SOVEREIGN IMMUNITY—THE MODERN TREND

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The overthrow of empires and the succession of new governments and states, which followed in the wake of the recent war, have in the past few years presented to the courts of all countries closely touched by this period of upheaval numerous cases involving the status of foreign governments and their property in other countries, and the validity abroad of their acts. At the same time the marked extension of government activity into fields hitherto regarded at least in countries of English law as sacred to private enterprise has, in intensifying the conflict of government with private interest both at home and abroad, stirred novel questions of government immunity.

An American makes a contract with a foreign government, which advances money to him for the purposes of the contract. The American defaults and pockets the advances. The foreign government sues this American here and is met with the answer that it has no standing in the courts of the United States because the State Department has seen fit to ignore officially the fact of that government's existence. An American citizen dies resident abroad in a country whose government is unrecognized in Washington. The widow, appointed administratrix in that foreign country, sues here to recover assets of the decedent's estate, but stumbles over the legal obstacle that the appointment as administratrix cannot be recognized here so long as the foreign appointing power is not "recognized" by the executive here. The growing conflict of public and private interest is typified by the common case of a trading vessel libelled for salvage service, collision damage or repairs; a foreign government appears as claimant of the vessel and asserts absolute immunity of its ship from process. Such examples are typical of the many cases which have been engaging the attention of courts in the past ten years. A re-examination of the principles and reasoning of the decisions, and of the facts forming the common background, of such cases may not be amiss.

How far shall the demands of "international comity" and of "sovereign immunity" exempt a government from responsibility in law, at home and abroad, for its acts; how far shall its acts at home obtain full recognition and validity abroad? Professor Borchart aptly points out that "it requires but a slight appreciation of the facts to realize that in Anglo-American law the individual citizen is left to bear almost all the risks of a defective, negligent, perverse or erroneous administration of the State's functions, an unjust burden which is becoming graver and more frequent as

the Government's activities become more diversified and as we leave to administrative officers in ever greater degree the determination of the legal relations of the individual citizen."¹

We shall exclude from direct consideration the question of the sovereign's immunity from suit and process in its own courts and the sovereign's statutory consent to be sued at home, except in so far as such topics shed light upon the problems of the foreign government's status and acts in courts of another country.

I.

Neither in England nor America does suit lie against the sovereign directly in its own courts, without its consent. This immunity or non-responsibility of the Crown or State has been viewed as a necessary corollary of the personal sovereignty of the king, of the non-suability of the sovereign in person.² Thanks to the researches of Ehrlich³ and others we may now doubt the soundness of this view, and incline rather to the belief that our present-day doctrine of immunity is an outgrowth of the royal prerogative. American courts and lawyers have swallowed whole the doctrines supposed to be the peculiar outgrowth of kingship, divine right and royal prerogative. This is the more peculiar when we consider that while in England sovereignty is still expressed as that of the "Crown", in the United States the sovereignty is that of the "government" or the "state", although it is clear that our Federal government is one of limited powers delegated by the people of the several states in whom therefore ultimate sovereignty must reside. The Austinian concept is reflected in the words of Justice Holmes:

"A sovereign is exempt from suit not because of any formal conception or obsolete theory, but on the logical and practical ground that there can be no legal right as against the authority that makes the law on which the right depends".⁴

There is a growing army of modern critics⁵ of the doctrine of

¹ Borchard, *Government Liability in Tort* (1924) 34 YALE LAW JOURNAL, 1.

² Cf. Borchard, *supra* note 1, at 2; Maguire, *State Liability for Tort* (1916) 30 HARV. L. REV. 20; Laski, *The Responsibility of The State In England* (1918) 32 HARV. L. REV. 447.

³ 6 *Oxford Studies In Social and Legal History* (1921) "Proceedings Against The Crown (1216-1377)" *passim*.

⁴ *Kawanakoa v. Polyblank* (1906) 205 U. S. 349, 353, 27 Sup. Ct. 526, 527.

⁵ Cf. Borchard, Maguire, Laski, *supra* note 2. Cf. Dickinson, *The Unrecognized Government or State In English and American Law* (1923) 22 MICH. L. REV. 29; Lord, *Admiralty Claims Against The Government* (1919) 19 COL. L. REV. 467; Hayes, *Private Claims Against Foreign Sovereigns* (1925) 38 HARV. L. REV. 599; Krabbe, *The Modern Idea of the State* reviewed by Dewey, in (1923) 23 COL. L. REV. 406; Duguit, *Law in the Modern State* (1919) *passim*; Borchard, *Government Responsibility in Tort—A Proposed Statutory Reform* (Aug., 1925) A. B. A. JOUR. 495.

non-responsibility of the state in the present-day law of England, the Dominions and America. It is now beyond doubt that in our day we shall see increasing encroachment in countries of English law upon the hitherto sacred domain of sovereign non-responsibility, and an approach to the continental theory of responsibility of the modern sovereign in its own courts.

The basic problems of "immunity" of the home sovereign and of the foreign government are widely different in nature. Immunity of the sovereign from suit at home flows from the historical notion that the sovereign is above the law, whereas the "immunity" of the foreign sovereign proceeds from considerations of practical expediency in friendly international intercourse.⁶ It is perhaps to be regretted that the term "immunity" is invoked in both types of cases.

When we come to consider the position of the foreign sovereign in the courts of England and America, we find at once the play of a wholly different set of ideas, sometimes cloaked in terms similar to those used regarding the home sovereign, but for the most part prompted by considerations of practical wisdom. It is uniformly held that the foreign sovereign, either in the person of the ruler or as the government, is immune from direct suit in the courts of another country.⁷ This is certainly true when the foreign sovereign is "recognized" as such by the home government; and although some suggestions have lately been made (and rejected) that an unrecognized foreign sovereign may be sued,⁸ it seems doubtful whether such a doctrine will, or indeed should, gain headway.

