

the discussion and settlement of the problems relating to conventional tariffs, extraterritorial rights and foreign settlements in China, "is whether China now has a stable government capable of carrying out these treaty obligations." The nine-Power identic note of September 4th also admonished China of "the necessity of giving concrete evidence of its ability and willingness to enforce respect for the safety of foreign lives and property and to suppress disorders and anti-foreign agitations" as a condition for the carrying on of negotiations in regard to the desires which the Chinese Government has presented for the consideration of the treaty Powers.

GEORGE A. FINCH.

#### THE RUSSIAN REINSURANCE COMPANY CASE

In comments upon the later recognition cases, published in a recent issue of this Journal,<sup>1</sup> the present writer suggested that as an aid in determining the effect which courts may properly attribute to the acts, ordinances, or laws of an unrecognized *de facto* government, the formula that all matters of recognition are for the political departments to decide is of little use. Attention was directed especially to two recent opinions of the New York Court of Appeals<sup>2</sup> in which the formula's insufficiency had been indicated in language at once significant and illuminating. It was hopefully remarked that the realistic attitude revealed in these opinions would in all probability find expression sooner or later in a decision of sufficient importance to make a leading case. The comments containing the remark were hardly through the press before the anticipated decision had been rendered. The case was decided April 7, 1925, and is reported as *Russian Reinsurance Company v. Stoddard and Bankers Trust Company*.<sup>3</sup>

The facts in the Russian Reinsurance Company case were without precedent. The Reinsurance Company had been incorporated in Russia in 1899 under a special statute constituting its charter and by-laws. In 1906 it had obtained permission to do business in New York, depositing securities and funds of the company for the protection of local policyholders and creditors as required by New York law. In 1917 the revolutionary Soviet Government was established in Russia and seven of the eight persons constituting the company's board of directors were driven into exile. In 1918 Soviet decrees nationalized the company, confiscated its property, and apparently terminated its corporate existence.<sup>4</sup> Nevertheless, the exiled directors held meetings in Paris and continued to direct the company's

<sup>1</sup> "Recent Recognition Cases," this JOURNAL, Vol. 19, p. 263 (April, 1925).

<sup>2</sup> *Sokoloff v. National City Bank*, (1924) 239 N. Y. 158; *Fred S. James & Co. v. Second Russian Insurance Co.* (1925) 239 N. Y. 248.

<sup>3</sup> (1925) 240 N. Y. 149; 147 N. E. 703.

<sup>4</sup> In recent English cases it was argued before the House of Lords that Soviet nationalization decrees had terminated the corporate existence of Russian banks, but the House of Lords was not satisfied that the Soviet decrees were intended to have this effect. *Russian Commercial and Industrial Bank v. Comptoir d'Escompte de Mulhouse*, [1925] A. C. 112;

business outside Russia. In 1923, after the company's last reinsurance contract in the United States had expired, these directors proceeded to liquidate. They instituted the present suit in the company's name against the defendant Trust Company, with whom the Reinsurance Company's securities and funds had been deposited, joining the State Superintendent of Insurance as a party defendant, to compel the return of as much of the securities and funds as were no longer required to satisfy outstanding obligations. The Trust Company claimed no interest in the securities and funds except as trustee or depositary, but set up as a defence the Soviet nationalization decrees and contended that either the plaintiff corporation was no longer in existence, or was without capacity to sue, or was not represented by the persons claiming to be directors, and that the New York courts should not take jurisdiction because they could not give a judgment which would be binding upon other parties not before the court and who might thereafter establish valid claims.

The decision was for the plaintiff company in the lower court on the ground that the case justified no exception to the general rule that acts or decrees of an unrecognized government are to be regarded as nullities.<sup>5</sup> The Soviet Government remaining unrecognized by the United States, it was thought that in courts of the United States at least the existence and standing of the Russian company must remain unaffected by the Soviet decrees. The New York Court of Appeals repudiated this reasoning and reversed the decision. It was held, Crane, J., dissenting, that the court's inability by its judgment to protect the defendant Trust Company against a second recovery upon the same cause of action required the dismissal of the suit. Considerations of policy founded upon justice and common sense were invoked to justify the court in taking cognizance of conditions existing in Russia, although those conditions had been largely created by a government from which recognition had been withheld.

