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Admiralty--Punitive Damages Awarded

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ADMIRALTY -- PUNITIVE DAMAGES AWARDED UNDER THE JONES ACT

On May 7, 1965, a collision occurred between the Norwegian Topdalsfjord, of the Den Norske Amerikalinje A/S, and the American Steamship Cedarville, owned by the United States Steel Corporation, as a result of which the Cedarville sank with the loss of ten of her crew. The respective owners of the two ships filed petitions in the federal district court requesting exoneration from or limitation of liability against the administratrices of the estates of three Cedarville seamen who lost their lives in the collision, and against many of the surviving crew, who were potential claimants. The representatives of a deceased crewmember, proceeding under the Jones Act,[1] counterclaimed for punitive damages against the master and owner of the Cedarville. Finding that the master of the Cedarville had exhibited wilful and wanton misconduct toward his crew[2] and that United States Steel Corporation had ratified that misconduct,[3] the court held, judgment on the counterclaim, awarding punitive damages. Upon a showing of wilful and wanton misconduct, a plaintiff suing under the Jones Act may recover punitive damages. Petition of Den Norske Amerikalinje A/S, 276 F. Supp. 163 (N.D. Ohio 1967).

Until the decision in the principal case, punitive damages had not achieved general judicial recognition or approval by admiralty courts in tort cases. In 1859, a federal district court had allowed the imposition of exemplary damages against the master of a ship for deporting a citizen with full knowledge of the illegality of the deportation proceedings.[4] In addition, some admiralty courts, while not actually allowing punitive awards, had suggested in dicta that the imposition of punitive damages would be justified against tortfeasors for

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[1] 46 U.S.C. § 688 (1964).

[2] The master had held all crewmembers to their stations in a futile attempt to beach the Cedarville following the collision. The court found that the presence of the men was not necessary to the beaching operation, that there was no evidence suggesting the operation could succeed, and that the men could have been safely removed to a nearby ship.

[3] The court found that United States Steel Corporation ratified the misconduct of the master by refusing to halt the attempt to beach the Cedarville while in contact with the vessel by ship-to-shore phone immediately following the collision, with full knowledge of the impossibility of the beaching operation.

[4] Gallagher v. The Yankee, 9 Fed. Cas. 1091, (N.D. Cal.), aff'd. 30 Fed. Cas. 781 (1859).

wilful and malicious acts.[5] By 1903, however, admiralty law afforded seamen no remedy whatsoever for injuries sustained through the negligence of master or owner, although crewmembers were entitled to indemnity for injuries occasioned by the unseaworthiness of the vessel.[6] In 1920, for the purpose of providing seamen with more adequate remedies, Congress passed the Jones Act, under which the claimants in the instant case were proceeding. The act incorporated the provisions of the Federal Employers Liability Act (FELA),[7] and provided that seamen could recover damages for injuries incurred in the course of their employment and caused by the negligence of master, owner, or fellow crewmen.[8] The Jones Act, however, did not specifically provide for recovery of exemplary damages, and, prior to the decision in Den Norske, no admiralty court had indicated that claimants under the Jones Act were entitled to a recovery of punitive damages. In fact, a long series of cases had indicated that recovery for wrongful death under the FELA and the Jones Act was based on pecuniary loss to dependants of the deceased, with recovery limited to the pecuniary benefits which the beneficiaries might reasonably have received had deceased not died from his injuries.[9] An additional recovery was available for the decedent's conscious pain and suffering before death.[10]

The court in the principal case recognized that punitive damages had not achieved general approval in admiralty courts, but reasoned that "in the absence of a specific rule to the contrary, there is no basis in law or reason for proscribing the recovery of punitive damages in admiralty."[11] The court indicated that the failure of the Jones Act and the FELA specifically to provide a punitive recovery did not operate to bar that remedy under the general provisions of the acts, since exemplary damages were not the product of legislation, but of common law.[12]

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[5]The Amiable Nancy, 16 U.S. 546 (1818); Ralston v. The State Rights, 20 Fed. Cas. 201, 209-210, (D. Pa. 1836).

[6]The Osceola, 189 U.S. 158, 175 (1903).

[7]45 U.S.C. §§ 51-60 (1964).

[8]46 U.S.C. 688 (1964).

