

Washington University Law Review

Volume 12 | Issue 2

January 1927

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Recommended Citation

O. H. Thormodsgard and Roger D. Moore, *Recognition in International Law*, 12 ST. LOUIS L. REV. 108 (1927).

Available at: http://openscholarship.wustl.edu/law_lawreview/vol12/iss2/3

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RECOGNITION IN INTERNATIONAL LAW

BY O. H. THORMODSGARD AND ROGER D. MOORE*

IN GENERAL

International Law, as a body of rules regulating relations between states, must as law be concerned with facts and not hypotheses existing in the international world. From the standpoint of such law, a state logically assumes its relative position among other states according to its conformity with the international standards of statehood. Furthermore, courts of the various states in considering the ramifications flowing from the life of other states, must, as courts, be concerned with the facts of such life.¹

When the political department charged with the conduction of the foreign affairs of a government has given assurance by expression or implication to a new state in its exercise of the attributes of sovereignty, the courts as part of the same government need go no farther for proof of the new state's existence. But, when the political department has refused or neglected to give such assurance, and so to afford "recognition," the courts—pressed by the obvious need for intra-governmental co-ordination on the one hand, and by their basic obligation not to disregard the equitable and legal rights of persons and states on the other—must decide each case upon its particular merits in the light of *all* of its facts.

Such facts as interstate commerce and trade, the migration and naturalization of nationals, the exchange of mails, public notoriety of existing conditions, and particularly actual recognition of new governments by other well-established governments, cannot be overlooked in the judicial determination of the international situation of statehood. If the political department expressly disclaim the existence of a new government when in fact such a government does exist, there may very probably result legal miscarriage and equitable dilemma from which only a change in executive policy can bring extrication. If, on the other hand, political non-recognition constitutes basically a mere refusal to deal diplomatically with the new government, the courts may

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¹"So-Called De-Facto Recognition"—Thomas Baty, 31 *YALE LAW JOURNAL* 465. See also "The Juristic Status of Foreign States, Their Property and Their Acts"—Oswald K. Fraenkel, 25 *COLUMBIA REVIEW* 544.

act much more normally to substantiate such a policy of political non-intercourse without jeopardizing at the same time the rights and best interests of the persons concerned in the forum.²

Statehood is grounded in supreme civil authority of reasonable stability, established over a certain territory. When, in the international world, a government is reduced to impotency, that government must be considered as having ceased to exist in law as well as fact; the new government, if it be actually obeyed within the territory that it claims, is the only government that can be considered, for, even tho it be the usurper of a former sovereign, it does in fact go to make up a complete state. When, as the result of an insurrection, a part of a recognized state has broken away and established itself separate from the old, the new international entity may safely be considered as forming a state as soon as it becomes evident that the parent state harbors no present intent of retaking it.³

RECOGNITION AS A POLITICAL FACT

Fundamentally, the political fact of recognition exists when the government of an established state signifies its unreserved willingness, either expressly or impliedly, to treat with a new government. Recognition, altho generally *de jure*, may be simply *de facto*, in which latter case there almost invariably follows the political conundrum of *de jure* recognition. Recent examples of such a process are recorded in the *de facto* recognition of Russia by Great Britain in 1921, followed by *de jure* recognition in 1924, and in the *de facto* recognition of the Carranza Government in Mexico by the United States in 1915, followed by *de jure* recognition in 1917. Once made, recognition, whether *de facto* or *de jure*, relates back to the very inception of the new government.⁴

²"The Unrecognized Government or State in English and American Law"—Edward D. Dickinson, 22 MICHIGAN LAW REVIEW, Part V. The law as to recognized states is well established, but uncertain as to the unrecognized. 25 COLUMBIA LAW REVIEW 544. See also "Effect of Soviet Decrees in American Courts." 34 YALE L. J. 499.

³Kenneth v. Chambers, (1852), 14 How. 38, 46: the test of recognition is "a civil government in successful operation." HALL'S INTERNATIONAL LAW 8th ed., Part 11, Ch. I. HYDE'S INTERNATIONAL LAW (1922), pp. 55-82. I MOORE'S INTERNATIONAL LAW DIGEST. Sec. 79.

