IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936

No. 532

UNITED STATES OF AMERICA, *Petitioner,*

—vs.—

MORGAN BELMONT, et al., *Respondents.*

BRIEF AMICUS CURIAE ON BEHALF OF PRESIDENT AND DIRECTORS OF THE MANHATTAN COMPANY

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Of Counsel

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UNITED STATES OF AMERICA,

Petitioner,

against

MORGAN BELMONT and ELEANOR R. BELMONT, as Executors of the Last Will and Testament of August Belmont, Deceased,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF PRESIDENT AND DIRECTORS OF THE MANHATTAN COMPANY AS *AMICUS CURIAE*

Statement

This brief is submitted upon the written consent of the parties to this appeal filed with the Clerk of the Court.

The President and Directors of the Manhattan Company have a vital interest in the substantive issues raised by the appeal herein. The Bank holds funds formerly belonging to the Northern Insurance Company of Moscow, as assignee for the benefit of creditors. These funds the United States of America is seeking to recover in an

action instituted in the Supreme Court of the State of New York.

Before commencing the action in the State Court, the Government had instituted a suit on August 25, 1934, in the Federal Court seeking possession of the assets. A motion was made on behalf of the President and Directors of the Manhattan Company to dismiss the complaint for failure to state a cause of action. District Judge Coxe rendered an opinion dismissing the complaint upon the merits, *United States* v. *President and Directors of the Manhattan Co.*, 10 Fed. Supp. 269. The Circuit Court of Appeals affirmed the decree of Judge Coxe but upon the ground that the Federal Court had no jurisdiction of the action in view of the prior *quasi in rem* proceeding for the adjudication of creditors' rights pending in the State Court. (22 Fed. (2nd) 866, 881.) The Supreme Court of the United States affirmed the ruling of the Circuit Court in an opinion rendered by Chief Justice Hughes (296 U. S. 463) and recommended that the United States proceed in the New York Supreme Court for a determination of its rights.

A consideration which is absent from the record in the present case should be noted with reference to the case brought by the United States against President and Directors of the Manhattan Company. There are creditors in the latter case pursuing a statutory remedy, who are claiming adversely to the Government. This Court should point out that well established precedents support the proposition that where creditors are pursuing their remedies in New York State the title of one claiming through a foreign transferee will not be enforced, particularly when the law and policy of the State have provided a rule of transfer different from that of the owners domicile. To hold otherwise would deprive creditors of vested rights.

Questions Presented

1. Whether Soviet legislation could effectively transfer title to a bank deposit in the State of New York.

2. Whether a right derived under the penal law of a foreign State will be enforced by our Courts.

3. Whether the public policy renders it impossible to accept as valid a transfer under the confiscatory decree.

4. Whether the language of the Litvinoff letter included the deposit in question.

Facts

Prior to 1918 the Petrograd Metal Works deposited with the private bank of August Belmont & Co., a sum of money (R. 3). In 1918 the corporate structure of the Russian corporation was shattered by a decree of the Russian Socialist Federated Soviet Republic (R. 4, 7). This decree dissolved and terminated the Metal Works, and the Russian State seized and appropriated for its own benefit all the corporation's property and rights. No compensation was made to the former owners of the corporation, creditors or stockholders (R. 4).

In November, 1933, the Union of Soviet Socialist Republics assigned to the United States all amounts admitted to be due or that might be found to be due to the said Russian Government as the successor of prior Governments of Russia from American nationals. The complaint alleges that this included the deposit with Belmont & Co.

August Belmont died in 1924. The defendants are the duly appointed representatives of his estate.

Summary of Argument

I

Courts deny effect to transfers by confiscatory laws with respect to property situated outside the territorial jurisdiction of those laws.

Debts or choses in action are generally found to be situated in the country where they are properly recoverable or can be enforced.

Where a bank is located in the State of New York, that sovereignty has control over amounts on deposit. For practical purposes the situs of the debt is in that State.

If the debt be regarded as having no situs the transfer of the deposit must be characterized as being ancillary to the transaction which gave rise to the debt and be governed by the law of the State of New York which is the proper law of the transaction.

Attributing to the transfer of a debt to a third person a proper law of its own is the least satisfactory method of characterization.

II

The Courts of one country will not enforce the penal laws of another.

The substance of the right sought to be enforced by the plaintiff will directly involve the execution of penal laws of the Russian Socialist Federated Soviet Republic.

III

Legislation nationalizing without compensation to formers owners, banking corporations and other industries is confiscatory in character and contrary to our public policy. This public policy will be enforced, to prevent the

transfer of property here to one claiming title under confiscatory decrees.