[9]See, e.g. Petition of Southern Steamship Co., 135 F. Supp. 358 (D. Del. 1955); Frabutt v. New York, Chicago, and St. Louis R. Co., 84 F. Supp. 460, 466 (D. Pa. 1949); Jensen v. Elgin, Joliet & Eastern R. Co., 182 N.E. 2d 211, 24 Ill. 2d 383 (1962).

[10]Id.

[11]Petition of Den Norske Amerikalinje A/S, 276 F. Supp. 163, 174 (N.D. Ohio 1967).

[12]Id. at 176.

The court cited with approval Mr. Justice Stewart's concurring opinion in Vaughan v. Atkinson, 369 U.S. 527, 540 (1961), to the effect that a seaman should be entitled to exemplary damages, as a traditional right under maritime law, in the event a shipowner's refusal to pay maintenance stemmed from wanton and intentional disregard of the seaman's rights.[13] The instant court reasoned that the Jones Act could be interpreted as authorizing a punitive recovery since language of general import in other federal acts, e.g. the Civil Rights Act,[14] has been so interpreted,[15] and since at least one case had indicated punitive damages could be granted under the provisions of the FELA.[16] The court concluded that, under the provisions of the Jones Act, the imposition of punitive damages against the master and owner of a ship in favor of representatives of a deceased crewman was justified.

The decision in the principal case is the latest of a trend in recent admiralty decisions expanding remedies for seamen injured in the course of their employment. For example, the Supreme Court, in construing the Jones Act, has indicated that the shipowner has an extremely high duty of care toward the crewmembers aboard his vessel--"an obligation of fostering protection."[17] In addition, the judicially developed rule allowing Jones Act claimants "permissible inferences from unexplained events,"[18] which is the admiralty equivalent of res ipsa loquitur, and recognition by admiralty courts that seamen are "the wards of admiralty,"[19] have encouraged recoveries for seamen suing under the Jones Act for injuries caused by the negligence of master, owner, or fellow servant. In addition to the Jones Act, the seaman's traditional remedy of maintenance and cure, which assures the injured or disabled seaman reimbursement for medical expenses, a per diem allowance for living expenses, and a recovery of

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[13]Den Norske, id. at 173, 174. It should be noted, however, that a number of admiralty courts had indicated, in cases not within the provisions of the Jones Act, that damages in admiralty were awarded under the principle of restitutio in integrum, and designed not to punish the tortfeasor, but to return the injured party to his condition before the injury. The West Arrow, 80 F. 2d 853 (2d Cir. 1936); Lekas and Drivas, Inc. v. Goulandris, 306 F. 2d 426 (2d Cir. 1962).

[14]42 U.S.C. § 1983 (1964).

[15]See Basista v. Weir, 340 F. 2d 74 (3rd Cir. 1965).

[16]Ennis v. Yazoo and M. V. R. Co., 118 Miss. 509, 79 So. 73 (1918).

[17]Cortes v. Baltimore Insular Line, 287 U.S. 367, 377-78 (1932).

[18]Johnson v. United States, 333 U.S. 46 (1948).

[19]Cortes v. Baltimore Insular Line, supra note 17 at 374-75.

unearned wages, regardless of the fault of the master or owner in causing the injury or disability, has been undergoing recent expansion by admiralty courts.[20] Similarly, the seaman's remedy for injuries occasioned by the unseaworthiness of the vessel has also been the subject of recent admiralty court expansion,[21] and the courts have long held that a shipowner's duty to furnish a seaworthy ship is absolute, and is not governed by principles of negligence.[22]

Following the decision in Den Norske, there is almost no limit to the liability of shipowners for injuries incurred by seamen in the course of their employment and caused by the negligence of master, owner, or fellow crewman. The decision represents the current admiralty policy of expansion of remedies available to seamen, and the decision is a critical one to the American marine industry, which is suffering from dwindling profits, rising labor and transportation costs, and renewed foreign competition. Furthermore, because of certain concepts inherent in admiralty, (e.g. the doctrine that shipowners owe a duty of fostering protection to seamen), and the decision in Den Norske may result in future punitive awards against masters and owners under the Jones Act on proof of conduct somewhat less serious than the wilful and wanton misconduct justifying punitive recoveries in common law tort actions.

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[20] G. Gilmore & C. Black, Admiralty 254, 257-59 (1957).
[21] Id., at 252-53.
[22] The Osceola, 189 U.S. 158, 175 (1903).

