

## 2) Supreme Court, New York County.

i) Irish Free State et al v. Guaranty Safe Deposit Co. et al.  
May 11, 1927. (222 N. Y. S. 182.)

Staatensukzession — De-facto-Regierung.

1. Die sogen. »irische Republik« war keine de-facto-Regierung.
2. Die Regierung des irischen Freistaats ist direkte Nachfolgerin der Regierung von Großbritannien und Irland.
3. Gelder, die für eine erfolglose revolutionäre Organisation gesammelt wurden, stehen der darauffolgenden de-jure-Regierung nicht zu.

Klage des irischen Freistaats auf Herausgabe von Geldern, die zur Errichtung einer unabhängigen irischen Republik gesammelt und beim Beklagten deponiert worden waren. Der Irische Freistaat behauptet, der Nachfolger der Organisation zu sein, die sich (vor Errichtung des Freistaats) »irische Republik« nannte.

Das Gericht *entscheidet*, daß die revolutionäre Organisation, für die das Geld gesammelt wurde, niemals eine de-facto-Regierung dargestellt habe, daß sie vielmehr eine Rebellen-Gruppe gegen die damals noch bestehende de-jure-Regierung von Großbritannien und Irland gewesen sei, deren unmittelbare Nachfolgerin die Regierung des irischen Freistaates sei: es könne unmöglich angenommen werden, daß die neue, mit Zustimmung von Süd-Irland durch England eingesetzte Regierung die Nachfolgerin einer gescheiterten revolutionären Organisation sei, der es nicht gelungen sei, als de-facto-Regierung die de-jure-Regierung zu ersetzen; die neue Regierung sei die unmittelbare Nachfolgerin der bis zu ihrer Einsetzung bestehenden Regierung von Großbritannien und Irland.

Wäre eine de-facto-Regierung zustande gekommen, so wäre der irische Freistaat in der Tat deren Nachfolger geworden, denn eine de-facto-Regierung, die eine de-jure-Regierung ersetzt, ändere zwar die Natur der Regierung, aber unterbreche nicht die Nachfolge.

Aber auch wenn der Kläger als Nachfolger der Rebellen-Gruppe anzusehen wäre, so wäre dieser Anspruch ein *derivativer*, und in solchem Fall müsse der irische Freistaat auch die *Verpflichtungen* des ursprünglich Berechtigten (aus den Anleiheverträgen mit den Geldgebern) übernehmen; dies habe der Kläger nicht getan.

Ein *selbständiger* (paramount) Anspruch könne hier nicht bestehen, da hierzu nötig wäre, daß die Gelder aus der Staatskasse Englands als der Staatskasse der Regierung zur Zeit der Erhebung der Gelder oder der des irischen Freistaats stammten. Beides sei nicht der Fall.

Die einzige Regierung, die auf die Gelder Anspruch erheben könne, sei die britische (gegen die die Rebellion gerichtet war), und es sei nirgends ersichtlich, daß diese einen Anspruch erhoben oder ihn an den Kläger abgetreten hätte.

So stehe dem Freistaat kein Anspruch zu; es sei aber kein Grund  
des Völkerrechts Bd. 2), Kiel 1926; *Sépulcre*, Inst. belge de droit comparé (Rev. trimestrielle) Bd. 12, 1926, S. 65; Yale Law Jour. Bd. 34, 1925, S. 328; Solic. Jour. Bd. 72, 1928, S. 5; Houghton, Am. Law Rev. Bd. 62, 1928, S. 228 u. a.

mehr vorhanden, die Gelder dem Beklagten zu überlassen. Das Gericht ordnete die Verteilung der Gelder unter den ursprünglichen Geldgebern im Verhältnis ihrer Beiträge an, die mit Erlaubnis des Gerichts eine entsprechende Eingabe gemacht hatten.

