sum judgment can be immediately executed and is safe from the danger of the spouse's becoming judgment-proof or leaving the state.[22] The judgment, being recovered in a tort action, would not be taxable to the recipient,[23] while alimony is now subject to the federal income tax.[24]

Thus if for any reason alimony is not a solution, the deserted family, under the doctrine of the *Johnson* case as modified by the statute, has an alternative remedy, at least where the enticer is a person of means and the family's income is in a bracket where tax savings weigh more heavily than the difficulties of a tort action and the cut in "take home" recovery by contingent attorney's fees. In the usual case, however, the family's protection against the effects of desertion, the "poor man's divorce," is not increased.

THE CANADIAN SPY CASE: ADMISSIBILITY IN EVIDENCE OF STOLEN EMBASSY DOCUMENTS

An indictment was lodged against Fred Rose by the Attorney-General of Quebec, charging him with having conspired with foreign and Canadian subjects in violation of several provisions of the *Official Secrets Act*. The Crown sought to prove that the defendant, a member of the Canadian Parliament, had communicated to a foreign power information which he had obtained illegally as to the nature of Canada's munitions of war. To this end the prosecution submitted documents stolen from the Soviet Embassy by a former aid to the Soviet military attaché, showing the existence of an extensive spy ring with headquarters in a wing of the Soviet Embassy building. The active participation of Rose in this organization was also shown, particularly as regards his securing the formula for the powerful explosive RDX from Dr. Boyer, a professor at McGill University. Over the objections of the defendant, the President of the Assizes held the documents admissible in evidence. Although there were other grounds for the appeal which was taken, Rose's conviction hinged upon the final decision as to the evidence point. The Quebec Court of King's Bench upheld the lower court's ruling, stating that since the executive had submitted documents which might otherwise be held privileged for use in a prosecution of one of its own citizens, and since the Soviet Government had made no claim to immunity with respect to the documents, the courts had no jurisdiction to determine whether the documents were privileged and whether the executive had committed a breach of international law. *Rose v. The King*.[1]

[22] The practical importance of this problem is shown in the fact that Judge Julius H. Miner, in a recent report to the Circuit Court Executive Committee on the problem of children made dependent by divorce, suggested that thought be given to the use of restraining decrees to keep divorced fathers from remarrying until they are able to post bond to insure support of dependents. Chicago Daily News, p. 4, col. 3 (November 22, 1947).

[23] 26 U.S.C.A. Int. Rev. Code § 22(b) (5) (1939).

[24] Ibid., at § 22(k).

[1] [1947] 3 D.L.R. 618 (Que.).

The court conceded that the privilege of diplomatic immunity given to an ambassador by international law extends to himself, his personnel, dwelling, documents, archives, and correspondence.[2] If the diplomatic character of these documents were in question, the case of *Engelke v. Musmann*[3] might be cited as precedent for this decision. There the statement of the British Foreign Office was held to be conclusive evidence of the diplomatic status of the defendant, since such finding of fact depended upon matters peculiarly within the cognizance of the sovereign. Once the existence of the diplomatic status had been determined by the executive, however, it was admitted that it remained the function of the court to determine as a matter of law whether immunity from jurisdiction necessarily followed. *Rose v. The King* goes one step further in that the court flatly stated that while the documents might otherwise be held privileged, the question of the immunity to be granted them was strictly a matter for executive determination. Thus not only the nature of the documents but, more important, their legal incidents are deemed issues improper for judicial consideration.

Judge Gagne, while concurring in the result, indicated some doubt as to the diplomatic character of the documents in question. The fact that the Bureau of Espionage was situated in a wing of the Embassy building did not, in his opinion, necessarily lead to this conclusion, since the Soviet Ambassador himself was denied access to the room in which these documents were kept. In the Wolf von Igel affair, the government of the United States expressed the opinion that documents obtain an acquired immunity from the fact that they are under official seal, that they are on Embassy premises, or that they are in the actual possession of a person entitled to diplomatic immunity.[4]

The whole issue of whether these documents could properly be considered as possessing a diplomatic character seems relegated to a position of irrelevancy in the face of the opinion of Judge Bissonnette, apparently speaking for a

[2] Hyde, International Law 1271 (1945); Wheaton, Elements of International Law 128 (1936); 4 Moore, International Law Digest 627 (1906).