The basis of the immunity of the foreign sovereign is the purely practical argument that to permit process to issue would "vex the peace of nations". To state the rule is to establish its viability. The rule is perhaps the clearest example of "comity", that often quoted and over-worked term. The foreign sovereign is immune from suit in the courts of another country, not because of any right in the sense of historical or analytical jurisprudence, but solely because by the process of judicial self-limitation in the interest of friendly intercourse among nations we judge it inexpedient to issue process of any sort or to sit in judg-

⁶ Cf. Weston, *Actions Against The Property of Sovereigns* (1919) 32 HARV. L. REV. 266.

⁷ *Duke of Brunswick v. King of Hanover* (1849) 2 H. L. C. 1; *Wadsworth v. Queen of Spain* (1851, Q. B.) 17 A. & E. (N. S.) 171; *Mighell v. Sultan of Johore* (1894) 1 Q. B. 149; *Strousborg v. Costa Rica* (1880, C. A.) 44 L. T. 199; *Manning v. State of Nicaragua* (1857, N. Y.) 14 How. Pr. 517; *Hassard v. United States of Mexico* (1899, Sup. Ct. Spec. T.) 29 Misc. 511, 61 N. Y. Supp. 939, *aff'd* (1903) 173 N. Y. 645, 66 N. E. 1110; *Kawananakoa v. Polyblank*, *supra* note 4. Cf. *Porto Rico v. Rosaly* (1913) 227 U. S. 270, 33 Sup. Ct. 352.

⁸ *Wulfsohn v. Russian Socialist Federated Soviet Republic* (1922, 2d Dept.) 202 App. Div. 421, 195 N. Y. Supp. 472.

ment. Comity has of course been long since vested with the dignity of a "rule of international law".⁹ Whether or not a "right" exists in favor of the suitor against the foreign sovereign sought to be hailed into court, it is fruitless to inquire, for as Justice Holmes has observed:

"Legal obligations that exist but cannot be enforced are ghosts that are seen in the law, but that are elusive to the grasp".¹⁰

The absolute immunity of the sovereign from direct personal suit abroad, save with its consent, will probably endure for many years; but the immunity of the sovereign from suit at home is being weakened by legislative consent, by the critical onslaught of writers, and by the growing disfavor toward the doctrine in the courts.

The natural converse of the rule of immunity of the foreign state is equally clearly established, that our courts are by custom freely open to suit by a foreign sovereign as plaintiff.¹¹ Intellectually and logically we might refuse the privilege—practically we cannot, save in a world of closed frontiers.

For the same reasons of practical expediency it follows that our courts will not sit in judgment upon the acts and conduct at home of foreign states when called in question before our courts in litigation to which the foreign state is not a party.¹² Title to property located within the territorial limits of a foreign country is conveyed or determined by act, executive or judicial, of that country; subsequently the validity of that determination of title is questioned in litigation in our courts. If the foreign sovereign is recognized, its acts "import absolute verity", and our courts will not look further into the question. A foreign government requisitions a vessel under its flag for its own purposes; the validity of that requisition cannot be considered elsewhere. "The courts of one country will not sit in judgment on the acts of a government of another, done within its own territory".¹³

A recent decision applies the rule forcibly. In *The Oliver*

⁹ *The Paquete Habana* (1900) 175 U. S. 677, 20 Sup. Ct. 290.

¹⁰ *The Western Maid* (1922) 257 U. S. 419, 42 Sup. Ct. 159.

¹¹ *The Sapphire* (1870, U. S.) 11 Wall. 164; *Russian Government v. Lehigh Valley Railroad Company* (1919, S. D. N. Y.) 293 Fed. 133; *Vavasour v. Krupp* (1878) 9 Ch. Div. 351.

¹² *Canada Southern Railroad Company v. Gebhard* (1883) 109 U. S. 527, 3 Sup. Ct. 363; *Ricaud v. American Metal Co.* (1918) 246 U. S. 304, 38 Sup. Ct. 312; *Underhill v. Hernandez* (1897) 168 U. S. 250, 18 Sup. Ct. 83; *American Banana Company v. United Fruit Co.* (1909) 213 U. S. 347, 29 Sup. Ct. 511; *Oetjen v. Central Leather Co.* (1918) 246 U. S. 297, 38 Sup. Ct. 309; *The Invincible* (1814, C. C. D. Mass.) 2 Gall. 29; *Hewitt v. Speyer* (1918, C. C. A. 2d) 250 Fed. 367; *Earn Larc S. S. Co. v. Sutherland S. S. Co.* (1918, S. D. N. Y.) 254 Fed. 126; *Secretary of State v. Kamachee* (1859) 13 Moo. P. C. 22; *Buron v. Denman* (1848) 2 Exch. 167; *Doss v. Secretary of State* (1875) L. R. 19 Eq. 509.

¹³ *Underhill v. Hernandez*, *supra* note 12.

American Trading Co. v. The Government of the United States of Mexico, et al.,¹⁴ an American corporation brought suit in the state courts of New York against the then unrecognized Mexican Government and the Mexican National Railway administration for breach of a contract made with that government in Mexico. The action was begun by attachment of Mexican Government property. The government appeared specially, objected to the jurisdiction of the court, and removed the action to the Federal court. Following the recognition of the Obregon government, the motion to vacate the attachment and to dismiss the action was granted on the familiar ground of immunity. On appeal the dismissal was sustained by the Circuit Court of Appeals. The most significant point of the decision concerns the plaintiff's contention that as the contract in question was made and the acts of seizure of property and embargo complained of were done by the Mexican Government in its operation of the Mexican state railways, a trade as distinguished from a governmental function, the government was not entitled to the customary immunity. The court declined to accept the plaintiff's contention and said:

"It is said that the Mexican Government in operating the National Railways of Mexico is engaged in trade and in a non-governmental enterprise. This view of the matter we do not accept. It is a fact, of which we take judicial notice, that in the leading countries of Europe, as well as in Canada, it is the practice of governments to own and operate the railways. This is not regarded by them as engaging in trade but as the performance of a fundamental governmental function. It evidently is so regarded in Mexico, and while in the United States the railways are not owned and operated by either the State or Federal governments we are not justified, on that account, in holding that the Mexican Government is engaged in trade and not performing a governmental function in operating the National Railways of Mexico".

