EDITORIAL COMMENT

THE EXTRADITION CASE OF SAMUEL INSULL, SR., IN RELATION TO GREECE

On October 6, 1932, the Governor of Illinois telegraphed the Department of State requesting that the American Embassy at Paris be directed to ask for the provisional detention and arrest of Samuel Insull, Senior, an alleged fugitive from justice from the State of Illinois, where a warrant had been issued for his arrest, charging him with what was known in the Illinois statutes as larceny and larceny by a bailee.[1] On October 6, 1932, the Embassy at Paris was instructed as directed; but on the following day telegraphed that while the arrest of the accused had been requested, the Embassy was advised that he had left France. On October 8, the Governor of Illinois requested that Insull's arrest be requested in Italy, and the American Embassy at Rome was duly instructed to ask for his arrest. On October 10, the American Legation at Athens telegraphed that the police of that city had arrested Insull on their own responsibility; and that if no request were received for his extradition within twenty-four hours he would be released. On that date the Legation at Athens was directed to ask for Insull's arrest, since only a formality was necessary to bring into force the pending extradition treaty between the United States and Greece through an exchange of ratifications. On October 11, the Legation at Athens reported that the Greek Government would not arrest Insull because the treaty with the United States was not in force. On the following day, the Legation was instructed to take up Insull's passport. On October 13, the Legation reported that the Premier of Greece had expressed the intention to prevent Insull from leaving that country until ratifications of the pending treaty were exchanged. On October 14, the Legation reported that Insull refused to surrender his passport. On November 1, the Department of State advised the Legation at Athens that ratifications of the treaty had been exchanged on that date, and directed the Legation to request Insull's arrest pursuant to the treaty. On November 4 the Legation reported his arrest and provisional detention at Athens.[2] On November 17, the Department sent the necessary papers to the Legation at Athens, the President of the United States issuing a warrant to take the fugitive into custody, who was

[1] Through the courtesy of the Honorable Joseph R. Baker, the extradition expert of the Department of State, it has been possible for the writer to ascertain the facts upon which this editorial is based.

[2] The Legation at Athens reported that on Nov. 5 the Public Prosecutor asked for the provisional detention of the accused for sixty days, in harmony with the provisions of the treaty. This was granted. Owing, however, to a medical statement by police surgeons that the accused was suffering from arteriosclerosis and diabetes, the court ordered that the accused be transferred to a particular hospital where he was held under a police guard. It may be noted that counsel for the accused protested against his provisional detention on the ground that it was giving retroactive effect to the relevant provisions of the treaty.

charged with "embezzlement by persons hired, salaried or employed to the detriment of their employers or principals." [3]

On December 27, 1932, the "Council of the Judges of the Court of Appeals" of Athens, at a public session, rejected the application of the United States for the extradition of the accused, expressing the opinion that there was no legal cause for his extradition thereto. The reasons for its conclusions are set forth hereinbelow.[4]

It should be observed that the treaty with Greece [5] contained in Article 1 the usual provision that the surrender of a fugitive charged with an offense made extraditable by the provisions of Article 2 should "take place only upon such evidence of criminality, as according to the laws of the place where the fugitive or person so charged shall be found, would justify his apprehension and commitment for trial if the crime or offense had been there committed." This points to the exact nature of the proceeding before the judicial authorities of the state within whose territory the fugitive is found and from which his surrender is sought. It has been well portrayed by the Supreme Court of the United States in the case of Benson *v.* McMahon,[6] where it was declared that:

[3] To quote the language of the judges of the Court of Appeals of Athens of December 27, 1932, the accused was "charged with embezzlement, larceny, and larceny by bailee, that is, with acts provided in the treaty (Article 2, sections 11, 15, 18 and 21)."