SUBPOENA OF DOCUMENTS LOCATED IN FOREIGN JURISDICTIONS WHERE COMPLIANCE SUBJECTS WITNESS TO CIVIL OR CRIMINAL SANCTIONS IN FOREIGN STATE

First National City Bank of New York was served with a subpoena duces tecum in connection with a federal grand jury investigation of alleged violations of antitrust laws by several of its customers. The subpoena required the production of documents located in the bank's offices in New York and Frankfurt, Germany relating to transactions in the names of the customers under investigation. The bank refused to produce those documents kept at its Frankfurt branch on grounds that compliance would subject the bank to civil liability and economic loss in Germany. The government contended that the bank could be excused from compliance with the order only upon a showing that compliance would result in criminal liability under German law. The federal district court adjudged the bank and a bank officer in civil contempt, finding that the bank would not have been subject to a criminal penalty under German law, that it had not acted in good faith, and that there appeared to be a valid defense to any subsequent suit for damages in Germany. On appeal to the United States Court of Appeals for the Second Circuit, held, affirmed. A state having jurisdiction to enforce a rule of law is not precluded from exercising that jurisdiction solely because such exercise requires a person to engage in conduct subjecting him to civil liability under the law of another state having jurisdiction over that conduct. United States v. First National City Bank, 396 F.2d 897 (2d Cir. 1968).

Prior cases are in agreement that it is improper to order a witness[1] to produce documents located in another country where production would place the witness in jeopardy of criminal liability under the laws of that country.[2] In First National City Bank v. Internal Revenue Service,[3] a bank moved to modify a subpoena requiring production of records located at its branch in

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[1]A distinction must be made between parties and witnesses who are not parties. When ordering parties to obey a subpoena, the court can punish noncompliance by dismissal, default judgment, or by permitting the drawing of adverse inferences. See Societe International v. Rogers, 357 U.S. 197 (1958). When ordering nonparties to produce evidence located in a foreign jurisdiction, a court must rely almost exclusively on its contempt powers for enforcement.

[2]Note, Subpoena of Documents Located in Foreign Jurisdiction Where Law of Situs Prohibits Removal, 37 N.Y.U.L. Rev. 295, 300 (1962); Note, Limitations on the Federal Judicial Power to Compel Acts Violating Foreign Law, 63 COLUM. L. REV. 1441, 1461 (1963).

[3]271 F.2d 616 (2d Cir. 1959), cert. denied, 361 U.S. 948 (1960).

Panama, contending that production would violate Panamanian law. The Court of Appeals for the Second Circuit held that the subpoena should not be modified because it had not been shown that compliance would involve a violation of Panamanian law. The court suggested that in such circumstances a party "should surrender to one sovereign or the other the privileges received therefrom," or, alternatively, be willing to accept the consequences.[4] The court added by way of dicta, however, that if production would violate Panamanian law, it should not be ordered.[5] In Ings v. Ferguson,[6] the district court quashed a subpoena directed to three foreign banks with New York branches to the extent that it required the production of documents in Cuba on the basis of an uncontroverted affidavit of an expert on Cuban law that disclosure would violate Cuban law and might subject officers and employees of the bank's Cuban branch to criminal penalties. On appeal, the Second Circuit quashed the subpoena with respect to records located in Canada because the foreign banks were witnesses, not parties to the action, and the court felt that whether removal of records from Canada was prohibited was a question of Canadian law best resolved by Canadian courts. Referring to its dicta in First National City Bank v. Internal Revenue Service, the court stated that it was improper to "take such action as may cause a violation of the laws of a friendly neighbor or, at the least, an unnecessary circumvention of its procedures,"[7] and suggested that the party seeking production utilize the procedures provided by Canadian law. The Second Circuit again faced the problem of conflicting foreign law in Application of Chase Manhattan Bank.[8] There the bank contended that a recently enacted Panamanian statute prohibited production of records located in Panama. After finding that production would result in a violation of Panamanian law "equivalent to a misdemeanor" under United States law, the court shifted the duty to proceed by appropriate process within Panama to the party seeking production.[9] The subpoena remained in force, however, to encourage the bank to cooperate with the production efforts. No other domestic cases have involved a witness who contended that compliance with a court order should not be required because of potential civil liability and economic reprisals in another country. The Supreme Court, however, encountered similar arguments in a case where, incident to a tax

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[4] Id. at 620.

