JOHN G. LAYLIN*

Justiciable Disputes Involving Acts of State

Litigants are entitled as a general rule to judgment on the merits notwithstanding that an act of a foreign state is involved. The courts will exercise a self-imposed restraint only under certain circumstances. They will refrain from taking personal jurisdiction over a foreign state on claims for liability for acts of a public—*i.e.*, noncommercial—nature. This is the Sovereign Immunity concept.

They will not pass adverse judgment on a public[1] act of a foreign state, notwithstanding proper jurisdiction, where to do so would fall short of according to the laws of that state the respect we would have accorded to our laws ("comity")[2] or hand down any judgment, adverse or otherwise, where to do so could bring embarrassment to the conduct of foreign relations by the officials in the Executive Branch responsible for this activity. The Act-of-State Doctrine may, accordingly, be invoked for reasons of comity or possible embarrassment, or both. Further, the courts refrain from deciding certain issues, which might involve an act-of-state, not susceptible to resolution by application of legal principles, such issues being described as Political Questions.

To avoid confusion, one must distinguish the precedents where the

*Of the District of Columbia and New York State bars. The law firm to which he belongs was counsel *amicus curiae* for an American company with Cuban sugar properties expropriated by Castro. For much of the material in this article he is indebted to the research and analysis of his partners John Lord O'Brian and Brice M. Clagett and his then associates James R. Patton and Ky P. Ewing. To the last named and to Professors Myres McDougal and Louis Sohn he is further indebted for criticism of early drafts of this paper. He takes credit alone for the faults.

[1]The act must be a public, as distinguished from a commercial, one. Victory Transport Inc. v. Comisaria General, 336 F.2d 354, 363 (2d Cir. 1964).

[2]The SHORTER OXFORD DICTIONARY defines "Comity of Nations" as "The courteous and friendly understanding by which each nation respects the laws and usages of every other, so far as may be without prejudice to its own rights and interests." On an international scale it compares to the "full faith and credit" required by the Constitution to be accorded by each state to the acts of the other states taken within their jurisdiction and not contrary to the public policy of the forum. Our courts would, for instance, not want to set a precedent for a Canadian court to ignore the Gold Clause Resolution in an action brought against an American company doing business there on a gold clause bond issued and payable in the United States.

courts have declined to decide on the merits for one or the other of the considerations mentioned above. Confusion has resulted from failure to make the appropriate distinction by judges, by advocates, public and private, and by commentators. The members of the American bar, professors and practitioners alike, owe it to themselves and to the courts to put the precedents in their proper slots. If they falter in this duty, resort may have to be had to legislation.

The distinctions are so elemental, that apologies are owing to most readers of *The International Lawyer* for spelling them out. A reading of recent court opinions and law review comments will, however, suggest that a little elucidation of the obvious is in order.

The confusion was nurtured by misleading representations of government lawyers appearing in *Sabbatino*,[3] and by the opinion of the majority which accepted the representations at face value. After agreeing that passing judgment could embarrass the Executive, the Court nevertheless did pass judgment giving effect in the United States to an act of Cuba which the State Department had protested as a violation of international law.[4] The confusion thus engendered has now been compounded with the cita-

[3]Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964). It will be recalled that in this case an agency of the Government of Cuba brought suit to recover the proceeds of the sale of sugar it had taken without provision for meaningful compensation to the original owner. The owner did not counterclaim for the amount owing. The District Court dismissed on the ground that the taking, being in violation of international law, would not be recognized as valid. The Circuit Court affirmed. In the Supreme Court the Department of Justice represented that passing judgment on a foreign act of state could embarrass the Executive in the conduct of foreign relations. The majority took this representation as the premise for its opinion.

Passing judgment on the merits could indeed have embarrassed the Executive but not in its conduct of foreign relations. The Assistant Secretary for Inter-American Affairs had assured the writer that it would not cause embarrassment so far as Cuba was concerned. The embarrassment was to the Department of Justice in a foreign court in which it was resisting judgment on the merits in a case where an act of the United States was claimed to be in violation of international law.

Justice White alone seemed to have perceived that the only embarrassment was to the Department from which he was elevated. He observed:

> As I see it no specific objection by the Secretary of State to examination of the validity of Cuba's law has been interposed at any stage in these proceedings, which would ordinarily lead to an adjudication on the merits. Disclaiming, rightfully, I think, any interest in the outcome of the case, the United States has simply argued for a rule of nonexamination in every case, which literally, I suppose, includes this one. If my view had prevailed I would have stayed further resolution of the issues in this Court to afford the Department of State reasonable time to clarify its views in light of the opinion. In the absence of a specific objection to an examination of the validity of Cuba's law under international law, I would have proceeded to determine the issue and resolve this litigation on the merits. p. 472.

[4]State Department Notes of Protest to Cuba of July 16, August 8 and August 13, 1960, 43 Dep't State Bull. 141, 171 (1960). The act-of-state doctrine being a rule of abstention where comity or embarrassment to the conduct of foreign relations is involved, the proper course when it is applicable is to dismiss without prejudice. Only Justice White recognized this. He pointed out:

tion of *Sabbatino* in the dissenting opinions of *City Bank*,[5] as establishing that the question whether an act of a foreign state is in breach of international law is necessarily a political one.[6]

Sovereign Immunity

Many acts-of-state that involve issues which could be resolved without embarrassment are sometimes not reviewed because one of the parties is entitled to sovereign immunity. Before it became not uncommon for states to engage in commerce, the refusal of a sovereign to waive its immunity could usually be excused on the ground that the acts in question very possibly involved an exercise of sovereignty. After states began carrying on business, such as running a shipping line, it seemed unconscionable for them to escape accountability for their acts of commerce. The courts began exercising jurisdiction and rendering judgment. Some of the case law produced precedents but were hard to reconcile with one another.[7]

To encourage a consistent practice, the State Department on May 19, 1952, outlined in a letter of Acting Legal Adviser Jack Tate the boundaries

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Where the act of state doctrine becomes a rule of judicial abstention rather than a rule of decision for the courts, the proper disposition is dismissal of the complaint or staying the litigation until the bar is lifted, regardless of who has possession of the property title to which is in dispute. p. 472.

