Unrecognized Government or State in English and American Law (Part 2)

 Edwin D. Dickinson

University of Michigan Law School

Available at: https://repository.law.umich.edu/articles/805

Follow this and additional works at: https://repository.law.umich.edu/articles

Part of the Courts Commons, Legal Remedies Commons, President/Executive Department Commons, Supreme Court of the United States Commons, and the Transnational Law Commons

Recommended Citation

This Article is brought to you for free and open access by the Faculty Scholarship at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Articles by an authorized administrator of University of Michigan Law School Scholarship Repository. For more information, please contact mlaw.repository@umich.edu.
THE UNRECOGNIZED GOVERNMENT OR STATE IN ENGLISH AND AMERICAN LAW*

By Edwin D. Dickinson

IV

PROBABLY no one in the British Empire or the United States would question the doctrine that it belongs exclusively to the political departments to recognize new governments or states. The difficulties involved are those which arise in the application of a doctrine so broadly stated. Not every situation involving an unrecognized government or state requires the decision of a question of recognition. If the decision of a political question is not involved, then it is entirely proper for the courts to take cognizance of a mere de facto government or state. In what situations may the courts appropriately take account of the facts? In what should they be guided solely by the decisions of the political departments?

If it is clear that the rule invoked in a given case applies only to recognized governments or states, then the answer is easy enough. The court has only to ascertain whether recognition has been granted or withheld and apply the rule accordingly. Such a situation has been presented the courts in a number of cases involving loans to insurgents. Suppose, for example, that a revolution is fomented in a neighboring state, that one of our citizens advances funds by way of loan to the revolutionists, and that he later finds that the persons to whom he advanced the money are perpetrating a fraud and appropriating the proceeds. The courts will give the lender no relief because the insurgents have not been recognized, either as belligerents or as an independent state, and loans to unrecognized insurgents to promote revolution in a friendly state are illegal.44 Recognition is

*Continued from the November number.

44 See Bire v. Thompson, unreported (see 2 Sim. 222-3); Jones v. García del Río, Turn. & Russ. 297 (1823); De Wütz v. Hendricks, 9 Moo. 586, 2 Bing. 314 (1824); Yrisarri v. Clement, 2 Carr. & Payne 223, 228 (1825); Thompson v. Powles, 2 Sim. 194 (1825); Taylor v. Barclay, 2 Sim. 213 (1828); Habershon v. Vardon, 4 De G. & Sm. 467 (1851); Emperor of Austria v. Day, 3 De G. F. & J. 217, 244 (1861); Kennett v. Chambers, 14 How. 38 (1852); Kent, Commentaries, 2d ed., I, 116. “With respect to loans to
vital in this type of case because the legality or illegality of the transaction depends upon it.\footnote{45}

Although the situation presented was not quite so clear, it is believed that the early cases arising out of the disturbances in Haiti and Santo Domingo were of the same general type. In those cases the government asked the court to decree condemnation or impose other penalty for carrying contraband to the enemy,\footnote{46} engaging in prohibited trade with the enemy,\footnote{47} or breaching non-importation\footnote{48} or neutrality statutes.\footnote{49} In the cases involving contraband and prohibited trade, it was for the political departments to decide when the enemy's colony in revolt should cease to be regarded as enemy. So long as they recognized no change in status, the courts properly applied the rules as before. In the cases arising under the American insurgents, if the insurgent Government has been recognized by the lender's Government as independent or even as belligerent, loans made to it would be equally valid with those made to a belligerent State, for the reason that this amounts to a recognition of capacity to do all acts that can be lawfully done in carrying on the war, of which the raising of loans is one; whilst voluntary subscriptions would of course be illegal. But an advance of money, whether by way of loan or subscription, to unrecognized insurgents, in arms against a friendly Government, would be internationally improper, because loans for promoting an insurrection cannot be regarded as coming within the range of commercial business or as being free from political motive; and would for this reason be illegal also in municipal law.\footnote{50} Cobbett, Cases, 3d ed., II, 366.

