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De Facto Governments--The Significance of Their Acts in Our Courts

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De Facto Governments—The Significance of Their Acts in Our Courts.

Of the many juridical problems which followed in the wake of the World War, not the least important were the questions involving the new Soviet regime and the effect of the many Soviet decrees regarding the ownership of property. So closely are the economic and financial lives of the nations of the world bound up with one another that the chaos and confusion caused by the Soviet declarations have penetrated into the judicial systems of every major country of the universe. There are cases reported in England, France, Germany, Switzerland, the United States, and many other jurisdictions—all dealing with these very problems. In our own state, we find the Court of Appeals confronted with case after case in a steady stream of litigation, the magnitude of which may be attributed to the refusal of the executive department to recognize the Soviet government.[1]

Inasmuch as the legal importance of the principles of recognition and non-recognition of national governments has thus been brought to the fore, it is of vital interest to review the decisions of American courts which have dealt with similar perplexities. Not very much has been written upon the subject in the past, and this sudden influx of "Russian" cases has been too recent to have given rise to much discussion in textbooks. However, there are several excellent and interesting articles in the law reviews of the country.[2]

The basic difference between a full-fledged *de jure* government and one that is *de facto* is the element of recognition. A *recognized* state is merely a *de facto* state to which some nation has accorded the essentials of international acknowledgment and such a state is *de jure* as to the *recognizing* government.[3] A non-recognized power is either a *de facto* government or no government at all, depending upon principles to be discussed subsequently. And so it is quite evident and true that states do exist regardless of and apart from recognition,[4] though all desire it for the rights and privileges it confers upon them. Recognition has been defined as "the assurance given to a new state that it will be permitted to hold its place and rank, in the capacity of an independent political organism, among the associated nations." [5] It may be implied from the acts and state-

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[1] Cardozo, *J.*, in Sokoloff v. National City Bank, 239 N. Y. 158, 145 N. E. 917 (1924).

[2] Fraenkel, *The Juristic Status of Foreign States* (1925) 25 Col. L. Rev. 544; Borchard, *The Unrecognized Government in American Courts* (1932) 26 Am. J. Int. Law 261; Dickenson, *Unrecognized Governments* (1923) 22 Mich. L. Rev. 29, 118; Connick, *Effects of Soviet Decrees in American Courts* (1924) 34 Yale L. J. 499.

[3] 1 Moore, Digest of International Law 119.

[4] Wulfsohn v. Russian Socialist Federated Soviet Republic, 234 N. Y. 372, 138 N. E. 24 (1923).

[5] 1 Rivier, Principes du Droit des Gens (1896) 57.

ments of the executive department of a country,[6] and when effected by the proper political department, it will be conclusive upon the courts [7] and subject to judicial notice.[8] Furthermore, the courts will seek information regarding recognition from the State Department,[9] inasmuch as it is a matter entirely within the control of the executive and legislative branches of the government.[10]

One might ask what are the privileges endowed upon a recognized state. Such a state has the right to sue in the courts of the recognizing state,[11] and is itself immune from suit in those courts.[12] This immunity follows naturally from the status of sovereignty. Any other rule would "vex the peace of nations." [13] Nor will the acts of the recognized nation affecting internal problems be questioned in our courts.[14] What is more, recognition is retroactive and validates all the acts done by the government from the date of its creation.[15]

The law concerning non-recognized *de facto* governments is not so well settled, nor can we do more than describe what conditions are necessary for the establishment of a *de facto* status. To use the words of Andrews, *J.*, a *de facto* state is one which, though not recognized is "clothed with the power to enforce this authority within its own territory, obeyed by the people over whom it rules, capable of performing the duties and fulfilling the obligations of an independent power, able to enforce its claims by military force, * * *." [16] Clear as this description appears, the courts have nevertheless experienced some difficulty, in the past century, in the determination of specific cases. What the outcome of

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[6] *Supra* note 3, at 73.

[7] Oetjen v. Central Leather Co., 246 U. S. 297, 38 Sup. Ct. 309 (1918); Ricaud v. American Metal Co., Lt'd, 246 U. S. 304, 38 Sup. Ct. 312 (1918); Taylor v. Barclay, 2 Sim. 213, 2 Eng. Ch. 214.

[8] *Ibid.*

[9] Jones v. United States, 137 U. S. 202, 11 Sup. Ct. 80 (1890); The Rogdai, 278 Fed. 294 (N. D. Cal. 1920); Mighell v. Sultan of Johore, 1 Q. B. 149 (1894).

[10] Jones v. United States, *supra* note 9.

[11] Republic of Honduras v. Soto, 112 N. Y. 310, 19 N. E. 845 (1889); United States of America v. Wagner, L. R. 2 Ch. App. 582.