It is not sufficient for a right to have been duly acquired on the territory of a foreign state to be capable of automatic enforcement.

The case is not unseldom when the exception of public order has been employed and the adoption of foreign legislation refused.

IV

Since the sovereign parties are dealing in private causes of action, the Litvinoff assignment must be strictly construed.

An interpretation of the correspondence compels one to conclude that a fund of the character held by the Bank was not embraced therein.

POINT I

Soviet legislation could not effectively transfer title to a bank deposit in the State of New York.

The title of the United States is based upon a double transfer, *i. e.,* the Soviet decree and the Litvinoff assignment. To support the title of its assignor, derived under penal and confiscatory legislation, the United States relies upon the fiction *mobilia sequuntur personam,* and the proposition that a decree of confiscation is equivalent to a voluntary assignment. If practical considerations, logic and the policy of the State conflict with the fiction compelling it to give way and if the effect of confiscation is misconceived, the Government must fail.

No case in this country has been found raising the specific problem concerning the transfer or assignment of a bank deposit.

The best approach to the problem is found in *The Canadian Bar Review,* Ottawa, May 1935, pages 265 through 278:

> "The question of the transfer, *inter vivos* of the debt or chose in action, however, is in a state of doubt or confusion in English Conflict of Laws (1927, I. K. B. 699). The nature of the problem may be clarified if we begin by distinguishing clearly between (a) the transaction which gives rise to the debt and (b) the transaction by which the debt is transferred from the creditor to a third person. The validity of the creditor's claim against the debtor and generally the rights and obligations of creditor and debtor *inter se* are governed by the ordinary principles of conflict of laws applicable to transaction (a), that is, in the case of a contract, by the proper law of the contract. The selection of the proper law relating to transaction (b) is more difficult and depends on the way in which transaction (b) is characterized in relation to transaction (a). Three modes of characterization suggest themselves:
>
> (1) The debt arising out of transaction (a) might be characterized as a movable thing having a situs of its own, and transaction (b) might be characterized as being sufficiently analogous to the transfer of a tangible movable to justify the application of the ordinary rule that the lex rei sitae governs the transfer of the thing; and the proper law of transaction (a) would be immaterial.
>
> (2) Transaction (b) might be characterized as being merely incidental or ancillary to transaction (a) with the result that the transfer of the debt would be governed by whatever is the proper law of the transaction which gives rise to the debt; and the situs of the debt, so far as it has a situs at all, would be immaterial.

(3) Transaction (b) might be characterized as being analogous to a contract, or at least as having a proper law of its own ascertained in a way similar to that in which the proper law of a contract is ascertained, without regard to situs, if any, of the debt and without regard to the proper law of transaction (a).

The first mode of characterization is attractively simple. It results in the application of a single law (the lex situs of the debt) to the validity of one transfer or several transfers, no matter where or by whom it or they may be made, and in particular avoids any problem of priorities as between transfers made in different countries. If it should happen that the debtors' obligation under transaction (a) is governed by some law other than the lex situs of the debt, he is of course still entitled to avail himself of the proper law of transaction (a) as regards the nature of the obligation, and in any action against him to recover the debt he is of course entitled to avail himself of the rules of procedure of the forum. As a general rule the place of action would be the same as the situs of the debt.

The second mode of characterization has some advantages (51 L. Q. R. 76, at p. 85, 1935). It avoids any problem of priorities as between two or more transfers because, as in the case of the first characterization, both or all the transfers are governed by a single law. It avoids any possible conflict between the rights and obligations of the creditor and debtor *inter se* on the one hand, and the rights of the transferee or transferees on the other hand, because they are both governed by the proper law of the transaction which gives rise to the debt.

The third mode of characterizing transaction (b), namely, attributing to the transaction of a debt a proper law of its own, would seem to be least satisfactory. It may make applicable to the trans-

> fer of a debt a law different from the proper law of the transaction which gives rise to the debt, and it involves all the usual problems which arise in connection with contract, such as those relating to capacity, formal validity and intrinsic validity. It raises also a difficulty. That there may be two or more transfers of the same debt in different countries, and that each transfer may be valid by its own proper law, and may be entitled to priority by that law."

A

Under the first mode of characterization, we must attribute a situs to the debt. In most instances the situation of property does not admit of doubt. The difficulty arises in affixing to debts or choses in action a proper situs. Such intangible property may be held to be situate at the place where it can be effectively dealt with. Debts or choses in action are generally to be looked upon as situate in the country where they are properly recoverable or can be enforced.

The property in dispute being a bank deposit had a situs at the place where the deposit was payable.

It is of no consequence whether the funds on deposit with the New York bank are tangible or intangible.