What would be the position of the defrauded purchaser of bonds issued by an unrecognized revolutionary government after the old recognized government had been completely overthrown (e. g., by Soviet Russia), or by the undisputed \textit{de facto} though unrecognized government of a recognized state (e. g., by Mexico prior to recent recognition)? No cases have been found. It is submitted that in principle the defrauded purchaser should have relief. It hardly seems necessary or appropriate to denounce traffic in such obligations as illegal. It may be that the two cases suggested should be distinguished, but this seems doubtful. On this see \textit{infra}.

\footnote{46} Similarly, while it is hardly conceivable that a court would award salvage for rescuing a ship from the forces of a recognized government with which the court's country was at peace, salvage has been awarded for saving a ship from the forces of the unrecognized Bolshevik. The Lomonosoff, 37 T. L. R. 151 (1920). The question of recognition or not is material in the decision of such a case.

\footnote{47} The Happy Couple, Stewart's Reports 65.
\footnote{48} Clark v. United States, 3 Wash. C. C. 101.
\footnote{49} Gelston v. Hoyt, 3 Wh. 246.
non-importation and neutrality statutes, the language of the statutes was so explicit as to leave no alternative open to the courts.\footnote{50}

Does it follow, from the application of the principle made in these early cases, that the ships of unrecognized revolutionists may be seized and condemned as pirates? Astonishing as it may seem, the United States District Court gave an affirmative answer to this question in the case of \textit{The Ambrose Light},\footnote{51} decided in 1885. The decision is a good illustration of the erroneous results which are likely to be reached when a court garners scintillating passages from earlier opinions and applies them uncritically to a case which is unlike the earlier cases. War is not piracy; and certainly the courts may take cognizance of \textit{de facto} war, just as Chief Justice Marshall did in \textit{Rose v. Hiney}, whenever it is necessary to do so in order to determine the true character of a contest at sea.\footnote{52}

The problem may become much more difficult when the government of a foreign state comes into court seeking relief with respect to state property or other public interest. If there is a contest between rival governments in the foreign state, it is the recognized government which has standing in court. The Emperor of Austria once filed a bill in the English Court of Chancery to stop the printing of paper money for the Hungarian revolutionists. When the plaintiff's counsel were about to reply to the contention that the Emperor was not \textit{de jure} King of Hungary, Lord Chancellor Campbell interrupted, saying: "Surely that question depends merely on this, whether the Plaintiff is acknowledged by her Majesty's government as \textit{de facto} King of Hungary, and we are bound to take judicial

\footnote{50} It may be anticipated that the terms "foreign state" or "foreign government," in penal statutes, at least, will be interpreted to mean recognized foreign state or foreign government. Thus it is unlikely that the counterfeiting within the United States of the bonds or other securities issued by an unrecognized government would be regarded as counterfeiting the bonds or securities of a "foreign government" within the meaning of § 156 of the Federal Criminal Code (35 Stat. L. 1117).

\footnote{51} 25 Fed. 408.


\textit{MICHIGAN LAW REVIEW}
UNRECOGNIZED GOVERNMENTS

notice of the fact that he is so acknowledged. We cannot enter here into the question whether he is rightfully king."

Suppose, however, that the recognized government has been in fact completely overthrown and succeeded by a new *de facto* government which has not been recognized. There are at least two possible situations. Either the political departments may continue to regard representatives of the old government, now defunct, as the accredited representatives of the foreign state, or the foreign state may be for the time without any recognized representatives whatever. The former situation has recently arisen as regards Russia; and it has been held in several cases that only the recognized agents of Russia have any standing in court to ask relief on behalf of the state which they claim to represent. In the case of *The Rogdai*, an action instituted by the Soviet Republic to secure possession of a Russian naval transport, the United States Secretary of State certified that Bakhmeteff, an appointee of the defunct Kerensky régime, was recognized as ambassador from Russia, Bakhmeteff moved to discharge the attachment, and the court granted the motion. The court remarked: "The question at issue is one of state; it involves international relations, and is primarily for the State Department. If, as contended by libelants, it be granted that a revolution has taken place in Russia, and that the Soviet Republic is in actual control, the question when, if at all, such *de facto* government shall be recognized, is a political one. It involves considerations of national policy, which are not justiciable, and touching it the voice of the Chief Executive is the voice,


54 The recent reversal of America's traditional policy in respect to the recognition of new governments or states, particularly as regards Mexico and Russia, has presented this situation to the courts in some unusually difficult cases. On the policy of the United States, see *Hyde, International Law*, I, §§ 43-45; *Goebel, The Recognition Policy of the United States*, chs. 4-8.

