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International Law--Soviet Decrees Nationalizing Russian Insurance Companies--Assignment of Assets to the United States--Extraterritoriality (Moscow Fire Insurance Co. v. Bank of New York, 253 App. Div. 644 (1st Dept. 1938))

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Justice Holmes dissented also in *Black & White Taxicab and Transfer Co.* v. *Brown & Yellow T. & T. Co.:* [37] "If within the limits of the Constitution a State should declare one of the disputed rules of general law by statute there would be no doubt of the duty of all Courts to bow * * *. I see no reason why it should have less effect when it speaks by its other voice. If a state constitution should declare that on all matters of general law the decisions of the highest Court should establish the law until modified by statute or by a later decision of the same Court, I do not perceive how it would be possible for a Court of the United States to refuse to follow what the State Court decided in that domain. But when the constitution of a State establishes a Supreme Court it by implication does make that declaration as clearly as if it had said it in express words * * *." [38]

No doubt all these dissenting opinions, in conjunction with the extensive criticisms,[39] have been responsible for the instant case, so that we may now say that the *lex loci* would govern in all diversity of citizenship suits in the federal courts where questions of general jurisprudence arise. It is submitted that the instant case is only a precursor, for there are many questions left unanswered. Is Congress free to enact a law reiterating the *Swift* doctrine? Is equity involved? If there are no statutes or decisions upon certain matters of general law, will a Supreme Court decision be followed in a subsequent state case, or will the state judges pride themselves on being able to overrule the United States courts? The answers to all these questions must be left to the future.[40]

A. M. A.

INTERNATIONAL LAW—SOVIET DECREES NATIONALIZING RUSSIAN INSURANCE COMPANIES—ASSIGNMENT OF ASSETS TO THE UNITED STATES—EXTRATERRITORIALITY.—As a consequence of nationalization by Soviet decrees in the years 1918 and 1919 of the Russian insurance companies and the confiscation of their property, cancellation of their debts, and extinguishment of the rights of shareholders, there followed a liquidation of the American branches of the Russian insurance companies here. However, because of the nonrecognition of Russia in 1931, the surpluses could not be remitted to domiciliary receivers in that country. Lest the surpluses be lost, it

[37] 276 U. S. 518, 532, 48 Sup. Ct. 404, 408 (1928).
[38] *Id.* at 534 (Brandeis and Stone, JJ., concurred in this dissent).
[39] See notes 1, 3, 4, 5, 6, and 10 of Mr. Justice Brandeis' opinion in Erie R. R. v. Tompkins, 304 U. S. 64, 58 Sup. Ct. 817 (1938).
[40] For recent criticisms of the instant case see Note (1938) 13 ST. JOHN'S L. REV. 71; Shulman, *The Demise of Swift v. Tyson* (1938) 47 YALE L. J. 1336; Schweppe, *What Has Happened to Federal Jurisprudence?* (1938) 26 A. B. A. J. 421.

was directed [1] that they be turned over to the conservators or directors of the companies. Following a liquidation proceeding [2] of the Moscow Fire Insurance Company, its sole surviving director duly became the conservator and remitted its assets to the defendant bank. Thereupon the insurance company and its conservator, and later certain shareholders, instituted actions to determine that the assets be payable to the creditors and shareholders. After both actions were consolidated, all claims of creditors and shareholders were adjudicated in 1934. In 1936, having failed in the federal courts, the United States, appellant, was permitted to intervene in the consolidated actions upon a petition, which prayed for a vacatur of the judgment of 1934, asserting title to the assets on the grounds that they were assigned to the intervenor on the occasion of the United States according recognition to Russia in 1933. On appeal from a dismissal of the petition by the court below, *held,* affirmed. The evidence adduced showed that the decrees confiscating the assets of the insurance company were not intended to apply to assets situated outside of Russia and in the United States. *Moscow Fire Insurance Co.* v. *Bank of New York,* 253 App. Div. 644, 3 N. Y. Supp. (2d) 653 (1st Dept. 1938).[3]

Assuming that the decrees were extraterritorial the same result would have been attained.[4] Acts, statutes, or decrees of a foreign state have no force beyond the limits of the sovereignty from which their authority is derived.[5] Universal acknowledgment is given to the principle of the perfect equality of nations.[6] Thus, it cannot be demanded as a matter of strict right that laws or decrees of one nation be enforced within the jurisdictions of this state or nation, or any other nation.[7] At times enforcement of foreign laws or decrees is permitted only because of comity which exists between states and nations; [8] but, although comity is something more than mere political

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[1] Matter of People (Russian Reinsurance Co.), 255 N. Y. 415, 175 N. E. 114 (1931).