[4] "Whereas the Council of Judges of the Court of Appeals having considered carefully all the official documents presented, namely, the warrants for the arrest of the person sought, which were legally issued, the depositions of the witnesses, examined under oath, as well as all the other official documents and proofs, together with the arguments of the Public Prosecutor, the person sought and his attorneys, and likewise the supplementary depositions under oath of the witnesses Oliver McCormick and E. Davis, as well as the opinion of the ex-professor of Criminal Law in the University of Chicago, Floyd Thompson, who all fully deny the existence of any criminal intent in the acts of the person sought, and characterize his acts *as a loan and as a usual commercial act*, the purpose of which, indeed, was to prevent the sale of a great lot of securities deposited by Martin Insull with the brokers as security, and which sale if made would cause as a result a violent drop in the market, thus greatly reducing the value of the securities issued by the companies controlled by the person sought to their greater loss, and in addition thereto the fact that the amount of money for which the defendant is accused is so very little in comparison with the property owned by these companies, while he, on the other hand and during the long period of the life of these companies, one of which has been operating for twenty years and the other for four, did not obtain any profit from their property excepting only his regulated salary, as well as the fact that even the books of these companies do not show any indebtedness of the person sought, and furthermore the fact that the conduct of the person sought has been audited since by the officers authorized for said purpose by the constitutions of these companies; for all the above reasons this Council of the Court of Appeals is fully convinced that in this case there are no criminal acts provided in and punished by both the Greek and the American law; that is, acts of embezzlement, larceny, and larceny by bailee, for which the extradition is sought, but that they are, on the contrary, legal acts, forced by the circumstances, and, consequently the application for extradition must be rejected."

[5] Printed in Supplement to this JOURNAL, p. 45.

[6] 127 U. S. 457, 462–463. In this case, the Supreme Court was dealing with a similar article embraced in the Extradition Treaty between the United States and Mexico of Dec. 11, 1861.

> Taking this provision of the treaty, and that of the Revised Statutes above recited, we are of opinion that the proceeding before the commissioner is not to be regarded as in the nature of a final trial by which the prisoner could be convicted or acquitted of the crime charged against him, but rather of the character of those preliminary examinations which take place every day in this country before an examining or committing magistrate for the purpose of determining whether a case is made out which will justify the holding of the accused, either by imprisonment or under bail, to ultimately answer to an indictment, or other proceeding, in which he shall be finally tried upon the charge made against him.

Hence, defensive testimony by way of confession and avoidance becomes immaterial; the inquiry before the tribunal not being whether there is excuse or justification for the conduct of the accused, but rather whether there is probable cause for holding him for trial. The Court of Appeals, while seemingly convinced that the accused had a solid defense against conviction in Illinois, did not indicate whether, despite such fact, the production of like evidence of criminality before the judicial authorities in Greece would fail to justify his apprehension and commitment for trial in that country if the offenses charged against him had been there committed.

On December 30, 1932, the Legation at Athens reported to the Department of State that no appeal could be taken in the Insull case, and that the decision could not be reviewed by the same court on the same evidence, adding, however, that possibly a rehearing on the presentation of fresh facts might be had. On March 17, 1933, the Legation at Athens reported that the decision was irrevocable, that no method of appeal was provided by the Greek legislation, and that no additional evidence could be presented. It was said that a fresh request for extradition would be heard if based on an indictment, warrant and the proofs of criminality of such nature as were contemplated in the treaty, if the evidence consisted of a new set of facts unrelated to those embraced in the demand for surrender which had been rejected.

In June, 1933, Insull was indicted in the United States under five counts, charging violations of §52b, Clause 6 of Title 11, U. S. Code (Bankruptcy Laws). The alleged violations were said to have been committed at Chicago on November 2, December 12, December 15, December 22, 1931, and January 20, 1932, "consisting of the unlawful transfer of property belonging to the Corporation Securities Company of Chicago, Illinois, while Insull was an officer and agent thereof and in contemplation of the bankruptcy of said corporation, and to defeat the operation of the Bankruptcy Act." A bench warrant was issued for the arrest of the accused, but returned not found. The Attorney General of the United States formally requested the Secretary of State to obtain the provisional arrest and detention of the fugitive. The arrest of the accused was requested of Greece on August 14, 1933, and was effected on August 26, and his surrender to the United States duly demanded under the provisions of Article 2 of the Extradition Treaty.

