CONFISCATION AND CORPORATIONS IN
CONFLICT OF LAWS

From 1918 to 1921 revolutionary committees of the R.S.F.S.R., which later
became a republic of the Soviet Union, passed and enforced decrees purporting
to dissolve Russian corporations, to confiscate their property, and in many
lines of business to nationalize commercial and industrial enterprise. In many
of the courts of the world, the question has arisen as to the effect of the con-
fiscation upon property belonging to Russian corporations but recoverable
abroad. The legal answer to this question depends on (1) the interpretation
of the Soviet decrees in regard to the corporate entity; (2) the nature and situs
of the property; and (3) the effect of anti-confiscatory policies in countries
other than Russia. This question had been resolved in favor of the Russian
corporations and stockholders and creditors claiming under them. The Soviet
government, however, had one recourse left. It could assign by international
negotiation its rights based on its confiscation decrees to a foreign government
which could then sue debtors to Russian corporations found within its territory.
The recent decision of the United States Supreme Court in United States v.
Belmont suggests that the Soviet resort to diplomacy has met with partial
success.

I

In the Belmont case, a Russian corporation of the imperial regime prior to
1918 deposited a sum of money with a private New York banker. In 1918 the
Soviets enacted decrees dissolving the corporation and confiscating its property.
In 1933, the United States recognized the Soviet Union on terms which in-
cluded an assignment from the Soviet Union to the United States of its claims
against American nationals and a duty on the part of the United States to
notify the Soviet Union of its collections. The United States, as assignee, sued,
in the southern district of New York, the executor of the New York banker
for the sum of money deposited by the Russian corporation. It was held on
a motion to dismiss that, as against the executor and Russian creditors and
stockholders, the United States can recover the sum, but American and prob-
ably non-Russian-foreign creditors and stockholders can set up defenses at
Federal law against the United States; no defenses at New York law, however,
will be available because the assignment from the Soviet Union to the United
States has the status of a treaty. A minority of the court concurred only on

1 301 U.S. 324 (1937).
2 For text, see 28 Am. J. Int. Law Supp. No. 1, Official Documents, 10 (1934); State of
Russia v. National City Bank, 69 F. (2d) 44, 46 (1934). See also Anderson, Recognition of
Russia, 28 Am. J. Int. Law 90 (1934); Jessup, The Litvinoff Assignment and the Belmont
Case, 37 Am. J. Int. Law 481 (1937).
3 Sutherland, J., speaking for Hughes, C. J., McReynolds, Butler, Roberts, and Van De-
the proposition that the United States can recover the sum as against the executor. A motion by the New York receiver of the Russian corporation to intervene in the case was refused, presumably without prejudice to later action against the United States. On the question of what defenses creditors and stockholders can raise against the right of the United States, the majority and minority opinions differ. The minority, refusing to discuss the possible status of the assignment as a treaty, declared the effect of the assignment was to pass to the United States no more than the Soviet Union had, and the executor had no standing to challenge that effect, but they added that if New York had a policy allowing "local" to prevail over "foreign" creditors, that state could refuse to enforce "external transfers to property within its borders."

If the last clause of the Fifth Amendment is applied in its natural meaning, the deposit must first satisfy the claims of creditors and stockholders of the Russian corporation who are of any nationality other than Russian. The remainder will be handed over to the United States. Creditors will, of course, come before stockholders, and creditors whose claims arose from transactions in this country may come before creditors whose claims arose from transactions abroad. However, statutes of limitation, affecting claimants other than the United States, and natural dispersion of persons interested in the corporation over the twenty years since it ceased to do business suggest that the United States may in the end recover something on this claim and others like it.

The partial success in enforcing rights based on confiscation in the Belmont case has been regarded by commentators as a surprising increase in the constitutional treaty-making power of the executive. An examination of the underlying problems in the conflict of laws reveals, however, that the result reached is not unjustifiable and renders the constitutional law difficulties intelligible and perhaps unimportant.