If the foreign government performs a function or does acts, they are part of the business of that government, and it is not for the courts of another country to hold that such functions and acts are not government business. Distinctions accepted with us locally between those activities of the state which are or are not governmental in essence cannot properly be invoked against a foreign state. It alone is judge of its own functions and activities; and the mere fact of their existence and performance by the foreign state should conclusively place them above question abroad. We may of course ascertain that the foreign sovereign in fact had jurisdiction over the property in question or the subject matter of the original litigation,¹⁵ or that the original litigation abroad was conducted in a manner calculated to

¹⁴ 1924, C. C. A., 2d Circuit.

¹⁵ *The Santissinia Trinidad* (1822, U. S.) 7 Wheat. 283; *Second Russian Insurance Co. v. Miller* (1924, C. C. A. 2d) 297 Fed. 404.

render substantial justice to our own citizen who was a party to it,¹⁶

Not infrequently a court is in doubt as to the existence in fact or the standing in international intercourse of an alleged foreign "sovereign" which is a party to an action or whose acts are set up as affecting questions at issue. X claims title to property acquired by executive act of a certain faction of another country. Do the acts of that faction import absolute validity abroad as the acts of the sovereign? A vessel libelled in our courts is claimed as the public property of a foreign sovereign; is that sovereign the recognized government of that country? While the court does not require proof or extra-judicial suggestion that Nicaragua, Russia and Turkey exist as nations of people under some form of independent government, the court clearly may require proof whether the faction of General A or of General B is in fact the government of some Central American republic and recognized as such by our government, may require proof whether the Soviet government is or is not recognized by us *de facto* or *de jure* as the successor of previous recognized régimes, and whether we have resumed diplomatic relations with Turkey which were broken off during the war without formal declaration of hostilities.

A court is not the proper body or functionary either to determine such questions of fact or establish such relationships of international intercourse. These are tasks for the executive branch

¹⁶ Cf. *Hilton v. Guyot* (1894) 159 U. S. 113, 16 Sup. Ct. 139. In England a personal judgment of a foreign country is held conclusive evidence of the merits of the case, attackable only for fraud or want of jurisdiction. "It is against the law of nations not to give credit to the judgments and sentences of foreign countries, till they are reversed by the law, and according to the form, of those countries wherein they were given. For what right hath one Kingdom to reverse the judgment of another? And how can we refuse to let a sentence take place till it is reversed? And what confusion would follow in Christendom, if they should serve us so abroad, and give no credit to our sentences"; *Cottington's Case* (1638, Ch.) 2 Swan. 326; *Tarleton v. Tarleton* (1815, K. B.) 4 M. & S. 20; *Martin v. Nicolls* (1830, Ch.) 3 Sim. 458.

In the United States the majority rule is the same. *Fisher v. Fielding* (1895) 67 Conn. 91, 34 Atl. 714; *Dunstan v. Higgins* (1893) 138 N. Y. 70, 33 N. E. 729; *Coveney v. Phiscator* (1903) 132 Mich. 253, 93 N. W. 619; *Law v. Hansen* (1895) 25 Can. Sup. Ct. 69. But the Supreme Court holds that a foreign judgment will be given conclusive effect only when reciprocal treatment is there accorded to American judgments. *Hilton v. Guyot*, *supra*. Accord: *Johnston v. Compagnie Générale Transatlantique* (1924, Sup. Ct. Spec. T.) 123 Misc. 806, 206 N. Y. Supp. 413.

In France a foreign judgment against French citizens will be given effect for execution only following an examination into the merits, upon *exequatur*. But even in France a foreign judgment may be held conclusive, without such re-examination, as a decision of fact. Cf. *Bartin, Le Jugement Etranger Considéré Comme Un Fait* (1924) *Jour. du Droit Int.* 857.

of the government, and it is so universally recognized.¹⁷ The court when in doubt as to such matters will always receive, or of its own initiative request, the advice of the executive, and be bound by it. If the Foreign Office advises that recognition as a *de facto* government has been accorded to the Soviet Republic, the Court of Appeal is bound accordingly; and full validity is automatically accorded to acts of that government.¹⁸ If the State Department advises that the revolutionary faction headed by General B has been recognized as the *de jure* government of a Latin-American country, our courts accept such executive determination as final.¹⁹

In *Russian Govt. v. Lehigh Valley R. R.*²⁰ action was brought by the accredited representative of the Kerensky régime, Mr. Bakhmatieff, as the recognized successor of the Czarist government; the defendant objected that both governments had ceased to exist, that the Soviet régime was in power and that the action could not be continued. The court denied the defendant's motion to dismiss, pointed out that it was bound by the executive's continued recognition of Mr. Bakhmatieff and his successor as the sole representative of the Russian State, and declined to go behind the executive determination. We shall have occasion to observe later, however, that in the *absence* of executive recognition of a foreign government, the courts may be forced to some consideration or a determination of the existence of what is asserted to be a foreign government in fact, its status, or the effect of its acts for the purposes of the litigation. Where the executive has granted recognition, the courts will not deny or attack it, directly or collaterally. Where the executive has denied recognition, the courts will not arrogate to themselves the function of according it *de jure*, yet they may be compelled to give effect and validity to acts of an unrecognized *de facto* government.

II.