> "Thus the deposits are clearly intangible property within the state. Over this intangible property the state has the same dominion that it has over tangible property."
>
> *Security Savings Bank* v. *California,* 263 U. S. 282, 285.

> "The Fourteenth Amendment did not, in guaranteeing due process of law, abridge the jurisdiction which a State possessed over property within its borders, regardless of the residence or presence of the owner. That jurisdiction extends alike to

> tangible and to intangible property. Indebtedness due from a resident to a non-resident—of which bank deposits are an example—is property within the State. Chicago, Rock Island & Pacific Ry. Co. *v.* Sturm, 174 U. S. 710. It is, indeed, the species of property which courts of the States have most frequently applied in satisfaction of the obligations of absent debtors. Harris *v.* Balk, 198 U. S. 215."
>
> *Pennington* v. *Fourth National Bank,* 243 U. S. 269, 271.

Under the law of New York where the property here in question was deposited, the localization of a bank account at that point is clearly recognized. *Bluebird Undergarment Co.* v. *Gomez,* 139 Misc. 742, which followed *Richardson* v. *National Bank of India,* 43 T. L. R. 631.

> "Conceding that the deposit was a debt, conceding that it was intangible, still it was property in this State for all practical purposes * * * the fund has a situs here because it is subject to our laws."
>
> *In Matter of Houdayer,* 150 N. Y. 37, 40, 41.

The State can always exercise through its Courts jurisdiction over such intangible things as are localized within its borders. The debt in question was localized within the State of New York. Russian law with respect to it is inoperative.

> "For the rule, as we conceive, is well settled that an assignment by virtue of or under foreign law does not operate upon a debt, or right of action, as against a person in this state."
>
> *Hibernia National Bank* v. *Lacombe, et al.,* 84 N. Y. 367, 384.

In *40 Harvard Law Review,* 1926, 1927, page 991, it was said:

> "In determining what law governs the assignment of a bank account a court is faced with a preliminary question as to the nature of an assignment. Is an assignment the creation of a power to collect the debt coupled with a contract not to revoke, or is it a transfer of ownership, that is, a conveyance of the debt? If the former be the accurate description, then the law that governs the validity of contracts, should, of course, govern the assignment. If, on the other hand, an assignment be a conveyance of ownership, will the assignment of a bank account fall within the rule that determines the governing law for the conveyance of chattels? Or is the sounder analysis to assimilate it to the assignment of an ordinary debt and then permit the law of the place of assignment to govern?
>
> Whatever be the nature of an assignment historically, it is now difficult to deny that it is more than a contractual obligation between assignor and assignee. There is a transfer of ownership; whether it be legal or equitable is immaterial for the purpose of conflict of laws. Consequently, it would seem that the rule governing conveyances is logically to be preferred to the rule governing contracts. But that rule, as already indicated, predicates its result upon situs. And unless we are to reason from a metaphor, a bank deposit, representing most of its legal aspects a contractual obligation of the bank to pay, can have no situs.
>
> Yet there is doubtless a factual difference between a bank account and an ordinary debt. The bank's books and investments are subject to close scrutiny, supervision by the state wherein it operates; the deposit may be claimed upon demand usually at a single established place, and as the maintenance of a reserve is normally required, the

> expectancy of repayment is higher than in the case of an ordinary debt. Perhaps the most impressive yielding to reality has come in the series of cases that have declined to invalidate legislation providing for the escheat to the state of local bank deposits of non-resident depositors. It is submitted that the rationale of these cases lies not in any hypostalization of the bank's obligation to pay, but in the question—what state controls the obligation as reasonably to justify the application of its law to the obligation? From such a premise the conclusion might well follow that the assignment of a bank account is governed by the law of the State where the bank is. Certainly this result is functionally the most desirable. The scope of a bank's discretion as to the use of depositary funds is narrowly prescribed by statute, and its duty of caution is stringent. Advice as to the validity of claims presented to the bank will be most reliable if counsel may be guided by those tests of legality that they know best, and not be obliged to discover first, the place where the assignment was made or the domicile of the assignor, and the second the assignment law of either or both of those places. To the particular assignor-depositor and his assignee, on the contrary, the perplexity of place is easily solved and the second inconvenience is considerably more than balanced by the facility with which the bank, free from doubts, will make payment upon the assignment."

In England a debt has its situs where it is payable. In *Russian Bank for Foreign Trade* (1933), Ch. Div. 745, 767, the Court said:

> "If the debt was primarily recoverable in London, I am of opinion that it was not affected by the Soviet legislation, even though it was due to a person who was a Russian subject at the date of the nationalization decrees. Its locality must

> be taken to be the place where the debt was in the ordinary course recoverable. * * * The decrees in question could not according to our laws have the effect of extinguishing the debt, if locally situate here, or of transferring it to the Soviet Republic. * * * Moreover, it is evident that our courts have never entertained the view that a debt incurred here by a foreign corporation permitted to carry on business here under the English law can be discharged by a foreign Statute."

