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1. FOREIGN NATION—IN ABSENCE OF TREATY WITH UNITED STATES—MAY NOT HOLD TITLE TO REAL ESTATE LOCATED IN OHIO WITHOUT EXPRESS CONSENT OF STATE.
2. INTERNATIONAL LAW—PRINCIPLES OF RECIPROCITY AND COMITY EMBODIED IN INTERNATIONAL LAW NOT AVAILABLE TO A STATE OF UNITED STATES IN ABSENCE OF TREATY BETWEEN FEDERAL GOVERNMENT AND A FOREIGN NATION.

SYLLABUS:

1. A foreign nation, in the absence of a treaty with the United States, may not hold title to real estate located in the state of Ohio without the express consent of the state.

2. The principles of reciprocity and comity embodied in international law are not available to a state of the United States, in the absence of a treaty between the federal government and a foreign nation.

Columbus, Ohio, September 20, 1949

Hon. Frank J. Lausche, Governor of Ohio
Columbus, Ohio

Dear Governor Lausche:

This will acknowledge receipt of your request for my opinion which reads as follows:

> "Herewith I am attaching a letter dated June 22nd written by the Department of State to me as Governor of Ohio in respect to the desire of the Czechoslovak government to acquire certain property in Cleveland, Ohio.
>
> You will note that the letter raises the question whether legally the foreign government has the right to own property within our State.
>
> Please let me have your opinion concerning the legal principles that are applicable to the questions involved."

The letter from the United States Department of State attached to your request reads:

> "The Department of State recently received a memorandum from the Czechoslovak Embassy, a copy of which is enclosed

for your information, in which a question has been raised regarding the purchase by the Czechoslovak Government of property in Cleveland, Ohio, for the use of the Czechoslovak Consular Mission there.

The Czechoslovak Embassy is of the opinion that the laws of the State of Ohio do not permit purchase by foreign governments of real estate for consular purposes and, as a result the Chief of the Consular Mission in Cleveland, Ohio has been designated as formal purchaser. This arrangement makes it necessary to change the purchase agreement every time a change in Chiefs of Mission is made. The arrangement sought by the Czechoslovak Embassy is one which would permit the Czechoslovak Government to be regarded as both the formal and de facto owner of the buildings.

The Czechoslovak Embassy states that the principle of reciprocity is guaranteed insofar as property owned by the United States and used for consular purposes in Czechoslovakia is concerned.

Is there a possibility that the Czechoslovak Government can be permitted to own consular property in the State of Ohio on a reciprocal basis?"

The statutes of Ohio are silent on the subject of the rights of foreign nations to acquire or hold real estate situated within the boundaries of this state. An exhaustive search of reported cases, text book and legal treatise authorities has failed to disclose any authoritative statement upon the rights of a foreign nation to hold title to real estate in any state of the United States in the absence of treaty provisions with respect thereto between such foreign power and our Federal Government.

The State of Ohio, while exercising all the rights of sovereignty not inconsistent with those delegated to the Federal Government, is denied the right to enter into any treaty, alliance or confederation, and may not enter into any agreement or compact with a foreign power, without the consent of Congress, by virtue of Article I, Section 10 of the Constitution of the United States. The denial of these rights coupled with the vesting of the treaty-making power in the President of the United States, upon concurrence of two thirds of the members of the Senate as provided by Artcile II, Section 2 of said Constitution, removes the State Government from the field of international relations and clothes the Federal Government with exclusive jurisdiction thereof. Consequently, the concepts of comity and reciprocity embodied in international law

would be inapplicable to the several states except as to their application as a result of the powers exercised by the Federal government.