The recognition of the Czecho-Slovaks by the Allied Powers during the World War exemplified the converse situation. In that instance a revolutionary movement received recognition as *de facto* before it had succeeded in establishing *de facto* control within ascertainable boundaries. See *13 Am. Jour. Int'l Law* 93-5. So far as the author is aware, no cases involving that interesting situation came before the courts.

55 278 Fed. 294 (1920).
not of a branch of the government, but of the national sovereignty, equally binding upon all departments.”

In the second situation suggested above, the foreign state is for the time being without any recognized representation whatever. Does this mean that its public interests, pending recognition, are without protection from the courts? The cases which have actually come up for decision seem to point to an affirmative answer. On numerous occasions, at the beginning of the last century, Lord Eldon held that an unrecognized *de facto* government has no standing in court to claim property of the former recognized government which it has succeeded. And it appears that it made no difference to Lord Eldon whether the foreign state had other recognized representatives or not. The same rule has been applied in more recent instances.

It has been suggested that courts ought at least to make a distinction between the case in which an unrecognized *de facto* government claims the public property of its predecessor and the case in which such a government seeks relief with respect to some property or other interest of its own. The latter situation was presented in *Russian Socialist Federated Soviet Republic v. Cibrario*, recently before the courts of New York. One of the departments of the Soviet Government entered into a contract with the defendant in Russia for the purchase of moving picture machines and supplies and delivered one million dollars to the United States commercial attaché at Petrograd to be deposited in an American bank subject to draft according to the contract’s terms. The money was deposited in the National City Bank of New York. Thereafter the Soviet Government commenced an action in New York to compel the defendant to account for sums of money which it was alleged he had been obtaining from the fund through fraud. The Supreme Court ordered the appointment of a receiver, but the Appellate Division reversed the order and held that the action could not be maintained.

---


69 191 N. Y. Supp. 543 (1921); 139 N. E. 259 (1923).

60 It was remarked in the Appellate Division that “the question of whether the plaintiff is a sovereign state must be determined by the court, not on its
This decision was affirmed by the Court of Appeals on the ground that the privilege accorded foreign governments of suing in our courts is a matter of comity, that without recognition there is no comity, and that recognition and consequently the existence of comity are exclusively for the political departments to decide.

Must it be said, then, that the funds of an unrecognized government are free plunder for anyone who has a mind to help himself? We should not be overbold in our generalizations. There are still more difficult situations which may come before the courts. When these difficult situations arise, the courts may be impressed with the disadvantages to society in permitting foreign states to own valuable property without assurance that there shall always be someone legally capable of looking after it. They may be impressed with the danger of serious international complications when such property becomes a unique sort of res nullius in the absence of any agent recognized as capable of asserting the owner's rights. It may yet come about

own initiative, but by reference to the public acts of the executive and legislative departments of the government, of which the courts are bound to take judicial notice." 191 N. Y. Supp. 543, 546. This was true enough. But whether the plaintiff was a sovereign state or not this court was not required to decide. The question at issue was whether the de facto government of Russia had standing to compel defendant to account for the money which it was alleged he had obtained through fraud. It is at least arguable that a de facto government's standing in such a situation ought not to be denied.

Another attempt was made to recover on the same facts by bringing the action in the names of the individuals who constituted the Soviet governmental committee when the contract was made, but this attempt also failed. It was held that the committee's right to bring an action on the contract had been extinguished, and further that, in any event, the committee or its members could have no greater right than their principal, the Soviet government.


"Comity may be defined as that reciprocal courtesy which one member of the family of nations owes to the others. It presupposes friendship. It assumes the prevalence of equity and justice. Experience points to the expediency of recognizing the legislative, executive, and judicial acts of other powers. We do justice that justice may be done in return." 139 N. E. 259, 260. "The use of the word 'comity' as expressing the basis of jurisdiction has been criticized. It is, however, a mere question of definition. The principles lying behind the word are recognized. Whether or not we sum them up by one expression or another, the truth remains that jurisdiction depends upon the law of the forum, and this law in turn depends upon the public policy disclosed by the acts and declarations of the political departments of the government." 139 N. E. 259, 261.
that the courts, exercising the capacity for making distinctions which is usually enlivened in a difficult situation, will find a way to take cognizance of unrecognized *de facto* governments or states as such without becoming involved in the decision of questions of recognition. Unless the courts can find a way to do this, or at least a way to protect such property by some kind of temporary receivership pending recognition, it may become necessary to create a federal custodian who will look after the property of foreign states in cases in which recognition is withheld.

