EFFECTS IN PRIVATE LITIGATION OF FAILURE TO RECOGNIZE NEW FOREIGN GOVERNMENTS

Nonrecognition of new foreign governments which have achieved territorial security has developed, during the twentieth century, into an important aspect of United States foreign policy. The United States has continued to recognize certain governments even after they have been ousted from all control over the territory they formerly controlled. Recognition of new foreign governments has been delayed for as much as sixteen years. This policy has created new problems in private litigation.

Where the law of a foreign nation properly applies, the legislative, administrative, and judicial acts of an exiled government which continues to be recognized despite the relinquishment of territorial control, compete for acceptance with the acts of the new and unrecognized government. The choice of law may depend upon the locus of the events involved in the particular case. The time of the judicial determination may also be important since a court which applies the law of the old government before recognition may apply the law of the new government after recognition. A party who participated in transactions to which the laws of one of the governments properly apply may find his rights and duties changed by recognition. Thus, banks and other commercial interests face possible double liability unless they can bring all the parties claiming under both laws together in one suit during the period of nonrecognition. These problems were raised in a recent case, Bank of China v. Wells Fargo Bank & Union Trust Co., where a California bank, holding a deposit of a bank chartered by the Republic of China (Nationalist), was faced with the opposing claims of the old Nationalist-appointed representatives and agents appointed by the new People's Republic of China (Communist). Because of the difficulties involved, the federal district court postponed determination of the claimants' rights sine die.

I

The great majority of cases in which past or present nonrecognition was an important factor have involved confiscation, especially in connection with corporate "nationalization." Absent any problem of nonrecognition, these cases have been handled by courts in the United States under rules which may be divided into three categories.

(1) For purposes of private litigation within the United States, the executive acts of a recognized government within the territory of its actual and effective

1 For the purposes of this comment, the distinction made in international law between recognition of new governments and recognition of new states is not of practical significance. In reference to recognition, the word "government" will be assumed to include the word "state."

2 The longest delay was in the case of the Soviet Union. Russia—Diplomatic Relations, 24 Encyc. Americana 58 (1943).

control may not be questioned, even though confiscatory or repugnant to American public policy. General legislation of a foreign government regarding the effect of contracts subject to the law of the country in question, or transactions affecting property situated within its territory, generally controls, except where the foreign law is fiscal or penal, or where its application would be contrary to the strong public policy of the forum.

(2) With respect to attempts by foreign governments to affect assets located outside their own territory the situation is entirely different. The usual rule is that title to property is determined by the law of the place where the property is situated at the time of the event which is alleged to have affected the title.

4 Underhill v. Hernandez, 168 U.S. 250 (1897) (plaintiff, detained by authorities of the Venezuelan government, was denied recovery against those responsible when their presence in the United States made personal service possible); American Banana Co. v. United Fruit Co., 213 U.S. 347 (1909) (plaintiff alleged that Costa Rican soldiers took over plaintiff's Panamanian plantation on the Costa Rican border and conveyed it to a third party who conveyed to defendant, all at the inducement of the defendant; plaintiff's claim for triple damages under the Sherman Act denied on the ground, among others, that the acts of the soldiers were those of the Costa Rican government); Banco de Espana v. Federal Reserve Bank of New York, 114 F. 2d 438 (C.A. 2d, 1940) (proof of official acts of the then officially recognized Spanish loyalist government within Spain accepted as finally determinative in a dispute over the title of Spanish silver sold by the Spanish government to the United States). This view has support from the leading English case, Princess Paley Olga v. Weisz, 1 K.B. 718, but several European countries are contra. Mann, The Sacrosanctity of the Foreign Act of State, 59 L.Q. Rev. 43, 159-64 (1943).

6 Rest., Conflict of Laws §§ 208-12, 332-40, 358-63 (1934); Goodrich, Conflict of Laws §§ 105-11, 144-51 (1938); Dicey, op. cit. supra note 5, at 531-41, 560-64. In the case of contracts, this rule may sometimes be limited by the intention of the parties or restrictions imposed by the courts enforcing the contract, but it disposes of the great majority of contracts cases both here and abroad. 2 Rabel, Conflict of Laws: A Comparative Study 357-484 (1947).

8 Subject to exceptions that cannot be gone into here, this view is the accepted one both in the United States and abroad. 2 Beale, op. cit. supra note 7, at §§ 255-5, 262.1-262; Goodrich, op. cit. supra note 6, at 404-6, 426-29; Wolff, op. cit. supra note 7, at 599-69.
But even if the conflict of laws rules of the place where the property is located call for giving effect to foreign law in determining title, such effect may be refused if the foreign law in question is contrary to the public policy of the place where the property is situated.9

(3) In common-law countries the law of the state of incorporation is determinative as to the creation, continuance and dissolution of a corporation.10 Courts in the United States generally allow the foreign liquidator of a dissolved, insolvent, or bankrupt foreign corporation to sue in the courts of the forum for assets of that corporation,11 but local creditors are usually granted prior rights.12

The succeeding two sections of this comment will consider the rules applied in cases involving nonrecognition, past or present at the time of the litigation. As these rules are developed, reference to the rules where nonrecognition is not a factor in the case will facilitate a determination of the exact effect of nonrecognition or delayed recognition in the particular case.

II

Before 1920 there were few cases and a wide diversity of opinion in the courts of the United States as to how the acts of unrecognized governments should be treated. The Supreme Court adopted the moderate view that Confederate laws were valid for purposes of private litigation unless they furthered the anti-Union war effort and were, therefore, hostile to the United States.13 The Court of Errors and Appeals of New Jersey held valid even "the acts of paramount military authority," in a case arising out of confiscation by revolutionary officers in Mexico.14 But, in a similar case, the Supreme Court of Texas treated as

9 "Russia might terminate the liability of Russian corporations in Russian courts or under Russian law," but its "fian to that effect could not constrain the courts of sovereigns, if assets of the debtor were available for seizure in the jurisdiction of the forum... Neither comity nor public policy requires us to enforce a mandate of confiscation [with respect to assets within the territory of the forum] to the prejudice... of those... seeking justice in our courts." Cardozo, J., in James & Co. v. Second Russian Ins. Co., 239 N.Y. 248, 257, 146 N.E. 369, 371 (1925). This is the usual view both here and abroad, as the general refusal to give extraterritorial effect to Soviet confiscation shows. Nebolsine, The Recovery of the Foreign Assets of Nationalized Russian Corporations, 39 Yale L.J. 1150, 1155-60 (1930); Kuhn, Comparative Commentaries on Private International Law 82-84 (1937).

10 2 Beale, op. cit. supra note 7, at §§ 152.2, 152.4, 157.1, 157.2; 2 Rabel, op. cit. supra note 6, at 31-33, 85.

11 2 Beale, op. cit. supra note 7, at §§ 159.3; 3 ibid., at §§ 560A-571; Goodrich, op. cit. supra note 6, at § 195.

12 Even the Full Faith and Credit clause of the Constitution does not prohibit local creditors of an insolvent corporation incorporated in another state from getting the property of that corporation within the forum even after the state of incorporation had appointed a statutory liquidator for the corporation. Clark v. Williard, 294 U.S. 211 (1935).

13 United States v. Ins. Companies, 22 Wall. (U.S.) 99 (1874), Baldy v. Hunter, 171 U.S. 388 (1898) (upholding Confederate incorporation and trustee investment laws); Shortridge v. Macon, 22 Fed. Cas. 20, No. 12,812 (C.C. N.C., 1867); Williams v. Bruffy, 96 U.S. 176 (1877) (voiding Confederate laws which sequestered the property of enemy aliens).

"banditry" the confiscatory acts of the same unrecognized government in Mexico.\textsuperscript{15}

Opinions of New York courts in cases arising from the extended delay in recognizing the Soviet Union present the most complete judicial development of the effects of nonrecognition in private litigation.\textsuperscript{16} The continued recognition of the defunct Kerensky government by the United States was decisive\textsuperscript{17} in cases involving the Russian state as such.\textsuperscript{18} The Kerensky government alone could represent the Russian state in American courts;\textsuperscript{19} it was protected from suit by the doctrine of sovereign immunity.\textsuperscript{20} However, the Soviet government was also protected from suit, even though it could not sue in courts in the United States.\textsuperscript{21}

The over-all attitude of the New York courts in cases not involving the Russian state was closest to the moderate view held by the Supreme Court in the Confederate cases. In dicta in two early opinions, Judge Cardozo spoke in broad terms of doing justice between the parties without extending the executive policy of nonrecognition beyond the political sphere.\textsuperscript{22} This attitude comes out even


\textsuperscript{16} The principal nonrecognition cases are collected in United States v. President and Directors of the Manhattan Co., 276 N.Y. 396, 12 N.E. 2d 518, 521-22 (1938). They fall mainly into two groups: (1) Cases involving the disposition of the United States' assets of nationalized Russian corporations: Russian Reinsurance Co. v. Stoddard, 240 N.Y. 149, 147 N.E. 703 (1933); Petrogradsky Mejdonarodny Komercchesky Bank v. Nat'l City Bank of New York, 239 N.Y. 158, 145 N.E. 917 (1930). (2) Cases involving insurance contracts interfered with by confiscation of Russian insurance companies: James & Co. v. Second Russian Ins. Co., 239 N.Y. 248, 146 N.E. 369 (1926); James & Co. v. Russia Ins. Co. of America, 247 N.Y. 262, 160 N.E. 364 (1928). They involved confiscation, directly or indirectly, almost without exception. A full analysis of the important decisions is contained in Hollander, op. cit. supra note 5, at 31 et seq.