Aus den Gründen: Peters, J. "This is an action in equity; wherein the plaintiff Irish Free State seeks a judgment adjudging that it is the owner of and entitled to the possession of funds and property hereinafter described, and that the defendants Stephen M. O'Mara and Eamonn De Valera render an account of said funds and property, together with an account of all other funds and property received by them under a certain trust agreement. The funds and property in question consist of moneys on deposit with the defendant Harriman National Bank and certain securities contained in safe-deposit boxes, all within the jurisdiction of this court. Said funds and property represent the proceeds of the balance of subscriptions to two certain loans of an organization which was seeking to set up by force in Ireland a republic of Ireland, which would be free and independent of any allegiance whatsoever to the government of Great Britain and Ireland. Sums aggregating something over \$ 6 000 000 were subscribed by citizens or inhabitants of this country. The greater portion of the amounts subscribed was transferred to Ireland and used for the purposes for which they were subscribed. The balance not so transferred amounts in the aggregate to approximately \$ 2 500 000, and it is this balance which is the subject of this action.... (Die Art der Sicherung der Anleihe wird beschrieben.)

The uncontradicted purport of the testimony is to the effect that these moneys were loaned for the purpose of establishing a free and independent republic of Ireland. It is admitted, of course, that no such republic was established, and the court must now determine in this action the title to these unexpended moneys.

The plaintiff Irish Free State claims possession of the funds by title paramount, contending that it succeeded the organization called the 'Irish republic', whether this court decides that such organization constituted a de facto government, or whether it was merely an organized rebellion against the authority of the duly constituted government of Great Britain and Ireland. The defendant trustees deny that title, and claim that they have a right to continue in possession of the funds.... (Die Eingaben der Ausschüsse der Geldgeber werden dann beschrieben.)

(Geschichte der Revolution): By the Act of Union of 1800, enacted by the King and Parliaments of Great Britain and of Ireland, Ireland formed a part of the United Kingdom of Great Britain and Ireland, with one parliament called the Parliament of the United Kingdom of Great Britain and Ireland, consisting of a House of Lords and a House of Commons, and sitting at Westminster, England. From time to time efforts were made by some of the people of Ireland to establish a free nation, at times by parliamentary means, and at other times through armed resistance to the government. The events upon which

the decision of this case must be founded began on April 24, 1916, when there occurred in Dublin what is known in Irish history as the 'Easter uprising', by an armed force known as the 'Irish volunteers'. Independence was declared and the republic of Ireland proclaimed. This uprising was short-lived, being sternly suppressed by the military forces of the British government. The Irish volunteers continued in existence, reorganized their forces, and engaged in Irish political activities.

In or about 1918 an Irish political party, known as the 'Sinn Fein Party', adopted the policy of sending forward candidates for parliamentary elections in Ireland on a pledge that, if elected they would not attend the Parliament at Westminster, but would assemble in Ireland and constitute themselves a parliament for Ireland, and as such would take over the government of the country. In December, 1918, the British Parliament was duly dissolved, and new elections were ordered for members in the House of Commons. At this election the constituencies in Ireland were entitled to elect 105 members to the House of Commons to sit in the British Parliament. The Sinn Fein party took advantage of the election machinery to elect candidates who had pledged themselves as aforesaid. All members elected at said election in Ireland were summoned to a meeting to be held at the official residence of the Lord Mayor, known as the 'Mansion House', in Dublin on the 21st of January, 1919. This summons was issued pursuant to the aforesaid pledge made by the Sinn Fein candidates, and all of the elected Sinn Fein candidates, except those who were in the custody of the British military forces or abroad on political missions, assembled at the appointed place on January 21, 1919, and constituted themselves a Parliament for Ireland, to which they gave the name of 'Dail Eireann'. This parliament or assembly will be hereinafter called the 'First Dail'.

The majority of candidates elected in constituencies other than Sinn Fein candidates were elected for seats in so-called Northern Ireland, and these members did not attend the meetings of Dail Eireann. This First Dail issued a proclamation of independence, adopted a provisional constitution and standing rules and orders, and set up a ministry, and attempted to perform varied governmental functions in Ireland. This Dail on April 1, 1919, elected the defendant De Valera Prime Minister, and on April 10, 1919, authorized a loan of £ 1 000 000, £ 500 000 to be offered for immediate subscription, £ 250 000 for subscription at home and £ 250 000 for subscription abroad. The plaintiff Rev. Michael Fogarty, the defendant De Valera, and one James O'Mara were appointed trustees for one year for the funds to be raised and subsequently executed a trust agreement in respect of such funds. A further loan of £ 23 750 000 was authorized by the Dail in August, 1919. The trustees were reappointed for the succeeding year. After the formation of the Dail Eireann organization, the military forces of the British government became active in the work of suppressing the revolt. The activities of the First Dail will now be noted. This Dail set up ministries and a civil service for offices.

