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International Law--Jurisdiction--Foreign Governments--Money Paid to Bondholders' Committee by Foreign Government in Liquidation of Its Public Debt (Lamont v. Travelers Insurance Co., 281 N.Y. 362 (1939))

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statements of the law that always existed as expressed by only the overruling opinion, the later overruling decisions are retroactive. In the light of this principle, even if the *Burnet* case is considered by a dissenter to be a construction of the statute favorable to the plaintiff's cause, we see that the portion of the *Burnet* case presented by the dissenter to support the plaintiff's position can be overcome. The court might have declared that it was never the law. In other words, in the realm of taxation there exists the precedent that a taxpayer, who makes use of existing judicial interpretations of statutes affecting other taxpayers, does so at his peril.

A. C. H.

INTERNATIONAL LAW—JURISDICTION—FOREIGN GOVERNMENTS —MONEY PAID TO BONDHOLDERS' COMMITTEE BY FOREIGN GOVERNMENT IN LIQUIDATION OF ITS PUBLIC DEBT.—The Mexican Government was in default in the payment of interest on bonds issued at various times and generally classified as: "(a) the Secured Direct Debt; (b) the Unsecured Direct Debt; and (c) the Railways Debt." A committee of foreign bankers was formed for the purpose of negotiating, in behalf of the bondholders, an agreement with the Government of Mexico for the adjustment and liquidation of its public debt. The committee successfully negotiated a satisfactory agreement with the government whereby the government promised to pay to the committee stipulated sums, to be distributed by the committee. The government has paid to the committee large sums of money and the committee now holds a fund of several million dollars which, concededly, it has received from the government for distribution among the holders of government obligations deposited with the committee. Conflicting claims have been made by the holders of the three classes of obligations, and the Mexican Government has claimed that it is entitled to the return of the fund. The plaintiffs, as such committee, brought this action for a voluntary accounting of the moneys so received, and has named the representatives of the holders of the three general classifications as party defendants. The foreign government appeared specially for the purpose of asserting that it owned the fund, and thus was immune from suit here. The problem is whether the Mexican Government is a necessary party because of its claim that it owns the fund, and whether the controversy involves questions upon which the court can pass without invading the sovereign right of immunity of Mexico. The Supreme Court of New York held that Mexico was a necessary party in interest in the fund, and therefore since it had no jurisdiction dismissed the complaint.[1] On appeal,

[1] Lamont v. Travelers Ins. Co., 254 App. Div. 511, 5 N. Y. S. (2d) 295 (1st Dept. 1938). The lower courts have consistently held Mexico to be a

held, orders reversed and motion to dismiss denied. The Supreme Court has jurisdiction to pass upon the issues raised by the pleadings and render appropriate judgment unless it shall appear at the trial that the foreign government has, *in fact,* retained some right or interest in the property which is the subject of the accounting, and is a necessary party to any adjudication. The mere assertion by the government of Mexico that the committee holds the moneys not as trustee for the bondholders but as agents of the government for distribution among the bondholders does not preclude the court from determining whether, under the contracts, the committee is acting solely as agent and trustee for the bondholders and not as agent of the government. *Lamont* v. *Travelers Insurance Co.,* 281 N. Y. 362, 24 N. E. (2d) 81 (1939).

A sovereign state is not, without its consent, subject to suit in either its own courts, or in those in a foreign state. This rule extends to cases involving the sovereign's property.[2] The immunity is not based on an absolute right, but on international comity.[3] An agency created by the law of a foreign state,[4] or national interest in the subject matter *compels* the court to decline jurisdiction [5] even though the sovereign is not a defendant in the action.

It is open to a friendly government to present its claim and to assert its immunity from suit, either through diplomatic channels or, if it chooses, it is entitled as of right to appear in a pending suit, assert its claim, and raise the jurisdictional question.[6] If the claim is recognized and allowed by the executive branch of the government, it is then the duty of the courts, upon appropriate suggestion by the Attorney General or officer under his direction, to constrain jurisdiction.[7] However, a mere presentation of a "suggestion", without the intervention of the United States, does not indicate that the executive branch of our government has recognized and allowed the claim. Although the courts must take judicial notice of [8] the public acts of the

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necessary party in actions involving the fund. In Gallopin v. Windsor, 234 App. Div. 601, 251 N. Y. Supp. 448 (1st Dept. 1931), the court held that it was without jurisdiction to appoint receivers of a fund in which the Mexican Government had an interest. The remedy of the plaintiff is to seek redress through the executive branch of our national government.

