and Luther's plea rejected.
The court held that the confiscatory decree nationalizing all the property in
Russia, when executed on the lumber in Russia, was a proper decree, the results
of which the courts of England would recognize. The appeal court had permitted
new evidence on the one issue—whether or not England had recognized the
Soviet Government as the lawful Government of Russia. The court found this
new evidence showed that the Government had recognized the Soviet Govern-
ment as the lawful Government of Russia, and the court, therefore, recognized
the confiscation decree as a valid act of state. The decision was unanimous,
several judges giving concurring opinions. One judge said:

The Court is asked to ignore the law of the foreign country under which the vendor
acquired his title, and to lend its assistance to prevent the purchaser dealing with the
goods. I do not think that any authority can be produced to support the
contention. 87

Another judge said:

It is well settled that the validity of the acts of an independent sovereign govern-
ment in relation to property and persons within its jurisdiction cannot be questioned
in the Courts of this country . . . . 88


Facts. The plaintiff was the widow of the Grand Duke Paul of Russia.
The princess had fled from her residence, the Paley palace in Russia, and it
and its contents were seized by the Soviets, and part of the contents were sold.
The defendant Weisz purchased some of the art previously contained in
the Paley palace, some for himself and some as an agent for other persons.
On finding that the articles were to be sold in England, the princess, who had
fled from Russia, brought an action for their recovery.

Contention and Decision. The lower court found that Weisz had acquired title
and that the Princess Paley had lost title to the goods. On the appeal, three
judges gave their opinions seriatum and, basing their holdings on the act of
state doctrine, upheld the lower court.

Lord Justice Scrutton said:

Our Government has recognized the present Russian Government as the de jure
Government of Russia, and our Courts are bound to give effect to the laws and acts

87. [1921] 3 K.B. at 545 (Bankers, L.J.).
88. Id. at 548 (Warrington, L.J.).
of that Government so far as they relate to property within that jurisdiction when it was affected by those laws and acts.\textsuperscript{89}

The concurrence of one judge appeared to be couched in more restricted language.

This court will not inquire as to the legality of acts done by a foreign government against its own subjects in respect to property situated in its own territory.\textsuperscript{90}

It was such a statement which the court of Aden (in the \textit{Rose Mary} case) narrowly construed to hold that an act of state, however wicked, if directed only against citizens of that country which created the act, must be recognized; but if it related to the person or property of foreigners, foreign courts might ignore it. This was the misconstruction of the court of Aden which was corrected in the English Court of Chancery opinion in the \textit{Wagg} case. The Court of Chancery of England construed both the \textit{Luther v. Sagor} and the \textit{Princess Paley Olga v. Weiss} opinions as laying down a universal rule that an executed act of state of a foreign country will be recognized in England as valid in the foreign country, whether or not it is directed against citizens of that country or foreigners, even if it be contrary to international law.

D. Those English Cases Involving a Foreign Act of State Affecting Obligations of a Contract Rather Than Title to Property

Certain English cases relate to an act of state of a foreign country which did not purport or attempt to confiscate property, but did attempt to prevent performance of a contract made and to be performed in another country. This phase of an act of state was not considered in the \textit{Sabbatino} case, and was not discussed in any of the cases involving Iranian oil, but foreign cases involving this problem were cited in the \textit{Sabbatino} decisions.

Reference to a United States Court’s Determination in This Field

Before reviewing the English cases which involved an act of state creating a breach of a foreign contract, we should turn briefly to United States sources to establish our measuring rod as to what United States courts have held in such cases. United States courts recognize as valid the foreign act of state but give it no extraterritorial effect. The foreign obligor of the contract remains liable, although the intention of such an act of state is to relieve from liability. The principal United States
case on this subject is *Central Hanover Bank & Trust Co. v. Siemens & Halske Aktiengesellschaft.*

**Facts.** In the time between the early 1920's and 1933, many German corporations and municipalities borrowed money in the United States on an issue of bonds. Usually an American bank was made trustee of such an issue and funds for servicing the bonds were transmitted from time to time to the trustee. In 1933, Germany, by law, refused to permit any of these German companies, which were obligated to pay in dollars in New York, to have foreign exchange with which to make these payments. A German institution was created, known as the Konversionskasse. All companies having outstanding dollar bonds were required to make payments to the Konversionskasse in the equivalent amount of German marks for the obligations payable in the United States in dollars. The United States trustees were without funds from that time on to meet the payment of coupons and sinking fund on the bonds. The action cited above (with other similar actions) was begun by the trustee against one of the borrowing German companies in an effort to collect some of the unpaid interest and other charges which should have been paid.

**Contention and Decision.** The German company defended the suit on the ground that it was not in default. Under German law, it had paid the mark equivalent of dollars due to the Konversionskasse. It was not its fault, it contended, if Germany had refused to convert the mark and that its obligations in the United States were therefore unpaid; under German law, the company, a German company, had no liability. The United States court properly treated this situation as a foreign act of state which had no effect upon the obligations within the United States. The contract between the corporation issuing the bonds on the one hand, and the trustee and bondholders on the other, was by the terms of the contract to be due and payable in dollars in the United States.

**Analysis and Discussion of Decision.** Of course, not every refusal to pay or otherwise to perform under a contract is a breach of contract. Such refusal to pay or perform may be justified, and if justified, no liability exists for a breach of contract. A conclusion that a wrongful act, a breach of contract, has occurred is as much a conclusion of law as a determination of title to property; in both instances it is a conclusion of law based upon evidentiary facts. As to a contract, the court must decide whether the refusal to perform is wrongful or justified. Here, the United States court held that the act of state by Germany was not a defense to exonerate the companies from liability. Since the German act was one of a foreign country intended to affect property within the United States, it was ineffective for that purpose. The conclusion was that all of the German companies which had dollar bonds in the United States were guilty of a breach of contract and liable for the unpaid amounts with interest. The court said:

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91. 15 F. Supp. 927 (S.D.N.Y.), aff'd per curiam, 84 F.2d 993 (2d Cir., cert. denied, 299 U.S. 535 (1936)).
But as the contracts were made here and were to be performed here, the German law relative to performance is of no legal significance in the courts of this country. By our law the bonds were valid when issued; by our law there is no impossibility, illegality, or other excuse for nonperformance, beyond the fact that payment in gold coin is dispensed with.  

Two of the English cases cited in the Rose Mary decision were contract cases of this type.


Facts. The oldest of the English contract cases involving consideration of an act of state is that of Wolff v. Oxholm. Wolff, a naturalized British citizen, with certain others, also British subjects, as an English partnership, was doing business with Oxholm, a Dane. At the time in question the Dane was indebted to the British partnership in the amount of over £21,000. By agreement, this debt was for money advanced in England and was to bear interest at five per cent. Oxholm defaulted and Wolff instituted suit in the proper court of Copenhagen for recovery of the amount due. In 1807, while this suit was pending, war was declared between Great Britain and Denmark, and Denmark by an ordinance of August 16, 1807 declared that all monies belonging to English subjects were to be sequestered, and debtors were instructed to pay all debts due to English subjects to the Danish Treasury. Payment was made by the defendant to the Danish Treasury, but of course without knowledge or consent of the English plaintiffs. No payment was made after the war by the Danish Treasury to the Wolff partnership.

Contention and Decision. In 1814 Oxholm, the Dane, came to England where he was arrested by the plaintiff for debt (this being a proceeding for the recovery of debts in accordance with legal procedure in England at that time). The Dane pleaded no liability because he had paid the debt to the Danish Treasury. Lord Ellenborough rejected this plea and, after reviewing international law cases on this subject and legal writers including Vatel, Grotius, Bynkershoek, and Puffendorff, said:

Considering, therefore, that . . . such confiscation was not general at any period of time, and that no instance of it, except the ordinance in question, is to be found for something more than a century, we think our judgment would be pregnant of mischief to future times, if we did not declare, that in our opinion this ordinance, and the payment to the commissioners appointed under it, do not furnish a defence to the present action . . . . The parties went into that Court expecting justice, according to the then existing laws of the country, and are not bound by the quashing of their suit, in consequence of a subsequent ordinance, not conformable to the usage of

92. 15 F. Supp. at 929. Judge Patterson, in making this statement, also quoted Judge Learned Hand: "By the law of most civilized countries the legality of the performance of a contract depends upon the law of the place of performance, and the contract is enforceable, if lawful by the law of the place of making when made, and if the performance is lawful by the law of the place of performance when due." Anglo Continentale Treuhand v. St. Louis S.W. Ry., 81 F.2d 11 (2d Cir.), cert. denied, 298 U.S. 655 (1936).
nations, and which, therefore, they could not expect, nor are they or we bound to regard.93

In spite of some quaint language, the parallel of this case with the American cases involving German bonds sold in the United States and to be serviced in the United States by the payment of dollars, which an act of state in Germany prevented, is clear. The principle is the same. A debt due and owing in one country is property in that country, collectible in and subject to the laws of that country, and a foreign act of state does not affect the obligation. An act of state of a foreign country which in some way attempts to affect that property or lessen its value is an act contrary to international law, and its extraterritoriality will not be recognized. It is not a justifiable, but a wrongful, refusal to pay; it creates a breach of contract.

8. In re Fried Krupp A.G., [1917] 2 Ch. 188.

The legal principles in the Krupp case are the same as those in the Hanover Bank case, except that the events in Krupp occurred during World War I instead of before World War II.

Facts. On September 30, 1914, a German ordinance was issued by the Federal Council of Germany which forbade transmission of funds to “Great Britain and Ireland or to the British colonies and foreign possessions.” By German law, payment of debts abroad was postponed and no interest was to accrue during the period of postponement. Fried Krupp had owed a sum of money to J. Wild & Co. of England. However, Fried Krupp, a German company, refused to pay interest, claiming in defense the German decree which forbade the payment of interest during the period of postponement. The debt was payable in pounds in England.