In *Sedgwick Collins & Co., Ltd.* v. *Rossia Insurance Company of Petrograd* (1925), 1 K. B. (C. A.) 1, 41 T. L. R. 663, the Court of Appeals, per Sargent, L. J., stated at page 666:

> "Nor do I think that the position of creditors here as against property of the Rossia Insurance Company here, such as debts owing to them from debtors in this country, is altered by legislation or decrees of the Russian sovereign power which 'nationalized' the undertaking and assets of the Rossia Insurance Company; that is, as I understand it, purported to transfer these assets from their private proprietors to the Russian nation as a whole. Effective as such legislation may be within the limits of Russian territory, it cannot determine the ownership of property locally situate in this country such as debts owing from debtors here. See Dicey, Conflict of Laws, 2nd Ed., p. 310 and Lecouturier and Others *v.* Rey (26 The Times L. R. 368; (1910) A. C. 262); an analogous case with reference to the goodwill of, a trade-mark or trade-name in England."

In the case of *In Re Russian Bank for Foreign Trade, supra,* Maugham, J., stated:

> "It is interesting to note that the same view is taken by the R. S. F. S. R. itself in a circular dated

> April 12, 1922, and in a circular issued by the People's Commissariat of Justice to all District Courts dated September 26, 1923, which are set out in the elaborate judgment of Hill, J., above referred to. These circulars show that the Soviet Government does not regard the nationalizing decrees as having any extra-territorial effect even as against Russian citizens."

In the case of *Republica de Guatemala* v. *Nunez* (1927), 1 K. B. 669, upon which the Government relies, the Court treated the debt as having a situs in England despite the fact that the case was decided upon another ground.

The United States relies upon the doctrine of *mobilia sequuntur personam.* In this country *mobilia sequuntur personam* is a governing rule in the case of succession *ab intestato,* disposition by will and marriage settlements. The cases in this country cited by the Government on situs state the limitation imposed by the Supreme Court of the United States upon the exercise of jurisdiction to tax by the various States.

> "No case has extended the principle by which the taxing power of the State has been limited to impose similar restrictions upon the exercise by the State of jurisdiction for any other purpose." (Conflict of Laws, Section 50, special note.)

This doctrine is one of convenience and yields to other considerations.

> *Helvering* v. *Stockholms Enskilda Bank,* 293 U. S. 84, 92;
>
> *Safe Deposit & Trust Co.* v. *Virginia,* 280 U. S. 83, 93.

The tax is not imposed upon the property passing at death, but an excise imposed upon the right to succession.

The movables in such circumstance only appear as an accessory of the person. But where the intangible property has no intimate relation with the person of the owner, for example, where a matter of priority is involved, or process of garnishment, or a prohibition forbidding export or confiscation, then no title can be transferred except in compliance with the law of the place where the property is situated.

It is claimed that the situs of the property was with the creditor in Russia since his right to collect the debt followed him there, and that the acquisition thereof must be governed by Soviet law. In other words, that a transfer valid according to the law of the domicile of the owner and in conformity with the laws of the place where made (in this case the same) is valid everywhere.

We submit that since the authorities recognize the principle that the law of the place where the movables are actually found must be applied, the fiction relied upon by the Government must give place to the fact. If we disregard theoretical speculations concerning the whereabouts of the debt, it is clear that the transfer must depend upon the law of New York. The rule recognized and applied in garnishment and attachment cases should be preferred to the theory advanced in the tax cases. *Harris* v. *Balk,* 198 U. S. 215, 222; *Chicago, Rock Island Railway Co.* v. *Sturm,* 174 U. S. 710.

Those classes of cases that have declined to invalidate legislation providing for the escheat to the State of bank deposits of non-resident depositors apply a real rather than artificial rule. *Pennington* v. *Fourth National Bank,* 243 U. S. 269; *Security Bank* v. *California,* 263 U. S. 282, 285.

Certainly confiscation, if comparison is possible, more closely resembles attachment than it does taxation. In

the case of taxation the persons liable for the tax are deemed compensated by the governmental protection such as the police system or by general benefits such as public schools, hospitals and similar services. There was no pecuniary return from the forced exaction of the decree.

What could the debtors of the Metal Company attach or levy upon in Russia to satisfy their claims? Nothing—certainly the fiction of *mobilia sequuntur personam* would not aid them in that jurisdiction with regard to *in rem* proceedings. *Baker* v. *Baker, Eccles & Co.,* 242 U. S. 394.