[12] The Exchange, 7 Cranch 116 (U. S. 1812); Wulfsohn v. Russ. Soc. Fed. Sov. Rep., *supra* note 4.

[13] Wulfsohn v. Russ. Soc. Fed. Sov. Rep., *supra* note 4.

[14] Salimoff & Co. v. Standard Oil Co., 262 N. Y. 220, 186 N. E. 679 (1933); *cf.* Russian State v. Compagnie Ropit, 53 Journal de Droit International 667 (1925), which says, "* * * while the recognition [*de jure*] does not permit a French judge to ignore the Soviet law and to reject it systematically, *en bloc*, it does not forbid him to examine in each case the text and the spirit of such law and to deny to it juridical effect if he thinks that it is contrary to the essential principles of the political and social organization of France."

[15] Underhill v. Hernandez, 168 U. S. 250, 18 Sup. Ct. 83 (1897); Oetjen v. Central Leather Co., *supra* note 7; Republic of China v. Merchant's Fire Assur. Corp. of N. Y., 30 F. (2d) 278 (C. C. A. 9th, 1929).

[16] Wulfsohn v. Russ. Soc. Fed. Sov. Rep., *supra* note 4, at 375, 138 N. E. at 25 (1923).

these decisions has been, we shall see as we trace the development of the matter in our courts. One thing, however, has always been conceded, namely, that whether a stipulated and alleged government is or is not *de facto* is a question of fact for the courts to determine.[17]

Some of the earliest cases upon the subject arose out of the British-American conflict of 1812. Probably the most noted of these was the case of *United States* v. *Rice*.[18] In September, 1814, the British captured Castine, Maine, and established custom-house regulations. The defendant's goods entered the port subject to these rules and he paid the duties thereon. After evacuation, the American collector of customs sought to levy the duties of our revenue laws upon the same goods. The Court, holding the attempted imposition of duties invalid, said, "By the conquest and military occupation of Castine, the enemy acquired that firm possession which enabled him to exercise the fullest right of sovereignty over that place * * *." And then, "From the nature of the case, no other laws could be obligatory upon them (the inhabitants); for where there is no protection or allegiance, or sovereignty, there can be no claim to obedience." [19] And so, while the British occupied the port and were in full control, their government was the only government and its regulations were the valid enactments of a *de facto* body. Quite recently, in a case even more in point, the doctrine of the *Rice* case was cited with approval.[20]

The Civil War next created a series of problems which gave rise to further litigation on this point. The question was usually whether acts done in conformity with the laws laid down by the Confederacy and the individual seceded states were valid and enforceable. In *Williams* v. *Bruffy*,[21] a leading case, a citizen of a Confederate state paid to the Confederacy a debt he owed to a Northerner, under a confiscatory decree of the Confederacy. The Court held such a payment to be impotent to wipe out the debt owed, and declared the Confederate decree invalid. The decision of Justice Field distinguished between actual *de facto* governments and the Confederacy, which was merely a large military force attempting to establish an actual *de facto* government in vain. The United States never agreed to such action, nor was the Confederacy ever in undisputed control over the territory it sought to organize. Justice Field said, "The validity of its acts, both against the parent state and its citizens or subjects, depends entirely upon its ultimate success. If it fail to establish itself permanently, all such acts perish

[17] Wulfsohn case, *supra* note 4.
[18] 4 Wheat. 246 (U. S. 1819).
[19] *Ibid.* at 254.
[20] MacLeod v. United States, 229 U. S. 416, 33 Sup. Ct. 955 (1913). Here, the collection of duties by a group of insurgents in full control of the port of Cebu, Philippine Islands, was held to be the valid act of a *de facto* government, and an executive order by the President, prescribing for the payment of import duties in the Philippines was declared non-applicable.
[21] 96 U. S. 176 (1877).

with it. If it succeed, and become recognized, its acts from the commencement of its existence are upheld as those of an independent nation." [22] However, acts of the *individual states* which were not contrary to the Constitution, nor inconsistent with public policy, were upheld by the Supreme Court.[23] These were the usual administrative functions of states, and, inasmuch as these state governments were in possession of the "seats of power" undisputedly, their deeds were valid except as they might result in giving aid to the Confederacy.[24]

And now we come to a consideration of the modern trend of our courts on the question. As was stated at the inception of this article, the Russian revolution and the consequent establishment of the Soviet regime have created a series of problems for our courts. These have resolved themselves into two major divisions. One group contains the cases where the Russian government has been a party to the action; the other, where the action is between two parties whose relations have been affected by the Soviet decrees. The former is pretty well settled in New York; the latter, not so, due, of course, to the magnitude and breadth of the field.