The Court of Appeals assumed that in the absence of recognition no court in the United States could regard decrees of the Soviet authorities as the lawful decrees of a recognized government would be regarded. It was pointed out, however, that the decrees of such a *de facto* authority may affect the rights, obligations, or capacities of a corporate plaintiff in ways which courts in the United States cannot justly ignore. While the Soviet decrees in the instant case could not be treated as having lawfully terminated the Reinsurance Company's corporate existence, it was nevertheless the fact that they had prevented the company from doing business in Russia, had taken the company's property in Russia and nationalized its business,

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Banque Internationale de Commerce de Petrograd v. Goukassow, [1925] A. C. 150. More recently a similar view has been taken by the German Court of Appeal (Kammergericht) of Berlin. *Juristische Wochenschrift*, June 1, 1925. Professor Dr. Leo Zaitzeff of the University of Berlin kindly called the author's attention to the German case.

<sup>5</sup> (1925) 207 N. Y. Supp. 574.

and had driven the company out, if it is possible to drive a corporation from its domicile without destroying it, from the country in which it was originally created. Since March, 1917, there had been no directors' meetings in Russia, as the charter provided, no elections or reëlections of directors, and no meetings of shareholders although the charter invested shareholders' meetings with important powers. The seven exiled directors in Paris had assumed sole management without direction or supervision. And the government chiefly responsible for this situation was not only *de facto* in Russia, but had been recognized by many if not most of the other countries of Europe. Even in France, where the exiled directors had been meeting, the Soviet Government had obtained belated recognition. In such circumstances, strict adherence to an inadequate premise would have accomplished no other purpose than to exalt conceptions above common sense and inappropriate juridical logic above the requirements of justice.

Delivering the opinion of the Court of Appeals, Judge Lehman said:

The situation is, not only without precedent, but anomalous. In its domicile the corporation cannot function; the government of the place where its directors sit has recognized as sovereign the government of the country of the corporate domicile which has issued a decree which either terminates the existence of the corporation, or at least has terminated the right of directors or shareholders to act for the corporation. Though we might say that for us such a decree is not the law even of the country which the Soviet government rules, yet it is enforced as the law in 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 sequestered, 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? Shall we recognize the right of the corporate directors to revoke the deed of trust and to receive property deposited thereunder, though their authority is no longer recognized in the country of the corporate domicile, or in the country where the directors reside; though they might probably urge the nonexistence of the corporation as a defense to any action brought by policyholders, creditors or stockholders in any forum which gives effect to the decree of nationalization made by the Soviet Republic; and the corporation will be immune from suit here after it withdraws from this jurisdiction? 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."<sup>6</sup>

The Court of Appeals concluded that it should refuse to take jurisdiction because of the injustice which might be done the Trust Company by an adverse judgment. Disregarding the possibility that the Soviet Government might be recognized eventually by the United States and after recognition present a claim to these securities and funds, and disregarding also the possibility that the corporation itself might repudiate the authority of the directors and seek to recover the funds, there still remained the substantial possibility of a second recovery against the defendant Trust Company in the courts of some foreign country where the Soviet Government had been recognized. While the courts of other countries would ordinarily respect the decisions of American courts, it could not be safely assumed that they would respect decisions "based upon somewhat doubtful inferences drawn from disputed facts and resting on a premise of who is the lawful sovereign of Russia which other jurisdictions are by their own public policy compelled to deny."<sup>7</sup>

In a notable passage, which may well come to be regarded as a classical statement of the relation between the political and the judicial function in matters of recognition, Judge Lehman said:

The fall of one governmental establishment and the substitution of another governmental establishment which actually governs, which is able to enforce its claims by military force and is obeyed by the people over whom it rules, must profoundly affect all the acts and duties, all the relations of those who live within the territory over which the new establishment exercises rule. Its rule may be without lawful foundation; but, lawful or unlawful, its existence is a fact, and that fact cannot be destroyed by juridical concepts. The State Department determines whether it will recognize its existence as lawful, and, until the State Department has recognized the new establishment, the court may not pass upon its legitimacy or ascribe to its decrees all the effect which inheres in the laws or orders of a sovereign. The State Department determines only that question. It cannot determine how far the private rights and obligations of individuals are affected by acts of a body not sovereign, or with which our government will have no dealings. That question does not concern our foreign relations. It is not a political question, but a judicial question. The courts in considering that question assume as a premise that until recognition these acts are not in full sense law. Their conclusion must depend upon whether these have nevertheless had such an actual effect that they may not be disregarded. In such case we deal with result rather than cause. We do not pass upon what such an unrecognized governmental authority may do, or upon the right or wrong of what it has done; we consider the effect upon others of that which has been done, primarily from the point of view of fact rather than of theory.<sup>8</sup>

EDWIN D. DICKINSON.

<sup>6</sup> 147 N. E. 703, 706.

<sup>7</sup> 147 N. E. 703, 708.

<sup>8</sup> 147 N. E. 703, 705.