On October 31, 1933, the Court of Appeals at Athens refused the application

for Insull's surrender. Its decision, as well as the dissenting opinion of the Presiding Justice, Mr. Panegyrakis,[7] deserve attention. From the former it is apparent that evidence was offered charging the accused with the commission of acts which apparently in the mind of the court constituted offenses against the laws of both Greece and the United States, and which must compel the conclusion that, if the commission of those acts had taken place in Greece, evidence such as that offered by the United States would have been deemed to justify his apprehension and commitment for trial.[8] In this connection the language of the dissenting Presiding Justice is significant. He declared that:

> The Council is unanimously of the opinion that the accused did commit the offenses under the American law, for which he has been indicted, although the distinction is drawn that some of these violations do not constitute the offense of bankruptcy of a company administrator according to Greek law. But the Council is agreed that the company was in a state of insolvency at the time when the accused, as its administrator, paid into The Northern Trust Company the sum of $558,120 for the payment of a dividend to the holders of the company's preferred stock, a payment which had been voted not out of real profits or surpluses of the company, but out of its capital and out of fictitious and pretended profits or surpluses (first count); that this act of paying a dividend out of capital is in itself a fraudulent act and it is not necessary to seek any other more specific confirmation of fraud; and that the payment of dividends to a certain class of shareholders comes under Section 3 of Article 685 of the Greek Commercial Law. Consequently, under that provision of the Greek law, the accused as the company's administrator, by paying dividends to the holders of the company's preferred stock not out of profits and thereby reducing the company's capital, can be prosecuted for bankruptcy even under the Greek law.

[7] Printed in this JOURNAL, *infra*, pp. 362, 372.

[8] Thus the court, after discussing the nature of the five offenses charged against the accused in the indictment, went on to say: "Lastly, under the first count, the accused being, together with others, an officer (Chairman of the Board of Directors and member of the Executive Committee) of the bankrupt corporation and well knowing the latter's insolvent condition, etc., handed over out of the corporation's assets and capital a sum of $558,120 to The Northern Trust Company of Chicago, which, acting on the accused's instructions, used this sum for the payment of a dividend to the holders of the company's preferred stock (amongst whom was the accused himself), which dividend was paid, not out of real earnings or surpluses of the company, but really out of its capital, the earnings and surpluses being fictitious and imaginary.

"All the foregoing five counts constitute the offenses (according to the indictment) against the laws of the United States, and are punishable by imprisonment not exceeding five years, if committed by officers or agents of a person or corporation who, in contemplation of the corporation's bankruptcy or with intent to frustrate the operation of the bankruptcy law, shall conceal or transfer any assets of the corporation or person, whose officers or agents they are, 'transfer' being understood, under the official interpretation, to mean any alienation of the property or of its possession, whether absolute or conditional, and if attempted in any manner.

"These acts constitute offenses under the Greek bankruptcy law, as well. . . . This payment of dividends manifestly non-existent at the expense of the share capital is in itself fraudulent and it is unnecessary to prove any other more specific definition of fraud."

Moreover, he went on to say that under the Greek law, sufficient indications were furnished by the evidence to justify the arrest and commitment to trial of the accused had the offenses been committed on Greek territory.

The majority of the tribunal appeared to justify its decision on the ground that, despite the acts chargeable to the accused and of which evidence was offered, there was provocation for his conduct of which some features were not inspired by any malevolent intention, and that he did not appear to have been actuated by any fraudulent intent. It is not apparent, however, how this argument could be applied with reference to the transaction involving the payment of dividends non-existent, at the expense of capital stock. Attentive examination of the decision must inspire the conclusion that the court essayed to try the accused and to accept its own conclusions as to a lack of fraudulent intent as a sufficient defense against conviction, and against also the obligation of the Greek state to surrender him to the United States.

