THE GENERAL APPROACH TO FOREIGN CONFISCATIONS

BY

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1. INTRODUCTORY REMARKS

METHODOLOGICAL QUESTIONS have always attracted a great and well-deserved interest in Scandinavian legal thinking. This approach has not precluded Scandinavian lawyers from making a close study of the realities behind legal phenomena—indeed, it may be said that such study has been a necessary prerequisite for all methodological discussions. Very often the experiences gained in such investigations will be embodied in principles having the character not of strict legal rules but of standards which, if a clear answer is wanted, are on the one hand rather vague, but on the other hand are broad enough to provide some guidance even in unexpected situations. As several important parts of the civil law in the Scandinavian countries are not codified, the judge often has to rely on such standards and general considerations, based on analogies from rules laid down in statutes or precedents as well as upon the purpose of such rules; it should be mentioned in this connection that in Sweden the decisions of the Supreme Court are regarded as being persuasive only, and neither the lower courts nor the Supreme Court itself are bound by precedents as the English or American courts are.

Even though a common trend may thus be discerned among Swedish and Scandinavian legal writers in their general approach to methodological questions, it would certainly be going too far to say that they all apply the same legal methods. Many variations occur, depending on the subject treated as well as on the author's preference for a certain way of handling his material. The following lines have therefore been written merely to describe my own approach to a certain subject and to point to some of the questions of method and principles relating to foreign confiscations that I was confronted with when writing a treatise on foreign exchange restrictions and their repercussions on municipal, public international and private international law.[1]

[1] Lars A. E. Hjerner, *Foreign Exchange Restrictions and Private International Law*. Studies in the Enforcement and Recognition of Foreign Penal, Revenue, Confiscatory and Political Laws in Different Legal Systems. (Främmande valutalag och internationell privaträtt. Studier i de främmande offentligrättsliga lagarnas tillämplighet.) With a Summary in English. Stockholm 1956–1957.

The existence of exchange restrictions as an encroachment upon private economic relations is a comparatively new phenomenon in law. During the last few decades, articles and books on the subject of foreign exchange restrictions in the conflict of laws have been written in increasing numbers. The discussion has, however, circled around such questions as the proper law of the contract and its determination, or various kinds of territoriality concepts, or *lex rei sitae* as governing property questions. Of course, established rules in these sections of law should not be disregarded, but it must also be kept in mind that many of these rather old-fashioned rules originated and were developed in practice in long-distant times and in circumstances very different from those in which the modern rules bearing the same names operate when applied to questions arising out of foreign exchange restrictions. Therefore it seems necessary to reconsider the *ratio* of such old rules and concepts in the light of modern experience. In many situations arising out of foreign exchange restrictions, either no precedents at all can be found, or such as do exist seem contradictory or obscure. In these circumstances it will be necessary to trace and find out standards which, if not precise rules, may provide some guidance in this obscure field of law with its many unsettled questions. Much uncertainty may be involved in such an approach. But it cannot be presumed that an uninspired application of rules originally intended for the solution of quite different conflicts will give better results.

When studying foreign exchange restrictions it appears natural to look for guidance to the treatment of penal, revenue and confiscatory laws and other similar types of laws, e.g. gold clause and moratory legislation, or what some writers prefer to call political or territorial laws, because exchange control law has frequently been compared in various respects with one or other category of such laws. For this reason my investigation of foreign exchange restrictions became at the same time a study of the enforcement and recognition of different types of such political or territorial laws. Thus, one section of my study concerned the attitude of the courts in relation to foreign confiscations. The aim of the following pages is to render an account of the ways followed in that investigation and of some of its results.

Like all other sciences, jurisprudence must be based primarily on the observation of facts. The next step will be to link together observed facts in a sensible way by advancing rules or theories capable of expressing all the relevant observations. Legal thinking,

however, seems to be more than this. It is not only a specific conglomerate of the observation of the facts of human life and the formulating of rules capable of expressing the observations in an exact and comprehensive way; these activities must at the same time be coupled with common sense and social evaluations. This latter phase of the process will mainly depend on the effect that one or other rule will have in our modern society. But even in considerations of that kind the legal writer is tied to facts. He must try to stick to the values prevailing in the national or international society in which the rules will have to operate. In order to find these values he has again to observe and collect facts. By studying the general approach of the courts when deciding matters of the same or a similar nature, it will be possible to state purposes and values apparently influencing the courts and thereby apparently accepted by them.

Now it could be said that the first step to take must be to collect and report the enormous mass of cases on confiscations, and to state the case law in these matters. That would certainly not be possible in the space available in an article like this. If most of that fact-finding must be omitted here, this does not mean that these activities have been neglected. In the above-mentioned treatise a very extensive body of facts has been collected and the case law about foreign penal, revenue, confiscatory, political as well as foreign exchange control laws has been discussed in detail. In all, some 1,200 cases have been considered, a very large proportion of them being confiscation cases. Since this process obviously cannot be repeated here, in what follows only a few typical examples will be outlined for the sake of illustration. For further details, references of the cases and so on, any reader who is not content with the following rather summary discussion is referred to the treatise itself.

2. DIFFERENT GROUNDS OF CLASSIFICATION IN CONFISCATION MATTERS

At first sight it may appear that a great mass of cases about foreign confiscations cannot be reconciled. Many of the decisions seem to contravene each other and many of the stated opinions appear to be contradictory. To reconcile them it seems necessary to find a system for grouping the cases which would enable a writer to abstract from some circumstances and to stress others as

more important. Obviously, statements of legal principles and rules in the reported opinions of the judges can be regarded as facts, viz. facts consisting in the verbal behaviour of the courts. And indeed, the verbal behaviour of the judges will be something important to know, since with the help of such knowledge one may to some extent and with some degree of certainty be able to foretell the course courts will take in deciding future disputes in related matters. But one must also take into account the possibility that the courts are only paying lipservice to precedents and alleged rules, and that the true *ratio decidendi* must be looked for elsewhere. The stated reasons can then be reduced to mere *obiter dicta*—a method familiar to Anglo-Saxon lawyers. Therefore, when it is suspected that a decision may in fact conflict with the opinion stated in the judgment, or a stated opinion with other decisions in fact, one must, in grouping the cases, rely primarily on *the situation in fact, the nature of the claim* and *the outcome*. Compared with these, the stated opinions of the judges must be given less weight.

The nature of the confiscate, whether this circumstance is reckoned as attaching to the situation in fact or to the character of the claim—will in an easily conceivable manner distinguish some confiscations from others, as the way of enforcing and completing a confiscation will depend on the precise nature of the confiscate. Therefore it is necessary to deal separately with confiscations of things (tangibles) in general (including ships), debts, bonds and securities, and literary and industrial property rights (copyrights, trade marks, patents etc.). The confiscation of companies and other associations and the special problems arising therefrom must also have separate treatment. In that way and through the separate treatment of the confiscation of things—and only things (tangibles) can, in the true sense of the word, be "situated" anywhere—it will be possible to give due weight to the situation of the confiscate, a circumstance that is generally deemed very important in these matters.

Without doubt many other circumstances besides those mentioned must be taken into consideration, e.g. the nature of the confiscatory decree and the compatibility of the confiscatory measure with international law. But it seems more convenient not to spoil the vision of the whole in the beginning by taking too many different aspects, but rather to trace the outlines first and then to pass to the details. Nevertheless some remarks about the notion of "confiscation" seem appropriate here.

The determining of notions like confiscation, expropriation and requisition will be of minor importance, in so far as no conclusions are drawn from such notions, and is mainly a question of the disposition of the material. As the author has no intention of making such terms the basis for any conclusions, it seems that no formal distinction between the above-mentioned notions should be made at this stage of the investigation. Later on, after having surveyed the practice about confiscations in general, it may be useful to consider modifications in the terminology according to whether compensation is granted or not. However, it may be convenient first to deal with those cases where the deprivation of the property is openly performed and then to consider in what respects the results of such an investigation can be applied to similar cases where the deprivation is disguised in some way or other. As *open confiscations* I have reckoned those where the intention permanently to deprive the titleholder of his title derives clearly from the nature of the act or the wording of the foreign decree. As *disguised confiscations* I have considered other deprivations of property, e.g. compulsory administration (*kommissarische Verwaltung*). Taxes, fines and penalties imposed in an ordinary procedure will not be treated in this connection—which is not to say that those matters must follow altogether different rules. Regarding taxes and penalties, however, supplementary considerations would have to be advanced for which there is no space here.

3. THE CASE LAW

Tangibles

Let us now proceed to study the practice of the courts in cases about foreign confiscations, first focussing our interest on cases where the confiscate has been a tangible thing. Among the tangibles we will at a later stage take up ships for special consideration, in order to see whether rules regarding foreign confiscations of ships differ in any substantial respect from those applying to foreign confiscations of other tangibles.

Legal scholars and courts frequently face the problem of foreign confiscations by asking in whom the property is vested and at what moment and at what place it may have passed from the original owner to the confiscator. I would suggest that this is an inappropriate approach. Property is no absolute phenomenon,

it is a short word for a certain freedom that "the owner" is enjoying in his activities and for certain privileges as to the assistance of the community—or, in other words, a more or less safe position.[2] Property ultimately depends on the assistance which a claimant receives from the community. We may take real property as an example. The freedom allowed to the owner to dispose of his land, (subject to all the existing social and restrictive legislation), is one aspect and a most important one, of "real property". The buyer's right to claim specific performance is one aspect of his claim to property in the goods. The right of a possessor to recover chattels taken away from him is one function of "property" in chattels, and another is his right to damages for wrongful conversion. In matters of foreign confiscations it will be convenient to deal with such property functions separately. Thus, the nature of the claim invites a distinction between claims for delivery of confiscandum and claims for restitution (vindication). Claims of confiscators for revindication ought to be considered separately, too. It might be useful to make even further distinctions, but to do so would probably complicate the problem without throwing much more light on it.

