law requirement of mutual assent. This rationale does not apply in *Hudson Distributors* because there the goods were purchased from a third party. Thus, there was no basis for finding the common law requirement of mutual assent.

The "non-signer" clause of the 1936 Ohio Fair Trade Act stated that where the manufacturer entered into resale price maintenance agreements with some retailers in the jurisdiction, all other retailers were bound, whether they consented or not.[19] The 1959 fair trade act provides that a non-signer who accepts goods with notice of the manufacturer's established price is deemed to have contracted not to sell them below this price.[20] Since retailers who have not dealt directly with the manufacturer cannot be said to have entered into a common law contract or agreement with him, they are in effect being bound by the prices set by the manufacturer without their consent. As previously noted, legislation having this effect was declared unconstitutional in Ohio when the "non-signer" provision of the 1936 act was held invalid.

In *Hudson Distributors* the court may appear to have found a method of reversing the present trend of declaring unconstitutional fair trade acts which bind non-signers. However, it is likely that many courts will look to the effect of the statute rather than to its wording, and come to the conclusion that such provisions are subject to the same objections as "non-signer" clauses.

HENRY S. HEALY

Foreign Corporations—Nationalization—Act of State Doctrine and Executive Action.—*Banco Nacional de Cuba v. Sabbatino.*[1]—Farr, Whitlock and Co., hereinafter referred to as Farr-Whitlock, contracted to purchase sugar from a wholly owned Cuban corporate subsidiary of Campania Azucarera Vertientes—Camaguey, a Cuban corporation controlled by United States' interests, hereinafter referred to as C.A.V. The sugar was to be loaded on vessels of Farr-Whitlock's choice at a designated port and Farr-Whitlock was to make payment in New York upon presentation of the necessary shipping documents. Loading commenced on August 6, 1960, and was finished by one p.m. on August 9, 1960. On August 6, 1960, the Cuban government nationalized the property of C.A.V. pursuant to a law which allowed the nationalization of Cuban enterprises in which United States persons, physical and corporate, held a majority interest. The law declared that this procedure was necessary because of aggressive acts by the United States, to wit: the reduction of the Cuban sugar quota. Farr-Whitlock, in order to obtain the necessary consent of the Cuban government for the departure of the vessel, entered into a contract with plaintiff's assignor, a corporation wholly owned by the Cuban government, purporting to sell the sugar on board the vessels to Farr-Whitlock. This contract con-

[19] Supra note 5.
[20] Supra note 2.

[1] 193 F. Supp. 375 (S.D.N.Y. 1961).

tained essentially the same terms as the contract between Farr-Whitlock and C.A.V. The vessel then departed from Cuba.

Plaintiff, the financial agent of the Cuban government, delivered the necessary shipping papers to Farr-Whitlock in New York, and Farr-Whitlock proceeded to sell the sugar. Meanwhile a receiver had been appointed for C.A.V. by the New York State Supreme Court pursuant to section 977-b of the New York Civil Practice Act.[2] The state court enjoined Farr-Whitlock from disposing of the sales proceeds and later issued an order, with which Farr-Whitlock complied, directing that the sales proceeds be paid over to the receiver, who was directed to deposit them in a New York bank pending further orders.

Plaintiff brought this action for conversion of the shipping papers and sales proceeds against Farr-Whitlock and the receiver, alleging that it had title to the sugar by virtue of the Cuban decrees. Plaintiff's motion for summary judgment was denied and summary judgment was granted for defendants. HELD: This court can review the Cuban decree, and, since it is contrary to international law, it vested no title in the Cuban government upon which that government could base its contract with Farr-Whitlock and this subsequent action for conversion.[3]

The court in its decision reasoned that, although C.A.V. had an interest in the sugar, and although it was within the territorial reach of the decree, the decree was in violation of international law since it was not for a public purpose,[4] was discriminatory,[5] and failed to provide adequate compensation.[6] This being so, the court concluded that there was no reason to give effect to a foreign law which is violative of the principles of international law. It is well to note that judicial reluctance to inquire into the validity of the act of a foreign state has been due to a desire to avoid embarrassment

[2] Section 977-b authorizes the appointment of a receiver for New York assets of foreign corporations which have been dissolved or the property of which has been nationalized.

[3] This conclusion was reached on the basis of plaintiff's motion for summary judgment and made moot several other motions before the court. Judge Dimock first determined that since this was an in personam action it made no difference that the New York court had first perfected jurisdiction over the subject matter. He also determined that the federal court should not abstain from exercising jurisdiction pending the state court determination, since there was no important countervailing interest here, Farr-Whitlock having ample opportunity to protect itself from double recovery should the state and federal courts reach contrary conclusions on the ownership of the property. This being so, he denied Farr-Whitlock's motion to dismiss for lack of jurisdiction.

[4] The expropriation was not for the economic, social or security interests of the state, but rather was directed to a retaliatory purpose which is not a public purpose. See McNair, The Seizure of Property and Enterprises in Indonesia, 6 Netherlands Int'l L. Rev. 218 (1959).

[5] The act was discriminatory since it was directed expressly at citizens of the United States.