In another type of situation, closely related to the one just considered, the problem is presented to the court in connection with a claim to exemption from jurisdiction. The usage of nations requires, in the interest of comity and convenience, that extensive immunities from the local jurisdiction shall be accorded to foreign states for their various governmental agencies, including the government itself, its diplomatic representatives, public ships, and other public property. Is recognition a prerequisite to the enjoyment of such immunities?

The decided cases seem to point to an affirmative answer, but they are not conclusive. The immunities of diplomatic representatives are conceded to the agents of recognized states only when the diplomatic character has been acknowledged by the executive department. It might be inferred from this that no immunities would be accorded the agents of an unrecognized government or state. The latter case is distinguishable, however, and involves peculiar difficulties.

The immunities of public ships, in the recent English cases at least, have been made to depend upon recognition. In 1919, two Russian ships entered English ports, where they were arrested on behalf of former Russian owners. One of the ships had been taken from the Bolshevik by the provisional government of Estonia; the other had been requisitioned by the provisional government of Archangel. The court addressed two inquiries to the British Foreign Office, desiring to know about the Estonian and Archangel governments respectively. In the one case the Foreign Office replied that provisional recognition had been extended to the Estonian National

---

63 In re Baiz, 135 U. S. 463 (1890); United States v. Trumbull, 48 Fed. 94 (1891); Savie v. City of New York, 193 N. Y. Supp. 577 (1922).
Council; in the other that, although British authorities were co-operating with the government at Archangel, recognition had not actually been granted. The court applied the rule of immunity accordingly and released the Estonian ship, while the ship belonging to the government at Archangel was detained.64

The question of the immunities to be accorded other kinds of public property belonging to a state without a recognized government appears to have been rather acutely involved in the recent attempt of the Oliver Trading Company to attach Mexican public funds in New York City.65 According to press reports, when the United States Secretary of State intervened he intimated to the New York authorities that the public property of a foreign state is immune from attachment. Does this mean that immunities may be enjoyed by a foreign state even though recognition of its government has been withheld? Are we to distinguish claims to immunity advanced on behalf of a recognized state without recognized government from similar claims made on behalf of an unrecognized state? There is a difference, but whether it is a difference of which courts will be able to make practical advantage may be doubted.66

Dickinson, "International Recognition and the National Courts," 18 Mich. L. Rev. 531-5. Further study and reflection have convinced the author that the epitome which he attempted in the note cited above needs modification in several particulars. See also De Visscher, "Les gouvernements étrangers en justice," Rev. de Dr. Int., 3d series, III, 152, 160-1; McNair, "Judicial Recognition of States and Governments, and the Immunities of Public Ships," British Year Book of Int. Law (1921-22) 57-74.


Since the above was written, Oliver Trading Co. v. Government of Mexico and National Railways of Mexico, decided October 11, 1923, in the United States District Court for the southern district of New York, has been reported in 70 N. Y. L. Jour. 209. The decision contributes nothing that is new, for the court, anticipating early recognition of the Mexican government by the United States, delayed its decision until recognition had been announced and then attributed retroactive effect thereto and vacated the attachment.

If we are to assume that unrecognized states, and perhaps even recognized states without recognized government, enjoy no immunities for their representatives, ships, or other public property, then it would seem to follow logically that suits may be instituted against the governments themselves. Apparently that was the theory upon which counsel for the Oliver Trading Company proceeded in their recent attempt to attach Mexican funds. In Wulfsohn v. Russian Socialist Federated Soviet Republic, an action for the conversion of furs confiscated by Soviet authorities in Russia, the lower New York courts arrived at this astounding conclusion. The Supreme Court observed that since there was no comity between Russia and the United States the Soviet government could claim no immunity from suit. "The inability to sue," said the court, "arises by reason of the non-recognition of the Russian Soviet Government by the United States government, but it does not seem that that fact creates any immunity from suit." This view was approved by the Appellate Division, where it was said: "It is a matter of common knowledge that the defendant, though not recognized by the government of the United States, is de facto, at least, the existing government of Russia, 'so as to represent in fact the sovereignty of the nation.' But, being unrecognized and unacknowledged, it is not entitled to the immunities accorded to recognized governments."