\textsuperscript{17} Only one government can be the representative of a state in international affairs. The Rogdai, 278 Fed. 294 (N.D. Calif., 1920), and in the United States, under the doctrine of executive supremacy in foreign affairs, the executive, not the courts, determines which government that is to be. United States v. Palmer, 3 Wheat. (U.S.) 610 (1818); Kennett v. Chambers, 14 How. (U.S.) 38 (1852); Jones v. United States, 137 U.S. 202 (1897).

\textsuperscript{18} Legally, governments are distinct from the sovereign states over which they rule. Governments may replace one another but the state lives on continuously and is unaffected by governmental shifts. Lehigh Valley R. Co. v. State of Russia, 21 F. 2d 396 (C.A. 2d, 1927); Hackworth, Digest of International Law 127 (1940).

\textsuperscript{19} Russian Soviet Federated Socialist Republic v. Cibrafio, 235 N.Y. 255, 139 N.E. 259 (1923).

\textsuperscript{20} According to the doctrine of sovereign immunity, a foreign government cannot be sued in courts in the United States without its consent. Monaco v. Mississippi, 292 U.S. 313 (1934); Oliver American Trading Co. v. United States of Mexico, 5 F. 2d 659 (C.A. 2d, 1924); Sullivan v. State of Sao Paulo, 122 F. 2d 355 (C.A. 2d, 1942).


more clearly in cases in which the existence of the Soviet Union simply could not be ignored. However, since most New York cases involved the disposition of assets of confiscated corporations, the import of this attitude is difficult to discern because many other grounds were available for each decision.

The majority of the cases concerned liquidations of New York branches of Russian insurance companies. The courts had to apply the New York Insurance Law of 1909, as amended, which required that local creditors be the first to benefit from the proceeds derived from liquidation. The assets remaining after the payment of local claims against New York branches of Russian insurance companies and the assets of nationalized corporations in other fields were, in most cases, disposed of according to the prior—Czarist-Kerensky—law, and turned over to directors who continued to operate outside of Russia. This result was achieved on the theory that confiscatory acts of an unrecognized government could not affect assets located in New York. However, since confiscation is contrary to the public policy of New York, the application of ordinary rules would have resulted in denying effect to the confiscatory acts of the Soviet government with respect to New York assets even if the Soviet Union had been recognized throughout. The only new departure, therefore, was in the decision to apply Czarist-Kerensky law rather than Soviet law in the disposition of the surplus assets; and thus, in effect, to allow old Russian corporations to live on for the purposes of New York litigation long after their demise in the state of their incorporation.

Soviet confiscation was given limited extraterritorial effect in one case, but

The affinity of the New York courts for the moderate Supreme Court view is indicated by the citation of the Supreme Court cases in the Sokoloff case.

23 "The State Department... cannot determine how far the private rights and obligations of individuals are affected by a body not sovereign or with which our government will have no dealings. That question does not concern our foreign relations. It is not a political question, but a judicial question," Lehman, J., in Russian Reinsurance Co. v. Stoddard, 240 N.Y. 149, 158, 147 N.E. 703, 705 (1925). "[T]he question of the validity of acts and decrees of a regime not the subject of diplomatic recognition becomes a matter to be decided by the courts in an appropriate case." Pound, C. J., in Salimoff & Co. v. Standard Oil Co. of New York, 262 N.Y. 220, 224, 186 N.E. 679, 681 (1933). See notes 30 and 34 infra for the facts of these cases.

24 The main provisions in the Insurance Law of 1909 relevant to these liquidations were Section 27, N.Y.L. (1919) c. 382, §2; Section 28, N.Y.L. (1919) c. 382, §3 and Section 63, N.Y.L. (1909) c. 300, amended by N.Y.L. (1922) c. 69 and N.Y.L. (1930) c. 196. Matter of People (Second Russian Ins. Co.), 255 N.Y. 412, 175 N.E. 113 (1931).


29 Authorities cited notes 8 and 9 supra.
only in order to protect local debtors from the risk of double liability.30 No other reported New York decisions give any extraterritorial effect to Soviet acts or legislation of any kind. However, because all the reported cases involved attempted confiscation, the decisions could be distinguished where the extraterritorial effect of acts not confiscatory and not repugnant to public policy were in dispute.31

New York courts, without exception, refused to recognize Soviet corporate dissolution, a domestic act.32 Such treatment does not mean that domestic acts were handled as were attempted extraterritorial controls. In fact, the dissolution cases all involved only assets outside territory controlled and dominated by the Soviets; in several, moreover, Soviet dissolution was recognized by implication since various limitations were imposed upon disposition according to Czarist-Kerensky law.33 Holdings in two cases34 and dicta in others35 indicated

30 Russian Reinsurance Co. v. Stoddard, 240 N.Y. 149, 147 N.E. 703 (1925). The New York Court of Appeals refused to allow the French representatives of a Russian corporation, nationalized in Russia by the Soviets but still operating in France, to sue in New York for the assets it deposited to secure its American operations. The court felt that French recognition of the Soviets might validate the nationalization in French courts and give the Soviet government a claim against the United States defendant, thus subjecting him to double liability. This case gives a clear indication that local creditors would be protected, at least in the disposition of assets within the forum, even where the Insurance Law did not require that result. But see In re Stoddard, 242 N.Y. 148, 158–159, 151 N.E. 159, 164 (1926).

31 International precedent on the question of giving extraterritorial effect to the non-repugnant acts of unrecognized governments is practically nonexistent. Lauterpacht, Recognition in International Law 151–53 (1948).

32 The Soviet nationalization decrees involved two main steps: (1) dissolution of all the corporations and associations covered by the decree in question, an act within the normal legislative powers of any government, and (2) the transfer of all their assets to the credit of the Soviet state without compensation to anyone. United States v. Pink, 315 U.S. 203, 217–19 (1942). In this latter transaction the decrees, although general in their application, operated on each specific company like a seizure of its assets so that this aspect of the decrees was in the nature of a specific executive act rather than a legislative proceeding.


35 Referring to the internal acts of an unrecognized government, the opinion in Sokoloff v. Nat'l City Bank of New York, 239 N.Y. 138, 165–66, 145 N.E. 917, 919 (1924), states that "effect may at times be due to the ordinances of foreign governments which, though formally unrecognized, have notoriously an existence as governments de facto" and that such a government "may gain for its acts and decrees a validity quasi-governmental." Again, in Petrogradsky Mejdunarodny Komerchesky Bank v. Nat'l City Bank of New York, 253 N.Y. 23, 29, 170 N.E. 479, 481 (1930), Chief Judge Cardozo argues that "[t]he every-day transactions of business or domestic life are not subject to impeachment, though the form may have been regulated by the command of the usurping government." Following the same line of reasoning, a dictum in a federal case from the same period, Banque de France v. Equitable
cate that New York courts would give effect to many domestic acts of the Soviet government. *Werenjchik v. Ulen Contracting Corp.* indicated that effect would be given to the ordinary domestic legislation of an unrecognized government and the ordinary acts of its officers. In *Salimoff & Co. v. Standard Oil Co. of New York*, the holding gave effect to Soviet confiscation of movables within Soviet territory. The *Salimoff* decision, however, was not a clear holding that all internal executive acts of an unrecognized government must be given effect because considerations of executive policy apparently influenced the result. Whether the decision would be interpreted as requiring that all domestic acts and regulations of unrecognized governments be accorded the same treatment as those of recognized governments is an open question. Its interpretation has not been before New York courts. The fact that the person whose property was expropriated in the *Salimoff* case was a Soviet national and that the party who had acquired it from the Soviet government was a United States corporation may also have influenced the court. The argument would be that considerations of equity, which led the court to hold the national of a foreign country as against a local resident who had relied upon that law, would not apply where a foreign defendant or two local residents are litigating.

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35 Trust Co., 33 F. 2d 202, 205 (S.D.N.Y., 1929), states that a “marriage which is valid under the laws of the present [Soviet] government of Russia is quite universally regarded as valid in this country.”


37 The language of the opinion on this point is broad, and the decision does not in any way turn on the distinction between executive acts and similar domestic legislative regulations. 229 App. Div. 36, 37-38, 240 N.Y. Supp. 619, 620-21 (3d Dep't, 1930).

38 262 N.Y. 220, 186 N.E. 679 (1933).