The legal routine in the Russian cases has not been illuminating: the Soviet decrees are enforcible only in Soviet territory; extraterritorial enforcibility in

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6 The receiver was only custodian of the corporate property which was not impounded by court process. The rights of American creditors were expressly saved by the Belmont case. See Moore and Levi, Federal Intervention I, 45 Yale L. J. 565, 581, 586, 589 (1936).
foreign courts must rest on international comity; the comity does not require anything at all in a mandatory sense, certainly not enforcement of any foreign law contrary to the public policy of the forum; the confiscation of private property without compensation is the purport of the confiscation decrees and is contrary to public, capitalistic policy; the decrees, therefore, cannot be enforced in the states of the forum.\textsuperscript{12}

It might seem that uncompensated confiscation would be so anathematic to courts in capitalistic countries\textsuperscript{13} that no Russian confiscation would be under any circumstances recognized abroad. This, however, has not been the case. Where a chattel was in Russia at the time of the decree and subsequently removed, the validity of the confiscation decree has, except before recognition of the Soviet Union,\textsuperscript{14} been upheld.\textsuperscript{15} Since it is arguable that the policy against confiscation is equally strong regardless of where the chattel was at the time of the decree, it would seem that the clue to these cases lies not in policy of the forum but rather in jurisdiction of the confiscating state. If, then, there can be confiscation effective to create rights which will be recognized in foreign courts, the question is one of finding its requirements.

It is clear that when all the elements are local the decree will be recognized abroad.\textsuperscript{16} The problem arises when either the property or its owners is in the


The most recent expression of judicial policy against Soviet confiscation can be found in Moscow Fire Ins. Co. v. Bank of New York and Trust Co., 161 Misc. 903, 294 N.Y. Supp. 648 (1937), in which the United States intervened on the strength of the Litvinov assignment, but the court evidently felt not bound by the Belmont case because New York courts had taken jurisdiction of the fund in question before the Litvinov assignment was negotiated. See United States v. Bank of New York and Trust Co., 77 F. 2nd. 880 (C.C.A. 2nd 1934).

As to Federal policy, see suggestion, 22 Minn. L. Rev. 114 (1937), that the Litvinov assignment may express a policy superior to Federal anti-confiscatory law. But see Const. Art. V.


\textit{Italy:} R. S. F. S. R. v. Romische Schwefelgesellschaft, Ct. of Cass., Italy, April 25, 1925, 1 Ostrecht 178.


\textsuperscript{16} Dame P. v. S., Trib. Sup. Zurich, Dec. 18, 1928, 57 Clunet 1159.
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confiscating state at the time of confiscation. Where the property is tangible there is the old question of whether control over the owner's person or control over the property itself is the compelling factor. The general result in the Russian cases has been to recognize the confiscation if the chattel was in Russia at the time of confiscation decree, but not to recognize it if the chattel was outside at the time. This result making the situs of the property dominant has several precedents and analogies. Some analogies sustain the Russian cases.

Assignees in compulsory bankruptcy or insolvency proceedings, for example, can only reach the debtor's property abroad subject to attachment or assignment to local creditors either before or after the proceedings. Where there are local creditors or ancillary receivers, a receiver of a corporation does not

17 Note 14, supra.


A prior voluntary assignment by a debtor apparently has universal validity. Crapo v. Kelly, 16 Wall. (U.S.) 610 (1872).


Harrison v. Sterry, 5 Cranch (U.S.) 289 (1809).