⁴See I MOORE'S DIGEST Sec. 72 for definition of recognition. Luther v. Sagor, 37 Times L. R. 777; Oetjen v. Central Leather Co., 246 U. S. 297; Underhill v. Hernandez, 168 U. S. 250. For redress left open, under treaty provisions see Oliver American Trading Company v. Government of the United States of Mexico, (1924) 5 Fed. 11, 659. A recent group of Texas cases follow these distinctions. See Ramos v. Bartlesville Zinc Co. 275 S. W. 388; Terrazas v. Holmes, 275 S. W. 392; Terrazas v. Donahue, 275 S. W. 396—all decided in June, 1925. Also Bradford v. Director-Gen'l of Railways of Mexico, 278 S. W. 251 (Nov. 19, 1925).

Recognition may arise in a number of ways. Probably the most common method is thru mere diplomatic communications, as when in 1915 President Wilson recognized the Carranza Government in a letter to the American *chargé d'affaires* in Mexico.⁵ One way is thru the opening of negotiations calculated to lead to the conclusion of a treaty, as when in 1871 an American consul was instructed by his government to negotiate a treaty with the Orange Free State.⁶ Another is thru the accrediting of a diplomatic representative or consular agent to a new government, as when in 1826 the independence of Peru was recognized by the appointment of a *chargé d'affaires* by the government of the United States.⁷ Or, it may result from the receiving of a diplomatic representative from the new government, as when in 1793 the United States received without reservation M. Genet as Minister from the French Republic.⁸ In a few instances recognition has been accorded by a collective treaty, as when by the Treaty of Berlin of 1878. Great Britain, Germany, Austria, France, Italy, Russia and Turkey joined in the recognition of Montenegro, Servia, and Roumania as independent states.⁹

THE UNRECOGNIZED STATE IN BRINGING SUIT

The early cases of *City of Berne v. Bank of England* and *Taylor v. Barclay* are frequently referred to as having involved the right of unrecognized states to sue, as well as the status of *de facto* unrecognized states in the courts, altho relief was in reality denied plaintiffs in these suits on purely equitable grounds distinctly aside from the effect of recognition.¹⁰ Altho, as a general rule, English and American courts have bound themselves to the action—or lack of action—of the executive as regards recognition, and have refused to permit the government of a new state to bring suit before them in the absence of a political recognition, there have been instances in which they have undertaken to take proof of *de facto* authority.¹¹

⁵ SENATE DOCUMENT 324, 64th Congress.

⁶ 1. MOORE'S DIGEST, 116.

⁷ 1. MOORE'S DIGEST, 92.

⁸ 1. MOORE'S DIGEST, 122.

⁹ Articles 26, 34, and 43, Treaty of Berlin Nouv. Rec. Gen. 2 ser 111, 458, 460. In the Treaty of Versailles (Br. Cmd. Paper 223), Poland and the Czechoslovak State were recognized.

¹⁰ 9 Ves. Jr. 348 (1804) and 2 Sim 213 (1828), respectively. See also *Dolder v. Bank of England*, 10 Ves. Jr 353 (1805); *King of Spain v. Oliver*, Cir. Court of Penna. (1810) Fed. case No. 7814, *The Hornet* (1870) Dist Ct. pf N. C. No. 7814. There is dicta denying the right to sue in *Republic of Honduras v. De Soto*, (1889) 112 N. Y. 310; *The Sapphire* (1871) 11 Wall. 164; *Emperor of Austria v. Day* (1861) 3 De G. F. & J. 217.

¹¹ *Yrissari v. Clement*, (1826) 2 Bing. 432; *O'Neill v. Central Leather Co.* (1915) 87 N. J. L. 552; *United States v. Palmer* (1818) 3 Wheat. 610.

And yet in the recent case of *Russian Soviet v. Cibrario*,¹² which was brought by the Soviet government in the New York courts to procure an accounting of Soviet funds deposited in a New York bank by defendant and alleged to have been subjected subsequently to his misappropriation, it was held in line with the old rule as expressed in *Rose v. Himely*,¹³ that without having been recognized the court could not under the principle of comity permit the *de facto* government to bring suit.

