EDITORIAL COMMENT

IMMUNITY OF A STATE FROM SUIT IN THE SUPREME COURT BY A FOREIGN GOVERNMENT WITHOUT THE STATE'S CONSENT

The United States Supreme Court in its recent decision in the case of The Principality of Monaco, Plaintiff, *v.* The State of Mississippi, Defendant,[1] has at last written the final chapter in the long drawn out history of the attempts of the holders of defaulted State bonds to enforce payment through judicial proceedings. The Chief Justice delivered the opinion of the court, with no dissenting opinions.

The question was presented on a motion by the Principality of Monaco for leave to bring suit in the Supreme Court against the State of Mississippi on bonds issued by that State and alleged to be the absolute property of the Principality.

It appears that the bonds referred to consisted of 10 bonds of $1,000 each, known as Mississippi Planters' Bank Bonds, and 45 bonds of $2,000 each, known as Mississippi Union Bank Bonds, all issued by the State of Mississippi.

In setting out the facts, the opinion states that:

> In each count it was alleged that the bonds were transferred and delivered to the Principality at its legation in Paris, France, on or about September 27, 1933, as an absolute gift. Accompanying the declaration and made a part of it is a letter of the donors, dated September 26, 1933, stating that the bonds had "been handed down from their respective families who purchased them at the time of their issue by the State of Mississippi"; that the State had "long since defaulted on the principal and interest of these bonds, the holders of which have waited for some 90 years in the hope that the State would meet its obligations and make payment"; that the donors had been advised that there was no basis upon which they could maintain a suit against Mississippi on the bonds, but that "such a suit could only be maintained by a foreign government or one of the United States"; and that in these circumstances the donors were making an unconditional gift of the bonds to the Principality to be applied "to the causes of any of its charities, to the furtherance of its internal development or to the benefit of its citizens in such manner as it may select."

The opinion further states that:

> The State of Mississippi, in its return to the rule to show cause why leave should not be granted, raises the following objections: (1) that the Principality of Monaco is not a "foreign State" within the meaning of Section 2, Article III, of the Constitution of the United States, and is therefore not authorized to bring a suit against a State; (2) that the State of Mississippi has not consented and does not consent that she be sued

[1] Printed in this JOURNAL, *infra*, page 576.

> by the Principality of Monaco and that without such consent the State cannot be sued; (3) that the Constitution by Section 10, clause 3, Article I, "forbids the State of Mississippi without the consent of Congress to enter into any compact or agreement with the Principality of Monaco, and no compact, agreement or contract has been entered into by the State with the Principality"; (4) that the proposed litigation is an attempt by the Principality "to evade the prohibitions of the Eleventh Amendment of the Constitution of the United States"; (5) that the proposed declaration does not state a controversy which is "justiciable under the Constitution of the United States and cognizable under the jurisdiction of this court"; (6) that the alleged right of action "has long since been defeated and extinguished" by reason of the completion of the period of limitation of action prescribed by the statutes of Mississippi; that the plaintiff and its predecessors in title have been guilty of laches, and that the right of action, if any, is now and for a long time has been stale.

Supplementing this last point, the State of Mississippi set out the amendment to the State Constitution in 1876, prohibiting the payment of these bonds, and contended that since the adoption of that amendment "no foreign State could accept the bonds in question as a charitable donation in good faith."

In reply, the Principality contested the validity of all of these objections on grounds stated in the opinion.

In discussing the issues thus presented, the court found it necessary to deal with but one, which was "the question whether this court has jurisdiction to entertain a suit brought by a foreign State against a State without her consent. That question, not hitherto determined, is now definitely presented." The opinion of the court accordingly deals only with the question of the jurisdiction of the court to entertain this suit without the consent of the State of Mississippi.

In discussing this question, the court reviews the previous decisions of the court involving the effect of the provisions of Clauses 1 and 2 of Section 2 of Article III of the United States Constitution, and also the debates in the Constitutional Convention with reference to immunity of a sovereign state from actions brought against it without its consent. Summarizing its examination of these authorities, the Court states:

> The question of that immunity, in the light of the provisions of Clause one of Section 2 of Article III of the Constitution, is thus presented in several distinct classes of cases, that is, in those brought against a State (a) by another State of the Union; (b) by the United States; (c) by the citizens of another State or by the citizens or subjects of a foreign State; (d) by citizens of the same State or by federal corporations; and (e) by foreign States. Each of these classes has its characteristic aspect, from the standpoint of the effect, upon sovereign immunity from suits, which has been produced by the constitutional scheme.

