Den Ausländern ist wohlbekannt, daß sie »mit dem Einschmuggeln von Spirituosen nach Norwegen eine strafbare Handlung begehen« 5).

Bloch.

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## 7. Vereinigte Staaten von Amerika

### a) Bundesgerichte

#### α) Supreme Court

**Jordan, Sec. of State of California et al. v. Tashiro et al. Nov. 19. 1928 (49 S. Ct. 47)**

Vertragsauslegung — Fremdenrecht.

*1. Verträge sind nicht eng auszulegen, vor allem, wenn der Wille der Parteien auf Begründung wechselseitiger, gleicher Rechte gerichtet ist.*

*2. Die Ausdrücke »Handel« (commerce) und »Gewerbe« (trade) sind nicht notwendig auf geschäftliche Unternehmungen beschränkt, die Warenkauf oder -austausch zum Ziele haben; ein Krankenhaus kann auch ein geschäftliches Unternehmen im Sinne des japanisch-amerikanischen Vertrages sein.*

Tatbestand. Die Beklagten (japanische Staatsangehörige) wünschten eine Gesellschaft zur Errichtung und Verwaltung eines Krankenhauses in Kalifornien zu gründen. Dagegen hatte der Kläger eingewandt, daß dies nach dem Alien Land Law des Staates Kalifornien (St. 1921) nicht zulässig sei. Die Beklagten beriefen sich auf den Handels- und Schiffahrtsvertrag zwischen den Vereinigten Staaten und Japan von 1911 (37 Stat. 1504), welcher es den Japanern gestatte, in den Vereinigten Staaten eine derartige Gesellschaft zu gründen; die Supreme Court of California entschied zugunsten der Japaner, und das höchste Bundesgericht bestätigte das Urteil in der Berufungsinstanz, u. a. aus folgenden Gründen:

».... Section 2 of the Alien Land Law of California, as amended by the Act of the Legislature approved June 20, 1923, Stats. 1923 p. 1020, provides that aliens of a class in which respondents are included may acquire, possess and enjoy real estate within the state 'in the

5) Vgl. die Anmerkung der finnischen Regierung zu dem Entwurf der Kodifikationskommission (Report a. a. O. S. 162—163), die ebenfalls vorwiegend zur Bekämpfung des Alkoholschmuggels eine Unterscheidung zwischen dem Territorialgewässer an sich, das sozusagen ein Anhängsel des Festlandes und der Souveränität des Uferstaates in vollem Umfange unterworfen sei (und praktisch auf drei Seemeilen beschränkt werden könne), und den anderen je nach Bedarf mehr oder weniger über die Grenze hinausgehenden Zonen festgelegt wissen will, in denen der Uferstaat nur bestimmte polizeiliche oder administrative Befugnisse ausüben könne.

manner and to the extent, and for the purposes prescribed by any treaty now existing between the government of the United States and the nation or country of which such alien is a citizen or subject, and not otherwise'. Section 3, in like terms, permits (a) acquisition of land by a corporation, the majority of whose stockholders are aliens; and (b) the purchase by aliens of stock in corporations owning or leasing land, only for purposes prescribed by such a treaty.

The statutes of California do not otherwise forbid the organizing of a corporation by citizens of Japan residing in the state, and by these enactments there was effected perfect harmony in the operation of the statute and of the treaty. What the treaty prescribes, the statute authorizes. There is thus no possibility of conflict between the exercise of the treaty-making power of the federal government and the reserved powers of the state such as that suggested in Geofroy v. Riggs, 133 U. S. 258, 267, ... on which petitioners placed reliance in the argument. ...

The Supreme Court of California, in passing upon the application for mandamus, granted the relief prayed, not as a matter of statutory construction, but because it thought the conduct of a hospital by Japanese citizens through the instrumentality of a corporation, organized under the laws of the state, was a privilege secured to the respondents by the treaty which the state statute did not purport to withhold. The privilege challenged by petitioners is one specially set up or claimed under a treaty of the United States and sustained by the state court and the case is thus one within the jurisdiction of this court conferred by section 237 (b) of the Judicial Code, 28 USCA § 344 (b). Compare Red Cross Line v. Atlantic Fruit Co., 264 US. 109, 120....