A force of unpaid volunteers was maintained, any members of which, captured by the British in action, or with arms, even if not in action, were almost invariably executed after summary military trial. The force was small and active, and because it was small it had to strike frequently at different points. Its real nature, however, is shown by the testimony that it was housed, fed, and *concealed* by the population generally. Courts were set up, which in fact first became effective after the treaty hereinafter mentioned. The British local boards were largely ousted. The Dail organization maintained no post offices, printed no stamps, exercised no supervision over railroads, which were maintained by the British government, issued no money or currency, had no school system, and raised no taxes. It maintained a secret police force, appointed consular agents who had no official status in the countries to which they were sent. It set up a land commission and passed decrees.

The uncontradicted testimony is that throughout the period of the First Dail and the hereinafter described Second Dail, and until the treaty hereinafter mentioned, though persons were appointed to ministerial positions and staffs were appointed to help them, it was impossible for them to have any permanent location, for the reason that during the entire period every one connected with the Dail was hunted down by the British, and all office equipment was of a portable character capable of instantaneous removal at the approach of the British military forces. An entire department might find it necessary to make a hurried removal through a skylight or down a drainpipe at a moment's notice.

The courts tentatively set up were, like the ministry, continuously 'on the run'. They sat in private houses, sometimes in fields, cellars, and wherever it was possible to congregate for a sufficient length of time. The Dail did not maintain jails. Occasionally persons were held by the Dail authorities, but only for short periods, and they generally had to be 'on the run' with their captors. Records were always in danger of seizure. This Dail organization was never recognized by any foreign country.

Another indication of the nature of the Dail organization, upon the question whether it was a *de facto* government, is apparent from a provision in the trust deed, before mentioned, which devolved the duty of disbursing the Dail funds upon the trustees or 'such of them as may be free to act' in the event that neither a quorum of the Dail or the ministry were available or able to meet. From all the foregoing, it is apparent that the Dail organization was never a *de facto* government, but simply an organization fostering a rebellion or revolt against the British government in Ireland.

In an attempt to bring peace and quiet to the Irish People, a statute called the 'Government of Ireland Act' was enacted by the King and Parliament of Great Britain and Ireland in the year 1920, which was designed to confer upon Ireland a measure of home rule. This act provided for a separate government for the six counties and two boroughs in the northeast of Ireland, defined in the act as Northern Ireland, and

a separate government for the rest of Ireland, defined in the act as Southern Ireland. To make this act effective, elections were ordered for the election of members of the parliaments of Northern and Southern Ireland, respectively, by a proclamation of the King of England, to take place in May and June, 1921.

The First Dail adopted a resolution to the effect that said election should be regarded as an election of members to the Dail, and that that body would automatically dissolve on the meeting of the new body. In other words, the De Valera organization again took advantage of the British election machinery in Ireland for the election of members to a new assembly, which is hereinafter called the Second Dail. Candidates of the Sinn Fein party made the same pledges as in the election of 1918. Candidates elected were summoned to meet at the Mansion House, Dublin, and on August 16, 1921, 120 members elected on a Sinn Fein program assembled at the appointed place and constituted themselves the Second Dail Eireann under the constitution adopted by the First Dail. Candidates elected to the House of Commons and to the Senate for Northern Ireland made and constituted a government under the aforesaid Government of Ireland Act. The Parliament of Southern Ireland, which was provided for by said act, was summoned to meet on June 28, 1921. The House of Commons met on that day. The First Dail ignored the two parliaments provided for by the Government of Ireland Act.

On July 11, 1921, a truce was declared between the forces of the British government and the volunteer forces of Dail Eireann. On August 26, 1921, a new ministry was elected by the Second Dail, with the defendant De Valera as president; a further loan of \$. 20 000 000 in the United States was authorized, and the three trustees of the loan funds were elected for the years 1921—1922. On September 14, 1921, the Second Dail appointed plenipotentiaries to treat with the British government in an effort to secure permanent peace for Ireland. These plenipotentiaries entered into negotiations at London with the British delegates headed by D. Lloyd-George, Prime Minister of England.