Unrecognized foreign governments may be before the courts as suitors, as defendants, as third party claimants or as alleged sovereigns whose acts may directly affect the issues of the case.

¹⁷ *Foster v. Neilson* (1829, U. S.) 2 Pet. 253, 307; *Garcia v. Leo* (1838, U. S.) 12 Pet. 511; *Williams v. Suffolk Ins. Co.* (1839, U. S.) 13 Pet. 415; *Kennett v. Chambers* (1852, U. S.) 14 How. 38; *Holden v. Joy* (1872, U. S.) 17 Wall. 211, 242; *In Re Baiz* (1890) 135 U. S. 403, 10 Sup. Ct. 854; *Jones v. United States* (1890) 137 U. S. 202, 11 Sup. Ct. 80; *Agency of Canadian C. & F. Co. v. American Can Co.* (1918, S. D. N. Y.) 253 Fed. 152, (1919, C. C. A. 2d) 258 Fed. 363, 368; *Republic of Peru v. Peruvian Guano Co.* (1886) L. R. 36 Ch. Div. 489; *Republic of Peru v. Dreyfus* (1888) 38 Ch. Div. 348, 356, 359.

¹⁸ *Luther v. Sagor* (1921) 3 K. B. 332.

¹⁹ *Underhill v. Hernandez*, *supra* note 12; *Oetjen v. Central Leather Co.*, *supra* note 12.

²⁰ *Supra* note 11; (1923, S. D. N. Y.) 293 Fed. 135.

In *Wulfsohn v. Russian-Socialist Federated Soviet Republic*,²¹ the Soviet Government was sued for alleged conversion of personal property. Upon a motion to set aside service of summons by publication, the court of first instance in denying the motion, held that the defendant, not being either a recognized government or a domestic corporation, was a foreign corporation and as such amenable to suit.²² The Appellate Division sustained this novel theory of corporate entity, but the Court of Appeals held that the defendant was immune from suit, saying:²³

"The result we reach depends upon more basic considerations than recognition or non-recognition by the United States. 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 its recognition does not create the state although it may be desirable. So only are diplomatic relations permitted. Treaties made with the government which it succeeds may again come into effect. It is a testimony of friendly intentions. . . . 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 recognition. . . . But whether recognized or not the evil of such an attempt would be the same. 'To cite a foreign potentate into a municipal court for any complaint against him in his public capacity is contrary to the law of nations and an insult which he is entitled to resent'. (*De Haber v. Queen of Portugal*, 17 Q. B. 171). 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. Whenever an act done by a sovereign in his sovereign character is questioned it becomes a matter of negotiation, or of reprisals or of war."

The decision seems eminently sound in result and in the main course of its reasoning. To say, however, that the unrecognized foreign sovereign is immune from suit without its consent, "not because of comity, but because he has not submitted himself to our laws", or "because an independent government is not answerable for its acts to our courts", seems to be whipping the devil around the stump.

A year later the same court observed,²⁴ "Juridically a govern-

²¹ The report of the decision of the Court of Appeals in this case may be found in (1923) 234 N. Y. 372, 138 N. E. 24.

²² 1922, Sup. Ct. Spec. T.) 118 Misc. 28, 192 N. Y. Supp. 282.

²³ *Supra* note 21, at 375, 376, 138 N. E. at 25.

²⁴ *Sokoloff v. National City Bank* (1924) 239 N. Y. 153, 165, 145 N. E. 917, 918.

ment that is unrecognized may be viewed as no government at all, if the power withholding recognition chooses thus to view it. In practice, however, since juridical conceptions are seldom, if ever, carried to the limit of their logic, the equivalence is not absolute, but is subject to self-imposed limitations of common sense and fairness, as we learned in litigations following our Civil War".

We may if we like subject foreign government-owned property to suit in our courts, as we have done in some admiralty cases; that we do not do so when the suit is in name against the foreign government owner is purely for reasons of comity and not because of any fiction of submission or non-submission, or because there is anything of magic in the conception of an "independent government". In the *Wulfsohn* decision the court was primarily confronted with the correctness of the ruling of the lower courts that a foreign unrecognized government was a "foreign corporation" within the meaning of the Code provisions; the rejection of that notion was the first consideration; and it is at least a fair ground of speculation whether invocation for the benefit of Moscow of the fair name and repute of Comity, undisguised, was not a trifle abhorrent.

At the present time it appears that an unrecognized foreign government may not bring suit in the courts of England or America. Lord Eldon expressed great doubt²⁵ whether the City of Berne, of the new *de facto* but unrecognized government of Switzerland, might maintain an action. Since then the question does not seem to have been presented or decided in England. In *Russian Socialist Federated Soviet Republic v. Cibrario*,²⁶ it appeared from the pleadings that the plaintiff, the Soviet Government, had advanced certain monies to defendant under a contract to supply that government with films. It was alleged that defendant had misappropriated some of these funds; and an action for an accounting was instituted in New York, presumably the only place where personal service and adequate relief could be obtained. In denying the right to sue, Judge Andrews, speaking for the court, placed the decision upon the ground that comity, "that reciprocal courtesy which one member of the family of nations owes to the others", follows upon recognition and fails in the absence of recognition. "A foreign power brings an action in our courts not as a matter of right. Its power to do so is the creature of comity. Until such government is recognized by the United States, no such comity exists. . . . We may add that recognition and consequently the existence of comity is

²⁵ *City of Berne v. Bank of England* (1804, Ch.) 9 Ves. Jr. 347; cf. *Dolder v. Lord Huntingfield* (1805, Ch.) 11 Ves. Jr. 283.