39 Lauterpacht, Recognition in International Law 148-50 (1948). Although Chief Judge Pound, in writing the opinion in this case, states that he does not feel bound by executive policy (see note 23 supra) he nevertheless sets out in full the State Department's official view on the Soviet government and interprets it broadly as giving de facto recognition to the Soviets, a thing it probably did not intend to do. The only case in point cited by Pound was the *Werenjchik* case, 229 App. Div. 36, 240 N.Y. Supp. 619 (3d Dep't, 1930), which admitted documents authenticated by Soviet officials in evidence in a New York court, certainly not a very strong case where confiscation of property is the subject of dispute. Continual reference is made, throughout the opinion, to the policy of “the State Department” and of “our government,” something never true in prior New York decisions. It seems possible that the court was anticipating the recognition of Soviet Russia by the United States, an event which was then expected and which did actually occur just four months later.

40 See Hollander, Confiscation, Aggression and Foreign-Funds Control in American Law 8 (1942).

International precedent is divided on the question of how to treat the internal acts and legislation of unrecognized governments. With respect to corporate dissolution, recognition determines whether French courts allow or do not allow Soviet dissolution of Russian corporations to take effect. The German-Swiss view is that the dissolution is effective in any case. British, Swedish and Swiss decisions are inconclusive on this point. Nebolsine, The Recovery of the Foreign Assets of Nationalized Russian Corporations, 39 Yale L.J. 1130, 1139-46 (1930). For internal acts in general, the courts of some nations, e.g., Germany and Switzerland, apply the rule that recognition has little or no effect so that the law of whatever government is
Such New York precedent as exists, therefore, tends toward a territorial solution of the problem of which Russian law to apply in the nonrecognition situation: Soviet law to transactions within Russia; Kerensky-Czarist law to those outside. However, most of the cases on the former point involved ordinary regulations; those on the latter, confiscation. Such cases would have been decided exactly the same way had no delayed recognition been involved, except that Kerensky-Czarist law might have been applied to determine the disposition of the surplus assets of nationalized Russian corporations after local creditors had been paid. Cases involving domestic acts and legislation repugnant to the public policy of the forum or attempted extraterritorial application of nonrepugnant regulations would be the easiest in which to reduce the effect given the law of an unrecognized government. Unfortunately, such situations were not presented to the New York courts.

The few federal decisions reported during the period of nonrecognition of the Soviet Union are in general accord with those of the New York courts. However, dicta in more recent federal district court opinions indicate a shift toward giving a broader effect to the executive policy of refusing recognition. These in power will be applied. United States v. Pink—A Reappraisal, 48 Col. L. Rev. 890, 892 (1948); Houghton, The Validity of the Acts of Unrecognized De Facto Governments in the Courts of Non-Recognizing States, 13 Minn. L. Rev. 216, 227 (1929). Even in nations like England, which deny full effect to the laws of an unrecognized government, the confiscation would apparently be valid within Russian territory after the Soviets had been recognized de facto. Dicey, Conflict of Laws 14, 477 (6th ed., Morris, 1949). But while the Soviets remained unrecognized de jure or de facto, courts in France and Belgium refused even to recognize Soviet divorces. Lauterpacht, Recognition in International Law 151-53 (1948).

42 In The Penza, 277 Fed. 91 (E.D.N.Y., 1921), The Rogdai, 278 Fed. 294 (N.D. Calif., 1920), Lehigh Valley R. Co. v. State of Russia, 21 F. 2d 396 (C.A. 2d, 1927) (representatives of the Soviet government have no standing in United States courts, and only the representatives of the Kerensky government can sue here for wrongs to the Russian state); Banque de France v. Equitable Trust Co., 33 F. 2d 202 (S.D.N.Y., 1929) (replevin for gold shipped by the Soviet government to defendant in the United States, defendant allowed to submit proof as to the validity of the Soviet government's title despite plaintiff's claim that the Soviet government confiscated the gold from plaintiff); Amtorg Trading Corp. v. United States, 71 F. 2d 524 (Cust. & Pat. App., 1934) (a New York corporation solely owned by the Soviet government treated like any other corporation; affidavits by Soviet officials admitted in evidence).

44 In The Maret, 145 F. 2d 431 (C.A. 3d, 1944), the court discusses the New York Court of Appeals' policy of considering nonrecognition as a negative policy "freeing it from a regard for the executive action," and then sharply dissents from such reasoning: "This we think is contrary to the doctrine enunciated by Mr. Justice Douglas in the Pink case.... Nonrecognition of a foreign sovereign and nonrecognition of its decrees are to be deemed as essential a part of the power confided by the Constitution to the Executive for the conduct of foreign affairs as recognition.... When the fact of nonrecognition... is demonstrated... the courts of this country may not examine the effect of decrees of the unrecognized foreign sovereign and determine rights in property, subject to the jurisdiction of the examining court, upon the bases of those decrees. A policy of nonrecognition when demonstrated by the Executive must be deemed to be as affirmative and positive in effect as a policy of recognition." Ibid., at 441-42. The Regent, 35 F. Supp. 985 (E.D.N.Y., 1940); The Florida, 133 F. 2d 719 (C.A. 5th, 1943). These cases, which involve the unrecognized Baltic Soviet Republics, are analyzed in Briggs, Non-Recognition in the Courts: The Ships of the Baltic Republics, 37 Am. J. Int. L. 585 (1943). A recent case to the same effect is Latvian State & Cargo Passenger S. S. Line v. McGrath, No. 10131 (App. D.C., Feb. 23, 1957).
opinions conflict with the view of the New York courts that failure to recognize a new government leaves the question of what effect to give to its laws and decrees largely up to the courts in each individual case. They indicate an unwillingness to give any effect to the acts of unrecognized governments. They all, however, involved attempted confiscation by unrecognized governments of assets situated outside of their territory. Thus these decisions represent no reversal in the actual holdings of the earlier cases.

Where cases involving events which occurred before the recognition of a new government are litigated after recognition, courts in the United States have, during the last fifty years, developed the doctrine of the retroactivity of recognition as their guiding principle. Under this doctrine, activities of the new government are retroactively validated as though that government had been recognized from its inception.

Before 1900, cases which achieved results similar to those of the retroactivity of recognition doctrine were scattered and scarce, probably because of the United States' nineteenth-century policy of swiftly recognizing new governments. The first full development of the retroactivity doctrine as now ex-

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43 See text and note at note 23 supra.

44 The only example of this shift in the attitude of the federal courts that had practical effect is provided in the comparison of two cases involving corporations owned by unrecognized governments: Amtorg Trading Corp. v. United States, 71 F. 2d 524 (Cust. & Pat. App., 1934), and Latvian State Cargo & Passenger S.S. Line v. Clark, 80 F. Supp. 683 (D.C., 1948). In the former case the fact that the corporation was owned by the unrecognized Soviet Union was ignored, but in the Clark case, fourteen years later, a Latvian state corporation was held to be an integral part of an unrecognized government and, therefore, not capable of being a party to United States litigation. Even these cases are distinguishable, however, because in the Amtorg case the company in question had been incorporated under the laws of New York, while the Clark case involved a Latvian corporation.

45 Oetjen v. Central Leather Co., 246 U.S. 297 (1918); United States v. Belmont, 301 U.S. 324 (1937). In the Oetjen case both de facto and de jure recognition were stated to have occurred before the decision in the case. No litigation has turned upon the difference between de facto and de jure recognition. The only authority on the point in any court in the United States is an unsupported dictum in Banque de France v. Equitable Trust Co., 33 F. 2d 202, 205 (S.D.N.Y., 1929), which states that de facto recognition will be treated the same as de jure recognition in delayed recognition cases.

46 Recognition is decisive even though it comes after a lower court decision but before final disposition in appellate courts. Oetjen v. Central Leather Co., 246 U.S. 297, 303 (1918).

47 Only three scattered American cases reaching results similar to those now achieved by the retroactivity of recognition doctrine were reported. Underhill v. Hernandez, 168 U.S. 250 (1897); United States v. Trumbull, 48 Fed. 94 (S.D. Calif., 1891); Murray v. Vanderbilt, 39 Barb. (N.Y.) 140 (S. Ct., 1883).

48 United States recognition policy before 1912 concerned itself mainly with three facets of the new government's position: internal stability, consent of the governed, and capacity to fulfill international obligations. 1 Hackworth, Digest of International Law 175 (1940). Although the relative importance of these three factors is open to dispute, it is fair to say that the United States was then generally willing to recognize new governments as soon as their control was established without regard to their origin or principles of government. In the case of the South American republics, not recognized by the United States until well after their de facto establishment in several cases, our practice may not have been entirely consonant with
pressed occurred in cases arising from the two-year delay in the recognition of Mexico's Carranza government during the Woodrow Wilson administration. After recognition, courts in the United States treated as valid the domes-

tions of the "de facto" theory, Moore, Digest of International Law 74–96 (1906); and there were undoubtedly deviations after the Civil War, probably an aftermath of American fear that the Confederacy would be recognized, Lauterpacht, Recognition in International Law 126–27 (1943); but broadly speaking it is fair to say that during this period the "de facto" or "stability" test was the keynote of American recognition policy as opposed to the "legitimacy" or "constitutive" theories of recognition. Hyde, International Law 161–65 (1945); Goebel, The Recognition Policy of the United States 219–21 (1915).