The English courts, on issuing a compulsory order for winding up a corporation whose principal assets are abroad, apparently expect the order to receive full enforcement abroad. In re General Co., L.R. 5 Ch. App. 563 (1870); In re Madrid-Valencia Ry. Co., 19 L. J. Ch. (N.S.) 260 (1850). This expectation suffered early disappointment in the United States. Harrison v. Sterry, 5 Cranch (U.S.) 289 (1809).
have power to collect chattels or to transfer assets lying in a foreign state but belonging to the corporation whose liquidation he is authorized to supervise. A statutory successor to the assets of a corporation may, however, have such power. Equitable or statutory mortgage foreclosure ordinarily does not affect land situated in a foreign state, nor does probate of a devise. Distribution of property by the law of intestate succession at the intestate’s domicil does not affect his land in a foreign state.

These examples are analogical to the Soviet confiscation decrees because a judgment or decree of a court has set in motion the state’s executive implements of coercion and force which can be effective only within and not beyond the boundaries of the state. So the Soviet decrees, although they purported to be legislation, were orders to Soviet committees setting in motion a standard, often violent, revolutionary procedure achieving effective dissolution of Russian corporations and confiscation of their assets within Soviet territory.

Other analogies, however, lend some force to an argument that the Soviet decrees might be effective beyond the Soviet boundaries. Courts of equity have granted decrees in personam ordering the conveyance of foreign land.

The rule in the Federal courts is a strict territorial limitation on the powers of receivers. Booth v. Clark, 17 How. (U.S.) 322 (1854); Laughlin, The Extraterritorial Powers of Receivers,

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when they have before them a defaulting trustee, a defaulting contractor, or a defaulting contractor, or a person who obtained the property by a fraudulent device. The compulsory deed resulting from such an order will be upheld where the land is because the compulsion was legal. This line of cases is particularly strong because land is peculiarly subject to local law. Aided by favorable construction, there are some striking parallels to the situation in many of the Russian cases. The Soviet Union had the Russian corporations within its jurisdiction; it regarded those corporations as defraudsers and defaulders by the standards of the new order of communism; confiscation was legal compulsion in Russia; the confiscation decrees, although they have been construed otherwise, are inclusive enough to be construed as orders to convey foreign property to the Soviet government. But objections are readily discoverable. The mere statement of the parallels is enough to show that a non-Russian court could hardly be expected to be so generous on questions of construction. Further, there is no evidence that such conveyances were actually made. Finally, local anti-confiscatory law or policy is a handy shield against application of Russian law even if it were found the proper law.

Considering the Russian cases and their analogies in respect to tangible property located abroad, it seems that recognition of the territorial limitation upon a state’s executive power is the real basis for refusal of foreign states to give the confiscation decrees extraterritorial force, if a legal rationale for the Russian cases must be found.

Where the property is intangible as in the Belmont case, the same approach may be used. Thus, if the situs of the intangible was in Russia at the time of the decrees, the decrees are effective; if it was outside Russia, the decrees are not effective. This seems to be the view in the Russian cases. However, the

34 Clark v. Iowa Fruit Co., 185 Fed. 604 (C.C.D. Mo. 1911).
36 Massie v. Watts, 6 Cranch (U.S.) 148 (1810).
37 1 Beale, Conflict of Laws 422 (1933).
38 Clark v. Graham, 6 Wheat. (U.S.) 577 (1821); Swank v. Hufnagle, 111 Ind. 453, 12 N.E. 303 (1887); Sell v. Miller, 11 Ohio State 331 (1860).
39 Note 32, supra.
40 See Bullock v. Bullock, 52 N.J. Eq. 561, 566, 30 Atl. 676, 677 (1894).
41 But American courts have gone further in this type of case by formulating decrees implicitly requiring acts done on foreign territory. Salton Sea Cases, 172 Fed. 792 (C.C.A. 9th 1909); see Vineyard, etc., Co. v. Twin Falls, etc., Co., 245 Fed. 9 (C.C.A. 9th 1917), 31 Harv. L. Rev. 646 (1918); cf. 1 Beale, Conflict of Laws 433-434 (1933).
formula is not quite so easy to apply. There are at least eight different views—all of them somewhat objectionable—as to the situs of a debt.44