²⁶ (1923) 235 N. Y. 255, 139 N. E. 259.

purely a matter for the determination of the legislative or executive departments of the government".²⁷

It is submitted that although the right of any foreign government to sue, or to be exempt from suit against it in our courts, is clearly a matter not of right but of privilege decreed by comity, and although the courts must look to the legislature or the executive for formal recognition or the withholding of it, the want of comity does not logically or of necessity flow from the want of recognition. To hold that an unrecognized foreign government may sue as such in our courts is not the equivalent of diplomatic recognition. A more satisfactory basis must be found, if at all, in considerations of the avowed policy of that foreign government in relation to our own public policy as determined by the various branches of our government, or in the practical convenience of courts in determining whether the alleged sovereign is in fact the ruling government of that country, or who is the governing entity of that state. On the one hand not every faction of a revolution-torn country can by its own *fiat* at home and solemn pleading in a foreign court expect to be accepted for the full face value of its hopeful assertions, and so be entitled to the privilege of suing as a political entity. On the other hand, it may be that a governing body, as yet unrecognized by the chancelleries, is in truth the sovereign power of that country, and that the fact of its existence and undisputed power is susceptible of definite, uncontrovertible proof. Under such an hypothesis, the denial of the right to sue may result in as much future embarrassment to the executive, for example in negotiations for the resumption of diplomatic relations, as would be subjection of a recognized government to suit over its protest. If the plaintiff is in fact a political entity and is sovereign in its own domain, the want of formal executive recognition as such abroad does not make it any less sovereign at home. Why then should a court abroad refuse to accept it for what it is—an entity in fact?²⁸

In *The Penza*,²⁹ a libel in admiralty by the Soviet government, Judge Manton in dismissing the libel pointed out that not only was the Soviet régime unrecognized but that the former régime of Russia still had a diplomatic representative in the United States and recognized by the State Department. The same ruling was made upon similar facts in *The Rogday*.³⁰ The rulings were clearly sound, for to have allowed suit by the Soviet government under such circumstances would have been a refusal to abide by

²⁷ *Ibid.* at 258, 262, 139 N. E. at 262.

²⁸ See Connick, *The Effect of Soviet Decrees in American Courts* (1925) 34 YALE LAW JOURNAL, 499.

²⁹ (1921, E. D. N. Y.) 277 Fed. 91.

³⁰ (1920, N. D. Calif.) 278 Fed. 294, 279 Fed. 130.

the executive determination that the Kerensky régime was the government of Russia.

It seems exceedingly difficult, if not impossible, to reconcile the reasoning of the *Cibrario* and *Wulfsohn* decisions. The actual results, however, might be approximated by confining the reasoning of each to demonstration that in neither case was there any entity before the court, as plaintiff in the *Cibrario* case, as defendant in the *Wulfsohn* case. Stress might have been laid on the practical difficulties of proving the official acts of the Soviet government in its behalf or the name and function of its officials on whom process might be served by publication against it. It is to be regretted that the court in these opinions attempted to make comity the child of recognition, and to disguise comity in vague language about an unsubmissive foreign government, especially when, as in the *Wulfsohn* case, the action was one to subject to process and judgment property within the jurisdiction.

There are numerous cases in which courts have taken cognizance of the existence of unrecognized governments and have given full effect to their acts. In *United States of America v. Prioleau*,³¹ it appeared that goods were sent to England under a contract between a private citizen and one of our Confederate States. The Union government sued to recover the goods. In denying the right of suit the British court held that the contract could not be regarded as void and the United States must adopt the contract and take such rights under it as the *de facto*, unrecognized government of the rebel states might have claimed under it.

In *Yrisarri v. Clement*,³² the plaintiff, in suing for libel, claimed that the defamatory matter had been uttered concerning his activities on behalf of Chile, of which he claimed to be the duly appointed diplomatic representative. To his offer to prove that Chile was a state, it was objected that the court must take judicial notice that Chile still belonged to Spain. Chief Justice Best said:

"If a foreign state is recognized by this country, it is not necessary to prove, that it is an existing state; but if it is not so recognized, such proof becomes necessary. . . . I take the rule to be this—if a body of persons assemble together to protect themselves, and support their own independence, and make laws, and have Courts of Justice, that is evidence of their being a state".

In 1903 the Supreme Court of the Transvaal, following the Boer War, examined and gave full effect, in two cases involving questions of title to property, to the laws and orders of the *de*

³¹ (1865, Ch.) 2 H. & M. 559.

³² (1825, N. P.) 2 C. & P. 223.

facto Boer government, as yet unrecognized by the British government.³³

After the Civil War our courts were called upon not infrequently to consider the validity and effect of laws, orders and decrees of the Confederate States. Where such acts were in purported derogation of the rights of loyal citizens, the courts refused to give validity to them.³⁴ Where on the contrary such acts did not directly aid in the prosecution of the war by the Confederacy or were not in derogation of rights acquired by citizens of the Northern States, the courts recognized these acts as importing full validity. Thus one residing in Confederate territory during the war was held³⁵ not responsible to the owner of property destroyed by the defendant under compulsion of Confederate military forces. Contracts for payment of debts in Confederate money, the investment of trust funds in Confederate securities, Confederate money as good consideration for a contract, the creation by act of a Confederate legislature of a corporation capable of suing to recover property have all been upheld.³⁶

Exaction of custom duties at the port of Castine by the British military forces in control there during the War of 1812 was upheld³⁷ in the Supreme Court in an action brought subsequently by the American government to recover payment of American duties on the same goods. In *Keene v. M'Donough*,³⁸ an adjudication of title to lands in Louisiana made by a Spanish tribunal after the cession of Louisiana to the United States but before the United States had actually taken possession was sustained as "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."

In all these cases the court took cognizance of and gave full effect to the purported sovereign acts of the government actually exercising power and jurisdiction over the territory, the property or the persons affected, although in each instance the existence or the lawful jurisdiction of the foreign power was not recog-

³³ *Van Deventer v. Haneke* (1903, Sup. Ct.) Transvaal L. R. 401; *Lemkuhl v. Kock* (1903, Sup. Ct.) Transvaal L. R. 451.