The rationale of the only pre-1900 retroactivity cases, cited note 47 supra, is straightforward: a successful revolution justifies its founders and, therefore, its actions from its beginnings will be treated by courts in the United States as valid. See Williams v. Bruffy, 96 U.S. 176, 186 (1877). That this dictum is the main support for the three pre-1900 retroactivity cases is indicated by the fact that although the holding of the Bruffy case is not in point it is the only real authority relied on in the Underhill and Trumbull cases, while the Vanderbilt case contains no citation of authority relevant to the retroactivity of recognition.

In the nineteenth century, when the tradition of the American revolution was strongly felt and the majority of revolutions involved changes in the direction of more rather than less democracy, this attitude is not hard to explain. Today when many revolutions are a threat to United States security, this rationale for the retroactivity doctrine may be less persuasive; and it is not surprising, therefore, that the approach of these early cases has increasingly disappeared in the more recent cases to be discussed below.

Yucatan v. Argumedo, 92 N.Y. Misc. 547, 157 N.Y. Supp. 219 (S. Ct., 1915) (in a dispute between officials of rival Mexican governments the officials representing the government later recognized by the United States allowed to recover after recognition even though the suit began before recognition); Oetjen v. Central Leather Co., 246 U.S. 297 (1918) (title to leather derived from an agent of the Carranza government, by which it had been confiscated after recognition, allowed to stand as against the United States transferee of the original Mexican owner); Ricaud v. American Metal Co., 246 U.S. 304 (1918) (United States owner of property seized by Carranza government before recognition and sold to defendants not allowed to recover after recognition); Molina v. Comision Reguladora del Mercado de Henequen, 92 N.J.L. 38, 104 Atl. 450 (S.Ct., 1918) (holder under the Mexican revolutionary government not liable in conversion, after recognition, for henequen actually transferred to him under the authority of the revolutionary government); Monte Blanco Real Estate Corp. v. Wolvin Line, 147 La. 563, 85 So. 242 (1920) (Mexican plantation owner not able to recover coffee taken before recognition from a holder under the confiscating soldiers of the revolutionary government after recognition); Terrazas v. Holmes, 115 Tex. 32, 275 S.W. 392 (1925) (after recognition, the owner of cattle in Mexico not able to recover from one shown to have bought from a person in quiet possession in Mexico after the plaintiff had been, before recognition, divested of the cattle by decree of the revolutionary authorities); Terrazas v. Donohue, 115 Tex. 46, 275 S.W. 396 (1925) (essentially the same as the preceding case). Up to 1938 the Oetjen and Ricaud cases were the most authoritative retroactivity of recognition opinions reported in courts in the United States. The only precedent on the retroactivity point relied on in these cases is Underhill v. Hernandez, 168 U.S. 250 (1897), and the dictum from Williams v. Bruffy, 96 U.S. 176, 186 (1877). That the doctrine of the retroactivity of recognition was not an accepted one before this time is indicated by the comments of John Bassett Moore on the statement of the holding in the Underhill case. Said Moore: "By no law, national or international, can such a statement be justified. . . . The supposition that recognition of any kind 'validates all the actions and conduct' of the government recognized is as startling as it is novel." Moore, The New Isolation, 27 Am. J. Int. L. 607, 618 (1933).

Nevertheless the principle has not since been questioned in courts in the United States and has been followed abroad, especially in France and England. Lauterpacht, Recognition in International Law 59–60 (1943); Nisot, Is the Recognition of a Government Retroactive?, 27 Can. Bar Rev. 627, 630, 640 (1943).
tic confiscations of Carranza’s military commanders before recognition. Unless the Salimoff decision should not be regarded as precedent for giving effect to all domestic confiscations, these cases are in complete agreement with the later New York holdings in the nonrecognition situation. If the dicta of the recent federal nonrecognition cases induces courts in future cases to abandon the Salimoff case as precedent, results after recognition would differ from results before recognition where the effect to be given even to the internal activities of unrecognized governments was the issue.

The plight of those who entered transactions in reliance upon United States nonrecognition militates against extension of the law of the new government retrospectively. But courts in the United States have accorded reliance little weight against arguments favoring application of the law of the newly recognized government to the future consequences of past events, as well as to future events. Recognition per se favors such treatment in the interests of simplicity, stability and good relations. Failure to apply the law of the newly recognized government to past actions within territory controlled by it might cause friction between the United States and the newly recognized government, especially where it would assist the former government.

The nonrecognition of the Soviet Union was the most important example, before World War II, of the changed United States attitude toward recognition of new governments which often delayed recognition for long periods. Litigation like The Maret, 145 F. 2d 431 (C.A. 3d, 1944) (nationalization by an unrecognized government of the ships of its own nationals not given effect with respect to a ship overseas at the time—even for the purpose of recovering back money sent, by the new and unrecognized government to the captain of the ship, to enable it to return home), than to courts following the approach of the New York courts and allowing the law of the new government to control many cases before recognition even where they involve confiscation. Such cases cut down greatly the possible scope of reliance on the law of the old government.

A similar argument that can be made in these cases is stated by Judge Cardozo with reference to the possible double liability of an American bank doing business in Russia: “Whatever risk it runs abroad, is one that it assumed as part of the business of a bank.” Petrogradsky Mejdunarodny Komernesky Bank v. Nat’l City Bank of New York, 253 N.Y. 23, 40, 170 N.E. 479, 485 (1930). However, this assumption of risk notion can be equally well applied to either side in these cases, where both parties are often engaged in foreign business; hence it is really of no great help in deciding retroactivity cases.


In cases where the Russian state was claimant, Lehigh Valley R. Co. v. State of Russia, 21 F. 2d 396 (C.A. 2d, 1927), Guaranty Trust Co. v. United States, 304 U.S. 126 (1938), a preference for the Kerensky government would result in turning over large sums which could well be used to finance anti-Soviet activity. Even in the private suits, one party was often a confiscated Russian corporation whose exiled officers were likely to put the money collected to anti-Soviet uses.

The shift in American recognition policy during the twentieth century has been many-sided. There has been an increase in the practice of exacting concessions for American recognition. Hyde, International Law 181 (1945). Emphasis has been placed on the willingness as well as the ability of a new government to fulfill its international obligations, especially in the case of the Soviet Union. x Hackworth, Digest of International Law 176–80 (1940). The prac-
tion arising from events during the nonrecognition period but litigated after the United States recognized the Soviet Union in 1933, with the United States government suing as Soviet assignee, has provided the only American holdings on the effect of the retroactivity doctrine respecting events which did not occur within the territory of the newly recognized government.

During the 1930's the New York courts refused to give effect to pre-recognition Soviet nationalizing decrees with respect to assets situated outside of the U.S.S.R. All post-recognition New York cases involved the American assets of corporations, usually insurance companies, confiscated by the Soviet government. The insurance cases came up under the provisions of the New York Insurance Law of 1909, as amended, covering the regulation and liquidation of foreign insurance companies. In *Moscow Fire Insurance Co. v. Bank of New York and Trust Co.*, the most important New York case, local creditors of the United States branch of an old Russian insurance company, confiscated by the Soviets, had received payment. The only question in the case concerned disposition of the remaining assets, a point not covered by the Insurance Law. The Court of Appeals of New York, in a four-to-three decision, reasoned: (1) Soviet nationalizing decrees had not been intended to reach these overseas assets; (2) the New York branches of Russian insurance companies were separate entities whose assets were to be disposed of according to New York law; and (3) "justice and equity" required distribution of assets to foreign creditors and then to stockholders of the old Russian corporation rather than to those claiming under the nationalizing decrees. Whether Soviet claims would have been allowed if not based on confiscation is not settled by the language used by the majority. Speaking for the dissenters, Judge Rippey disagreed with all three of the court's arguments. Although it is not clear in the opinion, the majority was probably influenced by the fact that the usual rule respecting a foreign
confiscation is to refuse it effect as to local assets. The doubt in resolving the issue according to the general rule probably sprang from the fact that all the claimants involved were foreigners or assignees of foreigners, rather than local residents. This inference is supported by the dissenters’ belief that violation of the public policy was not paramount, an unlikely position had the victims of the Soviet confiscation been United States residents. The dissenters urged an analogy to the New York rule allowing the assignee in bankruptcy to claim local assets, an argument only possible in the narrow situation where local creditors had been satisfied. The main importance of the opinion was, therefore, that foreign claimants as well as local residents were allowed to benefit from the refusal to permit foreign confiscation to affect local assets. In this refusal the New York court followed the overwhelming weight of foreign authority.

There is little precedent respecting the extraterritorial effect given Soviet decrees and legislation not repugnant to New York public policy. The Court of Appeals of New York was willing, after recognition, to give effect to domestic decrees of the Soviet government without the hesitancy apparent in the Salimoff case. But, in general, New York courts exhibited the same proclivity for minimizing the importance of executive action as they had before recognition, indicating that their pre-recognition approach would not be substantially altered. Since confiscation was present in the Moscow case it is not possible to conclude that pre-recognition Soviet dissolution of a corporation, a nonrepugnant act, would be refused effect after recognition with respect to assets outside the Soviet Union in all cases. No clear holding has been found in any foreign or domestic case indicating how recognition affects the treatment accorded


60 This principle is well established in New York even in cases not involving corporations, Matter of Accounting of Waite, 99 N.Y. 433, 2 N.E. 440 (1885), Stone v. Penn Yan K. P. & B. Ry., 197 N.Y. 279, 90 N.E. 843 (1910), and has been reaffirmed since the Moscow holding. Fincham v. Income from Certain Trust Funds, 193 N.Y. Misc. 365, 81 N.Y.S. 2d 356 (S. Ct., 1948). The general American rule against the right of a foreign assignee in bankruptcy to sue in courts of the forum is reversed in the corporate dissolution situation. 2 Beale, Conflict of Laws §§ 159.3 (1935); 3 ibid., at §§ 560A–571; Goodrich, Conflict of Laws § 195 (1938).