It is situated at the creditor’s domicil for purposes of taxation by the state benefiting by the taxation;45 or at the business situs.46 It is situated at the debtor’s domicil for purposes of escheat by the state benefiting by the escheat.47 It is situated where the debtor to the principal debtor can be found for purposes of garnishment by the state which has a law providing for the attachment of such a debt to be upheld.48 In the Russian cases, debts with any foreign con-


Sweden: By a decision of the Supreme Court of Sweden, the Paris branch of a Russian bank recovered a deposit in a Swedish bank, according to a report in the Rouskoe Slovko of New York, April 10, 1930, noted in Nebolsine, Recovery of Foreign Assets of Nationalized Russian Corporations, 39 Yale L. J. 1135, 1146 n. 49 (1930).


Germany: Ginsberg v. Deutsche Bank, K.G., March 3, 1925, 1 Ostrecht 163. This decision was reversed on rehearing three years later. Juristische Wochenschrift 1232 (1928). Art. 30 of the E.G.B.G. reads: “The application of a foreign law is excluded if the application would contravene good morals, or the purpose of a German law.” Nebolsine, op. cit. supra 1159 n. 55 (1930). The decision both ways turned on the interpretation of that article. After the Treaty of Rapallo, Art. 30 was held inapplicable to the operation of Soviet law. In re Spahn and Son, R. G., May 20, 1930, 61 Clunet 147.


Poland, Latvia, Esthonia: By legislation, Russian corporations were dissolved and their assets distributed to local claimants. Makarov, The Legal Status of Assets Abroad Owned by Nationalized Russian Stock Companies (unpublished paper by A. N. Makarov, former Prof. of Law at the University of Petrograd).

44 Carpenter, Jurisdiction over Debts, 31 Harv. L. Rev. 905, 907-908 (1918).


46 Bluefields Banana Co. v. Board of Assessors, 49 La. Ann. 43, 21 So. 627 (1897); J. Beale, Conflict of Laws 304, 588-593, 619 (1933).


nections owed to Russian corporations have been held situated abroad for the purpose of ascertaining the effect of the Russian confiscation decrees by courts likewise situated abroad.49 Other formulas for the situs of a debt would place the debt in the Belmont case somewhere outside Russia: the domicil of the debtor,50 the place where the original transaction which gave rise to the debt occurred,51 the places where the debtor can be found,52 the places where the debt is recoverable,53 the places having the power to control the debtor.54

But it is now old learning that a debt is a relation between persons only and consequently has situs only in a fictitious, question-begging sense.55 The cases are not inconsistent—the "situs" depending each time on the purpose for which it was to be determined.56 The old view that it is at the domicil of the creditor, based on the maxim mobilia sequuntur personam57 has yielded today to the view that one fiction—ascribing situs to any debt58—is enough and must be flexible according to the purpose invoked.

The real question, then, for purposes of confiscation is whether the state of the creditor or the state of the debtor has effective control. Accepting the modern doctrine, it can be argued that the situs of a debt for the purpose of taxation is at the creditor's domicil,59 that confiscation is like taxation,60 that therefore the Soviet government could tax or appropriate the debt to one of its corporations created by a deposit in New York. The distinction between taxation and confiscation, like most distinctions, is one of degree.61 That there was confiscation, not mere taxation, by the Soviet government is clear from the intention of the decrees to leave the corporations absolutely nothing.62 If, in the Belmont case, a certificate of deposit had been in Russia at the time the confiscation decrees were enforced, the modern tendency to identify the debt with its tangible evidence, even in the case of a non-negotiable chose in action,

