1929

Validity of the Acts of Unrecognized De Facto Governments in the Courts of Non-Recognizing States

N.D. Houghton

Follow this and additional works at: https://scholarship.law.umn.edu/mlr
Part of the Law Commons

Recommended Citation
https://scholarship.law.umn.edu/mlr/1989

This Article is brought to you for free and open access by the University of Minnesota Law School. It has been accepted for inclusion in Minnesota Law Review collection by an authorized administrator of the Scholarship Repository. For more information, please contact lenzx009@umn.edu.
THE VALIDITY OF THE ACTS OF UNRECOGNIZED DE FACTO GOVERNMENTS IN THE COURTS OF NON-RECOGNIZING STATES†
By N. D. Houghton*

I

IN GENERAL

In the ordinary course of their operations the courts of a country are frequently called upon to interpret and give application to the laws and governmental acts of other states. It may happen, therefore, that the laws and acts of an unrecognized foreign government may come before the courts, and in such cases it becomes necessary that the question of the legal status of such laws and acts, within the jurisdiction of the court, be determined. It may also occur that the validity of the laws and governmental acts of a defunct insurrectionary government may have to be determined by the courts of the victorious de jure government. Cases involving the former consideration have been before the courts of a number of countries, including those of the United States, in connection with the acts of the Russian Soviet Government, and cases of the latter sort arose especially pointedly in the courts of the United States with respect to the acts of the Confederate governments, central and state.

THE VALIDITY OF THE LAWS AND GOVERNMENTAL ACTS OF THE SEVERAL CONFEDERATE STATE GOVERNMENTS IN THE COURTS OF THE UNITED STATES

From apparent uncertainty as to their validity, the governments in all the seceding southern states, after the Civil War, passed ordinances or laws either declaring all laws passed by the insurrectionary governments void, with whatever exceptions they saw fit to make, or adopting them all, except certain ones, which it was not seen fit to adopt. But the question of the validity of the acts of those governments was not to be so readily disposed

*Assistant Professor of Political Science, University of Arizona, Tucson, Arizona.
†For a discussion of the principles governing the recognition of de facto governments, see Stinson, Recognition of De Facto Governments and the Responsibility of States, 9 MINNESOTA LAW REVIEW 1. See also Houghton, N. D., Recognition in International Law, 62 An. L. Rez. 228. (Ed.)
1See Keith v. Clark, (1878) 97 U. S. 454, 24 L. Ed. 1071, the dissenting opinion of Mr. Justice Bradley.
of, and it came before the United States courts in a number of cases, eliciting some rather definite judicial statements as to the kinds of acts to which validity should be attributed and those which, from their nature, were deemed to have been of no legal effect.

In the case of Texas v. White, decided in 1869, the United States Supreme Court stated, with reference to the government of Texas, which was established in 1862 and operated during the period of the Civil War, that:

"It may be said, perhaps with sufficient accuracy, that acts necessary to peace and good order among citizens, such, for example, as acts sanctioning and protecting marriage and the domestic relations, governing the course of descents, regulating the conveyance and transfer of property, real and personal, and providing remedies for injuries to person and estate, and other similar acts, which would be valid if emanating from a lawful government, must be regarded in general as valid when proceeding from an actual, though unlawful government; and that acts in furtherance or support of rebellion against the United States, or intended to defeat the just rights of citizens, and other acts of like nature, must, in general, be regarded as invalid and void."

And, in the case of Horn v. Lockhart, in 1873, the Supreme Court stated:

"We admit that the acts of the several [Confederate] states in their individual capacities, and of their different departments of government, executive, judicial, and legislative, during the War, so far as they did not impair or tend to impair the supremacy of the national authority, or the just rights of citizens under the constitution, are, in general, to be treated as valid and binding. The existence of a state of insurrection and war did not loosen the bonds of society, or do away with civil government or regular administration of the laws. Order was to be preserved, police regulations maintained, crime prosecuted, property protected, contracts enforced, marriages celebrated, estates settled, and the transfer and descent of property regulated precisely as in time of peace. No one, that we are aware of, seriously questions the validity of judicial or legislative acts in the insurrectionary states touching

---

2(1869) 7 Wall. (U.S.) 700, 10 L. Ed. 227
4(1873) 17 Wall. (U.S.) 570, 21 L. Ed. 657.
5The judicial proceedings of the courts of the insurrectionary states were generally held to be valid, unless in direct aid of the rebellion. See French v. Tumlin, (1871) Fed. Cas. No. 5,104; Hill v. Arnistead, (1876) 56 Ala. 118; Pepin v. Lochenmeyer, (1871) 45 N. Y. 27 Though the supreme court of Arkansas, under authority of the constitution of 1868, held judgments of the courts of that state, acting under authority of the insurrectionary constitution absolutely null and void. Penn v.
these and kindred subjects where they were not hostile in their purpose or mode of enforcement to the authority of the national government, and did not impair the rights of citizens under the constitution."

The Validity of the Laws and Acts of the Confederate Central Government in the Courts of the United States

The laws and acts of the Confederate Central Government, however, as distinguished from those of the governments of the several seceded states, were held to have no legal effect, and hence to give rise to no rights which were entitled to judicial recognition in the courts of the United States after the fall of the Confederacy. In the case of Ford v Surget, it was held that a statute passed by the Confederate Congress could have, as an act of legislation, "no force whatever in any court recognizing the federal constitution as the supreme law of the land."

In the case of Hickman v Jones, the United States Supreme Court held the act of the Confederate Congress providing for a system of Confederate district courts to be void.

"It was," said the court, "as if it were not. The court was a nullity, and could exercise no rightful jurisdiction. The forms of law with which it clothed its proceedings gave no protection to those who, assuming to be its officers, were the instruments by which it acted."

And, in the case of Sprott v United States, the Supreme Court pointed out that

"The recognition of the existence and the validity of the acts of the so-called Confederate Government, and that of the states which yielded a temporary support to that government stand on very different considerations. The latter, in most, if not in all in-
stances, merely transferred the existing state organizations to the support of a new and different national head. The same constitutions, the same laws for the protection of property and personal rights remained and were administered by the same officers.”

