COMMENTS

CONSTITUTIONAL LAW—U.N. CHARTER V. ALIEN LAND LAW. Sei Fujii, an alien ineligible for citizenship, purchased land in California on July 29, 1948. This action was brought by Fujii under Section 738.5 of the California Code of Civil Procedure[1] for the purpose of determining whether an escheat of the land had occurred under the Alien Land Law.[2] The state filed an answer alleging that the plaintiff was born in Japan, was ineligible for citizenship under the naturalization laws, and that consequently under the Alien Land Law, he was not qualified to acquire any interest in real property in the State of California. The trial court found that the facts supported the answer and a judgment was entered declaring the property had escheated to the State of California on July 29, 1948, the date of the deed. Plaintiff appealed to the District Court of Appeals contending that the judgment of the trial court violated the equal protection clause of the Fourteenth Amendment and also that the judgment stood in contravention of the declared principles and spirit of the United Nations Charter.

The appellate court refused to follow the reasoning of the Oregon Supreme Court in *Namba v. McCourt*[3] in which that

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1. This section states in part that "An action may be brought against the State of California to determine whether or not an escheat has occurred as to any real property or interest therein under the provisions of . . . (the Alien Land Law) . . . Such an action may be commenced by any person claiming an interest in the property." CAL. CODE CIV. PRO. § 738.5 (Deering 1949).

2. The Alien Land Law was adopted by the initiative in 1920. It was amended by the legislature in 1923 and 1945. Pertinent sections as amended are as follows:

"Section 1. All aliens *eligible* to citizenship under the laws of the United States may acquire . . . real property . . . in the same manner and to the same extent as citizens of the United States, *except as otherwise provided by the laws of this state.*" (Emphasis added.)

"Section 2. All aliens other than those mentioned in section one of this act may acquire . . . real property . . . in the 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." Calif. Stats. 1923, ch. 441, p. 1021.

"Section 7. Any real property hereafter acquired in fee in violation of the provisions of this act by any alien mentioned in section two of this act . . . shall escheat as of the date of such acquiring, to, and become and remain the property of the State of California." Calif. Stats. 1945, ch. 1129, p. 2164.

3. 185 Ore. 579, 204 P.2d 569 (1949). Of this case the California court

court reviewed recent decisions of the United States Supreme Court[4] and concluded that the old cases upholding the constitutionality of the Alien Land Laws under the Fourteenth Amendment[5] had been overruled. The District Court of Appeals, however, found the plaintiff's second contention well taken and reversed the judgment of the trial court, invalidating the Alien Land Law on the ground that it was inconsistent with the United Nations Charter which, as a treaty, was paramount to the state statute. The California court expressly stated that its decision was based on "... an authority more potent than the Constitution of this State, an authority which for want of opportunity has not previously been made the basis of a judicial determination of the question now before us..." Finding that "the Charter has become 'the supreme law of the land,' " the court cited Articles 1, 55, and 56[6] of the United Nations Charter and concluded:

> A perusal of the Charter renders it manifest that restrictions contained in the Alien Land Law are in direct conflict

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said, "The opinion in that case, after quoting extensively from majority and minority opinions of the United States Supreme Court . . . concludes that that court has now overruled its former decisions. We do not so construe the decisions in the Shelley and Takahashi cases since no question relating to the Alien Land Law was there involved, and . . . the court refused in the Oyama case to consider the main questions as to constitutionality of the statute although such questions were squarely placed before the court and extensively argued in the briefs." Fujii v. State, 217 P.2d 481, 484 (Cal. 1950).

4. Oyama v. California, 332 U.S. 633 (1946) held unconstitutional only section 9 of the Alien Land Law which established a presumption of an intent to avoid the statute where, in a conveyance of real property, the consideration was furnished by an ineligible alien, placing the burden on the grantee to rebut the presumption. The court at 647 expressly declined to re-examine the constitutionality of any provision other than section 9.

Shelley v. Kraemer, 334 U.S. 1 (1947) held the "enforcement" of racial restrictive covenants by injunction to be unconstitutional state action.

Takahashi v. Fish and Game Commission, 334 U.S. 410 (1947) held unconstitutional a California statute forbidding the issuance of commercial fishing licenses to aliens ineligible for citizeship.

5. Porterfield v. Webb, 263 U.S. 225 (1923); Webb. v. O'Brien, 263 U.S. 313 (1923); Frick v. Webb, 263 U.S. 326 (1923); Cockrill v. California, 268 U.S. 258 (1924).

6. "Article 1. The Purposes of the United Nations are:

"2. To develop friendly relations among nations based on respect for the principle of equal rights. . . ."