49 See cases collected in note 43, supra.
50 Jackson v. Tiernan, 15 La. 485 (1840); Minor, Conflict of Laws 276–277 (1901).
52 Harris v. Balk, 198 U.S. 215 (1904); Rest., Conflict of Laws § 108 (1934).
53 In re Russian Bank for Foreign Trade, [1933] Ch. D. 745.
54 Carpenter, Jurisdiction over Debts, 31 Harv. L. Rev. 905 (1918).
55 1 Beale, Conflict of Laws 302 (1935).
56 16 Harv. L. Rev. 63 (1902).
57 Story, Conflict of Laws §§ 376–381, 397–399, but cf. § 383, n. (a) (8th ed. 1883); Wharton, Conflict of Laws § 363 (3d ed. 1905).
58 1 Beale, Conflict of Laws 301–302 (1935).
62 See Sokoloff v. National City Bank, 239 N.Y. 158, 145 N.E. 917 (1924), where effect of the confiscation decrees was sought to be sustained as a "revolutionary tax."
for the sake of commercial convenience would provide an argument for locating the debt in Russia.63

Control of the owner-creditor may be enough to transfer a debt. Intangible property, such as the beneficial interest in a New York insurance policy, can be transferred by operation of law in the state of domicil of the owner, who was outside the jurisdiction.64 Also jurisdiction over shareholder alone is enough to transfer shares of stock in a foreign corporation by confiscatory operation of law.65

Further, it is by no means clear that control over the debtor alone is enough. It has been held that Soviet jurisdiction of an American debtor was not sufficient to transfer a contract obligation, performable in Russia, to the Soviet Union,66 unless the contract specifically stated Russian law was applicable to all questions about performance of the contract.67 Again, much the same result was reached in the state insolvency cases in which discharge of foreign creditors could not be accomplished by control of the state over the debtor.68 Finally, it is arguable that Harris v. Balk69 is distinguishable because the principal debtor is protected—viz., has his debt to the garnishor, or part of it, paid. Of course, it does not follow that some state must always have sufficient control over a given debtor-creditor relation to make an effective confiscation of the debt. Yet such a view seems as plausible in the case of a debt as it does in the case of a chattel whose owner is in another state.

It may be useful to consider whether formal changes in the decrees would affect the result.70 Suppose the confiscation decrees are viewed as raising a debt owed by the Russian corporations to the Soviet government for the value of all their property, including that located abroad? In the Belmont case, then, the assignment to the United States was a transfer of a creditor's right against the Russian corporation, and the United States garnisheed the New York debtor to the Russian corporation, where the debtor was found.71 The objection

69 198 U.S. 215 (1904). In that case it was held that a judgment in favor of a garnishor against the garnishee, who was temporarily in the state, is entitled to full faith and credit, although the principal debtor was not before the court.
70 Had the Soviet Union purported to compensate the Russian corporations, which it did not, would there have been any confiscation, even though compensations were grossly inadequate? When the United States confiscates property, a promise to compensate is implied. Russian Volunteer Fleet v. United States, 282 U.S. 48T (1930).
71 Harris v. Balk, 198 U.S. 215 (1904); Kennedy, Garnishment of Intangible Debts, 35 Yale L. J. 689 (1926); Beale, Conflict of Laws 454-467 (1934); Stumberg, Conflict of Laws 101-104 (1937); Goodrich, Conflict of Laws 126-131 (1927); Rest., Conflict of Laws § 108, Comment b (1934).
of unfairness to the principal debtor is not available because the Russian corporation, too, can be served in New York.  

The question of the validity of the confiscation can in this way be litigated among the three interested parties. The notion that a court would adopt such an interpretation of the confiscation decrees is preposterous enough, but it is interesting to observe how a change of legal language from “confiscation” to “debt” could change legal sympathies.

Suppose the confiscation decrees are viewed as an appropriation of the shares of Russian corporations by the Soviet Union? As between corporation and shareholders, the law of the state of incorporation is final, although it is said, as between transferor and transferee of shares the law of the place is applicable, but the law of the state of incorporation can finally control even this question. A transfer of corporate shares can be made in the state of incorporation although the certificates representing the shares are not in the state. Such a transfer will be upheld abroad.

