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RECOGNITION CASES IN AMERICAN COURTS, 1923-1930

By JOHN S. TENNANT*

ALTHOUGH the Soviets have maintained complete, uninterrupted, and practically undisputed control over most of the territory of the former Russian Empire for more than ten years, the United States still refuses to recognize the Soviet government as the international representative of Russia. The first general consideration of the legal situation engendered by the policy of our government was contained in an article by Professor Edwin D. Dickinson, "The Unrecognized Government or State in English and American Law," which appeared in the Michigan Law Review in 1923.[1] In view of the importance of this matter, and the number of cases involving it decided since that time, further consideration of some of the problems may be worth while. The present writer has undertaken, therefore, to review the intervening cases.

The problems faced by the courts have centered around the frequently announced rule that recognition is a political question, and that the courts are bound by the action of the political department thereon.[2] This vague formula gives little assistance in the determination of the specific questions presented in any given case. The questions that the courts have had to answer are these: When does a particular set of facts so involve a matter of foreign relations that the attitude of the state department must be adopted by the

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[1]22 MICH. L. REV. 29, 118. See also, by the same writer, "Recent Recognition Cases," 19 AM. J. INT. L. 263, and "Recognition Cases, 1925-1930," *ibid.*, April, 1931. Other articles of interest on the subject include: Connick, "Effects of Soviet Decrees in American Courts," 34 YALE L. J. 499; Fraenkel, "The Juristic Status of Foreign States, Their Property, and Their Acts," 25 COL. L. REV. 544; Habicht, "The Application of Soviet Laws and the Exception of Public Order," 21 AM. J. INT. L. 238; Thormodsgard and Moore, "Recognition in International Law," 12 ST. L. L. REV. 108. See also HERVEY, LEGAL EFFECTS OF RECOGNITION IN INTERNATIONAL LAW. Articles dealing with particular portions of the subject will be referred to later. More complete bibliographies of the literature may be found in Dickinson, *op. cit.*, AM. J. INT. L., April, 1931 and HERVEY, *op. cit.*

[2]Jones v. United States, 137 U. S. 202, 11 Sup. Ct. 80.

court? Conversely, when may the court take cognizance of the actual fact situation, without reference to the state of diplomatic affairs?

In pursuing these inquiries, we may briefly investigate the purpose and meaning of recognition, and the reason for the rule that the judiciary must follow the decision of the executive.

While a new state, or a new government in an old state, becomes an international person by acquiring internal sovereignty, it can not achieve full international status without recognition by other states.[3] This recognition it is not entitled to as a matter of right, but may expect as a matter of course as soon as it has proved its control over its own territory. As Oppenheim said, "* * * in practice such recognition can not in the long run be withheld, because without it there is no possibility of entering into intercourse with the new State. The interests of the old State must suffer quite as much as those of the new State, if recognition is for any length of time refused, and in practice these interests in time enforce either express or implied recognition."[4]

The United States, in particular, has followed a general policy of according recognition to new states and governments as soon as their capacity to maintain their independence, or, in the case of new governments, to rule, has been demonstrated.[5] The result of this policy has been that non-recognition by our government has meant in a real sense that the sovereignty of the alleged new state or government was in doubt. Thus when a court was faced with a question of sovereignty, it could look to the attitude of the state department with confidence that it would therefrom discover the truth.[6]

In addition to this practical reason, another was usually advanced for using this method of determining such a question. It was said

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[3] 1 OPPENHEIM, INTERNATIONAL LAW 4th ed., sec. 71.

[4] 1 *ibid.* sec. 72.

[5] GOEBEL, THE RECOGNITION POLICY OF THE UNITED STATES; COLE, THE RECOGNITION POLICY OF THE UNITED STATES SINCE 1901, ch. II. "The Policy of the United States, announced and practiced upon occasions for more than a century, has been and is to refrain from acting upon conflicting claims to the *de jure* control of the executive power of a foreign state; but to base the recognition of a foreign government solely upon its *de facto* ability to hold the reins of administrative power." Quoted from directions to the American minister in Colombia in 1890, in 1 MOORE, DIGEST OF INTERNATIONAL LAW 162.

[6] The unfitness of the courts to decide such matters was pointed out in Kennett v. Chambers, 14 How. (U. S.) 38, 51.

that if different conclusions on matters of foreign relations were reached by different departments of the government, embarrassment to the political department would result.[7]

This was undoubtedly true in some situations. If, while our government was maintaining friendly relations with a foreign government, a portion of its territory was attempting to set itself up as an independent state, or a faction within the state was attempting to overthrow the government, premature recognition of the revolutionary group by our government would constitute an affront to the old government.[8] An acknowledgment of sovereignty by the judiciary might have the same effect. Thus the rule. It must be noted, however, that when political recognition had been granted, or when the passing of the political crisis had removed the possibility of embarrassment, courts felt free to hold that sovereignty had existed during a period when it had been denied by the state department.[9]

In late years, our government has denied recognition to governments which have proved conclusively their internal sovereignty. It should be obvious that non-recognition can no longer mean that the executive doubts the sovereignty of such governments, or believes the old governments to be still in power. Rather, denial of recognition in such cases must mean that for other reasons our government is not willing to enter into diplomatic relations with the new sovereign.[10] It is believed that a communication from the state department quoted in a recent case demonstrates this point. "* * * the United States has not recognized any other government in Russia since the *fall of the provisional government,* to which reference is made above. The regime *now functioning in Russia,* and known as the 'Soviet Regime,' has not been recognized by the United States."[11]

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[7]Williams v. Suffolk Insurance Co., 13 Pet. (U. S.) 415.

[8]1 OPPENHEIM, *op. cit.* sec. 74.

[9]Oetjen v. Central Leather Co., 246 U. S. 297, 38 Sup. Ct. 309; Thorington v. Smith, 8 Wall. (U. S.) 1; Dickinson, *op. cit.*, 22 MICH. L. REV. 29.

[10]These reasons are not so difficult to find as to justify. Fear of communist propaganda, and a desire to force an assumption by the Soviets' of the international obligations of former regimes are the usually suggested reasons. See MOYER, ATTITUDE OF THE UNITED STATES TOWARD THE RECOGNITION OF THE SOVIET REPUBLIC. The change in our traditional policy is discussed in COLE, *op. cit.*

[11]Russian Government v. Lehigh Valley R. R. Co., 293 Fed. 135, 137. The italics in the above quotation are the present writer's.

It seems reasonably clear from this pronouncement that the continuation of the old regime is not asserted, and, although the language is guarded, that the control of the new government is not denied. Recognition is now granted, it would appear, only when (1) sovereignty is established, and (2) certain other conditions are fulfilled. Non-recognition must mean that one or the other prerequisite is not present, but does not necessarily mean that neither is present. If it is quite clear from the state department's statements that only the second condition is lacking, it is believed that a court may, without disturbing precedent, take cognizance of the new government's sovereignty.

It may be argued, however, that officially, non-recognition is a denial of sovereignty. If this be so, we may at least say that a court can no longer rely on finding a correct view of the facts in the executive's attitude. The question is then how far should a court follow an erroneous conclusion of the executive in such a case? We may grant that when the situation is doubtful, the court should rely on the superior qualifications of the executive for discovering the truth. We may further grant that when premature acknowledgment of the sovereignty of a succeeding or usurping faction might cause an international affront to a friendly foreign government, the courts should feel precluded by the position of the executive. But it is believed that when there is neither such doubt, nor such danger, the court should exercise an independent judgment.

A further objection may be raised, that under our division of powers, the courts are constitutionally bound to follow the executive on such questions.[12] While a full consideration of this point can not be attempted here,[13] it is clear that in dealing with the present situation courts have not considered themselves restrained by any constitutional limitations. Whenever Soviet immunity has been involved, the courts have invariably held that sovereignty may be established independently of recognition, and when established will result

[12]The tenor of many of the older authorities is to this effect. See Williams v. Suffolk Life Insurance Co., 13 Pet. (U. S.) 415.

[13]See the interesting discussion of the nature of political questions in Finkelstein, "Judicial Self-Limitation," 37 HARV. L. REV. 338; Weston, "Political Questions," 38 HARV. L. REV. 296; Finkelstein, "Further Notes on Judicial Self-Limitation," 39 HARV. L. REV. 221.

in immunity regardless of the attitude of the state department.[14] The reason for the realistic view taken in these cases is undoubtedly that a denial of sovereignty, and of resultant immunity, would have caused real embarrassment to the state department. Nevertheless, it is clear that the courts refused to be bound by non-recognition. It is submitted that in all cases where Soviet sovereignty is involved, the same realistic view should prevail, facts should be substituted for fiction, and cognizance taken of the true situation.