In respect of the situation of the confiscate it will be necessary to distinguish situations when the confiscate is in the foreign confiscating country from situations when it is in the judging country.[3] A third possibility, that the confiscate is neither in the confiscating country nor in the judging country, but in a third country, ought to be noted, but in general such situations do not seem to differ in any important respect from situations when the confiscate is in the judging country. With regard to ships, yet another alternative must be taken into consideration, viz. ships on the open sea. Finally, when the confiscate has been moved from one country to another, one has to consider whether some *situs* can be deemed more important than another. There are a number of possibilities: the situation of the goods at the time of the confiscatory decree, at the time of the confiscator's taking possession of the confiscate, at the time of a later buyer's taking possession of the confiscate, at the time of the original owner's recovery of

[2] Cf. Ross, "Tû-Tû", *Scandinavian Studies in Law* 1957, pp. 146 ff.

[3] In what follows "the judging country"—as opposed to the confiscating or the legislating country—is used to mean the country on the basis of whose legal system a judgment is pronounced, whether this judgment is delivered by a judge in a court or by any other lawyer who has to give an opinion in the matter.

the confiscate, or the situation of the confiscate at the time of the lawsuit.

From all the above-mentioned points of view a certain conformity in the practice of the courts can easily be discerned.

Claims for delivery of confiscandum are seldom presented openly and, when made, they have generally been dismissed, whether the confiscandum has been in the possession of the original owner or has been left by him on deposit at a bank or with another person. Here the much-discussed cases *Bollack* v. *Société Générale etc.* (NY AppDiv 1942), *Don Alonso de Velasco* v. *Cornero* (Adm. 1612), *King of Italy* v. *De Medici* (Ch. 1918), *Banco de Viscaya* v. *Don Alfonso* (K. B. 1934), *Affaire Ropit* (Req. 5.3. 1928), *RG 7.6. 1921* (Gebiet Gotha *v.* Herzog von Gotha), *Firma Wichert* v. *Wichert* (BG 28.10. 1948) may be mentioned.[4] Only a very few exceptions are known from this practice, e.g. *The Georges and The Edwich* (People's Court in Batoum 1922) and *The Navemar No. 2* (US CCA 2d 1939). The first of these two cases can easily be explained by the political situation in the country of the court, and *The Navemar No. 2* could probably be distinguished by the circumstance that at the time of the lawsuit the ship was in the possession of a crew who had declared their loyalty to the plaintiff, the Spanish Republican Government. Admittedly, in many cases of this type *dicta* can be found to the effect that the mere passing of the confiscandum over the confiscator's territory or territorial waters—and as regards *The Navemar No. 2* even the arrival of the ship in the open sea—will render the title of the owner precarious, but the actual outcome of any decision does not support such a view, *The Navemar No. 2* being distinguished in the way mentioned before.

Passing now to cases where *a claim for restitution* is made against the confiscator or any one who has acquired the confiscate from him, we find that the aspects are changed. When the confiscator still remains in possession of the confiscate, any claim will generally be dismissed because of the immunity of foreign states. It is to be believed that no general conclusions as to the matter of enforcement or recognition of foreign confiscations should be drawn from such decisions. The immunity rules rest upon considerations independent of those relevant in confiscation matters. When, however, the confiscate has left the possession of the confiscator, e.g. when it has passed by purchase to a private person

[4] Hjerner, *op. cit,.* pp. 269 f., footnote 4.

who has taken the goods into his possession, no immunity rules will protect the new possessor from a lawsuit. In such restitution cases the practice of the courts has in some respects been divided.[5] On the one hand there are cases such as *Rose* v. *Himely* (US SpCt 1808), *Cia Minera etc.*, v. *Bartlesville Zinc Co.* (Tex SpCt 1925), *Luther* v. *Sagor* (K. B. 1920), *The Rose Mary* (Aden SpCt 1953), *Affaire Bloch* (Civ. 14.3. 1939, CA Nimes 19.5. 1941), *Rosenberg* v. *Fischer* BG 3.6. 1948) in which restitution has been granted, and on the other hand cases like *Hudson* v. *Guestier, Lafont* v. *Bigelow,* (US SpCt 1808), *Oetjen* v. *Central Leather Co.* (US SpCt 1918), *Ricaud* v. *American Metal Co.* (US SpCt 1918), *Luther* v. *Sagor* (C. A. 1921), *Paley* v. *Weisz* (C. A. 1929), *De Keller* v. *Maison de la Pensée Française* (TC référé Seine 12.7. 1954), *Sache Lepke* (LG Berlin 11.12. 1928) in which the action has been dismissed. Then the question must be asked whether the place of the enforcement of the confiscation is of any importance. No accurate or authoritative case seems to exist in which the remedy of restitution has been denied when the foreign confiscation has been effected in the territory of the judging country. In respect of claims for restitution of goods confiscated in the confiscating country the courts are still divided in their opinions. It may also be noted that, when restitution is denied, additional grounds are very often forwarded by the court to the same effect as that of the *situs* of the confiscate.[6] It seems therefore to be safest, when reporting the case law of restitution of confiscated tangibles, not to state any too strict rule. Probably it will be adequate to say that each case has to be judged on its own merits, and, apparently, legal traditions in these matters differ from country to country. However, when the confiscation is not in conformity with international law or its recognition would be against public policy, restitution will be in line. Such would probably also be the case when the confiscation is no longer recognized as lawful even in the confiscating country.[7]

As regards *claims of confiscators for revindication* of goods once

[5] *Id.* pp. 272 ff. note 10, 11. — It may here be noted that the decision in the French case *De Keller* v. *Maison de la Pensée Française* (TC réf. 12.7.1954) cannot be said to overrule earlier French decisions. Among several other reasons invoked by the court it was specially stressed that proceedings had not been instituted against the proper defendents and that the decision of the court (une ordonnance de référé) did not prejudice an action on the merits. Furthermore it may be observed that more than 30 years had passed since the nationalization and according to Art. 2262 Code civil "toutes les actions, tant réelles que personnelles, sont prescrites par trente ans".

[6] *Id.* p. 275 note 15.

[7] *Id.* pp. 279 ff.

confiscated and thereafter recovered by the original owner, there are very few cases. None, however, really supports the supposition that the confiscate would be released to the confiscator. On this point a great many legal writers, also, are in favour of the view that the original owner should be permitted to keep what he has recovered.[8]

When the *claim* is not for restitution to the original owner but *for damages* or other outflows of his right of property, the situation is a little more complicated. Without going into detail, it seems that—if the confiscate is outside the confiscating country at the time of the lawsuit or, if destroyed, was there at least at the time of its destruction—a money claim might in certain circumstances be more successful than a claim for restitution would have been.[9]

One often hears it said that ships are floating parts of the territory of the country whose flag they fly, but this comparison will not bear upon *ships as objects for foreign confiscations*. The confiscation of a ship, effectively performed in the confiscating country or in its territorial waters, seems in all relevant respects to be comparable to a confiscation of other tangible things. When the confiscation of the ship has not been effected at all or has taken place in the country of the court, no distinction ought to be made between a ship and other tangibles. Finally, if the confiscation of the ship is enforced in the open sea, its lawfulness ought to be judged according to international law. So, if a capture in the open sea is unlawful according to the law of nations, a claim for restitution ought to be sustained upon the ship's entering a port outside the confiscating country. Here a number of American cases may be mentioned, beginning with *Glass et al.* v. *The Sloop Betsey* (US SpCt 1794).[1]

Taking everything together, the practice of the courts in matters of foreign confiscations of tangible things envisages the importance of the place of the taking into effective possession of the confiscate. However, the *situs* of the confiscate at the time of the lawsuit is, although not so very often stressed in the written opinions of the courts, none the less important. If the confiscate at the time of a projected lawsuit does not have a *situs* in the country of the court, or anyhow outside the confiscating country, no claim will, for practical reasons, be raised outside the confiscating country.

[8] *Id.* pp. 281 f., 282 note 42.
[9] *Id.* pp. 282 ff.
[1] *Id.* p. 286 note 64, 65.

Debts

We now turn to *confiscation of debts.* A close study of many of the cases in which a confiscation of a debt has been at issue will reveal that in only a few of them can the dispute be said to concern the property right of the confiscator, and that in the remaining number of cases the confiscation of the debt or the validity of the confiscatory decree has been merely a prejudicial question, from the solution of which only very limited conclusions can be drawn. Instead, these cases must often be characterized as concerning the distribution of the risk of confiscation between two parties, neither of which claims to derive its right from the confiscator. In other cases a confiscatory decree purporting to transfer the property right to the confiscator is never seriously taken into consideration, the real question being who may be regarded as the legal representative of the creditor or of the debtor, when one of them is a nationalized legal entity.

Cases concerning confiscations of debts should, like cases concerning confiscation of tangibles, be divided into different groups with respect to the nature of the claim. *Claims for delivery of confiscandum consisting of the payment of a debt* have to be presented by the confiscator in very much the same way as claims for delivery of tangible confiscandum: but such claims for payment are rare. Instead there will be disputes between the original creditor and the debtor about the payment of the debt. As a debt can never be taken into possession or—at least in a strict sense—be "situated" anywhere, the place of the effective taking into possession of the confiscandum cannot be assigned the same capital relevance here as in relation to the confiscation of tangibles, but the fact that it has proved to be possible to start a lawsuit about the confiscate in a court outside the confiscating country must still be taken into consideration as an important circumstance.