For all purposes, however, it is now conclusive with us that the Soviet government is the ruling *de facto* authority in Russia. "To refuse to recognize that Soviet Russia is a government regulating the internal affairs of the country is to give to fictions an air of reality which they do not deserve." [25]

The leading case on the subject of Soviet Russia as a defendant is *Wulfsohn* v. *Russian Socialist Federated Soviet Republic*.[26] The plaintiff owned furs which were stored in Russia. The Soviet government passed an act confiscating private property, and, under this decree, seized the furs in question. The plaintiff brought suit against the Russian regime for conversion, claiming that, since it was not recognized by the United States, it ought not be immune from suit in our courts. The Court, in holding for the defendant, said that it was not within its power to sit in judgment upon the acts of a concededly existing sovereign, affecting property situated within its jurisdiction. There would be no doubt about this decision if defendant were a recognized nation.[27] Certainly the resulting evil

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[22] *Ibid.* at 186.

[23] Texas v. White, 7 Wall. 700 (U. S. 1868); Sprott v. United States, 20 Wall. 459 (U. S. 1874); United States v. Insurance Companies, 22 Wall. 99 (U. S. 1874).

[24] *Supra* note 23. And so also where an executor invested funds of an estate in Confederate bonds, the investment was invalid, because it was a contribution to the wealth and power of the rebellion; Horn v. Lockhart, 17 Wall. 570 (U. S. 1873).

[25] Pound, *C.J.*, in Salimoff v. Standard Oil Co., *supra* note 14, at 227.

[26] *Supra* note 4.

[27] The Schooner Exchange v. McFadden, 7 Cranch 116 (U. S. 1812); Underhill v. Hernandez, *supra* note 15; Oetjen v. Central Leather Co., *supra* note 7.

would be similar in the instant case. The Court quotes from *De Haber* v. *Queen of Portugal*.[28] "To cite a foreign potentate into a municipal court for any complaint against him in his public capacity is contrary to the law of nations and an insult which he is entitled to resent." The reason for the rule is that the foreign government has not submitted itself to our laws. As the Court said, "Whenever an act done by a sovereign in his sovereign character is questioned it becomes a matter of negotiation, or of reprisals or of war." [29]

In *Russian Socialist Federated Soviet Republic* v. *Cibrario*,[30] the Court of Appeals refused to entertain a suit brought in our courts by the present Russian government. The court differentiated the *Wulfsohn* case. There the decision was based upon the *de facto* sovereignty of the defendant and the fact that it did not submit itself to our laws. However, the permission to sue in our courts is a privilege granted only to governments recognized by our executive department. Such a privilege depends wholly on comity.[31] "Comity may be defined as that reciprocal courtesy which one member of the family of nations owes to the others." [32] And so, where our government not only refuses to recognize a foreign regime, but gives adequate reasons for its refusal, the courts have no choice but to refuse to allow a suit by that government.

Commenting upon this case, Osmond K. Fraenkel holds it an objectionable decision "upon equitable grounds, as permitting breaches of trust. In cases such as this, in which no political considerations of any kind are involved, it could well have been decided that the right to sue did not depend upon recognition." [33] Professor Borchard, in his learned article,[34] also regards this decision as unfortunate. The Court of Appeals, perhaps foreseeing some criticism of its decision, justified it on the grounds that "public policy must prevail over comity," that often in the past the relations of the United States and foreign unrecognized governments were so precarious that to permit them to recover money in our courts would be an inexpedient contribution to a potential enemy. It is submitted that this attempted justification has no bearing upon the matter. It could be used with equivalent force in cases of suits by *recognized* governments, with whom our relations may have become critical. However, it seems that the decision needs no justification and is amply supported by established authority.[35]

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[28] 17 Q. B. 171.
[29] *Supra* note 14, at 376.
[30] 235 N. Y. 255, 139 N. E. 259 (1923).
[31] The Sapphire, 78 U. S. 164 (1870); Republic of Honduras v. Soto, *supra* note 11.
[32] Salimoff v. Standard Oil Co., *supra* note 14, at 258.
[33] *The Juristic Status of Foreign States*, *supra* note 2, at 551.
[34] *The Unrecognized Government in American Courts*, *supra* note 2.
[35] The Penza, 277 Fed. 91 (E. D. N. Y. 1921), in which the plaintiff was denied the privilege of suit.

Suits between parties whose rights have been altered by the decrees of Soviet Russia have not been so easily decided. No doubt, the most famous foreign case on the effect of the confiscatory acts of Russia on title to property is *Luther* v. *Sager*.[36] In the first appeal the Court held the Soviet decrees invalid to deprive one of title. When the second appeal was made, the Court took judicial notice that there had been a *de facto* recognition of Russia since the first appeal. Since English courts do not distinguish between *de facto* and *de jure* governments in such cases, it was held that this subsequent recognition made valid all the prior acts of the government. Consequently, a purchaser from the Russian authorities of property confiscated from the plaintiff had an unimpeachable title in England.