Since the above was written, Professor Quincy Wright has kindly called the author's attention to a recent unreported case in which counsel for "the United States of Mexico" asked the Massachusetts Superior Court for a temporary restraining order to prevent the dissipation by a former Mexican official of Mexican public funds deposited in a Massachusetts bank. On the trial of the case, a statement was presented from the Under Secretary of State to the effect that the state of Mexico was a recognized international person, although without recognized government. A temporary restraining order was granted. The negotiations which culminated in the recognition of the Mexican government were pending at the time. Professor Wright is to have an editorial on the case in Am. Journ. Int. Law, October, 1923.


68 Quoting from Williams v. Bruffy, 96 U. S. 176, 185.

69 195 N. Y. Supp. 472, 475. Accord, Nankivel v. Omsk All Russian Government, 197 N. Y. Supp. 467 (1922). "A new state springing into existence does not require the recognition of other states, to confirm its internal sovereignty; so long as it confines its action to its own citizens, and to the limits of its own territory, it may dispense with such recognition; but if it desires to enter into the society of nations, all the members of which recognize rights to which
The position taken by the lower courts in the Wulfsohn case was reversed in the Court of Appeals. It was there held that a foreign government admittedly de facto could not be sued for an act of confiscation within its own territory, whether such government had been recognized or not. In the course of a notable opinion, Mr. Justice Andrews observed that the result reached depended upon "more basic considerations than recognition or non-recognition by the United States." It depended upon the de facto situation in Russia. He said: "The fact is conceded. We have an existing government sovereign within its own territories. There necessarily its jurisdiction is exclusive and absolute. It is susceptible of no limitation not imposed by itself. This is the result of its independence. It may be conceded that its actions should accord with natural justice and equity. If they do not, however, our courts are not competent to review them. They may not bring a foreign sovereign before our bar, not because of comity, but because he has not submitted himself to our laws. Without his consent he is not subject to them. Concededly that is so as to a foreign government that has received recog-

they are mutually entitled and duties which they may be called upon reciprocally to fulfill, such recognition becomes essentially necessary to the complete participation of the new state in all the advantages of this society. Every other state is at liberty to grant or refuse recognition, and until such recognition becomes universal on the part of other states the new state becomes entitled to the exercise of its external sovereignty as to those of the states only by whom that sovereignty has been recognized." See De Visscher, Rev. de Dr. Int., 3d series, III, 150-8.

"The Russian Federated Soviet Republic is the existing de facto government of Russia. This is admitted by the plaintiff. Otherwise there is no proper party defendant before the court. It is claimed by the defendant. The Appellate Division states that it is a matter of common knowledge." 234 N. Y. 372, 374.

"The government itself is sued for an exercise of sovereignty within its own territories on the theory that such an act if committed by an individual here would be a tort under our system of municipal law. It is said that because of non-recognition by the United States such an action may be maintained. There is no relation between the premise and the conclusion." 234 N. Y. 372, 375.

"Whether or not a government exists clothed with the power to enforce its 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, is a fact, not a theory. For it recognition does not create a state, although it may be desirable." 234 N. Y. 372, 375.
nition. * * * But whether recognized or not the evil of such an attempt would be the same. * * * In either case to do so would 'vex the peace of nations.' In either case the hands of the state department would be tied. Unwillingly it would find itself involved in disputes it might think unwise. Such is not the proper method of redress if a citizen of the United States is wronged. The question is a political one, not confided to the courts but to another department of government."

The admission that the Soviet Republic was the de facto government of Russia may have weakened the plaintiff's case, but admission or no, the decision is believed to have been thoroughly sound. Indeed, the de facto character of the Soviet government, as the Appellate Division remarked, was matter of common knowledge. If the court had insisted upon making recognition the criterion of immunity, it would have blundered unwittingly into the very sort of delicate political question which it has been the reason of the rule in regard to recognition to avoid.