Treaties entered into between the United States and a foreign nation are the Supreme Law of the Land. Any treaty embodying provisions in derogation of the law of any State of the Union will operate as a suspension of the operation of that law during the continuance of the treaty as applied to the foreign signatory or its nationals. Terrace v. Thompson, Attorney General, 274 Fed. 841, affirmed 263 U. S. 197. In the absence of such treaty the law of any state of the United States, if within the realm of the powers reserved to the several states under the Tenth Amendment to the Constitution of the United States, is the law of the state. Under our federal system of government each state enjoys a sovereignty subject only to the sovereign powers delegated to the Federal Government. See 48 C. J. S. International Law, Sec. 10, Note 41.

In the case of Sunderland v. United States, 45 S. Ct. 64, 266 U. S. 226, 69 L. Ed. 259, affirming Circuit Court of Appeals, 287 Fed. 468, it was stated that the tenure, transfer, control and disposition of land is subject to the exclusive jurisdiction of the state. By this was meant that the jurisdiction in such matters was not among the powers delegated to the Federal Government. The same principle was recognized in the Terrace case, supra, but further acknowledged that such matters were proper subject of treaty agreements and when embodied therein will operate to suspend the state law. In this connection, it might be pointed out that even in treaty agreements the Federal Government has tended to refrain from interfering with the policies of the several states as to real estate within their jurisdiction.

In Section 203 of Hyde's International Law, Second Revised Edition, Volume 1, at page 651, while discussing the question of the private ownership and control of property, the author writes as follows:

> "The Government of the United States has exhibited restraint in generally refraining from attempts to hinder the several States of the Union from shaping their own policies with regard to lands within their respective territorial limits. It has by treaty permitted 'goods and effects' (deemed to embrace real property) owned by nationals of a foreign contracting State to pass by testamentary disposition or descent to non-resident nationals of such State. Again, it has subordinated the alien acquisition and disposition of lands to the will of the particular State of the Union wherein they might be located. It is not understood that

the United States is a party to any treaty now in force which in terms purports to permit the nationals of another contracting party, residing abroad, to succeed to (by devise or descent) and retain indefinitely, title to lands in the several States of the Union, where such a privilege is opposed by the local law. In the more recent treaties, such as those of the present century, the United States has agreed to permit the nationals of the other contracting party to enjoy the privilege of succession by inheritance or otherwise, allowing such successor a reasonable period of time within which to sell the property so acquired and to remove the proceeds. 'Whether and the extent to which aliens may acquire interest in real property in the United States are, in the absence of applicable treaty provisions, matters to be determined by the law of the particular State in which the property is situated.'

The United States is not at the present time disposed to yield by treaty, for the benefit of the nationals of a foreign contracting State, the privilege of acquiring lands within American territory save where, as has been observed, such acquisition is by way of succession to the rights or interests in such lands as are possessed by the nationals of such States. A few treaties to which the United States is a party have, however, reflected the willingness of a foreign contracting State to permit American nationals to acquire immovable property within its domain."

It appars reasonably clear, in view of the foregoing, that the State of Ohio, with respect to its jurisdcition over title to real estate within its territorial limits, may be considered and treated as a sovereign state. The question then resolves itself into whether or not, in the absence of statutory prohibition, one sovereign state may own real estate within the territorial limits of another. Since the problem involves a relationship between two sovereignties we cannot depend exclusively on the common law for our answer. The common law rules known only to the English speaking nations apply to individuals be they citizens or aliens. There is no common law in the field of intersovereignty relationships.

As indicated above, the concepts of comity and reciprocity would be inapplicable to the problem here presented for they are concepts of international law and exclusively within the jurisdiction of the Federal Government. There appears to be no doubt that such acquisition could be made with the consent of the state in which the property is located.

In Wilson on International Law, Hornbrook Series, 3rd Ed., Chapter 6, Section 33, at page 88, the following statement may be found:

"Jurisdiction is the right to exercise state authority. It extends in general to all persons and those within the boundaries

of the state, and, conditioned by the rights of other states, to the property and subjects of the state beyond its boundaries.

While a state may have absolute ownership of property and exclusive domain within a defined sphere, the exercise of jurisdiction may be conditioned or even waived by agreement or otherwise in such manner that jurisdiction may overlap, as when one state holds property within the jurisdiction of another state."