Such a decision, it is submitted, tends to carry functional doctrine beyond its logical application. Had the Soviet government been attempting to secure or exert control over property of a preceding government or of a government with which it was contending, it should have failed to secure standing in the court, because in deciding title in such cases a court would in fact be determining a political issue, and in so doing might embarrass the executive in the carrying out of his policies.¹⁴ Several Federal courts sitting in admiralty have readily recognized such a distinction. In the recent cases of *The Pensa* and *The Rodjai* the unrecognized Soviet government was not permitted to enforce property rights vested in the destroyed régimes that had preceded them.¹⁵

A distracting effect in the complexities of modern civilization of trying to follow the archaism of delayed recognition, which for obvious reasons was quite gratifying to nobilities under the system of the divine right of kings, is evident in *The State of Russia v. Lehigh Valley Railroad Company*.¹⁶ In that case, begun and prosecuted in 1923 after the Kerensky government had fallen, by a diplomatic representative of that government which had been recognized before the fall, to recover the value of property lost while in the custody of defendant company, proceedings were permitted to continue to a recovery by plaintiff, although it was evident that the existing government in Russia would disclaim the activities of that representative on the grounds that they had not authorized him to act for them. It is highly illogical, at least, to attempt to adhere to the holding of the court that the representative who prosecuted the suit really represented the State of Russia because our State department had recognized no other government than his, when we recall that one of the fundamental requisites of statehood is a government reasonably stable and actually existent *in fact*, not merely in memory.

Such an action as this could have been prosecuted with both the Russian people and the defendants well protected, by an appointee of the

¹² 235 N. Y. 255 (1923).

¹³ 4 Cr. 241 (1808).

¹⁴ 31 YALE L. J. 534.

¹⁵ 277 Fed. 91 (1921), and 278 Fed. 294 (1920).

¹⁶ 293 Fed. 135 (1923).

court, such as a receiver, with instructions upon its successful culmination to hold the proceeds in trust until some government of Russia should be recognized by the President of the United States.¹⁷

THE UNRECOGNIZED STATE AS DEFENDANT

From its position of international eminence, the Permanent Court of International Justice has shown no inclination to relegate unrecognized States to a standing before it inferior to that of recognized States. Rather, in one instance it has already premised its reasoning as a distinctly contrary assumption of equality. In replying to a request of the Council of the League of Nations for an opinion concerning the legal effect of certain treaty provisions in the Treaty of Dorpat between Finland and Russia, the Court resolutely declined to take jurisdiction, even in an advisory capacity, inasmuch as Russia had refused to appear. It should be noted that at that time Russia, aside from not being a member of the League of Nations, had been recognized only by Afghanistan, Esthonia, Finland, Germany, Persia, Poland, and Turkey,—a group forming roughly a mere tenth of the states of the world, and including but one first-rate power (Germany), which was even then laboring under heavy international handicaps.

"It is well established in international law," the Court declared, "that no State can, without its consent, be compelled to submit its disputes with other States either to mediation or to arbitration or to any other kind of pacific settlement."¹⁸

Based upon reciprocity and mutual convenience, international law grants immunity from suit to a sovereign in foreign courts without expressed submission, even as he reserves it to himself in his own courts.¹⁹ But, as was pertinently remarked in *The Pesaro*, if the sovereign himself give no immunity in his own courts there should be no reason to invoke the doctrine of comity to protect him in the courts of another country.²⁰

In the absence, however, of any such disregard of the accepted practices of international intercourse, immunity from suit is generally considered as correlative with sovereignty. And so it would seem that in

¹⁷ Late case comment 23 COLUMBIA L. R. 787; also 25 COLUMBIA L. R. 551.

¹⁸ PUBLICATION OF THE PERMANENT COURT OF INTERNATIONAL JUSTICE, Series B, No. 1.

¹⁹ For the history and principle of such immunity see *United States v. Lee* (1882) 106 U. S. 196. *The Helena* (1861) 4 C. Lab. 4 where a vessel had been confiscated by the Barbary States: "although their notions of international justice differ from those we entertain, we do not on that account venture to call in question their public acts." See also *The Exchange* (1812) 7 Cr. 116, and *Kansas v. United States* (1907) 204 U. S. 331.

²⁰ Note (15) *supra*. As to the tendency toward exceptions see "Private Claims against Foreign Sovereigns"—Alfred Hayes, 38 HARVARD L. R. 599.