Accepting the final decision in the Wulfsohn case as sound, what shall we say when the same principle is invoked in support of other claims to immunity in suits involving the diplomatic representatives, ships, or other public property of unrecognized de facto governments? May it be that the Wulfsohn case has at last opened the way for a much needed reconsideration of some of the more important aspects of our problem?

In still another group of cases, recognition has been thought to have a bearing upon the capacity of a foreign government to bind the state and hence succeeding governments by the obligations which it incurs and by its acts. Suppose, for example, that a new de facto government arises following a revolution in a foreign state. Suppose that this new de facto government is presently recognized. Our citizens may now enter into contracts with the new government with a measure of security, for if the new government is later overthrown and the old government restored the courts will regard the restored government as bound by the contracts.\(^7^4\)

Suppose, however, that recognition is withheld from the new de facto government. With whom may our citizens contract? Not

\(^7^3\) 234 N. Y. 372, 375-6.

\(^7^4\) Republic of Peru v. Dreyfus Brothers & Co., 38 Ch. D. 348 (1888). See also the Neopolitan Indemnity, Moore, Int. Arbtt., V, 4575.
with the unrecognized de facto government, for it appears that neither the courts nor the political departments are prepared to give adequate protection. Shall it be with the representatives of the old recognized government which is now defunct? It seems absurd that there should be a magic in continued recognition which is capable of perpetuating the capacity of a defunct government. But this is apparently the theory of some of the recent cases. The old Russian Imperial Government, for example, was interested, possibly to the extent of one and one-half millions of dollars, in an agreement in regard to some munitions contracts. After the Bolshevik revolution, the old Russian Supply Committee in America, purporting to act for the Russian government, assigned Russia's interest in this agreement to American corporations. When the obligor objected that these corporations might not be in a position to give a good discharge for the debt, the United States Secretary of State certified that Bakhmeteff was ambassador from Russia, Bakhmeteff certified that the Supply Committee had authority to make the assignment, and the court, regarding these certificates as conclusive, held that Russia had been effectively divested of its interest in the agreement.

We come, finally, to situations like that presented in the Pelzer case with which we began, situations in which the only contest is between individuals about matters of private right. Surely in such situations the courts ought to take cognizance of the existence of

76 See the incident involving the Amory oil concession in Costa Rica, New York Times, Feb. 27, 1921, p. 3, col. 2; April 20, 1921, p. 17, col. 4; Nov. 2, 1922, p. 24, col. 2. See also "Legal Position of Foreign Concessionaires in Russia," 3 JOURNAL OF CONISTATIONAL LAW, 1-8.

70 Agency of Canadian Car and Foundry Co. v. American Can Co., 253 Fed. 152 (1918), 258 Fed. 363 (1919). "The question at issue being, on this phase of the case, whether the Russian government has effectually divested itself of all interest in the moneys now in the hands of the defendant, this court holds that the certificate of the personal representative of that government, duly accredited to and recognized by the government of the United States, certifying that the official who assumed to assign and release any such interest as his government might have was authorized to act in behalf of his government in making such assignment and release, is competent and conclusive evidence, which the court below properly held to be decisive." 258 Fed. 363, 369. The District Court remarked: "no tribunal in this country will ever subject defendant to a second payment—and we have no concern with remote possibilities as to the action of any foreign tribunal." 253 Fed. 152, 157. But the possible action of a foreign tribunal might be something of real concern to a corporation engaged extensively in international trade.
unrecognized *de facto* governments or states and of the capacity of *de facto* governments to do such acts as are required in the appointment of administrators, the adjudication of titles, the collection of taxes, the issuing of currency, the creation of corporations, or even the confiscation of property.\(^7\)

