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RECENT RECOGNITION CASES

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The prolonged interval during which the United States declined to recognize the government functioning in Mexico, and the still more protracted period during which recognition has been withheld from the *de facto* government in Russia, have produced some unusually interesting problems with respect to the appropriate judicial attitude toward an unrecognized *de facto* foreign government. In Mexico the recognized Carranza régime was overthrown by revolution in the spring of 1920, and General Obregon was inaugurated president on the first of December in the same year, yet it was not until August 31, 1923, that the Obregon Government received recognition from the United States. In Russia the recognized Provisional Government of Kerensky fell before the onslaughts of the Bolsheviki in December, 1917, and the Soviet Government established by the Bolsheviki soon acquired virtually undisputed control of most of the old empire, yet the Soviet régime remains unrecognized by the United States even at the present day. During intervals thus abnormally prolonged it has become increasingly difficult for the courts to resolve the cases which arise by applying the simple arbitrary formula that all matters of recognition are for the political departments to decide. More and more it has become evident that cases may arise in which the courts, without deprecating in any way the general principle which the formula is conceived to express, may be justified in taking account in some degree of *de facto* foreign governments from which recognition has been withheld. It is proposed to consider here only the more recent English and American cases.¹ The cases considered may be grouped under three heads.

Under the first head attention will be called to an interesting group of decisions in which the question at issue was the capacity of an unrecognized foreign government to maintain a suit in the national courts. Lord Eldon long ago laid it down that a foreign government must be recognized by the British Government before it can be permitted to sue in the British courts.² The rule has had numerous applications in recent years. The Russian Soviet Government, for example, has made several attempts in admiralty

¹ For the earlier cases and more exhaustive discussion of the questions here considered, see Dickinson, "Les Gouvernements ou États non reconnus en Droit Anglais et Américain," *Revue de Droit International et de Législation Comparée*, 3d series, Vol. IV, pp. 145-178; same article in English, 22 *Michigan Law Review*, 29-45, 118-134.

² *City of Berne in Switzerland v. Bank of England* (1804), 9 Ves. 347.

proceedings to recover possession of ships belonging to the Russian state, but always without success.³ In *Russian Soviet Republic v. Cibrario* an attempt was made to compel the defendant to account for funds claimed by the Soviet Government, not as successor to previous governments of Russia, but in its own right. It has been forcefully argued that this presented a situation which should have been distinguished from the situation upon which Lord Eldon founded his earlier opinion, and from the more recent attempts to get possession of Russian public ships, and that in this type of case at least the *de facto* government should be permitted to maintain the action.⁴ The decisions, however, have uniformly denied the unrecognized government standing in court.⁵

If the *de facto* government has no standing in court, then where lies the authority, it may be asked, to institute locally such proceedings as may be necessary to protect and conserve the interests of the foreign state? In a Massachusetts case involving Mexico, decided a few months before recognition was extended to the Mexican Government, it seems to have been thought that suits could be brought in the name of the foreign state, which continued to be recognized, although without a recognized government at the time.⁶ The result thus achieved is desirable, but the means seems a rather transparent subterfuge. The court was probably encouraged to resort to it by the prospect of early recognition. In cases involving Russia the solution has been both simple and arbitrary. Not only has the United States declined to recognize the Soviet Government, but it has continued to recognize officials appointed by the defunct Kerensky Government as representatives of Russia and the State Department has certified freely to that effect. In the result the only successful litigations in the United States on behalf of Russia have been those which were authorized by representatives of the old Provisional Government who have continued their residence in the United States in what purports to be an official capacity.⁷ In one of the more recent suits authorized by these officials a motion was granted to substitute the "State of Russia" for the Russian Government as the party plaintiff, on the assumption, it would seem, that the Russian State has continued to exist and has never ceased to be recognized.⁸ An examination of the Soviet Constitution gives rise to doubts, however, as to whether it is

³ The *Penza* (1921), 277 Fed. 91; The *Rogdai* (1920), 278 Fed. 294; The *Rogday* (1920), 279 Fed. 130.

⁴ Borchard, "Can an Unrecognized Government Sue?" 31 *Yale Law Journal* 534.

