AN INTERNATIONAL SERVITUDE

The Supreme Court of Cologne (Oberlandesgericht) rendered, on April 21, 1914, a very important judgment against the Aix-la-Chapelle-Maastricht Railroad Company, in which the Dutch Government intervened on behalf of its lessee.[1] The plaintiff in this case owns, it appears, a number of houses situated at Naustrass near Herzogenrath, and alleged that they had been damaged and depreciated in value by reason of the *dominial* or governmental mine worked by the lessee of the Netherland Government. Leaving out details, the important point before the court, and which it squarely decided, was whether the lessee, operating a mine within Prussian territory, was subject to the mining law of Prussia in the assessment of damages, or whether, admitting the injury to have taken place, the law of the Netherlands was to be applied. In an ordinary suit this question could not have been argued, as in matters of real estate the local law is universally held to be applicable. The circumstances, however, were peculiar, and by reason of this peculiarity and the legal status created, the case is one of more than passing interest.

It appears that a boundary treaty between Prussia and the Netherlands was concluded on June 26, 1816, and that certain districts, including the one in which the mine in question was located, were ceded to Prussia. It was provided, however, in Article 19 of this treaty that "the cession of the districts * * * shall cause no damage or disadvantage to the exploitation of the coal mine", and that the Dutch Government, "or in its place the lawful owner, retains the authority to carry on in the ceded parts works serviceable for the mining of coal or for drainage purposes. Neither under the pretext of instructions issued to its engineers, nor by imposts or other burdens, may the Government of Prussia interfere with or restrict the mining of coal or the bringing of the coal mined to the surface; nor may it place any hindrance in the way of its being marketed."

The question involved was whether the interest which the Dutch Government had in the mine was to be considered as a mere concession, in which case it would be subject to Prussian law, or whether it was to be regarded as an international servitude, in which case it was contended that it would not be subject to the Prussian law. According to the first

[1] Decision printed in Judicial Decisions, page 907.

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view, the mining right would be a creature of private law and as such controlled by its provisions. According to the second view, the mining right would be a creature of international law and controlled by its provisions. The court adopted the latter view, as appears from the following judgment:

> The opinion of the judge of the lower court, to the effect that the aforesaid authority of the Dutch Government must be regarded as a mining concession, transferred to the defendant, does not meet the present case. The plea entered by the intervener that, in conformity with all the circumstances, the boundary treaty between Prussia and the Netherlands is in the nature of an agreement coming within the sphere of international law, by which the territorial sovereignty of the two neighboring states was mutually defined, must be accepted. Parts of the districts of Kerkrade and Rolduc go to Prussia, but the Dutch Government *retains* the *right* to carry on mining in the ceded parts. This means, as the intervener correctly states, not what might be termed a mining concession of the Dutch Government granted by Prussia according to civil law, but the exclusion of certain sovereign rights in the ceded parts resulting from the territorial sovereignty. In so far as the right to mine coal and other minerals contained in this coal-field comes into question, part of this territorial sovereignty remains with Holland. Because of this fact, a sort of international servitude has arisen by which Holland is, as a state, entitled, now as previously, in the matter of this mine, to exercise its own legislative authority and police supervision; that is, it has real sovereign rights with respect to the object situated within the territory of the foreign state. (See Ulmann, *Völkerrecht*, pp. 320 ff.)

It would seem that this judgment is an express recognition of an international servitude, and that an essential element of such a legal status is that the country, on whose behalf it is created, exercises its right as a sovereign, and that for the purpose of the exercise of the right, it is withdrawn from the sovereignty of the grantor.

In the recent North Atlantic Fisheries arbitration, decided at The Hague in 1910, the tribunal used language calculated to throw doubt upon the existence of international servitudes, explaining that the doctrine "originated in the peculiar and now obsolete conditions prevailing in the Holy Roman Empire, of which the *domini terrae* were not fully sovereigns"; that "the modern state * * * has never admitted partition of sovereignty, owing to the constitution of the modern state requiring essentially sovereignty and independence"; that the doctrine was "but little suited to the principle of sovereignty which prevails in states under a system of constitutional government * * * and to the present international relation of sovereign states, has found little, if any, support from modern publicists. It (the international servitude) could therefore, in the general interest of the community and of the

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parties to this treaty, be affirmed by this tribunal only on the express evidence of an international contract."

It cannot be said that Prussia and the Netherlands at the time of the treaty of 1816 between them "were not fully sovereigns," and it cannot be maintained with any show of reason that Prussia or Holland is not a modern state. It may be that a servitude is "little suited to the principle of sovereignty," but this is a matter for the nations themselves to determine. The statement of the tribunal that the doctrine "has found little, if any, support from modern publicists" flies in the teeth of most modern publicists, who overwhelmingly support the doctrine. It is difficult to ascertain just what the tribunal meant by saying that it could affirm the doctrine "only on the express evidence of an international contract," unless it means that the term servitude should be used in the treaty creating this status. The contract between Prussia and Holland of 1816 did not use the term servitude, although the Oberlandesgericht held that it created a status aptly termed an international servitude, which it could not have done if it were impressed by the arbitral award of the fisheries tribunal.

It is not the purpose of this comment to thresh over the fisheries dispute. It merely calls attention to the fact that a modern state, with a constitutional form of government, recognized the doctrine of servitude against its own interest in the interpretation of a treaty in which the term servitude was not mentioned, and declared squarely that the right created was a sovereign right in favor of the grantee and, as such, withdrawn from the sovereignty of the grantor. For this reason the case is not merely of interest to the parties in litigation, but to students of international law in all parts of the world.

MEXICO

Previous comments in these columns have informed our readers from time to time of the course of events in the revolution which has been in progress in Mexico for several years. The comment in our last number narrated the events leading up to the mediation of Argentina, Brazil and Chile, growing out of the Tampico flag incident and the occupation of Vera Cruz by the American forces. The result of the mediation, namely, the conclusion of a protocol between the United States and General Huerta, which adjusted the differences between them and left the organization of a provisional government which would be recognized

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