The question presented is one of the construction of the treaty, the relevant portions of which are printed in the margin [1]). It in terms authorizes the citizens of Japan to carry on trade within the United States and 'to lease land for residential and commercial purposes, and generally to do anything incident to or necessary for trade upon the same terms as native citizens or subjects, submitting themselves to the laws and regulations there established'.

The petitioners insist that the construction and operation of a

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1) Treaty of commerce and navigation between the United States and Japan... Article 1. The citizens or subjects of each of the high contracting parties shall have liberty to enter, travel and reside in the territories of the other to carry on trade, wholesale and retail, to own or lease and occupy houses, manufactories, warehouses and shops, to employ agents of their choice, to lease land for residential and commercial purposes, and generally to do anything incident to or necessary for trade upon the same terms as native citizens or subjects, submitting themselves to the laws and regulations there established...

The citizens or subjects of each of the high contracting parties shall receive, in the territories of the other, the most constant protection and security for their persons and property, and shall enjoy in this respect the same rights and privileges as are or may be granted to native citizens or subjects, on their submitting themselves to the conditions imposed upon the native citizens or subjects...

hospital is not one of the purposes prescribed by the treaty, which, it is argued, are limited so far as 'trade' and 'commerce' are concerned to the purchase and sale or exchange of goods and commodities, and that, in any case, the treaty does not confer upon Japanese subjects, resident in California, the privilege of forming a corporation under the laws of California or of leasing lands through a corporate agency for such a purpose.

The principles which should control the diplomatic relations of nations, and the good faith of treaties as well, require that their obligations should be liberally construed so as to effect the apparent intention of the parties to secure equality and reciprocity between them. See Geofroy v. Riggs, supra: Tucker v. Alexandroff, 183 U. S. 424, 437... Wright v. Henkel, 190 U. S. 40, 57... In re Ross, 140 U. S. 453, 475... Upon like ground, where a treaty fairly admits of two constructions, one restricting the rights that may be claimed under it and the other enlarging them, the more liberal construction is to be preferred. Asakura v. Seattle, 265 U. S. 332... Tucker v. Alexandroff, supra; Geofroy v. Riggs supra.

While in a narrow and restricted sense the terms 'commerce', or 'commercial', and 'trade' may be limited to the purchase and sale or exchange of goods and commodities, they may connote, as well, other occupations and other recognized forms of business enterprise which do not necessarily involve trading in merchandise. Asakura v. Seattle, supra. And although commerce includes traffic in this narrower sense, for more than a century it has been judicially recognized that in a broad sense it embraces every phase of commercial and business activity and intercourse. See Gibbons v. Ogden, 9 Wheat, 1, 189,....

Considerations which led this court to conclude that the terms 'trade' and 'commerce' as used in this treaty do not include agriculture, and the circumstances attending the making of the treaty which were deemed to exclude from the operation of its broad language any grant of the privilege of acquiring and using lands within the United States for agricultural purposes, were discussed in the opinions in Terrace v. Thompson, 263 U. S. 197, 223,... Webb v. O'Brien, 263 U. S. 313, 323,... Frick v. Webb, 263 U. S. 326, 333,... and need not now be detailed. But in Asakura v. Seattle, supra, it was held that the language of this treaty securing to Japanese citizens the privilege of carrying on trade within the United States was broad enough to comprehend all classes of business which might reasonably be embraced in the word 'trade', and included the privilege of carrying on the business of a pawnbroker. .... (Weiteres Beispiel der Anwendung des Vertrags.)

Giving to the terms of the treaty, as we are required by accepted principles, a liberal rather than a narrow interpretation, we think, as the state court held, that the terms 'trade' and 'commerce', when used in conjunction with each other and with the grant of authority to lease land for 'commercial purposes' are to be given a broader significance than that pressed upon us, and are sufficient to include the

operation of a hospital as a business undertaking; that this is a commercial purpose for which the treaty authorizes Japanese subjects to lease lands.

It is said that the elimination from the original draft of this clause of the treaty of words authorizing the leasing of land for 'industrial, manufacturing and other lawful' purposes (see Terrace v. Thompson, supra, page 223 of 263 U. S.) leads to the conclusion that land might not be leased for hospital purposes by Japanese subjects, even though under the other provisions of the treaty they might be permitted to operate such an institution. But as the leasing of land for a hospital is obviously not for an industrial or manufacturing purpose, this argument presupposes that the phrase 'commercial purposes' is limited to merchandising businesses, which for reasons already stated we deem inadmissible. Moreover, a construction which concedes the authority of Japanese subjects to operate a hospital but would deny to them an appropriate means of controlling so much of the earth's surface as is indispensable to its operation, does not comport with a reasonable, to say nothing of a liberal, construction. The Supreme Court of California has reached a like conclusion in State of California v. Tagami, ... 234 P. 102 holding that this treaty secured to a Japanese subject the privilege of leasing land within the state for the purpose of using and occupying it for the maintenance of a health resort and sanitarium.