This view is not supported by what the courts have said, except in the immunity cases, but the results of the actual decisions are not inconsistent with the theory presented. It was perhaps inevitable that common law courts would add on to an existing structure rather than build another to meet the requirements of a new situation. Furthermore, when the first cases were presented, it was not so apparent that a new foundation was required, since the then current doubt of Soviet ability to continue control prevented the courts from seeing what is now obvious, that the present situation is unprecedented.

Fortunately, the cases did not force the courts to commit themselves very far, before they became aware of the need for some changes, but the process of reconstruction has been gradual. While it is believed that the fundamental change in approach suggested above would be desirable, in view of the reluctance of common law courts to make such a change, an intermediate position will be suggested in connection with the cases where the need for a realistic view is most important, the cases dealing with private rights as affected by Soviet law.[15]

The case material will be considered under the following headings: (1) The Unrecognized Government in Court; (2) The Effect of Non-Recognition of the Rights of Aliens in the United States; (3) The Effect of Non-Recognition on the Application of Conflict of Laws Rules; (4) Retroactivity and Conclusiveness of the Act of Recognition.

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[14]Wulfsohn v. R. S. F. S. R., 234 N. Y. 372, 138 N.E. 24; Banque de France v. Equitable Trust Co., 33 F.(2d) 202. See also Dickinson, *op. cit.*, 22 MICH. L. REV. 29, and infra, page 703.

[15]See infra, pages 710 ff.

THE UNRECOGNIZED GOVERNMENT IN COURT

In the earlier article, Professor Dickinson gave full consideration to *The Rogdai,*[16] and other cases in which access to court was denied the Soviet government for the purpose of recovering property of former regimes, and to *Russian Socialist Federated Soviet Republic v. Cibrario,*[17] in which access was denied even for the purpose of protecting its own property. Two later cases involved the first of these questions. The Nationalist government of China brought suit against two American insurance companies for losses under fire insurance policies issued to its predecessor. The United States court for China sustained pleas in abatement on the ground that this government was without capacity to sue, not having been recognized by the United States. On appeal to the federal circuit court, the holding of the lower court was held to have been correct at the time it was given. The decisions in both cases were reversed, however, since the Nationalist government had been recognized in the interim.[18]

The present writer has no quarrel with the rule that an unrecognized government is denied access to court. This right does not follow from sovereignty alone, but is dependent, if not on comity, at least on friendly diplomatic relations, and certainly would be refused also in the case of a government with whom diplomatic relations had been severed as a result of war.

The immunity from suit of an unrecognized but sovereign government was established in *Wulfsohn v. Russian Socialist Federated Soviet Republic,*[19] discussed in detail in the earlier article. Briefly, the basis of the holding was that the court had no jurisdiction over a foreign government, sovereign in fact, regardless of the diplomatic situation. This statement of the law was reasserted in a later case, *Nankivel v. Omsk All-Russian Government,*[20] where a suit was brought against a government which had controlled a portion of Rus-

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[16]278 Fed. 294. The cases are discussed by Dickinson, *op. cit.*, 22 MICH. L. REV. 118, at 121. See also 31 YALE L. J. 534; 17 AM. J. INT. L. 742.

[17]235 N. Y. 255, 139 N.E. 259.

[18]Republic of China v. Merchant's Fire Assurance Corp.: Same v. Great American Insurance Co., 30 F.(2d) 278. See comment, 42 HARV. L. REV. 959.

[19]234 N. Y. 372, 138 N.E. 24. Writ of error dismissed 266 U. S. 580, 45 Sup. Ct. 89.

[20]237 N. Y. 150, 142 N.E. 569.

sian Siberia for some two years. In following the earlier case and dismissing the suit, Judge Pound made some pertinent remarks regarding the basis of the immunity. "So long as it maintained an independent existence, it was immune from suit for its governmental acts in our courts without its consent. Lack of recognition by the United States government, we have recently held, does not permit an individual suitor to bring a *de facto* government before the bar. To sue a sovereign state is to insult it in a manner which it may treat with silent contempt. It is not bound to come into our courts and plead its immunity. It is liable to suit only when its consent is duly given."[21]

The federal district court for the southern district of New York had occasion to examine a question of immunity in *Banque de France v. Equitable Trust Co.*[22] The plaintiff, a French corporation, purchased gold in Russia in 1915 and 1917, which it deposited in the Imperial Russian State Bank for safe-keeping. This gold was confiscated by decrees of the Soviet government, which were carried out by seizure in Russia. In 1928, the defendant received a shipment of gold via Germany to be held for the State Bank, a part of the Soviet government. The plaintiff claimed the gold included that which they had deposited in Russia, and sued for its recovery. One defense urged was that the court was not competent to pass on the title to property claimed by a foreign government. The court denied plaintiff's motion to strike out this defense, holding that a sovereign could not be brought into court without its permission, and that a court could not pass on the title to property claimed by a sovereign, regardless of whether such sovereign had been recognized, since its existence might be proved in other ways, and could not be ignored.

This holding goes beyond that of the earlier cases, and suggests that immunity is due a de facto sovereign in all cases where it would be granted a recognized government. The court might have limited the doctrine of the *Wulfsohn* case to situations where the suit was personally directed against the foreign government, without the presence of a res in the jurisdiction. Judge Goddard refused to take this narrow view, and thus established what is believed to be

[21]Nankivel v. Omsk All-Russian Gov't., 237 N. Y. at 156, 142 N.E. at 570.
[22]33 F.(2d) 202.

a sound precedent for the determination of other immunity cases which may arise. While the present scope of state immunity may be too broad, there is no reason why it should be limited to recognized governments, since the policy behind the doctrine does not justify any distinction on the ground of non-recognition.[23]

THE EFFECT OF NON-RECOGNITION ON THE RIGHTS OF ALIENS IN THE UNITED STATES

The absence of diplomatic relations with Russia raises many questions in regard to the rights of Russian citizens in this country, and a few have been presented for judicial determination. The question most frequently raised has been whether an individual or corporation is to be permitted access to our courts, when the government of the state of his citizenship had not been recognized by the United States.

The plaintiffs in *Falkoff v. Sugerman*[24] were citizens of Russia, suing to establish certain interests in the property of a deceased resident of Ohio. The defendants objected to the continuance of the suit on the ground that since the Soviet government was not recognized, its citizens had no right to maintain an action in the courts of this country. The Ohio common pleas court refused to sustain the objection, holding that under Ohio law all aliens were accorded equal rights in the ownership of property, and in the protection of person and property by appeal to the courts, without regard to the state of diplomatic relations between their government and ours. The court said, "It is manifest that the word 'aliens,' as used in Sec. 8589, is not limited to citizens of foreign countries with which the United States has treaty or diplomatic relations, but is used in the broadest sense."[25]

The same question was raised in *Sliosberg v. New York Life Insurance Co.*,[26] decided in the courts of New York. The plaintiff

[23]Cf. Hennenlotter v. Norwich Union Fire Ins. Soc., 124 Mis. 626, 207 N. Y. S. 588.

[24]26 Ohio N. P. 81.

[25]Falkoff v. Sugerman, 26 Ohio N. P. at 85. The section of the code referred to permitted aliens to hold property. This was then held to call into play a constitutional provision that the courts should be open to every person to protect his property and person. Art. I, sec. 16, Ohio constitution.

[26]217 App. Div. 67, 216 N. Y. S. 215, affirmed 244 N. Y. 482, 155 N.E. 749. See comment, 36 YALE L. J. 142.

in this action, a Russian citizen resident in Paris, brought suit on two life insurance policies issued in Russia before the revolution. The defendant sought a judicial stay of the proceedings under a New York statute[27] authorizing a stay until thirty days after recognition of a government of Russia, in all cases founded upon life insurance contracts made by American companies before the revolution, which were to be performed wholly or in part within Russia. The plaintiff claimed that the statute impaired the obligations of a contract and took his property without due process of law. The answer of the defendant was that while this might be true with regard to citizens of the United States, it had no application to non-resident aliens; that their right to sue was dependent on comity existing between the United States and the nation of their citizenship; since no comity existed in the absence of diplomatic relations, a Russian plaintiff had no right to sue and thus could not be injured by the operation of the statute. The appellate division of the supreme court denied the application for a stay, holding the statute unconstitutional, on the grounds urged.