Assume that the Government was not in the picture and that creditors of the company through operation of law had succeeded by virtue of their claims to title to this, the only property. *People* v. *National Trust Co.,* 82 N. Y. 283, 287; *Shayne* v. *Evening Post,* 168 N. Y. 70; *People* v. *O'Brien,* 111 N. Y. 1. Then, according to the Government, we have as many varying sitae as there are creditors of the company. It would then be necessary to look at the contract which created the debt, or at least to where it was recoverable.

What gives the debt validity? The law of the place where the debtor is and which will compel him to pay. The Metal Company was subject to this law whether it invoked it or not, just as respectable citizens are governed by the criminal law whether or not they commit crimes.

What enables the debtor to collect the debt? This same law, the law of New York. If New York should enact legislation (similar to the recent statutes abolishing actions for seduction, breach of promise to marry and criminal conversation) decreeing that all debts hereafter contracted in New York and payable thereafter should be extinguished by either parties' death, it is clear that the right of any foreign assignee or one claiming through him would be lost.

Great reliance is placed on *Republica de Guatemala* v. *Nunez* by the Government. In that case the learned Justices were considering a voluntary assignment and not a transfer by virtue of a confiscatory decree. The learned Justices admitted that a debt due from a London Bank had its situs in England. The issue in that case depended not only upon the law applicable to an assignment, but also upon the law governing the capacity of an infant, Nunez. On the first proposition the assignment to Nunez was treated as a contract to assign which is supported by one authority—and the *lex loci contractus* was applied. This doctrine is unsound. On the latter question the capacity of Nunez—the assignment taking place outside the situs of the debt—was ascertained by the *lex actus* and *lex domicili* which are the same.

No artificial extension of Russian law can be applied to domestic transactions. The debt has a situs here and its transfer must be governed by the law of the State of New York.

Being intangible property within this State, its transfer must be governed by our laws.

Since it is only the acts performed in its own territory with reference to property there that can be validated by the retroactive effect of recognition, the decree which nationalized the Metal Company has no effect in the United States.

Baglin v. *Cusenier,* 221 U. S. 580;
Second Russian Insurance Co. v. *Miller,* 268 U. S. 552; 297 Fed. 404;
Lehigh Valley R. Co. v. *State of Russia,* 21 Fed. (2nd) 396;
James & Co. v. *Second Russian Insurance Co.,* 239 N. Y. 248;

Hamilton v. *Accessory Transit Co.,* 26 Barb. 46;
Huntington v. *Attrill,* 146 U. S. 657;
Oscanyan v. *Arms Co.,* 103 U. S. 261;
The Apollon, 9 Wheat. 362.

In *Baglin* v. *Cusenier, supra,* this Court, speaking through the present Chief Justice, stated at page 596:

> "We are not concerned with their authority under the French law to conduct this business, but it is not the business to which the trademarks in this country relate. That business is being conducted according to the ancient process by the Monks themselves. The French Law cannot be conceived to have any extra-territorial effect to detach the trade-marks in this country from the product of the Monks, which they are still manufacturing."

In *Vladikavkazsky Ry. Co.* v. *New York Trust Company,* 263 N. Y. 369, the New York Court of Appeals considered the effect of Soviet decrees after recognition. The plaintiff in that case brought an action to recover a deposit of funds in the New York office of the defendant banking institution. It was argued by the defendant company that the Russian railway company was dissolved by the ukase or legislation of the Soviets, and that in view of this Country's recognition of the Soviet government, the courts of New York were bound to enforce the decree of confiscation and dissolution as a matter of comity. In the course of its opinion the Court stated, in rejecting this contention (p. 378):

> "It is hardly necessary to state that the arbitrary dissolution of a corporation, the confiscation of its assets and the repudiation of its obligations by decrees, is contrary to our public policy and shocking to our sense of justice and equity. That

> the confiscation decree in question, clearly contrary to our public policy was enacted by a government recognized by us, affords no controlling reason why it should be enforced in our courts." Baglin *v.* Cusenier, 221 U. S. 580.
>
> "We enforce the same principle even in regard to statutes of sister States. Barth *v.* Backus, 140 N. Y. 230, 239.
>
> "The fact that the present Russian government was not recognized was not the basis of our refusal to give effect to its decrees nationalizing corporations and confiscating their property. During the period when those decisions were made, we recognized and enforced 'mere ordinary legislation' relating to 'every day transactions of business or domestic life.' (Petrogradsky M. K. Bank *v.* National City Bank, supra; Matter of People (First Russian Ins. Co.), 255 N. Y. 428, 432.)
>
> "Prior to recognition we clearly intimated that our decision would have been the same if at the time recognition had been granted. (James & Co. *v.* Second Russian Insurance Company, 239 N. Y. 248, 257.)"