Submitting that the laws of the states embodied “the fundamental principles for which civil society is organized into government in all countries,” and that they “must be respected in their administration under whatever temporary dominant authority they may be exercised,” the court stated that: “It is only when in the use of these powers, substantial aid and comfort was given or intended to be given to the rebellion, that the acts are void.”

But, it was held that:

“The [Central] Government of the Confederate States can receive no aid from this source of reasoning. It had no existence, except as a conspiracy to overthrow lawful authority. Its foundation was treason against the existing federal government. Its single purpose, so long as it lasted, was to make that treason successful. So far from being necessary to the organization of civil government, or to its maintenance and support, it was inimical to social order, destructive to the best interests of society, and its primary object was to overthrow the Government on which these so largely depended. When it was overthrown it perished totally. It left no laws, no statutes, no decrees, no authority which can give support to any contract, or any act done in its service, or in aid of its purpose, or which contributed to protract its existence.”

Thus the basis upon which the court, in the earlier cases, held the acts of the Confederate central government to be invalid was the principle that all acts in aid or support of the insurrection were void. This principle was also relied upon in the case of Dewung v. Perdicartes, decided in January, 1878, in which acts of sequestration of shares of stock by the Confederate government were held to be invalid, the court pointing out that, “nothing is better settled in the jurisprudence of this court than that all acts done in aid of the rebellion were illegal and of no validity. The principle has become axiomatic.”

But, in the case of Williams v. Bruffy, decided in March,

---

15 (1878) 96 U. S. 176, 24 L. Ed. 716.
1878, the court announced a new constitutional and legal basis for holding the acts of the Confederate Government invalid. The invalidity of its acts was here based,

1. Upon the principle of the illegal existence of the Confederate Government, as having been in specific violation of article I, section X, of the United States constitution, which declares that, "No State shall enter into any Treaty, Alliance, or Confederation;" 

2. Upon the fact that "The United States, during the whole contest, never for one moment renounced their claim to supreme jurisdiction over the whole country," nor, "acknowledged in any form, or through any of their departments, the lawfulness of the rebellious organization or the validity of any of its acts;" and,

3. Upon the fact that the Confederate Government failed of ultimate success.

THE VALIDITY OF THE LAWS AND DECREES OF THE RUSSIAN SOVIET GOVERNMENT IN THE COURTS OF EUROPEAN STATES, PRIOR TO RECOGNITION

In the case of Luther v. Sagor,19 the King's Bench Division of the British High Court of Justice refused, in 1920, to give any legal effect to the nationalization decrees of the Russian Soviet Government, on the ground that that government had not been recognized by Great Britain. But the decision was reversed by the Court of Appeal20 in 1921, after the British Government had recognized the Soviet Government as the de facto government of Russia.21

16Its illegality as an insurrectionary organization had been previously asserted, in Sprott v. United States, (1874) 20 Wall. (U.S.) 459, 22 L. Ed. 371. See above, note 10.
17See also Ford v. Surget, (1878) 97 U. S. 594, 24 L. Ed. 1018, decided in November after the Bruffy decision in March, 1878.
18It should be pointed out that the court, for the purpose of getting jurisdiction in the Bruffy case, recognized that an act of the Confederate central government which had been sanctioned and enforced by the Confederate state government of Virginia, was thereby given legality to the extent of permitting an appeal from a decision of the Virginia courts under the terms of the Judiciary Act of 1867. The court said, "Any enactment, from whatever source originating, to which a state gives the force of law, is a statute of the state, within the meaning of the clause cited [from the Judiciary Act of 1867] relating to the jurisdiction of this court [in matters of constitutionality of state laws]."
The French courts, likewise, refused to give any legal effect to the laws and decrees of the Soviet Government, prior to recognition by the French Government, on the ground that the Soviet Government had not been recognized, and continued to apply the laws of the Imperial Government in cases involving the application of Russian law. But, it appears that the German courts do not concern themselves with the question of the recognition or the non-recognition of a government in a foreign state as a factor in the application of the law of such a government. They inquire only as to what the law actually is in the foreign state. When that is determined, the law which is actually in force is applied by German courts when an occasion arises for its application, provided the law is not contrary to international law, nor to German law, nor injurious to the German morals and public order. This is the policy which German courts pursued toward the laws of the Soviet Government, treating them just as they would have treated the same laws passed by a recognized Russian Government.

The Court of Appeal held the nationalization decrees issued in 1918 to be valid as the acts of the government of a sovereign state, brushing aside the contention that the decrees should be considered illegal as "contrary to essential principles of justice and morality." Moreover, in a bit of rather pointed dictum, Scrutton, L. J., stated that, "Individuals must contribute to the welfare of the state, and at present British citizens who may contribute to the state more than half their income in income tax and super tax, and a large proportion of their capital in death duties, can hardly declare a foreign State immoral which considers (though we may think wrongly) that to vest individual property in the state as representing all the citizens is the best form of property right."

See also Idelson, V. R., "La Revolution Bolchevique et de Statut Juridique des Russes: Le point de vue de la jurisprudence anglaise," 51 Journal du Droit Int. 28.


