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THE UNRECOGNIZED GOVERNMENT OR STATE IN ENGLISH AND AMERICAN LAW[1]

By Edwin D. Dickinson*

I

Two years ago an American citizen who had been a resident of Mexico for many years died intestate in Mexico City. The widow was appointed administratrix by one of the Mexican civil courts. Finding among the papers a number of notes executed by an American corporation payable to the deceased, the administratrix began an action in New York to have whatever was due upon the notes paid to the estate. The corporation's attorneys moved for judgment on the pleadings, contending that an administratrix appointed by a Mexican court can maintain no action in courts of the United States *so long as the executive of the United States declines to recognize* the government functioning in Mexico. The Supreme Court of New York granted this motion.[2] Having procured letters of administration in New York, the widow then moved to amend her pleadings by dropping her status as administratrix appointed in Mexico and asserting the status acquired under New York law. On this motion the Supreme Court favored the widow,[3] but on appeal to the Appellate Division the order was reversed and the widow's motion denied.[4] The Appellate Division took the view that since the appointment in

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[1] This paper has already appeared in French translation in the Revue de Droit international et de Législation comparée, 3d series, Vol. IV, pp. 145-178. Acknowledgments are due the editors and publishers of that periodical for permission to reproduce the paper here. Advantage has been taken of another publication to make a few minor corrections, to incorporate a discussion of a few cases which have been reported since the former publication, and to add a number of citations which may be of interest to readers in this country.—The Author.

[2] New York Supreme Court, Trial Term, New York County (1922). The author has seen no official report of this opinion. A copy of the opinion, reproduced *infra*, note 5, was made available through the courtesy of counsel.

[3] 193 N. Y. Supp. 675 (1922).

[4] 193 N. Y. Supp. 676 (1922). *Semble* that a motion to substitute would have been equally futile. See also 196 N. Y. Supp. 342 (1922).

Mexico must be regarded in New York as a mere nullity there was nothing whatever to amend.

From the decision of this novel case, reported as *Pelzer v. United Dredging Co.*, we may infer that the New York courts regard unrecognized Mexico as a sort of legal vacuum. In granting the corporation's motion for judgment on the pleadings, the Supreme Court said: "The administratrix plaintiff is an officer of a foreign court. * * * It is syllogistically true that if the foreign court has no recognized power here she may not assert a right derived through her appointment therefrom. * * * The Mexican government is not *de facto* here, since recognition alone can make it so. It may have all the attributes of a ruling faction, a colony, a district of people, or maintain any other form of suzerainty in its established domain, but its power as a government remains nil without our patent of recognition. As the parent of the court it cannot have notice, either judicial or administrative, and surely the creature cannot be possessed of a power not given its creator. The duty to declare the legal incapacity to sue is paramount to a consideration of the evils attendant upon the failure of justice resultant upon this policy of international relations."[5] It was apparently immaterial, in the court's view, that in fact Mexico existed south of the Rio Grande and that in fact it pos-

[5] The text of Mr. Justice McAvoy's opinion, without omissions, is as follows: "The administratrix plaintiff is an officer of a foreign court. She exercises her function ex vigore the government of her origin, and has no separate existence such as an executor has through the appointment of a testamentary script. Hence it is syllogistically true that if the foreign court has no recognized power here she may not assert a right derived through her appointment therefrom. The foreign court is erected in Mexico, whose present government is not yet admitted to recognition as a sovereign by our federal authority. It seems obvious that judicial power cannot be contemplated as in an existence apart from the sovereignty under the sway of which it operates. It is but a branch of government, coeval and coexistent therewith, without distinct entity or being. The Mexican government is not *de facto* here, since recognition alone can make it so. It may have all the attributes of a ruling faction, a colony, a district of people, or maintain any other form of suzerainty in its established domain, but its power as a government remains nil without our patent of recognition. As the parent of the court it cannot have notice, either judicial or administrative, and surely the creature cannot be possessed of a power not given its creator. The duty to declare the legal incapacity to sue is paramount to a consideration of the evils attendant upon the failure of justice resultant upon this policy of international relations. It is imperative to sustain the motion for judgment by the defendant."

sessed a more or less effective government which included courts and a system of law. Until the United States Department of State had admitted, by word or act, that Mexico possessed a government, the New York courts felt constrained to remain legally ignorant and legally incapable of being enlightened.