When a confiscatory transfer has been made abroad, the transferee government is not secure until the state of incorporation upholds the transfer, which may be refused if the state of incorporation also has legislated confiscation of the shares. Following the supposed construction of the Soviet decrees the right the United States received by as-

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27 1 Beale, Conflict of Laws 465-467 (1935); Goodrich, Conflict of Laws 131 (1927); Stumberg, Conflict of Laws 104 (1937).


assignment in the Belmont case was that of sole shareholder in the Russian corporation. Subject to claims of creditors, the United States would recover the whole amount of the deposit made by the corporation in New York. The implication of the theory that the Soviet Union acquired the shares of Russian corporation have been disregarded by all the Russian cases, though it has been admitted that the decrees had that effect among others. The fact that many lines of business were "nationalized" by the Soviet government lends credence to the theory, because to own the stock is to control the corporations.

But except as to chattels subjected to confiscation in the Soviet Union and subsequently brought out, the old slogans of defeated comity and victorious public policy have in fact ruled the cases. The harsh injustice of uncompensated confiscation is granted, but the courts might more cogently have arrived at much the same result if they had faced more of the problems.

II

The strong feelings about confiscation undoubtedly also led to a judicial readiness to find that the Russian corporations were not dissolved by the Russian decrees in 1918. The most apparent means of defeating the claims of the Russian corporations was to show the corporations did not exist for purposes of suing and being sued in the forum. But the arguments employed by the corporations to show their continued existence in spite of the Soviet dissolution decrees were eminently successful. It was contended in many courts of the world that Russian corporations had corporate existence after the Soviet dissolution decrees because the Soviet Union was not recognized politically. This argument was successful before all courts which entertained the question.

82 Borchard, Confiscations: Extraterritorial and Domestic, 31 Am. J. Int. Law 675 (1937).


United States: The effect of non-recognition upon the standing of the Soviet government was severe; it had no capacity to sue, The Rogdai, 278 Fed. 294 (N.D. Cal. 1920) and 279 Fed. 130 (N.D. Cal. 1920); The Penza, 277 Fed. 91 (E.D. N.Y. 1921); R.S.F.S.R. v. Cibrario, 235 N.Y. 255, 139 N.E. 259 (1923); or be sued, Wulfsohn v. R.S.F.S.R., 234 N.Y. 372, 138 N.E. 24 (1923); and must helplessly observe representatives of the government it succeeded recover a public claim. Lehigh Valley R. Co. v. State of Russia, 21 F. (2d) 396 (C.C.A. 2d 1927). But the effect of non-recognition on private litigation was mitigated by judicial recognition of political and economic realities within Soviet territory, Banque de France v. Equita-
except the highest Swiss court, holding, despite non-recognition of the Soviet Union, that a Russian corporation no longer existed in Switzerland.

Political recognition of the Soviet Union by most countries subtracted one argument from a multitude against application of the Soviet dissolution decrees to Russian corporations. The English courts discovered by inspection of the relevant Soviet decrees that Russian corporations were not dissolved but only liquidated and therefore existent. Subsequently, they reached the same result by attributing the existence of Russian corporations to registration of branch offices under the Companies Act. The French courts invented certain requirements for the establishment of a de facto corporate domicil in France. Similarly, a German court in 1925 held a Russian bank was a juristic person in

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English courts admitted confiscations had occurred in Russia, White v. Eagle S. and B. Dominion Ins. Co., 127 L.T. 571, 38 T.L.R. 616 (1922), but were troubled by the concession theory of corporate existence giving autocratic power of life and death over corporations to the state of incorporation. Russian and English Bank v. Baring Bros., 146 L.T. 424 (1932).