Contention and Decision. The English court pointed out that this was a confiscatory measure in Germany, the result of which was to reduce the value of the property in England (the right to receive from the German company the whole face amount with the interest). The court stated that the ordinance shall not constitute a defense

so far as it operates to extinguish all German liability for conventional interest, as being one which is not conformable to the usage of nations, and which, therefore, Messrs. Wild could not expect, and which neither they nor we are bound to regard . . . .94

These contract cases cited in the Rose Mary case exemplify the cardinal principle of the act of state doctrine as it relates to the independent sovereignty of each nation. If the American and English courts in these cases had accepted the plea that the obligor was free of liability, they would have been enforcing a foreign act of state contrary
to their own laws on contract debts in their own country to the detri-
ment of those persons who had contracted in accordance with United
States or English laws.


This is another contract case decided on the same principles as the
other contract cases. The English court recognized the validity of an
act of state of Peru. In this case it was to the advantage of a partner-
ship which was not a national of the country committing the act of
state. The case is significant also for collateral principles: (1) only a
sovereign government, usually only one duly recognized as such, can
commit an act of state, but an act of state committed by a recognized govern-
ment creates a liability on that country if the contract is subsequently
broken by the government of the country, even by a successor government;
(2) where a foreign sovereign is by contract obligated to make payment
in England, an act of state of that foreign country will not be granted ex-
traterritorial effect in England though the other country’s act of state
purports to change or modify the contract, for to do so would be to
enforce in England the laws of a foreign country, changing and super-
seding the English law. The only difference between the Republic of Peru
case and the preceding English cases and United States case (the
Hanover Bank case which is used as our measuring rod) is that the
obligors in the English and United States cases were foreign corpora-
tions whose contractual performance was prevented by an act of state
of their own country. They remained liable in the foreign country where
their contract was to be performed. In the Republic of Peru case, the
obligor was the sovereign itself.

Facts. The facts are somewhat complicated. Dreyfus Brothers was a French
organization carrying on business in Paris, making purchases and arranging
for shipments to various parts of the world. A long time before the case in
question arose, Dreyfus Brothers entered into a contract with the then existing
Government of Peru for the purchase of a large quantity of guano. A contro-
versy arose concerning the performance of the contract and before this com-
mercial controversy was settled war broke out between Peru and Chile in 1879.
While this war was in progress, one Nicolas de Pierola became dictator of
Peru. England recognized this person as the supreme ruler of Peru; his Gov-
ernment was also recognized de jure by France and other European states. While
Pierola was dictator of Peru, his government made a settlement with Dreyfus
Brothers in the controversy concerning the purchase and sale of guano. This
settlement was for an amount much less than the amount which Dreyfus had
claimed was due to the partnership on the contracts, but the partnership
accepted the settlement in full satisfaction of its claim.
In 1886, some six years after the settlement, the dictator Pierola was deposed and the Government which had been in power previous to his dictatorship once again became the Government of Peru. During Pierola's dictatorship, Dreyfus had continued to do further business with this government, but when the previous Peruvian Government came back into power, it attempted to repudiate the earlier settlement between Pierola's Government and Dreyfus, as not being sufficiently favorable, and sought to deprive Dreyfus of proceeds of shipments currently being sent to the Dreyfus partnership in England on the ground that Dreyfus owed additional funds in the old controversy, beyond those agreed to by the partnership and the Government of Peru in the Pierola settlement. The Government of Peru which had come back into power also insisted that its interpretation of the old contract and repudiation of the settlement should be governed by the laws of Peru, although it had brought the case against Dreyfus in England.

Contention and Decision. Two questions arose in the English court: whether the settlement of the controversy by Pierola's Government (an act of state) was valid; and whether or not the repudiation of this settlement (act of state) by the Peruvian Government which had come back into power should be governed by the laws of Peru in a suit in England to collect funds in England.

The English court decided that it must recognize the validity of the act of state by the Pierola Government. It decided further that the act of state by the Peruvian Government which had come back into power had no extraterritorial effect to change the terms of a contract made and to be performed in England and therefore governed by the laws of England.

As to the first question listed above, the court said:

The short result of these facts is this. At the time when Señor Pierola seized upon the supreme power there was a question pending between Messrs. Dreyfus and the Peruvian Government as to the result of the accounts of their dealings in guano under the first contract. By art. 33 of that contract this question was to be settled by the tribunals of Peru. It was the obligation of this contract which was the subject of the settlement.

On the suit of the Peruvian Government in England to recover funds due and payable in England, English law governs. The court said as to the second question:

It is difficult to see how this can be determined by the law of Peru. It is a question of international law of the highest importance whether or not the citizens of a foreign State may safely have such dealings as existed in this case with a Government which such State has recognised [sic].


The chief importance of the Wagg case lies in its interpretation of the laws of England in respect to the act of state doctrine: that the

95. [1888] 38 Ch. at 355 (Emphasis omitted.)
96. Ibid.
validity of a foreign act of state, even if in violation of international law, is recognized by other governments, whether or not the sufferers from that act of state are citizens of the country which committed it or are foreigners, including Englishmen.

Facts. This is a contract case. In 1924 a German company entered into a loan agreement with Helbert Wagg & Co. for £350,000 sterling. Repayment of this loan, in accordance with the agreement, was to be made at various times in London, free of German taxes, and in every respect, except one, was a loan made and payment to be performed in London. That one exception was, as stated specifically in the loan agreement, that the obligation was to be governed by the laws of Germany. In 1933 came the German moratorium and payments on the loan ceased. Later (1956), Wagg made a claim in England against the German property fund on the ground that the company held a defaulted obligation of a German company which made them a proper claimant against that fund.

Contention and Decision. The question whether or not the claim was a proper one depended on whether or not the German obligation was in default. No payments, of course, had been received since the moratorium of 1933.

The court held Wagg was not a proper claimant because the loan, under the terms of the loan agreement, had not been defaulted. The parties had agreed that the obligation was to be governed by German law. By German law, the obligor company in Germany was not in default because it had made the proper payments to the Konversionskasse. The court found that the German exchange law which prevented payment of pounds sterling was a reasonable exercise of government power and, since the agreement of the parties provided that determination of the obligation should be by German law, that law was the law to be enforced in England as to this one loan.

The court said:

In my judgment, this was foreign exchange control legislation which must be recognized by this country as effective to modify contractual obligations where the proper law is German.97

E. French Cases Which Did Not Involve an Executed Act of State

Cited as Authority in the Rose Mary Case


98. For a complete statement of the facts underlying the La Ropit case, see The Jupiter, [1924] P. 236 (C.A.); The Jupiter (No. 2), [1925] P. 69 (C.A.); The Jupiter (No. 3), [1927] P. 122, appeal dismissed, [1927] P. 250 (C.A.). These cases, which concerned another of the La Ropit ships which had escaped under the same conditions, are summarized in
La Ropit case involved an unexecuted act of state.

Facts. The Soviet Ambassador to France asked the French courts to put him, as representative of the U.R.S.S., in possession of certain ships in a French port. He claimed title to these ships under a U.S.S.R. decree of January 26, 1918, which had nationalized the merchant marine of which these ships had been a part. In short, the Soviet Government asked the French courts to enforce in France a Soviet act of confiscation which the Soviet Government had been unable to enforce in Russia over a period of ten years.

Contention and Decision. The French courts refused. These particular ships, the possession of which was sought by the Russian Ambassador, were the property of an organization known as La Ropit and had been based at Odessa. At the date of the U.S.S.R. decree and thereafter, until April 1919, the U.S.S.R. had never exercised any governmental authority whatever over Odessa and its surrounding area. In April 1919, the Ukrainian Soviet (which later became part of the U.S.S.R.) gained governmental control of the Odessa area. But by that time these ships were no longer there, nor in any other territorial waters of the U.S.S.R., and never returned to such jurisdiction.

The ships had been seized once at Odessa by a short-lived local government (unconnected with the forces which later became the U.S.S.R.); but a succeeding government (Austrian) had returned the ships to La Ropit organization (which had then been dissolved in Russia), after which they arrived in France under control of the owners.

Under these circumstances, the courts in France refused to dispossess La Ropit owners and, thus, refused to enforce the confiscation decree extraterritoriality as the U.S.S.R. Ambassador had requested.

United States courts have recognized the effects produced by an executed act of state within the country which commits it, but do not enforce within the United States foreign acts of state which are contrary to international law on property never subjected to such foreign act of state. The decision in La Ropit case would be conventional in the United States since the ships were in France, not Russia, and had never been in the possession of this newly recognized Soviet Government.

These two cases, decided by different French courts, may be considered together, as the facts of each case are identical and the final decision on the issues presented is the same; the decision of each of the courts could apply equally to the other French case.

In both cases the decisions contain quotable statements which out of their context and, unapplied to the specific facts, may easily be construed as a repudiation of the validity of a foreign act of state—that "no one in France shall be deprived of his property without due compensation." Of course, the United States Constitution can be quoted for the same fundamental principle. The application of that principle, however, in relation to a foreign act of state, is relevant only if there is before a court (including a United States court as in the Sabattino case) property seized abroad under an act of state, confiscatory in nature and, therefore, contrary to international law and to the law of the forum of the country where title is being tried. Of course, property in France is subject to French law, as property under United States jurisdiction is protected by the Constitution.

In the two French cases above mentioned, the property before the court (the title to which was claimed by two persons—one claiming under an alleged confiscatory act of state and the other claiming a continued ownership), the facts of the cases show once again that the property had not been subjected to an executed act of state in a foreign country. In these two cases, therefore, the issue of the validity of an executed act of state did not arise. The act of state in the foreign country was passed to validate a previous unauthorized seizure and after the property had been brought to France and had been awarded by the courts to the original owners.