[5]First Nat'l City Bank v Banco Nacional de Cuba, 406 U.S. 759 (1972). The essential difference in this case from *Sabbatino* is that here the defendant did counterclaim. The "validity" of the foreign taking did not have to be passed upon. An agency of the Cuban Government sued for the proceeds of the sale of collateral in excess of the amount of the debt for which it was pledged. The defendant set off the amount owing for its property in Cuba taken without payment of compensation.

Justice Douglas voted with the Chief Justice and Justices Rehnquist, White and Powell to adjudicate the amount of the counterclaim up to the amount sued for by Banco Nacional "because Cuba is the one who asks our judicial aid in collecting its debt from petitioner and, as the *Republic of China* case [348 U.S. 356 (1955)] says, 'fair dealing' requires recognition of any counterclaim or setoff that eliminates or reduces that claim. It is that principle," not the representations of the Executive, that adjudication would not embarrass the Executive "which should govern here. Otherwise, the Court becomes a mere errand boy for the Executive Branch which may choose to pick some people's chestnuts from the fire, but not others'." pp. 772–773. One wonders whether the representation in *Sabbatino* that adjudication would embarrass the Executive would have kept Justice Douglas from reaching the same result as he did in *City Bank* had the defendant entered its counterclaim in the pleadings rather than waiting to argue the principle of fairness in its brief before the Court.

The opinions of Justices Brennan and Douglas both assume that acts of foreign sovereigns necessarily raise "political questions" and that *Sabbatino* so held. For instance, Justice Douglas states "Sabbatino held that the issue of who was the rightful claimant was a 'political question'. . . ." (p. 772) and commends Justice Brennan for observing "the Executive Branch 'cannot by simple stipulation change a political question into a cognizable claim,' " p. 772. Justice Brennan in turn compliments Justice Douglas for "recognizing that the political-question rationale of *Sabbatino* would preclude a judgment for petitioner in excess of Cuba's claim." p. 795.

[6]This is discussed in one of the few comments that make the proper distinctions. Leigh, *The Supreme Court and the Sabbatino Watchers*, 13 VA.J.INT'L L. 33 (1972).

[7]A relatively recent rundown of the cases is in 25 ALR3d 322.

of the immunities it considered to be absolute.[8] Outside of the boundaries the court could decline to bow to a plea of immunity. The Executive Branch would interpose no objection to the exercise of jurisdiction in cases involving acts of commerce of foreign states.

The borderline between acts of commerce and acts of sovereignty not always being easily determined, the practice grew up for foreign governments to request the State Department to issue suggestions of immunity. The reasons of the department for making such suggestions in some situations and denying them in others were seldom explained. A refusal would presumably be because the act involved was clearly commercial, but it also could be because review of the act in question would not embarrass the Executive in the conduct of foreign relations.

Passing upon requests for a suggestion of sovereign immunity was not a pleasant occupation for the Legal Adviser's office. The determination came to be regarded as a quasi-judicial act, and whichever way his office acted, one side to a dispute would necessarily come away unhappy.

The Department of State accordingly has proposed, with the Department of Justice, that the principles outlined in the "Tate Letter" be "codified" by legislation which, it is hoped, will make further suggestions unnecessary.[9] "Under international law," the proposed statute finds,

> states are not immune from the jurisdiction of foreign courts insofar as their commercial activities are concerned. . . . Claims of foreign states to immunity should henceforth be decided by the United States in conformity with these principles as set forth in this chapter and other principles of international law. (Section 1602.)

With enactment of this legislation, states will continue to enjoy immunity from suit in the United States courts with respect to all acts of a noncommercial nature. To enjoy such immunity the act need not necessarily be such a one as to come within the act-of-state doctrine. The immunity is broader.

A state may, of course, waive its immunity. The bringing of suit constitutes a waiver of immunity for judgment on a counterclaim up to the amount sued for, *Bank of China v. National City Bank*,[10] but does not make a nonjusticiable issue justiciable.[11]

[8]Dep't State Bull. 984 (1952).

[9]S.566, 93d Cong., 1st Sess. (1973) introduced by Senator Hruska, 119 Cong. Rec. S1297 (daily ed., January 26, 1973).

[10]348 U.S. 356 (1955). Under the proposed codification of the law of sovereign immunity parties may levy execution on assets of foreign sovereign parties "to the extent that they are used for a particular commercial activity in the United States," provided such execution "relates to a claim which is based on that commercial activity or on rights and property taken in violation of international law and present in the United States in connection with that activity." (Paragraph 1610). The *Republic of China* rule limiting counterclaims up to the amount sued for may have been suggested by the then inability of the successful party to collect any excess.

An issue may be decided only up to the amount claimed because immunity as to the remainder is deemed not to have been waived, not because the issue as to the excess becomes political. This elementary distinction appears to have been overlooked by Justice Douglas in his separate opinion in *City Bank*. He reasons that sovereign immunity having been waived by bringing suit, the debt counterclaimed involves a justiciable issue up to the amount the foreign sovereign sued for. As to the balance counterclaimed, he sides with Justices Brennan, Blackmun, Marshall and Stewart in finding the issue nonjusticiable, citing *Sabbatino*.[12]

If the issue in *City Bank* was one that came under the act-of-state doctrine, waiver of immunity did not take it out of the doctrine. If finding that a state has not paid compensation would not embarrass the Executive, and the Executive informed the court it would not, then *Sabbatino* is in point only if it decided that all acts of state raise political questions. If passing upon the claim that compensation was owing and not paid does not involve passing judgment on a political question, then the issue was justiciable for the full amount unless comity required otherwise. Judgment would be limited to the amount the sovereign sued for only because immunity had not been waived above that amount.

Rule of Judicial Abstention

Our courts abstain from passing judgment even when they have jurisdiction on certain acts of state and sit in judgment on others. They exercise

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The proposed codification removes the limitation with respect to "any counterclaim arising out of the transaction or occurrence that is the subject matter of the claim of the foreign state" (§ 1607).

The proposed codification provides, "the foreign state shall not be accorded immunity with respect to

"(1) any counterclaim arising out of the transaction or occurrence that is the subject matter of the claim of the foreign state; or

"(2) any other counterclaim that does not claim relief exceeding in amount or differing in kind from that sought by the foreign state."