The first type of situations to consider is that when the confiscator or any one of his assignees alleges that, by virtue of the confiscatory decree, the property in the debt has passed from the original creditor to the confiscator, and the latter or his assignee, in the pretended capacity of actual creditor, claims payment for the debt. Such claims will mostly not be put forward openly, but if they are—or when the true confiscatory nature of disguised claims is revealed—they will have no success.[2]

[2] *Id.* p. 288 note 75.

This can be said to be a firm rule in most jurisdictions, although some American cases seem to run against such a rule, e.g. *US* v. *Belmont* (US SpCt 1937) and *US* v. *Pink* (US SpCt 1942). However, the first of these two cases goes no farther than to the point that, with regard to deposited money, a claim of the Federal authorities will be given preference to a proposal by the debtor that he shall keep the money himself for an indefinite time. In the second case, *US* v. *Pink,* the court took one step further and sustained a preferential claim of the Federal authorities to assets in the U.S.A. (i.e. to money claims against American debtors) formerly belonging to a nationalized Russian corporation, at the expense of foreign creditors and shareholders of the Russian corporation. In both cases the United States Government alleged to have succeeded the Russian Soviet Government in its claimed rights to the assets—and these rights were founded on the Russian confiscatory decrees. Thus the action of the United States Government against the assets of the nationalized Russian corporation in the *Pink Case* virtually amounted to confiscation—since in that case at least some groups of the beneficiaries of the dissolved Russian corporation were set aside by the Federal authorities.

This case has been criticized by lawyers all over the world. It is difficult to point to anyone who has tried to defend it with any enthusiasm, and the following lines do not intend to detract from that criticism. It must be doubted whether the law really is as stated in the written opinion of the majority, which recognized the validity of the Russian nationalization even in respect to American assets. At any rate this seems to be bad law and the dissenting opinion of Chief Justice Stone must appear fully convincing to most international lawyers. However, it deserves to be mentioned that the decision can be seen from another point of view, easier to defend than that of the majority. As all American transactions of the Russian company were settled, the question was only who —the U.S. Government or the foreign creditors and shareholders— was most proximate to take the proceeds of liquidation. It can be seen, *inter alia* from the Litvinov agreement, that the intention was to use the Russian assets under this agreement to compensate American investors and other American subjects suffering from the Revolution and the subsequent nationalizations in Russia. To give one's own subjects such a preferential claim to the assets is certainly not beyond criticism, but it is after all only what has been practised in other countries besides the United States and is less startling than enforcing a foreign confiscation. As will be

seen from the above the decision was influenced also by the Litvinov agreement. The role of such international agreements in confiscation matters is further commented on in the last part of this article.

Yet another case which seems to run against the rule that the confiscation of a debt will not be executed by courts outside the confiscating country is *Lorentzen* v. *Lydden* (K. B. 1941). But a closer study of the circumstances in that case reveals that, although Lorentzen had not been entrusted with any powers by the Norwegian Government, there was very little reason to believe that the shipowners, who did not appear in the court and most of whom were known to be Norwegian patriots, did not acquiesce in or approve the action of Lorentzen. Certainly the fact that Great Britain and Norway were at war against the same enemy also influenced the decision.

Another type of situations arises when *a claim for money put forward by the original creditor is met by the debtor with the plea that the confiscator is now the true creditor,* by virtue of the confiscatory decree. A dividing line here will be whether the debtor has paid the debt or not. Often, perhaps usually, the fact that the debtor has already paid the confiscator has—as in *Stevens* v. *Griffith* (US SpCt 1884)—not relieved him from paying the amount again to the original creditor; and when the debtor has been relieved from paying the original creditor, the stated reason, or at least the *ratio decidendi,* may have been that the creditor was more proximate to bear the risk of confiscation than the debtor.[3] But with the payment still pending, there is less reason to accept a plea of the above-mentioned kind by the debtor. Such a plea can sometimes be regarded as an attempt of a debtor, who himself has suffered from a confiscatory program, to reduce his losses by compensation at the expense of his creditor.[4]

Often it will also be rather difficult to distinguish a plea by the debtor that the confiscator is the true creditor and that the debtor has already paid his debt from a plea, that the debtor has been relieved from his responsibility by virtue of the confiscation. In the last-mentioned case the confiscation may also be compared to a sudden casuality of any kind, i.e. a sort of risk, and the legal approach (outside the confiscating country) to the confiscation may be considered as a question of distributing such risks. In that way the different questions merge into one other and the practice

[3] *Id.* pp. 291 f. note 84, 85.
[4] *Id.* pp. 292 ff.

of the courts in these matters is to some extent contradictory or diffuse and uncertain.

Finally we have, in dealing with debts, to say a few words about situations where debts are involved, in the same way as a tangible confiscate, in an action by the original owner for restitution. Certainly, it must be most uncommon for the original creditor, whose debtor has already delivered his payment to the confiscator, to try go get the payment back from the confiscator. It will occur only under very special circumstances. In the German courts at least one case is known, *OLG Braunschweig 10.8. 1948* (Der Buchhandler Dr. K. *v.* T. in Leipzig), where a confiscator, actually a so-called *Treuhand* for an enterprise, after having collected payment belonging to the latter, was obliged to release it for the benefit of the original (beneficiary) owners.

We have previously found that as regards confiscation of tangibles the place of the effective taking into possession of the confiscate is of great importance, especially since a confiscation, being executed in the confiscating country, has frequently been accepted even outside the confiscating country. As to confiscation of debts there is no correspondence to such a taking in possession of the confiscate and the place thereof. In return, it seems that the place of the lawsuit gains in importance. So, when it has been possible to institute proceedings outside the confiscating country, no "recognition" seems, as a rule, to have been attributed to the foreign confiscation. When, nevertheless, the original creditor has not always been successful in his claim for payment, this is probably due to other considerations than "recognition" of the confiscation, e.g. to considerations of how the confiscation risk should properly be distributed.

Bonds and securities

Cases concerning confiscations of *bonds and securities* may be divided into two groups. Some of them concern claims for delivery or restitution of documents or claims for damages as compensation for the loss thereof. Here the original owner of the documents seems to have been treated in a way not less favourable than owners and possessors of tangible things.[5] Another type of case is that where the original holder of the document demands the payment of the underlying debt without being able to present the document—sometimes in competition with the confiscator, the

[5] *Id.* p. 296 note 101.

latter then being in possession of the document. There are cases where a debtor, who has already paid to the confiscator as holder of the document, has been obliged to pay once again and this time to the original possessor of the document, the latter being considered the true creditor in spite of his having lost the document; *Kongeriket Norges Hypoteksbank* v. *Bergens Provincialloge et al.* (Norway SpCt 1948).[6] And when, conversely, a debtor has been relieved from paying to the original creditor who has lost his document, the decision seems, at least to some extent, to have been based on special circumstances such as the nature of the pressure under which the debtor paid to the confiscator. The practice, however, varies very much according to the type of document and the other circumstances involved. To sum up, it may be said that confiscations of securities and bonds differ both from confiscations of tangible things and from confiscations of simple debts. It will appear that for confiscatory purposes the possession of the document is not assigned the same weight as for other purposes of a more normal common or civil law nature. Instead, the stress is laid on the situation of the material assets of the debtor and the actual possibilities of enforcing, independently of the document, payment from the debtor.

Literary and industrial property

Confiscation of *literary and industrial property rights* such as copyrights, trade marks and patents may be treated more briefly. Legal scholars often start their analyses of the effect of confiscation of such rights with speculations about the *"situs"* of the property concerned. But such property rights cannot be "situated" anywhere—far less so, indeed, than debts can. For our purpose, however, it is enough to state that original holders of non-material property rights, being attacked by a confiscation, have in all essential respects succeeded in their actions before courts and authorities outside the confiscating country.[7]

Companies

Confiscation of companies, i.e. their nationalization, calls for a separate treatment. From a dogmatic but superficial point of view the crucial question in these cases might seem to be whether the

[6] *Id.* p. 296 note 103.
[7] *Id.* p. 299.

company had been dissolved or not, and whether the dissolution ought to be recognized outside the confiscating country or not. But whatever position is taken, yet more important questions remain, namely to whom the assets outside the confiscating country should be delivered and whether the debts of the confiscated company should be paid or not. Here again it seems suitable to distinguish some different type situations. Accordingly, we will speak of *active legitimation* and *passive legitimation*. The former of these notions can be said to reflect the circumstances making it lawful for a person or a group of persons to claim money, property, and the like on behalf of the confiscated company; and the latter notion to reflect the circumstances under which a person or a group of persons is deemed a proper representative of a confiscated company in its position as debtor. It appears at once that cases like *Russian Reinsurance Co.* v. *Stoddard* (NY CA 1925) and *Banque I. de C. de Petrograd* v. *Goukassow* (H. L. 1924) concern active legitimation, while e.g. *James & Co.* v. *Second Russian Ins. Co.* (NY CA 1925), *Deutsche Bank und Discontogesellschaft* v. *Banque des Marchands de Moscou* (C. A. 1932) and *Deutsche Bank* v. *Banque I. de Petrograd* (CA Paris 29.3. 1938) concern passive legitimation. To understand the attitude of the courts it may be useful to keep in mind that the decisions in cases of one of these types do not prejudice the solution in cases of the other type. Mixed cases appear, too, where questions both of passive and of active legitimation arise, e.g. *Employers Liability Ass. Co.* v. *Sedgwick Collins & Co.* (H.L. 1926) and *Lazard Brothers & Co.* v. *Midland Bank* (H.L. 1932).[8]

