EDITORIAL COMMENT

NAZI LAWS IN UNITED STATES COURTS

One of the first cases to come before United States courts concerning the despoliation of Jews in Germany under the Nazi régime was the case of *Bernstein* v. *Van Heyghen Frères,* 163 F. 2d. 246 (1947).[1] Bernstein, a German Jew, was the owner of all the stock of the Bernstein Steamship Line, a German company. In January, 1937, he was arrested and imprisoned by "Nazi Gestapo" in Hamburg. Under duress of "Nazi officials," threats of bodily harm, indefinite imprisonment and business ruin, he assigned, while still in prison, his stock to one Boeger, "a Nazi designee," who took possession of all the assets, including the company's ships, without compensation and transferred same to defendants, a Belgian concern which was said to have full knowledge of the duress. The assignment took place in the British occupied zone of Germany. He was released in July, 1939, upon payment of a "ransom" by his family and allowed to leave Germany. He became naturalized in the United States in 1940.

Plaintiff demanded damages, loss of profits, and insurance of £100,000 received by defendant on the loss of a vessel in 1942. The United States District Court dismissed the case on the ground that the wrong was an act of the German Government committed in German territory and not subject to judicial review here. On appeal the Circuit Court of Appeals affirmed the decision below by a two to one vote, Judge Clarke dissenting.

It may be assumed that the plaintiff could not recover unless he showed he was entitled to the *res* and that the transfer to Boeger and by Boeger was illegal under the then German law. It appears that he only attempted the latter by pleading duress, although duress was countenanced under the Nazi decrees which came into force in 1938.

Judge Learned Hand speaking for the court, in the first place, deemed it clear, though some of the evidence was "fragile," that plaintiff had alleged that he was a victim of persecution by officials of the Third Reich. Although, as the court was informed, no non-Aryan laws might have been passed until December, 1938, and the transfer might have occurred before that time, and a German court might have disallowed the transfer, this, however, was irrelevant because "We have repeatedly declared, for over a period of at least thirty years, that a court of the forum will not undertake to pass upon the validity under the municipal law of another state of the acts of officials of that state, purporting to act as such. [Citations of Circuit Court decisions.] We have held that this was a necessary corollary of the decisions of the Supreme Court, and if we are mistaken the Supreme

[1] Digested in this JOURNAL, Vol. 42 (1948), p. 217.

Court must correct it,"[2] citing *Underhill* v. *Hernandez,* 168 U. S. 250, and *Oetjen* v. *Central Leather Co.,* 246 U. S. 297.

At this point it may be interjected that the non-inquiry doctrine has had a somewhat checkered career in the United States courts. A maze of cases descended upon the courts as a result of Soviet confiscation and nationalization decrees. Before recognition of the Soviet Government by the United States in 1933, the courts, generally speaking, disregarded the decrees so far as concerned companies or property *in the United States,* but did support them in respect of companies and properties located *in Russia.* After recognition and the concurrent Litvinoff assignment of Russian rights to the United States, the courts were still disinclined to give effect to such decrees concerning property *in the United States,* as repugnant to public policy. But the Supreme Court stepped in and held that the United States received good title under the Litvinoff assignment which overrode any State policy to the contrary. This, so far as is known to the writer, is the first instance of enforcing a foreign confiscation decree on property *in the United States.*[3]

As to Hitler's anti-Jewish decrees, the lower New York courts were scathing in denunciation, but the Court of Appeals held that a German contract to be performed in Germany should be construed according to German law however objectionable. "So long as the act is the act of the foreign sovereign, it matters not how grossly the sovereign has transgressed its own laws." (*Banco de Espana* v. *Federal Reserve Bank,* 114 F. 2d 438.)

In the second place, Judge Hand questioned whether the Executive, "the authority to which we must look for final word in such matters," has declared that this "commonly accepted doctrine" does not apply.

Since the plaintiff argued that the Government had already acted to relieve this restraint, the court considered the announcements of policy contained in certain official acts of the United States and other victorious Powers before the court,[4] and held that these spoke *in futuro* and so far

[2] Petition for certiorari was denied by the Supreme Court, 332 U. S. 772.