Under the circumstances, it is not surprising that on November 5, 1933, Mr. MacVeagh, the American Minister to Greece, was instructed to deliver to the Greek Minister of Foreign Affairs the following communication:

> I am instructed to inform Your Excellency that the United States Government has learned with astonishment that the Greek authorities have again declined to honor the request of the United States for the extradition of Samuel Insull, a fugitive from American justice.
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> My Government finds it difficult to reconcile this unusual decision with the admission of the competent authorities that the fugitive committed the acts with which he was charged and that these acts are illegal and fraudulent both in the United States and Greece. Without going into the details of the decision, it is evident that the authorities attempted actually to try the case instead of confining themselves to ascertaining whether the evidence submitted by the United States Government was sufficient to justify the fugitive's apprehension and commitment for trial. There can be no doubt that the question of criminal intent referred to by the Hellenic Government would be fairly and judiciously passed upon by the courts in the United States. I am to add that my Government considers the decision utterly untenable and a clear violation of the American-Hellenic Treaty of Extradition signed at Athens on May 6, 1931.[9]

In view of the position taken by the United States, which in substance asserts that the Greek state, through its judicial authorities, has failed to

[9] Department of State, Press Release, Nov. 5, 1933.

The communication contained the further statement: "Inasmuch as the Greek authorities have now seen fit on two occasions to deny the just requests of the United States made under the provisions of the above-mentioned treaty, it is apparent that this treaty, although similar in terms to treaties which the United States has found effective in extraditing fugitives from other countries, cannot be relied upon to effect the extradition of fugitives who have fled to Greece. My Government therefore considers that from the American point of view the treaty is entirely useless. Accordingly I am instructed to give formal notice herewith of my Government's denunciation of the treaty with a view to its termination at the earliest date possible under its pertinent provisions."

respect the terms of the Hellenic-American Treaty of Extradition, there has arisen an issue that requires adjustment. It is suggested that the alleged breach of the treaty appropriately calls for adjudication before an international forum. From an American point of view, it would be desirable to submit to the Permanent Court of Arbitration at The Hague, under the existing Arbitration Treaty between the United States and Greece, of June 19, 1930, the question whether Greece has been guilty of a breach of the Treaty of Extradition. The conclusion of that tribunal on that question would be helpful to the cause of extradition. The protest of an aggrieved state, such as the United States, however valid, needs support and vindication in an international forum to which the contracting states have agreed to have recourse.

CHARLES CHENEY HYDE

THE GOLD CLAUSE IN INTERNATIONAL LOANS

Huge amounts of external funded obligations, both public and private, issued in many countries and now outstanding, contain clauses for the payment of principal and interest in gold or in gold coin. For this reason the decision rendered in the House of Lords on December 15, 1933, in the case of Feist *v.* Société Intercommunale Belge d'Électricité,[1] is of international importance. No serious question of the conflict of laws was involved because the bonds under construction were by their own terms to be "construed and the rights of the parties regulated according to the law of England and as a contract made and according to the terms thereof to be performed in England." The circumstances of issue confirmed the rule of construction because the bonds were floated in England by an English firm, designated as fiscal agent of the obligor, and payable, principal and interest, at the office of such agent in London. The defendant, a Belgian company, promised to pay the principal in sterling in gold coin of the United Kingdom of or equal to the standard of weight and fineness existing on the first day of September, 1928. The interest was payable in the same medium at 5½ per cent. by equal half-yearly payments. In September, 1928, when the bonds were issued, the Gold Standard Act, 1925, had exempted the Bank of England from obligation to pay its own notes in gold coin but they still remained legal tender, and currency notes were not redeemable in gold coin. The Currency and Bank Note Act, 1928, had been passed, though it did not go into effect until November 22, of that year. By these laws, gold coin was substantially withdrawn from circulation. Furthermore, the literal interpretation of the gold clause would have required that the coins tendered would all have to be of the exact standard of weight and fineness specified in the Coinage Act of 1870, and the interest provided by the separate coupons would have had to be paid in gold coin of a denomination which did not and never did exist in the United Kingdom.

[1] Reprinted in this JOURNAL, *infra*, p. 374.