⁵ *Russian Socialist Government v. Cibrario* (1921), 191 N. Y. Supp. 543; *Preobazhenski v. Cibrario* (1922), 192 N. Y. Supp. 275; *Russian Socialist Republic v. Cibrario* (1923), 235 N. Y. 255.

⁶ See this *JOURNAL*, Vol. 17, p. 742.

⁷ See The *Rogdai*, 278 Fed. 294, *supra*; The *Rogday*, 279 Fed. 130, *supra*; *Russian Government v. Lehigh Valley R. Co.* (1919), 293 Fed. 133; (1923), 293 Fed. 135; (1924), 265 U. S. 573; 23 *Columbia Law Review* 787.

⁸ *Russian Government v. Lehigh Valley R. Co.*, 293 Fed. 135, *supra*.

correct to regard the present Russian State as the same entity in contemplation of law as the old recognized Russian state of the days antedating the Bolshevik revolution.⁹

Under the second head may be appropriately considered those cases in which the question at issue was the liability of an unrecognized foreign government to be sued in the local courts. Unrecognized governments have been denied for their public instrumentalities the immunities which would have been freely conceded to a recognized government.¹⁰ Should the government itself, in like manner, be denied immunity from suit? It would seem clear that an unrecognized *de facto* government is not in a position to claim the same jurisdictional immunities which international comity and concessions to mutual convenience have established for recognized governments; but it does not follow, as certain courts have concluded, that an unrecognized *de facto* government may be sued.

In *Oliver American Trading Co. v. Government of Mexico and National Railways of Mexico*, an American corporation commenced an action against the Government of Mexico in a New York court to recover damages for acts done in Mexico. Process was served on certain representatives of Mexico in the United States and attachments were levied on such Mexican public property as the plaintiff was able to find. The case was removed from the State court to the United States District Court, where attorneys for Mexico sought to have the action dismissed on the ground that the defendant was the *de facto* government of an independent foreign nation and as such was immune from suit without its consent. The question of immunity was elaborately briefed and exhaustively argued; but, negotiations for the recognition of the Mexican Government having been initiated in the meantime, the court delayed its decision. Soon afterwards the United States recognized the Mexican Government. The court regarded recognition as retroactive and promptly dismissed the suit.¹¹ In affirming this judgment the Circuit Court of Appeals pointed out that the Claims Convention of September 8, 1923, between Mexico and the United States,¹² had provided a remedy which the courts of the United States were incompetent to give.¹³

The question which events thus relieved the federal courts of the embarrassment of deciding had already been presented to the lower New York courts, in the famous *Wulfsohn* case, in such circumstances that there was

⁹ Russian Constitution of July 6, 1923; French text in *L'Europe Nouvelle*, Sept. 8, 1923, p. 1153.

¹⁰ The *Gagara*, [1919] P. 95; The *Annette*, The *Dora*, [1919] P. 105; McNair, "Judicial Recognition of States and Governments, and the Immunities of Public Ships," *British Year Book of International Law* (1921-22), 57-74. See also The *Gul Djemal* (1921), 296 Fed. 553.

¹¹ (1923) 70 N. Y. Law Journal, 209. See also (1924) 264 U. S. 440.

¹² 43 Statutes at Large, Part 2, p. 110.

¹³ The decision of the Circuit Court of Appeals is unreported at the time of writing. The author has been supplied with a copy of the opinion through the courtesy of counsel.

no escaping a decision. Wulfsohn had been the owner of a quantity of furs stored in Russia which were confiscated by decree of the Soviet Government. Treating the confiscation as a conversion, he proceeded against the Soviet Government in the New York courts. The Supreme Court sustained his right to maintain the action, reasoning in quite a mechanical fashion that because the Soviet Government had not been recognized it was not entitled to the immunities accorded recognized governments.¹⁴ This reasoning was not exactly fallacious. Like most mechanical reasoning it made no contact with the real question at issue. The immunities of recognized governments were not claimed for the Soviet Government. It was contended that an immunity of a sort, at least with respect to responsibility for the effect of its own public acts upon property within its own territory, ought to be conceded to an unrecognized *de facto* government. Happily this latter contention prevailed in the Court of Appeals, where the judgment rendered below was reversed.¹⁵ In the course of a notable opinion, Judge Andrews pointed out in effect that the court below had blundered unwittingly into the very kind of political business which it is the reason of the general rule in regard to recognition to avoid. The pressing of claims against foreign governments, recognized or unrecognized, is no part of the judicial function.¹⁶