The contention that the treaty does not permit the exercise of the privileges secured by it through a corporate agency requires no extended consideration. The employment of such an agency is incidental to the exercise of the granted privilege. But it is not an incident which enlarges the privilege by annexing to the permitted business another class of business otherwise excluded from the grant, as would have been the case in Terrace v. Thompson, supra, had the business of farming been deemed an incident to the business of trading in farm products.

The principle of liberal construction of treaties would be nullified if a grant of enumerated privileges were held not to include the use of the usual methods and instrumentalities of their exercise. Especially would this be the case where the granted privileges relate to trade and commerce and the use of land for commercial purposes. It would be difficult to select any single agency of more universal use or more generally recognized as a usual and appropriate means of carrying on commerce and trade than the business corporation. And it would, we think, be a narrow interpretation indeed, which, in the absence of restrictive language, would lead to the conclusion that the treaty had secured to citizens of Japan the privilege of engaging in a particular business, but had denied to them the privilege of conducting that business in corporate form. But here any possibility of doubt would seem to be removed by the clause which confers on citizens and subjects of the high contracting parties the right '. . . to do anything generally incident to or necessary for trade upon the same terms as

native citizens or subjects, submitting themselves to the laws and regulations there established'.

Affirmed."

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## β. Untere Bundesgerichte

### Circuit Court of Appeals 2nd Circuit

**Lehigh Valley R. Co. v. State of Russia. Aug. 8. 1927 (21 F. [2 d] 396)**

Anerkennung — Sowjetregierung — Fortdauer des alten russischen Staats — Vermögen des alten russischen Staats — Ausländische Regierungen als Kläger — Staat und Regierung — Diplomatische Vertreter.

*1. Eine ausländische Regierung darf vor den Gerichten der Vereinigten Staaten klagen.*

*2. Die Entscheidung darüber, wer der Souverän de jure oder de facto eines ausländischen Staats ist, gehört als politische Frage nicht in die Kompetenz der Gerichte.*

*3. Das Gericht ist verpflichtet anzuerkennen, daß der Staat Rußland fortbesteht, obgleich die Sowjetregierung nicht anerkannt ist.*

*4. Diplomatische Vertreter dürfen, solange sie als solche anerkannt sind, Klagen im Namen des Absendestaates anstrengen. Entscheidend für deren Berechtigung ist lediglich die Anerkennung durch das State Department. Gerichtliche Prüfung dieser Frage ist nicht gestattet.*

*5. Der Wechsel in der Person des Gesandten beeinflußt nicht die Beziehungen zu seiner Regierung. Solange eine anders lautende Entscheidung der politischen Abteilung der amerikanischen Regierung nicht ergangen ist, muß das Gericht den alten Zustand als fortbestehend ansehen.*

*6. Die russische (alte) Regierung kann Klage führen, mindestens bis die neue Regierung anerkannt wird.*

*7. Die rückwirkende Kraft der Anerkennung bezieht sich nur auf Handlungen der anerkannten Regierung innerhalb des eignen Staatsgebiets.*

Tatbestand. Im Jahre 1916 erlitt russisches Staatsgut Brandschaden in den Vereinigten Staaten. Die russische Regierung erhob Klage; nach Absetzung der zaristischen Regierung wurde die Klage im Namen des russischen *Staats* fortgeführt; Vertreter war der von den Vereinigten Staaten anerkannte Abgesandte der Kerensky- Regierung. Als dieser sich 1922 zurückzog, übergab er das russische Staatsvermögen in den Vereinigten Staaten der Obhut eines Finanzattachés der russischen Botschaft (Kerensky-Régime); das amerikanische State Department erkannte diesen als Verwalter des russischen Staatsguts an. Die verklagte Firma bestreitet in der Berufungsinstanz die Legitimation des Finanzattachés, die Gelder für den russischen Staat einzuklagen und