[3] [1928] A.C. 433. Accord: United States v. Liddle, 26 Fed. Cas. 936, No. 15,598 (C.C. Wash., 1808); United States v. Ortega, 27 Fed. Cas. 358, No. 15,971; (C.C. Pa., 1825); United States v. Benner, 24 Fed. Cas. 1084, No. 14,568 (C.C. Pa., 1830); Ex parte Hitz, 111 U.S. 766 (1884); In re Baiz, 135 U.S. 403 (1890); The Rogday, 279 Fed. 130 (D.C. Calif., 1920); Savie v. City of New York, 118 N.Y. Misc. 156, 193 N.Y. Supp. 577 (1922).

[4] Wolf von Igel, attached to the German Embassy in the United States, was indicted on April 17, 1916 in New York for using American territory as a base for hostile military operations. The German Ambassador demanded his immediate release and the return of papers allegedly belonging to the Embassy, seized at the time of Von Igel's arrest. Secretary Lansing asserted that the government of the United States was entitled to retain the papers in question for use in the legal proceedings which had been instituted, since the room in which the arrest had occurred had no connection with the Embassy and had not been used for the performance of its diplomatic functions. The reply of the German Ambassador was that if the seizure of the papers could be justified by a subsequent inspection of their contents, all diplomatic immunity would speedily come to an end. No further action on the indictment was taken since Von Igel was returned to Germany with other officials after the severance of relations between that country and the United States. Hyde, International Law 1267 (1945).

majority of the court. The fact that the documents are submitted in evidence by the executive effectively precludes judicial inquiry into the possibility of their being privileged communications. This tour de force is accomplished by the aid of a legal fiction, namely, that once the documents come into the possession of the executive, they become his property, free from any privilege except that which he chooses to impress upon them.

It seems curious that such a result should be reached in view of Judge Bissonnette's statement earlier in his opinion that modern public international law rejects the theory of extraterritoriality as the source of diplomatic inviolability and prefers rather the necessity of recognizing a full dignity in the state which delegates an ambassador.[5] It seems, then, that if these documents do not gain their immunity from the mere fact of their physical presence on Embassy premises, loss of immunity can hardly be attributed to their subsequent removal and change in possession. If, instead, the source of immunity is to be found in the recognition of the independence and dignity of the foreign sovereignty, it is difficult to see how the finders-keepers test adopted by the court can be expected to assuage the implied affront involved in such action on the part of the receiving state.

The court stresses the fact that the Soviet Government had made no claim to immunity in respect to the documents and that "to impose, through a judicial decision, immunity upon a state which does not claim any would be casting a slur upon its dignity and its sovereignty."[6] It is a well established principle of international law that a diplomatic agent cannot waive his exemption from the territorial jurisdiction of the receiving state without the consent of the sovereign whom he represents.[7] Moreover, it has been held that such waiver must be strictly proved.[8]

Where the party before the court is neither the sovereign nor his ambassador, however, it has been held that the claim of immunity will not be recognized unless asserted through diplomatic intervention.[9] The manner in which the

[5] It has been suggested by Francis Deák that the rejection of the concept of extraterritoriality in the 19th century was merely an attempt to deny, or at least restrict, the right of asylum for a person threatened with criminal prosecution which was implicit in that fiction, but that no further inroad upon the settled rules of diplomatic immunity was intended. 23 Amer. J. Int. L. 582 (1929). To the same effect see 1 Oppenheim, International Law 629 (1928); Lawrence, The Principles of International Law § 130 (1923); Foster, The Practice of Diplomacy 165 (1906).

[6] Rose v. The King, [1947] 3 D.L.R. 618, 648 (Que.)

[7] Barbuit's Case, Cas. t. Tal. 281 (Ch. 1737); In re Suarez, [1918] 1 Ch. 176; Marshall v. Critico, 9 East 447 (K.B., 1808); Taylor v. Best, 14 C.B. 487 (1854); 1 Oppenheim, International Law 636 (1928).

[8] In re Republic of Bolivia Exploration Syndicate, Ltd., [1914] 1 Ch. 139.