In affirming this decision, the court of appeals definitely denied that the right of an alien to sue depended on the state of diplomatic relations with the government of his nation. Judge Kellogg, in giving the opinion of the court, said that the fact that the Soviet government could not sue in the courts of New York "did not debar this plaintiff, even though he were, at the time, a Russian citizen, from bringing this action in the courts of this State."[28] He added that the right of alien corporations and individuals to sue had existed for so long a period that it had become fixed and that no court could now deny it, in the absence of "legislative fiat."[29]

The dictum regarding corporations in the *Sliosberg* case is supported by numerous other dicta and holdings to the same effect.[30]

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[27]New York Civil Practice Act, sec. 169-a.

[28]Sliosberg v. New York Life Ins. Co., 244 N. Y. at 491, 155 N.E. at 752.

[29]The statute in question was held not to be such a fiat, since its operation was not confined to aliens, but extended to all suitors on certain causes, and since its effect was not to deny suit, but merely to stay proceedings.

[30]It should be noted that we are concerned here only with access to court. Whether Russian corporations continue in existence is another question, to be dealt with later. See infra page 720.

In *Joint-Stock Co. v. National City Bank,*[31] the same court, although principally concerned with another matter, affirmed the right of a Russian corporation to sue in our courts. The same result was reached by the federal court in *Wulfsohn v. Russo-Asiatic Bank.*[32] In this case, the defendant Wulfsohn, appealing from a decision of the United States court for China,[33] claimed that in the absence of treaty relations between the United States and the present government of Russia, the plaintiff, a Russian corporation, had no standing in court. The federal circuit court of appeals for the ninth circuit denied the claim, holding that while a treaty might take away jurisdiction over claims presented by Russians, in the absence of such treaty provisions, anyone had access to the court as a plaintiff, the sole jurisdictional requirement being that the defendant be an American citizen.

A different conclusion was reached by another court of limited statutory jurisdiction, the United States court of claims, in *Russian Volunteer Fleet v. United States,*[34] a suit by a Russian corporation against the government. Jurisdiction depended on section 155 of the judicial code, providing that "Aliens who are citizens or subjects of any government which accords to citizens of the United States the right to prosecute claims against such government in its courts shall have the privilege of prosecuting claims against the United States in the Court of Claims, * * *."[35] Plaintiff alleged and offered to prove that under Soviet law and that of former regimes citizens of the United States were permitted to sue the Russian government. The court dismissed the suit, holding that jurisdiction was lacking on two grounds, first, because the plaintiff could not be allowed to prove Russian law to establish the right of United States citizens to sue, and second, because "government" in the statute included only recognized governments.

On the first point the court said, "Whether there exists a government in Russia, known as the Union of Soviet Socialist Repub-

[31] 210 App. Div. 665, 206 N. Y. S. 476, affirmed 240 N. Y. 368, 148 N.E. 552.

[32] 11 F.(2d) 715.

[33] 2 Extraterritorial Cases 536.

[34] 68 Ct. Cl. 32.

[35] 36 Stat. 1139, 28 U. S. C. A. sec. 261.

lics, is a question preliminary to the determination of the right of citizens of the United States to prosecute claims against such government in its courts. It has been repeatedly held that under our polity of government, the existence or non-existence of governments is a matter for the determination by the executive and not the judicial department of this Government."[36] The attitude thus expressed may be compared with that adopted by the same court in the earlier case of *Rossia Insurance Co. v. United States*,[37] where the court held "our jurisdiction depends upon the ascertainment of an existing and easily provable fact,"[38] (i.e., whether suit was actually allowed). It was determined in that case, either by proof or admission of the parties, that American citizens were *not* allowed to sue at that time, but opinion apparently forces the conclusion that if the opposite had been proved, the court would have heard the evidence and allowed suit. It is submitted that the attitude taken in the *Rossia* case was the correct one, since the "fact" that suit was or was not allowed did not in any way involve recognition by the court of the Russian government.

However, the decision in the later case may be justified on the second ground of the holding. As the court said, "The right given an alien to sue the United States in section 155 of the Judicial Code, *supra,* is a great privilege—one arising out of comity between nations. We must conclude that Congress, when it granted this great privilege to the subjects 'of any government' according reciprocal rights to citizens of the United States, had in mind such governments as may be recognized by the proper authorities of the United States under our well-known polity of government."[39]

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[36]Russian Volunteer Fleet v. United States, 68 Ct. Cl. 32 at 33.

[37]58 Ct. Cl. 180.

[38]Rossia Insurance Co. v. United States, 58 Ct. Cl. 180 at 181.

[39]Russian Volunteer Fleet v. United States, 68 Ct. Cl. 32 at 35. Since the above was written this case has been reversed by the United States Supreme Court on other grounds. Russian Volunteer Fleet v. United States (U. S. 1931) 51 Sup. Ct. 229. The plaintiff's claim rested upon an act of Congress authorizing the requisition by the government of ship-building contracts, upon the payment of just compensation. 40 Stat. 183. The Supreme Court held that sec. 155 of the Judicial Code, relied upon by the court of claims in its decision, did not apply to or limit the right thus given to sue in the court of claims for compensation. Thus the questions decided by the court of claims were held not pertinent to a consideration of the plaintiff's claim.

No cases have been found dealing directly with the question of the right of aliens who are citizens of states having no recognized government to hold property in this country,[40] or with the admission or naturalization of such aliens, but government statistics show that Russians have been admitted under the immigration laws,[41] and have been naturalized.[42] In the last mentioned situation, it appears from a statement in a recent case that they have been required to forswear allegiance to the "present government of Russia."[43]

Several interesting cases have arisen in connection with deportation of Russian aliens.[44] In *Re Petition of Brooks,*[45] it appeared that one Bonder had been ordered deported to Russia in 1922, but was released on bond until 1925, when, the surety having asked for release, he was ordered into the custody of the Commissioner of Immigration at Boston. After he had been held for several months, a habeas corpus proceeding was instituted in his behalf. The immigration officials admitted their inability to deport him, but asked that he be held until recognition of Russia, or that he be again released on bond, and ordered to report periodically to the commissioner. The court held that neither request could be complied with. "As the government admits it cannot deport him, he is entitled to be set free."[46]

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[40]Except as that question was presented in Falkoff v. Sugerman, supra page 705, where a statute was involved. Apart from statute, the right of aliens to hold real property depends on treaties, since there was no right at common law. No treaty with Russia covering this matter is in force, since the treaty of 1832 (8 Stat. 444) was terminated in 1911 (37 Stat. 627).

[41]For the year ending June 30, 1930, the total is 6,558. See the Annual Report of the Commissioner-General of Immigration.

[42]The total for the past eight years is 127,974, and for the year ending June 30, 1930, 12,994. See the Annual Report of the Commissioner-General of Naturalization.

[43]Banque de France v. Equitable Trust Co., 33 F.(2d) 202, 205. At present, allegiance is renounced to "The State of Russia." For a time, however, the sovereign renounced was, as the court said, "The Present Government of Russia."

[44]The problems arising in these cases are not due to non-recognition in itself, but to the resulting absence of diplomatic relations. The same problems would arise if diplomatic relations were severed as a result of war, or otherwise.

[45]5 F.(2d) 238. See also Ex parte Matthews, 277 Fed. 857, and Ex parte Jurgans, 17 F.(2d) 507, 25 F.(2d) 35.

[46]In Re Petition of Brooks, 5 F.(2d) 238 at 240.

That this holding was predicated solely on the government's admission is indicated by the later case of *Pestereff v. Reed.*[47] Several Russians had crossed to Alaska in a small boat, and had been apprehended by the immigration officials. After a hearing in which deportation was ordered, they were held in jail pending an appeal to higher immigration authorities. They petitioned for release in habeas corpus proceedings, on the ground that since deportation to Russia was then impossible, in the absence of diplomatic relations, they were entitled to their freedom under the authority of *Re Petition of Brooks.* The court denied the petition, holding that whether deportation was possible was not a judicial question, but a political one, and in the absence of any admission by the government, the court could not decide that the United States was powerless to deport the petitioners.

THE EFFECT OF NON-RECOGNITION ON THE APPLICATION OF CONFLICT OF LAWS RULES

The largest number of cases which have arisen during the period under discussion have been concerned with the rights of private individuals and corporations as affected by the acts, laws, and decrees of unrecognized governments. In the conclusion of the earlier article, Professor Dickinson stated his view as follows: "* * * there appears to be no good reason at all why, in suits between individuals about matters of private right, the courts should not frankly take cognizance of unrecognized de facto governments or states, and of their capacity to affect private rights in a great many different ways."[48] Although modified in its application, this view appears to have had some influence in leading the courts to recognition of individual rights.