The Supreme Court of the United States, in *United States* v. *Juan Percheman,* 7 Peters 51, 86, stated:

> "It may not be unworthy of remark, that it is very unusual, even in cases of conquest, for the conqueror to do more than to displace the sovereign and assume dominion over the country. The modern usage of nations which has become law, would be violated; that sense of justice and of right which is acknowledged and felt by the whole civilized world would be outraged, if private property should be generally confiscated, and private rights annulled."

If the public policy of the United States is material, it would seem clearly adverse to the present claim based on

the Russian decree. Confiscation of property within the United States is precluded by the Fifth Amendment to the Constitution. *Russian Volunteer Fleet* v. *United States,* 282 U. S. 481, 491.

It is inconceivable that, while prohibiting an act, the Constitution should tolerate its indirect performance, or its consequences.

The Russian legislation authorizing a transfer by confiscation must yield to the law and policy of the State of New York where the property is actually located. Since the latter jurisdiction has provided a rule of transfer requiring just compensation to the former owners of property, a title based on any other principle will not be recognized. Any other construction would make the provision of our Constitution a mere ineffectual formality. It would be an exceptional case where our courts would permit a foreign government to legislate with respect to property and things within the borders of the United States in contravention of our express statutory rules.

It follows therefore that the only transfer of property which could be effective here is one carried out according to the law of the State of New York. Since the transfer as attempted was not in accordance with what was required by law, it was ineffectual to vest any title in the Soviet government, and it "can require no argument to show that the transfer of any claim to the United States cannot give to it any greater validity than it possessed in the hands of the assignor." *United States* v. *Buford,* 3 Peters, 12, 30.

B

The second mode of characterization is the most preferable. The situs is then immaterial. The proper law of the transaction which gives rise to the debt is New York

law. *Zimmerman* v. *Sutherland,* 274 U. S. 253; *Sokoloff* v. *National City Bank,* 239 N. Y. 158, 169; *Vladikavkazsky Ry. Co.* v. *New York Trust Co.,* 263 N. Y. 369, 378; *Severnoe Security Corporation* v. *London and Lancashire Insurance Company,* 255 N. Y. 120, 124.

In *Ogden* v. *Saunders,* 12 Wheat. 213, the Court stated:

> "What is it, then, which constitutes the obligation of a contract? The answer is given by the Chief Justice, in the case of Sturgis *v.* Crowinshield, to which I readily assent now, as I did then; it is the law which binds the parties to perform their agreement. The law, then, which has the binding obligation, must govern and control the contract in every shape in which it is intended to bear upon it, whether it affect its validity, construction or discharge. * * * It is then the municipal law of the State, whether that be written or unwritten which is emphatically the law of the contract made within the State, and must govern it throughout, wherever its performance is sought to be enforced.
>
> It forms in my humble opinion, a part of the contract, and travels with it wherever the parties to it may be found. * * *"

The alleged assignment must be considered as merely ancillary to the contract which created the debt and is governed by the law in force in the State of New York. We have pointed out heretofore that the decrees in question are contrary to our public policy and shocking to our sense of justice and equity.

C

The third mode of characterization is the least satisfactory and is the one adopted by the Government in this case. It was adopted by the English Court in *Republica de Guatemala* v. *Nunez.* If such rule is applied in this case, it makes applicable to the transfer a law different

from the law in the State of New York where the debt arose. It may create a number of problems concerning capacity and validity. In the event of a double transfer of the same debt in different states, each transfer may be valid by the law in force in the state where the assignment was made one entitled to priority by such law. Even if the Court adopts this method, the Government may not recover.

Confiscation is not analogous to a voluntary assignment. It is not even analogous to a bankruptcy proceeding.

In *James & Co.* v. *Second Russian Insurance Company, supra,* Judge Cardozo, stated, page 257:

> "The decree invoked by the defendant is not in any true sense a decree of bankruptcy, though even if it were, there would be limits to its extra-territorial validity. A decree of bankruptcy presupposes a distribution of the assets for the benefit of creditors, and this decree is one of confiscation, appropriating the assets for the benefit of the Soviet republic."

The Soviet government does not resemble a universal successor. It did not succeed to the rights of the corporation, but it shattered the corporation and attempted to create new rights.

Assuming that the Soviet Government be regarded as an assignee it does not follow that it became such by virtue of a voluntary contract made with the assignor. A distinction is recognized in our law between a transferee whose rights are acquired by voluntary assignment and one whose rights are acquired by operation of law.