Facts. The facts of both cases are to be read against the confusion of the Spanish Civil War. The then existing Government of Spain, duly recognized abroad, had been attacked by the forces under Franco. The existing Government, being hard pressed, called for help from communist sources and came at last to be called the People's Communist Front. The Province of Catalonia was one which remained loyal to that Government. Within this province were certain potash mines owned by a company known as the Société Potasas Ibericas. The majority of the directors and stockholders were not Spanish, but French and Swiss. The operating office was, of course, in Spain, but the company was controlled from Paris. The disruptive conditions of the Civil War caused the company to cease operations and its principal personnel returned to France. The Government of Catalonia, a local government—not the central Government of Spain—passed certain decrees by which it ordered the immediate return to
Spain of these persons who, as aforesaid, were not Spanish nationals. Because of
the physical danger of the situation in Spain, they did not return. Catalonia
had threatened, if the mines were not reopened, to “nationalize” them although
no decree expressing an act of state, no official expression of either the local—
much less the national—will was promulgated until later. However, to raise
some revenue, some of this potash was sent to France. The defendants in each
case, the holders of the bills of lading, were both Spaniards who claimed the
potash solely because they held the bills of lading. The potash was claimed
by the potash company, or by one claiming to act for the potash company, and in
both cases the property was ultimately awarded to the plaintiff, this claimant.

Contention and Decision. The report of Société Potasas Ibericas v. Bloch in the
Annual Digest states: “The facts of the case are not clear . . . .” ([1938-1940]
Ann. Dig. at 150.) However, by reference to both cases, significant dates
can be established. The plaintiff in both cases was really Potasas, though its
interests were represented in one case by Moulin. In the Bloch case, the ship-
ment of potash was sent from Barcelona October 10, 1936, and the bills of
lading covering it were indorsed in Paris October 15, 1936. ([1939] D.H.I. at
258.) The date of the shipment of the potash in the Volatron case does not
appear, but an injunction relating to that property was issued by a French court
March 1, 1937, proving that the shipment had arrived in Paris prior to that
date. ([1939] D.H.I. at 329.) Volatron, who held the bill of lading, “refused
to reveal in what manner he came to possess the merchandise, from whom he
received it, and at what price.” ([1939] D.H.I. at 329-30.)

As to the act of state confiscating the potash mines, the Government of
Spain at Valencia by a decree of April 24, 1937, temporarily nationalized the
mines in question. A comparison of the dates involved show that this was after
both shipments of Potash had arrived in France. The local government of
Catelonia by its decree of June 19, 1937, stated that the nationalization of
the mines should have retroactive effect to July 22, 1936. ([1939] D.H.I. at
258, and [1938-1940] Ann. Dig. at 152.) Then the plaintiff, the potash com-
pany in France, contended that the decrees of expropriation did not operate
in France and could not be allowed retroactive effect to cover the time when
the potash was still in Spain. The potash company also, of course, contended
that the decree of expropriation was invalid in France because of lack of com-
pensation, although the Valencia decree promised compensation. The higher
French court reversed the lower court decision in favor of the holder of the
bill of lading, and held that

“the retroactive character of such a provision cannot in respect of French law, affect
acquired rights, particularly regarding goods which have previously been landed in
French territory.”99

In the course of these cases, one of the arguments presented to the French
court was that as the potash company was a Spanish corporation and the act
of seizing the property was by Spain, no international question was presented

to the French court; but the court rejected this argument, pointing out (because of the ownership of the company) that its nationality was most doubtful and that the nationality should be determined

"not only by their place of registration, but also according to the place of control and to the ownership of their capital."100

(This part of the decision conforms to the decision of all three United States courts in Sabbatino that although C.A.V. was a Cuban corporation, it should be considered as a United States national since it was predominantly owned by American citizens.)

Also the French courts questioned whether or not this was, for other reasons, a true act of state (i.e., was it a recognized government; was the seizure a proper one under the laws of a state?), saying:

"Further, it is impossible to discover with any certainty whether these measures have been taken in conformity with the internal legislation of Spain and whether they will be confirmed or annulled."101

In summarizing these two French cases, in language customary in United States jurisprudence, the lower courts decided that the holder of a bill of lading for goods shipped from a foreign country was entitled to possession of the goods and this, in effect, supported the seizure of the potash in Spain as an act of state, but, on appeal, and with strict reference to the facts, the courts reversed, holding: that in absence of a formal, properly executed act of state, the seizure of the potash was without governmental authority whatever; that a retroactive act of state, passed after the property was in France and no longer in the possession of any one claiming it under Spanish law, failed to transfer title to it; and that France would not enforce within France an unexecuted retroactive act of state. These cases, too, are thus not in conflict


101. [1938-1940] Ann. Dig. at 192. The countries of Europe taking a neutral position in the Spanish Civil War were unwilling to commit themselves even as to the continuity of recognition of the Spanish Loyalist Government. Compare:

No legal government resisting rebellion had ever been deprived of the right to import arms for its own defense. Such an action would be tantamount to placing a premium on rebellion. But in July 1936 all Europe was so tense that Leon Blum, Socialist Prime Minister of France, feared that if the Spanish Republic received arms, the champions of the insurgents, Germany and Italy, would use that as a pretext for unleashing a world war. Waiving precedent, therefore, the French suggested that both sides be deprived of outside aid by a non-intervention committee. Great Britain endorsed this move, as did nearly all the other powers. Germany and Italy accepted, but of course with no intention of abiding by its decisions.

The Powers then constituted the Non-Intervention Committee. Soviet Russia joined it but insisted that she would sustain the Spanish Loyalists if Germany and Italy were found sustaining the Insurgents.

Wells, An Intelligent American's Guide to the Peace 130 (1945). This action was tantamount to withdrawing recognition from the Loyalist Government.
with the principles laid down by the United States Supreme Court in *Sabbatino*.

Of course all confiscatory acts of the Peoples’ Front Government were annulled when the revolutionary forces of Franco triumphed and were recognized as the legitimate Government of Spain.

F. French Cases Cited by the Courts in the *Sabbatino* Case, but Not Relied on in the *Rose Mary* Case

All of the other French cases cited by the United States courts in the *Sabbatino* case also clearly support the act of state doctrine.


**Facts.** A company by the name of Cementos, claiming to be the owners of the ship Itxas-Zurri, procured the legal arrest of that ship then in the French port of La Rochelle. The ship’s captain, Juan Larrasquitu, claimed on behalf of the Spanish Government that the ship belonged to the Spanish state, and not to Cementos, having been properly requisitioned.

**Contention and Decision.** The courts of France (Civil Tribunal of La Rochelle and Court of Appeals of Poitiers) found that there was a decree of the Spanish Government requisitioning for national service all merchant ships of the Register of Guipuzcoa; that this had been properly passed and duly published in the official journal of the Spanish Government; that the ship in question did belong to the Register of Guipuzcoa; and that the captain of the ship, while the ship was lying in a Spanish port (Santander), duly received notice of this requisition. The courts of France found that the ship had been duly requisitioned and that the requisition, therefore, had immediate effect. They refused to recognize the claim of Cementos and recognized the title of the Spanish Government. The Court of Appeals of Poitiers said:

"The French jurisdiction is incompetent to consider the regularity of the act of a foreign sovereign, for that would be to judge that act. The Spanish courts alone have the right to decide if the requisition conforms to Spanish law. Nor can French justice examine whether the requisition did or did not transfer ownership. It is necessary and it is enough that there has been a requisition, and that no doubt exists as to its character as a governmental act."

The French courts recognized the validity of an executed act of state, but gave no extraterritoriality to an unexecuted act of state. This is exactly the act of state as it is enforced in United States courts.


103. For accuracy it might be well to mention that while using the name of this case, the court of appeals in the *Sabbatino* case refers, 307 F.2d at 835 n.6, to a different page and, thus, to the case of *Agusquiza v. Société Sota y Aznar*, Tribunal Civil de Bordeaux, Sept. 3, 1937, [1938] Sirey Recueil Général III. 65, [1935-1937] Ann. Dig. 195 (No. 70)
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Facts. L. et C. Hardmuth was a general partnership doing business under the laws of Czechoslovakia, with its principal factory established in Ceske Budejovice (Budweis), Czechoslovakia. The partnership manufactured “Koh I Noor” pencils. The company was nationalized by the Government of Czechoslovakia on October 27, 1945. In 1950 various members of the partnership, declaring themselves to be the sole owners of the partnership, came to France and there formed a limited liability company, “Société Hardmuth,” under French law, claiming all the assets of the L. et C. Hardmuth company in France. Shortly thereafter, one Mechura, acting as the Director of the nationalized Czechoslovakian enterprise, came to France and claimed as assets of the nationalized company in Czechoslovakia all the property held by the new French company in France.

Contention and Decision. The French court found that the assets in France, consisting of a building, certain available supplies and an automobile, had belonged to the Czechoslovakian company at the time of nationalization. It also found that a few patents and trademarks had been registered after the Czechoslovakian Government confiscation. The French court applied the act of state doctrine. Of course, the French court had no jurisdiction over the assets in Czechoslovakia. It held:

"This nationalization has the character of an expropriation and cannot, in principle, have any effect outside of the territory of Czechoslovakia... French laws on nationalization themselves provide that they do not apply to foreign assets of the affected enterprises..." 104

This statement of the French courts was in accordance with the provisions of the Franco-Czechoslovakian Agreement of May 1, 1950. The French court then held that the assets in France did not belong to the nationalized company in Czechoslovakia. The court appeared to be in doubt whether or not certain of the intangible assets, as trade marks and the like, were assets of the nationalized company or not, and referred this matter to an administrator.

Thus, the court refused to recognize any extraterritorial effect of the nationalization decree, but did recognize the transfer of assets in Czech-
oslovakia. It was consistent, therefore, to recognize that the persons from Czechoslovakia who had come to France and had formed the French corporation owned the assets in France.

The principle is clear—the French courts recognized that the title to all property under the jurisdiction of Czechoslovakia held by the partnership had been transferred by the nationalization decree to the Government of Czechoslovakia. Property outside of Czechoslovakia at the time of the nationalization decree had not been affected.

Thus the Franco-Czechoslovakian Agreement of 1950, as interpreted by the French courts, confirmed the act of state doctrine as defined and administered by United States courts.


Facts. The plaintiffs (and appellants) claimed to have acquired in France, in 1936, 180,000 pesetas in Spanish bank notes. However, these notes were not accompanied by an export permit from Spain as required by the Spanish Republican Government. Also in November 1936, the Nationalist Government of General Franco required that all notes be stamped and exchanged for new notes. These new notes he would recognize as legal tender. Later, the Government of General Franco was recognized by France as the lawful Government of Spain.

