RECENT CASES

discretion by individual courts to secure a politic result in each case. Very probably the changed attitude of the Court which gave rise to the Alaska Packers decision resulted in part from a similar distrust of inadequate choice of law principles and from a dislike of the results of the Court's previous decisions. Therefore, the Court would do well to progress slowly and to consider carefully the policies to be served by any choice of law rules they may impose. From that point of view the wisdom of the rule of the instant case and its precedents is open to serious question, for conceivably a rule could be laid down to serve a more desirable policy without sacrificing uniformity and certainty. It is true that in European countries, unless the parties have provided otherwise, insurance problems are decided under the law of the country in which the company has its main office, in order to simplify business operations and risk calculations. But experience in this country with the results of unequal bargaining power between insurer and insured has led the legislators of many states to believe that a maximum protection of the insured is essential. Seemingly, the policy of those states is one which should be fostered, and problems of the construction and effect of insurance contracts should therefore be uniformly decided under the law of the state in which the insured resided when the policy was issued.

JUDICIAL RECOGNITION OF NAZI ACTS OF STATE

The plaintiff, a former German national of the Jewish faith, was the owner of the shares of stock in a shipping corporation. In January 1937, he was imprisoned in Hamburg, Germany, on charges of unlawful disposition of foreign currencies. Because he was led to believe by "Nazi officials" that, unless he gave up his shipping interests, his life and remaining property would be imperiled, he transferred his shares to one Marius Boeger, a "Nazi designee." Subsequently, Boeger, acting for the shipping line, sold a ship to the defendant, a Belgian corporation, under conditions allegedly sufficient to put the defendant on notice of the circumstances of the coerced transfer. The ship was sunk during the war, and insurance proceeds were collected for the defendant by the Belgian corporation, which owned a claim against a debtor in New York. The plaintiff levied an attachment on this debt owed the defendant as a preliminary to an action for conversion and loss of use of the vessel. The proceeding, begun in the


39 Decisions depending upon the concept of substantive due process can probably be considered overruled at the present time. In that connection it is interesting to note that in the instant case the Court expressly refused to rely on the place of making of the contract as determinative, thus avoiding any question of due process.

Supreme Court of New York, was removed to the United States District Court for the Southern District of New York. On appeal, the Circuit Court of Appeals for the second Circuit affirmed the District Court's order quashing the writ of attachment and dismissing the complaint. Bernstein v. Van Heyghen Frères Société Anonyme.

The Circuit Court of Appeals, reasoning that the plaintiff's claim depended upon the validity of a transfer brought about by officials of a foreign government, declared that the validity of the transfer could therefore not be inquired into by American courts, and that the general rule forbidding such inquiry had not been changed with respect to Nazi Germany by the policy of our executive branch of government. This decision appears to be based on the “act of state” doctrine, according to which courts of one nation "will not sit in judgment on the acts of the government of another done within its own territory." It is submitted that the act upon which the plaintiff's claim depended was an “act of state” within the meaning of that doctrine, but that there are sufficient indications of an executive policy of retroactive repudiation of the recognition of expropriatory acts of the Nazi government to have warranted remand of the case to the district court with instructions to write the State Department for a statement of that policy as it pertains to this case.

The act of securing the original transfer seems to have been an act of the German government, done within its own territory, and precedent seems to place it within the “act of state” doctrine even though the act might have been illegal according to then existing German laws, was repugnant to our own laws and policies and was performed by a government subsequently defeated in war by our own.

To recover in this action the plaintiff had to show that Boeger was unable to pass good title to the chattel, and to do this the plaintiff had further to demonstrate that his transfer of the shares to Boeger was not legally effective. According to the German Civil Code, in whose territory of application the transfer was made, and whose provisions are therefore applicable, a transfer is voidable if it is induced by “illegal” coercion. If the coerced person avoids the transfer, the avoidance is effective as to third parties who knew or should have known of the illegal coercion. Thus the plaintiff, in order to recover, would have had to demonstrate the illegality of the coercion. Instead, however, he alleged in his complaint that the coercion was an act of “Nazi officials,” leaving open the

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1 163 F. 2d 246 (C.C.A. 2d, 1947), cert. den. 68 S. Ct. 88 (1947).
4 Rest., Conflict of Laws § 352 (1934).
5 German Civil Code of 1896 §§ 123, 124.
6 Ibid., at § 142.
7 Transcript of Record, p. 19. The plaintiff further stated in an affidavit in support of the writ of attachment that he was arrested by the Gestapo. Transcript of Record, p. 12. In his
question whether of the Party or of the Government. Even in the former case, their act would be an "act of state" because, in National Socialist Germany, Party and state were regarded as constituting one unit, politically dominated by the Party. Acts of party officials against citizens" are reported to have been held "valid law by the courts," and if "within the scope of their political authority" not to have been subject to judicial review.

While the "Nazi officials" may have acted in part from a desire for private enrichment, the act nevertheless remains within the scope of the "act of state" doctrine. A dictum in the Underhill case indicates that if the official is "actuated by malice or any personal or private motive," the act will be considered a private act, but this does not seem to apply where the official is motivated by both the policy of the state and personal motives. Moreover, even if the pleadings are not considered conclusive, it would seem that the duress is to be regarded as a governmental act because the German government subsequently ratified it.

complaint he stated that he was coerced by the same officials who arrested him. Transcript of Record, p. i9. Since the Gestapo was an official police agency it would seem that this allegation alone was sufficient to justify the court in finding that the coercion was a governmental act; see United States v. Watkins, 159 F. 2d 650, 652 (C.C.A. 2d, 1947).