Such an attitude on the part of courts toward an unrecognized government or state has certain significant consequences. It requires that courts ignore important facts until the executive has seen fit to recognize them as such. It makes important private rights depend almost entirely upon the executive pleasure. In situations like that presented in the Pelzer case, it admittedly results in a miscarriage of justice. Is such an attitude required by sound legal doctrine or the established precedents of the law?

II

The development of modern judicial doctrine in regard to unrecognized governments or states began, for British and American courts, in the period of rapid political change which followed the French revolution. In 1804, the City of Berne in Switzerland sought to have the British High Court of Chancery restrain the Bank of England and the South Sea Company from transferring certain funds which had belonged to the old government of Berne before the revolution. It was objected that since the new government of Switzerland had not been recognized by Great Britain it could not be noticed by the court. Lord Eldon refused relief, observing, according to the reporter, "that he was much struck with the objection; and it was extremely difficult to say, a judicial Court can take notice of a Government, never authorized by the Government of the Country, in which that Court sits; and whether, the foreign government is recognized, or not, is matter of public notoriety."[6] The reporter adds that a foreign government must be recognized by the British government before it can sue in British courts, and that "this was repeatedly declared by Lord Eldon, with respect to the

The recent recognition of the government of Mexico (September, 1923) will be retroactive in effect and a different result may be reached now without difficulty in cases of this type. See *infra,* note 43.

[6] The City of Berne in Switzerland v. The Bank of England, 9 Ves. 347. See also Dolder v. Bank of England, 10 Ves. 352 (1805); Dolder v. Lord Huntingfield, 11 Ves. 283-(1805).

new governments of South America, before their independence of Spain was completely established and formally acknowledged by the British cabinet."[7]

It will be recalled that the revolution in France was followed by a period of insurrection and turmoil in the French colony comprising what is now Haiti and Santo Domingo. Insurgents gained actual control of most of the island. The question soon arose as to how the courts should regard the *de facto* situation thus created. In 1805, in the case of *The Happy Couple,*[8] a British court at Halifax condemned an American ship for carrying contraband to the insurgents because it found nothing to indicate that the British government had recognized any portion of the island as having any other character than that of a French colony. In the cases of *The Manilla,*[9] decided in 1808, and *The Pelican,*[10] decided in 1809, British courts held that ports controlled by the insurgents should not be regarded as colonial ports of France within the meaning of orders in council subjecting neutral ships to condemnation for trading from colonial ports of the enemy. There was no departure, however, from the principle applied in *The Happy Couple,* for the courts in these later cases construed other orders in council as amounting to a recognition on the part of the British government of the *de facto* situation. In the case of *The Pelican,* the court expressly declared that "it always belongs to the government of the country to determine in what relation any other country stands towards it." "That is a point," remarked the judge, "upon which Courts of Justice cannot decide."

The leading American cases on unrecognized governments or states grew out of these same insurrections in Haiti and Santo Domingo. It will be worth while, in view of their importance as precedents and their influence upon the later development of judicial doctrine, to scrutinize these early cases somewhat carefully. In the first case, *Rose v. Himely,*[11] decided in 1808, an American merchantman had procured a cargo in ports controlled by the insurgents and had later been captured by a French privateer at a place more than ten leagues off the Dominican coast. The privateer took the mer-

[7] 9 Ves. 347 n.

[8] Stewart's Reports, 65.

[9] Edw. Adm. 1.

[10] Edw. Adm., App. D.

[11] 4 Cranch, 241.

chantman into a Spanish port in Cuba, where ship and cargo were sold under authority from a person styling himself agent in Cuba of the French government of Santo Domingo. The purchaser at this sale took the cargo into the United States, where it was claimed by the original American owner. The ship and cargo were subsequently condemned by a French tribunal in Santo Domingo for violating a decree of the French government prohibiting trade with the insurgents. When the case of *Rose v. Himely* came before the United States Supreme Court, Chief Justice Marshall proceeded to inquire into the French tribunal's jurisdiction, and preliminary to that inquiry he desired to know whether the tribunal's sentence purported to be an adjudication of belligerent right or simply an application of municipal regulation. He began by taking account of the *de facto* situation. "In making this inquiry," he said, "the relative situation of St. Domingo and France must necessarily be considered. The colony of St. Domingo, originally belonging to France, had broken the bond which connected her with the parent state, had declared herself independent, and was endeavoring to support that independence by arms. France still asserted her claim of sovereignty, and had employed a military force in support of that claim. A war *de facto* then unquestionably existed between France and St. Domingo."[12] Having taken cognizance of the *de facto* situation, and having observed that the French tribunal might have pronounced its judgment either as a prize court or as a court enforcing a municipal regulation, he proceeded to ascertain the true nature of the judgment by examining relevant acts of the French authorities.