The appellants took their notes and presented them, but without export permits, to a customs office at the Spanish border, which office, after first refusing to accept the notes, did so and issued a receipt. However, the appellants never received any new notes in exchange. The appellants then went to the French court and sued the Bank of Spain in France for the recovery of the sum. The Bank of Spain entered a plea that the French court had no jurisdiction over the matter.

Contention and Decision. The French court of first instance granted the Bank of Spain's plea of lack of jurisdiction on the ground that the stamping of the notes—without which they were no longer valid—and their exchange for notes which were legal tender was an exercise of sovereignty of the Spanish State and the Bank of Spain was entitled to immunity from French jurisdiction. The French Court of Appeals upheld the lower court, confirming the dismissal of the action on two grounds: (1) a lack of jurisdiction of the French courts; and (2) the stamping and exchange of notes was an act of state, saying:

"In the circumstances of this present case the Bank was merely an agent of the Spanish State exercising its public authority. Accordingly, the acts in question, even apart from the principle of immunity from jurisdiction, were public acts which are not subject to judicial control in France."105

Facts. One S., a Russian citizen until 1918, had owned a picture gallery in Moscow. On November 5, 1918, a decree of the Russian Government nationalized this gallery; i.e., this picture gallery was henceforth to be state property. S. subsequently left Russia and died in Paris in 1936. The defendant, Maison de la Pensée Française, was about to hold an exhibition in Paris, in 1954, and exhibit some of the pictures which had formerly been part of S.'s art gallery in Moscow. Heirs and other representatives of the estate of S. in Paris asked for an order of sequestration from the French court so as to enable the plaintiff subsequently to institute proceedings in France for determination of the ownership of the pictures.

Contention and Decision. The French court refused to grant the order and, after pointing out that the true defendants in the case would include the Union of Soviet Socialist Republics, the court stated:

"All these difficulties would require us to answer important questions which this Court cannot do without prejudging the admissibility of the main action and the question as to whether the French courts are entitled to exercise jurisdiction over it. For these reasons we decline to make the order of sequestration for which the plaintiffs ask."

Thus the court, by abstaining from jurisdiction and refusing to adjudicate, recognized the validity of the act of state of Russia in confiscating the gallery in Moscow.

G. The Greek Case

One Greek case is mentioned which may be identified as Case No. 1268/1937, Court of First Instance of Piraeus.107

One Greek case is mentioned which may be identified as Case No. 1268/1937, decided by the court of first instance of Piraeus. The citation to this case by the Greek court's number and date is not given in the opinions in the Sabbatino case. Reference is made there only to a magazine article about this case by a Greek writer.108 But a reading and examination of the actual decision of the Greek court shows this case to involve requisition decrees of the Spanish Government during the Spanish civil war. United States and British courts had to make similar determinations in regard to requisitioning decrees of the Spanish Government. At an earlier time the same question arose under efforts of the Soviet Russian Government to confiscate ships. The Greek decision in this case and the decisions in the United States, British and

107. 4 EPHEMERIS TON HELLENON NOMIKON 560-61 (Athens 1937).
French courts are all consistent in regard to the act of state as it applies to ships. None deny the validity of an act of state. Some found that, on the facts before the court, there had been no execution of the act of state on the particular ship, the title to which was claimed both by the confiscating government and by the one who claimed continuing ownership after the act of state.

In all of the cases involving the confiscation of ships, the first question to be answered is: Was the attempted confiscation an act of state? If it was by a recognized government, it was an act of state and was valid within that government's own territory. Sometimes a court found that the act was not by a recognized government or was merely by a local government lacking sovereignty. The second and more important question in these cases is: Where was the ship and was there an execution of the act of state on that ship? When the ship was seized within the territory of the confiscating government, the government's title to that ship was recognized. But when there was no executed act of state and the owner prior to the issuance of the act of state claimed the ship, his continuing title was recognized. The Greek case is consistent with all other similar cases.

Facts. The names of the parties in the Greek case are omitted; only the name of the ship is given. This ship, the Inocencio Figaredo, flying the Spanish flag, was lying in the Greek port of Piraeus. A creditor of the Spanish Popular Front Government sought to attach the ship as property of this Spanish Government. His effort to place this ship under judicial control was for two purposes—to secure jurisdiction over the Spanish Popular Front, and to hold property of the Spanish Popular Front to satisfy his hoped for judgment. He claimed against this government of Spain for losses due, as alleged, from a breach of contract between him and the Spanish Popular Front, suffered by the latter's failure to fulfill the terms of a contract to charter the petitioner's own steamship. He also served a court process on the Spanish ambassador in Greece.

Contention and Decision. The court decided two preliminary questions. One: Did Greek courts have judicial right to adjudicate the rights in a commercial contract where a foreign sovereign was a party to a contract and alleged to be the one at fault? The court found that a sovereign had no immunity from commercial contract if jurisdiction could be obtained, nor could the foreign sovereign plead sovereign immunity. The second preliminary question was: Could jurisdiction be obtained in a Greek court over any foreign government by personal service on its ambassador? The court held that such service was not valid to bring the Spanish Government before the Greek court. The court had jurisdiction only if the attachment against the ship in Piraeus was valid.

The case, therefore, resolved on the one main question: Was this ship the property of the Spanish Popular Front Government? No one appeared for the Spanish Popular Front Government and no claim was made on its behalf except by the creditor of that Government. He claimed that the ship had been
requisitioned by a governmental decree. There was no doubt that such a decree had been promulgated and that it was intended to apply to all ships of the Spanish merchant marine. The immediate question was, however, had this decree ever been executed on this ship; had the ship ever been seized by anyone acting on behalf of the Spanish Government? The captain of the steamship intervened in behalf of the owner and showed that the owner was not in Spain and that he, the captain, had acted for that owner and no one else. The Greek court held:

"Furthermore it is not established that this ship has in fact been confiscated by the Spanish Government and is now in possession of the Spanish Government." 109

In short, the Greek court conventionally refused to enforce extraterritorially a confiscation decree which the confiscating government had not been able to enforce within its own territory.

The Greek writer, whose magazine article is cited by the Supreme Court in the Sabbatino case, 110 has obviously relied upon a dicta and has coupled this case with La Ropit case which he misinterpreted. But he admits that a solution of non-recognition of the validity of an executed act of state (as the lower courts did in the Sabbatino case) would be an exception contrary to Greek law. He stated:

[T]he application of the foreign rule in this country does not shock the fundamental rules on expropriation since this deprivation of property against the imperative rules of the Greek Constitution took place abroad and the Greek Judge applying the foreign law does not create now, for the first time, an opposition to public policy but merely recognizes a "fait accompli" in front of which he finds himself. A contrary solution of the problem would cause serious trouble. 111

H. English Cases Cited by the Courts in Sabbatino, but Not Relied on in the Rose Mary Case


The United States Supreme Court in its opinion in the Sabbatino case cited this case as authority for "the classic American statement of the act of state doctrine, which appears to have taken root in England as early as 1674 . . . ." 112

Facts and Decision. Blad, a Dane, seized property in Iceland of certain English subjects who were endeavoring to carry on fishing operations there. At some time later, Blad came to England and was arrested for his acts in seizing this English property. He proved he had done these acts under letters patent from the King of Denmark, and asked the English Chancery Court for a perpetual

109. Supra note 107, at 561.
110. 376 U.S. at 422 n.21.
111. Massouridis, supra note 108, at 67-68.
112. 376 U.S. at 416.
injunction restraining proceedings against him in England for any seizure in Iceland sanctioned by the Danish authorities. This injunction was granted.

The similarity of this case on its facts and decision with the United States case of *Underhill v. Hernandez*\(^\text{113}\) must at once be apparent. The act of state of Denmark, directed against English subjects and their property, was upheld as valid exercise of sovereign power within the sovereign's territory.


**Facts.** The West Rand Central Gold Mining Company, Limited, was an English corporation which owned and worked a gold mine in the Transvaal, while that area in Africa was an independent state known as the South African Republic. On October 2, 1899, a quantity of gold owned by the West Rand company was in transit by train from Johannesburg to Capetown, the destination being a city under British sovereignty. Before the shipment had left the confines of the South African Republic, the resident magistrate of the district through which the shipment was then passing took possession of it. He acted under instructions of the state's attorney for the Republic, who ordered him to take the gold into safekeeping. Nine days after this event, war was declared between the British Government and the South African Republic. Great Britain was victorious and annexed the whole area, which had previously been an independent state. The gold mining company never received the shipment; in fact, there is no evidence in the case to show what became of it.

On this statement of facts, the gold mining company secured in England a petition of right against the British Government (against the King), alleging that the British Government, as the successor to the South African Republic, was liable to it for the gold which the gold mining company had shipped but which had never arrived at its destination.

It is difficult to determine why this case was cited in a *Sabbatino* decision or to determine what proposition of law it was intended to prove or illustrate. The petition of right was obviously based upon the assumption that the South African Republic was liable to the gold mining company for the value of the shipment and that the British by conquering the country had assumed this obligation. All that was known about this shipment was that it was stopped by an official of the then South African Republic. There may be some doubt that this was indeed "an act of state," for the authority of the official was never discussed in the case and what happened to the gold is not stated.

**Decision.** The question then was: Was a succeeding government liable for gold destined for a city under British sovereignty, the shipment of which had been stopped by an official of, at that time, another sovereign government but at the

\(^{113}\) 168 U.S. 250 (1897).
time of the suit a part of the British empire? The British court decided in this case that the King (the British Government) had no liability to the West Rand Company.

Comparing this case with *Sabbatino*, one cannot find the issues to be the same. In the gold mining case, the question was not who held title to the gold. It seems to have been generally admitted that it belonged to the gold mining company. *Title* to the sugar was the issue in the *Sabbatino* case. In the gold mining case, the English court was not asked to declare an act of state of a then defunct government to be null and void—validity of an act of state was the issue in the *Sabbatino* case. Liability of the South African Republic was assumed; liability of a succeeding government was questioned. No such issue arose in *Sabbatino*.