The great obstacle to peace throughout these negotiations was the insistence by the Irish delegates on independence for Ireland and the insistence, on the other hand, on the part of Lloyd-George, that independence would never be granted Ireland. The official correspondence relating to these negotiations is in evidence. Lloyd-George guarded most zealously against any action which would in any way involve a recognition by the British government of the independence of Ireland.... (Auszüge aus den Briefen Lloyd Georges).

It is apparent that the British government never recognized the De Valera organization, and never receded from the position that it was the only duly constituted government within the territory comprising Ireland. In this last letter Lloyd-George invited a meeting of the delegates, with a view to ascertaining how an association of Ireland with the community of nations known as the British Empire might

best be reconciled with Irish national aspirations, which invitation was accepted. . . . (Einzelheiten über die Art der Vertragsverhandlungen.)

On December 6, 1921, articles of agreement were signed at London by the British and Irish delegations, which provided that Ireland should have the same constitutional status in the community of nations known as the British Empire as the Dominion of Canada, the Commonwealth of Australia, and the Dominion of New Zealand, with a parliament having power to make laws for the order and good government of Ireland, and an executive responsible to that parliament, and should be styled and known as the Irish Free State. The position of the Irish Free State with relation to the British Parliament and government was to be similar to that of the Dominion of Canada. The representative of the crown in Ireland was to be appointed by the king. The oath to be taken by members of the Parliament of the Irish Free State provided that the deponent would be faithful to his majesty King George the Fifth, his heirs and successors by law. The Irish Free State assumed liability for the service of the public debt of the United Kingdom as existing at the date of the agreement and towards the payment of war pensions as existing on that date, the sum to be determined by agreement or by arbitration. . . . (Übergangsbestimmungen bis zur Ratifikation des Vertrages.)

On January 7, 1922, the Dail Eireann approved the treaty. *This approval was a voluntary action, as such action was not requisite under the treaty.* Following the approval of the treaty by the Dail Eireann delegates, defendant De Valera and his ministry resigned and a new ministry of the Dail was elected on January 10, 1922. Shortly thereafter, at a joint meeting of the trustees and the ministers of the Dail, it was agreed that the funds of the Dail should be kept in the names of the three trustees. Pursuant to the provisions of the treaty a meeting of the members elected to sit in the *Parliament of Southern Ireland* was held on January 14, 1922, the treaty was approved, and a provisional government set up. The Second Dail met for the last time on June 8, 1922.

An election of members to a parliament to which the provisional government should be responsible, as provided for in the treaty, was duly called and was held in June, 1922. This body, thus elected, constituted the Provisional Parliament. This parliament convened on September 9, 1922, and on the 13th of the month attempted to appoint the Rev. Michael Fogarty, Richard Mulcahy, and Richard Hayes trustees for the funds of the former Dails, intending to oust the defendants De Valera and O'Mara as trustees. The power of the provisional government to oust these two defendants is questioned in this action.

The British Parliament on March 31, 1922, passed the Irish Free State Agreement Act, thus ratifying and enacting into law said agreement. The act provided that the articles of agreement should have the force of law as from the date of the passing of the act. The act further

provided that within four months the Parliament of Southern Ireland should be dissolved, and that steps should be taken for the holding of an election to the provisional parliament from the constituencies which would have been entitled to elect members to the Parliament of Southern Ireland and the members so elected were to constitute the House of Parliament to which the provisional government should be responsible. The British government, on April 1, 1922, pursuant to the treaty agreement, by an order in council, provided for the transfer of functions in connection with the administration of public services in Southern Ireland theretofore performed by the existing *British* government departments and officers to the provisional government constituted under the treaty.

The Constitution of the Irish Free State was adopted by that government on October 25, 1922, and on December 5 of the same year the British Parliament enacted the Irish Free State Constitution Act, thus creating plaintiff, the Irish Free State, which now is a government consisting of the king, an Irish Parliament called the 'Oireachtas', consisting of an upper house, the Seanad Eireann, and a lower house, the Dail Eireann, and a ministry called the Executive Council. On December 6, 1922, the Constitution of the Irish Free State was declared to be in operation by a proclamation by the king, made pursuant to the Irish Free State Constitution Act.