Counsel for the claimant urged the court to go much further

[12] 4 Cranch 241, 272. See also Consul of Spain v. The Conception, 6 Fed. Cas. 359 (1819); La Conception, 6 Wh. 235 (1821). In United States v. Hutchings, 2 Wheeler's Crim. Cas. 543 (1817), in which the prisoner was indicted for piracy and tried before Chief Justice Marshall sitting in the United States Circuit Court, the accused had sailed under commissions from the revolutionary government of Buenos Ayres and had made captures of Spanish ships. The attorney for the prosecution objected to the accused's commissions going to the jury, *inter alia,* because there was no proof that Buenos Ayres was an independent government. Chief Justice Marshall observed that before the judiciary could consider Buenos Ayres as independent and capable of having a national seal it must be recognized by the executive. He decided, however, that the commissions could go to the jury merely as papers found on board the accused's ship. In about ten minutes the jury returned a verdict of not guilty.

than this. They contended that since the insurgent colony had declared itself a sovereign state and had thus far maintained its sovereignty by arms, it ought to be regarded by other nations as sovereign in fact and therefore entitled to maintain the same intercourse with the world that is maintained by other belligerent nations. It was in reply to this extreme contention that Chief Justice Marshall uttered the famous dictum which has come to be regarded by courts as a classical statement of the rule in regard to recognition. He said: "It is for governments to decide whether they will consider St. Domingo as an independent nation, and until such decision shall be made, or France shall relinquish her claim, courts of justice must consider the ancient state of things as remaining unaltered, and the sovereign power of France over that colony as still subsisting."[13]

The Chief Justice concluded that the French tribunal had condemned for breach of municipal regulation and that it had no authority to condemn for such an offense an American ship seized on the high seas and never carried within French jurisdiction.[14] It followed that the original owner was entitled to recover his cargo. Before leaving this case, it ought to be observed that Chief Justice Marshall's famous statement in regard to recognition was obiter dictum and that there was nothing to indicate its approval by more than two of the seven justices. It was uttered in connection with a decision almost immediately overruled on every essential point.[15] Conceding that it was sound as a statement of general principle, it is noteworthy that it was formulated in a case in which, in one of the most delicate situations involving an unrecognized government or state—a situation in which the colony of a friendly state had revolted and was seeking to establish its independence by arms—the great justice

[13] 4 Cranch, 241, 272. This dictum has been quoted many times as a statement of controlling principle in cases which were in no important respect like Rose v. Himely.

[14] The Chief Justice based his decision upon the proposition that an American ship could not be lawfully seized by the French on the high seas for violating a French municipal regulation. Three justices concurred in reliance upon the proposition that an American vessel seized by the French for violating a municipal regulation could not be lawfully condemned by the French tribunal while lying in the port of another nation. Two justices dissented. The propositions invoked by the Chief Justice and the concurring justices, respectively, were both repudiated by the Supreme Court in Hudson v. Guestier, 4 Cranch, 293 (1808), 6 Cranch, 281 (1810).

[15] Hudson v. Guestier, *supra*.

who announced it manifested no diffidence about taking cognizance of the *de facto* relation between the colony in question and the mother country.

Three years after *Rose v. Himely* was decided, the case of *Clark v. United States*,[16] arising under the non-importation act of 1809, reached the circuit court. The act of 1809 prohibited the importation into the United States of any goods "from any port or place situated in France, or in any of her colonies or dependencies." The goods in question were imported from Santo Domingo, long since under the complete *de facto* control of the revolutionists. Was Santo Domingo to be regarded as a colony or dependency of France within the meaning of the statute? The claimant relied upon the *de facto* independence of Santo Domingo; but the court held that the non-importation act applied. Mr. Justice Washington said: "These arguments, on the side of the appellants, had great weight with us, when they were urged; and we must candidly confess, that they lost nothing by the examination which we have given the subject during the vacation. But they seem to us to be so completely borne down by the opinion of the Supreme Court, pronounced in the case of *Rose v. Himely*, that it is impossible, we think, to sustain them, without disregarding principles most clearly expressed in that opinion."[17]