61 The New York Insurance Law called for the payment of local creditors first, note 56 supra. Because of the Full Faith and Credit clause, this preference would have been given effect in any case, even had the claim been that of a previously appointed assignee of the dissolved insurance company in another American state. Clark v. Williard, 294 U.S. 211 (1935).

62 2 Rabel, op. cit. supra note 59, at 88–92.

63 Dougherty v. Equitable Life Assurance Society, 266 N.Y. 71, 193 N.E. 897 (1934) (an American insurance company licensed to do business in Russia was required by the Czarist government to keep securities there for the benefit of Russian policy holders and to stipulate that Russian law would govern contracts with Russian nationals; confiscation of the Russian branch by the Soviets was held to release the insurance company from obligation on the insurance contracts written by the Russian branch).

64 The New York attitude is well indicated in United States v. President and Directors of the Manhattan Co., 276 N.Y. 396, 403–4, 12 N.E. 2d 518, 522 (1938).
the attempts of unrecognized governments to reach assets outside their territory by methods not contrary to the public policy of the forum.

The Supreme Court of the United States initially followed the lead of the New York courts. It refused to disturb the jurisdiction of the New York courts over New York assets of liquidated Russian corporations,\(^6\) and it approved the key Moscow decision.\(^6\) In Guaranty Trust Co. v. United States,\(^6\) the Court limited the effect of the retroactivity doctrine by holding that the statute of limitations had run against the Soviet government during nonrecognition even though the Soviets had then been refused access to American courts. Although a strong argument can be made for tolling the statute of limitations in such circumstances,\(^6\) this opinion rested on even stronger grounds than the Moscow case. The defendant in the case had repudiated the claims of the Soviet government to the funds in question in the early 1920's. It would have been harsh to refuse the bank the protection of the six-year statute of limitations, especially, as the Court reasoned, since the representatives of the Kerensky government could have enforced the claim of the Russian state during the 1920's.\(^6\) Thus, it appeared that the Court would follow the overwhelming weight of world authority by refusing to give extraterritorial effect under American law to confiscatory decrees of the Soviet Union.\(^7\)

However, in Belmont v. United States\(^7\) the Court held that the United States, as assignee of the Soviet Union under the Litvinov Assignment, had a cause of action for the American assets of a nationalized Russian corporation. The assets of a Russian corporation had been placed on deposit with a private New York banker. After confiscation by the Soviet government neither the corporation nor any of its representatives or creditors claimed the money. The only alternative to giving extraterritorial effect to Soviet confiscation would have been to allow the banker, or the state through escheat,\(^2\) to benefit from the funds.

The Belmont case was followed five years later in 1942 by United States v. Pink,\(^3\) which overruled the Moscow decision and greatly extended the Belmont holding. The assets of Russian insurance companies had been confiscated by the Soviet Union. A surplus remained from the assets of the United States

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\(^6\) Moscow Fire Ins. Co. v. Bank of New York & Trust Co., 309 U.S. 624 (1940), affirming the New York decision by a three-to-three tie vote (without opinion).
\(^6\) 304 U.S. 126 (1938).
\(^6\) 304 U.S. 126, 138-41 (1938).
\(^7\) 2 Rabel, op. cit. supra note 59, at 88-92.
\(^7\) 301 U.S. 324 (1937).
\(^7\) For the present provisions on escheat of unclaimed bank deposits together with their historical development, consult the New York Abandoned Property Law §§ 300-305.
\(^7\) 315 U.S. 203 (1942).
branches after local creditors had been satisfied. The question in issue, as in the *Moscow* case, was whether foreign creditors and stockholders of the old companies or the United States, as Soviet assignee, should take the surplus. Speaking for the Court, Justice Douglas stated that the Soviet nationalization decrees should be given extraterritorial effect in accordance with their intent,74 New York policy notwithstanding. But the reasons for extending the effect of the Soviet decrees were not those of the dissenters in the *Moscow* case. Nothing is said respecting the separateness of American branches of Russian corporations or of the analogy to bankruptcy proceedings. The reason given for the extraterritorial application of the decrees is the executive policy accompanying recognition of the Soviet Union.

In according broad effect to the retroactivity doctrine, the *Pink* case contradicted the traditional policy of refusing effect to attempted confiscations of assets situated outside the territory of the confiscating government, recognized or unrecognized. The fact that the government of the United States was beneficiary of the Soviet confiscation probably was of importance in achieving the result, but clearly, executive policy is the prime ground for the decision. However, the executive policy of the Litvinov Assignment,76 which the *Pink* case followed, is far from clear. It could be argued that the Court was influenced by more general considerations than the specific policy of the Assignment. Perhaps, as later opinions in the lower federal courts in nonrecognition cases have thought,77 the Court felt bound by the policy of recognition per se. The increased importance of recognition in American foreign policy may have influ-

74 315 U.S. 203, 218–21 (1942).

75 The finding of contrary and overriding executive policy was necessary for the Supreme Court to take an independent position on this case under the rule of *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938), since the federal courts are bound to follow the rules of the states in which they sit even with respect to conflict of laws rules. *Klaxon Co. v. Stentor Co.*, 313 U.S. 487 (1941); *Griffin v. McCoach*, 313 U.S. 498 (1941).

76 *Establishment of Diplomatic Relations with the Union of Soviet Socialist Republics*, Eastern European Series, No. 1 (Dep't State, 1933).

77 The Supreme Court's interpretation of the Litvinov Assignment has been bitterly attacked. Borchard, Extraterritorial Confiscations, 36 Am. J. Int. L. 275 (1942); Jessup, The Litvinov Assignment and the *Pink* Case, 36 Am. J. Int. L. 282 (1942). Justice Douglas, speaking for the Court in the *Pink* case, reasons that giving extraterritorial effect to the Soviet decrees will help do away with Russo-American friction. Mr. Jessup and Mr. Borchard argue that the Assignment itself states no executive policy; that there was no executive intent to give extraterritorial effect to Soviet confiscation; that such intent could not be presumed for acts giving effect to confiscation which would possibly violate the Fifth Amendment when done in peacetime without congressional concurrence; and that collection by the United States of All Russian credits in the United States would amount to a mere $20,000,000 as against the $300,000,000 total of Russian debts to the United States and would, therefore, have almost no friction-lessening effect even if distributed by the United States to domestic creditors of Russia. See text and note at note 106 infra. Although this summary cannot adequately present the full scope of the controversy, it does show that the Supreme Court was not following clear and undisputed executive policy in the *Pink* case. Hollander, op. cit. supra note 40, at 64–78.

78 Authorities cited note 42 supra.
enced the Court in this direction. If so, future Supreme Court retroactivity decisions (the Pink case is the latest) can be expected to follow the Pink holding even where explicit executive policy, similar to the Litvinov Assignment, does not accompany recognition.

Only local creditors were excepted from the sweeping effect of the Pink decision. Succeeding decisions in the lower federal courts show no disposition to limit the scope of the Pink decision despite its unprecedented nature. In Steingut v. Guaranty Trust Co., the scope of the first Guaranty Trust decision was limited. The United States, as Soviet assignee, was awarded the New York bank deposits of a nationalized Russian corporation against the claims of the New York statutory liquidator and local creditors barred for procedural reasons. The district court held that the claims of the United States under the

Note 54 supra outlines the factors that first became of primary importance in American recognition policy during the second and third decades of this century. Exemplified in the refusal to recognize the results of aggression during the 1930's and 1940's and in the continued recognition of exiled governments, this new policy was an important tool of United States foreign policy during this period. Relations with Communist China and with the Baltic states are recent examples of the fact that recognition and nonrecognition are now dependent more on the strategy of world politics than on objective standards as to the internal popularity of the new government.

In theoretical terms American recognition policy has approached the "constitutive" theory rather than the "stability" theory. On this subject consult Kelsen, Recognition in International Law, 35 Am. J. Int. L. 605 (1941); Lauterpacht, Recognition in International Law (1948); Graham, Some Thoughts on the Recognition of New Governments and Régimes, 44 Am. J. Int. L. 356 (1950).

This changed attitude toward recognition, together with the over-all increase of the importance of foreign policy, changes the whole context in which the courts decide retroactivity of recognition cases, and it undoubtedly accounts, to some degree at least, for the greatly increased attention given in recent retroactivity cases to the question of executive foreign policy. For a discussion of a similar example of the increasing importance of executive foreign policy in a field of law where local control is ordinarily at its peak, consult State Regulation of Nonresident Alien Inheritance—An Anomaly in Foreign Policy, 18 Univ. Chi. L. Rev. 329 (1951).