[9] Kunglig Jarnvagsstyrelsen v. Dexter and Carpenter, 300 Fed. 891 (D.C. N.Y., 1924). The plaintiff corporation, the governmental railway administration of Sweden, claimed immunity as against a counterclaim. In denying immunity, Judge Learned Hand stated that there is no difference between a libel in rem, under which a ship is arrested, and an action in personam against an agent of the sovereign. Reference was made to Ex parte Muir, 254 U.S. 522 (1921),

claim of immunity should be brought to an American court's attention was made explicit by the case of *Compañia Española de Navigación Marítima S.A. v. The Navemar*, [10] where it was held that the foreign government may assert immunity from suit either as claimant in the court or through diplomatic channels; if such claim is recognized and allowed by the executive branch of the government, it is then the duty of the courts to accept the claim of immunity upon appropriate suggestion by the Attorney General of the United States.[11]

If the Soviet Government had decided to assert its diplomatic privilege directly by appearing formally in court and laying claim to the documents, it would have run the risk of having such intervention held equivalent to recognition of the right of the court to assume jurisdiction over and to make final disposal of the property in question. If, on the other hand, the Soviet Government had sought the intervention of the Canadian State Department, the executive decision would have been binding upon the court. By holding that immunity depends not solely upon the existence of a fact, but also upon proper assertion of such fact, the courts have forced the foreign sovereignty to choose between a procedural Scylla and Charybdis in order to claim its diplomatic privilege, with the result that often appropriate relief has been denied. Where, as in the present case, the court recognizes the property as that of a foreign sovereignty, it seems unfortunate to hold that diplomatic immunity is a right capable of being lost by a failure to put it in issue. If diplomatic immunity is to have anything more than a mere verbal existence, the courts must exercise the only effective deterrent to executive violation of international law, i.e., in the instant case, refusal to permit the introduction in evidence of admittedly diplomatic documents and declining jurisdiction unless renunciation of the privilege can be shown.

When called upon to decide questions affecting international relations,

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where it was held that a claim of immunity in favor of an arrested ship must be made either through direct intervention as a party by the sovereign, by his ambassador or minister, or through the usual diplomatic channels resulting in a suggestion by the Attorney General. Accord: The Pesaro, 255 U.S. 216 (1921).

[10] 303 U.S. 68 (1938). In a suit in admiralty by the owner to recover possession of a vessel expropriated by the Spanish Republican Government, the Department of State declined to present a suggestion of immunity claimed by the Spanish Ambassador, who then himself sought and obtained leave to intervene. The Supreme Court held his allegation of ownership was not conclusive and that the ship, therefore, was not immune from suit in American courts.

[11] Lamont v. Travelers Insurance Company, 281 N.Y. 362, 24 N.E. 2d 81 (1939) is an interesting sequel to The Navemar. It was there held that while the claim of immunity of the Mexican Government was properly brought to the attention of the court, the language of the suggestion filed by the United States District Attorney did not constitute a "recognition and allowance" of the claim by the executive branch of our government such as would be conclusive upon the court under the Navemar decision. By analogy, the argument could be made that the submitting of the documents in evidence by the Canadian Government in the instant case was a mere suggestion as opposed to such affirmative intervention as would be binding upon the court.

courts generally respect decisions expressly or impliedly made by the executive branch of the government.[12] It has been suggested that the emergence of the political question doctrine in this field is due chiefly to the inability of the courts to act in the absence of applicable legal principles.[13] This reasoning falls short as an explanation for the present case, however, since diplomatic immunity was one branch of international law which was regarded as having crystallized sufficiently to permit its codification.[14]

The practical reasons given by the court for its decision are more difficult to challenge. The court argues that it would be impossible to give effect to diplomatic immunity in a situation such as this when to do so would be to counteract the decision of the executive of the country. Due to distribution of sovereignty among the various governmental departments, the executive branch has absolute and exclusive authority to determine policy in the field of international relations. Issues such as these are essentially political in their nature and should be resolved by those responsible and responsive to the community as a whole. Moreover, in case of conflict the judiciary is without any effective means of enforcing its will.

In the absence of a world court with power to enforce its decrees, the law of nations must be administered, if at all, by national courts, which are often bound to find themselves in the uncomfortable position of being judge in their own nation's cause. Prize courts have resolved this problem in a striking manner, as exemplified by *The Zamora*,[15] where an executive order in conflict with principles of international law was not considered as binding upon it by the court. This assertion of independence was not surprising in view of the fact that traditionally prize courts have acted upon the principle that their duty is "not to deliver occasional and shifting opinions to serve present purposes of particular national interest but to administer, with indifference, that justice which the law of nations holds out without distinction to independent states."[16]