It is manifest from the foregoing that the object or the purpose for which the moneys were subscribed by the so-called bondholders — that is, the establishment of a republic of Ireland free and independent of any allegiance to Great Britain — was never accomplished, and it follows, therefore, that if it were not for the claim of the plaintiffs the said subscribers would be entitled to a return in proportion to the amounts of their subscriptions of the funds and property within the jurisdiction of this court.

Manifestly, the trustees would not have any legal title to the funds, holding such funds merely as such. It is, therefore, necessary to consider the propositions advanced by the plaintiffs' counsel to support their claim of title.

Plaintiffs' first contention is that the Irish Free State is the successor of the original *de facto* government which raised the money. As hereinbefore shown, and held in this opinion, the so-called Irish republic never existed as a *de facto* government.

Plaintiffs' next contend that (a) if the *de facto* status has not been established, then the Irish Free State is the successor of the revolutionary group which raised the money; (b) the Irish Free State is also in fact the continuation of the very Dail Eireann which raised the money, and to which the trustees admitted they were responsible.

With these contentions this court cannot agree. The De Valera group, organized as the Dail Eireann, were engaged in a revolt against the only lawful government existing in Ireland, which was the government of Great Britain and Ireland formed under the Act of 1800, as modi-

fied by the Government of Ireland Act of 1920. This was the de jure government existing in the territory of Ireland up to the time of the formation of the Irish Free State.

England did not crush this rebellion or revolution with military force, but set up, with the consent of the governed, a *new* government to take the place of the *existing* government in Ireland. This consent, so far as Southern Ireland was concerned, consisted of the approval of the Treaty by *the duly constituted Parliament for Southern Ireland* as provided for by that instrument. The treaty absolutely ignored the Second Dail, and, as before stated, the approval by that body was wholly voluntary and without any legal effect. This government of the Irish Free State was therefore set up by the English government with the consent of the people of Southern Ireland.

As the government of Great Britain and Ireland was the only existing government in Ireland, with a revolt on its hands in the form of the Dail Eireann organization, how can it be said that the new government set up by England succeeded the revolt and not the legal existing government? Such a conclusion would be an assertion that the new government succeeded an unsuccessful rebellious organization and not the existing government of Ireland.

In the case of *King of the Two Sicilies v. Willcox*, 1 Sim. [N. S.] 301, the court said:

'Every government in its dealings with others necessarily partakes, in many respects, of the character of a corporation. It must of necessity be treated as a body having perpetual succession.'

In short, when a revolt succeeds so far as to become a de facto government, which displaces a de jure government, this change merely affects the character of the government, but does not interrupt its perpetual succession. If, therefore, the Dail Eireann had succeeded in displacing the de jure government of Great Britain and Ireland, and had become a de facto government, while the nature of the government of Ireland would have changed, such change would not have interrupted the perpetual succession of the government. The de facto government would merely have succeeded the de jure government previously existing, and the Irish Free State would have succeeded the de facto government, thus preserving the continuity of the government of Ireland. As Dail Eireann did not succeed in establishing a de facto government, it therefore did not displace the existing de jure government. It follows, therefore, that the Irish Free State succeeded the only government in existence in Ireland at the time it came into being, to wit, the de jure government of Great Britain and Ireland.

The plaintiff Irish Free State has not shown that it has a title paramount to the funds in question, and as it did not succeed the revolutionary organization, but merely the de jure government in Ireland, it has shown no derivative title to the funds in question. The complaint must therefore be dismissed, unless this court is bound by the judgment in the so-called Irish action, hereinafter referred to.



Plaintiffs also contend that, apart from any succession or continuation of the present government to the Dail Eireann the present government has succeeded in title to all property acquired for purposes of the revolution which was carried on in Southern Ireland. In short, the Irish Free State claims title irrespective of succession to or continuation of Dail Eireann. This is, in fact, a claim of paramount title to the funds in America. This claim will be hereinafter discussed when we come to consider the opinions of the English courts... (Die Sache ist nicht *res judicata* trotz ergangener Entscheidung des irischen Gerichtes, da die jetzigen Beklagten in der irischen Klage nicht Partei waren).