The language in the case indicates that, with respect to property existing at all times in this country, the claims arising out of the business of the United States branch of a nationalized Russian corporation might be allowed, even where they conflicted with executive policy. The argument is that confiscation of foreign governments cannot extinguish claims to property in the United States arising from transactions in the United States simply by reason of an executive agreement collateral to recognition because such an agreement runs counter to the limitations of the Fifth Amendment. Borchard, Extraterritorial Confiscations, 36 Am. J. Int. L. 275 (1942); United States v. Pink—A Reappraisal, 48 Col. L. Rev. 890 (1948). The protection of the Fifth Amendment extends to aliens, making it a consideration in all these cases. Russian Volunteer Fleet v. United States, 282 U.S. 481 (1931).

Steingut v. Guaranty Trust Co. of New York, 58 F. Supp. 623 (S.D.N.Y., 1944), aff'd 161 F. 2d 571 (C.A. 2d, 1947); United States v. New York Trust Co., 75 F. Supp. 583 (S.D.N.Y., 1946) (United States, as Soviet assignee, takes the New York assets of a nationalized Russian corporation as against the New York statutory liquidator and creditors of the Russian corporation, some of whom may be domestic but all of whom have slept on their rights); United States v. Nat'l City Bank of New York, 90 F. Supp. 448 (S.D.N.Y., 1950) (United States, as Soviet assignee, takes the assets of a nationalized Russian corporation in preference to New York's statutory liquidator, but subject to the set-off of notes defaulted on by the Russian state and due and payable at the same bank).

Litvinov Assignment were not barred by the statute of limitations if the statute had not run before recognition against the old Russian corporation because of a suit by that corporation in the pre-recognition period. In other words, there was privity for the purpose of tolling the statute of limitations between the Soviet Union and the corporation it had nationalized. The court also reduced the defendant bank's set-off against the Russian state by the amount the United States, as Soviet assignee, had been unable to recover in the first Guaranty Trust case because of the statute of limitations bar. To reach this result District Judge Rifkind argued that it would be inequitable to allow the defense of the statute of limitations where the only claimant admitted to have a claim before recognition had sued during the nonrecognition period and the only claimant admitted to have a claim after recognition had begun his suit shortly after recognition. Judge Rifkind felt that the first Guaranty Trust case was an exception to a general rule that the statute of limitations does not run against those barred from suing in the only courts where their claims are enforceable. He refused to extend the exception to the case before him, the set-off and the suit by the old corporation serving to distinguish the two cases. The Supreme Court has never given its views on these matters.

In summation, the decided cases indicate certain precautions that should be taken by those expecting to have dealings with persons or property from the territory of an unrecognized government. They should require payment in advance, keep goods and other property to which they have title out of the territory of the unrecognized government and out of the ships (which might be seized and the goods along with them) of the still recognized government, have all contracts expressly governed by United States law, and deal with persons having attachable property within the United States. Furthermore, they should keep well posted on the attitude of the United States government toward the new government. More than this cannot be said with certainty. A great deal remains undecided and subject to change.

IV

As an aid in analyzing the probable future developments in the private litigation involving delayed recognition, consider the problems facing courts in the

83 Set-offs or counterclaims against foreign governments when they enter the courts of the United States as plaintiffs must arise from the same transaction and be equal to or less than the claims of the plaintiff government to be permissible. Reeside v. Walker, 11 How. (U.S.) 271 (1850); The Siren, 7 Wall. (U.S.) 152 (1868); People of the State of New York v. Dennison, 84 N.Y. 272 (1881). In retroactivity of recognition cases, where the Soviet Union had a claim against a United States bank, set-offs of the obligations of former Russian governments due and payable at the same bank were allowed, even though they arose from other transactions, on the theory that different accounts of the Russian state held by the same bank could be allowed to cancel one another without violating sovereign immunity. United States v. Nat'l City Bank of New York, 83 F. 2d 236 (C.A. 2d, 1936); United States v. Nat'l City Bank of New York, 90 F. Supp. 448 (S.D.N.Y., 1950). Contra: United States v. New York Trust Co., 75 F. Supp. 583 (S.D.N.Y., 1946).

United States in a more complicated case than the *Wells Fargo* case outlined in the introductory section of this comment. Suppose a United States bank, "B," has deposits of "X" and "Y," two companies incorporated by the predecessor of an unrecognized government. X and Y have been "nationalized" by the new government; their former directors have a new domicile outside the territories of both the United States and the unrecognized government. B will do well to give the matter considerable thought before deciding whether to make payment to the expatriated representatives of X and Y.

If "Russian" cases are followed as precedent, the outlook for B is indeed an undesirable one. If the new government tried to take over the assets of X and Y, B's payment, followed by recognition before the statute of limitations has run, could result in B's being subject to double liability under a broad application of the *Pink* doctrine, although considerations not otherwise applicable in retroactivity cases militate strongly against such a result. If the *Steingut* case is followed, B would be liable to the new government beyond the statutory period, provided X and Y had been suing for the money during the running of the statutory period. If the new government's claim to the funds of X had been barred by the statute of limitations, any counterclaim or set-off B might have against the new government in a suit for the funds of Y might be reduced to

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**Footnote:** Even if a court decided that the *Pink* case called for post-recognition liability to holders under the law of the new government after holders under the old law had been paid before recognition, a decision against B bank would not be without difficulty. Had B paid X and Y of its own accord, the decision would probably go against B on the theory that it paid with its eyes open knowing that the retroactivity doctrine existed and would be applied if recognition did in fact occur. Payment at the order of a court other than a court of highest appeal would probably be the same. No relief is allowed from a lower court decision based on a mistaken view of the law where no appeal from that decision was taken. 21 C.J.S., Courts § 194 (1940). The analogy to the circumstances under discussion seems persuasive. However, if the Supreme Court required B to pay X and Y, and the same court decides later that in theory the claim of the new government against B is a good one, more difficult problems arise. Where a court reverses itself, the second decision is generally held to be retroactive, but this general rule is said not to be able "to impair the obligations of contracts entered into, or injuriously affect vested rights acquired, in reliance on the earlier decision, as where . . . the construction of a Constitutional provision or statute . . . is afterward changed." 21 C.J.S., Courts § 194 (1940). The line between vested rights and those subject to divestment under this rule has not been clearly delineated, and it has been suggested that the question of the retroactive application of the second decision is up to the overruling court in the individual case. Great Northern Ry. Co. v. Sunburst Oil & Refining Co., 287 U.S. 358, 364–65 (1932). Strictly speaking, there is no court reversal here, only a change in executive policy; and it might be argued that if the first decision was wrong then B should have an action back against X and Y rather than a defense to the second action. However, the analogy to the overruling of a prior judicial determination is a close one, and the scope of the vested rights protected by the rule excepting such rights from those subject to divestment by the reversal of judicial precedent is certainly narrow if it does not include B's rights here.

The right of B to restitution from X and Y following a second payment to the new government rests on theoretically substantial grounds, Rest., Restitution §§ 46, 74 (1937), but is not worth much practically. The statute of limitations may have run in favor of X and Y if the nonrecognition period is long, and they are likely to have all their assets abroad out of the reach of courts in the United States. Furthermore, if the "Russian" cases are any indication, their original suits were probably part of a liquidation process so that they would be completely defunct by the time B got around to suing them in most cases.
the extent of the barred funds of X. Clearly, B will try to avoid payment. Refusal to pay, however, will probably result in litigation, which will toll the statute under the doctrine of the Steingut case. Apparently, the best course of action for B where nonrecognition is expected to be of long duration is to pay the expatriated representatives in order to start the running of the statute of limitations as soon as possible. If recognition is expected momentarily, the best course would be to resist the claims of X and Y in the hope that their claims will not be settled before being quashed by recognition of the new government. The opinion in the Wells Fargo case indicated that where the holders under both the old and the new law sue at once before recognition the bank may be able to deposit the money in court and escape further harassment. However, this solution, although apparently a desirable one, will generally not be available to the bank. In no case involving the Soviet Union was there a successful attempt to bring all the possible parties together in one suit.

Clearly, it will be important to B to be able to forecast the specific recognition policy of the United States government. Even if B were able to predict whether the nonrecognition period in question was to be of long or short duration, its difficulties in discovering and following governmental policy would not be at an end. Various specific policies of the United States, such as freezing orders, might affect the assets during the nonrecognition period. Although the mandates of policy were followed, recognition could undermine B's position if some new arrangement as to the disposition of this type of claim were a condition expressly or tacitly accompanying recognition.