[2] 33 C. J. (1924) § 20, p. 398.

[3] Wulfsohn v. Russian Socialist Federated Soviet of Russia, 118 Misc. 28, 192 N. Y. Supp. 282 (1922).

[4] Hannes v. Kingdom of Roumania Monopolies Institute, 169 Misc. 544, 6 N. Y. S. (2d) 960 (1938). The sovereign could not be sued by holders of bonds issued by it and embraced in the public debt of the foreign kingdom.

[5] Hassard v. United States of Mexico, 173 N. Y. 645, 66 N. E. 1110 (1903); Gallopin v. Windsor, 234 App. Div. 601, 251 N. Y. Supp. 448 (1st Dept. 1931).

[6] The Sapphire, 11 Wall. 164 (U. S. 1871); Berizzi Bros. Co. v. The Pesaro, 271 U. S. 562, 46 Sup. Ct. 611 (1925).

[7] Compania Espanola de Navigacion Maritima, S. A. v. The Navemar, 303 U. S. 68, 58 Sup. Ct. 432 (1938).

[8] "Judicial Notice" describes a mode of ascertainment by judicial authority

United States and its departments,[9] they cannot take judicial notice of the acts of a foreign state.[10] One having the burden of establishing a fact is not in consequence relieved of the necessity of bringing the fact to the knowledge of the court.[11] *In re Muir,*[12] the court held that mere allegations of matters not within the range of judicial notice, must be established in an appropriate way before a claim of immunity can be upheld. Thus, those who question the jurisdiction must produce whatever proof was needed to sustain their challenge as a truth by evidence.[13]

Prima facie the court had jurisdiction of the suit and the moneys.[14] The question of whether a third person is a necessary party is held to depend on whether the plaintiffs had a cause of action against the third party,[15] or whether a substantial decree could not be made without the presence of the third party.[16] The foreign government does not become a necessary party to the action, unless the issues raised by the pleadings of the parties cannot be decided without it. No issue is raised by a mere suggestion of a government which refuses to intervene and sustain its allegation.[17] Immunity exists where the object of the suit is to enforce a claim or right against the foreign government.[18] The court distinguishes the instant case from the recent case of *Ezra* v. *Lamont.*[19] There, the action was for repudiation of the agreement made with Mexico, and it was held that the determination of the issues involved, in which said government had a vital interest, could not be made without Mexico. In the case under review, the Supreme Court has jurisdiction to pass upon the issues raised by the pleadings and render appropriate judgment unless it shall appear at the trial that the foreign government has, *in fact,* retained some right or interest in the subject matter.

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without having such matters established by evidence in the individual case. People v. Goldberger, 163 N. Y. Supp. 663 (1916).

[9] Schultz, Jr., Co. v. Raimes and Co., 99 Misc. 626, 164 N. Y. Supp. 454 (1917).

[10] Orr v. B. & O. R. R., 168 App. Div. 548, 153 N. Y. Supp. 920 (1st Dept. 1915).

[11] Shapleigh v. Mier, 299 U. S. 468, 57 Sup. Ct. 261 (1937).

[12] 254 U. S. 522, 41 Sup. Ct. 185 (1921) (Mandamus to prevent a federal district court from exercising further jurisdiction, wherein counsel appearing as *amici curiae* made a mere suggestion unsupported by proof, denied).

[13] 5 WIGMORE, EVIDENCE (2d ed. 1923) § 2567.

[14] The Belgenland, 114 U. S. 355, 5 Sup. Ct. 860 (1885).

[15] Gill v. Johnson, 125 Cal. App. 296, 13 P. (2d) 857 (1932).

[16] Mahoney v. Bernhardt, 27 Misc. 339, 58 N. Y. Supp. 743 (1899).

[17] Instant case at 373, N. E. (2d) at 86.

[18] *Ibid.*

[19] 265 N. Y. 635 (1934), *aff'g,* 241 App. Div. 805 (1st Dept. 1939), *aff'g,* 149 Misc. 912, 268 N. Y. Supp. 222 (1933) (In an action for rescission, the issues cannot be adjudicated where the foreign government is a necessary party, and refuses to submit to the jurisdiction of the court. Complaint properly dismissed).