[5] Id. at 619.

[6] 282 F.2d 149 (2d Cir. 1960), modifying Matter of Equitable Plan Co., 185 F. Supp. 57 (S. D. N. Y. 1960).

[7] Id. at 152.

[8] 297 F.2d 611 (2d Cir. 1962).

[9] Id. at 613.

lien, the Internal Revenue Service obtained an injunction restraining a domestic bank from transferring funds in the account of an alien which were payable only at the bank's Montevideo branch.[10] The court found no showing that the bank would be subjected to liability under Uruguayan law and rejected the argument that enforcement of the injunction would hurt the bank's overseas business.[11]

In the instant case the court expressed reluctance to hold that the mere absence of criminal sanctions would necessarily require compliance with a subpoena. Recognizing that the vital interests of a country may be expressed in ways other than the enactment of criminal laws,[12] the court said that such a rule would show "scant regard for international comity."[13] To demonstrate further the inadequacy of such a rule, the court noted the absurdity of its effect: noncompliance might be excused in one case because of an insignificant criminal penalty,[14] but compliance might be required in another case despite a much more severe noncriminal penalty such as loss of the right to do business. The court reasoned that in such cases it would be unrealistic to let the decision turn on whether the sanction was in fact criminal and to disregard all other factors. Accordingly, instead of terminating the inquiry with a finding that the conduct ordered would not violate the criminal laws of a foreign country, the court attempted to balance the national interests of the United States and Germany while, at the same time, considering what hardships, if any, the bank would suffer. In so acting, the court followed section 40 of the Restatement (Second), Foreign Relations.[15] Applying the standards suggested

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[10] United States v. First National City Bank, 379 U.S. 378 (1964).

[11] Id. at 384, 402.

[12] The court felt that the statements and directives of the various organs of a government also indicated a nation's vital interests. 396 F.2d at 902.

[13] Id.

[14] The court referred to Application of Chase Manhattan Bank, supra, where a subpoena was modified because compliance would have resulted in a violation of Panamanian law punishable by a fine equivalent to $100. In the opinion of the court, it would have been a "gross fiction" to contend that revocation of the bank's license would be less disastrous than having to pay in insignificant fine merely because revocation is theoretically not a criminal sanction. Id.

[15] Section 40 states:

> Limitations on Exercise of Enforcement Jurisdiction
> Where two states have jurisdiction to prescribe and enforce rules of law and the rules they may prescribe require inconsistent conduct upon the part of a person, each state

by the Restatement, the court observed that United States antitrust laws were essential elements of the nation's economic policies and that the evidence indicated that bank secrecy was not an element of overriding importance in German national policy. Therefore, the court concluded, the German laws would not excuse the refusal to produce evidence necessary for the enforcement of United States antitrust laws. In support of its conclusion, the court noted that neither the State Department nor the German government had expressed any view that enforcement of the subpoena would violate German public policy or embarrass German-American relations.[16] The court further observed that the protection of foreign economic interests of the United States from injustice under foreign law must be left to the executive branch of the government - the moving party in this case. In deciding the case as it did, the court seemed to be influenced by the bank's apparent lack of good faith[17] and the fact that First National City appeared to have a valid defense to any subsequent civil suit under German law.

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is required by international law to consider, in good faith, moderating the exercise of its enforcement jurisdiction, in light of such factors as

(a) vital interests of each of the states,

(b) the extent and the nature of the hardship that inconsistent enforcement actions would impose upon the person,

(c) the extent to which the required conduct is to take place in the territory of the other state,

(d) the nationality of the person, and

(e) the extent to which enforcement by action of either state can reasonably be expected to achieve compliance with the rule prescribed by the state.

[16]The opinion cited In re Grand Jury Investigation of the Shipping Industry, 186 F. Supp. 298, 318 (D.C. 1960), where the Phillipine National Lines moved to quash a subpoena duces tecum on grounds that it was an instrumentality of the Phillipine government which did not wish to waive sovereign immunity to suit or process. The court stated that it would reserve its views pending a showing by the United States that the activities were of a non-governmental nature. In upholding the subpoenas issued to other shippers, the court noted, nevertheless, that it was required to give great consideration to the objectives of the various foreign governments involved,

See also In Re Investigation of World Arrangements, 13 F.R.D. 280 (D.C. 1952), where a subpoena duces tecum issued to an oil company in which the British government had a 35% interest was quashed on grounds of sovereign immunity after diplomatic intervention.