Germany for the purpose of garnishing its debtor, but later reversed the same case.8

American courts have endowed internationally foreign corporations with new life at the instance of American creditors in spite of dissolution by the recognized government of the corporate domicil.9 Dissolution by an unrecognized government, like the Soviet Union until 1933, has not disturbed the standing of Russian corporations before the courts in the United States8 if properly pleaded.9 Their existence has been justified by various legal platitudes. For example, the assessor of the nonexistence of a Russian corporation may be estopped by his behavior in having treated it as a corporate entity.89 Or conceding—without considering the legal difficulties—corporate existence in the forum to Russian corporations, some courts refer to the extraterritorial impotency94 of the Soviet dissolution decrees resulting from non-recognition of the Soviet Union by the United States.89 Or they refer to the repugnance of the decrees to the public policy of the forum.86 On the other hand, the existence of Russian corporations in the forum has been admirably sustained by sheer judicial ingenuity. Mr. Justice Cardozo in *P.M.K. Bank v. National City*

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Bank97 grasped the presumption of continued corporate existence and propped it up with a theory of spontaneous corporate existence.98

The courts of this country have never been idle in discovering means of invigorating corporations which are in de facto dissolution in the state of incorporation.99 If dissolution is admitted, a statute or terms of the dissolution decree can usually be found to extend its existence for the purpose of suing and being sued.100

The ingenuity expended in avoiding a finding of dissolution in the state of incorporation or, if found, in avoiding its effect suggests that the theory of corporate existence which holds the corporate personality is a revocable concession from the state is unsatisfactory when the interests of the forum demand continued existence of a corporation. The theory that an association of persons dedicated to certain objects has a natural, spontaneous existence as a corporation suits the purposes of capitalistic courts in the Russian cases, but involves the inconvenience of determining when such a corporation begins and ends existence which are not found in the more arbitrary concession theory; if the theory of spontaneous existence were put in general use the difficulties would multiply. Would families, football teams, and political parties be corporations? The United States Supreme Court has long embraced the concession theory of corporate existence,103 and its latest expression on the question of corporate dissolution expressly adopts that theory.104 Adversaries of Russian corporations challenging their existence had strong arguments of authority and convenience, but met with failure. There is no suggestion in the cases that states might have absolute power to create but not necessarily to destroy corporations.

Perhaps the corporate fiction in the Russian cases has been overemphasized.

97 253 N.Y. 23, 170 N.E. 479 (1930).
98 See note 102, infra.
104 Chicago Title & Trust Co. v. Forty-One Thirty-Six Wilcox Bldg., Corp., 58 S. Ct. 125 (1937).
by excursions of the courts into theories of corporate existence. The real problem was to provide groups of expropriated individuals a convenient method of suing for their property abroad. They were permitted to use the corporation as plaintiff and defendant as a procedural device in the forum for the convenience of both court and parties. These cases may indicate that the nature of the corporate entity, when it is a question of suing or being sued as distinguished from a question of limited liability, is merely a question of procedure, and hence, under the old formula of the conflict of laws, is to be determined by the law of the forum.\textsuperscript{105}

III

With all doubts about the effect of the Soviet confiscation and dissolution decrees on Russian corporate property recoverable abroad resolved in favor of those claiming under the Russian corporations by the courts of the world, the importance of the executive agreement in the \textit{Belmont} case which reached a different result cannot be ignored.

In view of further explanatory memoranda exchanged between the Soviet Union and the United States in July, 1936, there is no question but that claims based on the confiscation decrees were included in the assignment.\textsuperscript{106}

The court took a desirable step beyond the precedents in treating the executive agreement as a treaty for the purpose of superseding New York law,\textsuperscript{107} because the added sanction to such agreements will facilitate the business of the Department of State in the conduct of the foreign affairs of the United States.\textsuperscript{108} The exclusion, in the \textit{Belmont} case, of Russian nationals who have a claim under the corporation from the use of Federal law as a defense to the claim of the United States under the assignment may later be regarded as a dictum.\textsuperscript{109} If not, it modifies a previous decision, \textit{Russian Volunteer Fleet v. United States},\textsuperscript{110} which held that the United States cannot under the Fifth Amendment confiscate the right to the performance of a contract from alien friends without compensation. The position of the alien friends in that case, however, is distinguishable from the position of the Russian nationals in the \textit{Belmont} case, because the latter's own government initiated the confiscation

\textsuperscript{105} 3 Beale, Conflict of Laws, 1603 (1935); Rest. Conflict of Laws § 588 (1935).