³⁴ *Williams v. Bruffy* (1877) 96 U. S. 176.

³⁵ *Ford v. Surget* (1878) 97 U. S. 594.

³⁶ *Thorington v. Smith* (1869, U. S.) 8 Wall. 1; *Delmas v. Merchant's Mut. Ins. Co.* (1871, U. S.) 14 Wall. 661; *Planter's Bank v. Union Bank* (1872, U. S.) 16 Wall. 483; *United States v. Insurance Companies* (1874, U. S.) 22 Wall. 99; *Baldy v. Hunter* (1898) 171 U. S. 388, 18 Sup. Ct. 890.

³⁷ *United States v. Rice* (1819, U. S.) 4 Wheat. 246.

³⁸ (1834, U. S.) 8 Pet. 308. *Accord: Macleod v. United States* (1913) 229 U. S. 416, 33 Sup. Ct. 955.

nized by the other branches of the home government. An unrecognized foreign government does not necessarily exist in a judicial vacuum. To deny unqualifiedly the right or privilege of the unrecognized government to sue in our courts and at the same time to give full effect to some at least of its acts is logically inconsistent and unnecessary in practice.

Where, however, the acts of the unrecognized government are deemed to impair the rights of citizens of a friendly power or of the country whose courts are asked to give or deny effect to those acts, recognition of their validity will not be accorded. In *Luther v. Sagor* the lower court refused³⁹ to recognize the confiscation of British-owned goods by the then unrecognized Soviet régime; and it may be safely assumed that the decision would have been sustained on appeal if the Soviets had not in the meantime been recognized.

In *James & Co. v. Second Russian Insurance Co.*,⁴⁰ an action against a Russian company doing business in New York upon a policy of reinsurance, it was held that notwithstanding Soviet decrees dissolving the company and vesting its assets in the Russian state, the company was amenable to local process. "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". In fact the defendant company was still engaged in active business in New York, long after the decrees were put into effect in Russia. The court, by Cardozo, J., was careful to observe⁴¹ "We do not say that a government unrecognized by ours will always be viewed as nonexistent by our courts though the sole question at issue has to do with a transaction between the unrecognized government and a citizen or subject of a government by which recognition has been given". The court further held that although the responsibility of the company in Russian courts or under Russian law might be terminated by a Russian decree, this could not operate to terminate its responsibility abroad, "if assets of the debtor were available for seizure in the jurisdiction of the forum". Observing that this was a decree of confiscation, "neither comity nor public policy requires us to enforce a mandate of confiscation at the behest of such a government to the prejudice either of our own citizens or of those of any friendly power seeking justice in our courts".

In *Pelzer v. United Dredging Co.*⁴² the widow of an American citizen, who died intestate a resident of Mexico, was appointed

³⁹ (1921) 1 K. B. 456.

⁴⁰ (1925) 239 N. Y. 248; cf. NOTES (1925) 38 HARV. L. REV. 816.

⁴¹ 239 N. Y. at 255, 256, 257.

⁴² (1922, Sup. Ct. Spec. T.) 118 Misc. 210, 193 N. Y. Supp. 675, *aff'd* 200 App. Div. 646, 192 N. Y. Supp. 676.

administratrix by a Mexican court, and brought an action in the New York courts to recover on notes executed by an American corporation payable to the deceased. The government functioning in Mexico was at that time unrecognized in the United States. On motion the action was dismissed on the ground that no legal effect could be given to the appointment of plaintiff as administratrix by a Mexican court. Such a conclusion seems quite indefensible, provided adequate proof can be adduced of the acts of the foreign government.

There is another type of case in which courts properly refuse to give any effect to acts alleged to be those of an independent government, or refuse to recognize that in fact an alleged government is independent or is the successor of a government still recognized by the executive department. Portions of a nation's territory sometimes attempt to break away from the parent government and often successfully set up a local government which in fact exercises complete sovereignty in the revolting territory. Until the revolting power, however, is recognized as a new state, either by the foreign parent state or by our own government, our courts cannot directly or indirectly give any validity to its acts or recognize its existence as a government.⁴³ To do so would infringe upon the function of our executive or legislative department to determine who is the sovereign of any given territory, or would belie the official claims of the recognized foreign power to continued sovereignty over all its original territory.

Once the foreign government has been recognized, full validity is given⁴⁴ to its acts performed prior to recognition, even to acts which are in question in litigation pending at the moment of recognition. It is necessary to give retroactive effect in this respect to the act of formal acknowledgment of independent sovereignty.

*Luther v. Sagor*⁴⁵ was an action involving title to goods claimed by plaintiffs as the original owners in Russia against the defendants claiming title through seizure of the goods by the Soviet régime and purchase from it. The suit was brought, and the decision of the lower court was given, before any recognition of

⁴³ *Gelston v. Hoyt* (1818, U. S.) 3 Wheat. 246; *Rose v. Himely* (1808, U. S.) 4 Cranch, 241; *United States v. Hutchings* (1817, C. C. Richmond) 2 Wheel. Cr. C. 543; *Clark v. United States* (1811, C. C. A. 3d) 3 Wash. C. C. 101; cf. *Williams v. The Suffolk Ins. Co.*, *supra* note 17; *The Rogday* (1920, N. D. Calif.) 279 Fed. 130.

⁴⁴ *Murray v. Vanderbilt* (1863, N. Y.) 39 Barb. 140; *Underhill v. Hernandez*, *supra* note 12; *Oetjen v. Central Leather Co.*, *supra* note 12; *Ricaud v. American Metal Co.*, *supra* note 12; *Oliver American Trading Co. v. Mexico* (1924) Fed. Consent to suit may be withdrawn at any time, even as to existing litigation. *Beers v. Arkansas* (1857, U. S.) 20 How. 527; *Railroad Co. v. Alabama* (1879) 101 U. S. 832; *Ex Parte State* (1875) 52 Ala. 231.