At the time it was introduced, the phrase "matters of private right" was useful to suggest a desirable distinction to be drawn be-

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[47] 7 Alaska 644.

[48] Dickinson, *op. cit.,* 22 MICH. L. REV at 134. On this phase of the subject see also: Connick, *op. cit.,* 34 YALE L. J. 499; Habicht, *op. cit.,* 21 AM. J. INT. L. 238; Houghton, "The Validity of the Acts of Unrecognized De Facto Governments in Courts of Non-Recognizing States," 13 MINN. L. REV. 216; Nebolsine, "The Recovery of the Foreign Assets of Nationalized Russian Corporations," 39 YALE L. J. 1130; 38 HARV. L. REV. 816; 30 COL. L. REV. 226.

tween cases in which a de facto government was itself a party, and those involving only private parties. The present writer has suggested, in the introduction to this paper,[49] a view which it is believed would solve satisfactorily both types of cases. But whether that view is accepted or not, the distinction urged by Professor Dickinson still justifies recognition of private rights under the laws of unrecognized de facto governments. It should now be pointed out, however, that the basis of this distinction lies in an approach to the question from the conflict of laws standpoint, since where reliance is placed on foreign law by private parties, it is through the medium of our conflict of laws rules.[50] For example, the validity of a marriage under our law depends upon its validity where solemnized. If a marriage has taken place in Russia, valid under Soviet law, but not in accordance with the rules prescribed by our law or that of previous regimes in Russia, may a court in this country recognize its validity? One court has ventured its opinion that marriages valid under Soviet law are to be regarded as valid in this country.[51] The correctness of this dictum depends, in large measure, on the theory underlying the application of conflict of laws rules.

Under the view of the Dutch jurists, followed extensively during the last century by many common law courts, that a court applied a rule of foreign law because of comity existing between nations,[52] a court might well reach the conclusion that it could not apply Soviet law in the absence of diplomatic relations with that government.[53] The modern view, however, rejects the theory of comity, and regards the foreign law, when applicable, as one of the

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[49]Supra page 701.

[50]The germ of this suggestion was contained in Dickinson, *op. cit.*, 22 MICH. L. REV at 132, footnote 85. See also 38 HARV. L. REV. 816, where the writer takes a view similar to the one here advanced, but seems to be troubled by theoretical difficulties not apparent to the present writer.

[51]Judge Goddard, in Banque de France v. Equitable Trust Co., 33 F.(2d) 202, 205. The English courts have upheld the validity of a Soviet marriage, though not all its incidents. Nachimson v. Nachimson, [1930] P. 217, commented on in 29 MICH. L. REV. 256. For a comparison of Soviet marriages with our own "companionate marriages" see 64 U. S. L. REV. 459.

[52]See STORY, CONFLICT OF LAWS, 8th ed., secs. 32 ff; BEALE, TREATISE ON THE CONFLICT OF LAWS, ch. 3.

[53]This would not necessarily follow, however, since it is usually said that the comity spoken of is comity between nations, not courts or governments.

operative facts determinative of the rights of the parties.[54] As stated by Professor Beale, "If by the national law the validity of a contract depends on the law of the place where the contract was made, then that law is applied for determining the validity of a contract made abroad, not because the foreign law has any force in the nation, nor because of any constraint exercised by an international principle, but because the national law determines the question of the validity of a contract by the *lex loci contractus*. * * * The provisions of this law having been proved as a fact, the question is solved by the national law, the foreign factor in the solution—i.e., the foreign contract law—being present as mere fact, one of the facts upon which the decision is to be based."[55]

In our case, the parties entered into a legal relationship, consisting of a change in status, and the assumption of certain rights and obligations, by virtue of a law existing and enforced where the marriage was solemnized. This law, under our common law rules of the conflict of laws, is to be proved as a fact, like the fact of the place of the marriage or any other fact, and will then determine the validity of the marriage. As one court wisely said, "Facts are facts, in Russia the same as elsewhere."[56] The fact of the law having been established, of what consequence can it be that our government refuses to recognize the government enforcing the foreign law? There is no question, under our theory, of helping a possibly objectionable government enforce its laws, but merely one of enforcing our conception of the rights of the parties. It is submitted

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[54]BEALE, *op. cit.*, secs. 73 ff; GOODRICH, CONFLICT OF LAWS, sec. 6; DICEY, CONFLICT OF LAWS, Introduction.

[55]BEALE, *op. cit.*, sec. 73. An interesting variation of this conventional view is presented in Cook, "The Logical and Legal Bases of the Conflict of Laws." 33 YALE L. J. 457, 469. "* * * the forum, when confronted by a case involving foreign elements, always applies its own law to the case, but in doing so adopts and enforces as its own law a rule of decision identical, or at least highly similar though not identical, in scope with a rule of decision found in the system of law in force in another state or country with which some or all of the foreign elements are connected, the rule so selected being in normal cases, and subject to exceptions to be noted later, the rule of decision which the given foreign state or country would apply, not to this very group of facts now before the court of the forum, but to a *similar but purely domestic group of facts involving for the foreign court no foreign element.*"

[56]Sokoloff v. National City Bank, 120 Mis. 252, 258, 199 N. Y. S. 355, 359.

that where the governing law is clear and can actually be determined, recognition does not enter the picture.[57]

Unfortunately, the cases have not presented in general such simple problems as the one outlined above. In one case, a lower court in New York, dealing with a contract made in Russia, to be wholly performed within Russia, held it to be governed by Russian law.[58] But, for the most part, the ordinary problems have been complicated by factors never before presented. The nationalization and confiscation decrees, which contain most of the law involved in current cases, are themselves anomalous and without precedent. Their scope was enormous, the consequences intended by their authors not always easy of ascertainment, and the social theories on which they were based abhorrent to the courts of countries whose law regards private right as almost sacred.[59] It was unthinkable, for example, that the decrees would be held effective to pass title to the enormous assets of the nationalized corporations located without Russia from these owners to the Soviet government, or otherwise to deprive the shareholders of these assets. On the other hand, manifest injustice would result from regarding Russia as a legal vacuum, and refusing to give any significance to its body of private law. Some middle path had to be found, and the conflict of European cases, both where the Soviet government had been recognized and where it had not, indicated that established principles were not entirely adequate to deal with the situation.[60] The English courts, before recognition,

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[57]"It [the state department] cannot determine how far the private rights and obligations of individuals are affected by the acts of a body not sovereign or with which our government will have no dealings. That question does not concern our foreign relations. It is not a political question, but a judicial question." Russian Reinsurance Co. v. Stoddard, 240 N. Y. 149, 158, 147 N.E. 703, 705.

[58]Dougherty v. Equitable Life Assurance Co., 135 Mis. 103, 236 N. Y. S. 673. The decision was reversed by the appellate division in a memorandum decision (228 App. Div. 624, 238 N. Y. S. 824) on the ground that the questions had been settled adversely to the defendant in previous cases. In the cases referred to, however, the contracts were not purely Russian in all their aspects. It is submitted that the court took insufficient account of this distinction, and that the decision should have been affirmed.

[59]See Wohl, "Nationalization of Joint Stock Banking Corporations in Soviet Russia and Its Bearing on Their Legal Status Abroad," 75 U. OF PA. L. REV. 385, 527, 622.

[60]The foreign cases are discussed in Nebolsine, *op. cit.*, 39 YALE L. J.

had used the government's attitude as a shield to protect private owners from loss through confiscation,[61] and after recognition, had struggled to minimize the effect of the decrees by the doubtful expedient of narrowly interpreting their meaning.[62]

The approach of the courts of this country was indicated in *Sokoloff v. National City Bank*,[63] the first case involving the Russian decrees. In June, 1917, the plaintiff deposited several thousand dollars in the defendant bank in New York, the latter agreeing to open an account in its Petrograd branch. After a portion had been withdrawn, the revolution and subsequent events drove the defendant out of Russia and prevented its completing the contract there. In a suit brought in New York for the balance due, the defenses were set up that the defendant's existence had been terminated by the nationalization decrees, and that further decrees confiscating assets and liabilities terminated defendant's liability, and transferred it to the State Bank. The lower court denied a motion to strike out these defenses, refusing to treat the decrees as governmental acts, but holding that the defenses might be sustained by proof of actual conditions in Russia.[64]

This decision was reversed by the court of appeals. The holdings were that the obligation was a debt, not a bailment, so that there was no res in Russia which could have been confiscated in fact; that there was no basis for the assertion that the plaintiff had agreed to look only to the Russian assets, which were actually confiscated; and that the existence or obligations of a corportion organized under American law could not be terminated by Russian law. Obviously, these conclusions would have been reached if Russia had been recognized, or if the decrees had been treated as those of a recognized government.[65]

1130; Wohl, *op. cit.*, 75 U. of Pa. L. Rev. 385, 527, 622; Habicht, *op. cit.*, 21 Am. J. Int. L. 238; Dickinson, *op. cit.*, *ibid.* April, 1931. See Ann. Dig. 1925-6, cases 16, 17, 75, 101, 102.