The case law about foreign confiscations of companies and active and passive legitimation is instructive from many points of view. In several aspects the solutions adopted differ from what might be expected to follow from the ordinary rules of municipal law and of conflict of laws. In spite of the recognition of the dissolution of the company, courts have, under the pressure of the circumstances, considered as proper representatives of the company single persons or groups that otherwise would not have been accepted as authorized to act on behalf of the company. Thereby its creditors and shareholders generally have, with the exclusion of the confiscator, been considered beneficiaries of the remaining assets of the company. This attitude is further emphasized in other groups of cases concerning the administration and liquidation of company property outside the confiscating

[8] *Id.* pp. 301 ff. note 134, 144, 145.

country, the distribution of the assets between debtors and shareholders or holders of preferential claims. A common opinion here is to exclude persons who, because of their actual domicile in the confiscator's country, can be identified with him or presumed to be forced to place their share in the liquidation at the disposition of the confiscator; *Wright* v. *Nutt* (1788), *Van Der Heyden* v. *Sté Tanneries d'Azow.* (TCom Liège 25.3. 1938), *Irving Trust Co.* v. *Deutsch-Atlantische Telegraphengesellschaft* (NY SpCt 1940).[9]

On the other hand, courts or legislators have in some countries, with the exclusion of the shareholders and foreign creditors, given their own nationals preference to the assets. It has happened, too, that the *fiscus* of the judging country has tried to appropriate the proceeds of a liquidation for its own use. Of both these aspects the above-mentioned *Belmont* and *Pink* cases offer good illustrations.

The confiscation risk

In the foregoing discussion the author has touched upon the problem of *the confiscation risk and the distribution thereof.* If a Russian princess leaves her jewels on deposit in the vaults of the Russian branch of a French bank, and the jewels are taken from the bank by Soviet-Russian authorities in virtue of a confiscatory decree, we have the main ingredients for a question of risk distribution. If, further, the princess sues the bank in a French court and the court gives judgment in favour of the bank, this ought not to be taken as the court's "recognition" of the Russian confiscation.[1] Or, to take a more lucid example: If a bailee is robbed of bailed property and the bailor is found no longer to have any valid claim against the bailee for his deposit, nobody would, on that account, speak of "recognition" of the robber's theft. It is a question only of who should carry the risk, the bailor or the bailee. Questions as to which of two contracting parties should bear the loss can be answered without taking any position as to the question of the "validity" or "recognition" of the confiscation. And many cases, which on the face of them seem to deal with "recognition" of a foreign confiscation, could be better understood if viewed from the angle of the distribution of the confiscation risk. Evidently, it is not only confiscations of tangibles that raise questions

[9] *Id.* pp. 313 ff., cf. note 171, 172 with further references, and contrast: *Bauer Marchal & Cie* v. *Pioton et al.* (Civ. 2.3.1955.)

[1] *Id.* pp. 318 ff. note 189.

of risk distribution. In principle, the problem will be the same also in respect to confiscation of debts, companies and other intangibles. As an example we may take an insurance company which has paid the compensation to a confiscating state and not to the insured person, and then is sued for payment by the latter; another example would be a bank customer with a rouble account at the Russian branch of an American bank and claiming—following the nationalization of the Russian bank—payment at the bank's head office in New York.[2]

In all legal systems there are different complexes of rules which have the object of distributing certain risks between contracting parties; it is enough here to recall such doctrines as "*casum sentit dominus*", "*impossibilium nulla est obligatio*", "*rebus sic stantibus*", "frustration", "*die Geschäftsgrundlage*" etc. Such doctrines will be found applied in confiscation matters also, even if that does not necessarily mean that they could be so applied without any modification with respect to the special type of risk in question.

Though it is to be recommended that in confiscation matters questions of risks should be distinguished from questions of recognition, one may often find it difficult to make such a separation, as to some extent the two questions may merge into each other. This will also show the links and interaction between the rules of municipal law and of private international law in confiscation matters—when otherwise distribution of risks is generally regarded as a question of municipal law, and recognition of confiscation and other questions about the confiscator's property right in the confiscate as belonging to private international law.

Interesting illustrations to these problems are the two English cases *Wright* v. *Nutt* (1788) and *Folliott* v. *Ogden* (1789—1792) which, though old, possess a striking actuality.

Wright, an English Loyalist during the American War of Independence, had become indebted to a certain Brewton. On behalf of Brewton's successors residing in America Nutt claimed payment, and judgment against the debtor was obtained. The property of Wright, as of other English Loyalists, had been confiscated in America and from their property a fund had been established for the paying of creditors. For some reason, however, the creditor preferred to claim payment from Wright in England. But the court then ruled in equity that the action against the debtor should be stayed. The creditor was considered to be under the duty to claim payment first in America out of the funds there,

[2] Cf. *id.* p. 318 note 187 (p. 316 note 184, p. 292 note 85, p. 294 note 93).

the judge saying, "and you shall demonstrate to me that you have proceeded to make it available *bona fide,* and that you have neither for the fraudulent purpose of obtaining double satisfaction, nor the malignant purpose of plaguing your debtor, made your claim in this country".

Shortly after this, in *Folliott* v. *Ogden,* an action at law, the court had to decide on a similar claim. Here, however, the debtor and the creditor were both English Loyalists whose property had been declared confiscated in America and who had taken refuge in England. The debtor pleaded *inter alia* that the creditor was deprived of his claim in virtue of the American confiscation decree, but the court—though at the same time approving *Wright* v. *Nutt*—upheld the creditor's claim. Thus not only was the right of the confiscator rejected but the confiscation risk was put on the debtor. In *Wright* v. *Nutt,* on the contrary, the confiscation risk struck the creditor. The reason apparently was in the latter case that the beneficiaries under the debt had so established their solidarity with the confiscator that the claimant could for this purpose be identified with him. Such a solution seems fair not only from the viewpoint of risk distribution, but—in so far as it could be open to suspicion that the creditor was only acting as a tool for the confiscator—such a position of the court was necessary, if the refugee was, as later Buller J. said in *Folliott* v. *Ogden,* to be "protected against the designs of artful men who could gain possession of it [the property of refugees] by any means". Here we could see again how a question of risk transcends into a question of the confiscator's right.

Indeed, such claims as in *Wright* v. *Nutt* raise one of the most startling problems in modern confiscation practice. Nowadays confiscators show a special inclination to appropriate the assets of an enterprise or of a person, leaving the liabilities of the deprived to be paid out of his foreign assets. This, if not met by courts outside the confiscator's country, enables the confiscator to eliminate, with the assistance of creditors, even foreign assets. In some countries, as in Federal Germany, the legislator has intervened, in others, as in Sweden, the problem—though urgent after two alarming decisions in *Morska Centrala* v. *Kozicki* (Sweden SpCt 1951, reversing the decisions of the lower courts) and *Zjednoczone Stocznic Polskie* v. *Konkel No.* 2 (Sweden SpCt 1952, also reversing the decisions of the lower courts)—remains unsolved. Here it must be noted, however, that there are courts that have, without the assistance of the legislator, succeeded in mastering problems of similar kinds. Thus

n *Peter Buchanan Ltd in Liq.* v. *McVey,* (Eire, Dublin SpCt 1951) a claim for payment of an originally genuine civil debt was rejected because of discovery of underlying circumstances which meant that the payment would be appropriated exclusively for tax purposes in a foreign state.

4. THE THEORETICAL GROUNDS

Immunity

After this rather brief survey of the practice of the courts in confiscation matters we will raise the problem of the reasons given in the decisions. Naturally, there are many variations in the reasons stated, depending on the period and country involved, but some main lines can nevertheless be discerned.

First some words ought to be said about the *immunity of foreign states.* Many decisions about confiscation have been based on immunity rules. It may be believed, however, that the principles behind the immunity rules are an outcome of considerations about the relations between states in general and have not been specially devised for confiscation matters. Therefore, if the decision, according to the stated reason, is based on immunity rules, there is little ground for taking this as a support for the validity or the recognition of the foreign confiscation. Even if the opinion contains some statements about the confiscation, it seems wiser to lay the stress on the immunity rules and take the other for what they then are, namely *obiter dicta.*

It is also important to keep in mind that the immunity rules have their rather narrow limits, and that beyond these they can no longer give any protection. The immunity rules protect the foreign state in its capacity of defendant or possessor of things capable of being possessed, or owner of such things. But when possession has been lost or property has been transferred to a new acquirer, the immunity rules do not cloak the previous situation with the veil of legality. Nor do the immunity rules give any support to a foreign state which is not in actual possession of the litigated thing but only claims a right to it by virtue of confiscatory measures or decrees. The protection afforded by the immunity rules is therefore, in principle, only temporary.[3]

[3] *Id.* pp. 324 ff.

In fact, however, the immunity rules will constitute a very strong shield against claims for restitution. If this protection should, as a consequence of the evolution of the immunity rules which is always going on, be abolished or diminished, it might be necessary to reconsider, in the light thereof, court practice about recognition of confiscations and restitution of confiscated property. The possibility of such an interaction between the immunity rules and the rules about restitution is certainly a very interesting topic, but it cannot be dealt with here.

Diplomatic recognition

Another element that often appears in the opinions is the recognition of new states and governments, i.e. what is here called diplomatic recognition. It would seem that this reason is assigned undue importance in confiscation matters. All rough generalizations in this connection must be met with scepticism, and the very fact that different countries have different practices in recognizing states and governments is an argument for caution in drawing any general conclusions from a diplomatic recognition.