See Freund, M., "La Revolution Bolchevique et le Statut Juridique des Russes: Le point de vue de la Jurisprudence allemande", 51
THE VALIDITY OF THE SOVIET DECREES IN THE COURTS OF THE UNITED STATES

The question of the validity of the Soviet nationalization decrees of 1918 has come before the courts of the United States in a number of cases. In so far, however, as the matter is considered at this point, the cases here discussed are cases in which the invalidity of the decrees is urged as a basis of private rights, admittedly existing before the decrees were issued, and in which the validity of the decrees is relied upon as a defense against actions where liability was clear before the decrees were issued. That is to say, the cases here considered do not require the courts to concede legal validity to the nationalization decrees in order to arrive at just decisions. They are, therefore, cases in which the courts have had opportunity to apply general principles, unhampered by the necessity of conceding validity to the decrees in order to avoid injustice to private litigants.25

In the case of James and Co. v. Second Russian Reinsurance Co.,26 the defense to an action for recovery on an insurance policy was a contention by the insurance company that its existence as a corporation, and its obligations, had been terminated by the Soviet nationalization decrees of 1918. The New York supreme court rejected the contention on the ground that the decrees of the Soviet Government could have no validity in the courts of the United States, because that government had not been recognized by the United States. This decision was affirmed by the appellate division, and by the court of appeals,27 but by the latter on the further ground that "Justice and public policy do not require that the defendant now before us shall be pronounced immune from suit." Considering that


See also Habicht, Max, "The Application of Soviet Laws and the Exception of Public Order," 21 Am. Jour. Int. Law 238. For cases in which the Tribunal of Athens held the Soviet Nationalization Decrees to be void, as contrary to the Greek public order, see 52 Journal du Droit International 1111, 1143 (1925). See also In re Federazione Italiana dei consorzi agrari di Piagenza v. Commissariato per il commercio estero della Republica Socialista dei Soviet di Russia ed altri (1923), 51 Journal du Droit International 257 (1924), for a similar decision of the civil court of Rome.

25See infra.
26(1924) 210 App. Div. 82, 205 N. Y. S. 472.
27(1925) 239 N. Y. 248, 146 N. E. 369.
"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 today [in the state of New York]," the court refused to "declare its death as a means to the nullification of its debts."

The court strongly intimated that it would probably have refused to do so, even if the Soviet Government had been recognized by the United States, stating that.

"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."

For, as was pointed out, not even a recognized government could free a corporation of its liabilities as regards foreign creditors and their recourse to foreign assets, because such an action would have no extraterritorial effect.28

In July, 1924, the British House of Lords rendered two decisions which have affected the attitude of American courts somewhat as to the design and effect of the Soviet nationalization decrees. The Russian Commercial and Industrial Bank and the Banque Internationale de Commerce de Petrograd were joint stock companies organized under the Russian Law, several years before the Revolution. Their main offices were in Petrograd, but they maintained branches in London, Paris, and elsewhere. The managers of the branch banks held a power of attorney from the corporations, giving them large powers, including the right to sue in the name of their corporations.

In December, 1917, and January, 1918, the Soviet decrees nationalizing Russian banking and confiscating the property of the corporations in Russia, were issued.29 In suits brought in the British courts by the London branch of the Russian Commercial and Industrial Bank, and by the Paris branch of the Banque Internationale de Commerce de Petrograd to recover certain moneys


29For the texts of these decrees see Sen. Doc. No. 62 (Sen. Documents, Vol. IV), 66th Cong., 1st sess., Vol. 3 p. m. 1236.
and security bonds, the defendants set up as a defense, the contention that, the Soviet nationalization decrees being valid in the courts of Great Britain, therefore, the plaintiff corporations had not been in existence since 1918, and so no suit could be brought in their names. This contention was sustained by the Court of Appeal in 1923, but the decisions were reversed by the House of Lords in 1924, holding that the effect of the decrees was not to dissolve joint stock companies such as the plaintiff banks, whatever effect they may have had in depriving them of their assets and managements. Their Lordships considered that a perusal of the terms of the decrees was conclusive of the fact that they did not have either the design or the effect of dissolving such corporations. It was pointed out that after the decrees went into operation the London branch continued to communicate and do business with the Petrograd office, the management of which clearly continued to recognize the London branch as a branch of the Petrograd institution, with no breach of continuity. And it was held that the London and Paris branches could bring suit in the names of the Petrograd institutions.

In the case of Joint Stock Co. v. National City Bank, the plaintiff, a Russian corporation incorporated under the laws of the Imperial government, had deposited certain funds with the defendant bank. In a suit by the plaintiff to recover these funds, the

---

30 After recognition by Great Britain of the Soviet Government as a de facto government.


32 The Petrograd management signed itself as "Formerly the Russian Commercial and Industrial Bank, Liquidating Committee," or described itself as a "branch of the State bank."

33 A similar decision was rendered on March 3, 1925, by the Prussian Kammergericht, Juristische Wochenschrift, (1925) H. 11, p. 1300. See 75 U. of Pa. L. Rev. 386.

But see Banque Internationale de Commerce de Petrograd v. Housner, (1924) 52 Journal du Droit International 488, for a contrary decision by the Court of the Swiss Confederacy, (Tribunal Federal) on December 10, 1924, ignoring the decisions of the British House of Lords and of the New York Court of Appeals (see next paragraph), even though Switzerland had not recognized the Soviet Government. See also Wohl, Paul, "The Nationalization of Joint Stock Banking Corporations in Soviet Russia and its Bearing on Their Legal Status Abroad," 75 U. of Pa. L. Rev. 385ff., 527ff., 622ff., for a full discussion of the matter, in which it is submitted that the effect of the Soviet Nationalization decrees was to terminate, to all intents and purposes, the separate existence of Russian banking companies.

34 (1925) 240 N. Y. 368, 148 N. E. 552.
ACTS OF UNRECOGNIZED GOVERNMENTS

bank denied the existence of the corporation because of the Soviet nationalization decrees.