[61]See Luther v. Sagor, [1921] 1 K. B. 456, [1921] 3 K. B. 532.

[62]See Russian Comm. & Ind. Bank v. Comptoir d'Escompte de Mulhouse, [1925] A. C. 112.

[63]239 N. Y. 158, 145 N.E. 917. See comments, 23 Mich. L. Rev. 802; 38 Harv. L. Rev. 816; 5 Bos. U. L. Rev. 206.

[64]Sokoloff v. National City Bank, 120 Mis. 252, 194 N. Y. S. 355.

[65]The contract was made in New York, partially performed in that state, and the court might have held it governed by New York law.

After a trial, the case was again taken to the court of appeals. (250

Judge Cardozo made it clear, however, that such was not the approach adopted in reaching the result, but that, instead, a new line of reasoning was to be used in dealing with the situation. The starting point of his argument was as follows, "Juridically, a government that is unrecognized may be viewed as no government at all, if the power withholding recognition chooses thus to view it. In practice, however, since juridical conceptions are seldom, if ever, carried to the limit of their logic, the equivalence is not absolute, but is subject to self-imposed limitations of common sense and fairness, as we learned in litigations following our Civil War."[66] He then suggested a rule, based on the anology of these Civil War cases, which might govern the situation at hand. "* * * a body or group which has vindicated by the course of events its pretensions to sovereign power, but which has forfeited by its conduct the privileges or immunities of sovereignty, may gain for its acts and decrees a validity quasi-governmental, if violence to fundamental principles of justice or to our own public policy might otherwise be done."[67] On the basis of this reasoning, he then reached the conclusion that no public policy required the giving effect to the Russian decrees in the situation before him.

Upon analysis, the principle announced seems to be that, instead of applying the foreign rule, (when applicable under rules of conflict of laws), except when public policy is opposed to its application, the court will apply a foreign rule which is enforced by an unrecognized government only when public policy demands its application.[68]

If we assumed the old view of conflict of laws, this rule might be regarded as a salutary means of getting around the logical difficulty that in the absence of comity, there would be no basis for the application of foreign law.[69] Under the modern view, however, as

N. Y. 69, 164 N.E. 745). The principal question on this appeal was whether the decrees furnished the defendant with an excuse for non-performance.. Although the court held the decrees unlawful, it nevertheless held them no defense, which reasoning seems contrary to the usual rule. However, since the plaintiff was awarded restitution only, the result seems fair enough. Compare Gurdus v. Philadelphia Nat. Bank, 273 Pa. 110, 116 Atl. 672.

[66]Sokoloff v. National City Bank, 239 N. Y. 158, 165, 145 N.E. at 918.

[67]Sokoloff v. National City Bank, 239 N. Y. 158 at 166, 145 N.E. at 919.

[68]See Habicht, *op. cit.*, 21 AM. J. INT. L. 238, 252.

[69]See, however, note 53, supra.

we have pointed out, there is no theoretical impediment to the application of the law in force in Russia in accordance with the ordinary rules. Judge Cardozo's rule apparently admits this, since if the foreign rule may be applied in some cases, it follows that it may be applied in all cases where it would ordinarily be applicable. The reason for the novel approach must be, therefore, that in dealing with the unprecedented Soviet legislation, the court is not willing to be bound by accepted doctrines of the conflict of laws.

Before taking up the cases which follow, we may consider the theoretical value of Judge Cardozo's rule.[70] Under the ordinary conflict of laws rules, there are two prerequisites to the application of the foreign law: first, a condition precedent, that the foreign law be applicable to the case; and second, a condition subsequent, that the foreign law be not contrary to the public policy of the forum.[71] To refer to our Soviet marriage as a convenient example, if the Soviet law permitted Russian citizens domiciled in New York to marry by mailing notice of a marriage contract to officials in Russia, New York courts would determine the status of these individuals according to New York domestic law, rather than Russian law since the *loci contractus* would be New York. And even though the marriage were performed in Russia and valid under Russian law, if it were bigamous or incestuous under New York law, the New York courts would refuse to hold the Russian law determinative, because its result would be, in this case, in conflict with the public policy of the forum.[72]

Only if Russian law was applicable, because the marriage was held to have been solemnized in Russia, and if the rule did not violate New York public policy, would the Russian rule be held determinative.

Under Judge Cardozo's rule, it is believed that the same results would follow in all three cases, in the first two because "principles

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[70]If we start with the proposition that the reason for the presence of the conflict of laws as a part of the common law can only be that principles of justice or the public policy of the forum are better served by adjudicating rights and obligations in accordance with rules applied in similar cases arising where these rights and obligations were created (see MINOR, CONFLICT OF LAWS, sec. 4), it logically follows that Judge Cardozo's rule is merely a statement that the reason for the general rules is also present in the case where the foreign law involved is that of an unrecognized government.

[71]GOODRICH, *op. cit.*, sec. 7; MINOR, *op. cit.*, secs. 5 ff.

[72]GOODRICH, *op. cit.*, ch. 8.

of justice" would not require the application of Russian law, and in the third, because justice or policy would so require.

Departing from this specific case, it may be suggested that principles of justice or public policy might not require reference to the foreign rule in all cases where, under the ordinary rule, it would be applied. In other words, a case might arise in which the court would not wish to apply Soviet law, and yet it would ordinarily be applicable, and recognized exceptions based on public policy would not justify a refusal to apply it.

The obvious answer is that another public policy exception might be introduced to take care of this case.

It may be further objected that the case is such that if the government of the foreign state whose law is involved were recognized, the court would be bound by precedent to apply the foreign rule—it now wishes to distinguish on the sole ground that the government which created the law is not recognized.

Judge Cardozo's rule would take care of this situation, if it ever arose. Apparently, this is the only situation where it could be necessary. Even in this case, it is believed the desired result could be reached more simply, by holding that non-recognition furnished a basis for an extraordinary public policy exception rather than for denying the force of conflict of laws rules as a whole. By thus inserting the same distinction at a later point, it would be unnecessary to undermine the whole doctrine of conflict of laws, and the intervening cases would be more easily and logically solved. From a theoretical standpoint, then, there seems to be insufficient justification for the rule announced in the *Sokoloff* case.

In practice, it must be admitted, the rule has been helpful in limiting the effect of the socialistic legislation, and generally has resulted in substantial justice in the cases decided. Since, however, the desired results in many of the cases have been, and in all the cases could have been, reached without reference to the rule, its value may still be questioned.

James v. Second Russian Insurance Co.,[78] followed two months after the *Sokoloff* case. The defendant, a Russian insurance com-

[78] 239 N. Y. 248, 146 N.E. 369. See comments, 25 Col. L. Rev. 668; 38 Harv. L. Rev. 816. See also James v. Rossia Insurance Co., 247 N. Y. 262, 160 N.E. 364.

pany, engaged in business in New York, both before and after the revolution, had entered into reinsurance contracts with a British company, which had assigned claims under these contracts to the plaintiff, an American corporation. When the plaintiff brought an action in New York, several defenses were urged, among them, that the defendant's existence had been terminated by the Russian decrees, and that its liability had been extinguished by the decrees which confiscated assets and liabilities. The court held the defenses without merit.

Judge Cardozo restated the principles previously announced, but the decision may be clearly based on independent reasoning. With regard to the first defense, the court said, "This is obviously not a 'defense' at all, if the word defense is employed as one of art, with a proper legal meaning. A corporation with vitality sufficient to answer a complaint has by the very terms of the hypothesis vitality sufficient to permit it to be sued. The shades of dead defendants do not appear and plead."[74] In a later passage the court made it clear that it was not intended to expressly limit this holding to the situation where it did not feel obliged to give effect to the law decreeing death. "If the Russian government had been recognized by the United States as a government *de jure*, there might be need, even then, to consider whether a defendant so circumstanced, continuing to exercise its corporate powers under the license of our laws, would be heard to assert its extinction in avoidance of a suit."[75]

Turning to the defense that the liability had been extinguished, Judge Cardozo explicitly predicated the court's holding on broader grounds than non-recognition. "As to Soviet decree," he said, "we think its attempted extinguishment of liabilities is *brutum fulmen*, in England as well as here, and this whether the government attempting it has been recognized or not. Russia might terminate the liability of Russian corporations in Russian courts or under Russian law. Its fiat to that effect could not constrain the courts of other sovereignties, if assets of the debtor were available for seizure in the jurisdiction of the forum."[76]

[74]James v. Second Russian Ins. Co., 239 N. Y. 248 at 254, 146 N.E. at 370.
[75]James v. Second Russian Ins. Co., 239 N. Y. 248 at 255, 146 N.E. at 370.
[76]James v. Second Russian Ins. Co., 239 N. Y. 248 at 257, 146 N.E. at 371.