Wulfsohn v. Soviet,²¹ wherein defendant appeared under protest and secured the vacation of an attachment which had been made upon certain of its goods for an alleged confiscation of a quantity of plaintiff's furs in Russia, service having been had upon a commercial representative of the Soviet, the court acted most sensibly. An unrecognized *de facto* government should be entitled to the same immunities from suit that a recognized government would enjoy under the same circumstances. Assuredly, recognition cannot create a government any more than the breaking off of diplomatic relations once established can abolish it.²²

It goes without saying, that, as was noted in *Naukiviel v. Omsk All Russian Government*, no action can be brought against a defunct government.²³

In general, the immunity from suit to which a foreign government, whether recognized or not, is entitled, may be waived by active participation of that government in a suit brought against it.²⁴ The best law in both England and the United States seems to be that even a general appearance is not a waiver of such right when it is followed by an answer specifically raising the question of immunity.²⁵ Of course, a special plea to the jurisdiction effectively raises the privilege of immunity.

PRIVATE RIGHTS AS AFFECTED BY THE ACTS OF AN UNRECOGNIZED GOVERNMENT

Obviously, care must be taken to tread lightly in implying validity to the acts of any group of irregulars insecurely established. And yet, if, in fact, a foreign government is found to exist, the courts of no country, except perhaps those of a jealous parent, can be expected in the face of private rights to apply a political shibboleth to the acts of the *de facto* government within its own territory. To be asked to do so should startle them to emphatic refusal. The action of the lower court in the well-known case of *A. M. Luther v. James Sagor & Co.*,²⁶ it is submit-

²¹ 234 N. Y. 372 (1923).

²² *Underhill v. Hernandez*, note (4) *supra*. The *Helena*, note (19) *supra*. See comment 25 COLUMBIA L. R. 555.

²³ 237 N. Y. (1923).

²⁴ *Clark v. Barnard* (1883) 108 U. S. 436. *Porto Rico v. Remas* (1914) 232 U. S. 627. See "Waiver of Immunity by a Foreign Sovereign" 33 YALE L. J. 418, for numerous citations. Yet, no affirmative judgment may be recovered by defendant on a counterclaim against sovereign Plaintiff. *Irish Free State v. Guaranty Safe Deposit Co.* 215 N. Y. S. 255, Mch. 13, 1926.

²⁵ *Duke of Brunswick v. King of Hanover* (1844) 6 Beav. 1; *The Jassy* (1906), *DeSimone v. Transpostes Martimas* (1922) 191 N. Y. Supp. 864. The Federal court held *contra* in *The Sao Vicente* (1922) 281 Fed. 811, and (1924) 295 U. S. 829.

²⁶ Note (4) *supra*.

ted, in disdaining to consider title to certain lumber as having passed in Russia under a confiscatory decree of the Soviet previous to either *de facto* or *de jure* recognition by the British Government, was decidedly out of harmony with the principle that the acts of a government within its own territory are not to be questioned by the courts of another country. If such a decision be set up as criterion, the purchaser of property subsequent to its confiscation by a *de facto* government could maintain his title as against the original holder in a country which had recognized that government, but would be restrained from doing so in a country which had not so acted in its political capacity,—regardless on the one hand of certain detriment to *bona fide* transferees, and on the other of impotence to affect the “unrecognized” government, toward which the political branch might then be unfriendly *but not at war*.²⁷

Subject to the decided trend of the American decisions toward the presumption that the local law under which either party claims is identical with the *lex fori* in the absence of proof to the contrary, a foreign law—when material to the merits of a case—must be specifically pleaded wherever the *lex fori* requires other facts under like circumstances to be pleaded.²⁸ According to another principle of Conflict of Laws, a court should in order to work substantial justice, overlook the more technical peculiarities of a foreign system of law as compared to the domestic law.²⁹ This, of course, is fundamental to any functional appraisal of related acts or transactions occurring in two or more jurisdictions. Exceptions to the general doctrine requiring the recognition and enforcement by a domestic tribunal of foreign-created rights may well be applied to recognized and unrecognized governments alike, for such exceptions merely assert, upon the grounds of equity, that foreign law should not be considered when the enforcement of rights created by it would contravene established state policy, tend to disturb the *mores* of the people, or subvert the dispensation of justice as conceived in the forum.³⁰

A group of cases arising in the Federal courts out of transactions

²⁷ 25 COLUMBIA L. R. 549; 22 MICH. L. R. 130; Case Comment 35 HARVARD L. R. 607 & 619; 31 YALE L. J. 82. For power of an American court to take jurisdiction over contracts made in Russia and providing for exclusive jurisdiction of Russian courts see *Sliosberg v. New York Life Insurance Co.* (1925) 211 N. Y. S. 270.

