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INTERNATIONAL LAW-RECOGNITION OF GOVERNMENTS

INTERNATIONAL LAW—RECOGNITION OF GOVERNMENTS.—The decision of the Circuit Court of Appeals for the Second Circuit recently brought to a close an interesting piece of litigation which had been dragging its way through the courts for several years. The issue on the international law point was so sharply presented, the counsel so able, investigation so completely exhaustive, and the recovery so substantial that the case has been given full attention by the newspapers as well as by legal commentators.

On July 30, 1916, property, largely war materials and explosives, belonging to the Russian Imperial Government was destroyed while in the possession of the Lehigh Valley Railroad as common carrier. The Imperial Government fell and these suits were brought by Mr. Bakhmeteff, the recognized ambassador of the provisional Russian Government. Motions were made to dismiss because there was no such party plaintiff in existence, but were denied on the ground that existence of a government is a political question on which the statement that the provisional Russian Government was still recognized was conclusive on the court.[1] In 1923 motions were again made to dismiss on the ground that the only government existent in Russia was not recognized by the United States and therefore had no right to sue in our courts. These motions were also denied on the ground that the suit did not abate on the fall of the government, and should be continued by Mr. Serge Ughet in whom the custody of Russian government property vested on the retirement of Mr. Bakhmeteff. A motion to amend by inserting the name of the State of Russia as party plaintiff was granted.[2] This decision was affirmed by the Circuit Court of Appeals holding, that the cause of action was the property of the State of Russia, that a foreign government as representative of its state may sue in our courts, and that the question of who is representing the state is one for recognition by the political department whose finding shall be conclusive on the court.[3]

A recognized foreign government may sue in our courts on a cause of action belonging to its nation.[4] The notion that the property belongs to the nation and not to the government which acts only as agent or trustee leads to the logical conclusion that a change in government does not effect the property rights belonging to the state.[5] Consequently a cause of action belonging to

[20]Supra, note 17. Where the defendants sued were all active and participating joint tort-feasors.

[1]Russian Government v. Lehigh Valley R. Co. (D. C. S. D. N. Y. 1919) 293 Fed. 133.

[2](D. C. S. D. N. Y. 1923) 293 Fed. 135.

[3]Lehigh Valley R. Co. v. State of Russia, 1927, 21 F. (2d) 396.

[4]The Sapphire, 78 U. S. (11 Wall.) 164, 20 L. Ed. 127.

[5]Hall, *International Law*, (8th ed.) p. 21; Moore, *Digest of International Law*, I, p. 249; Foulke, *International Law* I, pp. 62, 82, 102, 192; The Rogdai, (D. C. N. D. Cal.) 278 Fed. 294.

the state does not abate on the fall of the government.[6] The court in the principal case took judicial notice of the continued existence of the State of Russia.[7] It might be open to question whether this fundamental assumption of the court was true in any other than the geographical sense, since what was the old international person to whom the cause of action in question accrued is now a number of independent states of which the Russian Socialist Federated Republic is only one. However, as will be shown, whatever may be the fact as to that it will be of importance only in the question of the disposition of the funds and was not open to the inquiry of the court at the present time. The point of interest in this part of the case was the precedent established for bringing the suit in the name of the state itself as the real party in interest.

Who represents the rightful government of a state has long been a question on which the courts have held themselves bound by the attitude of the political department charged with the handling of our international affairs. The courts decline to make an investigation on their own account when the political department has expressed its position.[8] Pursuit of this principle necessarily leads courts to recognize things whose only basis in fact lies in the imagination of the state department. The principal case is a forceful illustration. When we have a recovery nearing a million dollars depending on the courts having to assume as true, facts, which they and everyone else knows are not true, our attention is at least challenged. It is sometimes said that such a result follows from the theory that until the political department has recognized it officially nothing has happened in the foreign territory. In science when facts conflict with a theory something happens to the theory. Can it be that in law the reverse is true? Surely a common sense explanation will secure the same result without a disconcerting indulgence in fiction. Security in foreign relations can only be attained by having a single responsible body determining the binding policy. The theory of our government vests this determination in the state department. Let its statement of policy as to the recognition that may be given the representatives of international persons be binding on our courts. The confusion and anomaly of having courts decide for themselves on their own investigation of fact is apparent, without considering the more serious practical difficulties that would arise should their findings be not in harmony with the policy of the state department. However, let them do it openly and consciously recognizing that they are following policy without claiming the results of following it to be the facts. As the judge said in the principal case, "If it be a fact that there is a Russian Socialist Federated Republic now in charge of the government of Russia, it would bring no different result here." The result is the same but the path to it may well avoid one of those fictional mazes which has made our legal thinking often unintelligible to the continental lawyer. As Mr. Justice Ford said in *Sokoloff v. National City Bank*,[9] "Facts are facts, in Russia the same as elsewhere."