[11]Justice Powell in his concurring opinion in *City Bank* commented:

> Jurisdiction does not necessarily imply that a court may hear a counterclaim which would otherwise be nonjusticiable. Jurisdiction and justiciability are, in other words, different concepts. One concerns the court's power over the parties; the other concerns the appropriateness of the subject matter for judicial resolution. pp. 772–773.

[12]Justice Douglas, we have seen, found the issue in the counterclaim justiciable up to the amount as to which sovereign immunity was waived by bringing suit. "If the amount of the setoff exceeds the asserted claim, then," he concluded, "we would have a *Sabbatino* type of case." p. 772. "*Sabbatino* held that the issue of who was the rightful claimant was a 'political question', as its resolution would result in ideological and political clashes between nations which must be resolved by the other branches of government. We would have that type of controversy here if, and to the extent that, the setoff asserted exceeds the amount of Cuba's claim." 406 U.S. at 772. Justice Powell found "little support for Mr. Justice Douglas' theory" (p. 774) which Justice Brennan observed "leads to the strange result that application of the act of state doctrine depends on the dollar value of the litigant's counterclaim." p. 778.

restraint, notably with respect to those acts of a state affecting title to property in its territories. Our courts have denied effect to foreign law, otherwise applicable under the conflict-of-laws rules of the forum, to many foreign acts contrary to the law of the forum.

Foreign confiscatory decrees purporting to take property in the United States on the basis of jurisdiction over its owners have been denied effect in our courts.[13] Our courts refuse to enforce the revenue and penal laws of a foreign state.[14] Furthermore, the judgments of foreign courts are denied conclusive effect where the procedures depart from our notions of fairness and generally where enforcement would be contrary to the public policy of the forum.[15] It follows that by no means does every act-of-state come under that part of the rule of judicial abstention called the act-of-state doctrine.

The Act-of-State Doctrine

(a) Before Sabbatino

(i) For reasons of comity (a policy akin to the full faith and credit accorded to the acts of the States of the United States by one another), our courts accord the acts of a foreign state on matters within its jurisdiction the respect we expect to be accorded to matters under our jurisdiction.[16]

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[13]Menendez v. Faber, Coe & Gregg Inc., 345 F. Supp. 527 (1972); Republic of Iraq v. First Nat'l City Bank, 353 F.2d 47 (2d Cir. 1965); Tabacalera Severiano v. Standard Cigar Co., 392 F.2d 706 (5th Cir. 1968), *cert. den.*, 393 U.S. 924 (1968); Moscow Fire Ins. Co. v. Bank of New York, 280 N.Y. 286, 20 N.E.2d 758 (1939), *aff'd sub nom.* United States v. Moscow Fire Ins. Co., 309 U.S. 624 (1940); Vladikavkazsky R. Co. v. New York Trust Co., 263 N.Y. 369, 189 N.E. 456 (1934); Plesch v. Banque Nationale de la Republique D'Haiti, 273 App. Div. 224, 77 N.Y.S.2d 43, *aff'd*, 298 N.Y. 573, 81 N.E.2d 106 (1948); Bollack v. Societe Generale, 263 App. Div. 601, 33 N.Y.S.2d 986 (1942); Latvian State Cargo & Passenger S. S. Line v. McGrath, 88 U.S. App. D.C. 226, 188 F.2d 1000 (1951).

[14]Banco do Brasil, S.A. v. Israel Commodity Co., 12 N.Y.2d 371, *cert. den.*, 375 U.S. 919 (1963). *See also* THE ANTELOPE, 10 WHEAT. 66, 123 (1825); Huntington v. Attrill, 146 U.S. 657 (1892); Moore v. Mitchell, 30 F.2d 600, *aff'd on other grounds*, 281 U.S. 18 (1930); DICEY, CONFLICT OF LAWS (Morris ed. 7th ed. 1958), 667; WOLFF, PRIVATE INTERNATIONAL LAW (2d ed. 1950), 525.

[15]Hilton v. Guyot, 159 U.S. 113 (1895); The W. Talbot Dodge, 15 F.2d 459 (D.C.S.D.N.Y.) (1926); De Brimont v. Penniman, 7 Fed. Cas. 309, No. 3, 715 (C.C.S.D.N.Y.) (1873); Reese, *The Status In This Country of Judgments Rendered Abroad*, 50 COL. L. REV. 783 (1950).

[16]Underhill v. Hernandez, 168 U.S. 250 (1897); American Banana Co. v. United Fruit Co., 213 U.S. 347 (1909); Oetjen v. Central Leather Co., 246 U.S. 297 (1918); Ricaud v. American Metal Co., 246 U.S. 304 (1918); Shapleigh v. Mier, 299 U.S. 468 (1937). Only in the case last cited did a question of violation of international law possibly arise, and there Justice Cardozo pointed out that any such question had been removed from the courts to "the International Claims Commission to which the plaintiffs . . . have long ago submitted a claim for reparation." The sole question, he stated, was "the efficacy of the decree under the land law of Mexico." 299 U.S. 468 at 471.

They do this also because a denial of right (including a defense) accorded by the law applicable under accepted conflict of laws principles, would constitute deprivation of property in violation of the Fourteenth Amendment[17] and if the aggrieved party were an alien, of international law as well.[18] It follows that our courts need not, for reasons of comity, give effect to a foreign act which itself was in violation of international law.

(ii) Acts of foreign states may come under the doctrine for the sole

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[17]In an unbroken line of decisions the Supreme Court has recognized the rule that the Fourteenth Amendment forbids a court of the United States from applying the substantive law of the forum to enlarge obligations in a case that is clearly governed by foreign law. Lauritzen v. Larsen, 345 U.S. 571 (1953); Hartford Accident & Indem. Co. v. Delta & Pine Land Co., 292 U.S. 143 (1934); Home Ins. Co. v. Dick, 281 U.S. 397 (1930); Aetna Life Ins. Co. v. Dunken, 266 U.S. 389, 399-400 (1924); New York Life Ins. Co. v. Dodge, 246 U.S. 357 (1918); New York Life Ins. Co. v. Head, 234 U.S. 149 (1914); Allgeyer v. Louisiana, 165 U.S. 578 (1897); *cf.* McGee v. International Life Ins. Co., 355 U.S. 220 (1957); International Shoe Co. v. Washington, 326 U.S. 310 (1945). *See also* Zimmerman v. Sutherland, 274 U.S. 253, 255-56 (1927); Deutsche Bank Filiale Nurnberg v. Humphrey, 272 U.S. 517, 519 (1926).