²⁸ MINOR, CONFLICT OF LAWS, Part VIII, and cases cited. FOOTE, PRIVATE INTERNATIONAL LAW, 5th ed. Part IV. See *Agency of Canadian Car & Foundry Co. v. American Can Co.* (1918) 258 Fed. 152.

²⁹ MINOR, Part 1. Note (27) *supra* also.

³⁰ MINOR, Ch. 11. See *Loucks v. Standard Oil Co.* (1918) 224 N. Y. 99; and *Powell v. Great Northern Railroad Co.* (1907) 102 Minn. 448. See also Beale “The Jurisdiction of a Sovereign State,” 36 HARVARD L. R. 241, for discussion and numerous cases.

which had taken place within the Confederate States during the Civil War were settled upon these rules, and can, therefore, be utilized, if indeed they have not since been followed, in adjusting similar difficulties resulting at the present time from acts done within the territory of non-recognized *de facto* governments.³¹

In *Baldy v. Hunter*,³² for example, it was held that transactions not directed to the furtherance of invasion or insurrection between persons actually residing within the territory dominated by the Confederate Government were not invalid because they had taken place under the sanction of the laws of that government. As was stated in this case, it logically follows that acts dealing with the preservation of order, the enforcement of contracts, the celebration of marriages, the punishment of crimes, the settlement of estates and the transfer and descent of property, when done under the control of *de facto* governments existent in the international world, whether they succeed in maintaining themselves perpetually or not, should be valid in the eyes of the courts of other governments.³³ Even under a system of laws different in many respects from the laws of other states, but enforced and obeyed under civil penalty over a fixed territory, as in Russia,³⁴ personal rights and personal status created by the law of such a government even though unrecognized, should, unless *contra bonos mores*, be considered as valid and binding elsewhere.³⁵ As a principle of municipal law, laws promulgated under a previous régime continue even after a change in sovereignty or in government unless abrogated or modified by competent legislative authority.³⁶ The apt words of Chief Justice Marshall in *United States v. Percheman* as regards the effect of such change are applicable to the precepts of our day: "The people change their allegiance, their relations to their ancient sovereign are dissolved, but their relations to each other and their rights of property remain undisturbed."³⁷

At best, fictions have served in transitional stages of legal development. The extremities to which they can be put are evident in a re-

³¹ *Thorington v. Smith*, 8 Wall. 1; *Williams v. Bruffy*, 96 U. S. 176; *Limar v. Micou*, 112 U. S. 452.

³² 171 U. S. 388.

³³ *United States v. Insurance Companies*, 22 Wall. 99; *Mauran v. Insurance Co.*, 6 Wall. 1.

³⁴ For the Civil Code of Russia see 10 VIRGINIA L. R. 337, and 32 Yale L. R. 779.

³⁵ "The Soviet Government and Russian Property in Foreign Countries"—Norman Bertwich, BRITISH Y. B. I. L. (1924) p. 78. Note also *The Helena*, (19) *supra*. For the French practice: *Pillet Traite pratique de Droit International Privé* (1924), TOME 11, Appendice "Des actes de l'état civil."

³⁶ 1 HYDE, INTERNATIONAL LAW, pp 199-238. See particularly *Commonwealth v. Chapman* (1848) 13 Metc. 68.

³⁷ 7 Peters 51 (1833).

view of decisions concerned with the effect of certain Soviet decrees upon the status of Russian corporations possessing branches in foreign countries. Apparently there has been no accord in the courts outside Russia as to whether these decrees have merely provided for the confiscation of the Russian assets of the corporations, or have gone so far as to actually dissolve their legal existence everywhere.³⁸