In America, the matter was very much confused. The Supreme Court, in *The Nueva, Anna & Liebra*,[37] had decided that the capture by a Mexican commander did not deprive the owner of the title to his property, because the United States had recognized neither the Mexican republic nor the existence of a state of war. Outside of this very unsatisfactory case, there was, up until this year, no superior court decision directly on the point.[38]

In *Sokoloff* v. *National City Bank*,[39] the Court decided that Russian liquidation of all banks and confiscation of all deposits did not wipe out the liability of the defendant to the plaintiff who had deposited money with the defendant in New York for an account in its Russian branch. But Cardozo, *J.*, said, "There is room for debate whether relief from liability would follow if the acts set up in its defendant's answer were those of a government *de jure*." [40] The decrees of Russia could only stop the defendant's business in Russia. It could not dissolve the defendant corporation, since it had been incorporated here, nor could it free the defendant from its just debts. To the same effect was the decision in *James & Co.* v. *Second Russian Insurance Co.*[41] Other cases have held that, as to Russian corporations doing business outside of Russia, the decrees had no extraterritorial effect.[42] In *Sliosberg* v. *New York Life Insurance Co.*,[43] Judge Kellog, confronted with the possibility of the validating of prior acts by the subsequent recognition of Russia,

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[36] 1 K. B. 456 (1921); later reversed in 3 K. B. 532 (1921).

[37] 6 Wheat. 193 (U. S. 1821).

[38] But see English cases holding seizures by non-recognized governments to be similar to captures by lawless bodies. Bank v. Comptoir D'Escompte de Mulhouse, 2 K. B. 630, 638 (1923); Banque Internationale v. Goukassow, 2 K. B. 682 (1923).

[39] *Supra* note 1.

[40] *Ibid.* at 166.

[41] 239 N. Y. 248, 146 N. E. 369 (1925).

[42] First Russian Insurance Co. v. Beha, 240 N. Y. 601, 148 N. E. 722 (1925); Petrogradsky M. K. Bank v. National City Bank, 253 N. Y. 23, 170 N. E. 479 (1930).

[43] 244 N. Y. 482, 155 N. E. 749 (1927).

said, "We do not think that the public weal required that honest creditors should be made to abide the time when a law, inherently unjust and confiscatory, enacted by a governmental power, then regarded as barbarous, might become an effective weapon of defense, through the recognition of that power as a worthy member of the society of civilized nations." This is indeed a vehement, but logical declaration.

Finally, in July of this year, the Court of Appeals was faced with the case of *Salimoff & Co.* v. *Standard Oil Co.*,[44] which, for the first time, squarely presented to it a conflict of title between an original owner and a subsequent purchaser of property confiscated by Russia. The plaintiffs' oil lands were taken by Russia under its nationalization acts, and oil from these lands were sold to the defendant. The plaintiffs, Russian nationals, joined in an equitable action for an accounting, claiming that the seizure by *unrecognized* Russia could no more affect the title of the plaintiffs than acts of bandits.[45] The Court held that the test with us was as laid down in *Russian Reinsurance Co.* v. *Stoddard*.[46] If "within Russia, the Soviet decrees have actually attained such effect as to alter the rights and obligations of parties in a manner we may not in justice disregard, * * *," then we shall give effect to those decrees in our courts. As a recovery here was based on an alleged conversion, there could be no recovery unless the act done was a wrong at the place of commission.[47] But the Soviet regime was obviously the true, *de facto* sovereign of Russia and its acts valid by the law of nations. Hence, the confiscation by the government of the plaintiffs' lands and oil deprived the latter of their title to the property, and they could maintain no action against purchasers of that property from the Russian nation. Thus, this case definitely settles the question in this state, and it is submitted that similar issues will be similarly decided in other states upon the strength of the logic of the case.

As this article is being written there is considerable talk of the possibility that the United States will formally recognize the Russian Soviet government before the year is out. If that should happen, all future litigation will be governed by the principles mentioned above in regard to recognized nations. But, whatever the outcome, the leading New York decisions discussed herein will remain a guiding light to all controversies which may arise in the future, relative to *de facto* governments.

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[44] *Supra* note 14.

[45] Luther v. Sagor, *supra* note 36.

[46] 240 N. Y. 149, 157, 147 N. E. 703 (1925).

[47] Riley v. Pierce Oil Corp., 245 N. Y. 152, 154, 156 N. E. 647 (1927).