Admittedly, in English courts the question of recognition or non-recognition will in special situations—as was the case in *Luther* v. *Sagor*—decide the case, but as regards American courts and numerous American cases the words of Professor Re seem more appropriate: "Although in almost all of these cases the result has been correct, it is to be observed that the correct result was not reached by virtue of the importance attributed to the element of recognition, but in spite of it".[4] And in many other countries, e.g. in Sweden—and far more markedly in Switzerland—the courts attribute no importance to the element of recognition in confiscation cases.

A realistic opinion seems to be that diplomatic recognition only confirms that the recognizing state considers the recognized government as the proper representative of the foreign state, as regards negotiations, protection of nationals, succession to state property, etc. The recognition does not as such have any bearing upon the question of what rules a court has to apply in lawsuits where private persons are involved. Such questions are internal matters which each country has to solve according to law, equity and convenience either by legislation or by judge-made law. The private international law of the country may refer to any rules

[4] Re, *Foreign Confiscations*, New York 1951, p. 127.

whatever, whether they originate in custom or in legislative acts of foreign rulers. The circumstance that a rule has been established in fact is more important than a foreign act of promulgation.[5]

Confiscation under international law

In matters of foreign confiscations it is sometimes pleaded that the actual confiscation is illegal under international law. Such a plea raises two problems: (1) What are the requirements of international law as to confiscations? (2) Has this any relevance to litigations in national courts?[6]

It is beyond doubt that in certain respects international law puts no obstacles in the way of a state which wishes to expropriate foreign property against compensation which is adequate, effective and prompt. This has led some writers to the conclusion that the taking of the property could never be deemed illegal, only the refusal to give compensation. Accordingly, a refusal to pay could not give a valid ground for claiming restitution of the property, because the acquisition of the property was unattained by international law. Whatever the merits of such a distinction may be in international law and before international courts, it is believed that it has no immediate relevance when a national court has to adjudicate a claim for restitution.

Some writers now even claim that the fact that a confiscation might be illegal under international law has no relevance at all for national courts. Admittedly, the national courts of one country do not have to settle the law between nations. No decision, however, is, e.g. in an action for restitution, to be taken as between two states, the illegality under international law being only a prejudicial question for the decision of the national court. It only seems useful, if national courts adopt such a practice as regards disputes brought before them, that a state as well as persons deriving their right from that state should not share the benefits of an illegal act emanating from that state.

Whether the illegal act consists in the taking of property or in the refusal to pay compensation seems less important, if the restitution to the original owner ordered by a national court (subject to immunity rules) can be considered an appropriate municipal law reaction on the illegal act, whatever that may be. It is, however, not enough to establish the illegality of the act under international

[5] Hjerner, *op. cit.*, pp. 337–339.
[6] *Id.* pp. 340–344.

law. A strict rule that such an illegal act shall have no effects in the national jurisdiction cannot be assumed. Other circumstances than the illegality must also be taken into consideration, e.g. long possession or the position of a *bona fide* buyer. One injustice cannot be taken as a pretext for another, and the reaction of the national courts against an illegal act of a foreign state must be so limited that the inconveniences do not strike innocent persons without any liens to the illegally acting state. How this is to be done is a question not answered by international law, which in itself here affords no guidance.

Normal private international law rules

A reasonable approach to foreign confiscations might appear to be to apply what is said to be "normal" or "ordinary" private international law rules. Thus questions of property would be adjudged according to *lex rei sitae*. Against such a proposition must be advanced, first, the argument that at least in Scandinavian law the concept of property has no absolute meaning but is broken down into smaller components.[7] Property may be described as the protected position of the owner. The question is not the absolute one whether a position is protected or not but against which groups of claimants the protection prevails. It should first be asked whether the assignee has a valid claim against the assignor—which could be called the question of the transfer of the property *inter partes*. Then will come questions as to whether and to what extent such an assignment is protected against claims of third parties, e.g. creditors of the assignor, a former lawful owner, a *bona fide* buyer and so on. It is to be supposed that all these "property" questions do not, even in "normal" circumstances, follow the same private international law rules. Even such a limited problem as the right of an acquirer against his predecessor involves such different categories of persons that analogies between confiscations and other acquisitions would not be permissible. As regards sales, the question, for example, of the buyer's right against the seller, i.e. the transfer of the property *inter partes,* is—at least in Scandinavian law—adjudged according to the proper law of the contract. But acquirements of tangibles through confiscation are not made by contract and there is consequently no proper law of the contract to apply. And in some

[7] Cf. *supra* note 2 and Ussing in 7e *Conf. de la Haye de droit int. privé, Actes,* La Haye 1952, pp. 69 ff.

other acquirements—such as inheritance—which like confiscation are not based on the expressed intention of the former owner, *situs rei* is of no or only minor importance. Yet further similar examples could be mentioned. Accordingly, it seems that no answer as to the property in the confiscated thing can be deduced from the proposition that property questions are governed by *lex rei sitae*. In any case, the legal term *lex rei sitae* does not tell us anything about which *situs* is meant, the place where a thing has once been or the place where it is actually situated at the time of the judgment. An adequate manner of putting the question would instead be to ask: According to which law or which rules have acquirements through confiscation to be adjudged by courts outside the confiscating country? What—by such courts—is to be considered the proper law of confiscation? What has been said is primarily of importance with regard to disputes between a dispossessed original owner and the confiscator, but the corresponding problem will arise when any party is basing his legal position on a right allegedly derived from the confiscator.[8]

The question of the *bona fide* possessor can be treated quite briefly. The doctrine of *bona fide* concerns the problem of the legal effect of good faith, i.e. ignorance, with respect to the *facts* involved.—But, in general, good faith with respect to the legal situation protects nobody: *ignorantia juris nocet*. And most assignees of confiscated property know very well the origin of the property which they have acquired, i.e. they know the relevant *facts*, but plead as an excuse their belief that the confiscator will turn out to be regarded as the true owner, even when he, *post liminium*, is transporting the confiscate to other countries. But this is exactly the legal problem which is in point: Should the confiscator still be regarded as owner when the confiscate has left his territory and his power to put his intentions into effect is exhausted? Obviously, rules such as *possession vaut titre* and other

[8] According to a theory advanced by Gihl ("Lois politiques et droit international privé", *Recueil des Cours* 1953, Tome 83, pp. 240 ff., cf. Gihl, "Two Cases"—see next footnote—pp. 63 f.) the title of an acquirer should be appreciated by the law of the place where the litigated object was situated at the time of the defendant's acquirement—and as a consequence thereof also the question of the conclusiveness of the confiscation should, as a matter of interpretation, be answered by that same law.—Even if such a theory may be supported by—as Gihl says—"la bonne logique juridique", it is difficult to read it from decided cases. Relevant for courts outside the confiscating country seems to be the place where a confiscation was executed, and compared thereto the place where the defendant acquired the confiscate seems to be of less importance.

similar rules about the burden of proof have no bearing upon these problems. It is only insofar as the relevant circumstances are unknown or dubious that such rules operate. Once the circumstances are revealed under which the possession is obtained, the court duly has to take them into consideration when examining the lawfulness of the acquirement.[9]

Speaking of normal private international law rules and the theory that they should also govern questions of confiscation, the normal rule governing a debt is certainly the proper law of the contract under which the debt has arisen—but a general rule that confiscations of debts shall be governed by the proper law of the debt would have no support, either in the practice of the courts or in legal doctrine. This, however, does not exclude altogether the possibility that certain effects of a confiscation already executed—e.g. the compelled payment of the debt to a person other than the original creditor—may be adjudged according to the proper law of the debt. If, on the other hand, the attempt is made to construe a *situs* for a debt or for an industrial or literary property right in order to apply the *lex rei sitae* on a right thus localized, we are on another line of thought, namely the doctrine of territoriality.

Territoriality

Another purported ground for the case law about foreign confiscations is the territoriality of confiscatory decrees or their territorial limitation. All such speculations about territoriality, however, must be of little value unless it is stated *in what respects* the law is territorial. Not even with respect to tangibles—the least complicated part of the problem—is there any unanimity as to how this territoriality operates. As examples we may here mention *The Navemar No. 2* contrasted with *The Rose Mary*. In the latter case the court stated—supporting a claim for restitution of confiscated oil—that the nationalization took place in Persia, but the refusal to hand over the oil took place in Aden. Thus, the territoriality concept does not tell which *situs* should decide, the main alternatives being that at the time of the effective taking into possession of the confiscate or that at the time of the lawsuit. Another

[9] Cf. Art. 2279 Code civil and French cases annotated under that article (Edition Petits Codes Dalloz). For a different view, see Gihl, "Two Cases concerning Confiscation of Foreign Property", in *Liber Amicorum of Congratulations to Algot Bagge*, Stockholm 1956, p. 63.

serious objection to the territoriality doctrine is that debts and industrial and literary property rights like trademarks and patents can have no *situs* in the strict sense of that word. It is only a legal fiction to say that such intangibles have a *situs,* and the purpose of the fiction is merely to enable a court to apply—after having attributed that merely fictive *situs* to an intangible thing—the *lex rei sitae* as if the intangible were a tangible, situated at the place in question. It would appear to be one of the gravest objections against most confiscation literature that so much labour is devoted to empty efforts to construe the *situs* for intangibles. Instead of asking for the *situs* of the debt, we should ask for the *rules* according to which confiscations of debts and other intangibles have to be adjudged—and when we are looking for the answer to that question the territoriality concepts are not of very great utility, and may even be misleading.[1]

Enforcement, recognition and sacrosanctity of foreign acts of state

Another theory is based upon the distinction between the enforcement of the foreign law and the recognition of its effects, especially the recognition of foreign acts of state, the two latter aspects being said to involve no "enforcement" of the foreign law. To this it could be said that the taking into effective possession of a tangible confiscate is a distinguishing mark of real importance, which must of course be taken into consideration—but the distinction between the enforcement of law and the recognition of its effects is merely verbal, especially as regards an intangible confiscandum, and cannot be allowed to decide practical questions of extreme importance. It seems also instructive here to stress the difference between a mere application of *lex rei sitae* and the "recognition" of a foreign act of state which has taken place on the territory of that state. If *lex rei sitae* is to govern the question, the court will apply the law of the foreign place and judge the lawfulness and the legal consequences of the act according to the law in force at the place where the act occurred. But the sacrosanctity of a foreign act of state will mean much more. Whether the requirements of *lex rei sitae* are fulfilled or not, the foreign act is attributed just the same consequences as a judgement rendered by the court itself, or as is said in the American case *Ricaud* v. *American Metal Co.* (US SpCt 1918), "... the details of such an

[1] Hjerner *op. cit.* pp. 349–352; 423–427; 233–236.

action or the merit of the result cannot be questioned, but must be accepted by our courts as a rule for their decision".