Even if *Rose v. Himely* had not already been decisively overruled, its actual decision certainly fell far short of a controlling precedent for *Clark v. United States*. There were good reasons, however, for applying Marshall's dictum in the latter case. For one reason, the non-importation act applied expressly to French "colonies and dependencies." Presumptively, a district regarded by France as a dependency and so recognized by the United States would be included. And this presumption was confirmed as regards Santo Domingo by the history of non-intercourse and non-importation legislation.[18] For another reason, *Clark v. United States* seems

[16] 3 Wash. C. C. 101.

[17] 3 Wash. C. C. 101, 102.

[18] The non-importation act (2 STAT. AT L. 528) superseded the embargo act (2 *ibid.* 451), which in turn superseded an act of 1806 (2 *ibid.* 351, 421) expressly prohibiting all commercial intercourse with any part of Santo Domingo "not in possession, and under the acknowledged government of France." The act of 1806 is said to have been passed in consequence of a remonstrance from the French government.

clearly to have presented one of those delicate political situations in which the court ought to follow the political departments. The political departments had recognized and dealt with the French government as having authority at the place in question. The position of the revolutionists would have been materially strengthened, to the disadvantage of the French government and the consequent embarrassment of the United States government, if the court had permitted the *de facto* situation to take Santo Domingo out of the operation of the statute.

The condition of revolution and civil war which had become chronic in Haiti and Santo Domingo continued for many years to perplex both the political departments of the United States government and its courts. The United States Neutrality Act of 1794 made it unlawful to fit out and arm ships with the intent that they should be employed "in the service of any foreign prince or state" against the subjects of "another foreign prince or state" with whom the United States was at peace. In *Gelston v. Hoyt*,[19] an action of trespass for seizing a ship, decided in 1818, the defendants justified as public officers making a seizure under the neutrality statute. They offered to prove that the ship had been fitted out and armed with the intent that it should be employed in the service of that part of Santo Domingo which was then under the *de facto* government of Petion against the subjects of that part which was under Christophe. It was not shown that either government had been recognized by the political departments as a "foreign prince or state." The Supreme Court held that the evidence offered by the defendants was properly rejected. Mr. Justice Story said: "if the court was bound to admit the evidence, as it stood, without this additional proof, it must have been upon the ground that it was bound to take judicial notice of the relations of the country with foreign states, and to decide affirmatively, that Petion and Christophe were foreign princes, within the purview of the statute. No doctrine is better established, than that it belongs exclusively to governments to recognize new states, in the revolutions which may occur in the world; and until such recognition, either by our own government, or the government to which the new state belonged, courts of justice are bound to consider the ancient state of things as remaining unal-

[19] 3 Wh. 246.

tered."[20] Justice Story relied upon *Rose v. Himely,* citing also *The Manilla* and *The City of Berne v. The Bank of England.*

It seems clear that the decision in *Gelston v. Hoyt* was correct. The Neutrality Act of 1794 applied only where a "foreign prince or state" was affected.[21] If the court had regarded unrecognized revolutionists as a "foreign prince or state," within the meaning of the statute, virtually it would have anticipated the decision of a most delicate and difficult question falling exclusively within the competence of the political departments of government.

In this wise the early cases established the principle that in English and American law at least the decision of questions of recognition belongs exclusively to the political departments of government. For the judiciary, it was admitted that courts are not equipped to decide such questions,[22] that considerations of policy prevent them from pursuing in respect to matters involving recognition a course which is not in harmony with that pursued by the political department,[23] in brief, that questions of recognition are exclusively political and that when they are really involved in litigation the court's only duty is to inform itself as to the decision made by competent political authorities and act accordingly.[24]

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[20] 3 Wh. 246, 324. See also United States v. Palmer, 3 Wh. 610 (1818); The Divina Pastora, 4 Wh. 52 (1819).

[21] In the Neutrality Act of 1818 (3 STAT. AT L. 447), Congress expressly enlarged the scope of the statute so that it would apply, not only where breach of neutrality affected any "foreign prince or state," but also where it affected any "colony, district, or people." See The Three Friends, 166 U. S. 1 (1896). See also the British Foreign Enlistment Act of 1819, 59 Geo. III, c. 69; The Salvador, L. R. 3 P. C. 218 (1870).