Moreover, interpretation of such policies in the proper court may be difficult to predict. The interpretation of the Litvinov Assignment by the Supreme Court in the Pink case was open to serious question. The uncertainties of litigation where interpretation of the policy of a foreign government becomes an issue are epitomized in the contrary views of the same Russian decrees in the Pink and Moscow cases. The ease with which a skilful judge can extend or limit the effect of a document which he is interpreting, in reaching a result he considers desirable for entirely different reasons, is too well understood to need further comment. Where no explicit governmental policy is present the courts may find it by interpolation from related areas. Recognition or nonrecognition per se may be deemed controlling policy. If past records are any indication, different courts will look at these matters differently. Thus, B must also

86 See text at notes 93-99 infra.
87 An example of the difficulties in interpreting executive intent in foreign affairs is the dispute between Circuit Judges Hand and Clark in Bernstein v. Van Heyghen Frères Société Anonyme, 163 F. 2d 246 (C.A. 2d, 1947).
88 The exact interpretation of foreign laws is a matter to be determined by the court in the same manner it would use in interpreting a deed or contract. Eastern Building & Loan Ass'n v. Williamson, 189 U.S. 122 (1903); Merinos Viesca y Companía v. Pan-American Petroleum & Transport Co., 83 F. 2d 240 (C.A. 2d, 1936); Petrogradsky Mejlunanarodny Komerchesky Bank v. Nat'l City Bank of New York, 253 N.Y. 23, 170 N.E. 479 (1930).
consider which court will be most favorable and whether it can get the litigation into that court.\(^8\)

In discussing this relatively simple situation involving B, X and Y, not all of the complicating factors involved in many past retroactivity decisions were raised. The United States branches of X and Y might be considered, by statute in certain cases, as separate from their foreign corporate parent, and, therefore, not subject to dissolution by the government of the state of their incorporation and not subject to levy for the debts of their parent corporations. Under such facts, B would be safe in paying X and Y. Statutes requiring that foreign corporations reincorporate themselves as United States corporations for purposes of doing business in the United States—in effect the New York Insurance Law does just that\(^9\)—could thus provide a solution to many retroactivity problems.

Next, there are the difficulties with respect to the local creditors of X and Y. The *Pink* decision left open the question of whether, where executive policy is involved, claims of local creditors have priority over those of the newly recognized government. Logically, there is no reason why their claims might not be overridden in the name of executive policy in the same manner as those of foreign creditors, but there is a serious question as to whether it would be constitutional to deny their claims under the Fifth Amendment.\(^9\) Matters of public policy also create difficulties. The split between minority and majority in the *Moscow* case on the issue of United States public policy with respect to confiscation is further complicated in situations where the confiscation is by a friendly government rather than by one considered hostile. Holdings from the war period sustaining the sequestration decrees of friendly governments in exile indicate that extraterritorial confiscation is not repugnant when in line with United States international policy.\(^9\) Executive policy, notions of reliance, protection of local creditors, and other public policy concepts are all crucial in

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\(^8\) Diversity of citizenship, making it possible to litigate in either federal or state courts, exists in a large number of these cases where foreign citizens are involved. Suits between aliens may be brought only in state courts, however. *Ex parte Edelstein*, 30 F. 2d 636 (C.A. 2d, 1929), cert. denied sub nom. Edelstein v. Goddard, 279 U.S. 851 (1929). Suits where the original parties both lived in one state or were both aliens could be brought within federal jurisdiction by bona fide assignments for value. *Jones v. League*, 18 How. (U.S.) 76 (1855); \(^1\) Stat. 78 (1789), as amended, \(^2\) U.S.C.A. § 1359 (1949). Where no diversity jurisdiction was involved, the presence of a federal question might still make it possible to bring the case into a federal court. The executive intent in the Litvinov Assignment was enough in the *Pink* case, and even nonrecognition might be sufficient to raise a federal question if failure to implement it might hinder executive foreign policy. See *United States v. Pink*, 315 U.S. 203, 229-31 (1942); compare the quotation in note 42 supra.

\(^9\) Statute cited note 56 supra.

\(^9\) See discussion at notes 77 and 80 supra.

decisions involving delayed recognition. As in most fields where litigation has not been too frequent, however, the order of priority has not been established.

At first blush, giving positive effect to the acts of recognition and nonrecognition per se, as recent federal courts appear inclined to do, seems a reasonable solution for the problems in this field. However, under such an approach B bank would have one set of rights and duties the day before recognition; a contradictory set the day after. In theory, this results from following executive policy, which is apparently in direct conflict on the two days. Actually, of course, the executive's decision results from balancing a complicated set of factors. The development is often one of gradual evolution rather than of widely fluctuating reversals. The contradictory solution of the courts not only offends against ordinary notions of reliance and of extinguishment of state claims; it fails in its stated objective of aiding executive policy. Where failure to recognize is of importance to the executive the reason usually is that the new government is not favored by the United States, or at least not favored over the old government. The desire is to help the old government at the expense of the new one. However, Americans will be chary of dealing with the old government (or those claiming rights under its laws) for fear that they will lose their rights after recognition. They may even be willing to risk dealing with an unrecognized government if they know recognition will validate their transactions. Despite the fact that executive policy has achieved new importance politically and judicially, the presence of recognition or nonrecognition per se cannot provide an unerring guide to the disposition of these cases. Compelling considerations, constitutional and otherwise, would probably require preferential treatment for local creditors; and problems concerning the statute of limitations would still exist. Moreover, reliance and possible double liability would furnish strong motivations for abrogating a judicial position making recognition crucial.

Clearly, a new approach must be made to the problems raised by delayed recognition if they are to be solved in a fair and consistent manner. One method of improvement is suggested in the Wells Fargo case outlined in the first paragraph: give the assets in question to the court until a final disposition of the dispute is possible. Unfortunately, the procedure suggested by the Wells Fargo case can be used only in a narrow field for at least three reasons.

(i) The case turned on the question of who should represent a Chinese bank, thirteen of whose twenty-five directors were appointed by the Chinese state. The Chinese Communists, having taken over the central office of the bank, disputed the right of the American branch to withdraw funds in an American bank. The opinion is not clear respecting the relevant provisions of the bank's charter, and the fact that the desires of the nongovernmental directors were unknown is emphasized by the court. The result would be in some doubt even under Nationalist law. Were there a clear-cut dispute between those claiming
under the law of the old government and those claiming under the law of the
new government, the latter would probably lose in all cases involving property
situated or contracts made and performed outside the territory controlled by
the unrecognized government.\textsuperscript{93} If the claimants were official representatives
of the new government they could not in any case appear in court because such
persons have no juristic personality in courts in the United States.\textsuperscript{94}

(2) The complicating factor in most of the "Russian" cases—acts repug-
nant to United States public policy—was not present in the \textit{Wells Fargo} case.
If courts in the United States decided to limit the Salimoff case to its particular
facts and to refuse to give effect to the internal confiscation of an unrecognized
government,\textsuperscript{95} no claims could be based on the domestic confiscatory activities
of unrecognized government.\textsuperscript{96}

(3) At the time of the decision, Communist China had not yet intervened
in Korea. It was rated an excellent chance of being admitted to the United
Nations and of being recognized by the United States within a short time. The
Court of Appeals of New York was apparently influenced by such considera-
tions in letting Soviet domestic confiscation stand, before recognition, in the
Salimoff case.\textsuperscript{97} If these factors account, even partially, for such a result in the
Salimoff case, postponement in the \textit{Wells Fargo} situation was clearly justified.
But the factors pointing toward early recognition in the \textit{Wells Fargo} case are

\textsuperscript{93} See text and notes at notes 8-9 and 25-29 supra. Complications may occur where the
new government in question, though not recognized by the United States, has been or is
about to be recognized by other nations and a cause of action involving the nationals of the
recognizing nations comes to trial. If courts in the United States hold claimants here to the
old law, the persons liable here, if they do business where the new government is recognized,
may be liable again. Fears of this nature led the Court of Appeals of New York to give in-
direct extraterritorial effect to Soviet confiscation before recognition by refusing to allow the
exiled directors of a Russian corporation to sue in the United States for corporate assets de-
posited in a United States bank. Russian Reinsurance Co. v. Stoddard, 240 N.Y. 149, 147
N.E. 703 (1925). However, the holding in this case was later closely hedged in by Petrogradsky
Mejdunarodny Komerchesky Bank, 253 N.Y. 23, 38-40, 170 N.E. 479, 485-86 (1930);
furthermore, the liquidation by the New York Superintendent of Insurance resulted eventually
in the directors of the old corporation repossessing their assets (after United States
creditors had been paid off). Matter of People (Russian Reinsurance Co.), 255 N.Y. 415, 175
N.E. 114 (1930). The total effect of the Stoddard case was to route the payment to the direc-
tors of the Russian corporation through the Superintendent of Insurance so that double
liability of a United States bank would be cut off, and therefore the case stands for giving con-
sideration to foreign recognition of new governments unrecognized by the United States only
in so far as is necessary for the protection from double liability of United States corporations.
Other United States precedent on this point is lacking.

\textsuperscript{94} Authorities cited notes 19 and 41 supra.

\textsuperscript{95} A not unlikely possibility in view of its somewhat tenuous basis and the recent trend in
the federal courts of increased hostility toward unrecognized governments. See text and notes
at notes 39, 40, and 42 supra.

\textsuperscript{96} Just as in the case of the possible extraterritorial effect of the law of the unrecognized
government, note 93 supra, this could raise difficulties for internationally operating corpora-
tions who were liable to suit in nations that apply the same rules to both recognized and un-
recognized governments as far as their domestic activities are concerned. Authorities cited
note 40 supra.