In a recent English case it was held that they had not dissolved a branch bank in England, which consequently was permitted to sue and recover bonds held by a French bank.³⁹ In a French case decided in 1922, the fact that the board of directors of a Russian bank nationalized by such decrees were meeting in France and conducting the affairs of the bank from that country, was considered as not inconsistent with the theory that the laws of the old régime had not been displaced by the Bolshevik revolution. That upheaval, the court maintained, had operated merely as a *force majeure* in changing the *siege* of the corporation but not in giving cognizable effect to the change in sovereignty, or in rendering valid the decrees of the new sovereign, although the old was defunct.⁴⁰ On the other hand, the highest court of Switzerland has held in a case arising in that country, that the effect of the decrees had been totally to destroy the legal existence of the Russian banks, and to render their local assets subject to immediate liquidation.⁴¹

As to the United States: In *James & Company v. Second Russian Insurance Company*⁴² the court refused to give effect to such decrees, and in *Russian Insurance Company v. Stoddard* held that neither necessity nor justice required the court to consider that such decrees had destroyed the right of plaintiff company to sue before it. For equitable reasons, however, plaintiff in the latter case was not permitted to recover because, as the court said, injustice might be worked on defendant by a subsequent suit upon the same cause of action in countries which had recognized the Soviet.⁴³

³⁸ For comment upon a considerable number of these cases see 37 HARVARD L. R. 606, BRITISH Y. B. I. L. (1924) p. 78; FOOTE'S PRIVATE INTERNATIONAL LAW, 5th ed. p. 658, and 25 COLUMBIA L. R. 564.

³⁹ 1925 A. C. 112. For the Russian bank cases in England see FOOTE'S PRIVATE INTERNATIONAL LAW pp. 656-661; also BRITISH Y. B. I. L. (1924) p. 78.

⁴⁰ *Vlasto c. Banque Russo-Asiatique*, Tribunal de Commerce de la Seine, 50 Clunet 933. See PILLET, TOME II. Sections 736, 737, 379, 750, 754, particularly p. 836. "Il faut naturellement que ces sociétés justifient de leur existence dans le pays étranger ou elles ont été fondées." Cass. civ. 7 févr. 1912 in Dumas c. Diéndossé et al., 39 Clunet 871.

⁴¹ *Heusuer c. La Banque International du Commerce de Petrograd* (1924) arrêt de la Tribunal Federal Suisse, Vol. 50, p. 507.

⁴² 239 N. Y. 248.

⁴³ 240 N. Y. 149. See also *Joint Stock Co. v. National City Bank of N. Y.*, 240 N. Y. 368, wherein it was held that nationalization had not terminated plaintiffs' corporate existence.

Subject to the rule that for certain purposes a corporation may exist in fact, it would hardly seem that such a body could be extinguished in the jurisdiction in which it had been created and yet continue to live in another jurisdiction for an appreciable period of time. If, on the other hand, a corporation or unincorporated association, be suppressed in the jurisdiction of its origin only to continue to live by reincorporation or otherwise under the laws of another jurisdiction, there is no reason why the continuity of certain of its rights of property under the laws of a third jurisdiction should be denied.

The English case of *Ley v. Lecouturier* is in point. There defendant, who had been made the receiver under the laws of France of an order of monks subsequent to the Law of Associations dissolving that order which had possessed patents under English law for a well-known brand of liquor manufactured under secret process, was enjoined, upon suit by a representative of the order, which had meanwhile removed to Spain, from transporting into England the same brand of liquor made without the secret process. The court observed that the French law of dissolution could not have been meant to affect in England the rights of the order, which in reality had continued to live in Spain.⁴⁴

In brief, it is to be expected that once the facts clearly show a foreign government, however new, to be exerting effective control over a people, the courts of all civilized countries will be moved in response to juristic principles to recognize practically all the private rights arising under the laws of that government, irrespective of political recognition. We note with little surprise, then, that in the interesting case of *Kedrovsky v. Rajdesvensky*, recently adjudicated, the Appellate Division of the Supreme Court of New York, in reversing the finding of the lower court, ousted the appointee of the Russian Orthodox Church under the Czarist régime from control of the property of that church in the United States, despite his resistance and protest, and established in his place a new appointee holding a commission issued by the reorganized church in Russia then functioning under the Soviet Government.⁴⁵

⁴⁴ 1910 A. C. 262. For discussion of this case see FOOTE'S PRIVATE INTERNATIONAL LAW, 5th ed. p. 656.

⁴⁵ N. Y. Sp. T. Sup. Ct., 1924; reported reversed in 212 N. Y. Supp. 273.