From a judgment granted by the New York supreme court, and affirmed by the appellate division,\textsuperscript{35} on the grounds of the insufficiency of defendant's answer and the illegality in the courts of the United States of acts of the unrecognized Soviet Government, defendant appealed. The court of appeals, on authority of the \textit{Mulhouse} and \textit{Goukassou Cases},\textsuperscript{36} affirmed the decision, on the ground that the effect of the Soviet decrees was not to destroy the identity of the plaintiff corporation, even if they should be given full force. Mr. Justice Crane, in delivering the opinion of the court, gave it as his personal opinion that the decrees of the unrecognized Soviet Government ought not to be given any recognition by the courts in the United States. But, since that question was not necessarily involved in a decision of the case, the point was not decided by the court of appeals.\textsuperscript{37}

In the case of \textit{Moscow Machine, Tool, and Engine Co. v. Richard and Co.},\textsuperscript{38} decided at the time of the decision in the \textit{Joint Stock Company Case}, the court of appeals affirmed decisions by the New York supreme court and the appellate division, permitting the plaintiff a corporation organized under the laws of Russia prior to 1914, to sue and recover certain funds, which were the balance due upon the proceeds of a sale by defendant, under a lien, of certain property belonging to plaintiff, though in this case, as in the other, the court of appeals did not find it necessary to decide upon the question of the validity of the Soviet decrees.\textsuperscript{39}

THE VALIDITY OF THE ACTS OF OTHER UNRECOGNIZED GOVERNMENTS IN THE COURTS OF THE UNITED STATES

It has been urged that the courts of a non-recognizing state should give effect to the laws and acts of an unrecognized government whenever occasion arises, as the laws and acts of a sovereign

\textsuperscript{35}(1924) 210 App. Div. 665, 206 N. Y. S. 476.
\textsuperscript{36}Discussed and cited supra, note 31.
\textsuperscript{38}(1925) 213 App. Div. 815; (1925) 240 N. Y. 707, 148 N. E. 768.
\textsuperscript{39}For other cases involving the status of the acts of the unrecognized Soviet Government, see In re City Equitable, (1924) 238 N. Y. 147, 144 N. E. 484; In re Norske Lloyd, (1925) 242 N. Y. 148, 151 N. E. 159; In re Second Russian Ins. Co., (1926) 243 N. Y. 524, 154 N. E. 590.
And, the courts have given expression to the principle that the courts of one state will not sit in judgment on the acts of a foreign state done within its own territory. But, that the acts of an unrecognized government in a foreign state constitute per se the acts of the sovereign state, so as to be required to be given effect in the courts of a non-recognizing state, has not been generally conceded.

In the case of Oetjen v Central Leather Co., the Carranza government had been recognized by the United States before the final decision of the case. And, in Luther v. Sagor, the court definitely held the decrees of the unrecognized Soviet Government not to be valid in England.

In the case of Underhill v Hernandez, Mr Chief Justice Fuller of the United States Supreme Court, delivering the opinion of the Court, stated that

"Every sovereign state is bound to respect the independence of every other sovereign state, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory. Redress of grievances by reason of such acts must be obtained through the means open to be availed of by sovereign powers as between themselves."

Continuing Chief Justice Fuller stated, "nor can the principle be confined to lawful or recognized governments, or to cases where redress can manifestly be had through public channels."

This language, when cited alone, seems to indicate that the court laid down the principle that all acts of an unrecognized government done within its own territory are beyond question by the courts of the United States. But the fact is that the revolutionary government in Venezuela, of which Hernandez was, in 1892, the

---

42 As a matter of fact, the laws of the several states of the United States have not always been given effect by the courts of the other states. See the case of Texas and Pacific Railway Co. v. Richards, (1887) 68 Tex. 375.
44 (1921) 3 K. B. 532, 90 L. J. K. B. 1210.
46 Italics, the author's.
military representative in the area in which Underhill was residing, and for whose acts Underhill sought to obtain judicial redress, actually became the established government of Venezuela, and was recognized as such by the United States in October, 1892, which fact was really largely relied upon by the court as a basis for the decision.

But, in the case of *O'Neill v. Central Leather Co.*, the New Jersey court of errors and appeals, in 1915, held that confiscation of property in pursuance of a properly levied military contribution by the forces of the Carranza government during its revolutionary period was valid, on the ground that an actual state of war existed, even though the Carranza government had not been recognized by the United States. And, the sale of confiscated property by the revolutionary forces was held, therefore, to convey good title. It may be significant that this decision came before the United States recognized the Carranza government, and so, is not confused with the question of the retroactive effect of recognition.

It has been pointed out that, with respect to the validity of the laws and acts of the Confederate governments, the courts of the United States, upon the restoration of their authority in that area, made a distinction between the laws and acts of the several Confederate state governments and those of the Confederate central government, holding, in general, the acts of the former, when not in aid of the rebellion, to be valid, while regarding all acts of the latter to be null and void. It has been further indicated that, in general, the courts of the United States, like those of France and England, have not adopted a general policy of giving legal effect to the laws of unrecognized foreign governments.

With respect to the decrees of the Soviet Government, while the lower courts in the United States have not hesitated to hold them invalid on the basis of non-recognition, the higher courts have, in the cases so far considered, not deemed it necessary to pass definitely upon that question, finding other grounds for deciding the cases. That is, the courts have not in these cases con-

---

48 The Crespo government.
49 (1915) 87 N. J. L. 552, 94 Atl. 789.
50 In the case of *Cia Minera Ygacio Dodriguez Ramos, S. A. v. Bartlesville Zinc Co.*, (1925), 115 Tex. 21, 275 S. W 388, the supreme court of Texas refused to give effect to confiscation decrees issued by General Villa in his revolutionary movement against Carranza, on the ground that his revolution being unsuccessful, its acts were all invalid; and, therefore, purchase of confiscated ore from Villa did not give good title.
sidered it to be essential to justice to hold the Soviet decrees either valid or invalid. It yet remains, however, to consider the question of the attitude of the courts in cases involving private rights, in which justice requires that de facto character, in greater or lesser degree, be conceded to unrecognized governments.

II


It has already been pointed out that, generally speaking, the courts of the United States and those of England consider themselves bound by the attitude of the executive with respect to the political status of foreign governments, and that, in general, the courts do not consider as valid, laws, acts, or decrees of a foreign government which has not been recognized by the executive authority. It sometimes happens, however, that, in order to avoid flagrant injustice in cases involving only private rights of persons or corporations, the courts are called upon to concede de facto character to an unrecognized foreign government. And, although the courts have been subjected to some criticism for their conservatism in this respect, yet, it does appear that both the British and the American courts have attempted to avoid injustice which might follow from a rigid and unbending adherence to their general policy of following the determination of de facto character by the executive branch of their own government, in private rights cases, which do not involve danger of international complications. That is, in some such cases, they have accepted evidence of de

---

61 Though, as has been pointed out, the New York court of appeals, in affirming the decisions of the lower courts in the cases here discussed, did not indicate any disagreement with the proposition that the Soviet decrees were invalid in the courts of the United States. It did not, however, rely solely upon that doctrine.