[22] See Kennett v. Chambers, 14 How. 38, 51 (1852); Republic of Peru v. Peruvian Guano Co., 36 Ch. D. 489, 497 (1887).

[23] See Thompson v. Powles, 2 Sim. 194, 212 (1828); Taylor v. Barclay, 2 Sim. 213, 221 (1828); The Hornet, 12 Fed. Cas. 529 (1870); The Rogdai, 278 Fed. 294, 296 (1920).

[24] In addition to the cases cited above in notes 22 and 23, see The City of Berne v. The Bank of England, Rose v. Himely, and Gelston v. Hoyt, discussed *supra.* More recent cases are discussed *infra.* Compare The Charkieh, L. R. 4 A. & E. 59 (1873), in which the court entered into an exhaustive inquiry into the status of the Khedive of Egypt, although informed by the foreign office that the Khedive had not been recognized, with Mighell v. Sultan of Johore [1894], 1 Q. B. 149, 158, 160, 161, in which the course pursued in The Charkieh was disapproved. See also Berdahl, "The Power of Recognition," 14 AM. JOUR. INT. LAW, 519.

A similar judicial incompetence to make political decisions affecting the conduct of foreign relations was established at an early date in respect to other matters. Thus it came to be well settled that a question of diplomatic character is exclusively for the executive to decide. The question is political and a certificate from the appropriate executive department is conclusive.[25] It is equally well settled that when an international boundary is in dispute the courts will accept and apply the conclusions announced by the political authorities of their own state.[26] If the authorities charged with the conduct of foreign relations deny sovereignty, the courts will deny it.[27] If

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See BLUNTSCHLI, VÖLKERRECHT, § 122; DESPAGNET, COURS DE DROIT INTERNATIONAL PUBLIC, 4th ed., § 83; LE NORMAND, LA RECONNAISSANCE INTERNATIONALE ET SES DIVERSES APPLICATIONS, pp. 277-285; and WIESSE, LE DROIT INTERNATIONAL APPLIQUÉ AUX GUERRES CIVILES, §§ 9, 33, indicating that the same principle applies in other countries. Bluntschli says: "Die Frage der Anerkennung einer auswärtigen Regierung wird in den modernen Staten durchweg von den inländischen Regierungen entschieden; und es haben sich dann die Landesgerichte auch in internationalen Processen nach diesem Entscheide zu richten."

[25] See United States v. Liddle, 2 Wash. C. C. 205 (1808); United States v. Ortega, 4 Wash. C. C. 531 (1825); United States v. Benner, Baldwin 234 (1830); Ex parte Hitz, 111 U. S. 766 (1884); In re Baiz, 135 U. S. 403 (1890); United States v. Trumbull, 48 Fed. 94 (1891); The Rogday, 279 Fed. 130 (1920); Savie v. City of New York, 193 N. Y. Supp. 577 (1922).

[26] Foster & Elam v. Neilson, 2 Pet. 253 (1829); Garcia v. Lee, 12 Pet. 511 (1838); United States v. Lynde, 11 Wall. 632 (1870). "In a controversy between two nations concerning national boundary, it is scarcely possible that the courts of either should refuse to abide by the measures adopted by its own government. There being no common tribunal to decide between them, each determines for itself on its own rights, and if they cannot adjust their differences peaceably, the right remains with the strongest. The judiciary is not that department of the government, to which the assertion of its interests against foreign powers is confided; and its duty commonly is to decide upon individual rights, according to those principles which the political departments of the nation have established. If the course of the nation has been a plain one, its courts would hesitate to pronounce it erroneous." 2 Pet. 253, 307.

[27] "And can there be any doubt, that when the executive branch of the government, which is charged with our foreign relations, shall in its correspondence with a foreign nation assume a fact in regard to the sovereignty of any island or country, it is conclusive on the judicial department? And in this view it is not material to inquire, nor is it the province of the court to determine, whether the executive be right or wrong. It is enough to know, that in the exercise of his constitutional functions, he has decided the question.

the authorities charged with the conduct of foreign relations assert sovereignty, the courts will assert it.[28]