Under the third head it is proposed to review some recent recognition cases in which the principal contest has been about matters of private right. To illustrate how matters of private right may become the paramount concern in cases in which recognition is involved, attention may be directed to two recent workmen's compensation decisions. One involved the workmen's compensation act of Minnesota. The act required that suit be brought within one year after the employer had given notice that he was willing to compensate. On July 26, 1918, the day her husband was killed, claimant was a resident subject of Austria-Hungary and being an enemy alien was incapable of prosecuting the claim. The employer gave notice on May 6, 1920. The action was commenced on June 1, 1921. Congress declared peace with Austria-Hungary by resolution of July 2, 1921. Ordinarily the state of war would have suspended the running of limitations.¹⁷ But it appeared that claimant resided in that part of Austria-Hungary which had been incorporated in Yugoslavia and that the United States recognized Yugoslavia on February 7, 1919. The court held that recognition terminated claimant's enemy character on the latter date and that her claim to compensation had been barred by limitation.¹⁸ The court seems to

¹⁴ *Wulfsohn v. Russian Socialist Federated Soviet Republic* (1922), 192 N. Y. Supp. 282; (1922), 195 N. Y. Supp. 472.

¹⁵ (1923) 234 N. Y. 372. See also *Nankivel v. Omsk All Russian Government* (1922), 197 N. Y. Supp. 467; (1923) 237 N. Y. 150.

¹⁶ See 22 *Michigan Law Review*, 126; 37 *Harvard Law Review*, 349.

¹⁷ See *Siplyak v. Davis* (1923), 276 Pa. 49.

¹⁸ *Kolundjija v. Hanna Ore Mining Co.* (1923), 155 Minn. 176.

have taken insufficient account of the unsettled condition in Jugoslavia on the date of recognition and of what the act of recognition was intended to accomplish and to have imposed upon the claimant an unwarranted hardship in requiring her to resolve the paradox created by some rather ambiguous political decisions. In the other case, arising under the Pennsylvania statute and involving in a similar way the recognition of Czechoslovakia, a better result was reached and the Minnesota decision was disapproved.¹⁹

Of the cases arising between private litigants and involving immediately only matters of private right, the most important are those in which the court is required to determine the effect to be attributed to the acts, orders, decrees, laws, etc., of an unrecognized *de facto* government. The outstanding English case is *Luther v. James Sagor & Co.*, an action to have certain plywood declared the property of plaintiff and for an injunction. The plaintiff was a Russian company which had been engaged in the manufacture of veneer or plywood in Russia. By decree of June 20, 1918, the Soviet Government had confiscated its mill and manufactured stock. Subsequently the Soviet Government sent a commercial delegation to England under the headship of Krassin and Krassin sold part of the confiscated plywood to defendant. When the case was before the King's Bench Division the court took the view that defendant's right to keep the plywood depended upon the effect to be attributed to the Soviet decree and that the validity of the decree depended upon the recognition which Great Britain had extended to the Soviet Government. Having satisfied itself that Great Britain had not recognized the Soviet Government, the court awarded the plywood to the plaintiff.²⁰ Defendant took the case to the Court of Appeal. Meanwhile Great Britain concluded a trade agreement with Soviet Russia and the Foreign Office announced that the Soviet Government had been recognized as the *de facto* government of Russia. The Court of Appeal approved the decision rendered below, as warranted by the evidence then presented, but unanimously reversed the decision and nonsuited the plaintiff because of the recognition which had been extended meanwhile and to which it felt constrained to give retroactive effect.²¹

The foreign *de facto* government's decree, which would hardly have been challenged had there been recognition, was thus ignored and a company subject of the government which issued the decree was assisted to recover from a purchaser the property which the decree had taken from it. The present writer ventures to think the result unfortunate and the principle unsound. In such circumstances the foreign decree ought not to be ignored. It is enough for the courts to subordinate themselves in matters of recogni-

¹⁹ *Garvin v. Diamond Coal and Coke Co.* (1924), 278 Pa. 469.