To search for a reason why this case would be considered an authority for anything in *Sabbatino*, we may look to textbooks which have discussed the *West Rand* case. Dickinson, in his case book, *The Law of Nations*, classified the case under the titles “Succession in the Law of Nations”114 and “Nature and Authority of the Law of Nations.”115 Brierly cites it for two purposes—one in definition of international law: “‘Whatever has received common consent of civilized nations must have received the assent of our country . . . .’”116 This is certainly conventional United States law also. Brierly next cites the case for the question, which he finds difficult to answer, as to how far an annexing state takes over the contractual liabilities of a state whose territory it annexes.117 Confiscation was not mentioned by either Brierly or Dickinson, which was, of course, the main problem in the *Sabbatino* case.

The *West Rand Mining Company* case decided merely that a conquering country does not under international law guarantee to right every wrong or to fulfill every obligation of the conquered country (or in default thereof to respond in damages).

I. The Singapore Case


This case is wholly irrelevant in any discussion of the act of state, for no act of state whatever was involved.

*Facts.* During the Second World War, Japan, as the aggressive invader, was for a time in possession of parts of the Dutch East Indies. There, certain Dutch companies had oil concessions. The occupying military power of Japan exploited

115. Id. at 62.
117. Id. at 146.
some of these concessions, and some of the oil from them was traced to storage tanks in Singapore after the Japanese had been driven out both from the then Dutch East Indies and Singapore. The question was: Did this oil belong to Japan or to the three Dutch companies which had joined together to claim it (the evidence showed that the oil could only have come from one or more of these three concessions)? At no time had the Dutch Government, the local government of Singapore, the British Government, or the United States Government recognized Japan either *de facto* or *de jure* as the government of the invaded area where the oil wells were.

**Decision.** Only a recognized government can commit an act of state. The legitimacy of title of any goods seized in a conquered country by a temporarily occupying foreign power is governed by the laws of war and not by any civil rules. Of course, this seizure of the Dutch oil was pure larceny and, of course, did not transfer title. The oil was, therefore, delivered to the three Dutch companies, instead of being seized by Singapore as Japanese property and sold for the benefit of war claims.\(^{118}\)

**J. The One Belgian Case (Mexican Oil)**

The Iranian nationalization of oil concessions was not the first time a government had nationalized an oil concession. Mexico had done this before. Let us, therefore, follow shipments of oil from Mexico claimed by Mexico under its nationalization decree. Five cases involving shipments of oil from Mexican oil fields after nationalization are cited by the three United States courts in the *Sabbatino* case. Four of these cases cited are by courts of The Netherlands and one by a court of Belgium. Of the five cases, the lower courts in one of them held that Mexico had not, by its nationalization decree, acquired title to a shipload of oil because, the court held, the Mexican law applied to real property only, and not to oil. This lower court's decision was promptly reversed by the higher court which found the act of state applied to the oil as well as to the land. The final decision in this case, and all of these other cases, supported the act of state doctrine. A brief review of each of the Mexican oil cases follows.


This case apparently involved several shipments of the Mexican oil which were treated together as one case in the Annual Digest reports.

\(^{118}\) This is governed by the Hague Conventions of 1907, including Convention IV to which is annexed the rules of land warfare. See 1 Malloy, *Treaties, Conventions, International Acts, Protocols and Agreements Between the United States of America and Other Powers 1776-1909*, 2269 (1910).
"In the case of 'Propetrol,' 'Petroservice' and 'Petrolest' v. Compania Mexicano de Petroleo and Tankage and Transport, the Civil Tribunal of Antwerp held . . . that a decree of the Mexican government expropriating without compensation installations, etc., belonging to foreign oil companies in Mexico, could not be questioned in a Belgian court on the ground that it violated the principles of Belgian public order. An application to allow the seizure of oil cargoes exported from Mexico which had been confiscated in this manner and were lying in port at Antwerp was rejected."119

K. The Dutch Cases


Facts. After nationalizing the oil concessions, Mexico had shipped to The Netherlands a cargo of oil in the steamship Lundgress. In a suit challenging Mexico's ownership of this oil under its nationalization decree, the Dutch court found that the oil in question originated from oil fields formerly the property of the Mexican Eagle Company (El Aguila), a Mexican corporation, which was a subsidiary of the Batsafsche Petroleum Maatschappij, a Dutch corporation. This Dutch corporation placed the oil brought in the Lundgress under judicial restraint, as the property of its subsidiary, to collect the debt due from that subsidiary to the Batsafsche parent company. The Mexican Government, claiming title, sought to release the attachment. To the Mexican Government's claim, Batafsche interposed three contentions: (1) that the Mexican expropriation law of 1936 was unconstitutional; (2) that the Mexican decree of 1938 was in turn inconsistent with the said law; (3) that the Mexican expropriation measures were contrary to Dutch public order.120

Decision. The Dutch court rejected these contentions and by vacating the attachment permitted the Mexican Government to take possession. In answering the three objections to Mexico's claim of title, the court said:

"(1) The defendant [Batsafsche], in attacking the constitutionality of the Mexican Law of 1936, asks for a decision, which is outside the competence of the Court. A Dutch Court is not allowed to put the laws enacted by the claimant as a foreign state to the test of its constitution. The Court is not entitled in the case under consideration to enter into an examination and to judge the constitutionality of the Mexican Expropriation Law of 1936.

"(2) The Court is not qualified to examine whether and how far decrees of the Executive of a foreign State are legally valid and, therefore, in this case, to extend its inquiry to the question whether the provisions of the Expropriation Law have been correctly observed in the Presidential Decree of 1938. So far as the Court has been able to ascertain, the claimant government has applied in respect of the Mexican Eagle the provisions of its Expropriation Law even as far as the fore-shadowed indemnification is concerned.

"(3) The Court rejects the defendant's plea that the provisions of the Mexican law ought to be left without application as being contrary to Dutch 'public order.'

119. [1938-1940] Ann. Dig. at 25. (Italics omitted.)
120. [1919-1942] Ann. Dig. at 17.
The Court does not feel at liberty to rule that the said provisions are at variance with what should be considered proper and permissible for a foreign legislature."\textsuperscript{121}

On further appeal, this case was affirmed.


\textit{Facts.} In this case a certain quantity of oil had been sold by Mexican Government authorities to a French company which had in turn sold it to another French company, the plaintiff in this action. The same claimant as in the previous case, El Aguila, a Mexican company and the subsidiary of the Dutch company, judicially seized the oil in The Netherlands on the ground that the oil was its own property.

\textit{Decision.} The lower court (District Court of Rotterdam) held that El Aguila still held title on the ground that the Mexican expropriation decrees related to real property only. The Court of Appeals at the Hague promptly reversed, holding that the El Aguila was a company under Mexican law, and the whole act of expropriation took place within the sphere of the national sovereignty of Mexico. The Court of Appeals said

"that a Dutch Court is not allowed to enter into an appreciation of the legality of the acts of the Mexican Government under consideration, but that it is bound to respect any juridical relations which might have arisen in the State of Mexico from measures taken by that State in respect of property situated in its territory and belonging to a Mexican Company. A Dutch Court is obliged to refrain from entering into an independent examination of the validity or invalidity of public acts of a foreign government."\textsuperscript{122}

The Dutch Court of Cassation affirmed on the technical grounds that it could not review a decision except where the issue in the appeal was the proper application of Dutch law.


\textit{Facts.} Here the claimants again were the buyers of the oil which had been attached by El Aguila on the ground that the oil belonged to it. The action was to vacate the judicial process permitting the oil to go to the buyers and, thus, affirm the title by the Mexican Government which had sold the oil to Dairs et Cy.

\textit{Decision.} In vacating the judicial restraint, the District Court of Rotterdam said:

"The defendant has argued that this was not a regular expropriation, but a confiscation, and has pointed out that not only the Governments of the United States and

\textsuperscript{121} Ibid.

\textsuperscript{122} Id. at 18.
the United Kingdom, but also the Netherlands Government protested against what had happened. There is, however, a profound difference between a diplomatic note, addressed by a sovereign government to another in order to suggest to the latter, on various grounds, the revision of a decision taken, in the interest of its nationals, and the judgment of a Court calling in question the good faith of a foreign government in the performance of one of its public acts. . . . It is up to the defendant as a Mexican company—as it is, indeed, engaged in doing—to bring about a decision of the Mexican judiciary on the legality of the expropriation measures which it challenged. The Court is not in a position to do anything else but to admit its legality for the time being.”


**Facts.** The following is the complete report of this case as it appears in the Annual Digest.

In this case the Court of Rotterdam set aside the arrest, effected by the Mexican Eagle Company, of a quantity of oil sold by the Mexican Government to Davis & Co. and brought by them to Holland. The Mexican Eagle Company contended that the Mexican Government came into the possession of the oil as the result of decrees of expropriation which in fact amounted to confiscation and was, as such, contrary to Dutch conceptions of public policy. The Court held that it was not within its province to question the good faith of a foreign Government in the performance of acts of a public law nature.

The decisions of the Dutch courts relating to the confiscation of the Mexican oil concessions are both brief and clear. The Dutch courts recognized the validity of the act of state of Mexico. They held that the confiscation of the oil fields within the national domain of Mexico transferred to an agency of the Mexican Government, as intended by Mexican law, the title to those oil wells and the oil which had been extracted from them. The considerations that Dutch interests were adversely affected failed to deter the court from pronouncing that the Government of Mexico had taken title to a Mexican company wholly owned by Dutch nationals.

There are some, however, who have claimed that a different rule was adopted by Dutch courts in respect to the act of state doctrine when the Indonesian Government began oppressive tactics against Dutch companies in Indonesia, tactics which were followed ultimately by the outright confiscation of all Dutch-owned assets in Indonesia. These oppressive measures—ultimately confiscation—were made in an effort by Indonesia to persuade, or force, the Netherlands Government to give up its sovereignty over Dutch New Guinea and to recognize Indonesia hegemony over that area. The case most often cited—but erroneously, as a

123. Id. at 19.
detailed study of the case will show—as one in which the Dutch courts, abandoning their former principles, refused to recognize the validity in Indonesia of an Indonesian act of state, follows.