In *Cole* v. *Cunningham,* 133 U. S. 107, the Supreme Court said:

> "It is certain that the laws of common domicile cannot overcome such registry and other positive

laws of the other country as are distinctly politic and coercive. (Wharton on Conflict of Laws, 369, 371) If a State provides that no title shall pass to property within its borders, except on certain conditions, such provision cannot be overriden by the law of any other State, which parties domiciled there may be held to have been adopted. * * *

Again, although, in some of the States the fact that the assignee claims under a decree of a court or by virtue of the law of the State of the domicil of the debtor and the attaching creditor, and not under a conveyance by the insolvent is regarded as immaterial, yet, in most, the distinction between involuntary transfers of property, such as work by operation of law as Foreign Bankrupt and Insolvent Laws, and a voluntary conveyance, is recognized. The reason for the distinction is that a voluntary transfer, if valid where made, ought generally to be valid everywhere, being the exercise of the personal right of the owner to dispose of his own, while an assignment by operation of law has no legal operation out of the State in which the law was passed. This is a reason which applies to citizens of the actual situs of the property when that is elsewhere than at the domicil of the insolvent, and the controversy has chiefly been as to whether property so situated can pass even by voluntary conveyance."

To the same effect are all authorities.

Security Trust Co. v. *Dodd Mead & Co.,* 173 U. S. 624, 629;
Matter of Accounting of Waite, 99 N. Y. 433;
Barnett v. *Kinney,* 147 U. S. 476;
Black v. *Zacharie,* 3 How. U. S. 483;
Barth v. *Backus,* 140 N. Y. 230;
Warner v. *Jaffray,* 96 N. Y. 248;
Osgood, et al. v. *Maguire,* 61 N. Y. 524, 529;
Willitts v. *Waite,* 25 N. Y. 586;

Hibernia National Bank v. *Lacombe,* 84 N. Y. 367, 385;
Keller, et al. v. *Paine,* 107 N. Y. 83, 89;
Hervey, et al. v. *R. I. Locomotive Works,* 93 U. S. 664;
Dearing v. *McKinnon Dash & Hardware Co.,* 165 N. Y. 78, 87.

In the case against the President and Directors of the Manhattan Company as Assignee for the benefit of creditors of the Northern Insurance Company of Moscow, creditors' rights were acquired before the intervention of the alleged universal successor. The government cannot defeat their rights and must yield "to the mandate of the sovereignty that has the physical control of what he would reduce to his possession". *Clark* v. *Williard,* 294 U. S. 211.

If the Soviet decrees have any force here it is only by virtue of comity, but comity has no place where the legislation offends the public policy of this forum.

In the present case such decrees will not be enforced because the judiciary of the State of New York has declared by repeated decisions that it is against our public policy to enforce them. The State of New York has by legislative enactment stated that these decrees shall have no extra-territorial effect or validity as to property including debts within such State and has provided a method for distribution to creditors. Laws of 1936, Chapter 917, Section 977-B, New York Civil Practice Act.

The Russian State could not transfer any rights to the United States since its legislation transgressed upon the territorial limits of its sovereignty. In any event our courts will not enforce a right otherwise duly acquired under the foreign law where the enforcement of such right is inconsistent with the policy of law in force in the United States.

POINT II

Our courts will not enforce the Penal Laws of a foreign state.

In the recent case of *Banco De Vizcaya* v. *Don Alfonso* (1934), 151 L. T. R. 499, the English Court considered the effect of a confiscatory decree of a Spanish Government purporting to confiscate the security of a Spanish bank held by it in England. The Court said at pages 500, through 501:

> "In my judgment, the substance of the right sought to be enforced by the plaintiffs is the delivery to them of the securities in question and the enforcement of this right will directly or indirectly involve the execution of what are undoubtedly and admittedly penal laws of the Spanish Republic. The plaintiffs' whole case is that they are bound by virtue of the decrees to hand over the securities of the Spanish Government in defiance of the mandate of the defendant, and, that being so, it seems to me unarguable that the enforcement of the plaintiffs' right will directly or indirectly involve the execution of the decrees. It was contended on behalf of the plaintiffs that, though the decrees may be penal, the plaintiffs' claim is not a penal action; because they are not asserting the right of the Spanish Government but their own contractual right to the securities as against the Westminster Bank. I am unable to accept this contention.
>
> The plaintiffs are not asserting their contractual rights as they originally existed but as altered by the decrees of the Spanish Republic. Nor are they in substance asserting their own rights at all, but the rights of the Spanish Republic."