\textsuperscript{97} See note 39 supra.
not part of the context of every nonrecognition case. As a matter of fact, since the Wells Fargo decision, the attitude of the United States obviously has grown more hostile toward the People’s Republic of China. Recognition of Communist China may be far in the future and courts today are not likely to order a delay in the litigation of claims involving Communist China for an indefinite period of nonrecognition.

The limitations of the Wells Fargo solution indicate that in many situations the claimants under the law of the new government would be unable to appear in courts in the United States, and would be sure to lose if they could. Those courts which give weight to executive policy would be hesitant to favor the new government by postponing the disposition of assets in dispute.

The Wells Fargo solution, limited as it is, depends upon having all parties to the dispute before the court so that they will be bound by the determination and so that an innocent stakeholder can deposit the assets with the court and be excused without possibility of further difficulties. In the Wells Fargo case the representatives of the unrecognized government, the Chinese Communists, prevented $600,000 from getting into the hands of their enemies and apparently stood a good chance to get it themselves in a short time. Six months later, however, freezing orders would have prevented their obtaining the funds, and the extreme hostility toward their intervention in Korea would have produced the least favorable atmosphere for the presentation of their claims. Their only course would have been to wait for recognition before claiming the money, on the theory that the retroactivity of recognition validated their claims irrespective of payment to the Nationalists. Interpleader by the Wells Fargo Bank would be the method of avoiding the possibility of double liability, but such a remedy would not be available. The presence of two alien claimants would make the most liberal interpleader remedy, the Federal Interpleader Act of 1936, unavailable.

The two states where Russian and Chinese cases have arisen, New York and California, have liberal interpleader statutes. But

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84 Trade with Communist China has been stopped and all funds that might be used to their benefit frozen. Transportation Order T-2, 15 Fed. Reg. 9063 (1950); Foreign Assets Control Regulations, Part 500, 15 Fed. Reg. 9040 (1950).

89 Referring to a similar situation in litigation involving a Russian corporation, Judge Cardozo said: “We are unable to accept the view that postponement to the Greek Kalends is the fitting answer to a prayer that the court unlock the fund.” Matter of People (Russian Reinsurance Co.), 255 N.Y. 415, 422, 175 N.E. 114, 116 (1931); and the Court of Appeals of New York rejected as unconstitutional under the Contracts Clause of the federal Constitution a New York statute calling for this very result. Siosberg v. New York Life Ins. Co., 244 N.Y. 482, 155 N.E. 749 (1927).

100 See note 98 supra.

101 62 Stat. 931, 936, 970 (1948), 28 U.S.C.A. §§ 1335, 1397, 2361 (1950). The jurisdiction of the District Courts is limited to certain categories of persons by this act and the categories do not include the case where the two claimants are aliens.

102 With exception of one Massachusetts case, all the “Russian” cases arose in the state or federal courts of New York, Hollander, op. cit. supra note 40, at 7, and the only Chinese case was in the federal district court for the northern district of California. Bank of China v. Wells Fargo Bank & Union Trust Co., 92 F. Supp. 920 (N.D. Calif., 1950).

interpleader would not be available in either state except for in rem actions because the requirement of personal service within the jurisdiction could not be met.\textsuperscript{104} The deep-seated tradition in American law against binding persons who have not had their day in court doubtless precludes any relaxation of this rule by the courts.

Discussion of the procedures available in this situation suggests the conclusion that the courts are unable to dispose of these delayed recognition difficulties during the nonrecognition period. A consistent and complete solution requires executive or legislative action. New York has made a start. With respect to bank deposits, a New York statute provides that claims by corporations from the territory of an unrecognized government can safely be ignored.\textsuperscript{105} Further, Section 977-b of the New York Civil Practice Act\textsuperscript{106} provides for the final disposition of all United States assets of foreign corporations that become defunct for any reason. These statutes cover many of the situations that caused trouble in the “Russian” cases but they are limited in scope and are subject to being overridden by contrary federal policy. Thus, action on the federal level is imperative.

The executive, being primarily responsible for foreign policy, is the logical branch of the government to initiate action. It does the bargaining with the new government over the disposition of claims existing between the United States and the new government, as part of the conditions of recognition. However, there are limits on unilateral executive action in this field. The executive has authority to recognize new governments and make executive agreements, but there is a point where these matters become broad enough to be treaties, requiring the concurrence of the Senate.\textsuperscript{107} Moreover, disposition of these claims through governmental action would probably involve monetary transactions

\textsuperscript{104} Rosenthal v. United Transportation Co., 196 App. Div. 540, 188 N.Y. Supp. 154 (1st Dep’t, 1921); Devoy v. Nelles, 197 App. Div. 628, 189 N.Y. Supp. 492 (1st Dep’t, 1921). No California cases are directly in point but the universal American rule is in accord with that of New York, 48 C.J.S., Interpleader §§ 21, 25 (1947), even as between states under the Full Faith and Credit Clause of the Constitution. New York Life Ins. Co. v. Dunlevy, 241 U.S. 518 (1916). One possible way around this difficulty would be to call all interpleader actions where the plaintiff brings the res into court in rem actions. Only one American jurisdiction has a case hinting at such a doctrine. In Metropolitan Life Ins. Co. v. Schultz, 21 Pa. Dist. & Co. Rep. 687 (County Ct., 1934), an insurance company faced two suits on one policy in two different Pennsylvania county courts. The company asked for interpleader in the court of X county. The claimant in Y county disputed the right of the X county court to obtain jurisdiction over him. The X county court interpreted a state interpleader statute as giving it the right to serve the Y county claimant on the ground that the money had been paid into court so that the action was essentially an action in rem rather than in personam. American authority directly in point is contra to the Schultz case. Hanna v. Stedman, 230 N.Y. 326, 130 N.E. 566 (1921); Brighton v. Washtenaw Circuit Judge, 217 Mich. 650, 187 N.W. 363 (1922).

\textsuperscript{105} New York Banking Law § 134, subsection 7.

\textsuperscript{106} N.Y.L. (1936) c. 917, as amended. The constitutionality of this section was upheld in Oliner v. American-Oriental Bank, 252 N.Y. 748, 27 N.E. 2d 40 (1940).

\textsuperscript{107} Borchard, Extraterritorial Confiscations, 36 Am. J. Int. L. 275 (1942); Executive Agreements and the Treaty Power, 42 Col. L. Rev. 831 (1942).
which require congressional action. Apart from these considerations, it is unlikely as a matter of practical politics that the executive would develop any broad plan for determining title to large amounts of property without congressional concurrence. Thus, joint executive-legislative federal action appears the only logical and feasible method of resolving the difficulties in this field.

A beginning was made in the case of the Soviet Union. The executive obtained the Litvinov Assignment, and Congress authorized the President to appoint a commissioner, apparently looking toward a distribution of the funds collected under the Assignment. Executive and legislative actions must meet the standards of the Fifth Amendment, but this presents no insuperable difficulties. Congress and the executive should be able to work out a set of rules defining the right of the various types of persons and property affected by delayed recognition. Legislative-executive regulation of this field on the federal level, is clearly preferable to the shifting, \textit{ex post facto} determinations of our many-headed judicial system.

ASSIGNABILITY OF EMPLOYEES' COVENANTS NOT TO COMPETE

Covenants of a vendor not to compete with the purchaser of his business and of an employee not to compete with his employer subsequent to his term of employment do not fall within the category of restraints of trade which are void. A desire to facilitate sales of businesses and the hiring of workers has typically been said to account for the enforceability of covenants ancillary to

\footnote{53 Stat. 1199 (1939). This commissioner was supposed to prove all United States claims against the Soviet Union, but the money to pay his salary was never appropriated and the claims never proved. The money collected under the Litvinov Assignment is still in the United States Treasury. Private Communication from M.P. Shaner, Assistant Legal Adviser to the State Department, Feb. 28, 1951.}

\footnote{See discussion notes 77 and 80 supra.}

\footnote{The freezing and trade restriction orders, note 98 supra, are a desirable prerequisite to full regulation of this problem.}

\footnote{All contracts in restraint of trade, even if ancillary, at one time were void. It is certain that if such covenants were contained in a bond by which the obligor undertook to forego the exercise of a trade, they were unenforceable. In \textit{Dier's Case}, Y.B. 2 Hen. V, pl. 26 (1414), the court remarked that if the plaintiff were there, he would go to prison until he paid a fine to the King. The policy that made it desirable that laborers work at some gainful occupation because of the manpower shortage occasioned by the Black Death, dictated that such persons should not be restrained from working. The Statute of Laborers passed in 1349 required every able-bodied man under sixty years of age, not engaged in a trade, tilling land or otherwise profitably engaged “to serve him that doth require him, or else be committed to the gaol.” 23 Edw. III c. 1 (1349). As the population increased and labor became more mobile, the policy changed. The leading case of \textit{Mitchell v. Reynolds}, 1 P. Wms. 181 (K.B., 1711), decided that ancillary restraints were valid, at least if partial in their scope. For a general survey of this subject, consult 5 Williston, Contracts §§ 1634, 1635 (rev. ed., 1937); Dietz, \textit{A Political and Social History of England} 57–58 (3d ed., 1946).}

\textit{ASSIGNABILITY OF EMPLOYEES' COVENANTS NOT TO COMPETE}