62 By "de facto character" is meant the power legally to act for the state.


64 Though, as indicated earlier, justice may at times depend upon a refusal of the courts to give effect to the laws of an unrecognized government.
facto character, in the absence of recognition and when it has not appeared that the executive would be opposed to such a policy.

**EARLY PRACTICE**

Thus in the case of *United States v. Rice,* the United States Supreme Court held that the military government, which had collected the taxes in question, possessed de facto character to the extent of validating its action in collecting revenue. The case being one between the United States and private persons involving no danger of international political complications, to have refused to concede de facto character simply because the military government had not been recognized by the United States, would have been an obvious injustice to the persons who had paid the duties to the de facto authorities.

In the case of *Yrisarri v. Clement,* a suit for libel was brought by the plaintiff against Clement, a private citizen in England, in 1825. Plaintiff claimed that matter damaging to his reputation had been published concerning his activity in trying to raise a loan for Chile, of which he claimed to be the duly appointed diplomatic representative. It was objected that Chile was a Spanish colony, and as such, could not be an independent state with a diplomatic representative. Evidence was offered to prove that Chile was an independent state, though it had not at the time of the alleged libel been recognized by the British government. The defendant objected that in the absence of recognition by the Crown, the court was bound to consider Chile a Spanish colony. In this connection Chief Justice Best, of the Court of Common Pleas, said.

"It occurs to me at present that there is a 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."

Continuing, he indicated that the actual existence of Chile as an independent state would be sufficient evidence, for the purposes of the case at bar. On appeal, however, the case was decided on the basis that the defendant, in the alleged libelous matter, had referred to Chile as a state, which was held to make proof of independence unnecessary, since the matter being adjudicated

---

55(1819) 4 Wheat. (U.S.) 246, 4 L. Ed. 562.
56(1825) 2 C. & P 223.
was not the question of the international status of Chile, but a libel suit between two persons. 57

The case of Keene v. McDonough, 58 decided in 1834 by the United States Supreme Court, was a suit concerning the title to certain lands in Louisiana, and involved the validity of an adjudication of a Spanish court made after the cession of the region to the United States, but before the United States had actually taken possession. The court held that,

"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."

Practice With Respect to the Confederate States

In a number of cases which came before the United States Supreme Court following the Civil War, it was necessary to determine the matter of the de facto character of the insurrectionary state governments, in order properly to decide the questions of private claims based upon contracts and arrangements which had been made under authority of those governments. And, although those governments had not been recognized in any degree by the government of the United States, beyond the concession to the armed forces of that region of belligerent rights, for humanitarian reasons, 59 yet, it was the general practice of the court to hold, that, for purposes of determining private rights, the governments of the individual insurrectionary states possessed de facto character, in so far as their acts were designed to provide for the ordinary affairs of civil government of the people, and in so far as they were not intended or designed to promote the rebellion or to subvert the rights of citizens of the United States under the Constitution of the United States.

In the case of United States v. Home Insurance Co., 60 a corporation, established under an act of the Georgia legislature

57 (1825) 2 C. & P. 223, 229.
58 (1834) 8 Pet. (U.S.) 308, 8 L. Ed. 955.
60 (1875) 22 Wall. (U.S.) 99, 22 L. Ed. 816.
ACTS OF UNRECOGNIZED GOVERNMENTS during the Civil War, was held by the court of claims of the United States to have been lawfully created, and thus to be eligible to sue in that court for the recovery of the proceeds of certain cotton which had been seized by the military forces of the United States during the War. Upon appeal by the United States, the Supreme Court affirmed the decision of the court of claims. Adverting to the principle, referred to above, of the general validity of the acts of the several Confederate state governments designated to promote the orderly affairs of civil society, the court stated that:

"Any other doctrine than this 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."61

In accord with this principle, the contracts and transactions between citizens, corporations, or municipalities entered into in the ordinary course of civil life and based upon the laws of the states, were, when not in direct aid of the rebellion, generally held to be valid.62 Even contracts stipulating payment in Confederate currency were held to be valid, on the ground that Confederate currency was forced upon the inhabitants of the Confederate states and made a legal tender, constituting practically the exclusive currency of the secession area. Pointing out that,

"As contracts in themselves, except in the contingency of successful revolution, these notes were nullities," the United States Supreme Court stated that, "While the war lasted, however, they had a certain contingent value, and were used as money in nearly all the business transactions of many millions of people," and that "They must be regarded, therefore, as a currency imposed on the community by irresistible force."63

61It seems that even in the event that a government, which succeeds a de facto government, sees fit to nullify the acts of the de facto authorities, it is deemed necessary to except many of the acts which have to do with the orderly conduct of the civil life of the people. For example, the Costa Rican government which followed the Tinoco regime expressly gave validity to the judicial proceedings of the civil courts and to contracts between private persons based upon the laws in force at the time, though in general the acts of the Tinoco government were declared to be invalid. See App. to Costa Rican Case, pp. 385, 386, British-Costa Rican Arbitration, 1923.


63Thorington v. Smith, (1839) 8 Wall. (U.S.) 1, 19 L. Ed. 361. See also, Delmas v. Merchants' Mutual Ins. Co., (1872) 14 Wall. (U.S.) 661, 20 L. Ed. 757.
Although contracts in direct aid of the rebellion were held to be invalid when authorized by the laws of the insurrectionary state governments, yet bona fide contracts, made in the ordinary course of business transaction, were held to be valid, even though it appeared that the indirect result of such contracts was to aid the rebellion. In the case of Baldy v. Hunter, the United States Supreme Court held a bona fide investment by a guardian, of certain funds belonging to his ward, in Confederate bonds, to have been a valid transaction, interpreting the situation as one in which

"The guardian had in view only the best financial interests of the ward in the situation in which both were placed, and that he was not moved to make the investment with the purpose in that way to obstruct the United States in its efforts to suppress armed rebellion."