III

The decided cases are clear enough as regards the rule that courts are incompetent to decide questions of recognition, but they are far from clear as regards the principles which define the rule and delimit its application. On the one hand, although the judiciary is undoubtedly influenced by a desire to avoid embarrassing the executive in the conduct of foreign relations, it is not simply because of the possibility of international complications that courts consider themselves incompetent to make such decisions. British and American courts, on the contrary, have long boasted of their competence to decide cases so complicated internationally as to require the application of international law.[29] They decide, for example, cases involving neutral rights and obligations in time of war, cases involving the interpretation of treaties, cases involving the rights and liabilities of resident aliens, and cases involving the immunities from jurisdiction of the sovereigns, diplomatic representatives, or public ships of other states. Such cases certainly have international complications, and on occasion the decisions may prove a source of embarrassment to the executive in the conduct of foreign affairs. It is not because of international complications alone that courts "crook the pregnant hinges of the knee" to the executive or legislative branches of government.

Having done this under the responsibilities which belong to him, it is obligatory on the people and government of the Union.

"If this were not the rule, cases might often arise in which, on the most important questions of foreign jurisdiction, there would be an irreconcilable difference between the executive and judicial departments. By one of these departments, a foreign island or country might be considered as at peace with the United States; whilst the other would consider it in a state of war. No well regulated government has ever sanctioned a principle so unwise and so destructive of national character." Williams v. The Suffolk Insurance Co., 13 Pet. 415, 420 (1839). See also Foster v. Globe Venture Syndicate, 69 L. J. Ch. 375, 377 (1900).

[28] Jones v. United States, 137 U. S. 202 (1890); In re Cooper, 143 U. S. 472 (1892). See also United States v. Yorba, 1 Wall. 412 (1863); Pearcy v. Stranahan, 205 U. S. 257 (1907).

[29] Triquet v. Bath, 3 Burr. 1478 (1764); The Paquete Habana, 175 U. S. 677 (1900); The Zamora [1916], 2 A. C. 77. But see West Rand Central Gold Mining Co. v. Rex [1905], 2 K. B. 391; PICCIOTTO, THE RELATION OF INTERNATIONAL LAW TO THE LAW OF ENGLAND AND OF THE UNITED STATES.

On the other hand, it is not because courts are constrained to receive all their intelligence of facts affecting international relations through the medium of a foreign office or a state department. They are not so restricted. They take cognizance of *de facto* situations at home or abroad, whether related to the conduct of foreign affairs or not, whenever it is possible for them to do so without becoming improperly involved in the decision of a political question. Attention may well be called to some of the more important instances in which *de facto* situations of international significance have been permitted to determine the outcome of litigation.

It will be recalled that Chief Justice Marshall took cognizance of a delicate *de facto* situation abroad in the much cited case of *Rose v. Himely*.[30] In the case of *Keene v. M'Donough*,[31] a suit in the United States Supreme Court involving lands in Louisiana, the defendant relied upon the adjudication of a Spanish tribunal made after the cession of Louisiana to the United States but before the United States had actually taken possession. In affirming a judgment for the defendant, the court said: "The adjudication having been made by a Spanish tribunal, after the cession of the country to the United States, does not make it void; for we know, historically, that the actual possession of the territory was not surrendered until some time after these proceedings took place. It was the judgment, therefore, of a competent Spanish tribunal, having jurisdiction of the case, and rendered whilst the country, although ceded, was, *de facto*, in the possession of Spain, and subject to Spanish laws. Such judgments, so far as they affect the private rights of the parties thereto, must be deemed valid."[32]

In *United States v. Rice*,[33] a case which came up for decision soon after the War of 1812, the defendant had imported goods into the American port of Castine while it was occupied by British forces and had paid the duties levied by British officials. After the conclusion of peace the United States reassumed jurisdiction at Castine and the collector demanded payment of American duties on the same

[30] 4 Cranch, 241. See also United States v. Hutchings, *supra*, note 12, and Consul of Spain v. The Conception, 6 Fed. Cas. 359. Justice Washington seemed reluctant to ignore the facts in as clear a case as Clark v. United States, 3 Wash. C. C. 101, discussed *supra*.

[31] 8 Pet. 308 (1834).

[32] 8 Pet. 308, 310.