The sacrosanctity of foreign acts of state, however, is a specifically Anglo-American doctrine having its origin in old English constitutional law and cannot be accepted as a base for a general theory about the effects of foreign confiscations.[2] To this great and complicated question there is only space here to stress the misleading character of the very frequent statements that not to recognize an act of a foreign state would amount to sitting in judgment on acts of the foreign state. Courts outside the foreign country, however, do not rehear the case once it has been decided by the act of the foreign state—they only have to decide whether out of the law *they* are administering, they want to attribute any effects to the foreign act and, if so, what effects. They cannot reasonably be said to impair the foreign sovereignty thereby and it is difficult to find any settled state practice or rule of international law precluding one state from attributing or not attributing any effects whatever to acts of another state.[3]

Public policy

Public policy, lastly, is a very wide and undetermined concept, the contents of which differ in different countries. For some writers and courts this concept will serve as a general heading covering aspects which by others are advanced under various other headings, such as the compatibility of the confiscation with international law or the territoriality of the confiscation.

It is a widespread opinion that confiscations against compensation must be treated otherwise than those where compensation is not granted. It may be doubted, however, whether any distinction of practical importance is to be upheld in this respect. From experience we know that compensation is almost always promised and—as far as concerns such confiscations as have ultimately resulted in lawsuits of any kind outside the confiscating country—almost never paid. There is no reason why a vague promise to pay should move the court to deviate from its ordinary course in confiscation matters. Only if the compensation is—as according to French requirements—"juste et préalable" or at least paid before the lawsuit, ought any weight to be attibuted to it. So a claim for restitution is very likely to be withdrawn when just compensation

[2] *Id.* pp. 432–435.
[3] *Id.* pp. 435–440.

has been paid. In such a case, the confiscation from the point of view of public policy also may be considered less exorbitant.[4]

Purely dogmatic are such propositions as that there is no room at all for public policy in confiscation matters, because public policy could not be pleaded in "prejudicial" questions, and, when the confiscation decree is not in a prejudicial position but about to be applied, pleading public policy would not be possible as foreign confiscation decrees were not applied at all.[5] On this it may be noted that courts, unhampered by such theories, have used the public policy argument in all kinds of situations, prejudicial ones as well as others.

Concluding remarks

Taking everything together, no single one of the generally advanced theories about the effects of foreign confiscations seems to be quite adequate and quite sufficient by itself, though a combination of them all could give reasonable results. But how, in such a case, is this combination to be made? To me it seems that this problem cannot be answered with one general formula but must be broken down into parts, each one of them treated according to its own merits, and a true individualizing method thereby introduced.[6] But general talk about an individualizing method does not mean very much unless one explains the way in which this individualizing has to be done. However, by grouping the many different cases about foreign confiscations in type situations and distinguishing the one from the other as seen above (pp. 183–194) some main features in such an individualizing method have been drawn. In the following section of this article, some further principles which are to be read from and which guide the case law reported will be commented upon.

5. RATIONALES

If only those reasons which are openly stated in the judgments were to be taken into consideration, the attitude of courts towards foreign confiscations would make a contradictory and confusing

[4] *Id.* pp. 352–356; 467–476.
[5] *Id.* pp. 428–432, 472; cf. Gihl, "Lois", pp. 217 ff., 229 ff., 244 ff.
[6] *Id.* pp. 444–446.

impression. On the other hand, the practical solutions of problems involved do not diverge so widely; on the contrary they tend to coincide, at least on some main points. This raises the question whether such tendencies could be explained by any common *ratio decidendi* not explicitly pronounced but nevertheless inherent in the decisions.

First, some negative conclusions may be drawn. Dealing with normal private international law, such principles as those of *equal treatment, unification* and *reciprocity* may often give some guidance. However, neither would an equal treatment of foreign confiscatory decrees and of those promulgated in the judging country be possible, nor would as regards confiscations the unification between the confiscating country on the one side and other countries on the other be acceptable as a principle. Unification, moreover, is not desirable *per se* unless the solution which is to be uniformly adopted is a good one. Whether and to what extent any reciprocity should be practised could be open to some doubt. Concerning confiscations, taxes, etc., governments sometimes are competing with each other for the obedience, efforts and property of the individuals. This affords no good basis for a policy of reciprocity, and even when no conflicts of governmental interests are actualized, the question arises what the confiscating country has to offer in return for its claim—for no true reciprocity can be established without an exchange of benefits. In double taxation treaties e.g., mutual assistance in collecting taxes will not be afforded if not at the same time each contracting state undertakes to limit its own tax claims even in respect to persons living in that state. No such limitations can be secured by courts when introducing reciprocity. Therefore when, as in confiscation matters, reciprocity cannot be based expressly on a treaty, there is little scope, if any at all, for courts to introduce a policy of reciprocity.[7]

Now if principles and standards such as those of equal treatment, unification and reciprocity are not sustained by the cases, can any positive conclusion be drawn from the material?

As far as I can see, the point of departure and the most important aspect of the problem must be the *potestas de facto,* i.e. the power in fact to regulate in law the transactions of the parties. This power depends not on any theories about jurisdiction, territoriality, or sacrosanctity of foreign acts of state but

[7] *Id.* pp. 237–247.

exclusively on the efficiency of the coercive measures at the disposal of the courts in the judging country, i.e. outside the confiscating country. It is from that point of view that the actual *situs* of a thing, when tangible, must be deemed so important in confiscation matters. As regards debts and other choses in action, however, measures with a considerable mass of efficiency can be taken as soon as the debtor possesses property in the judging country so that a writ can be served there and a judgment executed. This explains, too, why theories based on a fictive *situs* of a debt or another intangible or on the reciprocal competence of states to confiscate are all unsatisfactory. As to confiscations of intangibles, there may be two or more states that at the same time have power to enforce and uphold or to undo a confiscation, and then no uniform solution is to be expected, at least not between the courts of the confiscating country and the courts of other countries.

The power in fact invested in the judging country and its authorities, however, is not enough to explain the practice of the courts in matters concerning foreign confiscations. It draws the limits of the possibilities of an action when successful but does not say anything definite about whether and to what extent such an action will be supported by courts outside the confiscating country. A very strong trend and motivating factor in the judicial decisions seems to be the desire of such courts to protect persons against confiscation and its consequences, *the protection (or asylum) aspect.*[8] Irrespective of the confiscation policy of the judging country itself, its courts seem to use their power in fact to protect the original owners and titleholders from confiscatory actions and encroachments emanating from foreign states. The protection aspect is especially prominent when a confiscator tries to take posession of the confiscate through an action outside his own borders, or when a debtor-defendant refuses to fulfil his obligation, pleading that the right of the plaintiff and original creditor has been transferred to the confiscator by virtue of the confiscation. The principle of protection is also very strongly advanced when courts outside the confiscating country are reserving the foreign assets of a nationalized company for the benefit of its creditors and former shareholders. This principle has found one of its most pregnant expressions in the well-known English case *Folliott* v. *Ogden* (1789–1792) already referred to, where Lord Loughborough emphatically

[8] *Id.* pp. 358–360.

declared that a fugitive arriving in England "comes with all his transistory rights; — — — and cannot be affected in this country, by proceedings against him in that which he has left, beyond the limits of which such proceedings do not extend".

The denomination of this principle as a principle of protection or of asylum might perhaps cause misunderstanding and confusion with the right of asylum settled in the law of nations, where the granting of asylum is entirely in the discretionary power of the state whose protection is sought. It is not the intention to introduce such a granting of asylum by the courts in private property matters. The courts must, as before, decide according to legal rules and must not have resort to any discretionary granting of asylum. By a private property asylum, however, all that is meant is that the legislatures, as well as the courts in establishing judge-made law, have to take into consideration the same humanitarian considerations as have led to the state practice of granting asylum for the person of the refugee. The individuals—whether they have succeeded in escaping from the foreign state power or have been detained there against their will—are deserving of protection to property as well as to person.