²⁰ *Aksionairnoye Obschestvo Dlia Mechanicheskoyi Obrabotky Diereva A. M. Luther v. James Sagor & Co.*, [1921] 1 K. B. 456.

²¹ [1921] 3 K. B. 532. In *Fenton Textile Association v. Krassin* (1921), 38 T. L. R. 259, it was held that Krassin was not entitled to the usual diplomatic immunities.

tion to the decisions of the political departments. They are not required to assist the subjects of unrecognized *de facto* governments, at the expense it may be of nationals, in thwarting the operation of such *de facto* governments' decrees.

The case of *Luther v. Sagor & Co.* was appealed no further and subsequent English decisions have accepted its doctrine as law. The recognition of Soviet Russia, upon which the Court of Appeal based its decision, has of course given a different direction to the decisions and has saved the English courts from the necessity of resolving some rather complicated and difficult problems. The limit in time upon the retroactive effect to be attributed to British recognition has been settled with some approach to precision.²² It has been held that the nationalization of a Russian bank by Soviet decree terminated the bank's existence and the authority of the manager of its London branch to bring an action in its name in the English courts.²³ Even a Russian branch bank in Paris has had its suit in the English courts dismissed, for like reasons, although in this case the Soviet Government had not been recognized by France²⁴ and the suit was for breach of a contract made in France which would ordinarily have been governed by French law.²⁵

The problem involved in *Luther v. Sagor & Co.* has been considered in several interesting and important cases in the United States and further cases are in prospect if the recognition of Russia continues to be withheld. It is settled in New York by the *Wulfsohn* case that the party injured by the decree of an unrecognized *de facto* government cannot proceed against the government itself. May he obtain satisfaction, where the opportunity offers, by proceeding against an individual or corporate defendant? The answer will depend in some measure upon the judicial attitude toward the acts, decrees, or laws of such a *de facto* government. An attitude quite as rigid and unyielding as that which found expression in the English courts in *Luther v. Sagor & Co.* has been approved in a few American decisions and in numerous dicta.²⁶ On the other hand, two cases recently decided by the New York Court of Appeals are of exceptional interest and significance,

²² *White, Child, and Beney v. Simmons* (1922), 127 L. T. R. 571.

²³ *Russian Commercial and Industrial Bank v. Comptoir d'Escompte de Mulhouse*, [1923] 2 K. B. 630.

²⁴ The case arose before France had recognized the Soviet Government.

²⁵ *Banque Internationale de Commerce de Petrograd v. Goukassow*, [1923] 2 K. B. 682. Both this case and the case cited in note 23 preceding were overruled in the House of Lords upon the ground that Soviet nationalization decrees were not intended to end the existence of the Russian banks and upon grounds of estoppel. It was not doubted that effect should be given to Soviet decrees. (1924) 40 T. L. R. 837.

²⁶ See *Pelzer v. United Dredging Co.* (1922), 22 Michigan Law Review 29, 30; (1922) 193 N. Y. Supp. 675, 676; (1922) 196 N. Y. Supp. 342; *Bourne v. Bourne* (1924), 204 N. Y. Supp. 866, 873; *Joint Stock Co. of Volgakama Oil & Chemical Factory v. National City Bank of New York* (1924), 206 N. Y. Supp. 476, 480.

not so much for the precise points determined as for the revelation of a more realistic and liberal attitude.

In *Sokoloff v. National City Bank*, an action was instituted in the New York courts by a Russian subject against a New York bank to recover a sum of money which had been deposited with defendant and which defendant had agreed to repay in rubles at its Petrograd branch. The defense was offered and sustained in the court below that the defendant had been unable to repay as agreed because its Petrograd branch had been closed and the assets confiscated by the Soviet Government.²⁷ The New York Supreme Court, Appellate Division, overruled this decision on appeal, holding that the bank as a debtor was liable, whatever might have happened meanwhile to its Russian assets, and that impossibility of performance could not be invoked as a defense.²⁸ The latter decision has been recently approved by the Court of Appeals.²⁹ The result thus attained seems clearly correct, for the reasons given by the court.³⁰ The significant feature of the case is the warning embodied in the opinion with respect to the considerations which may determine future cases in this general category.