And an effort to recover the amount so invested, from the estate of the guardian failed.

RECENT PRACTICE

In the case of Pelzer v. United Dredging Co., the New York appellate division held that a person who had been appointed administratrix of an estate in Mexico by order of a Mexican court during the period when the Obregon government had not been recognized by the United States, could not sue in the courts of New York in her capacity as administratrix of the estate. The court stated that

"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. The foreign court is erected in Mexico, whose present government is not yet admitted to recognition as a sovereign by our federal authority. 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

---

64(1897) 171 U. S. 388, 18 Sup. Ct. 890, 43 L. Ed. 208.
66For cases, however, in which investments in Confederate bonds were held to have been illegal as being in direct aid of the rebellion, see, Hanauer v. Woodruff, (1873) 15 Wall. (U.S.) 439, 21 L. Ed. 224; and Lamar v. Micou, (1884) 112 U. S. 452, 5 Sup. Ct. 221, 28 L. Ed. 751. And see also Williams v. Bruffy, (1878) 96 U. S. 176, 24 L. Ed. 716,
or administrative, and surely the creature cannot be possessed of a power not given its creator.\(^7\)

It does not appear that any cases have yet been before the courts of the United States involving adjudicating the rights of parties under a contract made in Russia during the Soviet regime, and, therefore, requiring a decision as to the validity of Soviet law regulating such matters.\(^6\) Such cases as have been decided have had to do with the effect of the existence of the Soviet government and its decrees upon contracts and relations existing, for the most part, prior to the decrees.

In the case of *Agency of Canadian Car and Foundry Co. v. American Can Co.*,\(^6\) a certificate, issued by Secretary Lansing on May 8, 1918, was accepted by the United States district court for the southern district of New York, as conclusive of the fact that Boris Bakhmeteff was to be considered the duly recognized ambassador of Russia, though several months earlier the Kerensky government, which had accredited Bakhmeteff, had been overthrown. The court, thereupon, accepted Mr. Bakhmeteff's certificate as conclusive of the fact that the old Imperial Russian Supply Committee, organized in 1915 for the purpose of purchasing war supplies in the United States, had continued until March 1, 1918, to be possessed of official authority of the State of Russia with power to make settlements of obligations owed to Russia. And the defendant was required to make payment of certain funds which it owed to the State of Russia, and which it objected to paying over to the plaintiff\(^7\) because of danger, that, in the future, the Soviet Government, which had not authorized the Supply Committee to act on behalf of Russia, or some succeeding government, might sue for a second payment. The court, considering the statement of the executive to be binding upon the judiciary, stated that, "no tribunal in this country will ever subject defendant to a second payment—and we have no concern with remote possibilities as to action of any foreign tribunal."\(^7\) Thus, while a

\(^6\)This decision has been criticised as being "perhaps the extreme limit of the absurdities flowing from the refusal to validate domestic acts of de facto states (governments)." See 25 Col. L. Rev. 567. See also 22 Mich. L. Rev. 31.

\(^7\)See 38 Harv. L. Rev. 821.

\(^6\)See 38 Harv. L. Rev. 821.

\(^6\)See 38 Harv. L. Rev. 821.

\(^6\)(D.C.N.Y. 1918) 253 Fed. 152.

\(^7\)Upon arrangement made by the Supply Committee before March 1, 1918.

\(^7\)This part of the decision was sustained by the circuit court of appeals of the second judicial circuit in 1919, though the case was remanded to the lower court on other grounds. Agency of Canadian
concession of de facto character by the court to the unrecognized Soviet government was rendered difficult, if not impracticable, in this case, by the definite position of the executive, it was also made unnecessary as a protection of private rights, for the same reason, at least so far as the courts of the United States are concerned.

In the case of Sokoloff v. National City Bank, it was sought to recover the balance due on a deposit made by the plaintiff in New York, repayment to have been made in rubles by the Petrograd branch of the New York corporation. The defendant contended that the court should take judicial notice of the closing of the Petrograd branch and the confiscation of its assets by the Soviet government, thus rendering performance of the contract impossible. The plaintiff argued that the court could take no judicial notice of the unrecognized government or of its acts. The New York supreme court, while refusing to consider 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 recognized either de facto or de jure," stated that, "it does not follow that we must assume a state of anarchy in Russia." And Mr. Justice Ford, speaking for the court, admitted that, so far as the issues in that particular case were concerned, he could "see no valid objection to permitting the defendant to allege and prove upon trial the actual conditions prevailing in that great country," where, he stated that, as a "matter of common knowledge," a government had been functioning for several years, since, "Facts are facts, in Russia the same as elsewhere."

The court, considering then, that the completion of the performance of the contract in Russia by the defendant, having been rendered impossible by the closing and confiscation of the assets of the Petrograd branch by the Soviet government, held that, under the doctrine of frustration, plaintiff should not recover the balance of the New York deposit. But the decision of the supreme court was reversed by the appellate division, and upon appeal, the court of appeals affirmed the decision of the appellate division, holding the bank liable as an American corporation,


72(1922) 120 Misc. Rep. 252, 199 N. Y. S. 355; (1924) 208 App. Div. 627, 204 N. Y. S. 69; (1924) 239 N. Y. 158, 145 N. E. 917

73(1924) 208 App. Div. 627, 204 N. Y S. 69.

74(1924) 239 N. Y 158, 145 N. E. 917
whose existence could not be terminated by any Russian government, recognized or unrecognized. The obligation of the defendant was held to be "not changed by the fact that the property of the Russian branch has been scattered or despoiled."

So, as finally disposed of, the case did not involve a decision as to the validity of the Soviet decrees. Though, in the course of his opinion, Mr. Justice Cardozo did suggest the "possibility that a body or group of men 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 [i.e., an unrecognized de facto government], 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."

Similarly, in the case of James and Co. v. Second Russian Reinsurance Co., the New York Court of Appeals intimated that, if it were essential to justice or to public policy, effect would be given to decrees of the Soviet Government. Judge Cardozo stated that:

"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."

