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CONSTITUTIONAL LAW—EXTRA TERRITORIAL EFFECT EXECUTIVE AGREEMENTS

Plaintiff, an American citizen, brought an action against the United States for damage to property, situated in Austria, which had been utilized as an officers' club by the United States Army after the cessation of hostilities. The defendant's motion to dismiss was denied. *Held*, an American citizen is entitled to compensation under the Fifth Amendment when her property had been damaged or stolen; that such recovery was not barred on grounds that the property was located in "enemy territory." *Seery v. United States*, 127 F. Supp. 601 (Ct. Cl. 1955).

The earliest view, best expressed in *In re Ross*,¹ had been that, in the absence of a treaty, the Constitution had no authority outside the territorial limits of the United States; and where a treaty was in effect, only to the narrowest limitations of the treaty. This doctrine was somewhat vitiated in an outstanding Insular case, *Downes v. Bidwell*,² the court stating that Congress had the power to extend any portion of the Constitution to a territory in which the United States was sovereign. A strong dissent by Chief Justice Fuller expressed the opinion that if Congress had the right to extend the Constitution at all, it should extend the Constitution in its entirety, as all of the powers of the legislature are derived from the Constitution. In more recent cases, the courts have held that American citizens in foreign jurisdictions are bound by American law,³ their first loyalty being to the United States.⁴ This theory has encompassed, by implication, the major portion of the constitutional rights;⁵ and in *Turney v. United States*⁶ the court expressly extended the Fifth Amendment. The factor to be considered in extending and applying the doctrine is whether or not the plaintiff has been acted upon by an instrumentality of the United States.

Executive agreements, whether implemented by congressional action⁷ or not,⁸ have been held analogous to treaties within the meaning of Article IV, Clause 2, of the Constitution, in that such an agreement may withdraw the consent of the United States to be sued, since the right to sue the United States is not a vested right.⁹ However, in the *Pink*

1. 140 U.S. 453 (1891).

2. 182 U.S. 244 (1901).

3. *Steele v. Bulova Watch Co.*, 344 U.S. 280, 288 (1952); *Blackmer v. United States*, 284 U.S. 421 (1932).

4. *Chandler v. United States*, 171 F.2d 921, 944 (1st Cir. 1949).

5. *Eisentrager v. Forrestal*, 174 F.2d 961 (D.C. Cir. 1951) (Fifth Amendment in occupied territories only extended to citizens of the United States if it extended at all); *Best v. United States*, 184 F.2d 131 (1st Cir. 1950), *cert. denied*, 340 U.S. 939 (1951) (Fourth Amendment extended to an American citizen in Germany).

6. 115 F. Supp. 457 (Ct. Cl. 1953).

7. *Hannevig v. United States*, 84 F. Supp. 743 (Ct. Cl. 1949).

8. *United States v. Curtiss-Wright Export Corporation et al.*, 299 U.S. 304, 318 (1936); *United States v. Belmont*, 301 U.S. 324 (1937); *United States v. Pink*, 315 U.S. 203 (1942).

9. *Maricopa County v. Valley National Bank of Phoenix*, 318 U.S. 357, 362 (1943); *Lynch v. United States*, 292 U.S. 571 (1933).

case,¹⁰ Justices Douglas¹¹ and Frankfurter¹² impliedly reserved the question as to whether an executive agreement would be valid if it impaired the constitutional rights of an American citizen.

In the instant case the United States Army took possession of the plaintiff's property as an officers' club in 1945, and when the plaintiff visited the property in 1948 she discovered it to be greatly damaged. The plaintiff filed a claim with the Army asserting that her property had been taken by the United States for public use and therefore she was entitled to just compensation.¹³ The United States contended that although the property belonged to an American citizen, it was "enemy territory"¹⁴ and therefore subject to seizure.¹⁵ The plaintiff contended that Austria was not enemy territory at the time of the taking, in July 1945, but was a liberated country.¹⁶ The Court denied the defendant's motion to dismiss.

The trend of the decisions in this area of *de facto* sovereignty has been to extend the operation of constitutional privileges and immunities. However, the extent to which the provisions of the Constitution will be applied to any given case apparently depends upon the special facts of the case; no safe generalizations can be made. The relationship between the claimant and the sovereignty which the United States may hold in the particular area would be a significant factor. Perhaps the most important of the considerations is the fact that the injury was the result of an action by an instrumentality of the United States.

WILLIAM JAY GOLDWORM

CRIMINAL LAW—INCEST—CONSENT

The defendant, half-brother of the prosecutrix, was convicted of first degree rape and incest. He moved for an order arresting judgment and setting aside the verdict on the grounds that the crimes of rape and incest are mutually exclusive and cannot arise from the same act. *Held*, if the parties are within the prescribed lines of consanguinity, proof of first degree rape may result in a dual conviction of rape and incest. *People v. Wilson*, 135 N.Y.S.2d 893 (1954).

The defendant's contention was that acts constituting rape must necessarily be effectuated without the female's consent, while such consent is an essential element of the crime of incest. Courts generally agree that the crime of rape requires an absence of consent.¹ But such accord is

10. *United States v. Pink*, 315 U.S. 203 (1942).

11. *Id.* at 227.

12. *Id.* at 236.

13. *Filbin Corp. v. United States*, 266 Fed. 911 (D.C. Cir. 1920); *Lajoie v. Milliken*, 242 Mass. 508, 136 N. E. 419, 423 (1922).

14. *Young v. United States*, 97 U.S. 39 (1879).

15. *The Juragua Iron Co., Ltd. v. United States*, 212 U.S. 297 (1909).

16. H. R. Doc. No. 351, 78th Cong., 1st Sess. (1943); 15 DEP'T STATE BULL. 384-864 (1946).

1. See 44 AM. JUR., Rape § 8 (1942).