If the protection is to be effective, the court cannot give it up merely because the foreign power pretends that the act in question is not confiscatory. On a close investigation of the foreign decrees, as well as their purpose and application in the particular situation, disguised confiscations will often be revealed. The case law on foreign confiscations also offers many examples where courts have proceeded to a close enquiry into the true character of the action, treating it according to its substance instead of its outer form, an approach which could be called *the maxim of investigation,*[9] i.e. that measures of a potentially confiscatory character are never taken at their face value, but are accepted only after an investigation, estimated according to their true nature, their general purpose and the purpose of the application of the decree in the particular situation. Thus, no disguised confiscation ought to be treated in a way more favourable to the confiscator than if the confiscation had been an open one: on the other hand a treatment of the measures according to their pretended innocent nature is left open if this will be less favourable to the confiscator than if the measure were to be regarded in all respects as a confiscation.

A good example is afforded by cases concerning foreign com-

[9] *Id.* pp. 390–393.

pulsory administration.[1] In some respects these have to be treated as real and open confiscations. When, however, the administrator takes the position that he is not the holder of the title but only a "*Treuhand*" and representative of the holder of the title, a single person, this could be turned against him in the way that from the viewpoints prevailing in the judging country there is no need for a representative to appear on behalf of a person who is personally present at the court and is of full age and of sound mind. It may also be noted that for the achievement of the purpose of protection statutes and decrees of a confiscatory or otherwise odious nature will, *in dubio,* be interpreted and applied in a restrictive way—*odiosa sunt restringenda*—and a *principle of restrictiveness* (or restrictive interpretation) will thus be established.[2] This can be seen not only in the interpretation of statutes but also in the shifting of the burden of proof, in the requirements of proof and so on.

But even handled in this way the principle of protection has its limitations. It seems doubtful whether it can be pleaded when the person prejudiced by the confiscation wants it to be maintained or carried out. Sometimes a so-called voluntary declaration by a person living in the confiscating country may be revealed to have been obtained under pressure and that person's assignment of property will thereafter be treated as a real confiscation. But it may be questioned if arguments based on the "free will" of the prejudiced person are enough. Nowadays authorities in all states use different forms of threats to induce subjects to act in a certain manner—threats of taxes, penalties, fines and so on. There is no doubt that the fact that a person, if he does not act in a certain way, will be punished by the authorities in his home state, is not always a sufficient reason why declarations by him should be considered invalid as obtained under pressure. On the other hand, it is also clear that certain threats from foreign authorities—even if threats of a similar kind are practised in the judging country by its own authorities—may have the effect that declarations induced thereby will not be taken at their face value. To draw a line

[1] *Id.* pp. 393–395. On the other hand it may be mentioned that actions, confiscatory in form but with a purpose to protect the original owner or to restore his former position, have been adjudged in another way than open confiscations of an odious character, cf. *id.* pp. 388–389 and *State of Netherlands* v. *Federal Reserve Bank* (US CCA 2nd 1953), *Anderson* v. *Transandine* (NY SpCt AppDiv 1941; CA 1942), *Ammon* v. *Royal Dutch Co.* (BG 2.2.1954; OG Zürich 14.4.1953).

[2] *Id.* pp. 393–395.

between these two categories is extremely difficult, and it is, as said before, open to doubt whether the "free will" of the prejudiced can be used as the only test. It may actually occur that the prejudiced person prefers that the confiscation shall be effected and maintained. Perhaps he feels solidarity with the confiscator for patriotic reason—as seems to have been the case in *Lorentzen* v. *Lydden*—or he feels himself threatened by possible penalties, and not being able to leave the country of the confiscator he prefers to see his property abroad requisitioned against the fractional compensation that the confiscator may offer him at home. The latter is very often the case when foreign exchange is requisitioned or the owners are otherwise induced by fine to make a "voluntary" surrender of foreign exchange to the exchange authorities of their home country. In such cases it would be a dubious argument that the handing over to the confiscator would be against the "free will" of the person prejudiced. Nevertheless declarations resting on such grounds ought sometimes to be disregarded and the handing over to the confiscator refused. Here, however, *a principle of isolation* may be pleaded, i.e. that foreign governmental actions will not, as a rule, be enforced, and to some extent, foreign governmental actions will not even be furthered in any way. It is not the task of the courts in one country to execute or tighten the policies of another state, and the courts of one state ought not, even on a reciprocal basis, to range themselves among the tools and organs through whose assistance a foreign state pursues its policies. This principle of isolation has received its most pregnant expression in the attitude of the courts to foreign tax claims. There that principle can more easily be discerned.[3] The practice of the New York and other American courts—starting with the *Weidberg, Landau* and *Bold* cases (NY SuprCt 1939, 1940)—not to remit inheritance to persons residing in countries where, on account of confiscatory measures, exaggerated taxes or unfavourable official rates for the conversion of dollars, they will be deprived of a substantial part of the inheritance has now been settled for a long time and ought to be supported, as to its principles, by other courts also.

The principle of isolation is independent of the intentions of the individuals involved and seems by way of *identification* to be applied even as against individuals who—as in the New York inheritance cases—do not derive their right from the confiscator

[3] *Id.* pp. 253–255, 360.

n any way. This is also in conformity with the above-mentioned naxim of investigation, according to which the decisive point is he substance of the action and not its form. This seems also to urnish an acceptable explanation for the tendency to exclude creditors and shareholders still residing in the confiscating country rom taking part in the assets of a nationalized company.[4]

The principle of isolation may in doubtful cases spare courts the trouble of establishing the true "free will" of the person prejudiced. Such a principle seems also to give clearer evidence than the asylum principle in situations where the needs of protection are not so pronounced, e.g. when just compensation is allowed. The two principles of protection and isolation cover in part the same phenomena and to that extent they strengthen each other. In so far as they do not coincide, e.g. with respect to requisitions against just compensation, divergent opinions may more easily be advanced.

The two principles, however, do not fully and quite satisfactorily explain the practice of the courts in matters of confiscation. It is enough here to recall the very widespread opinion among courts and legal scholars that property which the confiscator has already taken possession of in his own country will not, if thereafter sent abroad, be restituted by courts there. Such a solution seems to be a limitation or an exception from the protection or from the isolation principle. Aspects of that latter kind, however, cannot dominate entirely. The court must be able to legitimate, by legal arguments of the traditional kind, the solution chosen. Sometimes this is easily done, e.g. when the court states as a reason for restituting or not restituting a confiscated thing that the property in the confiscate has or has not remained with the original owner; and sometimes the task has been more difficult, e.g. when legal arguments had to be found by the courts for the creation of a rule reserving foreign assets of nationalized companies for the benefit of their creditors and shareholders. In this connection the shrewdness, the distinguishing power and the ability of combination of the courts are severely tested, the main ingredients in their legal arguing being the rules considered in the above sections (pp. 197–205) of this article.

Further, such legal regulation of matters of foreign confiscations as a court outside the confiscating country is prepared to

[4] *Id.* pp. 360 f., 314 note 171, 172 with further references and *supra* p. 194 note 9. Cf. *id.* pp. 367 f.; 185–186, 573–578.

approve, must show a certain mass of *efficiency* and *stability*. In respect of tangibles, the preconditions for this will be good when the thing in question is at the moment of the litigation situated in the territory of the judging country. On the other hand, requirements of stability make it desirable that possession, once established in a foreign country under the effective protection of the legal and governmental system there, shall not be reversed only for the reason that the thing in question passes beyond the borders of the country and will then be subject to the power in fact of another country. If the foreign confiscations are on a large scale, trade and intercourse with the confiscating country may be upset and brought into disorder or even stopped altogether. When courts outside the confiscating country refuse restitution, disregarding the protection and isolation aspects, such decisions must be regarded as concessions to facilitate trade and intercourse. But for the making of such concessions it must be required that a real stability in the possession of the confiscate has already been obtained which again is dependent on the power in fact. If no such possession is established there is no reason why the courts outside the confiscating country should assist the confiscator in obtaining possession or in strengthening his faltering position. This seems to be the reason why it is usually stipulated by the courts as a condition for their granting of continued possession to the confiscator and his successors that possession was obtained *in the territory of the confiscator*—where his power is mostly unlimited. But if the possession once obtained by the confiscator proves to be so precarious that the deprived owner succeeds in retaking the possession on the confiscator's own territory, there seems to be no reason why courts outside the confiscating country should support the confiscator in his struggle for possession. For they have no ground to repress the opposition against the confiscator by persons living under him, and thus a confiscator's action for revindication of confiscated property, recaptured in the confiscating country by the original owner, ought to be dismissed. For courts outside the confiscating country the relevant facts will be who the original owner was and for whose account the confiscate was brought outside the confiscating country—but other phases of the struggle between the confiscator and his insubordinate subjects seem to be of very limited interest.[5]

Similar considerations apply to confiscations of debts and other intangibles. In respect to confiscates of that kind the power in

[5] *Id.* p. 363 note 16.

fact of the confiscator must very often be considered insufficient to stabilize the legal situation alleged by him. Even if the confiscator succeeds in enforcing payment of a confiscated debt, this will not necessarily mean that the situation is stabilized and that the confiscation of the debt must therefore be recognized. In so far as the debtor has property in the judging state or resides there, the possibility of claiming payment out of his assets there remains. This is in particular the case if the prejudiced person escapes abroad, and, contesting the confiscator's right there, claims payment of the debtor, notwithstanding that the latter has already paid the confiscator. This also affords an explanation why, in respect to confiscation of securities, the situation of the document is less important than the situation of the property of the debtor. The confiscator's possession of the document is on the one hand not enough for him to exploit a debt outside his own country; and on the other hand his possession of the document does not amount to any hindrance in fact to the creditor's obtaining payment.

Industrial and literary property rights are perhaps the best object for the demonstration of the above-mentioned theses. In respect of such rights the confiscator can never stabilize his holding of the property by taking possession of it or by enforcing payment. Such property rights are, in a more definite manner than other rights, dependent at each moment on the protection which the legal system in each particular country affords. Confiscations of trade marks, also, are never as a rule recognized outside the confiscating country.