Justices Brennan and Douglas in dissenting against the denial of a petition for certiorari involving this issue stated:

> Whether the state court correctly applied its own substantive law is, of course, not in issue here. We are concerned only with the state court's choice of law. Petitioner maintains that the Due Process Clause of the Fourteenth Amendment precludes a State from altering 'substantive obligations arising out of a foreign transaction having no significant relation to the state.' The general validity of that proposition is clearly established by *Home Insurance Co. v. Dick*. . . . Confederation Life Insurance Company v. Hector de Lara *et al.*, 409 U.S. 953, 954 (1972).

[18]" 'Due process,' substantive and procedural, has its international equivalent in that loose collection of fundamental notions of decency or natural justice, violation of which is claimed to be a 'denial of justice.' " Katzenbach, *Conflicts on an Unruly Horse: Reciprocal Claims and Tolerances in Interstate and International Law*, 65 YALE L.J 1087, 1111 (1956). "It is not possible to state with any precision the exact extent of this limitation on the norms of private international law applied. In general it is one of reasonableness, comparable to that imposed by the Federal Constitution upon the conflict of laws rules of the states." Stevenson, *The Relationship of Private International Law to Public International Law*, 52 COL. L. REV. 561, 579 (1952).

When the person injured by failure to respect the law governing a foreign transaction is an alien, "the court commits an international delict and subjects the State to diplomatic representations or the possible award of damages or other reparation by an international tribunal." Stevenson, *The Relationship of Private International Law to Public International Law*, 52 COL. L. REV. 561 (1952) at 574, citing Beckett, *What Is Private International Law?*, 7 BRIT. Y.B. INT'L L. 73, 75 (1926). *See also* League of Nations Doc. No. 1929, V. 10 at 10-11; Hague Codification Conference of 1930, Minutes of the Third Committee, League of Nations Doc. No. 1930, V. 17 at 237; 5 Hackworth, *Digest of International Law* 526 *et seq.* (1943) and cases there cited; BRIGGS, THE LAW OF NATIONS 678 (1952); BRIERLY, THE LAW OF NATIONS 215 (4th ed. 1953).

Cf. Cases of Serbian and Brazilian Loans, P.C.I.J., Ser. A., Nos. 20/21 (1929), 2 HUDSON, WORLD COURT REPORTS 340, 402 (1935); ILLINOIS CENTRAL RY. CO. (United States v. Mexico), UNITED STATES AND MEXICO GENERAL CLAIMS COMM'N UNDER CONVENTION OF 1923 (March 31, 1926), [1926-1927] *Opinions of Comm'rs* 15, 20 AM. J. INT'L L. 794 (1926), 4 U.N. Rep. Int'l Arb. Awards 21 (1951); Hilton v. Guyot, 159 U.S. 113, 163 (1895); RESTATEMENT, *The Foreign Relations Law of The United States*, Report on Revised Sections 194 (formerly 199), comment *a* (May 18, 1965), approved by the Institute at its meeting on May 20, 1965.

reason that passing judgment could embarrass the Executive in the conduct of foreign relations.[19]

(b) Under Sabbatino

The government lawyers in *Sabbatino* represented that passing judgment in a case involving a foreign expropriation could embarrass the Executive Branch, notwithstanding that the State Department had protested the act as one "manifestly in violation of those principles of international law which have long been accepted by the free countries of the West.[20] A majority of eight took this representation at face value. Justice White alone noted that "no specific objection by the Secretary of State to examination of the validity of Cuba's law has been interposed at any stage in these proceedings, which would ordinarily lead to an adjudication on the merits.[21]

The issue in *Sabbatino* was not whether compensation was owing but whether the original owner or the taking government was entitled to the proceeds of expropriated property sold abroad. Unfortunately the defendant did not counterclaim for the compensation owing. The courts then stated the issue as a question of the "validity" of the taking, that is, whether the taker got valid title.

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[19]This is the stated ground for decision in *Sabbatino* where the government lawyers contended that passing judgment as to the validity of the taking by a foreign state of property within its borders could embarrass the State Department in the conduct of foreign relations. Judge Learned Hand in Bernstein v. Van Heyghen Freres Societe Anonyme, 163 F.2d 246 (2d Cir. 1947), *cert. den.*, 332 U.S. 772 (1947), after stating "that a court of the forum will not undertake to pass upon the validity under the municipal law of another state of the acts of the officials of that state, purporting to act as such" went on to a "second question: whether since the cessation of hostilities with Germany our own Executive, which is the authority to which we must look for the final word in such matters, has declared that the commonly accepted doctrine which we have just mentioned, does not apply," p. 249. The Executive did reply stating that it had no objection in that case to the court passing judgment as to whether valid title had been acquired by the Nazi authorities, in the taking of ships belonging to the plaintiff's corporation. This precedent has led to the designation of a representation that adjudication would not embarrass the Executive as a "Bernstein letter."

The dissenting opinion in *City Bank* states that a majority of the court does not support respect for Bernstein letters. Inasmuch as the dissent with Justice Douglas concurring construed the representation in *City Bank* as an attempt to turn a political question into a cognizable claim this assertion can be understood. The dissent might have gone further and said that so far as was known no one on the Court or off supports a Bernstein letter which in fact attempts to make a political question justiciable.

The assumption of the minority in *City Bank*, with which Justice Douglas concurred, that the Legal Adviser had in his representation, that no embarrassment would be caused by adjudication, further attempted to instruct the Court as to the justiciability of the issue of just compensation appears to the writer to be quite mistaken. The Legal Adviser did not overstep in arguing that the question of liability was justiciable.

[20]43 Dep't State Bull. 141, 171 (1960).

[21]376 U.S. at 472. During argument of *City Bank*, counsel for Cuba proclaimed that *Sabbatino* was as good law today as it was when handed down. Justice White remarked "I agree."

Mr. Justice Harlan accordingly limited the decision to issues involving "the validity of a taking."[22]

The Court did not hold in *Sabbatino* that failure to pay compensation came under the act-of-state doctrine, much less that the issue of compensation raised a political question.