In the opinion of this court, the only government that had any claim of title whatsoever to these funds in the United States was the British government, because the Dail was in revolt against that government, and in none of the documents submitted to this court has there been shown any transfer of title whatsoever of any such claim by the British government to the plaintiff, Irish Free State... (Es folgt eine eingehende Besprechung früherer, vom Kläger angeführter Entscheidungen; das Gericht kommt zur Ablehnung der daraus geleiteten Argumente).

It is thus seen that none of the foregoing cases relied upon by plaintiffs support their position, but on the contrary, each one is an authority against that position. ... (Besprechung der irischen Klage).

As the plaintiff Irish Free State succeeded the *de jure* government of Great Britain and Ireland, and not the revolutionary organization known as Dail Eireann, said plaintiff has no title either paramount or derivative to the funds in question, and the complaint must therefore be dismissed. ... (Weiterer Grund zur Ablehnung unter Hinweis auf einen andern Fall.)

The defendant trustees have no title as owners of the funds in question, and their demand that they be left in possession of the same must therefore be denied. No good purpose could result from leaving them in possession of the trustees, for the reason that the Irish republic was never formed and the terms of the subscription — i. e., the issuance of bonds of the Irish Republic — cannot be complied with.

With the complaint dismissed on the ground that the plaintiff Irish Free State has not title to the funds in question, and as the government of Great Britain and Ireland has made no claim to the funds, the only parties entitled to the possession of the money are the original subscribers, and the two bondholder committees in their answers have set up counterclaims demanding judgment for the funds. The demand of the Noonan committee that the funds be awarded to the Irish Free State upon condition that that government issue bonds to the full extent of the original subscriptions cannot, in view of the foregoing opinion, be granted.

As the purpose or object for which the funds in question were advanced has become impossible of fulfilment (*Thomas v. Hartshorne*,

45 N. J. Eq. 215, 16 A. 916, L. R. A. 381), the relief demanded by the Hearn committee should be granted to the extent that a judgment be entered decreeing that these defendants and all other subscribers to the two loans in the United States are entitled to receive, in proportion to their subscriptions, the proceeds of the money and securities in question, together with accumulated interest, after payment of all proper charges and disbursements taxed or allowed by the court."

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ii) Herman et al. v. Apetz et al. Oct. 15, 1927.  
(224 N. Y. S. 389.)

Diplomatische Immunität.

1. *Die diplomatische Immunität der Gesandten und Attachés erstreckt sich auf die Mitglieder ihres Haushalts.*

2. *Ein Gesandter kann nicht ohne die Zustimmung des Heimatstaats auf seine diplomatische Immunität verzichten. Mitglieder des Haushalts können ohne Erlaubnis des Heimatstaats auf sie verzichten.*

3. *Das freiwillige Erscheinen der Frau des Gesandten als Beklagte in der Sache bedeutet den Verzicht.*

"Frankenthaler, J. Plaintiffs have brought this action against defendants Apetz and Gonzalez to set aside a conveyance from the former to the latter on the ground of fraud against creditors. Defendant Gonzalez, who is a sister of the other defendant, after pleading on the merits in a general appearance, has interposed a separate defense to the effect that she is the wife of the Secretary of Legation of the Republic of Costa Rica and as such immune from process. There is no doubt that the personal immunity of and envoys their attachés extends to members of their domestic suite, on the ground that their protection is necessary for the peace of mind of the envoy in discharging his official duties. Foulke, International Law § 180. But it is urged by the plaintiffs that the defendant has waived immunity by appearing to defend on the merits, and accordingly a motion has been made to strike out this defense. There is no doubt that an envoy may not waive his diplomatic immunity without consent of the sending state. Whether this inability to waive also applies to his wife, family, and domestic servants is a matter of conflict among text-writers. The better view seems to be that waiver on the part of such persons does not require the consent of the home state and is therefore effective. Has the defendant Gonzalez waived her privilege? . . . .

While it is true that the defendant Gonzalez during the period of diplomatic immunity cannot be proceeded against by execution in personam, she has nevertheless, by her voluntary appearance and