"Article 55. With a view to the creation of conditions of stability and well being based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote . . . *c.* universal respect for, and observance of, human rights and fundamental freedom for all without distinction as to race, sex, language, or religion.

"Article 56. All members pledge themselves to take joint and separate action in cooperation with the organization for the achievement of the purposes set forth in Article 55." U. N. CHARTER.

> with the plain terms of the Charter . . . and with the purposes announced therein by its framers.[7]

The court then held that "the Charter, as a treaty, is paramount to every law of every state in conflict with it. The Alien Land Law must therefore yield to the treaty as the superior authority."[8] The statement that a treaty is paramount to every law of every state in conflict with it is too well settled to admit of question.[9] But this does not automatically make every provision of every treaty a part of the municipal law to be administered by the courts because a treaty may have a double operation. First it may operate as an executory contract between nations, and second as equivalent to an act of Congress. In the first case it cannot become a rule for the courts until implemented by Congress. In the second instance it operates of itself as a rule for the courts without implementation.[10] Thus whether or not a treaty provision is part of the municipal law depends upon whether or not it is self-executing. The answer to this question requires the determination of the intent of the parties.

The consideration of three elements has been suggested to determine this intent of the high contracting parties:[11] the language used in the treaty, the subject matter of the treaty, and the circumstances surrounding the making of the treaty.

1. *Language.* The pertinent parts of Articles 55 and 56 of the U.N. Charter read as follows:

> Article 55. With a view to the creation of conditions of stability and well being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote: . . .
>
> c. universal respect for, and observance of, human rights and fundamental freedom for all without distinction as to race, sex, language, or religion.
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> Article 56. All members pledge themselves to take joint

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7. Sei Fujii v. State, 217 P.2d 481, 488 (Cal. 1950).
8. *Ibid.*
9. Missouri v. Holland, 252 U.S. 416 (1919); Geofroy v. Riggs, 133 U.S. 258 (1889). "The treaty power, as expressed in the Constitution is in terms unlimited, except by those restraints which are found in that instrument against the action of the government, or of its departments, and those arising from the nature of the government itself, and of that of the states." *Id.* at 267.
10. *In re* Metzger, 17 Fed. Cas. 232, 233, No. 9511 (S.D.N.Y. 1847).
11. Henry, *When is a Treaty Self-Executing*, 27 MICH. L. REV. 776 (1928).

> and separate action in cooperation with the Organization for the achievement of the purposes set forth in Article 55.

The phraseology of these articles was the subject of much debate at San Francisco when the Charter was written. The Dumbarton Oaks Proposals contained no such pledge as is now in Article 56. The first draft of this Article submitted to the San Francisco Conference was worded:

> All members pledge themselves to take separate and joint action and to cooperate with the Organization and with each other to achieve these purposes.[12]

After debate this draft was referred back to committee which then recommended:

> All members undertake to cooperate jointly and severally with the Organization for the achievement of these purposes.[13]

Several delegations objected to this wording on the grounds that it did not contain the threefold pledge already agreed to in principle by the committee, i.e., the pledge to take separate action, joint action, and to cooperate with the Organization. Referred back to committee again the present phraseology was recommended and adopted by the Conference. This phraseology is a compromise which, like most compromises, is equivocal and therefore capable of more than one interpretation.[14]

It has been stated that when a treaty admits of two interpretations and the one is limited and the other liberal, one which will further, and the other which will exclude private rights, the most liberal exposition should be adopted.[15]

Clearly, here, the court was faced with just such a problem, a narrow construction versus a liberal one, one restrictive of private rights, the other extending them, thus, in the mind of the court, to deny the authority of Articles 55 and 56 would be to restrict private rights and fail to live up to our obligations under the Charter.

It has been objected that the words "shall promote" of Article 55 and "Members pledge themselves to take action" of Article 56 are not words which imply a presently existing obligation, but merely an executory contract to be implemented by acts of

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12. GOODRICH AND HAMBRO, CHARTER OF THE UNITED NATIONS, COMMENTARY AND DOCUMENTS, 192 (1946).
13. *Ibid.*
14. *Id.* at 193.
15. Shanks v. Dupont, 3 Pet. 242 (U.S. 1830).

the political side of government.[16] "Shall" however is probably one of the most common of treaty words and any test which would render nearly every treaty in need of implementation should be ruled out. Furthermore it has been held that words of futurity do not necessarily indicate an executory contract.[17]