[6] The compensation was not adequate since it was in the form of thirty-year bonds whose interest rate was conditioned on sugar purchases from Cuba by the United States and whose payment at maturity was uncertain. Further, the appraisal of the property was to be performed by the agents of the Cuban government, an obviously adverse party to the persons whose interests were seized.

of the executive. No such problem was here presented since the executive had expressly denounced the decree as being contrary to international law.[7]

The doctrine which Judge Dimock declined to apply in the instant case, the so-called "act of state doctrine," was first promulgated by Mr. Chief Justice Fuller in *Underhill v. Hernandez*,[8] wherein he stated: "Every sovereign state is bound to respect the independence of every other sovereign state, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory."[9] Later cases were to adopt this doctrine and elaborate on it. *Oetjen v. Central Leather Co.*[10] applied the doctrine to uphold the defendant's title to hides seized by the Caranza government of Mexico and sold to the defendant. The Court reasoned that it was precluded from examining the merits of this seizure, since this was the act of a recognized government of Mexico done within Mexican territory.[11] Similarly, in *Ricaud v. American Metal Co.*,[12] another seizure by the Caranza regime was upheld in reliance upon the above enunciated theory.

Perhaps the most controversial application of the "act of state doctrine" occurred in *Bernstein v. VanHeyghen Freres Societe Anonyme*,[13] wherein Judge Learned Hand upheld the pre-World War II seizure of the plaintiff's property by the Nazi Government of Germany even though the sole basis of the seizure was that the plaintiff was a Jew. The apparent harshness of the decision is mitigated somewhat by the fact that Judge Hand was in doubt as to precisely what the negotiations then being conducted in Germany would produce in the way of reparations,[14] and, therefore, felt plaintiff's claim was better processed through the executive department.

In light of the above principles it is submitted that there is language in the instant case which could, if followed in the future, yield results unwarranted by the facts of the case. Judge Dimock is technically correct when he notes that "no court in this country has passed on the question,"[15] referring to whether or not the court can examine the validity of the Cuban act under international law, and refuse recognition of such act if it is in violation of international law.[16] However, it would seem that the "act of

[7] 43 Dep't of State Bull. 171 (1960).

[8] 168 U.S. 250 (1897). There are prior expressions of the doctrine, but Mr. Chief Justice Fuller's statement is generally recognized as the crystallization of the "act of state doctrine" in its modern sense. See, e.g., Hudson v. Guestier, 8 U.S. (4 Cranch) 293 (1808), and Duke of Brunswick v. King of Hanover, 6 Beav. 1 (1844), aff'd, 2 H.L. Cas. 1 (1848).

[9] 168 U.S. 250, 252 (1897).

[10] 246 U.S. 297 (1918).

[11] The Caranza regime was not recognized at the time of the seizure, but since recognition relates back and validates the acts of a government done prior to recognition, this act was treated as if it were the act of the recognized government of Mexico.

[12] 246 U.S. 304 (1918).

[13] 163 F.2d 246 (2d Cir. 1947), cert. denied, 332 U.S. 772 (1947).

[14] 163 F.2d 246, 251. Judge Hand indicated at this point that apparently plaintiff's remedies in the nature of reparations were not foreclosed.

[15] 193 F. Supp. 375, 381.

[16] It seems that the issue could have been raised in some cases and was not; therefore, no solid precedent exists where a case was decided with this problem in mind. For example, see Ricaud v. American Metal Co., supra note 12. In Bernstein

state doctrine" could have been avoided merely because of the executive pronouncement, and, that the violation of international law, while important in determining the validity of Cuban law, had no effect on the power of the court to review the law.

It is felt that a model for this decision could have been found in the *Bernstein*[17] litigation. There the court refused to act since its actions might embarrass the executive in his conduct of foreign affairs. As soon as the executive made known its position,[18] the court allowed plaintiff to recover in a subsequent litigation.[19] Since the executive position was already clearly enunciated in the instant case, the court could have merely held that the "act of state doctrine" did not apply since its principal reason for existence, prevention of embarrassment to the executive, was not present.[20] Since it may be conceded that this Cuban decree was violative of international law, the same result would follow, *i.e.*, that the decree would have no effect on the title to the sugar in controversy.

Situations can readily be imagined when the executive, for political reasons, might not choose to denounce a foreign act even though it is clearly a violation of international law. When this situation arises the question of whether or not a court may disregard the "act of state doctrine" and examine the validity of a foreign law which violates international law would be germane for decision. In the instant case, however, it is submitted that the doctrine was inapplicable, the situation being without the scope of its operation. Therefore, statements in the case which purport to declare that the doctrine does not shield the validity of a foreign law which violates international law should be treated as dicta.

In conclusion, it is felt that it would be folly to treat the "act of state doctrine" as inapplicable if there is a violation of international law without any statement of executive position. The commercial world should still be conscious of its presence until we have a clear-cut decision on the point without the addition of an executive statement.

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v. VanHeyghen Freres Societe Anonyme, supra note 13, there was no violation of international law because plaintiff was a German citizen at the time of the wrong, and a wrong done by a sovereign to its own citizen is not an offense under international law. It might be strongly argued however, that in view of the denunciation of this type of anti-Semitic conduct at Nuremberg, this seizure was so gross a crime against humanity in general that it constituted an offense against international law. For a later case presenting this same problem of a foreign national trying to avoid the acts of his sovereign in a United States court, see Pons v. Republic of Cuba, 249 F.2d 925 (D.C. Cir. 1961).

17 Supra note 13.

18 The President concluded that the invalidation by the courts of the Nazi decrees would not hamper the executive.

19 Bernstein v. N.V. Nederlandsche Amerikaansche, 210 F.2d 375 (2d Cir. 1954).

20 Mr. Reeves in his article, The Act of State Doctrine as a Rule of Law—A Reply, 54 Am. J. Int'l L. 141 (1960), cites several other reasons for the existence of the doctrine, but it would seem that prevention of embarrassment to the executive is the pillar upon which the doctrine rests.