Although this case has been cited frequently for the proposition that Dutch courts refuse to recognize the validity of a foreign act of state within the very country which enacted the offensive measure (a measure which was in violation of international law), the facts and decisions in this case show such interpretation to be unwarranted. If we apply our formula of measurement to this case, we shall find that the Dutch courts handed down a decision in no way inconsistent with decisions of United States courts which support the act of state doctrine. Contrary to the apparent belief of some, there was no issue whatever in this case concerning title to property in the Netherlands.

Senembah, a Dutch company, claimed as its own, certain property in the Netherlands. The Bank Indonesia, although a government institution of Indonesia, appeared in this case only as a private bank doing a commercial business (“in the capacity as a party to a contract of credit”\(^{126}\)), claiming the right to continue to hold that property previously pledged with it as collateral for a loan. The Bank Indonesia, the defendant in this case, admitted that the property in controversy was the property of Senembah, but subject to a pledge. The Bank Indonesia, as a bank, did indeed desire to acquire that property, not that it claimed that title had been transferred to it or to any government agency of Indonesia by Indonesian law. It made no such claim. Not that the Bank denied the property had been deposited with its branch in the Netherlands as property

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125. The N.T.I.R. contains the principal parts, but not the whole, of each decision of the lower court and the court of appeals. The original decision in the Dutch language has been compared with the excerpts printed in English in the N.T.I.R., which are found to be excellent translations. The English excerpts appearing in the Dutch Law Journal are, therefore, relied upon as the authority in this case.

When the decision of the district court was published in part in 7 N.T.I.R. 285 (1960), the editor’s resume of the facts was incorrect. Later, in this same journal, in a note following the court of appeals decision, the erroneous statement of facts was corrected. 7 N.T.I.R. at 403. The editor stated: “My attention has been drawn to the fact that owing to a very concise report in the Nederlandse Jurisprudentie the statement of the facts of this case on pages 285 and 286 ... is not quite correct.” (Italics omitted.)

126. 7 N.T.I.R. at 400.
of Senembah. It demanded the right to retain the property solely on the grounds that in the banking relations entered into between Bank Indonesia and Senembah, Senembah still owed money to the Bank and, therefore, the Bank demanded the right to continue to hold the property as collateral. Senembah denied any debt then owing.

In this case the Dutch court properly decided that Indonesian law, contrary to international law, was not effective outside of Indonesia, and Netherlands courts would not enforce it in the Netherlands. To decide otherwise would have supplanted Dutch law.

Before reciting the details of the case, certain misconceptions concerning this case may be dealt with briefly. One erroneous idea is that the property of which both Senembah and Bank Indonesia claimed possession, had been shipped to the Netherlands after confiscation and was there claimed by Senembah. This would have been similar to the Sabbatino case in which the sugar, after confiscation, was shipped to the United States, but the facts in this Dutch case were otherwise. A second misconception is that, because of the confiscation, some agency of Indonesia was entitled to assert a claim of title to the property in the Netherlands.

These two errors can be dealt with very briefly by the following quotation—

“All six lots of tobacco had already been shipped to the Netherlands before the Act on Nationalization of Netherlands Enterprises entered into force on December 31, 1958, and, with regard to the first two lots, even before the imposition of control, which, according to the Bank Indonesia did not in any case affect the property rights of Senembah.”

—and by reference to the date on which the decision of the district court was made. This shows that the decision of the court of first instance was prior to the time when the confiscation decree took effect. In short, the property in the Netherlands had been brought to the Netherlands by Senembah as its own property before the confiscation decree went into effect, and the case was decided before confiscation.

In further consideration of errors, it must be noted that a bureau of control had been set up in Indonesia to take over and administer the assets of Senembah, and some have felt that this Dutch case was an effort by the Indonesian Government to secure these assets extraterritorially. Such, however, was not the case as is easily shown by the fact that there was no agency of the Government of Indonesia in the case whatever, since the Bank Indonesia appeared only as a private bank.

A recital of the facts, not set forth in any of the opinions of the United States courts in Sabbatino, will prevent misinterpretation of this case.

127. Id. at 403. (Italics omitted.)
Facts. Senembah, the plaintiff, was a Dutch corporation which held several estates in Indonesia for the cultivation of tobacco. Bank Indonesia, the defendant, before the events of the case had been nationalized, but appeared in the case only as a private bank. On September 10, 1956, and before the Indonesian Government had taken measures against Dutch industry in Indonesia, Senembah secured a loan from Bank Indonesia in the Netherlands (not in Madan, Indonesia as at first was erroneously reported). This was an ordinary commercial loan but payable in local currency in Indonesia. As collateral for this loan, Senembah pledged a large number of bales of tobacco warehoused in Indonesia, the warrants (receipts) for which were held by Bank Indonesia in Indonesia. In addition, Senembah pledged, also as collateral, another and different lot of tobacco which was warehoused in the Netherlands, the warrants for which were held in the Netherlands by the Netherlands branch of the Bank Indonesia.

In 1957, sometime after this loan had been made, the Indonesian Government commenced oppressive, coercive measures against Dutch enterprises in Indonesia and established government control over all Dutch companies there. (This was before the measure for the confiscation of Dutch properties. In fact, the case here discussed was actually decided—not merely commenced—before Indonesian confiscation measures became effective against Dutch property in Indonesia. Thus, any reference to this case as proof of refusal to recognize transfer of title under a confiscation decree must be based on a misunderstanding of the facts, and particularly of the facts involving dates.) The Indonesian Government set up a special government bureau (referred to in the case as PPN-Baru) for the purpose of exercising control over Dutch properties in Indonesia, and an Indonesian official from this bureau was placed in charge of the business of Senembah in Indonesia. After this event, no officials of the Senembah company had any control whatever over any of its properties, management, or the purchase or sale of tobacco from these estates. It was these measures that the Dutch courts found were contrary to international law and were a prelude to confiscation. The Indonesian Government at this time did not claim title to any of the Senembah properties in Indonesia or to any in The Netherlands.

At the time of the institution of this “control” over the Senembah properties in Indonesia, the loan account between Senembah and the Bank Indonesia stood as follows: Senembah owed Bank Indonesia 50,859,440 Indonesian rupiahs against which the Bank Indonesia held collateral security of 3,476 bales of tobacco warehoused in Indonesia and an additional amount warehoused in The Netherlands.

The Indonesian controller of Senembah made an agreement with the Bank Indonesia to deliver to him all of the pledged tobacco held by that bank in Indonesia. The controller then sold the collateral and received payment of more than 51,000,000 Indonesian rupiahs, more than enough to pay off the loan against which they had been pledged. The debt was then further increased, although this had not been authorized by Senembah.

Sometime after the transactions just described had been completed in In-
Indonesia, the Senembah company in The Netherlands, considering that its loan to Bank Indonesia had been fully satisfied by the liquidation of its collateral pledged in Indonesia, desired to repossess the collateral deposited as excess collateral with the Bank Indonesia in The Netherlands. It wished to use this to satisfy a contract it had made. Not receiving the pledged warrants, Senembah sued the Bank Indonesia in The Netherlands to get back this property, which was also in The Netherlands, and the title to which was admitted even by the Bank Indonesia not to have been affected by the "control" of Senembah's property in Indonesia.

Contestation and Decision. The court in The Netherlands first ordered the Indonesian Bank in The Netherlands to deliver the warrants to De Twentsche Bank, to be held by that latter bank pending determination by the court of the respective rights of Senembah and Bank Indonesia. De Twentsche Bank had no other connection with the case.

The Bank Indonesia answered the complaint and counterclaimed against Senembah. To the indignant astonishment of the Dutch court, the Bank Indonesia claimed that Senembah must deliver the tobacco in The Netherlands to it, because it was required to do so.

It has been shown already that this claim was not because Indonesia had confiscated Dutch properties and claimed the right to the tobacco. No such claim was made. And as shown, the case was decided before the confiscatory Indonesian laws came into effect. The action of Indonesia which was declared to be contrary to international law was the imposition of this control—the PPN-Baru. The claim, therefore, must be related back to that particular act of state and to no other. Under this there could have been but two claims:

1) that by Indonesian law, Senembah, a Dutch company doing business in Indonesia, was obligated by Indonesian law to turn over tobacco to Indonesia. Senembah's position was that

"the control over its estates in Indonesia by the Indonesian authorities and all acts of administration of the PPN-Baru, the organ delegated by the Indonesian authorities to exercise the control, do not concern Senembah and lack legal force because they are contrary to international law."

Of course they had no validity in The Netherlands. That would have been to grant extraterritoriality to Indonesian law. However, Bank Indonesia claimed, under its own interpretation of the act of state doctrine, as follows:

"The Bank Indonesia, referring to the 'Act of State' doctrine, alleges that, according to international law, the legality of the control over the Senembah estates and of the administration carried out by the PPN-Baru cannot be questioned, since Nether-

128. Id. at 400. (Italics omitted.) The question here was not whether they had legal force in Indonesia, but whether they had legal force in The Netherlands as claimed by Bank Indonesia.
lands courts, being foreign courts with regard to the Indonesia State organs, are not entitled to review their acts."

(2) With all other possibilities eliminated, the defense of the Bank Indonesia could have been nothing more than an effort to recover a debt which under the laws of Indonesia it claimed was still due and owing. What the Bank Indonesia was asking The Netherlands court to do was in effect to recognize as still outstanding and owing a debt of Senembah, the collateral for which had been taken over pursuant to Indonesian law, and to enforce such an obligation in The Netherlands. It claimed that this was mere "recognition" of the laws of Indonesia, which in this case were contrary to the laws of The Netherlands and contrary to commercial law generally. The very peculiarity of this claim on laws contrary to international law is probably the reason for the confusion in its interpretation.

Decision. Of course, the lower court in The Netherlands rejected this plea of the Bank Indonesia. Thereupon, Bank Indonesia appealed. The very statement of the grounds on which this appeal was prosecuted is sufficient to show that Bank Indonesia desired to have enforced in The Netherlands Indonesian law violently at variance with the commercial law of The Netherlands and other commercial countries, and that any alleged obligation which Bank Indonesia claimed would be, under the laws of any other country except Indonesia, wholly fictitious; Senembah had no obligation in The Netherlands to deliver more tobacco warrants to Bank Indonesia. The grounds of Bank Indonesia's appeal were:

"The President [of the Dutch court of first instance] wrongly reviewed the control over the Senembah estates in Indonesia and was wrongly of the opinion that this control is contrary to a) international law, b) the concepts of morality prevailing in The Netherlands and c) the provisions of the Netherlands Commercial Code regulating the management of limited companies and applicable to Senembah."