(c) Under City Bank

The issue in *City Bank*[23] was not whether Cuba acquired title to property taken, but whether there was an enforceable duty to pay compensation.[24] No member of the court denied the existence of the duty, and

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[22]Justice Harlan carefully limited the rule adopted in *Sabbatino* to restraint in examining "the validity of a taking of property. . ." 376 U.S. at 428. On remand Judge Bryan found "The reversal of the Court of Appeals . . . was on the sole ground that the act of state doctrine proscribed a challenge to the validity of the Cuban expropriation." 272 F. Supp. at 838.

[23]The case has been the subject of extensive comment. In Volume 66 of A.J.I.L. alone there are the following: Delson, *The Act of State Doctrine—Judicial Deference or Abstention?* Page 82; Metzger, *The State Department's Role in the Judicial Administration of the Act of State Doctrine*, page 94.; a Note, *Sabbatino's Progeny: The Act-of-State Doctrine, the Stevenson Letter, and Foreign Policy in the Courts*, page 121; Lowenfeld, *Act-of-State and Department of State, First National City Bank v. Banco Nacional de Cuba*, page 795; Laylin, *Does Failure to Pay Compensation for Expropriated Property Come within the Act-of-State Doctrine?*, page 823 (all in 1972). Notes in other publications include: Leigh, *The Supreme Court and the Sabbatino Watchers*, 13 VA.J. INT'L L. 33 (1972); a Note entitled *Act-of-State Doctrine*, 86 HLR 284; Lapatin, *New Indications of Justiciability of American Claims against Cuban Expropriation*, 52 BULR 847; Allison, *Act-of-State Doctrine: First Nat'l City Bank v. Banco Nacional de Cuba*, 7 INT'L LAWYER 220 (1973); Case Note, *Expropriation and the Act-of-State Doctrine: the Supreme Court Reassesses Sabbatino*, 5 LAW & POLICY IN INT'L BUSINESS 292 (1973); Note by David C. Hollrah, 14 HARV. INT'L J. 131 (1973); Case Note by Patricia S. Brown, 48 NOTRE DAME LAWYER 750 (1973). The majority in *Sabbatino* excluded acts where there was agreement on the governing principles and did not hold that such a consensus was lacking as to the duty to pay for a taking apart from the issue of validity. Some commentators interpolate the article "an" before "agreement" in the Harlan opinion. The fact that he excluded the article and elsewhere speaks of consensus indicates that the agreement need not be contractual. It would have been natural to include the article if the agreement on the governing principles had to be embodied in an agreement. To this writer's dismay he has found that a well-intentioned proofreader in his office interpolated the article in his note in 44 A.J.I.L. 823.

Allison in 7 INT'L LAW at page 226 makes the cogent point that if the courts waited for even a consensus there would be little or no common law or customary international law.

[24]The position of the United States as to the existence of such a duty does not admit of doubt. As stated in the Foreign Relations Restatement of the American Law Institute, Section 191:

> Failure of a state to pay just compensation for taking the property of an alien is wrongful under international law, regardless of whether the taking itself was wrongful under international law.

The United States position as to the duty to pay just compensation was stated most forcibly in a communication of Secretary of State Cordell Hull, in a letter to the Administrator of the War Shipping Administration applied against ourselves. He wrote, "I consider it important that just compensation in the real sense be made to the Danish owners" of the ships requisitioned by the United States. "While the matter is of importance from the standpoint of the international responsibility of this Government, with respect to the properties of nationals of foreign countries," he wrote, "it is also of importance from the point of view of the

a majority held positively not only that such a duty exists but that the act of state doctrine did not preclude an award. Comity did not require the Court to overlook a breach of international law, and the Court had the assurances of the Executive that holding Cuba responsible would not cause embarrassment. Whether the majority would have reached the same conclusion absent such assurances was not stated although three Justices indicated that they would have.[25]

The minority (joined in part by Justice Douglas) found the failure to pay to be an act coming under the act-of-state doctrine, notwithstanding an Executive representation that passing judgment would not cause embarrassment.[26] They also found the duty of a state to pay compensation for property taken to be a political question.[27] They did this on the authority of *Sabbatino,* clearly a mistaken reading of that decision.[28]

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expropriation by foreign governments of extensive properties of American nationals in foreign countries, whose interests we must keep in mind." House Committee on Merchant Marine and Fisheries, *"Compilation of Material on the Determination and Payment of Just Compensation for Vessels Requisitioned Under Section 902 of the Merchant Marine Act,"* 1936, Committee Doc. No. 20, 78th Cong., 1st Sess. at page 167.

[25]Justices Powell and Douglas in *City Bank* and White in *Sabbatino,* Justice Douglas in spite of the Legal Adviser's representations which he resented, and Justice White reasoning from the absence of representations by the political arm of the Executive.

[26]The majority in *Sabbatino* and the minority in *City Bank* would apply the doctrine wherever a decision could be adverse to a position taken by the Executive. The reasoning of the opinion of Justice Rehnquist, that the doctrine does not apply where the Executive represents there would not be embarrassment, would be acceptable to the minority only "where the political branch is indifferent to the result reached." 406 U.S. at 783. The minority, joined by Justice Douglas, became a majority in sustaining that the Executive may not *both* represent that there would be no embarrassment *and* tell the court how it is to decide. Given this line of thought, the Executive in the future would be well advised to make its representations as to no embarrassment in "a suggestion," and its argument for a decision one way or another in a brief *amicus.*

[27]"In short," the minority opinion asserts, "*Sabbatino* held that the validity of a foreign act of state in certain circumstances is a 'political question' not cognizable in our courts." 406 U.S. at 787. Only in a footnote (4 at p. 779) does the dissenting opinion recall that the issue in *City Bank* was not "the validity of a foreign act of state." Justice Brennan argues there that the *Sabbatino* holding on the act-of-state doctrine "clearly embraced judicial review not only of the taking but of the obligation to make 'prompt, adequate and effective compensation.' " Nothing in the majority opinion in *Sabbatino* supports this proposition.

To be sure, Justice Harlan recognized in *Sabbatino* that different views exist concerning the duty under international law to pay compensation for expropriated property coupled with a claim of an invalid taking of property. But his opinion did not examine whether the act-of-state doctrine applies to a claim of failure to pay compensation assuming the validity of the taking. Indeed, the express limitation of the *Sabbatino* holding suggests that it was the former alone on which the Court chose not to rule.