The Soviet confiscatory decrees are penal in character and irrespective of the situs of the debt or chose in action are unenforcible here.

In *Wisconsin* v. *Pelican Insurance Co.,* 127 U. S. 265, the Court said at page 291:

> "The rule that the Courts of no country execute the law of another applies not only to prosecutions and sentences for crimes and misdemeanors, but to all suits in favor of the State for the recovery of pecuniary penalties for any violation of statutes for the protection of its revenue or other municipal laws, and to all judgments for such penalties."

The doctrine finds support in the following cases:

Huntington v. *Attrill,* 146 U. S. 657;
Louks v. *Standard Oil Co.,* 224 N. Y. 99;
Oklahoma v. *Gulf, Colorado & Santa Fe Ry. Co.,* 220 U. S. 290;
Baglin v. *Cusenier Co.,* 221 U. S. 580, 596.

POINT III

The public policy in this country renders it impossible to accept as valid a transfer under confiscatory decrees.

The Soviet decree dissolving the Russian corporation, appropriating its assets and terminating all the rights of creditors and stockholders was shocking to our sense of justice and contrary to our public policy. Every Court which has examined these decrees has held them to be an affront to justice and of no extra-territorial effect.

Russian Reinsurance Company v. *Stoddard,* 240 N. Y. 149;

James & Co. v. *Second Russian Insurance Company,* 239 N. Y. 248, 255;

Petrogradsky M. K. Bank v. *National City Bank,* 253 N. Y. 23;

Vladikavkazsky Ry. Co. v. *N. Y. Trust Co.,* 263 N. Y. 369;

The Jupiter, 43 T. L. R. 210;

Employer's Liability, 1926, 1 K. B. L. affirmed House of Lords, 1927, A. C. 95;

Etat Russe v. *Ropit* (1925, 52 Clunet 391), 1928, 55 Clunet 674;

Ginsberg v. *Deutsche Bank* (1928), Justice Wochenschrift 1232, 1233, Kammergericht, Berlin;

Council of Russian Orthodox Community in Copenhagen v. *Legation of R. S. F. S. R.* (1925-26 Ann. Dig. of Int. Law Cases 24, Sup. Ct. Denmark).

> "The public policy of the government is to be found in the constitution and the laws and the course of administration and decisions."

St. Louis Mining Co. v. *Montana Mining Co.,* 171 U. S. 650.

It is unreasonable to contend therefore that the executive department by the acceptance of the assignment has declared the public policy of this country and in connection with this has stripped the courts of their power to interpret it.

> "The construction of treaties is the peculiar province of the judiciary; and, except in cases purely political, Congress has no constitutional power to settle the rights under a treaty, or to affect titles already granted by the treaty itself."

Jones v. *Meehan,* 175 U. S. 1.

The transfer as attempted was not in accordance with what was required by our law, and was ineffectual to vest any title in the United States.

POINT IV

The language of the Litvinoff letter does not include the funds in question.

This point was discussed at length in the brief of the respondents and it is not necessary to deal at length with it here.

We submit, however, that the assignment to the United States was not made by the foreign sovereignty dissolving the corporation, or by the State which took title to the assets of the dissolved corporation. The Government of the Union of Soviet Socialist Republics assigned to the United States "the amounts admitted to be due or that may be found to be due it as the successor of prior governments of Russia or otherwise." The United States does not claim the amounts sued for are due the Union as the successor of any prior government of Russia but relies on the words, by confiscation and appropriation. The assignment of the amounts due is made by the Union of Soviet Socialist Republics. The decree which purported to dissolve and nationalize the Russian corporation was enacted by the Russian Socialist Federated Soviet Republic.

Even if the Government's argument to the effect that upon dissolution the assets of the corporation shall pass to the person designated by statute and give the right to such person, wherever situated, there is nothing in the record showing that this person is the assignor.

The Russian Socialist Federated Soviet Republic is but one of a number of member states which compose the

Union. Assuming that the property passed to the Russian Socialist Federated Soviet Republic by virtue of the decrees, we have no allegation or evidence in the record which shows that the Russian Socialist Federated Soviet Republic transferred its right to the Union of Soviet Socialist Republics so that the latter in turn could make an assignment to the United States. Until the United States cures this defect, it has no standing in our Courts.

Conclusion

Each state has a right to declare a policy of law which is to govern in its jurisdiction. The recognition of a foreign government does not alter the principles established in such forum, particularly when they have been in force for a number of years. When the public policy of the forum is against confiscatory legislation international comity has no place. The effect of the system which the Court is invited to adopt, would lead substantially to the foreign domination of American property.

The decision of the Court below should be affirmed.

Respectfully submitted,

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