⁴⁵ *Supra* note 38; (1921) 3 K. B. 532.

the Soviets by Great Britain. The lower court gave judgment for the plaintiffs and refused to give any effect to the Soviet decrees. While the case was on appeal, *de facto* recognition was accorded the Soviet government and the judgment of the lower court was reversed. Warrington, L. J., stated that the act in question "must in my opinion, be entitled to the same respect as the acts of a sovereign state, whether done before or after recognition".

We thus find the broad lines established that an unrecognized government (1) may not be subjected to direct suit over its objection, either because it has no existence as a legal entity⁴⁰ or if it is a definite entity, political or legal, because of comity disguised under the axiom that an independent sovereign is not answerable for its acts to a foreign court; (2) it may not sue in courts abroad because comity, which alone permits such suit, exists only when formal recognition has been accorded; (3) acts of such a régime will be in general accorded full effect and validity, where they do not involve spoliation or do violence to the public policy of the country where they are called in question, nor deny the necessary effect of existing formal intercourse; (4) recognition, once accorded, is retroactive to import conclusive validity to all acts done prior to recognition.

It may be suggested that further consideration of the essential requirements of comity may lead to a revision of the present view that an unrecognized government may not bring suit abroad, and that determination of the problem of giving effect to acts of an unrecognized government, when that state is not a party to litigation, must be left to a judicious weighing of the balance of considerations in each instance. This would involve a consideration of the practical result upon the respective rights and interests of the parties of giving or withholding recognition of validity, a contrasting of the public policy of the foreign state in such matters with that of our own government, and the practical convenience of proof of the *de facto* existence of the foreign state, its decrees, laws and judgments.

III.

How shall the fact of sovereign ownership or interest be established, and the plea of immunity properly presented to the court? If the suit is brought directly against the foreign state or personal sovereign, by designation of the defendant in terms which leave no doubt that a government or sovereign is being

⁴⁰ Cf. *Nankivel v. Omsk All Russian Government* (1923) 237 N. Y. 150, 142 N. E. 569, in which the Court of Appeals held that suit would not lie against an alleged political entity which by common knowledge had ceased to exist. "Whether alive or dead, no valid judgment could be obtained against it".

sued, it seems clear that the immunity may properly be asserted⁴⁷ by the defendant's attorney, even without official suggestion from the executive department of the jurisdiction of the suit, or without the necessity of the foreign state laying the claim through diplomatic channels. It would seem that even though the action is not against the sovereign in name but in interest, a suggestion by its attorney as *amicus curiae* should be sufficient; and such has been the practice in several well-considered cases.

In *Osborn v. The Bank of the United States*, Chief Justice Marshall observed:⁴⁸

"An independent sovereign cannot be sued and does not appear in court. But a friend of the court comes in and, by suggestion, gives it to understand that his interests are involved in the controversy. The interests of the sovereign, in such a case, and in every other where he chooses to assert them under the name of the real party to the cause, are as well defended as if he had been a party to the record".

In *Mason v. Intercolonial Railway*,⁴⁹ an attorney, appearing as *amicus curiae*, filed a suggestion for dismissal of the action and an affidavit of a Canadian government officer setting forth the foreign government ownership of the funds attached. On this suggestion the action was dismissed.

The executive branch of the government may,⁵⁰ however, *sua sponte*, make a suggestion of immunity to the court, it would seem (although such procedure would probably not be common practice), both because the executive is more likely to be first informed of the situation by representations of the government aggrieved, and because there is no reason for the executive to assume that the foreign government will necessarily refuse consent to suit. The government which is sued will in the majority of cases at once make representations to the executive and request that appropriate steps be taken to apprise the court of the defendant's objection to suit. In this country the State Department thereupon requests the Attorney General to designate the nearest United States attorney to appear in court at an appropriate occasion and inform the court that in view of the friendly relations maintained by the United States with the defendant government, it is in the interest of the continuance of such relations that process be vacated.

Greater difficulty arises when the proceeding is *in rem*, particularly in our admiralty courts. Since with us the ship is still regarded⁵¹ as an entity separate and distinct from her owner, it

⁴⁷ *Wulfsohn v. Russian Socialist Federated Soviet Republic*, *supra* note 21; *Oliver Co. v. Mexico*, *supra* note 14.

⁴⁸ (1824, U. S.) 9 Wheat. 738, 870.

⁴⁹ (1909) 197 Mass. 349, 83 N. E. 876.

⁵⁰ *Hassard v. United States of Mexico*, *supra* note 7.

⁵¹ *Cf. The Pesaro* (1921, S. D. N. Y.) 277 Fed. 473, and authorities there cited.

is but natural that our courts should require clear proof that the ship or property is government-owned and that immunity be affirmatively claimed by the proper person in an appropriate manner. These requirements are now more strictly applied than formerly; and this fact affords striking evidence of the tendency to limit immunity wherever possible.

In *The Maipo*,⁵² a suggestion of the ownership of the vessel by the Chilean government was made directly to the court by the Chilean chargé d'affaires; and immunity was requested. It was granted, and the court observed that it was not necessary for the suggestion to be made by an official of our government. In *The Adriatic*⁵³ the British Ambassador filed such suggestion and request directly in the court, through counsel; and the Circuit Court of Appeals, Third Circuit, affirmed the decree dismissing the libel.

In *The Attualila*,⁵⁴ however, the Circuit Court of Appeals for the Fourth Circuit had denied immunity to an Italian government vessel, because the State Department in filing a suggestion of the fact of requisition of the vessel and operation by the Italian government did not specifically request its release, even though the master of the vessel did object before the court to the assumption of jurisdiction. And in *The Florence H.*⁵⁵ immunity was denied to a vessel operated by the French government under charter from our own government, upon the ground, *inter alia*, that there was no suggestion from the State Department before the court.