Moreover, Justice Brennan fails, in the same footnote, to give adequate weight to the possible displacement of Cuban law by a United States court under the public doctrine of conflict of laws. He states that the act-of-state doctrine has the effect of preventing application of the public policy doctrine but that analysis begs the question. The very issue before the Court was the scope of the act-of-state doctrine.

It is clear that the content of the public policy doctrine in this country does and should depend upon governing principles of public international law, including the duty to pay compensation for expropriated property. Finally, a domestic court might apply a Cuban law which requires compensation for expropriated property, but refuse on the grounds of public policy to follow the standards for compensation under that Cuban law.

Political Questions

The Judiciary has abstained from passing judgment in cases involving acts more appropriately left to decision by states of the United States or other branches of the Federal Government,[29] but which could arise where an act of a foreign state raises questions that do not lend themselves to the application of principles of law.

Justice White in his dissent in *Sabbatino* contended that the issue before the Court did lend itself to the application of the rules of law.[30] The opinion of the majority, it would appear, discussed the disparity of views between the communist and free enterprise world, as to the power to pass title to support its agreement with the representations of the government lawyers, that a decision in this controversial area could embarrass the Executive.

In any event, the question in *Sabbatino* was one of validity of title, not of the duty to pay compensation. The question whether such a duty exists has been found to be susceptible to the application of legal principles in countless cases by municipal as well as international courts.[31] By no stretch of the imagination can that issue be considered political. The

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Turning from the act of state doctrine to ordinary conflict-of-laws rules, the footnote assumes Cuban law to be governing, and concludes that it "cannot be seriously contended that Cuban courts would hold the nationalization of petitioner's property invalid or Cuba liable to petitioner for meaningful compensation." (Footnote at 406 U.S. 780.) Under conflict-of-laws rules the forum need not apply law contrary to the standards of justice of the forum. Whether acts contrary to such standards—such as those that violate international law—come under the act of state doctrine is the issue.

[28]As pointed out earlier, the issue in *Sabbatino* was not the duty to pay compensation. When Justice Harlan spoke of the disparate views held by communist and free enterprise states he was referring to the "power" to acquire good title, not the duty to pay for the property taken. And even as to the issue of passing on the power to take, the thrust was on possible embarrassment of a decision to the conduct of foreign relations, which he was led to believe would be adverse. At no place did the majority in *Sabbatino* hold that inquiry into the duty to pay compensation raised a political question.

[29]A leading case is Luther v. Borden, 7 How. 1, 48 U.S. 1 (1849). The issue in that case was which of two claimants was the constitutionally elected Governor of Rhode Island. "The nonjusticiability of a political question is primarily a function of the separation of powers." Justice Brennan in Baker v. Carr, 369 U.S. 186 at 210 (1962). A typical case involved the question whether apportionment of election districts is solely for the legislatures to determine. Until Baker v. Carr, the Supreme Court found the question to be political. Scholarly reviews of the doctrine of political questions are contained in the majority opinion in that case, and also in the dissenting opinion there of Justice Frankfurter as well as in the opinion of Justice Frankfurter while in the majority in Colegrave v. Green, 328 U.S. 549 (1946).

[30]"An accepted principle of international law." 376 U.S. at 459.

[31]*Chorzow Factory Case* (Indemnity), P.C.I.J. Judgment No. 13, September 13, 1928, ser. A. No. 17, 1 Hudson, World Court Reports 646, 677; *German Interest in Polish Upper Silesia* (Merits), P.C.I.J. Judgment No. 7, May 25, 1926, ser. A., No. 7, 1 Hudson, World Court Reports 510, 523-24; *Norwegian Shipowners' Claims* (Norway/United States), 1 U.N. Rep. Int'l Arb. Awards 307 (Perm. Ct. Arb. 1921); *Arabian-American Oil Company* v. *Saudi Arabia*, Award of Arbitral Tribunal, Geneva, 1956, at 61, 101-02, 109, 127, portions of award quoted in 6 Netherlands Int'l L. Rev. 233-34 (1959); *Marguerite de Joly de Sabla* (United States/Panama), 6 U.N. Rep. Int'l Arb. Awards 358, 366 (1933); *Lena Goldfields Case* (Company/U.S.S.R.), [1929-30] Ann. Dig. No. 1, 30 Cornell L. Q. 31 (1950); Arbitral Award Between Portugal and Germany, June 30, 1930, 2 U.N. Rep. Int'l Arb. Awards 1035,

function of determining what compensation is just is indeed peculiarly a judicial one.

The Role of the Executive

The confusion between the doctrines of act-of-state and political questions reached its apogee when the minority, joined by Justice Douglas, declared that

> [t]he Executive Branch, however extensive its powers in the area of foreign affairs cannot by simple stipulation change a political question into a cognizable claim.[32]

The Legal Adviser in *City Bank* had represented that adjudication would not embarrass the Executive Branch, and had argued as any friend of the court may that compensation is owing for property taken. As to the latter, the United States has never taken a different view. As to the former, the government lawyers had, to be sure, represented in *Sabbatino* that the Court should not pass judgment on the effect to be given to takings in violation of international law. This had not theretofore been the position of the Executive.

Prior to the filing of the government brief in *Sabbatino,* the State Department twice took the position that it was for the courts to decide issues arising out of Cuban expropriation of American owned property.