[2] Matter of People (Moscow Fire Insurance Co.), 255 N. Y. 433, 175 N. E. 120 (1931).

[3] Memorandum decision—no opinion. See Moscow Fire Ins. Co. v. Bank of New York, 161 Misc. 903, 294 N. Y .Supp. 648 (1937), for an elaborate history of the case.

[4] It was shown by Referee Donnelly in his opinion (see note 3, *supra*) that the decrees were not intended to have any effect outside the boundaries of Soviet jurisdiction. However, in a didactic *dicta* the referee traces the law and proves that the result would have been the same if the decrees were extraterritorial.

[5] Hilton v. Guyot, 159 U. S. 113, 16 Sup. Ct. 139 (1894); Matter of Waite, 99 N. Y. 433, 2 N. E. 440 (1885); Deschenes v. Tallman, 248 N. Y. 33, 161 N. E. 321 (1928).

[6] The Antelope, 10 Wheat. 66 (U. S. 1825).

[7] Rose v. Himely, 4 Cranch 241 (U. S. 1808); The Appalon, 9 Wheat. 362 (U. S. 1824); Second Russian Ins. Co. v. Miller, 268 U. S. 552, 45 Sup. Ct. 593 (1924); United States v. Bank of N. Y. and Trust Co., 296 U. S. 463, 56 Sup. Ct. 343 (1935).

[8] See note 7, *supra;* Baglin v. Cusenier Co., 221 U. S. 580, 31 Sup. Ct. 669 (1911); MOORE, DIGEST OF INTERNATIONAL LAW (1906) § 197.

courtesy, it is not obligatory and will not operate when it is contrary to the public policy or prejudicial to the interests of the forum which is asked to apply it.[9]

Going to its constitution, its laws, and judicial decisions we find the public policy of the State of New York.[10] It is the established law in New York that the assets of a dissolved or liquidated corporation are not subject to *confiscation*,[11] nor do they escheat to the state, but rather, the assets are to be held for distribution to the creditors and shareholders, wherever they may be, as their own property.[12] Indeed, the United States has not only recognized the New York rule of public policy,[13] but entertains the same policy and would not recognize a title based upon confiscation.[14] However, it is immaterial that the public policy of the United States is in accordance with that of New York, for the disputed fund always had its *situs* in a New York depository [15] and, thus, New York has the jurisdiction and control of the *res*.[16] The title to the securities depends on the *lex fori* where the securities are found.[17] Therefore, the United States is bound by the public policy of New York like any private litigant.[18]

In this case the power of eminent domain—a fundamental governmental power—was utilized under the Soviet decrees, but the government refused to compensate for the property taken, and thereby the act resulted in confiscation. It is the rule that no matter how broad the powers of a sovereign may be, nevertheless, they must stop

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[9] Bank of Augusta v. Earle, 13 Pet. 519 (U. S. 1839), wherein comity is defined as "the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, *and to the rights of its own citizens or of other persons who are under the protection of its laws*". (Italics ours.) See also Fisher, Brown and Co. v. Fielding, 67 Conn. 91, 34 Atl. 714 (1895).

[10] Mertz v. Mertz, 271 N. Y. 466, 3 N. E. (2d) 597 (1936).

[11] There is a distinction between the dissolution of a corporation and the confiscation of its assets. Only the creating state can dissolve a corporation, Remington & Sons v. Samana Bay Co., 140 Mass. 494, 5 N. E. 292 (1886), and no foreign state will deny it the right, even though all the corporation's assets are located, and all the business is transacted in the foreign country. Geo. D. Witt Shoe Co. v. Mills, 224 Ala. 500, 140 So. 578 (1932).

[12] People v. O'Brien, 111 N. Y. 1, 18 N. E. 692 (1888). The Legislature has also declared the public policy of New York to be such as to protect creditors and shareholders against confiscatory decrees. N. Y. Civ. Prac. Act § 977-b, as added by Laws of 1936, c. 917.