Here some remarks should be added as to diplomatic recognition. If the confiscator is a rebel government it would, having regard to the requirements of stability, be wise not to recognize the measures of the confiscator as long as a counter-revolution can be expected. As diplomatic recognition generally has to follow as soon as a revolutionary government has consolidated its position, diplomatic recognition should possibly be taken by courts as evidence that stability has been attained. The granting and non-granting of diplomatic recognition, however, also depend to a considerable extent on other circumstances than such a stability test and are commonly used by states for special political purposes. If this is the case it becomes necessary for the court to assess the stability of a situation by other means than the recognition test.

The *weighing* against each other of arguments and opinions of the above-mentioned kind will admittedly be a very delicate task.

As regards confiscation of tangibles, the result is very often likely to be that possession obtained and effectively established on the territory of the confiscator will be upheld also by courts outside the confiscating country. But it deserves to be noted that this is not a rule given by natural justice, the law of nations, the sovereignty of states, their legislative competence, the territoriality of law, etc., but a rule emerging from a compromise between conflicting interests. Wortley's words seem quite adequate in his statement: "En tout cas, il semble qu'une fois qu'un gouvernment expropriant a perdu la possession du bien exproprié par droit national sans indemnité, son titre et celui de ses successeurs peuvent être à la merci de l'ordre public des cours du *situs* étranger".[6]

The maintaining of a possession once obtained by a confiscator may, however, turn out to be such an encumbrance to the conscience of justice, and the protection of the deprived appear so urgent that other considerations must be put aside. It may also be questioned whether international trade and intercourse would really be so seriously injured as has frequently been argued. The greatest inconveniences seem to arise where the judging country has a trade agreement with the confiscating country. But situations where the confiscated property is covered by a trade agreement could easily be distinguished from others, e.g. those confiscations which are mainly aimed at persecuting an individual or a political, religious or ethnical minority. Thus a differentiated practice can very well be adopted here. Against the argument that the law should embody rules favouring trade and intercourse it could be said that a court practice that invites confiscators to use the judging country as a staple for looted and confiscated property may also have its inconveniences. Perhaps it is not of such vital importance as is sometimes believed that intending purchasers should immediately have opportunities to engage in big business, at the same time assisting the confiscator to realize the confiscate on foreign markets. Perhaps it should instead be said that purchasers should not lay their hands on confiscated goods but wait and see.[7]

Special consideration ought to be given to the problems which are connected with confiscations illegal under international law. The taking into possession of the confiscate and the safe position of the confiscator in his own territory would be of little use to

[6] Wortley, "Problèmes etc. sur l'expropriation", *Recueil des Cours* 1939, Tome 67, p. 424.

[7] Hjerner, *op. cit.* p. 365 note 20 a; cf. *P. v. AG K. und P.* (BG 24.6.1948).

ıim, if, in transporting the confiscate outside his borders, he ould not there rely on authorities giving him the same protec- ion as of an owner. Why such a possession, even if obtained by ı confiscator, will frequently be upheld by courts and authorities ɔutside the confiscating country has been explained above. But if he confiscator has taken possession of the confiscate, by an illegal ıct committed against another country and against one of its ;ubjects, it seems too much to expect that the courts of that country ıevertheless should give the confiscator the same protection as that ɔf an owner. Restitution ought therefore (subject to immunity pri- vileges) to be the rule, and the considerations seem to be generally the same whether the illegal act consists in the taking of property ɔr in the refusal to grant compensation.[8]

International treaties and agreements in which one state under- takes to support or enforce a confiscation program of another state are found only exceptionally and in such a case an internal statute can be expected. But without having the character of municipal law or even regulating judicial questions, an inter- national agreement, or the situation of fact that the agreement establishes, may influence the decisions in one or other direction. The importance of trade agreements has already been mentioned and many verifications of this can be found in court practice. One of the most illustrative is perhaps *Luther* v. *Sagor*. An interna- tional agreement can also remove the illegality or the exorbitance from a foreign confiscation. The Litvinov Agreement and the American *Belmont* and *Pink Cases* may here be mentioned, as well as the Rapallo Agreement and the German case law concerning Soviet-Russian confiscations.

Sometimes a certain *solidarity* between two states may also in- fluence the practice. This can be expected in federated states or states with very similar legal and social systems or with the same political ideology as well as between two allies in war and their respective enemy legislation.

Now it must be observed that full protection of a prejudiced person sometimes cannot be granted without encumbering another party. Thus the question of protection and the question of *risk distribution* sometimes are coupled. Some of the main rules and methods as to risk distribution were considered above. It is of special interest here to see whether a person's nationality or his solidarity in any other form with the confiscating country in-

[8] *Id.* pp. 365–366; cf. pp. 340–344.

fluences the decisions of the court. It may be noted that as to foreign exchange restrictions a certain tendency can be observed to put the risk caused by such foreign measures on the party belonging to the country from which the restrictions emanate. From the practice of the courts in matters of foreign confiscations, on the other hand, it is difficult to discern a nationality test being used for the purpose of risk distribution. This may be due to the fact that in most confiscation cases the party in question, though once living in the confiscating country as its subject, has at the time of the lawsuit cut off all ties with that country by fleeing abroad; and under those circumstances there is no longer the same reason to identify such a person with the confiscating country. Therefore, if the nationality of a person from the confiscating country is to be allowed to prejudice his position, it may generally be required that at the time of the lawsuit he shall still be establishing his solidarity with the foreign confiscating country. That will be the case, e.g., when creditors and shareholders live in the confiscating country and claim to be entitled to participate in the liquidation abroad of the assets of a nationalized company. In such cases the question of risk distribution will be put in a very clear way. What is to be done is to apportion insufficient assets between several groups of claimants. It must be considered just and reasonable that persons who establish their solidarity with the government which has appropriated the assets for the benefit of its own nation and its own subjects, should be put after other groups. Otherwise those persons may first as nationals of the confiscating country enjoy an interest in the confiscated property and then, notwithstanding this, compete with other claimants outside the confiscating country.[9]

My analysis and synthesis of the case law concerning foreign confiscations are now concluded. It remains to consider and emphasize some of the main results. A good deal of space has been devoted to demonstrating how unsatisfactory many of the generally accepted theories are. It has been emphatically argued that all speculations as to the *situs* of debts or other intangibles and the territoriality of laws are useless, the real issue being to state the *rules* according to which questions about foreign confiscations have to be adjudged. Most of the theories commonly advanced have been found very ambiguous and it has been seen that some common phrases could without much trouble be distinguished in one way

[9] Vide *supra* p. 194 note 9 with further references.

or other and thus—as the two cases of *The Navemar* and *The Rose Mary* show as regards the territoriality concept—adopted for almost any alternative decision. Has now anything new been substituted for all this? A number of standards—rather vague, it is true—have been outlined and the introduction has been proposed of an individualizing method saying that no sweeping rules can be stated but each type situation must be considered separately, all relevant circumstances being taken into account. It may even be said that the individualizing method is nothing new, such a method being a common approach at least to questions as to which law shall govern a contract. Then it may be stressed that all that the individualizing method here advanced has in common with the individualizing method applied to contracts is that it aims to break down the material into smaller components. In that way and for each type of foreign law a series of various type situations is to be established. It is also important to emphasize that here is no question of finding by means of *"points de rattachements"* the "centre of gravity" for the legal relations of the parties or the country with which these relations have their closest connection.[1]

This can perhaps be said to be a very modest result though not so devoid of content as it may *prima facie* appear. In the section above dealing with the case law the main type situations have been outlined. Admittedly some of them are controversial but in others a solution can be found which tends to coincide in most countries. In that way less comprehensive but firmer particular rules can be established. Admittedly principles and standards such as the protection and isolation principles, the maxim of investigation and the principle of restrictiveness, or the stressing of the power in fact and the requirements of stability and efficiency do not offer any ready and easy available solutions, but they facilitate the distinguishing of cases and type situations. In that way and coupled with an individualizing method they make us more conscious of the real problems and the motivating factors in court practice. For that reason they will afford a more realistic approach to confiscation matters than that frequently adopted; at least the results, though modest, will be more reliable in that way than when based on purported axioms such as those of equal treatment, unification and reciprocity. And with approximately the same degree of certainty as that in other legal standards, e.g. the *culpa* principle

[1] *Id.* pp. 444 ff., 237; cf. pp. 447–464.

or the principle of unjust enrichment, the principles stated above in the text could be used as signposts in matters concerning foreign confiscations.

It may also fairly be assumed that standards and principles discerned in such a way as described above are not limited to purely confiscatory relations but may be adapted also to matters regarding governmental activities other than confiscation, which by way of special legislation, encroach upon or undermine private property rights. Foreign exchange control laws have, as said before, frequently been compared with confiscatory decrees, and not without reason, since they deprive the titleholder—if not of the title and all the functions and privileges of property—at least of some of them and very important ones, too. Other similar foreign laws of such alleged political or territorial character would also be open to comparable treatment.

To apply the above-mentioned experiences to foreign exchange control law and particularly the coordination thereof with rules about the intention of the parties and the proper law of the contract will certainly be as great and difficult a task as to ascertain the methods and tools to be used. This has been further developed in the treatise and will not be dealt with here. In this article the aim has been limited to a presentation of method and approach. It may perhaps be said that this was a very long way to go, but the author believes that short cuts consisting in deductions from sweeping general concepts are not of very great use, and though methods of the kind here outlined do not immediately render the problems easier to solve, they nevertheless lay more solid foundations for their solution.