In one case the Court asked the Legal Adviser's office for guidance. The reply was

> Effect in U.S. of decrees, etc. of Castro regime is question for court in which case heard.[33]

In another case,[34] the International Cooperation Administration, a divi-

1039 (1930); *Shufeldt Claim* (United States/Guatemala), 2 U.N. Rep. Int'l Arb. Awards 1079, 1095 (1930); *Walter Fletcher Smith Claim* (United States/Cuba), 2 U.N. Rep. Int'l Arb. Awards 913, 917-18 (1929); *Affaire Goldenberg* (Germany/Rumania), 2 U.N. Rep. Int'l Arb. Awards 901, 909 (1928); *George W. Cook* (United States/Mexico), 4 U.N. Rep. Int'l Arb. Awards 213, 215 (1927); *Spanish Zone of Morocco Case* (Great Britain/Spain), 2 U.N. Rep. Int'l Arb. Awards 615, 647 (1925); *Union Bridge Company* (United States/Great Britain), 4 U.N. Rep. Int'l Arb. Awards 138, 142 (1924); *Robert E. Brown* (United States/Great Britain), 4 U.N. Rep. Int'l Arb. Awards 120, 128 (1923); *Eastern Extension Australasia and China Telegraph Co., Ltd.* (Great Britain/United States), 4 U.N. Rep. Int'l Arb. Awards 112 (1923); *Landreau Claim* (United States/Peru), 1 U.N. Rep. Int'l Arb. Awards 347, 365 (1921); *Portuguese Religious Properties Case* (France, United Kingdom, Spain/Portugal), 1 U.N. Rep. Int'l Arb. Awards 8 (1920); *Upton's Case* (United States/Venezuela), Ralston, Venezuelan Arbitration of 1903, at 194 (1903); *Selwyn's Case* (United States/Venezuela), Ralston, Venezuelan Arbitrations of 1903, at 322, 480 (1903).

[32]406 U.S. at pp. 772 and 788.

[33]National Institute of Agrarian Reform v. Kane, 153 So.2d 40, 44 (1963).

[34]Cuban American v. Farr, Supreme Court of New York, County of New York, Index No. 16145/60 summary judgment for plaintiff February 19, 1962 not reported. The letter dated October 14, 1960 informed that I.C.A. had instructed its bank to pay on presentation of

sion of the State Department, had agreed to finance the purchase by Morocco of a shipload of sugar purchased from Cuban American Mercantile Company, an affiliate of Cuban American Mills Company. Before the ship left Cuban territorial waters its cargo was expropriated and the intermediate dealer was faced with the problem whether to pay the proceeds when received from ICA 's bank to Mercantile or to Cuba.

ICA instructed its bank to pay over the proceeds directly to Mercantile if a court decided it was entitled to the payment. The court gave notice to the Cuban Embassy so that Cuba could, if it chose, intervene. Cuba chose not to intervene. Final judgment was entered upholding Mercantile's claim that the proceeds represented the just compensation owing to it. Neither the Executive nor the Judiciary found adjudication to be embarrassing.

The position taken by the Department of Justice and a deputy Legal Adviser of the State Department in the government brief in *Sabbatino* thus represented a departure from previous practice. Rather than reflecting a long-term policy of the Executive it constituted an aberration. The Judiciary and Bar are entitled to know some background throwing light on this departure.

The United States had resisted review by the International Court of Justice in the *Interhandel Case,* of a Swiss claim that property taken by the Alien Property Custodian was Swiss, not enemy alien. The Swiss could count, it was explained, on the courts of the United States to apply international law impartially. The State Department, in a letter dated January 11, 1957, refused the suggestion of the Minister of Switzerland to enter into arbitration in the *Interhandel Case* and enclosed a memorandum in which it was stated:

> United States courts are known for their independence and readiness to do justice at the suit of all, regardless of whether the suitor is an alien or whether the United States Government is the party against whom complaint is brought. These courts have a continuing preoccupation to maintain the principles both of American constitututional law and of international law that property may not be taken from citizen or alien without due process of law and that for every taking claimed to be illegal there must be a full remedy.[35]

Loftus Becker, Legal Adviser to the State Department, at the oral argument of November 6, 1958, in the *Interhandel Case,* answered the Swiss charge that under American conceptions, international law is not the law of the land, by declaring to the World Court on behalf of the United States:

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a "certified copy of a final and non-appealable judgment of a court of the United States or the State of New York . . . which determines as amongst the parties to the proceedings . . . which of said parties is entitled to receive payment for the sugar."

[35]Interhandel Case (1959), I.C.J. Pleadings, Oral Arguments, and Documents 52, 55-56.

> [T]hat international law is applied and administered by our domestic courts as as the law of the land is so firmly established by numerous decisions of our Supreme Court that it cannot seriously be questioned.[36]

The International Court of Justice took note of the competence of our courts to apply international law in the *Interhandel Case* (Preliminary Objections), Judgment of March 21, 1959. The Court remarked:

> . . . [T]he decisions of the United States courts bear witness to the fact that United States courts are competent to apply international law in their decisions when necessary.[37]

There is an impressive history of statements by Secretaries of State encouraging the courts to assist in upholding international law.[38]

When a municipal court in the Netherlands found that a plea entered by an attorney for the United States constituted a voluntary waiver of sovereign immunity, the legality of the taking by the Alien Property Custodian under international law came in issue.[39] The lawyer for the United States pleaded act-of-state doctrine. The government brief in the *Sabbatino* case parallels its argument in the Dutch court.[40]

The connection between the two was revealed to the writer by a subordinate in the Legal Adviser's office as early as the Fall of 1960. The writer's response follows.

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[36]*Id.* at pp. 497, 504.

[37](1959) I.C. J. Reports at 28.

[38]As early as June 5, 1793, Thomas Jefferson, speaking as Secretary of State, wrote to M. Genet, French Minister: "The law of nations makes an integral part of the laws of the land." 1 Moore, *Digest of International Law* 10 (1906). This was supported by an opinion of Attorney General Randolph given June 26, 1792: "The law of nations, although not specially adopted by the constitution or any municipal act, is essentially a part of the law of the land." 1 Ops. Att'y Gen. 27.

On March 16, 1906, Secretary of State Root reminded the Secretary of Commerce and Labor: "International law is as much the law of the land as is a Statute." IV Hackworth, *Digest of International Law* 460-461 (1942).

On April 16, 1943, Secretary of State Cordell Hull wrote to the Administrator, War Shipping Administration, urging the application of the principles of international law in fixing compensation for requisitioned Danish ships. He enclosed a memorandum reminding the Administrator "that international law is to be considered as forming part of the law of the land, that it is as such to be judicially administered in all cases to which it is applicable." House Committee on Merchant Marine and Fisheries, *Compilation* cited in footnote 24 at 167, 168, 173.

[39]Bank voor Handel en Scheepvaart N.V. v. Union Banking Corporation v. Robert F. Kennedy (and successively Nicholas Katzenbach and Ramsey Clark). In the District Court of Rotterdam, Docket No. 1916/59, decided December 8, 1964, translation in 4 Int'l Legal Materials 259 (1965), on appeal The Supreme Court of the Netherlands, Docket No. 10.255, decided October 17, 1969, translation of opinion of file library, Tillar House, American Society of International Law.