[13] Cole v. Cunningham, 133 U. S. 107, 10 Sup. Ct. 269 (1889).

[14] United States v. Percheman, 7 Pet. 51 (U. S. 1833); Greenwood v. Freight Co., 105 U. S. 13 (1881).

[15] The deposit was created by N. Y. Ins. Law § 27; the surplus was created by N. Y. Ins. Law § 63.

[16] Clark v. Willard, 294 U. S. 211, 55 Sup. Ct. 356 (1934); Spencer v. Myers, 150 N. Y. 269, 44 N. E. 942 (1896); Deschenes v. Tallman, 248 N. Y. 33, 161 N. E. 321 (1928).

[17] Burnett v. Brooks, 288 U. S. 378, 53 Sup. Ct. 457 (1932).

[18] United States v. Stinson, 197 U. S. 200, 25 Sup. Ct. 426 (1904); Standard Oil Co. v. United States, 267 U. S. 76, 45 Sup. Ct. 211 (1924).

with confiscation.[19] Indeed, there is such a stern adherence to this rule that, even on the theory of constructive possession, the requisition, by a state, of property outside its jurisdiction has not been upheld, when that property has not come within its actual possession.[20] However, the New York rule should not be considered as impolitic, for the welfare of the state depends upon it, and New York merely shares the same rule with foreign jurisdictions.[21]

E. S. S.

LABOR—CLOSED SHOP CONTRACT—MONOPOLY—GENERAL BUSINESS LAW SECTION 340.—Defendant Transport Workers Union of America was the duly elected bargaining agent for the employees of I. R. T. shops. After long negotiations and threatened strikes, a contract was entered into between defendant union and defendant company which provided that the latter would not employ any worker who was not, or did not become a member of the union within thirty days. Plaintiffs were employees at the time; they refused to join the union and were consequently discharged. In this action to enjoin defendants from carrying out the "closed shop" contract, plaintiffs concede that a "closed shop" contract is generally valid,[1] but they contend that in this case it is invalid because, as the I. R. T. is the only labor market locally for plaintiffs, the contract caused an unlawful monopoly;[2] they further contend that subdivision 2 of Section 340 of the General Business Law[3] is unconstitutional as violating the

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[19] Nichols v. Coolidge, 274 U. S. 531, 47 Sup. Ct. 710 (1926); Blodgett v. Holden, 275 U. S. 142, 48 Sup. Ct. 105 (1927); Untermyer v. Anderson, 276 U. S. 440, 48 Sup. Ct. 353 (1927).

[20] Baglin v. Cusenier Co., 221 U. S. 580, 31 Sup. Ct. 669 (1911); Petrogradsky M. K. Bank v. Nat. City Bank, 253 N. Y. 23, 170 N. E. 479 (1930).

[21] The Jupiter, 1925-26 ANN. DIG. OF INT. LAW CASES, Case No. 100; Luther v. Sagor, L. R. [1921] 3 K. B. 532.

[1] NEW YORK LABOR LAW § 704, subd. 5; Jacobs v. Cohen, 183 N. Y. 207, 76 N. E. 5 (1905); Commonwealth v. Hunt, 4 Metc. 111 (Mass. 1842) is the leading case on the subject in this country. *Contra:* Mische v. Kaminski, 127 Pa. Super. 66, 193 Atl. 410 (1937).

[2] If the employees did not join the union, they would not be able to work at all. Curran v. Galen, 152 N. Y. 33, 46 N. E. 297 (1897); Grassi Co. v. Bennett, 174 App. Div. 244, 160 N. Y. Supp. 279 (1st Dept. 1916); Connors v. Connelly, 86 Conn. 641, 86 Atl. 600 (1913); Lehigh Co. v. Atl. Works, 92 N. J. Eq. 131, 111 Atl. 376 (1920); Polk v. Cleve. Ry., 20 Ohio App. 317, 151 N. E. 808 (1925).

The legal reasoning in many cases upholding a closed shop was that it was not oppressive and did not operate throughout the community to prevent non-union men from earning their livelihood; Jacobs v. Cohen, 183 N. Y. 207, 212, 76 N. E. 5, 7 (1905).

[3] This section is known as the Donnelly Anti-trust Act. Subdivision 2 expressly exempts "bona fide labor unions" from its provisions.