Delivering the opinion of the court, Judge Cardozo said:

Courts of high repute have held that confiscation by a government to which recognition has been refused has no other effect in law than seizure by bandits or by other lawless bodies. *Russian Commercial & Industrial Bank v. Comptoir D'Escompte de Mulhouse*, [1923] 2 K. B. 630, 638; S. C., H. of L., 40 T. L. R. 837; *Banque Internationale v. Goukassow*, [1923] 2 K. B. 682; *A. M. Luther v. James Sagor & Co.*, [1921] 1 K. B. 456; s. c., [1921] 3 K. B. 532. Cf. *White, Child & Beney, Ltd., v. Simmons*, [1922] 127 L. T. 571. It would be hazardous, none the less, to say that a rule so comprehensive and so drastic is not subject to exceptions under pressure of some insistent claim of policy or justice. . . .

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. In those litigations acts or decrees of the rebellious governments, which, of course, had not been recognized as governments *de facto*, were held to be nullities when they worked injustice to citizens of the Union, or were in conflict with its public policy. *Williams v. Bruffy*, 96 U. S. 176, 187, 24 L. Ed. 716. On the other hand, acts or decrees that were just in operation and consistent with public policy were sustained not infre-

²⁷ (1922) 199 N. Y. Supp. 355. Cf. (1922) 196 N. Y. Supp. 364, 367.

²⁸ (1924) 204 N. Y. Supp. 69.

²⁹ (1924) 239 N. Y. 158, 145 N. E. 917.

³⁰ Favorable comment by the present writer upon the decision of the court below (22 *Michigan Law Review*, 131) had reference only to the court's attitude toward the *de facto* situation in Russia and was not intended to imply approval of the decision on the question of impossibility of performance.

quently to the same extent as if the governments were lawful. *U. S. v. Insurance Companies*, 22 Wall. 99, 22 L. Ed. 816; *Sprott v. U. S.*, 20 Wall. 459, 22 L. Ed. 371; *Texas v. White*, 7 Wall. 700, 733, 19 L. Ed. 227; *Mauran v. Ins. Co.*, 6 Wall. 1, 18 L. Ed. 836; *Baldy v. Hunter*, 171 U. S. 388, 18 S. Ct. 890, 43 L. Ed. 208. Cf. *Dickinson, Unrecognized Governments*, 22 Mich. L. R. 29, 42. These analogies suggest the thought that, subject to like restrictions, effect may at times be due to the ordinances of foreign governments which, though formally unrecognized, have notoriously an existence as governments *de facto*. Consequences appropriate enough when recognition is withheld on the ground that rival factions are still contending for the mastery may be in need of readjustment before they can be fitted to the practice, now a growing one, of withholding recognition whenever it is thought that a government, functioning unhampered, is unworthy of a place in the society of nations. Limitations upon the general rule may be appropriate for the protection of one who has been the victim of spoliation, though they would be refused to the spoliator or to others claiming under him. We leave these questions open. At the utmost, they suggest the possibility that 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.

In *Fred S. James & Co. v. Second Russian Insurance Co.*, a British company had entered into contracts with a Russian company whereby the latter reinsured the former's marine risks. Losses were sustained and the British company attempted to recover them from its Russian reinsurer. In the meantime the insurance business in Russia had been nationalized by Soviet decrees and the Russian company dissolved. Great Britain had granted recognition to the Soviet Government while the United States had denied it. In this situation, the British company assigned to a New York company and the New York company sued the Russian company in New York where the latter was doing business as a foreign corporation. The defendant admitted that it was engaged in business in New York, but urged as defenses that its corporate life had been ended by the Russian nationalization decree, that the same decree released it from payment of its debts, and that Great Britain having recognized the Soviet Government, the plaintiff was seeking to enforce a right which had already been extinguished at the time of the assignment.