It is further stated in 30 Am. Jur., at page 196:

"* * * It has been said, however, that a sovereign, by acquiring private property in a foreign country, may possibly be considered as subjecting that property to the territorial jurisdiction."

The problem which you have presented, therefore, resolves itself into the right of an unlimited sovereign to acquire title to land lying within the boundaries of a foreign limited sovereign having no power with respect to international relations and not having consented to such acquisition.

I am of the opinion that the answer to the problem presented may be contained in the historical concept of land tenure upon which much of our present law of real property is based. While the last vestiges of the feudal system of land tenure were abolished in England over one hundred years before our original colonies became free and independent states, our system of real property law is based largely upon the common law of England which developed while the feudal system was in force. The feudal system originated when the lands of the conquered Roman Empire were parceled out among the victorious barbarian armies upon the theory of a continuing military organization. It was brought to England about the middle of the eleventh century by William the Conqueror. Under this system there was no such thing as absolute ownership in land, the primary title to all lands being vested in the Crown. All land was holden of some superior in consideration of certain services to be rendered to the lord by the tenant or possessor of the property. The thing holden was a tenement and the possessor was a tenant. The king, because all land was holden mediately or immediately of him, was lord paramount. It will thus be observed that under such a system of land ownership no foreign king or sovereign power could possess land within the realm, for to do so would subject such foreign power to the service of the king within whose realm the land was located as lord paramount.

In discussing the meaning of the term "tenure", Thompson on Real Property, Volume 1, Permanent Edition, Section 8 at page 11 says:

> "Ancient English tenures were held by four different kinds of service. As to quality they were free or base, as to quantity certain or uncertain. The highest and most common tenure by which lands are now held is the fee simple. While the holder is a tenant in fee, and is said to have and to hold his lands to him and his heirs, forever, without rendering service of any kind, yet he holds of the government to which he owes fealty and service; and should he fail in his allegiance to her, or should he die without heirs upon whom the duty of fealty may devolve, the tenure is at an end, and the land reverts to the sovereignty as the lord paramount. Thus, we may conclude that all real property is held of some superior, in consideration of certain services to be rendered to the superior by the tenant or possessor. No one can become the holder of an estate of inheritance without becoming the tenant of the state where the land lies."

And in Section 37 at page 30, in discussing the origin of American law of real property, it is stated:

> "The law of real property, as it exists today in the United States, is full of intricacy. The commercial spirit of modern times has broken down many of the artificial barriers which the feudal system of the English laws of descent and tenure interposed to prevent the quick and easy transfer of landed estates. Enough of the old rules survive, however, to confuse and perplex the student, and to tax the experienced lawyer, when he is called upon to decide concerning the rights of claimants to land. The English colonists in America brought with them the elements of the English common law of real property, not in books merely, but ingrained in their mental organization. In the grants by the crown to the colonies the charters provide that the land granted shall be held in free and common socage and not in capite by knight-service. The owner was not required to do homage to any one for his lands, nor did he owe any greater duty of fealty to the king by reason of his possession of land than he owed simply as a subject. As a matter of fact, however, the early grants in America were made with reference to a continuation of something like a feudal tenure, and many incidents of that system attached themselves to these grants; and, while the feudal system never obtained much foothold in this country, there are many things in our law of real property which require for their understanding that we bear in mind that our system, in the main, is based upon the common law of England, and that that law grew up while the feudal system was in force. When the colonies threw off allegience to the crown, and became independent states, each of them

> succeeded to all the rights of the crown within its limits, while the United States as a sovereignty succeeded to all the rights of the crown to unoccupied territory not within the limits of any of the states and not previously conveyed. Being thus possessed of the vacant lands, the United States and the several individual states have proceeded to make sale and conveyance thereof and to give titles which, though called fees, are in truth allodial. Thus, the character of the title to lands in this country since the Revolution has become allodial, that is, wholly independent, and held of no superior at all. It must be remembered, however, that some rights and interests in the land are reserved to the state; such, for instance, as the right of taxation, eminent domain, and escheat. Land held allodially is owned subject to such rights of the state, but free and independent of all other domination or control."