[17]The court felt that the bank had shown lack of good faith by failing to make a simple inquiry into the nature or extent of the

The result reached in the present case is consistent with the results of prior cases. The approach taken by the court, however, differs from those of previous decisions. Here the court indicated that there might be circumstances in which civil penalties or liabilities, by themselves, would provide adequate justification for disobeying a subpoena, while in prior cases the only consideration had been whether criminal penalties were involved. The former rule was an impractical and unjust means of determining whether compliance with a subpoena should be required since criminal penalties may in some cases be insignificant,[18] while civil penalties may be extremely harsh. This approach failed to recognize that domestic policy considerations may sometimes outweigh the respect which ought to be accorded to the laws of a friendly foreign sovereign. Moreover, such a rule in some instances fostered the evasion of United States laws.[19] In contrast the Restatement recognizes that a state having jurisdiction to prescribe and enforce rules of conduct should not be precluded from exercising that jurisdiction solely because such rules will require persons to violate the laws of another state also having jurisdiction.[20] In such cases of concurrent jurisdiction and conflicting laws, the Restatement dictates emphasis of the facts of each case to determine whether the burden of compliance should remain on the witness.[21] Among the factors to be considered are: whether the foreign prescription is related to a legitimate interest of the foreign nation; the public interest of the country which would be served by the production of the documents; the severity of the criminal or civil liability to which the adressee of the subpoena might be subjected; the nationality of the witness;

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records available at its Frankfurt branch and by not separating those records which reflected the banks own work product. 396 F.2d at 905, n. 15.

[18] See note 11, supra.

[19] In this regard one court remarked:

> Without impugning in the slightest the widespread legitimate use of foreign bank accounts, it is appropriate to observe that the supposed immunity of funds in such accounts and related information from American judicial process is sometimes considered an attraction by those who would evade taxes, conceal the ownership of assets, secrete illicitly obtained money, or engage in banned international trade. Matter of Equitable Plan Co., 185 F. Supp. 57, 60 n. 2 (S.D.N.Y. 1960).

[20] RESTATEMENT (SECOND), FOREIGN RELATIONS LAW OF THE UNITED STATES § 37 (1965).

[21] Id. § 40.

and whether the witness has demonstrated good faith. The application of the Restatement by the court in the instant case thus indicates that in the future the imposition of criminal sanctions by a foreign country will not necessarily justify noncompliance with a subpoena while, on the other hand, there may be circumstances in which civil penalties alone will be sufficient to excuse noncompliance.

J. v. K.

RELEASE OF AMERICAN SERVICEMAN TO FOREIGN COURT FOR TRIAL IS NOT VIOLATIVE OF DUE PROCESS WHERE SUBSTANTIAL UNITED STATES CONSTITUTIONAL GUARANTEES ARE PROVIDED BY FOREIGN COURT

Petitioner, an American soldier stationed in Korea, was charged by the Korean government with the murder of one of its nationals. The Korean government claimed primary jurisdiction over petitioner under the United States-Republic of Korea Status of Forces Agreement of 1966.[1] While trial was pending in a Korean court, petitioner sought a writ of habeas corpus from a federal district court.[2] Petitioner contended that his delivery to the Korean court would be unconstitutional because the fair trial guarantees of the Agreement did not protect his fourteenth amendment due process rights, and that the United States-Republic of Korea Status of Forces Agreement was not approved by the United States in a constitutionally acceptable manner. The court held, petition dismissed. The transfer of petitioner would not be a deprivation of due process rights since the Status of Forces Agreement provides adequate constitutional protection for United States servicemen prosecuted in Korean courts; and, since Korea had exclusive jurisdiction to punish offenses within its territory under international law, the Status of Forces Agreement constituted a unilateral waiver by Korea of its criminal jurisdiction so that ratification by the United States was unnecessary to give effect to the agreement. Smallwood v. Clifford, 286 F. Supp. 97 (D.D.C. 1968).