The unfortunate effect upon private rights and the security of business transactions of refusing to take account of the facts is well illustrated in the recent English case of *Luther v. Sagor & Company*.\(^7\) The plaintiff in this case was a Russian company which had been engaged in the manufacture in Russia of veneer or plywood. The Soviet government confiscated its mill and manufactured stock. Subsequently the Soviet government sent to Great Britain a commercial delegation under the headship of L. B. Krassin. Krassin sold a part of the confiscated veneer to the defendants. The plaintiff claimed the veneer when it arrived in England. The defendant’s right to keep it depended upon the effect to be attributed to the Soviet decree of confiscation. The British court took the view, erroneously, it is submitted, that the validity of the Soviet decree depended upon the recognition which Great Britain had extended to the Soviet government. Communications from the Foreign Office on this point were admirably calculated to mystify. The defendant’s solicitors were informed that “His Majesty’s Government assent to the claim of the Delegation to represent in this country a State Government of Russia.” To an inquiry from the plaintiff’s solicitors, on the other hand, the Foreign Office replied as follows: “I am to inform you that for a certain limited purpose His Majesty’s Government has regarded M. Krassin as exempt from the process of the Courts, and also for the like limited purpose His Majesty’s Government has assented to the claim that which M. Krassin represents in this Country is a State Government of Russia, but that beyond these propositions the Foreign Office has not gone, nor moreover do these expressions of opinion purport to decide difficult, and it may be very special questions of law upon which it may become necessary for the Courts to pronounce. I am to add that His Majesty’s Gov-

\(^7\) Upon the theory that recognition is retroactive in effect, courts do regard the acts of an unrecognized *de facto* government as valid whenever the question arises after recognition has been extended. See note 43, supra.

government have never officially recognised the Soviet Government in any way." Upon this evidence it was held in the King’s Bench Division that the Soviet government had not been recognized and that the plaintiff should recover its plywood. The defendants appealed. Meanwhile the British government concluded a trade agreement with the Soviet government and the Foreign Office announced that the Soviet Republic had been recognized as the de facto government of Russia. The Court of Appeal approved of the decision in the King’s Bench Division, as based upon the evidence then presented, but unanimously reversed the decision and nonsuited the plaintiff because of the recognition which had been granted meanwhile to the Soviet Republic. The unfortunate results which ensue when private rights may be thus tossed about in the eddying current of international politics are too obvious to require emphasis.

A more sensible result is reached in the recent New York case of Sokoloff v. National City Bank. The action was brought on account of the bank’s failure to repay in rubles at its Petrograd branch as agreed. The defense was the closing of the Petrograd branch and the confiscation of its assets by the Soviet government. The plaintiff objected that the court could take no cognizance of the Soviet government or its acts so long as it remained unrecognized. The court said that in so far as the defense necessarily ascribed attributes of sovereignty to the Soviet régime it must be regarded as insufficient. It was held, however, that the defense could be sus-

70 Little wonder that courts have had difficulty with cases involving unrecognized governments or states when foreign offices are capable of such extraordinary equivocation.


82 199 N. Y. SUPP. 355 (1922).

83 The opinion given in another suit between the same parties contained a dictum supporting the plaintiff’s contention. 196 N. Y. SUPP. 364, 367 (1922).
tained by proof of actual conditions prevailing in Russia. The dist-

inction suggested seems to have been superfluous, but it may have

helped the court to reach the desired result notwithstanding some of

the earlier recognition decisions. Mr. Justice Ford said: "While

this court may not recognize the Soviet government as sovereign,

and therefore possessing power to confiscate property or debts, as

must be done in respect of a foreign state which has been recog-

nized either de facto or de jure, it does not follow that we must

assume a state of anarchy in Russia. True, by legal fiction, for some

purposes which appertain more particularly to the other, the "politi-

cal," branches of the government than to the judiciary, we must con-
tinue to assume that the old imperial government is the only sov-

ereign government in Russia. Nevertheless, so far as the issues

raised upon this motion are concerned, I can see no valid objection

to permitting the defendant to allege and prove upon the trial the

actual conditions prevailing in that great country. Indeed we know

as a matter of common knowledge that there is a government there

which has been functioning in some fashion for five years or more,

and that it is not the imperial government of the czars. Facts are

facts, in Russia the same as elsewhere."55

That is the nub of the matter. "Facts are facts, in Russia the

same as elsewhere." The writer believes that courts have unneces-
sarily magnified the difficulties of their dilemma. On the one hand,

there is the de facto situation abroad. On the other, there is the
decision of the political department in regard to recognition. If the

54 This was, of course, a misstatement. The Kerensky government was
recognized by the United States after the overthrow of the old imperial gov-
ernment of the Czars.