The court affirmed the decision of the lower court and directed delivery of the warrants to Senembah.

It is perhaps unfortunate that the courts of The Netherlands rejected this outrageous claim so summarily without giving detailed reason why, in the court's opinion, the obligations of Senembah to the Bank Indonesia had been fully satisfied. Perhaps the court thought that they were too obvious to recite. The spectacle of two government agencies of the same government—one, the official of the "control"; the other, the fiscal agent of the government—conniving with each other about collateral pledged for a loan, and then for the fiscal agent to appear in The Netherlands as a private bank and claim that it had not been paid, or for other reasons under Indonesian law had a right to secure some property of Senembah.

129. Id. at 400-01. (Italics omitted.)
130. Id. at 400.
in The Netherlands, was too much for any court to take calmly. One needs scarcely go deeper into the commercial relations than that or observe that when the collateral was handed over in Indonesia, the Bank Indonesia had a security title to it. No bank may sue without recourse to the collateral, unless it is immediately prepared to deliver the collateral upon payment, which, of course, the Indonesian bank was not prepared to do, for it had already been sold. Also, Senembah, under commercial law, would have had a counterclaim for the full amount for which the Government of Indonesia, through the Bank Indonesia, sued. By the sale of the collateral through its control, Indonesia had been unjustly enriched in that amount. Bank Indonesia had no right to the collateral never in its possession, except under Netherlands law as collateral for a loan then fully paid.

The only connection which this case has with the act of state doctrine is in relation to extraterritoriality. What the Indonesian Bank asked the courts of The Netherlands to do was to recognize that, under the laws of Indonesia, Senembah still owed the bank, and then to enforce that liability under the laws of The Netherlands, thus permitting the Indonesian Bank to collect the same debt twice and some more in addition. This same unfair result would have been achieved by recognizing an extraterritorial power to the “control” if it had made claim to the property.

L. The German Cases

The Senembah case has been paired with a certain German case, presumably to show an opposite result. However, the two cases are not comparable. The Dutch case was decided before confiscation; the German case was decided after the Indonesian confiscation decrees.


Cited in the *Sabbatino* decisions, this German case is classified as one in which the courts recognized the validity of an act of state. Since the case indeed does support that proposition and has been correctly cited for what it actually holds, only brief discussion of it is necessary.

Facts. As shown in the previous case, control of Dutch enterprises in Indonesia began in 1957 and ended with confiscation of those properties on December 31, 1958. From the time the “control” governed the operations of the Estates formerly operated by the Dutch companies, this “control” took over the marketing of the tobacco grown on those Estates which had either been the property of Dutch-owned companies, or were included in concessions granted by the Indonesian Government to the Dutch for the purpose of raising tobacco.
The "control" determined not to attempt to market tobacco through the Netherlands which had been the normal trade route for tobacco grown in the Dutch East Indies by Dutch companies, but sought to establish instead a market in Germany. Tobacco from these Indonesian Estates sent by the "control" was claimed in Germany by the Dutch companies. One of these companies was the Senembah company, which figured in the previous case. These companies claimed a continuing ownership on the grounds that the Indonesian "control" was contrary to international law and that the marketing agents of Indonesia did not have the right to possession of the tobacco, nor did they have title.

The original decision in this case was April 13, 1959, at which time the confiscation decrees had been put into effect in Indonesia.

Decision. The German courts in deciding these claims recognized the validity of the "control" over the property in Indonesia, and that under the confiscation decrees title had been acquired by these Indonesian acts of state.

Several other German cases are cited in the Sabbatino opinions.


This case, cited by the district court, the court of appeals and in the dissenting Supreme Court opinion in the Sabbatino case, involves two refugee women deported as enemies and a disputed title to a sewing machine. The case was decided by the local court in the Bavarian town of Dingolfing, and it was never appealed to the next higher court in Munich.

The incident from which the case arose occurred in those difficult days following the cessation of hostilities of World War II when Nazi control of Czechoslovakia ceased and Benes came in as titular head of the Czechoslovakian Government under Allied sponsorship. Shortly thereafter, the Benes government promulgated the Decree of October 25, 1945, which recognized the Sudeten Germans as enemies, as, of course, they had been since Hitler took over the Sudetenland in 1938 and a year later the whole of Czechoslovakia. Under this decree the Sudeten Germans were to be deported from Czechoslovakia as enemies and their property forfeited to the state. Moreover, under this decree, the Sudeten Germans were placed in various concentration camps to await actual deportation to Germany. The incident of the sewing machine occurred in one of these camps.

Facts. Two women, both enemy nationals resident in Czechoslovakia and both

131. The original decision is not officially reported, "unveröffentlicht," but was reported in full by Professor Gunther Beitzke, University of Göttingen, in 15 Zeitschrift fur Auslandisches und Internationales Privatrecht 141-48 (1949).
dressmakers or seamstresses, were taken to a concentration camp as the preliminary step in their deportation to Germany. Both brought their sewing machines along with them to the camp, and both had these taken from them as they entered. One of the women, before leaving the camp, asked to have her sewing machine given back to her, and a sewing machine was given to her, but it was not the one she had had before. Nevertheless, she brought this machine from Czechoslovakia into Germany. The other woman likewise arrived in Germany, but without a sewing machine. However, she recognized the sewing machine of the other woman as the one she herself had had and had been obliged to give up as she entered the camp, and she claimed it as hers before the local court of Dingolfing.

Lack of information as to one very important fact was acknowledged by the judge trying the case, but he obviously did not recognize the possible ramifications of the case resulting from his lack of knowledge. He was not sure whether the State of Czechoslovakia had taken title or tried to take title to this sewing machine under the law of October 25, 1945. He thought that depriving these women of their personal property upon entering the camp might have been a wilful act of the guards of the camp. Curiously, the judge thought this of no importance, though had it been merely the act of a guard, the whole controversy would be removed from the realm of international considerations. The wrongful and unauthorized act of a prison guard would not transfer title. The conclusion that the Government did not intend to confiscate this machine is strengthened by the fact that both women were allowed to bring their sewing machines to camp with them and that, upon the request of one of them, a machine was returned to her to take with her to Germany. If the machine had been the property of the Czechoslovakian Government under a confiscation decree, then the guard at the camp embezzled or stole state property when he returned a machine to the woman who asked for it. Also, a sewing machine would be somewhat difficult to conceal if wrongfully in her possession when the woman left the camp. There was no evidence in the case that the Government of Czechoslovakia claimed this machine or that the woman who brought it into Germany claimed that she had title from the Government of Czechoslovakia. Certainly, she was not a bona fide innocent purchaser for value, for she paid nothing for the machine at the camp, but took it as a replacement for the one she had been obliged to turn in. There is also no evidence in the case that the other woman who came from the camp into Germany without a sewing machine (the claimant) had made any request to the guards for the return of her sewing machine before she left.

Contestation and Decision. The judge ordered the delivery of the sewing machine to the original owner, not the woman who had brought it into Germany.

Perhaps the most remarkable thing about this case is that a court in the year 1948 in Germany, a country occupied by foreign powers as conquerors, could ignore the terms of unconditional surrender of Germany, could ignore the fact that Czechoslovakia was recognized by the Allies as a country occupied by the enemy Hitler from the commence-
ment of the war and that the Allies drove the Nazi forces from Czechoslovakia, could ignore the fact that the Nazi Government no longer existed and that the Government of Germany at that time was the Allies, and could ignore the terms of the Postdam Conference and the Paris Reparations Agreement, and the laws imposed by the Allied occupation.

If we accept as our premise the Dingolfing judge's statement of facts of the case and the inference from them as found by this judge, then the case would have been decided by United States courts as this case was decided. But if we repudiate the world of fantasy created by the judge of the Dingolfing court and add facts important to the case which he ignored, we may be surprised to find that under this decision the treatment of Germany by the Allies and the retention of external German assets as reparations was wholly contrary to the law of nations and should have been ignored, not only by Germany but throughout the world.

As to the decision on the facts as given by the judge, and applying our yardstick as to what United States courts would have done, we may say (1) that there was no evidence in this case that Czechoslovakia had assumed title to the sewing machine. If there was no change of title, the original ownership of course continued. (2) If the seizure was merely that of a conquering country of the property of the citizens of that country, it was governed by the Hague Convention, and again the decision would have been correct. (3) The German Government did not recognize, as the government of the area, the Czechoslovakian Government, newly reestablished in its own territory after having been left in exile during hostilities; and only a recognized government can create an act of state.

Only (1) above could be true in this case. Under the Paris Reparations Agreement, the Allies took all property of Germans outside of Germany in lieu of reparations; and as to (3), of course, the Allies in occupation of Germany recognized Czechoslovakia as the legitimate government of the area.

The German court of Dingolfing, however, elected to treat this case as an act of state of a confiscating government, and the taking of the sewing machine in Czechoslovakia as an act against the law of nations. The Sudeten Germans, the judge finds, were a national minority, and as such "a special subject of the law of nations." He finds no difference between confiscations of non-enemies and seizure of enemy property—both he decided here were against the law of nations. He finds that although the German Government did unlawful acts against the Czechoslovakian state, the seizure of property of Germans was excessive as retaliation (reparation). He defends the Hitler Government: "The Nazi State did not... drive all Czechs and Slovaks from their homes merely on the ground of their national allegiance, nor did it deprive them of
their property without compensation." But he omits any reference to the treatment of the Jewish population and the fact that confiscation of the property of large numbers of Czechs and Slovaks was accomplished to create estates which were given to collaborators. He determined that the act was merely against German speaking persons, not recognizing that these persons had been the cause of the attack on and occupation of Czechoslovakia, and they were expelled, not because they spoke German, but because they were enemy. He finds the sewing machine was taken by a decree contrary to the law of nations, the Constitution of Germany, public policy and above all

"the questionable decree also constitutes a violation of Natural Law which applies over all state power and which is also recognized in Article 30 E.G.B.G.B. [German civil code]."