And, in connection with a contention on the part of the defense that the British-Soviet Trade Agreement of 1921 had the effect of extinguishing the obligations of the defendant, the court said.

"We pass the question whether such an agreement, if made, would be disregarded by our courts because of our refusal to recognize the existence as a government of one of the parties to the compact. We assume, though we are not required to decide, that if the compact existed we would not treat it as a nullity."

The plaintiff in the case of Russian Reinsurance Co. v. Stoddard was a corporation incorporated in Russia under the Imperial Government. Before the revolution, it had deposited certain securities and funds with Stoddard, as trustee, according to the requirements of the laws of New York, for the protection of its policy-holders and creditors. Its old board of directors, meeting in Paris, authorized an action to compel the return of the funds, the last policy of the company in New York having

75(1925) 239 N. Y. 248, 146 N. E. 369.
76But, it was held that the trade agreement did not establish any such situation nor contemplate doing so.
77(1925) 240 N. Y. 149, 147 N. E. 703.
The defendant, while not denying responsibility as trustee, resisted the action on the ground that, because of the nationalization decrees of 1918, the corporation as such had ceased to exist, and that he would be liable later to suit for recovery of the fund by the stockholders or by the Soviet Government as confiscator.

The bill was dismissed by the New York supreme court, and plaintiff appealed. The appellate division reversed the decision, and defendant appealed. Though the court of appeals held that it could not concede legal validity to the decrees of the Soviet Government because it had not been recognized by the United States, yet it refused to take jurisdiction of the case and reversed the judgment of the appellate division on the grounds,—

1. That, irrespective of the legal status of the acts of the unrecognized Soviet Government, from the American point of view, the effects of the actual state of affairs in Russia upon the private rights of persons affected thereby could not, or at least, ought not, in the absence of involvement of international political complications, be ignored,

2. That the action of the Soviet authorities had at least made it impossible for the plaintiff corporation, even if legally still in existence, to function in Russia or to maintain its organization according to the terms of its charter;

3. That the authority of the persons who, at the meeting in Paris, had authorized the bringing of the suit might well be questioned as not being that of a legal board of directors, because their terms had long since expired, and because in France the Soviet decrees were considered valid;79

4. That, therefore, to permit them to recover the trust fund might be to expose the defendant to later suit on the trust, and,

5. That the court could not protect the defendant against such later suit in some other jurisdiction.

Mr Justice Lehman, in delivering the opinion of the court, stated that

"In the present case the primary question presented is not whether the courts of this country will give effect to such decrees [of the unrecognized Soviet Government], but is rather whether within Russia, or elsewhere outside of the United States, they have actually attained such effect as to alter the rights and obligations of the parties in a manner we may not in justice disre-

78(1924) 211 App. Div. 132, 207 N. Y S. 574.
79After recognition by France.
gard, regardless of whether or not they emanate from a lawfully established authority. Though we might say that for us such decree is not the law even of the country which the Soviet government rules, yet it is enforced as the law of that country and is recognized as the law of that country by other great nations. The right of the directors to represent the corporation, even the existence of that corporation, must be determined in accordance with the law of Russia. For us the law of Russia, in its strict sense, may still be the law as it existed when the Czar ruled, for other nations the law of Russia is the law sanctioned by the Soviet Republic. Our view of what is the law of Russia rests upon a juridical conception not always in consonance with fact, in other nations recognition has brought juridical conceptions and facts into harmony. Do these juridical conceptions require us to hold that the law of Russia has remained unchanged since December, 1917, that the Soviet Republic does not exist, and, therefore, cannot act; that the plaintiff corporation still lives and is domiciled in Russia and is under the management of its former directors, though we know that its property in Russia has been sequestrated, its directors driven into exile, its business monopolized by an agency which enforces its decrees as if it were a government and is recognized as a government by most of the countries of Europe? If the logical application of juridical conceptions leads to this result, then we should consider its practical consequences to determine whether we have not been carried beyond the 'self imposed limits of common sense and fairness.' We shall not attempt to collate the authorities in order to deduce from them a new general rule which will define these limits. The very nature of the problem shows that general definitions must hamper rather than promote its solution. The facts of each case, the result of each possible decision, determines whether that decision accords with common sense and justice.

Mr. Justice Crane dissented, stating that he considered the decision of the majority as giving effect indirectly to the Soviet decrees, even though it refused to give direct legal effect to them. He submitted that no effect should be given to the decrees, and that, therefore, the old directors of the corporation should be entitled to possession of the funds, since he saw no possible way by which the stockholders might bring action to recover, except through the directors. And the danger of a second suit, he considered too remote to be given any real weight.

89Referring particularly to France, Great Britain, and Germany.
82This case was decided in April 1925. See the opinion in the case of Joint Stock Co. v. National City Bank, (1925) 240 N. Y. 368, 148.
It has been pointed out that in cases involving the validity of the decrees of the unrecognized Russian Soviet Government, the courts have not conceded their general validity, but, on the contrary, have indicated rather definitely, especially the lower courts, that, in general, the Soviet decrees were not considered to have any legal effect in the courts of the United States. It has been shown that, though the courts have not deemed it essential to justice in any case involving private rights to concede validity to the Soviet decrees, yet, there has been a tendency, as indicated in obiter dicta, to recognize, that in such cases, concession of de facto character to the unrecognized Soviet Government, and of a measure, at least, of legal effect to its accomplished acts, may be found to be necessary in order to avoid obvious and arbitrary injustice to innocent persons.

It has also been further indicated that, though there may not appear to be an absolutely consistent and completely continuous policy on the part of the courts, of conceding de facto character to unrecognized foreign governments in cases involving private rights, yet it does appear that there has been, in a considerable number of cases, extending over a long period of time, rather definite effort by the courts, both in England and the United States, to avoid arbitrary injustice by conceding de facto character in such cases, where the courts have seen no danger of international complications or of embarrassment to the executive. Though it may be, as it has been argued, that the time has arrived when the courts ought more "frankly [to] take cognizance of unrecognized de facto governments or states and of their capacity to affect private rights in a great many different ways."\(^3\)

The influence upon the courts of the attitude of the executive in such cases must not be overlooked, however. And it is to a consideration of this phase of the question that attention is now directed.