\textsuperscript{107} An executive agreement is a treaty for the purpose of direct appeal to the United States Supreme Court on a point of construction. Altman & Co. v. United States, 224 U.S. 583 (1912).


\textsuperscript{109} Claimants who are Russian nationals were not before the court. 301 U.S. 324, 332 (1937).

\textsuperscript{110} 287 U.S. 481 (1930).
to which the United States is a mere auxiliary. Although not expressly men-
tioned in the Belmont case, it seems likely that non-Russian foreign claimants
under the Russian corporation will be protected by the Fifth Amendment as
friendly aliens within the rule of the Russian Volunteer Fleet case. Further, it
should be noted, that although treaties have been examined and upheld under
the Federal Constitution, it not one has ever been held unconstitutional. It
remains, however, to see how far this judicial patience can be pushed. Conceivably, the Belmont case opens a novel field of power to the executive depart-
ment of the United States through the use of executive agreements and treaties,
a field that has long been subject to the speculations of law writers.

The necessity of forbidding palpably unconstitutional acts has sometimes
been evaded by the Supreme Court by refuge in the doctrine of political ques-
tions, but this doctrine was not relied on in the Belmont case. The doctrine
has been applied only to the negotiation, violation, and termination of
treaties, not to their domestic effect in the United States, although treaties,
conventions, protocols, and executive agreements are the final products of the
higher politics.

Missouri v. Holland, 252 U.S. 416 (1919); United States v. Winans, 198 U.S. 371 (1904);
United States v. Reid, 73 F. (2d) 153 (C.C.A. 9th 1934).
A treaty that would be unconstitutional if it were a statute is not unconstitutional. United
States v. Thompson, 258 Fed. 257 (E.D. Ark. 1919); United States v. Reid, 73 F. (2d) 153
(C.C.A. 9th 1934).

A treaty has never been declared unconstitutional. Field, Doctrine of Political Ques-
tions, 8 Minn. L. Rev. 485, 489, n. 21 (1924).

See DeGeofroy v. Riggs, 133 U.S. 258, 267 (1889); Asakura v. Seattle, 265 U.S. 332, 341
(1923); The Cherokee Tobacco, 11 Wall. (U.S.) 616, 620–621 (1870), for dicta asserting treaties
can be held unconstitutional.

Dowling, Cas. on Const. Law 391, n. 2 (1937).

Luther v. Borden, 7 How. (U.S.) 1 (1849).

Doe v. Braden, 16 How. (U.S.) 635 (1853).

Taylor v. Morton, 2 Curt. (U.S. C.C.) 454, 461, aff'd 2 Black (U.S.) 481 (1862); Ware v.
Hylton, 3 Dall. (U.S.) 199, 260 (1796).

Ware v. Hylton, 3 Dall. (U.S.) 199, 261 (1796).

Field, The Doctrine of Political Questions in the Federal Courts, 8 Minn. L. Rev. 485,
486–490 (1924). Cf. Cherokee Nation v. State of Georgia, 5 Pet. (U.S.) 1 (1831), and Finkel-
stein, Judicial Self-Limitation, 37 Harv. L. Rev. 339, 351–352 (1924). Jurisdiction in that case,
however, was denied because the Cherokee Nation was not a foreign state and therefore was
not a proper party. Chief Justice Marshall expressly left undecided the question whether the
equitable relief demanded "savours too much of the exercise of political power to be within the
proper province of the judicial department." 5 Pet. (U.S.) 1, 20 (1831).