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[6]The Sapphire, (*supra*) note 4.

[7]See Oppenhiem, *International Law*, I, § 75.

[8]Jones v. United States, 137 U. S. 202, 11 Sup. Ct. 80, 34 L. Ed. 691.

[9]82 N. Y. Supp. 355. See also, Dickinson, *Unrecognized Governments, 22 Mich. L. Rev. 29*, 118.

While one can scarcely help approving the wisdom of such a rule its logical pursuit is bound to lead to some rather absurd consequences. It is natural that in such a case the common law lawyer should seek for a distinction to avoid its application. One commentator on the case in speaking of the principle followed expressed himself thus, "This principle has never been applied when the political departments recognized a government that has no semblance of existence."[10] Whether what distinction there may be between recognizing a government *de jure* which has no existence and refusing to recognize one that has a *de facto* existence would justify allowing the court to make its own investigation of the facts, is doubtful. The reasoning at the basis of the rule of "political guidance" would be equally applicable in either case and writers state the principle broadly enough to cover both situations. Westlake says, "If a case were brought before a court of law which depended on an alleged change in the international condition of a certain piece of territory, whether by acquisition or extinction of state existence, or even by partial cession, and whether the change affected the state to which the court belonged or only foreign states, no evidence, however cogent, could absolve the court from being bound by the position of its own government as to the change alleged."[11]

Having recovered then, on sound international law principles on the cause of action running to the State of Russia, the question becomes one of disposal of the funds so collected by M. Ughet after he has paid counsel for his share in the seventeen or more volumes of proceedings which have recently been published. It appears that an arrangement has been entered into with the treasury department by which the sum recovered will be paid over to it in part payment of the debts due from the State of Russia to the United States.[12] This procedure has not been followed without protest from the Soviet government which, as was to be expected, was ignored.[13]

Such disposition would seem to be in accord with the general principles of obligations of reorganized states. Whether the Soviet government be considered as representing the old Russian state somewhat dismembered or the whole group of independent sovereignties as new states in the territory of the old Russian state, the obligations to our government continue, in the first case in whole and in the second ratably. On the facts therefore no injustice was done to the present recognized government. Considering it as a succession with mere loss of territory and change of government then, "Such a change no more affects its, the old state's, rights and duties than a change in its internal organization, or in the person of its ruler. This doctrine applies to debts due to as well as from the state, and to its property * * *." On the other hand, "The case is slightly different where one State is divided into two or more distinct and independent sovereignties. In that case the obligations which have accrued to the whole, before its division are (unless they have been the subject of special agreement) ratably binding upon the different parts. This

[10] *23 Col. L. Rev.* 787-788.
[11] Westlake, *International Law*, I, pp. 65-66.
[12] See *37 Yale Law Journal* 360.
[13] See New York Times, Feb. 12, 1928, p. 2, col. 3.

principle is established by the concurrent opinions of text writers, the decisions of courts and the practice of nations."[14]

That the rights as well as obligations descend ratably or *in toto* as the facts show the change to be, helps to strengthen the allowance of recovery in the present case rather than to allow the right to be barred by the statute of limitations for lack of a person to represent the owner.

We may expect to hear more of this part of the problem when diplomatic negotiations for recognition are discussed. Unless arranged for in the treaty, which is most likely, it may then be necessary to decide whether the obligations to our government and the money held by our treasury department for the old Russian state are to be divided *pro rata* among the independent nations in the territory of old Russia or whether the Russian Socialist Federated Republic is the dismembered "sole heir" to its credits and obligations.

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[14]Halleck, *International Law*, I, §§ 26, 27.