The rules concerning jurisdiction over foreign troops, absent a treaty or an executive agreement, developed tangentially from The Schooner Exchange v. McFaddon,[3] which involved a libel against a ship owned originally by the libellant, seized by the French, and subsequently docked in Philadelphia. The United States Supreme Court, per Chief Justice Marshall, held that the ship entered the United States under an implied exemption from territorial jurisdiction. The Court said that although the sovereign nation has absolute territorial jurisdiction, such jurisdiction may be expressly or impliedly waived. In dictum Marshall pointed out that in addition to the immunity of a friendly man-of-war from jurisdiction, there is immunity as to foreign troops in passage through a sovereign's territory with its consent. This dictum was expanded in Coleman v. Tennessee[4] and Dow v. Johnson[5]

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[1] July 9, 1966, 17 U.S.T. 1677, T.I.A.S. No. 6127.

[2] At a later date, petitioner filed a motion for a restraining order to prevent respondent, Secretary of Defense, from releasing him to the Korean authorities. The motion was denied, but on appeal it was granted to the extent of precluding his transfer pending the outcome of this petition for a writ of habeas corpus. Smallwood v. Clifford, 286 F. Supp. 97 (D.D.C. 1968).

[3] 11 U.S. (7 Cranch) 116 (1812).

[4] 97 U.S. 509 (1878).

[5] 100 U.S. 158 (1879).

to include exemption of armed forces from the territorial jurisdiction of the country in which they were stationed.[6] In Kinsella v. Krueger,[7] however, the Supreme Court limited the scope of the Schooner Exchange,[8] Coleman[9] and Dow[10] cases. In Kinsella, the Court recognized that under international law each nation has jurisdiction over all offenses committed within its territory and that exemptions arise only by an agreement between the sovereigns.[11] In Cozart v. Wilson[12] it was noted that the dicta of Schooner Exchange regarding immunity of armed forces is now entitled to no weight under Kinsella v. Krueger.[13]

Most legal scholars recognize a rule of international law granting foreign forces immunity from jurisdiction,[14] but they suggest enough exceptions in fact to negate its effect. For example, the existence of a state of belligerency may be crucial,[15] as there is greater likelihood of finding exclusive jurisdiction in the visiting force if there is a war.[16] The receiving state is more likely to have exclusive jurisdiction if a crime is committed by an individual rather than by a body of troops,[17] or if the crime is committed by a serviceman while off-duty rather than in the line of duty.[18] Another situation in which the host state has jurisdiction is when foreign troops are stationed in that state rather than just passing through its domain.[19]

Although there is general recognition that some immunity for foreign forces does exist, this immunity is usually established

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[6]Re, The NATO Status of Forces Agreement and International Law, 50 NW. U. L. REV. 349, 369 (1955). But see RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 57, Reporters' Notes at 178 (1965).

[7]351 U.S. 470 (1956).

[8]11 U.S. (7 Cranch) 116 (1812).

[9]97 U.S. 509 (1878).

[10]100 U.S. 158 (1879).

[11]Kinsella v. Krueger, 351 U.S. 470, 479 (1956).

[12]236 F.2d 732 (D.C. Cir. 1956). See Note, Criminal Jurisdiction over American Forces, 70 HARV. L. REV. 1043, 1047 (1957) (hereinafter cited as Criminal Jurisdiction).

[13]351 U.S. 470 (1956).

[14]1 C. HYDE, INTERNATIONAL LAW AS APPLIED BY THE UNITED STATES § 247 (2d ed. 1947); L. OPPENHEIM, INTERNATIONAL LAW § 443 (8th ed. 1955); 2 G. HACKWORTH, DIGEST OF INTERNATIONAL LAW § 169 (1941); King, Jurisdiction over Friendly Armed Forces, 36 AM. J. INT'L L. 539 (1942).

[15]1 G. HYDE, supra note 14, at § 249; Schwartz, International Law and the NATO Status of Forces Agreement, 53 COLUM. L. REV. 1091 (1953); Criminal Jurisdiction, supra note 12, at 1050. See also Bennett v. Davis, 267 F.2d 15 (10th Cir. 1959).

[16]This argument has been used to distinguish the Coleman and Dow cases in which the causes of action arose during occupation of the South in the Civil War.

[17]Schwartz, supra note 15, at 1105.

[18]Wilson v. Girard, 354 U.S. 524 (1957); May v. Wilson, 153 F. Supp. 668 (D.D.C. 1956); L. OPPENHEIM, supra note 14, at 1098; Criminal Jurisdiction, supra note 12, at 1050.