If more were needed to discredit this case than is inherent in the decision itself, we may find it in the laws of Allied Occupation. By Control Council Law No. 5 of 1945, which was prior to the decision, the occupying powers removed all German external assets from the control of the German owners by vesting title to them in the German External Property Commission, composed of representatives of the Four Powers, excepting only assets located within the territory of the United States, United Kingdom, France and the U.S.S.R. This was in accord with the Potsdam agreement of August 1945. Later, on September 5, 1951, the Council of the Allied High Commission enacted Law No. 63 clarifying the status of German external assets and other property taken by way of reparation or restitution. Directed specifically to situations in which seized German property would enter Germany, the Allied Government stated:

[I]t appeared desirable to protect all persons who had acquired German assets, taken as reparations, as well as the owners of restituted property, from any risk of having to defend their title against attack by former German owners if such property should be brought into Germany, no matter how remote such risk, and how devoid of a legal basis such attack might appear.

It would be easy to dismiss this case as one which, because of its very nature and of the type of opinions given, would be a precedent for

133. Id. at 25. In the original this reads: "Das Fragliche Dekret stellt auch eine Verletzung des Naturrechts dar, das über aller Staatsgewalt gilt und das auch in Art. 30 EGBGB anerkannt ist." Supra note 131, at 144.

Article 30, referred to frequently in German cases in this field, is the Article referring to Public Order, i.e. preservation of the right to private property within Germany. See Prince Dabischa-Kotromaniez v. Société Lepke, p. 669 infra.

134. Office of the United States High Commissioner for Germany, 8th Quarterly Report on Germany 55 (1951).
nothing. But the decision is of importance for two reasons. In the first
place it is the only decision which expresses the view set forth in une-
quivocally (sic) {language} in the district court and court of appeals opinions
in *Sabbatino* that something; whether it be called "international
law" or "natural law" is a limitation on sovereignty; and that limitation
can be imposed against any country (which of course must include the
United States) by any court anywhere in the world. The district court
in *Sabbatino* said:

There is an end to the right of national sovereignty when the sovereign’s acts impinge
on international law.135

The correlative statement of the court of appeals states:

[T]he very proposition that something known as international law exists carries with
it the implication that national sovereignty is not absolute but is limited, where
the international law impinges, by the dictates of this international law.136

The lower courts in the *Sabbatino* case also said:

The effective method to promote adherence to the standards imposed by international
law is to enforce these standards in municipal courts, particularly in view of the
poverty and inadequacy of international remedies.137

But until the day of capable international adjudication among countries, the munici-
pal courts must be the custodians of the concepts of international law; and they must
expound, apply and develop that law whenever they are called upon to do so.138

The second reason for the importance of this German decision is that
the United States, in its brief in *Sabbatino*, pointed out that United States
courts should not refuse recognition to Foreign acts of state; nor are their
pronouncements affecting American nationals likely to be accepted in
other countries as impartial determinations of international issues. Here
we have a decision so unimportant in Germany that it has never been
officially published; a decision written by a judge who sat in a local court
in the little Bavarian town of Dingolfing; a decision unappealed. There
was no appeal court there. The resulting decision is what one may expect
when matters of international import are entrusted to local nationalistic
judges, careless of the facts, indifferent to history, and ignore the law.

Examination of German cases cited among the thirty-two foreign
court decisions cited by the three United States courts in *Sabbatino* will
show that higher German courts both before and after the decision in
the Sudeten German case supported the act of state doctrine without an
exception.

135. 193 F. Supp. at 381.
136. 307 F.2d at 860.
137. 193 F. Supp. at 382.
138. 307 F.2d at 851.

Facts. The appellant, had been convicted of conversion of certain valuables entrusted to her by a German national, who had been domiciled in Czechoslovakia but was evicted under the laws requiring persons of German nationality to leave Czechoslovakia. Before leaving for Germany, the German national entrusted these valuables to the appellant, asking her to bring them to Germany and give them back to him there.

In her defense in the court of appeals in Germany, the appellant contended her conviction should be quashed because the original owner of the valuables could not claim the right of ownership. She based this conclusion on the fact that at the time when the German entrusted the valuables to her, the confiscation law of Czechoslovakia against Germans had already been passed, requiring that they deliver their valuables to Czechoslovakian authorities. The German did not do this but gave the property to her to hold, contrary to the Czechoslovakian law. She argued, further, that the real owner was the state of Czechoslovakia, to which the German should have given the property. She claimed that since the crime (his or hers) had been committed against the State of Czechoslovakia, the German courts had no jurisdiction. In short, she had committed no crime whatever against the man who had entrusted the property to her since the title was already in the state of Czechoslovakia.

Decision and Contention. The court rejected the appellant's defense. All one can say about this defense is that it was ingenious and a desperate last chance based upon a proposition of law recognized neither by Germany nor by the United States.

The unsoundness of this proposition of law can be shown by the answer to two questions. (1) Does a person against whose property a confiscation law is directed have a duty to deliver all of his property to the confiscating authority? Within the territory of the confiscating government, he has, under its laws, that obligation, and the confiscating government will try to seize the property or punish if he is caught. If, however, he can arrange for his property to elude that confiscating government, no other government will seize that property and deliver it to that foreign government which has attempted confiscation. (2) Does a foreign government by confiscatory decree acquire title to property which it has never had in its possession? No country recognizes the acquisition of title by confiscation of another country unless accompanied by jurisdiction and control.

This decision does not represent any question of law inconsistent with United States law and procedure. If the United States subscribed to that doctrine which the appellant pleaded as her defense, it would mean that the United States would require that the property of every refugee who fled his country—whether it be Russia, Germany, China, Cuba—because of confiscatory decrees be delivered back to the government of the country from which he came.
What proposition of law contrary to the United States adherence to
the act of state doctrine this case was intended to illustrate is not ap-
parent.

31. Prince Dabischa-Kotromaniez v. Société Lepke, Tribunal of Berlin,
Nov. 1, 1928, 56 Clunet 184 (1929) (Ger.).

The case of Prince Dabischa-Kotromaniez v. Société Lepke is similar
to the English case of Princess Paley Olga v. Weiss and the French case
of De Keller v. Maison de la Pensée Française. In all three cases, the
problem to be solved by the courts, the law applied and the results were
the same; all three cases supported the act of state doctrine.

Facts. Prince Dabischa-Kotromaniez had owned some art in Russia which had
been seized by the Soviet Government. This art appeared in an auction in
Berlin and was claimed by the Prince.

Decision and Contention. The court denied his claim of title to the property,
finding that by the confiscatory laws of Russia and the seizure of the property,
Russia had acquired title. In this case article Number 30 of the introduction
to the German Civil Code was pleaded. This was to the effect that in Germany
property may not be seized without adequate compensation. The contention
was that since there was no compensation, German courts should not recognize
change of title. This plea was rejected, the court saying:

"This article [Art. 30], however, does not permit us to criticize an act of sov-
ereignty that the Government of a foreign state takes against one of its citizens,
particularly when this Government, as is the case with the Russian government, is
recognized by Germany. . . .

"It is then impossible, according to German law, by application of article 30 of the
law of introduction, to refuse to recognize the effect of the transfer of ownership
effected on Russian territory, in conformity with the provisions of Russian law, and
therefore impossible to admit on this basis the claim of the former owners."139

M. The Austrian Case

4 E.O.G.Z. 274 (No. 10), [1919-1922] Ann. Dig. 56 (No. 31)
(Aus.).

This case was the only one of Austrian courts cited in any of the
Sabbatino decisions in regard to the act of state. The report of the case in
the Commercial Court of Vienna and the decision of the Supreme Court
(Court of Appeals) of Austria is given below as the report of these two
decisions can be found in the Annual Digest.

Facts. "The Hungarian Soviet Government seized, by Decree of 17, June 1919,
the securities and deposits in Hungarian banks. It then sold part of these effects
to a certain L.F., a merchant in Vienna. The owners contested the validity of

139. 56 Clunet at 184-85.
the purchase and brought an action asking for a declaration that they were the owners. The Commercial Court of Vienna decided that the purchase was valid, as the effects were sold by the Hungarian Soviet Government, as that Government exercised at that time power in Hungary, and as the Austrian Government recognised and entertained relations with the Hungarian Government. The fact that no compensation was paid was irrelevant. The Upper District Court of Vienna confirmed the judgment of the Court below.

“Held by the Supreme Court: That the decisions of the Courts below must be affirmed. The Soviet Government in Hungary was recognised by the Austrian Government, and it had an accredited representative with that Government. It follows that the decrees of the Soviet Government in Hungary are governmental acts which the Austrian Republic must recognise. The question whether the Allied Powers recognised the Hungarian Government is irrelevant, seeing that the purchase was made in Vienna. The decrees of the Hungarian Government which succeeded the Soviet Government and which declared the acts of the latter to be null and void cannot affect the acquired rights of third persons.”

The Austrian court recognized the validity of the Russian decrees and, therefore, the transfer of title pursuant to those decrees.


“Notwithstanding any other provision of law, no court in the United States shall decline on the ground of the federal act of state doctrine to make a determination on the merits giving effect to the principles of international law in a case in which a claim of title or other right is asserted by any party including a foreign state (or a party claiming through such state) based upon (or traced through) a confiscation or other taking after January 1, 1959, by an act of that state in violation of the principles of international law, including the principles of compensation and the other standards set out in this subsection: Provided, That this subparagraph shall not be applicable (1) in any case in which an act of a foreign state is not contrary to international law or with respect to a claim of title or other right acquired pursuant to an irrevocable letter of credit of not more than 180 days duration issued in good faith prior to the time of the confiscation or other taking, or (2) in any case with respect to which the President determines that application of the act of state doctrine is required in that particular case by the foreign policy interests of the United States and a suggestion to this effect is filed on his behalf in that case with the court, or (3) in any case in which the proceedings are commenced after January 1, 1966.”