2. *Subject Matter of the Treaty.* Some Treaties have a tendency to be self-executing or nonself-executing according to the nature of their subject matter. Thus treaties calling for payment of money,[18] tariff provisions,[19]and patent and copyright treaties[20] have been held not to be self-executing; while treaties giving aliens the right to dispose of property after death[21] and inherit lands[22] and the right to equal business privileges,[23] and sometimes extradition treaties[24] have been held self-executing. But it is difficult to draw any general conclusions to apply to a new type of treaty, such as the United Nations Charter. However, it may be argued that in the respect of its undertaking to guarantee human rights the Charter is similar to other treaties which have dealt with like subject matter on a less grand design and which have usually been held to be self-executing. It seems relatively unimportant that in the past treaties of this subject matter have in the main been bilateral while the Charter is multilateral, protecting the rights of all men of whatever nationality.

3. *Circumstances surrounding the making of the treaty.* Since interpretation of fundamental law of the land is involved in the construction of treaties the courts have not restricted themselves to narrow rules of construction. It has been held that courts may consider the history of a treaty,[25] the negotiations and the diplomatic correspondence concerning the treaty,[26] prior discus-

16. Hudson, *Integrity of International Documents,* 42 AM. JOUR. INT'L LAW 105 (1948); also see Comment, 2 STAN. L. REV. 797 (1950).
17. General Electric Co. v. Robertson, 21 F.2d 214 (D.C.Md. 1927).
18. Turner v. American Baptist Missionary Union, 24 Fed. Cas. 344, No. 14,250. (C.C. Mich. 1852).
19. Taylor v. Morton, 23 Fed. Cas. 784, No. 13,799 (D.C.Mass. 1855); CRANDALL, TREATIES, THEIR MAKING AND ENFORCEMENT, 195 (2d ed.)..
20. Robertson v. General Electric Co., 32 F.2d 495 (4th Cir. 1929); *In re* Stoffregren, 6 F.2d 943 (D.C. Cir. 1925).
21. Chirac v. Chirac, 2 Wheat. 259 (U.S. 1817).
22. Hauenstein v. Lynham, 100 U.S. 483 (1879).
23. Askura v. City of Seattle, 265 U.S. 332 (1923).
24. The British Prisoners Case, 1 Wood & M. 66 (C.C. Mass. 1845); *contra; In re* Metzger, 1 Barb. 248 (Sup. Ct. N.Y. 1847).
25. Choctaw Nation of Indians v. U.S., 318 U.S. 423 (1942).
26. Makah Indian Tribe v. McCauly, 39 Fed. Supp. 75 (D.C.W.D.Wash. 1941).

sions,[27] and the purpose of the treaty.[28] It has likewise been held that where the original text of the treaty appears in two or more languages both texts may be considered and compared and construed so as to harmonize their language.[29] Examination of these sources and questions does not give a clear picture of the obligations contemplated when Articles 55 and 56 were written.[30] Apparently meager consideration was given to the question of obligations assumed under these Articles.

However, there is evidence that the delegates did intend that some obligation should be assumed under Article 55 and the pledge of Article 56.[31]

Another point often raised is that Article 2, Section 7 says that the United Nations has no power to intervene in domestic affairs.[32] This provision should not affect a situation where a state court is applying the Charter under Article IV of the Constitution because this scarcely amounts to intervention as the moving party is not the United Nations but rather the court itself.

That the decision will be affirmed, however, appears doubtful in so far as it in effect holds Articles 55 and 56 to be self-executing. Appellants also urged in their brief that the Alien Land Law denied equal protection and, while this agument was rejected as being well settled under previous decisions of the Supreme Court,[33] this contention could very well become the basis for reaching this desirable result as was done by the Oregon Supreme Court in *Namba v. McCourt.*[34] On the other hand it is significant to note that in *Oyama v. State of California* four of the Justices of the United States Supreme Court expressed the view that the Alien Land Law was contrary to the U.N. Charter. But the Supreme Court has been reluctant to ground decisions on the U.N. Charter via the treaty power and has preferred to reach a desired result on the Constitution itself.[35]

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27. Fragoso v. Cisneros, 154 S.W.2d 991 (Tex. 1941).
28. The Tom, 39 Ct. Cl. 290 (U.S. Ct. Cl. 1904).
29. *In re* Metzger, 1 Barb. 248 (Sup. Ct. N.Y. 1847).
30. 2 STAN. L. REV. 797 (1950).
31. McDougal and Leighton, *The Rights of Man in the World Community*, 14 LAW & CONT. PROB. 490, 512 n. 153.
32. *Id.* at 505 n. 116.
33. *Supra* note 5.
34. *Supra* note 3.
35. Shelley v. Kraemer, 334 U.S. 1 (1948); Hurd v. Hodge, 334 U.S. 24 (1948).