[40]The lower court states the argument for the United States as follows: "that the Netherlands courts are not empowered to judge the official acts of the U.S.A. Government." 4 Int'l Legal Materials 266.

December 2, 1960

Eric H. Hager, Esq.
Legal Adviser
Department of State
Washington, D.C.

Dear Mr. Hager:[41]

It is my understanding that the political division of the State Department is of the view that it would not embarrass the conduct of our foreign relations so far as Cuba is concerned were the courts to inquire into the legal effect to be given in this country to the decrees which the United States has protested against as being arbitrary, discriminatory and confiscatory. There has been some indication, however, that your division may entertain some doubts as to other aspects in the conduct of our foreign relations so far as they might be affected by the precedent of an expression of non-objection to such an inquiry. For instance it has been asked, if the State Department were to give an expression of non-objection in the case of the Cuban decrees, might not other governments give a like expression when the United States takes property in a manner which, in the view of the other government, violates international law.

I cannot believe that the State Department would ever be a party to a policy that sought to deny to foreigners an opportunity to test in any court where jurisdiction could be obtained the effect of an act on our part that they believed to be in violation of international law. The State Department has made clear its policy in favor of eliminating the self-judging element involved in the Connally reservation. To seek to discourage other countries from permitting their courts to pass judgment on the merits in a case where the foreign office believed we had violated international law would run counter to this policy. I cannot, as I have said, believe that the international lawyers in our government would ever be a party to such a line of thought. If we ever act in a way that other governments believe is contrary to international law, the only honorable policy is to accept a judicial test of the correctness of our belief that we have acted rightly.

. . .

Sincerely,

John G. Laylin

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cc: Assistant Secretary of State
Thomas Mann

[41]It was not Mr. Hager, but a subordinate not appointed by him, who suggested that our government refrain from disclosing that the political division saw no embarrassment; nor was Mr. Hager in government when the Legal Adviser's office permitted the name of a deputy legal adviser to appear on the brief in *Sabbatino* filed by the Department of Justice. It is not suggested that the lawyer in the Legal Adviser's office whose name appeared did not sincerely share the views of the lawyers in Justice. Indeed, he apparently defends the earlier position in his criticism of communications to the Court in *City Bank*, of the Legal Adviser who has sought to restore the earlier policy of letting cases be decided on their merits. 66 A.J.I.L. 795.

The Legislative Role

The position taken in the government brief and adopted by the Court in *Sabbatino,* did not commend itself to the Legislative Branch. The Congress authorized the Federal courts to decide on the merits—despite the *Sabbatino* act-of-state doctrine—certain issues where the Court found the foreign act violated international law.[42]

The text of the statute known variously as the Rule of Law or Sabbatino or Hickenlooper, Amendment, was restricted to cases involving "a claim of title or other rights to property." Hence the issue of right to compensation did not come literally under the legislation. Much could be said, however, for the lower court's view in *City Bank* that the legislation indicated a general disposition to pass judgment on the merits lacking objection by the President under the circumstances of the particular case.[43]

Four Justices in *City Bank* had so little difficulty in finding the duty to pay compensation to be justiciable that they did not discuss it. Justice Douglas joined them up to the amount for which sovereign immunity was waived. The only question with the four was whether passing judgment would embarrass the Executive. They saw no reason why it should, especially as the Legal Adviser had confirmed their own conclusion (and that of Justice Douglas) that there would be no embarrassment.

Justices White in *Sabbatino* and Powell in *City Bank* have made clear that they would adjudicate on the merits on their own views as to what would or would not embarrass the Executive, doubtless guided by any representations from the policy arm of the Executive found to be convincing. Neither the Chief Justice or Justice Rehnquist has indicated that he would not. That question was not at issue in *City Bank.*

What the remaining Justices would decide in a case where the issues were confused less than in *City Bank* the reader will judge for himself. Following the Rule-of-Law Amendment and Justice White's powerful dissent in *Sabbatino,* Justice Powell's lucid exposition in *City Bank* of the obligation of Federal courts "to hear cases such as this," unless "it appears

[42]79 Stat. 653, 22 U.S.C. § 2370(e). The amendment was upheld on remand, the case now being denominated Banco Nacional v. Farr. Judge Bryan stated:

> The Amendment removed the bar of the act of state doctrine as enunciated by the Supreme Court in this case, (Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 84 S.Ct. 923, 11 L.Ed.2d 804 (1964)), to a determination on the merits as to whether the expropriation by the Castro government of the cargo of sugar involved here violated the principles of international law, unless the President determined and suggested to the court that the application of the doctrine was required by the foreign policy interests of the United States. 272 F. Supp. 836, 837 (1965).

His decision was affirmed, 383 F.2d 166 (2d Cir. 1967) and certiorari was denied, 390 U.S. 956 (1967).

[43]270 F. Supp. 1004, 1007, footnote 8 at p. 1010 (1970).

that an exercise of jurisdiction would interfere with delicate foreign relations,[44] the majority decision in *City Bank* and the statement of the long-term position of the policy arm of the Executive filed in *City Bank*, the act-of-state doctrine may be recognized as having been restored to its pre-*Sabbatino* confines.

The Legal Adviser's office, by filing its brief in *City Bank*, has served well in helping to remove the confusion and in reaffirming the policy of upholding in American courts the principles of international law. If in spite of its contribution toward a better understanding of the occasions for exercising judicial abstention, there lingers a belief that the position taken by the government lawyers in *Sabbatino* and in the ensuing opinion in *Sabbatino* (particularly as understood by the dissent in *City Bank*) is in line with the fundamental policies of the United States, broadening of the Rule-of-Law Amendment to confine the doctrine to its true limits may become necessary.

The *Sabbatino* precedent may well make this unnecessary, for it is unlikely with the background known that the Court will again be led into taking the chestnuts of the Department of Justice[45] out of the fire, by awarding to confiscators of our foreign investments the fruits of their transgressions.

[44]406 U.S. 773, 775.

[45]See footnote 5 on chestnuts and *City Bank*, pp. 772–773.