[19]Re, supra note 6, at 392; Schwartz, supra note 15, at 1105.

by agreements between sovereigns, and it is the territorial sovereign who determines to what extent jurisdiction will be waived. The United States, for instance, has formal agreements with the friendly nations in which American troops are stationed.[20] Under these agreements, when an offense is solely in violation of one state's laws and not of the other's, the former has exclusive jurisdiction. If the offense violates the laws of both states, this gives rise to concurrent jurisdiction. The receiving nation, however, retains the primary right as to all offenses, other than those against the property or security of the visiting state or solely against a person of that state and his property.[21]

It is clear that Americans abroad have no specific constitutional rights in the foreign state's courts, and absent a treaty or executive agreement they can argue only a denial of justice in the sense of discriminatory application of foreign laws.[22] But the extent to which American troops stationed abroad may be turned over for trial to a state not observing American standards of due process is not clear. In Wilson v. Girard,[23] the Supreme Court found that the transfer of a serviceman to Japanese custody for a crime committed in Japan did not violate any constitutional or statutory provision, since the transfer by the United States was no more than a waiver by the United States of the qualified jurisdiction granted to by the Japanese.[24] Fortunately, however, under treaties between the United States and friendly foreign nations in which American troops are stationed, the servicemen are provided safeguards substantially similar to those guaranteed by the Constitution. For example, in the NATO Status of Forces Agreement visiting servicemen are assured: the right to a prompt and speedy trial, to be informed of the charge against them, to be confronted by witnesses, to have compulsory process for obtaining witnesses in their favor, to have legal representation of their own choice or free legal assistance, to have the services of an interpreter if necessary, and to have a representative of their government present at the trial.[25]

In the instant case, the court found that, under applicable principles of international law, Korea should have exclusive

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[20]For example: (multilateral) NATO Status of Forces Agreement, June 19, 1951, 4 U.S.T. 1792, T.I.A.S. No. 2846; (bilateral) Amendment of Article 16 of the Administrative Agreement under Article 3 of the Security Treaty between the United States and Japan, Sept. 29, 1953, 4 U.S.T. 1846, T.I.A.S. No. 2848.

[21]If the state having primary jurisdiction does not exercise its right, the other state may exercise its secondary right, and in any case of particular importance, the state with the primary right may waive jurisdiction in favor of the other state.

[22]1 C. HYDE, supra note 14, at § 219.

[23]354 U.S. 524 (1957).

[24]Id. at 530.

[25]NATO Status of Forces Agreement, supra note 20, at Art. VII, § 9.

jurisdiction to punish offenses committed within its territory unless it consents to surrender its jurisdiction. For this reason, the court concluded that the Status of Forces Agreement constituted a unilateral waiver by Korea of its criminal jurisdiction so that ratification by the United States Senate was unnecessary to give effect to the agreement. The court also found that the Status of Forces Agreement provided for American servicemen tried in Korean courts rights substantially similar to United States constitutional safeguards. Balancing the possibility of deprivation of individual rights against the national interest in stationing troops abroad, the court concluded that the national interest outweighed any other considerations.

This case restates the rule of Girard[26] to the effect that international law requires that unless impliedly or expressly waived, the jurisdiction over friendly foreign forces belongs to the territorial sovereign in which the troops are stationed. The instant case also points out that American servicemen stationed abroad have no enforceable rights under the United States Constitution when they are tried in a foreign court. This is so because the United States cannot dictate to another state the procedures to be followed in its courts. The Girard case and the instant case also seem to indicate that transfer of an American serviceman from United States custody to a foreign court for trial does not violate any constitutional rights of the serviceman. This result is not unduly harsh or unreasonable so long as the foreign court provides the serviceman with rights substnatially similar to United States constitutional rights. But if the serviceman is transferred to the custody of a foreign court which does not provide such rights, the result does seem unduly harsh and unreasonable - particularly in light of the fact that the serviceman's presence in the foreign country may have been without his consent. In such a situation, a federal court should decline to transfer the serviceman to the foreign court. This result could be justified under the well-recognized nationality theory of jurisdiction which permits nations to prosecute its nationals for crimes wherever committed.

W. E. H.

[26] 354 U.S. 524 (1957).

PATRONS

Dr. Fred M. Medeweff

Mrs. Marjorie King Briggs

Mr. and Mrs. Norman D. Chadwick

Mr. Nelson V. Henry

Mr. and Mrs. Leslie D. Ball

Mr. and Mrs. G. Scott Briggs