The decision is valuable, though, as an example of a new trend in the attitude toward international law. International law has always been the law of sovereign nations, which by reason of their sovereignty, were not subject to law, and therefore international law was not law at all but merely the rules of a game which had no umpire except the strength and opinion of the players themselves. With the drafting of the U.N. Charter, however, writers have been pointing to the further recognition of the rights of the individual under international law.[36] Philip Jessup writes, "It is inherent in the concept of fundamental rights of man that those rights inhere in the individual and are not derived from the State."[37] Here, a court has taken the Charter, a document of international law, and invalidated a state law as a consequence thereof. No other court has gone this far. Other courts have taken steps in this direction, however. For instance, the Supreme Court of New York has held that "even without further action by Congress or by the State, the effect of Article 104 would be to give the United Nations the legal capacity to own land in the United States.[38]

In addition, several of the Justices of the Supreme Court of the United States have also placed their blessing on the Charter by way of concurring opinions, but no court has gone as far as the court in the principal case and given this document such import in the field of human liberties. On the other hand, several courts have taken a contrary view to that of the California court.[39]

It appears that in view of the conflict of opinion it will be necessary to wait for clarification of the obligations imposed

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36. Lauterpacht, *The Subjects of the Law of Nations*, 64 L.Q. REV. 97 (1948). In this article the author makes the point that in the sphere of international law the correlation between right and remedy is not as close as within a state, and that therefore we should not "permit our understanding of it to be blurred by the fact that these rights are not, so far as the Charter is concerned, fully enforceable at the instance either of the individual or of the members of the United Nations." *Id.* at 101.

McDougal and Leighton, *The Rights of Man in the World Community*, 14 LAW & CONT. PROB. 490 (1948); Sayre, *United Nations Law*, 25 CAN. B. REV. 809 (1947). *But see* Hudson, *Integrity of International Instruments*, 42 AM. JOUR. INT'L LAW 105 (1948); Rix, *Human Rights and International Law*, 35 AM. BAR ASS'N JOUR. 551 (1949).

37. JESSUP, A MODERN LAW OF NATIONS 90 (1948).

38. Curran v. City of New York *et al.*, 191 Misc. 229, 234, 77 N.Y.S.2d 206, 212 (Sup. Ct. 1947).

39. Sipes v. McGhee, 316 Mich. 614, 25 N.W.2d 638 (1947); Kemp v. Rubin, 188 Misc. 310, 69 N.Y.S.2d 680 (Sup. Ct. 1947).

by the Charter by the Supreme Court, or Congress, or by treaty such as the Covenant on Human Rights currently being drafted in the United Nations. The case has been appealed and will probably reach the Supreme Court of the United States when the issue will be squarely before the court, and in view of the concurring opinions in the *Oyama case* it may be that the Court will abandon its previous reluctance and make a determination of the obligations under Articles 55 and 56 of the Charter. If the court does this it may be that it would adopt a view that:

> . . . a promise *to promote* respect for and observance of human rights and freedom is not, under common sense interpretation, compatible with insistence upon the maintenance of internal doctrines and practices destructive of human rights and violent opposition to all change.[40]

WALLACE J. SHEETS

LITERARY PROPERTY—ARTIST'S RIGHT TO PREVENT DESTRUCTION OF HIS WORK AFTER SALE. In the United States an artist's rights in his work are legally protected from economic exploitation by statutory and common law copyright, but his further interest in the work after it has been sold has frequently been denied by the courts. The state of the law is illustrated by *Crimi v. Rutgers Presbyterian Church in the City of New York*,[1] in which the plaintiff, a nationally known artist, executed a fresco mural on the rear wall of the defendant's church. The work was copyrighted, and the copyright was assigned to the church. By 1946 opposition to the painting by various members of the congregation had grown to such a degree that, while redecorating, the church obliterated the mural by covering it with a coat of paint, without previous notice to the plaintiff. The latter filed suit, requesting one of the three following forms of relief: (1) that the defendant be required to remove the obliterating paint; (2) that the plaintiff be permitted to remove the mural at the defendant's expense; (3) that if the other forms or relief should be denied, the plaintiff be awarded damages for the destruction

40. McDougal and Leighton, *The Rights of Man in the World Community*, 14 LAW & CONT. PROB. 490, 513.

1. 194 Misc. 570, 89 N.Y.S.2d 813 (Sup. Ct. 1949).