[33] 4 Wh. 246 (1819).

goods. Although the United States government had contested in war the British occupation, and although the government was now the party plaintiff claiming a second payment of duties, the United States Supreme Court took full cognizance of the *de facto* situation at Castine during the war and held unanimously that the government's claim could not be sustained. Delivering the opinion of the court, Mr. Justice Story said: "By the conquest and military occupation of Castine, the enemy acquired that firm possession which enabled him to exercise the fullest rights of sovereignty over that place. The sovereignty of the United States over the territory was, of course, suspended, and the laws of the United States could no longer be rightfully enforced there, or be obligatory upon the inhabitants who remained and submitted to the conquerors. By the surrender the inhabitants passed under a temporary allegiance to the British government, and were bound by such laws, and such only, as it chose to recognise and impose. From the nature of the case, no other laws could be obligatory upon them, for where there is no protection or allegiance or sovereignty, there can be no claim to obedience. Castine was, therefore, during this period, so far as respected our revenue laws, to be deemed a foreign port; and goods imported into it by the inhabitants, were subject to such duties only as the British government chose to require."[34]

After the Civil War in the United States there arose numerous cases requiring the courts to determine how they should regard the late Confederate government and what significance they should attribute to its acts. The belligerency of the Confederacy had of course been conceded, but otherwise its status had not been substantially different from that of an unrecognized *de facto* government or state. In *Thorington v. Smith*,[35] the United States Supreme Court held that effect should be given to a contract made during the rebellion, between residents of Alabama, to sell land in Alabama, the purchase price to be paid in Confederate currency. The court relied upon the *de facto* character of the Confederate government,

[34] 4 Wh. 246, 254. It is noteworthy that the United States has insisted upon the application of the same principle where duties are paid to unrecognized insurgents in *de facto* control of a foreign port of entry. The Mazatlan Case, 1 Moore, Digest, 49 (1873); The Bluefields Case, 1 *ibid.* 49 (1899-1900). See also MacLeod v. United States, 229 U. S. 416 (1913). Compare Fleming v. Page, 9 How. 603 (1850).

[35] 8 Wall. 1 (1868).

described it as a government by paramount force similar to that established by the British at Castine during the War of 1812, and declared that obedience to its authority in civil and local matters was not only a matter of necessity but a matter of duty.

The United States Court of Claims decided, in *The Home Insurance Company's Case*,[36] that a corporation created by act of the Georgia legislature while Georgia was in rebellion was capable of claiming and recovering the proceeds of cotton captured by United States military forces during the war. The corporation's capacity was challenged, but it was held that it had a valid existence entitling it to maintain the suit. The general principle was formulated as follows: "Whatever act of the legislature of a rebel State did not tend to further or support the rebellion, or to defeat the just rights of citizens, but related merely to the domestic affairs of the people of the State as a community, aside from the connection of that people with the rebellion, is a valid act by a *de facto* though unlawful government, which will be sustained in the courts of the United States."[37] In affirming the decision of the Court of Claims, the Supreme Court observed that any other doctrine would "work great and unnecessary hardship upon the people of those states, without any corresponding benefit to the citizens of other States, and without any advantage to the national government."[38]

A situation similar to the one precipitated in the United States by the outbreak of the Civil War arose in South Africa during the Boer War. Long before the war ended the British government proclaimed the annexation of the South African Republic. Of course no British court could recognize the existence of the Republic after that event. But in a case involving title to a quantity of wool confiscated and sold by *de facto* Boer authorities, the Supreme Court of the Transvaal later examined the laws and orders of the *de facto*

[36] 8 Ct. Cl. 449 (1872).

[37] 8 Ct. Cl. 449, 450.

[38] United States v. Insurance Companies, 22 Wall. 99, 103 (1874). See also Mauran v. Insurance Co., 6 Wall. 1 (1867); Delmas v. Insurance Co., 14 Wall. 661 (1871); Ford v. Surget, 97 U. S. 594 (1878); Ketchum v. Buckley, 99 U. S. 188 (1878); Baldy v. Hunter, 171 U. S. 388 (1898). Compare Texas v. White, 7 Wall. 700 (1868); Hanauer v. Doane, 12 Wall. 342 (1870); Hanauer v. Woodruff, 15 Wall. 439 (1872); Horn v. Lockhart, 17 Wall. 570 (1873); Sprott v. United States, 20 Wall. 459 (1874); Williams v. Bruffy, 96 U. S. 176 (1877); Lamar v. Micou, 112 U. S. 452 (1884).