(1921). See Cechanowicz v. Highland Park State Bank, 194 N. W. 531
(1923); Carmen v. Higginson, 140 N. E. 246 (1923).

Suppose a court should be presented with any one of the numerous con-
flict of laws situations in which the controlling rule is to be derived from the
law of a foreign jurisdiction. And suppose, further, that the foreign juris-
diction happens to be that of an unrecognized state or of a recognized state
without recognized government. Can there be any doubt that the court ought
to take cognizance of the rule prevailing in the foreign jurisdiction, in order
to do justice between the parties concerned, and that in so doing it would
encroach in no way upon the sphere of the political departments of government?
two are in harmony, there is of course no difficulty at all. If the de facto situation abroad is uncertain and the issue in doubt, it may be assumed that the courts will rely upon the political department. The only real difficulty arises when the facts are well known, or capable of being established by proof in the usual way, and are not in harmony with the political department's decision.

It is clear that in English and American law the courts must never anticipate the decisions of the political department. If, in the case before the court, the application of the rule requires a decision on the question of recognition, then clearly the court should regard "the ancient state of things as remaining unaltered," to use Chief Justice Marshall's phrase, until the political department has acted. It seems clear, in any case, that the court should be conservative wherever there is danger of embarrassing the political department in the conduct of foreign relations.

There is still room, however, without encroachment upon the executive or legislative function, for the judiciary to concede much to the status of an unrecognized de facto government or state. Indeed much has been conceded, although the concessions seem to have been made in a somewhat halting and inconsistent fashion. It seems likely that eventually we shall find it desirable to attribute to an unrecognized but indisputably de facto government the capacity to appear in court and ask protection for state property or other public interest. Probably some jurisdictional immunities, analogous to those conceded to recognized governments, will eventually have to be conceded to unrecognized de facto governments. Otherwise the courts may become involved in controverted questions of international politics of the very kind they have been most anxious to avoid. Certainly, in situations involving only matters of private right, it is possible for the courts to take cognizance of an unrecognized de facto government or state and apply the rule accordingly without in any way encroaching upon the functions of other departments of government. While the precedents are admittedly confusing, it is believed that in principle this is what courts ought to do in situations similar in general to those presented in Luther v. Sagor & Co., Sokoloff v. National City Bank, and Pelzer v. United Dredging Co.

By way of conclusion, therefore, the writer would offer the following suggestions. The recognition of a foreign government or
state is exclusively a political question. The existence of a foreign government or state is exclusively a question of fact. No general principle yet formulated is sufficient to resolve all the situations which arise. Clearly an existing though unrecognized government or state is capable of acts which courts will frequently find it difficult to disregard. Frequently such government or state is the only instrumentality capable of moving adequately on behalf of the people it represents for the protection of public property or other interests. It seems desirable, therefore, that it should have some standing in court, at least for certain limited purposes, and that it should be entitled to some jurisdictional immunities. However diffident courts may naturally be about making any concessions in these respects, there appears to be no good reason at all why, in suits between individuals about matters of private right, the courts should not frankly take cognizance of unrecognized de facto governments or states and of their capacity to affect private rights in a great many different ways. It is a serious matter when the executive uses recognition as a bludgeon in the contests of diplomacy, but the situation may become doubly serious if courts feel constrained thereby to ignore what is going on abroad in a rather intricately integrated world.

Note.—In the first installment of this article, discussing the proposition that courts may take no cognizance of unrecognized governments or states, the author remarked that "In situations like that presented in the Pelzer case, it admittedly results in a miscarriage of justice." Supra, p. 31. The author's remark was prompted by a sentence in Mr. Justice McAvoy's opinion in the Pelzer case (see supra, p. 30, note 5) and also by the obvious probability that the rule of the case, if applied consistently, would be invoked in other cases by unworthy litigants to obstruct or prevent a decision on the merits. Important facts not in the record, and of course not disclosed by anything appearing in the reports, have since come to the author's attention which make it very clear that there was no miscarriage of justice in the Pelzer litigation. It would have been better, therefore, had the author's comment read as follows: "In situations like that presented in the Pelzer case, it delays or even prevents a decision on the merits and may eventuate in a miscarriage of justice."—The Author.