The State of Ohio, having been a part of the Northwest Territory, was a part of the unoccupied territory, not within the limits of any of the states, to which the United States succeeded as a sovereignty. The title to land within its boundaries is therefore held allodially subject to the rights and interests reserved to the State. While the word "allodial" means free from tenure, it does not imply exemption from the State's powers of taxation, eminent domain or escheat over lands within its borders. Each owner holds his land subject to these rights and powers of the State.

It must be pointed out that the nature of the title which may be acquired is to be distinguished from the capacity of a person or an entity to acquire such title. It is one of the attributes of property held allodially that the owner who has the legal capacity to bind himself or itself by contract shall enjoy a free and unrestricted right of alienation of the same. Under the feudal system and the English common law various restrictions were imposed upon the alienation of real property. Among them was the restriction that such property could not be alienated to one who was not a citizen or subject of the State or Crown. This restriction is obvious when it is remembered, as pointed out above, that all lands were held of the king, to whom certain services were due, depending upon the nature of the tenure. While the statutory trend has been toward removal of restrictions upon alienation of land and a liberalization of the feudal and common law concepts of alienation the common law rule that land could not be held by an alien was still in effect when the State of Ohio was admitted to the Union. This common law rule was followed in Ohio, regardless of the fact that the lands of the state were held allodially until 1804 when the act authorizing aliens to hold lands in this state, by purchase or otherwise,

was enacted. This law, with slight modifications has been continued on our statute books until the present date and is presently embodied in Section 10503-13, General Code.

As noted in the early part of this opinion, the rules of the common law would be inapplicable to intersovereignty relationships yet, in my opinion, they would have applicability to the capacity of a foreign sovereign to hold land lying within the territory of the state. It will be observed that the transfer of real estate is a contract between the grantor and the grantee and the sovereign in which the land is located is not a party thereto. I am inclined to the view, therefore, that even though the nature of the title to land in this state is not based upon the feudal theory of land tenure, the common law principles relative to the acquisition and alienation of land, which were founded upon feudalism, are applicable except in so far as they have been modified or rendered inapplicable by statutory enactment. In view of the common law requirement that only a citizen of the state in which the land was located was capable of acquiring title thereto, and since Section 10503-13, General Code, in derogation of this common law principle is applicable only to alien individuals, I am compelled to the conclusion that a foreign sovereign would be incapacitated from holding title to real estate in this state.

In support of this conclusion I am impressed with the common sense reasoning used by Judge Cushman in the Terrace case, supra, in discussing a statute of the State of Washington, wherein he forcefully wrote, concerning its purposes, at page 850, as follows:

> "* * * If one incapable of citizenship may lease or own real estate, it is within the realm of possibility that every foot of land within the state might pass to the ownership or possession of non-citizens. Such a result would leave the foundation of the state but a pale shadow, and the structure erected thereon but a Tower of Babel, from which the tenants in possession might, when the shock of war came, bow themselves out, because they were not bound as citizens to defend the house in which they lodged."

The statute under consideration in the Terrace case was The Alien Land Act of Washington, which prohibited the purchase of or lease of land by any alien who had not in good faith declared his intention to become a citizen. It is observed that the reasoning used by Judge Cushman would apply with even greater force to a foreign nation.

It is my opinion, therefore, that:

1. A foreign nation, in the absence of a treaty with the United States, may not hold title to real estate located in the state of Ohio without the express consent of the State.

2. The principles of reciprociy and comity embodied in international law are not available to a state of the United States, in the absence of a treaty between the federal government and a foreign nation.

Respectfully,

HERBERT S. DUFFY,
Attorney General.