Boer government in order to determine the validity of the act of confiscation.[39] And in another case the same court held that the owner's title to property useful in war had been effectively divested through confiscation by the *de facto* authorities. The court said: "Although the late Government was one which this Court cannot recognise, yet the burghers of the late Free State were a body of men bound together in fighting for a common cause, and in any case exercising control over that part of the country where they happened to be carrying on operations."[40]

In the cases reviewed—cases arising out of the Spanish possession of Louisiana after cession to the United States, the British military occupation of Castine during the War of 1812, the establishment of *de facto* governments in the South during the Civil War in the United States, and the continued existence of the Boer government in South Africa after the annexation proclamation—the courts were not asked to decide political questions. They were asked to take account of facts in adjudicating private rights. It was obviously proper that they should do so. Had they ignored the facts they would have projected the judicial process into the realm of unreality in which an unfortunate miscarriage of justice would have been the only sure result.

In *Yrisarri v. Clement*,[41] an action for libel decided by the English Court of Common Pleas in 1825, we have a situation which is more obviously relevant, indeed, than the situations considered above. The plaintiff claimed that defamatory matter had been published concerning his activity in endeavoring to raise a loan for Chile, of which he claimed to be the duly appointed diplomatic representative. He offered evidence that Chile was a state. It was objected that the court must take judicial notice of the circumstance that Chile belonged to Spain. But Chief Justice Best said: "It occurs to me at present, that there is this distinction. If a foreign state is recognized by this country, it is not necessary to prove, that it is an existing state; but if it is not so recognized, such proof becomes necessary. * * * I take the rule to be this—if a body of persons assemble together to protect themselves, and support their own independence, and make laws, and have Courts of Justice, that is evidence of their being a state.

[39] Van Deventer v. Hancke and Mossop, Transvaal L. R. [1903], T. S. 401.

[40] Lemkuhl v. Kock, Transvaal L. R. [1903], T. S. 451, 454.

[41] 2 Carr. & Payne, 223 (1825).

We have had, certainly, some evidence here today that these provinces formerly belonged to Spain; but it would be a strong thing to say, that because they once belonged, therefore they must always belong. * * * It makes no difference whether they formerly belonged to Spain, if they do not continue to acknowledge it, and are in possession of a force sufficient to support themselves in opposition to it."[42] When the case came up again on motion for a nonsuit, it was held that calling Chile a state in the alleged libel was an admission on the part of the defendant which made further proof unnecessary. Had there been no such admission, however, proof of the *de facto* existence of the Chilean government should have been enough, for the libel suit did not require a decision on the question of recognition, and surely libel is as injurious to the representative of a *de facto* government as to anyone else.

It should be noted, finally, that courts always take account of the facts after the event, even in cases in which a question of recognition has been clearly involved. They attain this salutary result by means of the fiction of retroactivity. It is incompetent for them to anticipate the political department's decision; but once recognition has been granted the courts may treat it as operative *ab initio* and so take account of the unrecognized *de facto* government or state which existed prior to the political department's action.[43] By means of this fiction, the judiciary has frequently found it possible to do justice in matters of private right without becoming involved in political questions. If the decision on recognition is not too long delayed, the fiction of retroactivity will usually enable the courts to deal adequately with most of the cases which arise. But the decision, as we have recently had occasion to know, may be too long delayed. Then the problem confronting the judiciary becomes more complicated. Then it becomes much more difficult to apply the principle that recognition or no is a political matter upon which courts must not venture to decide.

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[42] 2 Carr. & Payne, 223, 225.

[43] Murray v. Vanderbilt, 39 Barb. 140 (1863); Underhill v. Hernandez, 168 U. S. 250 (1897); State of Yucatan v. Argumedo, 157 N. Y. Supp. 219 (1915); Oetjen v. Central Leather Co., 246 U. S. 297 (1918); Ricaud v. American Metal Co., 246 U. S. 304 (1918); Luther v. Sagor & Co. [1921], 1 K. B. 456, [1921] 3 K. B. 532. Compare Kennett v. Chambers, 14 How. 38 (1852). See 35 HARV. L. REV. 607; REV. DE DR. INT., 3d series, III, 151, 162-6, 325-6.

If it is not simply because of the possibility of international complications that courts consider themselves incompetent to decide questions of recognition, and if the authority to direct and control foreign affairs does not give the political departments any general censorship over the facts at home or abroad of which courts may take cognizance, how may we expect courts to define the rule and delimit its application? How, in particular, is the judiciary's sphere of action to be bounded in more or less involved situations which seem to be very close to the line?

(*To be concluded*)