**The Attitude of the Executive Toward Concession of De Facto Character by the Courts to Unrecognized Governments**

It is, perhaps, hardly to be expected that the executive department would encourage the courts to concede de facto character

---

\(^3\) Dickinson, E. D. 22 Mich. L. Rev. 134.
to an unrecognized government, at any rate, certainly not to the extent of permitting it to sue, especially, if at the time the executive should be withholding recognition in order to induce or compel the adoption or the discontinuance of a particular policy on the part of the government seeking recognition. For, obviously, such judicial recognition would render much less effective the executive policy, and might practically defeat it. At any rate, an examination of the facts indicates that, generally speaking, the executive has not adopted a policy of encouraging such action by the courts, but has, rather, discouraged the practice in cases where it has been deemed to be at all detrimental to executive foreign policy.

In a number of cases which have been before the courts of the United States involving the question of the de facto character of the Russian Soviet Government, the state department has definitely discouraged the concession of any degree of de facto character to that regime. This attitude has been expressed in public statements, in direct communications to the courts, and in correspondence with counsel. And it has been expressed in cases involving both the right of the Soviet Government to sue and the private rights of corporations.

On May 6, 1921, the state department issued a public statement in which it was urged that:

"As the United States Government has not recognized the Bolshevik regime at Moscow as a government, extreme caution should be exercised as to representations made by anyone purporting to represent the Bolshevik Government."

This statement followed by several months a statement to the United States district court for the northern district of California in the case of the Rogdat, to the effect that Boris Bakhmeteff was the duly recognized diplomatic representative of Russia in the United States, and that neither the Soviet Government nor any of its agents had been given any sort of recognition whatever.

In a statement for the information of the United States district court for the southern district of New York, in the

---

84 In this connection, see 22 Col. L. Rev. 278, and 17 Am. J. Int. L. 745.
87 (D.C.Cal. 1920) 277 Fed. 294.
case of *Russian Government v. Lehigh Valley R. R. Co.*, Secretary Hughes, though conceding that the Kerensky government had fallen, and that the Soviet Government was functioning in Russia, clearly indicated that it was the attitude of the state department that the courts should not concede de facto character to the unrecognized Soviet regime. In response to an inquiry by counsel for the defense, as to the status to be ascribed to the Soviet Government Mr. Hughes stated

"I may say that the United States has not recognized any other government in Russia since the fall of the provisional government, to which reference is made above. The regime now functioning in Russia, and known as the 'Soviet Regime,' has not been recognized by the United States."

As an instance showing how guardedly and reluctantly the executive may concede any degree of de facto character to an unrecognized government, which concession is to be used by the courts as a basis for judicial concession, even in a private rights case, the statement of the British Foreign Office in the case of *Luther v. Sagar* may be cited. His Majesty's Secretary of State for Foreign Affairs, on November 27, 1920, in reply to certain requests by plaintiff's solicitors for information as to the status to be accorded to the Russian Trade Delegation, which was at that time in England under the leadership of M. Krassin, stated

"I am to inform you that for a certain limited purpose [certain negotiations] His Majesty's Government has regarded Monsieur 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 that which Monsieur 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."

And then, apparently as a further safeguard, he stated that, "I am to add that His Majesty's Government have never officially recognized the Soviet Government in any way." The King's

---

89For similar statements by the state department in an earlier hearing of the same case, see (D.C.N.Y. 1919) 293 Fed. 133. See also *The Penza*, (D.C.N.Y. 1921) 277 Fed. 91 and 3 N. C. L. Rev. 88.
91A representative of the then unrecognized Soviet Government.
92See also the statement of the Foreign Office in the case of *The Annette*,[1919] Pr. 105, 88 L. J. Pr. 107
Bench Division did not concede de facto character to the Soviet
Government on the basis of this statement.

It appears, however, that the executive may not necessarily
interpose an objection to a concession of de facto character
by the courts to an unrecognized government in all instances.
In fact, it seems that there is precedent for a policy of executive
encouragement of the courts to concede de facto character to an
unrecognized government in cases where justice would be thereby
promoted and where there appears to be no danger of international
political complications arising from such a policy.

In the case of Government of Mexico v. Fernandez,93 involving
the right of the unrecognized Obregon government to sue in
1923, to protect certain public monies which had been stolen from
that government by a Mexican citizen who had escaped to the
United States, the state department voluntarily presented the
following statement to the court.

"The Government of the United States has not accorded
recognition to the administration now functioning in Mexico, and
therefore has at present no official relations with that adminis-
tration. This fact, however, does not affect the recognition of
the Mexican state itself, which for years has been recognized by
the United States as an 'international person' as that term is un-
derstood in international practice. The existing situation simply
is that there is no official intercourse between the two states."

It thus appears that the state department was desirous that
in this case the court should concede de facto character to the
unrecognized Obregon government, though it may be significant
that there were pending, at that time (May, 1923) official nego-
tiations looking toward recognition, which was granted on August
31, 1923. And, for the court to have refused to permit the
Obregon government to sue to protect the funds belonging to
the Mexican state, would have resulted in a great loss to Mexico,
which, apparently, the State Department desired to avoid.94

93Decided by the superior court of Essex County, Massachusetts,
in 1923. Not reported, Discussed by Quincy Wright in 17 Am. J. of
Int. L. 743.

94The court has been criticized for this decision, however, on the
ground that such decisions involve danger of international political
complications. See 17 Am. J. Int. L. 744. In this connection, see also

It should perhaps be pointed out also in this connection that there
appears to have been no objection by the executive to the policy of the
courts in the case of United States v. Rice, (1819) 4 Wheat. (U.S.)
246, 4 L. Ed. 562, nor in the cases involving the concession of validity
to certain laws and acts of the Confederate state governments.