[3] Petrogradsky *v.* National City Bank, 253 N. Y. 23; Salimoff *v.* Standard Oil Co., 262 N. Y. 220; Vladikavkajsky Ry. *v.* N. Y. Trust Co., 263 N. Y. 369; U. S. *v.* N. Y. Bank and Trust Co., 77 F. 2d 866; U. S. *v.* Belmont, 85 F. 2d 542, 301 U. S. 324; U. S. *v.* Pink, 215 U. S. 203. See discussion of cases in 23 N. Y. U. Law Quart. Rev. (1948), Notes, p. 311; also by Jessup in this JOURNAL, Vol. 31 (1937), p. 481, and *ibid.,* Vol. 36 (1942), p. 232; Borchard, *ibid.,* Vol. 31 (1937), p. 675; and King, *ibid.,* Vol. 42 (1948), p. 811. It may be noted in passing that the confiscation of property of aliens is regarded as a violation of international law. C. P. Anderson, this JOURNAL, Vol. 21 (1927), p. 525.

[4] The Allied Declaration of June 5, 1945, assuming "supreme authority with respect to Germany including all the powers possessed by the German government, the High Command or any state, municipal or local government or authority"; the Potsdam agreement of Aug. 2, 1945, establishing the Supreme Council and enacting that all Nazi laws of the Hitler régime discriminating in respect of "race, creed, or political opinion

were only prospective in their operation. No Restitution Law had yet been approved. Moreover, the laws for the American Zone were "in a sense irrelevant," since the Bernstein Line and the assignment had their *locus* in the British Zone, and the court had no access to the British laws of that zone. The court continued: "The only relevant consideration is how far our Executive has indicated any positive intent to relax the doctrine that our courts shall not entertain actions of the kind at bar; some positive evidence of such an intent being necessary." Certainly, the court added, it is no indication of such intent that the Executive may have provided for adjudication *locally* where for the most part the cases will arise.

As an additional reason for maintaining the doctrine in question the court indicated that claims for this property wrongfully seized in Germany would become an item in the reparations account between Belgium and Germany, especially if the plaintiff succeed in this suit, and that therefore these matters should be left for settlement in the peace treaty, in the absence of the most explicit evidence of a contrary purpose of the victorious Powers.

Third, even if the British Military Government had gone as far as would in our opinion be necessary, said Judge Hand, we are not ready to agree that it would relieve a New York court from the need of an equivalent assent of our own Executive. Plaintiff nowhere suggests that the British have passed for their zone any legislation different from our zone.

Finally, as to the argument that the Nuremberg Charter and Judgment declared such acts to be crimes,[5] this does not aid the plaintiff, for we have assumed the New York law would not approve the validity of the transfer even if valid in Germany. Nor regardless of this does it overcome "the real obstacle in his path" that the New York court is not permitted to apply that law, since the claim along with all other such claims, is reserved for adjudication as part of the final settlement with Germany.

Judge Clarke dissented strongly on the ground that our Executive has repudiated the recognition of the Hitler Government and declared its acts null and void. "We have no precedent to govern this case. In short a new one must be formulated." But first he thought the court should order a trial to clarify the facts and issues in this record, and also request of the State Department a definition of Executive policy in the premises, and a precise recital of the instruments nullifying Nazi laws. The instruments discussed throw light on Executive policy; Executive policy was at

shall be abolished. No such discrimination, whether legal, administrative or otherwise shall be tolerated"; Military Government Law No. 1 and Law No. 52 of the United States Zone. Judge Clarke also mentioned the Directive of April, 1945, and Allied Council Law No. 1.

[5] It appears from the Judgment at Nuremberg that "The Tribunal therefore cannot make a general declaration that the acts before 1939 were crimes against humanity within the meaning of the Charter . . ." (Judgment, p. 84).

least in formulation. "If the policy of our Executive is one of non-recognition of Nazi oppression and of restitution to the Jews, I think we are bound to observe it in our courts."

Before the Van Heyghen case was decided in 1947, Bernstein brought a similar suit in June, 1945, in the United States District Court against the Holland-American Line. The facts related as to duress are essentially the same. After an appeal the case appears to be still pending in the District Court (*Bernstein* v. *Holland-America Line*, 76 F. Supp. 335; 79 F. Supp. 38; 173 F. 2d 71).[6] In this proceeding the attorneys for the plaintiff, taking a hint from the Van Heyghen decision and Judge Clarke's dissent, inquired of the Department of State whether it might care to express its view concerning the Executive policy as to the exercise of jurisdiction by the courts of this country in such cases. On April 13, 1949, the Acting Legal Adviser of the Department replied:

> This Government has consistently opposed the forcible acts of dispossession of a discriminatory and confiscatory nature practiced by the Germans on the countries or peoples subject to their controls. . . .[7]
>
> The policy of the Executive, with respect to claims asserted in the United States for the restitution of identifiable property (or compensation in lieu thereof) lost through force, coercion, or duress as a result of Nazi persecution in Germany, is to relieve American courts from any restraint upon the exercise of their jurisdiction to pass upon the validity of the acts of Nazi officials.[8]

A copy of this letter was sent to the other parties to the suit and to the judge of the court.