In the case of *Russian Reinsurance Co. v. Stoddard and Banker's Trust Co.*,[77] decided in 1925, the court of appeals first applied its doctrine of giving partial effect to the Russian decrees. The plaintiff was a corporation organized under Russian law in 1899, and authorized to do business in New York in 1906, in which year it deposited with the defendant trust company a fund to be held in trust for the protection of policy holders and creditors in the United States. It was driven out of Russia during the revolution, and seven of its directors met in Paris and purported to act in their former capacity. In 1923 those of the directors still living brought suit to revoke the trust, all of the corporation's American contracts having been completed. The defendant claimed no independent title to the fund, but resisted the plaintiff's claim on the grounds that it was no longer in existence; that if it were, the claimants no longer represented it; and that in any case, the plaintiff's title was not proved as against other parties, nor before the court, who might be able later to establish a superior right. In an opinion by Judge Lehman, the court of appeals refused jurisdiction, on the ground that the case came within the exceptions suggested in the *Sokoloff* and *James* cases.[78]

The approach of the court was again that the Soviet decrees need not be treated as those of a recognized government, but it wisely left open the question of whether they might be so treated in certain situations. "Until the question how far, if at all, the courts of this country may give effect to the decrees of an unrecognized governmental authority arises necessarily and directly, its further consideration may be postponed. In the present case the primary question presented is not whether the courts of this country will give effect to such decrees, but is rather whether within Russia, or elsewhere outside of the United States, they have actually attained such effect as to alter the rights and obligations of the parties in a manner we may not in justice disregard, regardless of whether or not

[77]240 N. Y. 149, 147 N.E. 703. See comments, 19 AM. J. INT. L. 753; 39 HARV. L. REV. 127; 35 YALE L. J. 98.

[78]Accord: Severnoe Securities Corp. v. Westminster Bank, 214 App. Div. 14, 210 N. Y. S. 629; Application of People, by Beha, 229 App. Div. 637, 243 N. Y. S. 35. Cf. Matter of Second Russian Ins. Co., 250 N. Y. 449, 166 N.E. 163.

they emanate from a lawfully-established authority."[79] In other words, the court held that in this case it was not necessary to take account of the effect intended by the Soviet government, but only of that actually resulting from the decrees as carried out, and as viewed in the courts of other states.

These results were then noted to be that the corporation had been driven out of Russia, and its property in Russia taken; that it had been prevented from continuing business there, and from holding stockholders' meetings to elect new directors to fill the places of the old ones, whose terms had expired; that since other countries had recognized the Soviet regime and would necessarily give some effect to the decrees, it was doubtful whether recovery in the present action would protect the defendants from another recovery abroad. These considerations, and the additional factors that "comity with a government of the Czar" did not require it to take jurisdiction, and that no danger from retaining the status quo was presented, were then held to justify the court in refusing to take jurisdiction.

First Russian Insurance Co. v. Beha,[80] decided in the same term, indicates that the danger of double liability was the principal ground of the *Stoddard* holding. In this later case, recovery of funds in the possession of the Superintendent of Insurance was allowed, as there was no danger of recovery in another jurisdiction from this defendant, an officer of the state.

It is evident that for the purpose of collecting funds in this country, the court wished to hold that life remained in the nationalized corporations. In one case, *Joint-Stock Co. of Volgakama v. National City Bank,*[81] the court reached this result on a theory of estoppel. The plaintiff, a Russian corporation, had deposited money in the defendant bank in June, 1918, upon express agreement that payment would be made on orders signed by certain named directors. After demand and refusal, the plaintiff brought suit, and the defendant relied on the termination of the plaintiff's existence by one

[79]Russian Reins. Co. v. Stoddard, 240 N. Y. 149 at 156, 147 N.E. 704.

[80]240 N. Y. 601, 148 N.E. 722. See also Andre v. Beha, 240 N. Y. 605, 148 N.E. 724, in which case the court refused to permit a stockholder and former managing director of the Northern Ins. Co. of Moscow to recover a deposit in the hands of the insurance commissioner, on the ground that he was not a proper party.

[81]240 N. Y. 368, 148 N.E. 552.

or more of the seven decrees promulgated from November, 1917, to November, 1920.[82] The court of appeals carefully avoided passing on the question of the validity of the foreign law as a defense, holding that the defendant was estopped to rely on the decrees promulgated previous to the deposit, and that the later decrees did not indicate any intent to end the plaintiff's corporate life. Judge Crane, in giving the opinion, stated his personal view to be that even if intent to terminate had been shown, the court should not give effect to the decrees, but said the majority of the court believed that question was not presented.

The next case involving the status of a nationalized Russian corporation was *Petrogradsky M. K. Bank v. National City Bank.*[83] The facts were similar to those of the *Stoddard* case. The plaintiff had been driven out of Russia by the revolution; its directors, meeting in Paris, were attempting to carry on business through a former French branch; recovery was sought of money deposited before the revolution. The court was unable to rely on estoppel, and in allowing recovery, was forced to meet the reasoning of the *Stoddard* case.

Three questions were involved: (1) Had the plaintiff corporation capacity to sue? (2) Were the directors competent to represent it? (3) Did the possible danger of a second recovery abroad justify a refusal to take jurisdiction?

In giving an affirmative answer to the first question, the court started with the premise that the nationalization decrees were not to be regarded as law, but as mere "exhibitions of power," thus going further than the *Stoddard* case had required. "Exhibitions of power," said Chief Judge Cardozo, "may be followed or attended by physical changes, legal or illegal. These we do not ignore, however lawless their origin, in any survey of the legal scene. They are a source of times of new rights and liabilities. *Ex facto jus oritur.*

[82]For a discussion of the Russian decrees, see Wohl, *op. cit.*, 75 U. of Pa. L. Rev. 385.

[83]253 N. Y. 23, 170 N.E. 479. See comments, 43 Harv. L. Rev. 1160; 78 U. of Pa. L. Rev. 1028; 8 N. Y. U. L. Rev. 137. See also Nebolsine, *op. cit.*, 39 Yale L. J. 1130.

The lower court had refused recovery on the authority of the Stoddard case. Banque Int. de Com. de Petrograd v. Nat. City Bank, 133 Mis. 527, 233 N. Y. S. 255.

Exhibitions of power may couple the physical change with declarations of the jural consequences. These last we ignore, if the consequences, apart from the declaration, do not follow from the change itself."[84]

The court then examined the physical changes to see whether actual destruction of the corporation had been accomplished. Since the juristic person had been created by Imperial law, the court looked to the conditions of continued existence prescribed by that law to determine whether the changes had automatically ended the span of life granted the corporation, and the conclusion reached was that "the corporation survives in such a sense and to such a degree that it may still be dealt with as a *persona* in lands where the decrees of the Soviet Republic are not recognized as law."[85]

On the second point, reference was again made to Imperial law, as setting forth the manner in which this person was permitted to act, and it was held that the directors, in the absence of other representatives, were competent to maintain an action on behalf of the corporation.

The third contention was decided adversely to the defendant on the ground that in an action at law to collect a debt, as distinguished from an equitable proceeding to revoke a trust, such as the *Stod-*

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[84]Petrogradsky M. K. Bank v. Nat. City Bank, 253 N. Y. 23 at 28, 170 N.E. at 481.

[85]Petrogradsky M. K. Bank v. Nat. City Bank, 253 N. Y. 23 at 36, 170 N.E. at 484. It should be noted that in thus referring to Imperial law, the court was not necessarily assuming the continuance of that law as the law in force in Russia today—the law applicable to transactions taking place in Russia at the present time, or even the law applicable to present controversies over past transactions. If such were the case, it could truly be asserted that, in the words of Judge Cardozo, a juridical conception had been carried far beyond the limit of its logic.

Rather, the court was merely investigating the status given to the corporation when it was created. Being an artificial person, a corporation has an artificial span of life, which may be fixed by its charter or by the general law under which it is formed. If this law fixes certain conditions which are to end the corporate life, and these conditions occur, the corporation expires by its own limitations, regardless of the continuance of the old law, unless a later law has increased its span of life by removal of the conditions.