The opinion then deals with each of the classes of cases above enumerated, showing that the immunity enjoyed by sovereign states from suits brought

against them without their consent rests upon a fundamental principle which exists independently of any specific Constitutional reservation. In view, however, of the relinquishment of this immunity by the States with reference to suits by foreign governments through the adoption of clause 1 of Section 2 of Article III of the Constitution, the court found it necessary to rest its decision upon the application of the provisions in the Eleventh Amendment of the Constitution to the present case. This appears from the concluding paragraph of the decision, which reads as follows:

> We conclude that the Principality of Monaco, with respect to the right to maintain the proposed suit, is in no better case than the donors of the bonds, and that the application for leave to sue must be denied.

It appears from the reports of the British Council of Foreign Bondholders that repudiated bonds of eight States of the Union are still outstanding. The repudiating States are Alabama, Arkansas, Florida, Georgia, Louisiana, Mississippi, North Carolina and South Carolina. The purposes for which these bonds were issued, the authority for issuing them, the terms of issuance, the amounts in default, the reasons for refusing payment, and the various attempts made to enforce payment are fully set forth in an article by Miss Bessie C. Randolph, published in this JOURNAL,[2] to which reference is made for the history of the repudiation of these State debts. The bonds under consideration do not include bonds issued for the prosecution of the Civil War, the payment of which was prohibited by the Fourteenth Amendment to the United States Constitution. It will appear from this article that the efforts which have been made to enforce payment of these repudiated bonds through judicial procedure cover a wide field comprising every conceivable course of procedure including international arbitration, except a suit in the Supreme Court by a foreign government against a State, which has now been tried, all of which efforts have failed.

Miss Randolph pointed out in her article that such a suit as that recently dismissed by the Supreme Court in the opinion above reviewed was the only untried avenue of relief, but she says, with reference to such a suit, that the query might arise "would not the rule in New Hampshire *v.* Louisiana,[3] that a plaintiff cannot sue in a representative capacity, be applied by the court as the fair intendment of Article XI," meaning presumably the Eleventh Amendment to the Constitution. As appears from the opinion of the Supreme Court above reviewed, that query did arise in the suit brought by the Principality of Monaco, and the court took the view anticipated by Miss Randolph in her article.

The only alternative now left for the adjustment of this troublesome question seems to be the possibility of a settlement on a compromise basis by an

[2] Vol. 25 (1931), p. 63. Miss Randolph, then Professor of Political Science, Florida State College for Women, is now President of Hollins College, Hollins, Va.

[3] 108 U. S. 76.

international agreement through the good offices and possible participation of the Government of the United States.

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THE NEW CUBAN TREATY

On May 29, 1934, the plenipotentiaries, Mr. Hull, Secretary of State, and Mr. Welles, Assistant Secretary of State, on the part of the United States, and Ambassador Marquez Sterling, on the part of Cuba, signed in Washington a treaty modifying the Treaty of Relations of May 22, 1903, between the two countries. The Senate gave its prompt and unanimous approval to the treaty on May 31. Only one or two Senators questioned the wisdom of the pact, but did not feel like objecting seriously. In Cuba, the President and Council of Secretaries (Cabinet) ratified the treaty pursuant to the provisional constitution of February 3, 1934. Ratifications were exchanged at Washington on June 9, on which date the treaty went into effect.[1]

The Treaty of 1903 has been criticized in Cuba and Latin America generally as establishing a protectorate over the island by incorporating the terms of the Platt Amendment to the Act of Congress of March 2, 1901. The Platt Amendment provided that the future relations of the two countries should be defined in the Constitution of Cuba substantially as follows:

(1) The Government of Cuba shall never enter into any treaty with a foreign Power which will impair the independence of Cuba, and shall not allow any foreign Power to obtain lodgment or control in any portion of the island for colonization, military or naval purposes, or otherwise.

(2) The Government of Cuba shall not contract any public debt of which the ordinary net revenues shall be inadequate to pay the interest and sinking fund.

(3) The United States may exercise the right to intervene for the preservation of Cuban independence and the maintenance of a government adequate for the protection of life, property and individual liberty, and for discharging the obligations assumed by the United States in the Treaty of Paris and now to be undertaken by the Government of Cuba.[2]

(4) All acts of the United States during military occupancy are ratified.

(5) The Government of Cuba will undertake the sanitation of the cities of the island.

(6) The title to the Isle of Pines shall be left to future adjustment.

[1] The treaty is printed in the Supplement to this JOURNAL, p. 97.

[2] The obligations of the United States mentioned in Paragraph 3 refer to those in the Treaty of Peace of 1898, and apparently mean that the rights therein granted to Spain in respect of Cuba shall be carried out by the Cuban Government; such as, obtaining the release of Spanish prisoners in the hands of insurgents in Cuba, allowing Spain to obtain copies of official documents in the archives, allowing Spanish subjects to acquire nationality under certain conditions, granting them rights of religion, access to the courts, continuation of judicial proceedings, and continuation of property rights, free importation of scientific, literary and artistic works for ten years, establishment of consular offices, etc.