The Supreme Court laid down certain rules in *Re Muir*⁵⁶ for appropriately presenting the claim. The case came to the court on a petition for mandamus or prohibition to prevent the District Court from exercising further jurisdiction *in rem* over a vessel operated by its private owner for the British government under the latter's requisition. Counsel for the British Embassy had presented to the District Court a suggestion to that effect, and the master had also objected to jurisdiction. The petition for relief was denied by the Supreme Court on the ground that the suggestion and claim had not been appropriately presented. The court said there were three ways in which this could be done properly: (1) for the government to appear in the suit, propound their claim and raise the jurisdictional question; (2) for its recognized representative to appear and take the same steps; (3) for the foreign government to make diplomatic representations to this end.

In *The Pesaro*,⁵⁷ the decree of the District Court dismissing

⁵² (1919, S. D. N. Y.) 259 Fed. 367.

⁵³ (1919, C. C. A. 3d) 258 Fed. 902.

⁵⁴ (1916, C. C. A. 4th) 238 Fed. 909.

⁵⁵ (1918, S. D. N. Y.) 248 Fed. 1012.

⁵⁶ (1921) 254 U. S. 522, 41 Sup. Ct. 185.

⁵⁷ (1921) 255 U. S. 216, 41 Sup. Ct. 308.

the libel against the Italian government-owned ship was reversed, on direct appeal, on the ground that under the rule enunciated in the *Muir* case, the direct suggestion of the Italian Ambassador to the court did not properly raise the claim.

In *Transportes Maritimos do Estado*,⁵⁸ the court held that the consul-general of a foreign government had no standing in court to raise the question of exemption; and in the *Gul Djemal*,⁵⁹ that a naval officer of a foreign government in charge of a vessel belonging to that government but chartered to a private carrier, likewise had no such authority. In the latter case the government concerned was that of Turkey, as yet unrecognized by the United States after diplomatic relations were broken off in 1917, but without declaration of war. The Spanish Ambassador, representing Turkish interests in the United States and recognized in that capacity by the State Department, had made the suggestion and request directly to the District Court, and had later suggested to the State Department that it suggest to the Attorney-General that the latter ask the vessel's release. To that the Department had replied:

"The Department has made it a practice carefully to refrain from taking any action which might constitute an interference by the authorities of this government in private litigation, even though such litigation may in some way involve merchant vessels owned by a foreign government. I therefore regret to say that the Department, in the light of the information before it, does not feel that it is in a position to take the action which you suggest".

In the *Pesaro*,⁶⁰ the State Department wrote the Court:

"It is the view of the Department that government-owned merchant vessels or vessels under requisition of governments whose flag they fly employed in commerce should not be regarded as entitled to the immunities accorded public vessels of war. The Department has not claimed immunity for American vessels of this character. In cases of private litigation in American ports involving merchant vessels owned by foreign governments, the Department has made it a practice carefully to refrain from taking any action which might constitute an interference by the authorities of this government in such litigation".

The situation thus presented is barren of results for the foreign government which desires to present its claim of immunity. (1) Neither the master of the ship nor the consular representatives have authority to assert exemption. (2) The ambassador, through counsel, may not appropriately raise⁶¹ the claim by direct suggestion to the court. (3) The ambassador must through

⁵⁸ (1922) 260 U. S. 151, 43 Sup. Ct. 15.

⁵⁹ (1924) 264 U. S. 90, 44 Sup. Ct. 244.

⁶⁰ *Supra* note 50, at 479.

⁶¹ Cf. *Osborn v. Bank of the United States*, *supra* note 47, where this procedure was specifically approved.

the State Department request immunity. (4) If the State Department refuses to exercise its good offices, the foreign government will be helpless, at least short of appearing formally in court and laying claim to the vessel as a prerequisite to asserting its immunity directly. Yet this procedure of formal appearance as a suitor may be with considerable propriety declined by the foreign government on the ground that it is equivalent to a recognition of the right of the court to assert jurisdiction over its property, for an alleged tort or breach of contract committed within the jurisdiction of the foreign claimant.

Some solution more logical and more practical must be worked out. At the present time local counsel for a foreign government must advise the ambassador that nothing short of diplomatic representation and a suggestion emanating from the State Department can now be safely relied upon.⁶² Yet the foreign government may be met by a refusal of the State Department to ask immunity in its behalf or to transmit to the court the sovereign's request for immunity for its trading vessel. The foreign state may refuse to go near the court in any manner, by general or special appearance, suggestion of counsel or otherwise. As immunity must be affirmatively claimed and may be waived, the ship will be condemned and sold. We shall then have a very pretty case to trouble the chancelleries and vex the "time-honored friendship of the two peoples". It is submitted that the State Department and the courts cannot go their separate paths, the one unmindful of the views of the other.⁶³ If the courts will now listen only to the executive, the latter cannot refuse at least to transmit requests. If the Department washes its hands of the whole business, short of libel of a war-ship, the courts cannot refuse to listen to the ambassador. The rulings and practices of the two branches of the government must gear together in order that the foreign state's claim to immunity may at least be presented to the Court for determination upon the merits.

⁶² In *Kunglig Järnvägsstyrelsen v. Dexter and Carpenter* (1924, D. C. Conn.) 300 Fed. 391, the plaintiff corporation, the government railway administration of Sweden, claimed immunity as against a counterclaim. Judge Learned Hand denied the immunity, holding that under the rule laid down by the recent Supreme Court decisions, where the party before the court is neither the sovereign nor his ambassador, the claim will not be recognized unless asserted through diplomatic intervention.

⁶³ See COMMENTS (1925) 35 YALE LAW JOURNAL, 98.