Similarly, a corporation may perform only certain acts, and those in a certain manner, as its charter, or the law under which it is formed, prescribes. Thus the court determined the capacity of the directors by Imperial law, which had set forth the conditions under which they could act for the corporation.

dard case, the possibility of adverse claims did not constitute a valid defense.[86] In order to justify this narrow distinction, the court noted the fact that foreign courts, even in states recognizing the Soviet regime, were not giving extraterritorial effect to the confiscatory decrees, and suggested that the danger of a second recovery was negligible.

There seem to be other possible bases for reaching the result in this case, besides the one adopted of denying effect to Soviet law. While it is usual to hold a corporation dissolved at its domicil as dissolved in the forum,[87] it would still be reasonable to hold the former directors competent to gather these assets for the benefit of the stockholders. Furthermore, the court might well have held that the de facto corporation in France had succeeded to the rights of the former Russian corporation. Another approach has been suggested by a recent writer, that of denying the rule that dissolution at the domicil is effective elsewhere, and holding that the status is a matter for the forum to decide for itself.[88]

Without detailing these possibilities, we may conclude that it is at least doubtful whether the approach adopted, that Soviet decrees generally are to be denied the force of law, has been any more effective in minimizing the destruction of established private rights, than would have been the ordinary procedure of taking cognizance of the law, but refusing to apply the resulting rules when in conflict with public policy of the forum.

Certainly it is true that where the law involved is a law regulating the everyday conduct of individuals, the usual conflict of laws

[86]"The defendant, if unable to interplead, must respond to the challenge, and defend as best it can." Petrogradsky M. K. Bank v. National City Bank, 253 N. Y. 23 at 39, 170 N.E. at 485. The Stoddard case still furnishes the rule in equity. See Application of People, by Beha, 229 App. Div. 637, 243 N. Y. S. 35, where the appellate division approved an order of the supreme court directing the Superintendent of Insurance to hold the funds belonging to several Russian companies until the happening of certain named contingencies. Limitations on the power of former directors of nationalized corporations are suggested by the latest decision of the court of appeals in Severnoe Securities Corp. v. London and Lancashire Ins. Co., 255 N. Y. 120, 174 N.E. 299.

[87]See the AM. L. INST. RESTATEMENT OF THE CONFLICT OF LAWS, (Proposed final draft no. 1) sec. 167.

[88]Nebolsine, *op. cit.*, 39 YALE L. J. 1130. This writer discusses several possible means of handling the situation, and the manner in which they have been used by American and European courts.

rules are more fitted to secure substantial justice. Since the cases so far presented have been concerned only with the legislation interwoven with the overthrow of the old order, the path is not blocked which would lead to the application of normal rules in such cases. In addition, the courts have indicated that their present attitude is limited to the type of case which they have been considering. In the *Petrogradsky* case, Chief Judge Cardozo said, "The everyday transactions of business or domestic life are not subject to impeachment, though the form may have been regulated by the command of the usurping government. * * * To undo them would bring hardship or confusion to the helpless and the innocent without compensating benefit."[89]

In this connection, mention may be made of a recent case which also suggests a hopeful outlook, although the question is not closely related to those we have been considering. In *Werenjchik v. Ulen Contracting Corporation*,[90] minor children of the deceased sought to recover for his death under the New York workmen's compensation law. Recovery depended upon establishing the ages of the claimants, and the proof offered was birth certificates authenticated by officials of the Soviet government.[91] The defendant argued that since the Soviet government was not recognized, the court could not hold authentication by its official competent evidence. The appellate division, affirming a decision for the plaintiffs, held the proof competent and sufficient. The court said, "It has been judicially determined that there does in fact exist a government, sovereign within its own territory, in Russia. Private rights and interests have been passed on judicially during the existence of the present 'Soviet Regime,' and our courts have held to the principle that our State Department 'cannot determine how far the private rights and obligations of individuals are affected by acts of a body not sovereign, or with which our government will have no dealings. That question does not concern our foreign relations. It is not a political question, but a judicial question.' "[92]

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[89]Petrogradsky M. K. Bank v. National City Bank, 253 N. Y. 23 at 28, 170 N.E. at 481.

[90]229 App. Div. 36, 240 N. Y. S. 619. See comment, 30 Col. L. Rev. 733.

[91]The signatures of the Russian officials were certified to be genuine by a Polish consul.

[92]Werenjchik v. Ulen Contracting Corp., 229 App. Div. 36 at 37, 240 N. Y. S. at 620.

Thus where it appears most clearly that private rights demand that cognizance be taken of Soviet law and governmental organization, the courts are ready to do so. These concessions go far to insure just decisions in most of the cases which are likely to arise in the future, and it is not improbable that courts may come to regard the existing law of Russia as competent not only to create rights and obligations, but to change those created under former regimes.[93]

RETROACTIVITY AND CONCLUSIVENESS OF THE ACT OF RECOGNITION

Once recognition has been granted the general rule is, of course, that this action is binding on the courts. Where recognition is accorded a government which has previously maintained de facto sovereignty, this doctrine, together with the rule that recognition is retroactive to the time when internal control was first shown, has solved many of the problems presented by the cases which have already been considered. On the other hand, where recognition is apparently continued beyond the period of actual sovereignty, or where it is granted to a faction not yet in control of any territory, other problems have been raised by the conflict between the rule and the factual situation.

The most important recent application of the doctrine that recognition is retroactive was in *Oetjen v. Central Leather Co.*[94] decided in 1918. It has solved several cases during the period under discussion. In two cases it was invoked to permit suit by a government which had been recognized between the time of trial and appeal.[95] In three others it cleared up matters of private right dependent upon an obscure fact situation.

The facts in these later cases were as follows. Property confiscated and sold in Mexico by General Villa during the revolutions

[93]In Banque de France v. Equitable Trust Co., 33 F.(2d) 202, it was held that title to gold in this country could be traced through the Soviet government, and it was indicated that this title might be upheld even though the gold had been confiscated. This seems a sound view, since confiscations actually carried out in Russia according to Russian law should be effective to transfer title. See Dickinson, *op. cit.* AM. J. INT. L., April, 1931; 30 COL. L. REV. 226.

[94]246 U. S. 297, 38 Sup. Ct. 309.

[95]Republic of China v. Merchant's Fire Assurance Co.: Same v. Great American Insurance Co., 30 F.(2d) 278, supra page 703.

of 1913 to 1915, was brought into Texas, where the former owners sought recovery. It appeared in *Terrazas v. Holmes,*[96] and *Terrazas v. Donohue,*[97] that the confiscations were made under the authority of Carranza, and in *Cia. Minera etc. Ramos v. Bartlesville Zinc Co.,*[98] that Villa had revolted from the ranks of Carranza and was asserting his own authority. The Carranza government had been recognized by the United States after the events in question, but before the suits were begun.[99]

The Texas court denied recovery in the first two cases, and allowed it in the third. Recognition of the Carranza government was held to determine conclusively the question of who was sovereign during the period of the confiscations. Thus the acts under the authority of Carranza were valid governmental acts competent to divest title, while those having the sanction of Villa alone were invalid. Since it was not clear from the facts what group was actually sovereign at the times in question, it is believed that the court was correct in following the state department's position.[100] Approaching the question as one of conflict of laws, it seems clear that the Mexican law would reach the same result.

A question of the effect of continued reception by the United States of representatives of the Kerensky government, long after it had fallen, was presented to the federal circuit court of appeals for the second circuit in *Lehigh Valley R. R. v. State of Russia.*[101] Property of the Imperial Russian government having been destroyed in the "Black Tom" explosion of 1916, suit was commenced in 1918 by Boris Bakhmetieff, ambassador of the Kerensky government, which had been recognized early in 1917, and had fallen late in the same year. In the lower court, the defendant had questioned the competency of Mr. Bakhmetieff to authorize the suit, as the govern-

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[96]115 Tex. 32, 275 S.W. 392. See comment, 20 ILL. L. REV. 624.

[97]115 Tex. 46, 275 S.W. 396.

[98]115 Tex. 21, 275 S. W. 388. See comments, 4 TEX. L. REV. 226; 35 YALE L. J. 506.

[99]De facto recognition was accorded Oct. 19, 1915, and de jure Aug. 31, 1917.

[100]Cf. Banco de la Lacuna v. Escobar, 135 Mis. 165, 237 N. Y. S. 267.