[12] The existence or non-existence of a treaty as a binding obligation upon the United States: Charlton v. Kelly, 229 U.S. 447 (1913); Mahoney v. United States, 10 Wall. (U.S.) 62 (1869); Doe v. Braden, 16 How. (U.S.) 635 (1853). The beginning and end of war: United States v. 129 Packages, 27 Fed. Cas. 284, No. 15,941 (D.C. Mo., 1862); United States v. Anderson, 9 Wall. (U.S.) 56 (1869); Hamilton v. Kentucky Distilleries Co., 251 U.S. 146 (1919). An assertion of title to or jurisdiction over territory made by the political departments of the government: Foster v. Neilson, 2 Pet. (U.S.) 253 (1829); Wilson v. Shaw, 204 U.S. 24 (1907); In re Cooper, 143 U.S. 472 (1892). Recognition of a state or government: Rose v. Himely, 4 Cr. (U.S.) 240 (1808); Russian Government v. Lehigh Valley Co., 293 Fed. 135 (D.C. N.Y., 1923); Duff Development Co. v. Government of Kelantan, [1924] A.C. 797.

[13] Field, The Doctrine of Political Questions in the Federal Courts, 8 Minn. L. Rev. 485 (1924).

[14] Harvard Draft Convention on Diplomatic Privileges and Immunities, Article 5 (1932): "A receiving state shall protect the archives of a mission from any violation and shall safeguard their confidential character wherever such archives be located within the territory of the receiving state. . . . ."

[15] [1916] 2 A.C. 77.

[16] Opinion of Sir William Scott in The Maria, 1 C. Rob. 340, 350 (1799). Accord: The Walsingham Packet, 2 C. Rob. 77, 82 (1799); The Recovery, 6 C. Rob. 341, 348 (1807).

Apparently it is possible for a national court to accomplish the herculean task of recognizing, even in time of war, that "the seat of judicial authority is indeed local, but the law [international] itself has no locality.[17]" England was at war when *The Zamora* was decided, as was Canada thirty years later when the Quebec Court of King's Bench was faced with *Rose v. The King*. The executive departments in each case asserted a right in contravention of international law to jurisdiction over property obtained by force. Such jurisdiction was conceded by one tribunal in the interest of the safety of the state, and denied by the other despite the existence of a national emergency similar to that which the Canadian court felt gave such peculiar force to the policy of short run expediency.

The decision in *Rose v. The King* is illustrative of the ambiguous position of international law in that, although the court admits its existence, the holding that it could be disregarded at will by an interested sovereign state seems to deprive it of the essential characteristics of law.[18] Diplomatic immunity has been recognized as one of the most important elements in the preservation of peace in the world community of nations.[19] It is in times of international tension that international law should be most doggedly adhered to in order to avoid possible retaliation and eventual resort to self-help. *Rose v. The King* is a disturbing precedent in that "as among men, so among nations, the opinions and usages of the leading members in a community tend to form an authoritative example for the whole."[20]

FULL FAITH AND CREDIT: A CONTROL OVER CHOICE OF LAW

The defendant, a fraternal benefit society incorporated in Ohio, issued a certificate of life insurance in South Dakota to a domiciliary of that state. After the death of the insured, the plaintiff brought suit in South Dakota as assignee of the beneficiary under the certificate. The terms of the certificate included a provision, valid in Ohio,[1] limiting the period within which such suits could be

[17] The Maria, 1 C. Rob. 340 (1799).

[18] See 26 Am. J. Int. L. 280 (1932) for an excellent discussion of the law of the land doctrine evolved by the English common law courts when dealing with a conflict between municipal and international law as contrasted with the prize court solutions of the same problem. It is there suggested that the law of the land doctrine in origin seems to have been entangled with the question of diplomatic immunity and particularly with the statute 7 Anne, c. 12 (1708).

[19] Secretary of State Hull made the statement that "it should be obvious that the unhampered conduct of official relations between countries and the avoidance of friction and misunderstanding which may lead to serious consequences are dependent in a large measure upon a strict observance of the Law of Nations regarding diplomatic immunity." Department of State Press Release 497, 498 (Nov. 7, 1935).

[20] Pollock, The Sources of International Law, 2 Col. L. Rev. 511 (1902); see also Hyde, International Law 9 (1945).

[1] Ohio Code Ann. (Throckmorton, 1940) §§ 9462–70, 9481; Appel v. Cooper Ins. Co., 76 Ohio 52, 80 N.E. 955 (1907); Bartley v. National Business Men's Ass'n, 109 Ohio 585, 143 N.E. 386 (1924).