It may be noted that it has not been unusual in the past for the Government to set forth its policies in communications to courts. In the Transandine Case [9] the Government practically told the New York court how it should decide the legal questions, but the court made its own decision that the State and Federal policies were in accord, adding, however, that this sort of thing might have "serious consequences in other cases."

[6] Digested in this JOURNAL, Vol. 42 (1948), p. 726, Vol. 43 (1949), p. 180, and Vol. 44 (1950), p. 182.

[7] He listed the following instruments in support of this statement: Inter-Allied Declaration of Jan. 5, 1943; Gold Declaration of Feb. 22, 1944; Potsdam Agreement of Aug. 2, 1945; Directives to U. S. Commander-in-Chief, April, 1945 and July 11, 1947; Allied Control Council Law No. 1; Military Government Laws Nos. 1, 52 and 59. He continued:

> "Of special importance is Military Government Law No. 59 which shows this Government's policy of undoing forced transfers and restituting identifiable property to persons wrongfully deprived of such property within the period from January 30, 1933 to May 8, 1945 for reasons of race, religion, nationality, ideology or political opposition to National Socialism. Article 1 (1). It should be noted that this policy applies generally despite the existence of purchasers in good faith. Article 1 (2)."

[8] Dept. of State Bulletin, Vol. XX, No. 514 (May 8, 1949), pp. 592–593.

[9] Anderson *v.* Transandine Handelmaatchappij, 289 N. Y. 9.

And courts are inclined in immunity cases to hang upon the words of the State Department in factual situations which they are perfectly capable of handling by regular procedure.[10]

In this principal case Judge Hand relied in the first instance on the act of state doctrine. Whatever the origin and early application of the doctrine, it has become by repetition, as John Bassett Moore says, "a settled principle that courts of one country will not undertake to judge the legality of acts of governmental power done in another country." [11]

In the precedents cited by the court and others of the same character,[12] the doctrine is predicated mainly (1) upon the existence of a government which had been recognized by the forum government and (2) upon the avoidance of thwarting the foreign policy of the latter government.[13]

As to the first point, there was clearly no government at all in Germany when the Van Heyghen suit was begun in 1946; it had been destroyed in the war and its functions and powers assumed by the victorious Allies. But in the period 1937 through July, 1939, during which the acts of state occurred, the Hitler Government had not been repudiated by the United States. Relations were undoubtedly strained under American protests regarding the treatment of Jews in Germany and the withdrawal of the American Ambassador in November, 1938. Nevertheless, the American Chargé and his staff remained on for three years conducting diplomatic business as usual with the German Government. The United States in effect recognized the annexation of Austria in April, 1938, and agreed with Germany to extend extradition to Austria in November, 1939. United States aid of arms and lend-lease to the Allies and embargoes of war materials to other countries did not begin until after war opened in Europe. The destroyer deal with Britain occurred in the autumn of 1940; the U. S.-German Claims Commission was sitting regularly in Washington until the spring of 1939, and Roosevelt's "shoot on sight" order came in September, 1941.

It must be assumed, therefore, that the Hitler Government was recognized by the United States and diplomatic relations, if not cordial, at least not hostile, continued during the period in question.

[10] Republic of Mexico *v.* Hoffman, 324 U. S. 30; *The Navemar,* 303 U. S. 68; Ex parte Muir, 254 U. S. 522; Ex parte Peru, 318 U. S. 578.

[11] This JOURNAL, Vol. 27 (1934), p. 607. Mr. Moore was of counsel in the early stages of the Underhill case.

[12] Besides the Underhill and Oetjen cases *supra:* Ricaud *v.* American Metal Co., 246 U. S. 304; Ex parte Peru, 318 U. S. 578; Mexico *v.* Hoffman, 324 U. S. 30; *The Navemar,* 303 U. S. 68; American Banana Co *v.* United Fruit Co., 213 U. S. 347; also several Circuit Court and State court decisions.

[13] It may be recalled that the act of state doctrine has not been applied to acts of the judicial arm of government. Courts frequently scrutinize decisions of foreign courts for lack of jurisdiction, fair procedure, fraud and other evils disfavored by the public policy of the forum.