[101]21 F.(2d) 396. See comments, 26 MICH. L. REV. 800; 41 HARV. L. REV. 102; 37 YALE L. J. 360.

ment he represented had perished. The court had held conclusive a certificate from the state department that he was still the accredited representative of Russia,[102] and later had given the same effect to another certificate affirming the authority of Serge Ughet, Bakhmetieff's financial attaché, to continue the suit after the retirement of his chief.[103]

These holdings were affirmed in the circuit court of appeals. Mr. Justice Manton, in giving the opinion, argued that since the Russian state survived all governmental changes, the right still remained, and the action could only fail through lack of an agent competent to authorize suit. The question of who was competent was then held to be a political one, and since the state department expressly affirmed the competency of these representatives, the court could not deny it.[104]

The decision seems limited to the question of representatives of the state, and did not involve determination of the existence of any government. Thus confined, it is believed to be sound, as the status of the diplomatic corps should clearly be left to the decision of the executive.

The court of claims was presented with the broader question of whether recognition of the Provisional government still continued, and whether, as a result, the courts were bound to hold it still in sovereign control of Russia. In *Russia Insurance Co. v. United*

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[102]Russian Government v. Lehigh Valley R. R., 293 Fed. 133.

[103]Russian Government v. Lehigh Valley R. R., 293 Fed. at 135. The court also granted a motion to change the name of the plaintiff to "The State of Russia."

[104]The opinion goes on to say that later recognition of the Soviet regime could not subject the defendant to any danger of a second recovery, as the doctrine of retroactivity would validate only Soviet acts within its own territory. The argument seems beside the point, and the force of the reasoning somewhat doubtful, inasmuch as there was no question of Soviet acts involved, but rather a matter of Soviet rights. Since recognition theoretically relates back to the time when a government becomes sovereign and establishes as of that time its rights and powers as a sovéreign state, it is hard to see how, after recognition, a court could deny that the Soviet government had been entitled to this claim all along, and that therefore this recovery, which it had not authorized, did not discharge the obligation. However, the defendant is in no danger of having to pay twice, since the money was turned into the United States treasury to be held until the diplomatic situation is cleared up. See 37 YALE L. J. 360.

States,[105] a claim against the United States government by a Russian corporation, jurisdiction depended upon whether, under the law of Russia, a citizen of the United States had the right to prosecute in the courts of that country any claim he might have against the Russian government. The plaintiff admitted, and the court found as a fact, that no such right was accorded by the Soviet government at the time of the suit. It was contended, however, that as the Soviet government was not recognized, the court was bound to presume the continuance of the Kerensky government and its judicial department. In answer to this contention, the court said, "However interesting and inviting the discussion might be, we are of the opinion that in the present instance our jurisdiction depends upon the ascertainment of an existing and easily provable fact,"[106] thus refusing to allow a fiction to obscure the actual situation. It may be noted that the court addressed no inquiry to the state department, and apparently took judicial notice of the overthrow of the Provisional government. This realistic view is to be commended.

During the world war, recognition was extended by our government to belligerent groups which were granted later, by the Versailles treaty, portions of the former territory of Austria Hungary. The effect of this premature recognition was raised in several cases arising under workmen's compensation laws. In *Kolundjija v. Hanna Ore Mining Co.,*[107] the claimant was a resident citizen of Austria Hungary at the time the cause arose and thus, as an alien enemy, unable to sue. Under a well established doctrine, the running of the statute of limitations would be suspended during the period of the plaintiff's incapacity,[108] and if this lasted until peace with Austria Hungary in 1921,[109] the action was seasonably begun. The contention of the defendant, however, was that since the section of Hungary in which the plaintiff resided became a part of Jugoslavia, which was recognized by the United States in February, 1919, the disability was removed at that time, and the cause was barred. The

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[105]58 Ct. Cl. 180.

[106]Rossia Co. v. United States, 58 Ct. Cl. 180 at 181.

[107]155 Minn. 176, 193 N.W. 163. See Dickinson, *op. cit.,* 19 AM. J. INT. L., 263, 266.

[108]Siplyak v. Davis, 276 Pa. 49, 119 Atl. 745.

[109]See Hudson, "Duration of the War Between the United States and Germany," 39 HARV. L. REV. 1020.

Minnesota court accepted this argument and dismissed the suit. On substantially identical facts, the Pennsylvania court reached a different conclusion in *Garvin v. Diamond Coal and Coke Co.,*[110] by holding that recognition of the Czechoslovak republic did not include recognition of any territory, so that citizens of Hungary remained enemies until war with the country was terminated.

In neither of these cases was the situation as fully analysed as in *Inland Steel Co. v. Jelenovic,*[111] decided by the Indiana appellate court. The court held that recognition of these states during the continuance of the war, and before they had established sovereignty over any territory, was merely intended as a friendly act toward governments allied with the United States in the war, and was neither intended to terminate the war with the territories claimed by these governments, nor to "change the status of any persons whom Congress by prior declaration of war had made alien enemies."[112] In the course of a well reasoned opinion, Mr. Justice Remy also said, "To hold, under conditions such as are revealed by the facts in this case, that litigants must anticipate the significance and final outcome of political acts of recognition would, in our opinion, impose upon them an undue burden."[113] The argument of this case is believed to be sound. It is well enough to allow the political department to decide such matters as the competence of state representatives, or the right of a new government to succeed to the property of the old,[114] but to hold private rights affected by such a maze of diplomatic complexities as was here presented would be not only unjust, but absurd.[115]

Conclusion

Viewed as a whole, the development of the past seven years is decidedly encouraging to those who believe, as does the present writer, that political non-recognition should not be permitted to close

[110]278 Pa. 469, 123 Atl. 468. See also Kopecky v. Coalmont Moshannon Coal Co., 278 Pa. 478, 123 Atl. 471; Zeliznik v. Lytle Coal Co., 82 Pa. Super. Ct. 489.

[111]84 Ind. App. 373, 150 N.E. 391. See comment, 35 YALE L. J. 886.

[112]Inland Steel Co. v. Jelenovic, 84 Ind. App. 373 at 376, 150 N.E. at 392.

[113]Inland Steel Co. v. Jelenovic, 84 Ind. App. 373 at 377, 150 N.E. at 393.

[114]See The Rogdai, 278 Fed. 294; The Penza: The Tobolsk, 277 Fed. 91.

[115]See also Rogulj v. Alaska Gastineau Mining Co., 288 Fed. 549; Afric v. Alaska United Gold Mining Co., 6 Alaska 540.

the judicial eyes to an obvious fact situation. While the courts have withheld from unrecognized governments the rights which clearly depend upon recognition, since it is the function of the executive to decide whether recognition will be granted or withheld, they have not accepted the executive's decision on recognition as conclusive on the question of the existence of a government sovereign in fact, and the consequences of such existence. When the fact situation was not clear, and the granting of recognition could be construed reasonably to solve the question, the courts have relied upon the executive's finding of fact. When, on the other hand, the executive's decision as to recognition bore no relation to the known fact of sovereignty, the courts have followed the fact, realizing that many of the consequences of sovereignty must follow from the fact, regardless of whether the political department is willing to establish diplomatic relations with the new sovereign. Thus, in effect, the granting or withholding of recognition has been construed, and its effect limited in accordance with its meaning under the circumstances.

The practical results of this realistic attitude of the judiciary have been that while unrecognized governments have not been allowed to sue, they have been accorded the immunity due to a foreign sovereign, and this immunity has been extended to property claimed by such a government. The right of individuals to represent foreign states has been held correctly to depend upon the status accorded them by the state department.

In private litigation, citizens of Russia have been accorded the same substantive and procedural rights as other aliens. Furthermore, the courts have come gradually to give increasing effect to Russian law. Although the process of development in this field has been retarded by the peculiar difficulties presented by the particular situations in which Russian law has been relied upon, and by the desire of courts to protect private property rights, substantial justice has been accomplished in most of the cases presented. The courts have indicated their readiness to apply the ordinary conflict of laws rules in cases where Soviet law is relied upon to create rights and obligations.

In other cases, however, where the effect of Soviet legislation would be to change or destroy rights and obligations created by the laws of former regimes, the courts have so far followed the halt-

ing approach adopted in the *Sokoloff* case, of giving effect to such law only when public policy or principles of justice so required. The experience of seven years indicates that such an attitude is unnecessary and needlessly confusing. It is submitted, therefore, that the courts should anticipate the change of approach which recognition will ultimately necessitate, and apply the existing law of Russia in all situations where it would ordinarily be applicable, except where public policy is opposed to its application.[116]

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[116]See Dickinson, *op. cit.*, AM. J. INT. L., April, 1931, xii.