The lower courts were content to rest upon the arbitrary proposition that, the Soviet Government being unrecognized, they might ignore Soviet nationalization decrees and treat the Russian corporation as an existent entity.³¹ In the Court of Appeals, however, no such drastic and uncompromising attitude was assumed. It was denied that the Soviet decrees could extinguish the debts of defendant in England or New York, whether the Soviet

³¹ (1924) 203 N. Y. Supp. 232; (1924) 205 N. Y. Supp. 472.

Government were recognized or not, and it was suggested that a corporation with vitality sufficient to answer a complaint must have vitality sufficient to permit it to be sued. "The shades of dead defendants," said Judge Cardozo, "do not appear and plead." Even if the issue had been raised in the usual way, by a suggestion that the corporation was defunct, the result would have been the same.

The decree of the Russian Soviet government nationalizing its insurance companies has no effect in the United States unless, it may be, to such extent as justice and public policy require that effect be given. We so held in *Sokoloff v. National City Bank*, 239 N. Y., 158, 145 N. E. 917. Justice and public policy do not require that the defendant now before us shall be pronounced immune from suit. . . . The defendant has complied with the provisions of our statutes prescribing the conditions in which foreign insurance companies may do business within our borders. Insurance Law, §§ 27, 28; Consol. Laws, c. 28. It has put itself for many purposes in the same category as our own domestic corporations. *Comey v. United Surety Co.*, 217 N. Y. 268, 274, 111 N. E. 832, Ann. Cas. 1917 E, 424. Far from suspending its activities since the promulgation of the decree which is said to have ended its existence, it has since then written policies of insurance covering millions of dollars of risks, has collected premiums in large amounts and by the admissions of its answer, is doing business to-day. 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. Cf. *Thompson on Corporations*, § 6569; 2 *Morawetz, Private Corporations* (2d Ed.) § 1003; 37 *Harvard Law Review*, 610.

In the existing situation, the refinements of learning that envelop and to some extent obscure the definition of *de facto* corporations are foreign to our inquiry. So long, at least, as the decree of the Russian government is denied recognition as an utterance of sovereignty, the problem before us is governed, not by any technical rules, but by the largest considerations of public policy and justice. *MacLeod v. U. S.*, 229 U. S. 416, 428, 429, 33 S. Ct. 955, 57 L. Ed. 1260. When regard is had to these, the answer is not doubtful. The defendant asks us to declare its death as a means to the nullification of its debts and the confiscation of its assets by the government of its domicile. Neither the public policy of the nation, as established by President and Congress, nor any consideration of equity or justice, exacts an exception in such conditions to the need of recognition. We do not say that a government unrecognized by ours will always be viewed as non-existent by our courts, though the sole question at issue has to do with a transaction between the unrecognized government and a citizen or subject of a government by which recognition has been given. To say this might seem to imply, for illustration, that a voluntary conveyance by a British subject to the Soviet government would be viewed as a nullity in the United States on some theory that the grantee, though recognized in Great Britain, was without capacity to take. No such sweeping declaration is essential to the decision of the case before us. We deal now with the single question whether defendant has an existence sufficient to subject it to suit in the domestic

forum. That is a question which the law of the forum will determine for itself. Liability to be sued is quite distinct from liability to be held in judgment upon the facts developed in the suit. We keep our ruling within these limits, and hold that the defendant is amenable to the process of our courts.³²

The New York Court of Appeals was not required, in either of the cases noted above, to pronounce unreservedly as to the effect which may be attributed to the decrees of an unrecognized *de facto* government. It is all the more noteworthy that it challenged attention to the problem, making it clear that considerations of policy and justice may warrant a court in giving effect indirectly, at least, to such decrees, even though plausible syllogisms or the arbitrary premises of a mechanical logic be shaken in the process. The same tribunal that delivered final judgment in the Wulfsohn case may yet find an opportunity to establish a precedent of equal or even greater significance for cases of another type.

³² (1925) 239 N. Y. 248, 146 N. E. 369, 370, 371. See also *Russian Reinsurance Co. v. Stoddard* (1925), 207 N. Y. Supp. 574, and *Hennenlotter v. Norwich Union Fire Ins. Soc.* (1924), 207 N. Y. Supp. 588, reported since this article was written.