As to the second point, which speaks as of the time of the suit, how would a decision for plaintiff have adversely affected the then foreign policy of the United States? Judge Hand held that the instruments [14] submitted on foreign policy were not a positive indication of an intent to relax the act of state doctrine. They were, he said merely prospective in operation. Judge Clarke thought the evidence showed at least a policy "in formulation" looking to restitution of duress properties. Rereading these documents, the writer must agree that they in a sense speak *in futuro* by the use of the word "shall"; but "shall" may also be taken as a command, and as showing an intention to annul Nazi laws and to restitute "duress properties." Thus Control Council Law No. 1 merely repealed anti-Semitic laws, though not retroactively. While the Directive of April, 1945, envisaged the eventual restoration of "duress properties," the actual Restitution Law (Law No. 59 of the American Zone) for that purpose was yet to be issued. Until that time the duress properties were simply held in possession and control. It was therefore for the court to decide whether to make inquiry of the State Department or to render a decision and let the Supreme Court correct it. It took the latter course and *certiorari* was denied.

Of the additional documents listed in the Department's letter of April 13, 1949, the first two would have added little as to foreign policy, and the important fifth and ninth documents were published shortly after the decision was rendered. Doubtless they would have been produced had Judge Clarke's view prevailed, and probably would, together with the Department's letter, have determined the question of policy. For they definitely provided for the "speedy restitution of identifiable property (tangible or intangible)" wrongfully taken between January 30, 1933, and May 8, 1945, notwithstanding purchase in good faith (with a few exceptions).[15]

The foreign policy of the United States with respect to Germany or the American Zone is, however, not an isolated matter. There were other imponderables involved. The *locus* of duress and ownership of the property was in the British Zone, whose laws were apparently unknown to the court.[16]

[14] See footnote 4 above.

[15] See the Special Report of the Military Governor, November, 1948 for the text of other Laws and Regulations. Such restitution was to be made by courts in Germany and not elsewhere. Up to this time the legislation in the American Zone provided only for restitution of identifiable tangible and intangible property (Law No. 59). On Sept. 30, 1949, the German Laender comprising the U. S. Zone promulgated legislation whereby certain classes of persons who suffered monetary and other losses through persecution by the Nazi régime, may receive indemnification for losses falling outside the previous restitution legislation. (State Department, Press Release No. 759, Oct. 3, 1949; Bulletin, Vol. XXI, No. 537 (Oct. 17, 1949), pp. 591–592.)

[16] Also it had been found impossible to make them uniform for all zones or even for two zones (Special Report of Military Governor, November, 1948, p. 22).

If it be assumed that the British laws follow the American Zone laws, then should they be applied to this case and if so, is the *res* here "identifiable property"? Is it the property of the plaintiff or of the steamship line of which he owned the stock? The *res* is the proceeds of property never owned by the plaintiff but by his company. Where would a decision for the plaintiff leave the Belgian company and would it arouse the ire of the Belgian Government in its behalf? Perhaps Belgian laws and policy were involved in the purchase by the Belgian company. Would a decision for the plaintiff have interfered with the United States policies in these directions, or with the general question of reparations in respect of all three countries? Judge Hand wisely considered the question of reparations and, while this was not at first an impressive consideration to the writer, the study of the international aspects of this case leads to the conclusion that such cases as this one cannot be adequately handled by local courts of any one country applying principles of local law, but should go before an international tribunal of some sort to be established and governed by mutual agreement of the governments concerned.

While at first blush it seems incongruous that the United States policy in Germany should favor restitution and indemnification for Nazi atrocities to the Jews and that the court in the Van Heyghen case should deny relief here for the same kind of Nazi acts, yet considering the complex international considerations involved in this case, it seems on the whole better for the court to recognize its limitations than to try a case in which it lacked competence to do full justice in an international sense.

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THE SWING OF THE PENDULUM: FROM OVERESTIMATION TO UNDERESTIMATION OF INTERNATIONAL LAW

The history of man's spiritual activities, of his attitude toward the world and life as a whole as well as toward particular problems shows a continuous swing of the pendulum from one attitude to the opposite one. Philosophically we see a change between the different attitudes which can be taken—all outlined already by the thinkers of ancient Hellas. It may be that the first attitude has reached its fullness, that its possibilities seem, for the time being, exhausted. It may be that the first attitude has seemingly been disproved by historical events and no longer seems adequate to the needs of a changed situation. Then trends and tendencies appear which may ultimately climax in the establishment of the opposite attitude. And as, in order to establish the new attitude, very likely a distorted picture of the former one will be given, and as the new attitude, once established, itself often goes to extremes, the pendulum not only swings from one side to the other, but from one extreme to the other.

Thus classicism is followed by romanticism in the field of art, literature