Law to Insure the Unity of Party and State of 1 December 1933, RGBL, 19331 1016.

Fraenkel, The Dual State 3 (1941).

Ebenstein, The Nazi State 60 (1943).

Fraenkel, The Dual State 35 (1941). This governmental position of the Party and its officials has been pointed out by Dr. Goldschmidt: "Considering the interpretation of the position of the Nazi Party by the political leaders of Germany, by its Supreme Court, and by its jurists, all of whom agree that the Party is called upon to execute the political will of the people . . . . there can be no doubt that the Party, its officers and officials, its organizations are agents or members of the Third Reich." Goldschmidt, Legal Claims against Germany 142 (1945); see also Ebenstein, The Nazi State 102 (1943); Heiden, The New Inquisition 40-41 (1939); Institute of Jewish Affairs, Hitler's Ten-Year War on the Jews 16-17 (1943).

Goering, in November 1938, in discussing the advisability of issuing a decree compelling "aryanization" of Jewish businesses is alleged to have stated:

"It is easily understood that strong attempts will be made to get all these stores to party-members and to let them have some kind of compensations. I have witnessed terrible things in the past; little chauffeurs of Gauleiters have profited so much by these transactions that they now have about half a million." Stenographic Report of the Meeting on the "Jewish Question," trans. in 4 Nazi Conspiracy and Aggression 427 (1946). For examples of such enrichment see ibid., at 302-305.


In Oetjen v. Central Leather Co., 246 U.S. 297 (1918), certain of General Villa's confiscatory acts were found to be acts of the Mexican revolutionary government, but it seems likely that Villa was not motivated solely by policies of that government. See 23 Encyclopaedia Britannica 150 (14th ed., 1929).

It appears from the periodicals of the time that the coerced transfer resulted in German control of the lines. N.Y. Times, p. 4, col. 3 (Jan. 4, 1938); Cheapest Tourist Vessels Make and Break Owner, 11 Newsweek, No. 3, at 22 (Jan. 17, 1938); Egotistical Bernstein, Time, No. 3, at 25 (Jan. 17, 1938). By retaining such control, it would seem that the German government made the coercion a governmental act. American Banana Co. v. United Fruit Co., 213 U.S. 347, 359 (1909).
It has been squarely held that the fact that the act of the foreign government is illegal under its own laws is not sufficient to remove the act from the "act of state" doctrine. So long as the act is the act of the foreign sovereign, it matters not how grossly the sovereign has transgressed its own laws.

Moreover, courts have applied the doctrine to acts repugnant to our own laws and policy. In United States v. Pink the United States Supreme Court, in overruling the New York Court of Appeals, which had refused to give effect to Soviet confiscatory decrees because they were against the policy of the state, held that state policies must give way to the foreign policy of the United States. The same result has been reached by New York courts in several cases dealing with anti-semitic acts of the Nazi government. In McCarthy v. Reichsbank the defendants allegedly coerced a Jewish person in Germany into transferring to them shares of stock. The court, in refusing to inquire into the validity of the transfer, stated that "it is legally immaterial that such acts are unjust morally." In Holzer v. Deutsche Reichsbahn-Gesellschaft the defendant had discharged the plaintiff in Germany in compliance with a Nazi law requiring the elimination of Jews from business enterprises, and the plaintiff sought to recover on his employment contract. The court stated that it was not competent to review the acts of the German government, "however objectionable." In 1943, in a case before a New York court, the plaintiff sought to recover on an insurance policy taken out in Germany with the defendant, a Swiss company doing business in Germany. The German government had confiscated the plaintiff's funds in the Swiss company because the plaintiff was a Jew, and the plaintiff attached the defendant's property in New York. The court in quashing the writ of attachment stated, "As for the very obnoxious and offensive character of the German decrees, the court is obliged to hold that governing law is


17 Banco de España v. Federal Reserve Bank, 114 F. 2d 438, 444 (C.C.A. 2d, 1940).

18 315 U.S. 203 (1942).

19 Ibid., at 232.

20 It would appear that the federal courts need not follow New York cases because the "act of state" doctrine operates as a bar to the action and thus the proceeding would seem to be governed by the law of the forum. Rest., Conflict of Laws § 585 (1934). However, there seems to be no good reason why the federal courts should not follow these cases.


22 Ibid., at 1017, 457.

23 277 N.Y. 474, 14 N.E. 2d 798 (1938).

24 Ibid., at 479, 800.

no less controlling because it is a bad law.... [W]e cannot undo or set at naught what has been done by the German government with the assets of the parties in Germany.\(^6\)

Although no previous case has been found involving acts of a recognized foreign government subsequently defeated in war by the United States, it would seem that the subsequent defeat is not sufficient to remove the case from the "act of state" doctrine. It has been held that the acts of governments subsequently overthrown by governments other than the United States are within the doctrine.\(^7\) The rationale for these decisions, according to the Circuit Court of Appeals for the Second Circuit in *Banco de España v. Federal Reserve Bank*,\(^8\) is that "Persons who dealt with the former.... government are entitled to rely upon the finality and legality of that government's acts, at least so far as concerns inquiry by the courts of this country."\(^9\)

The fact that it was our own government which overthrew the Nazi regime does not seem to be significant except insofar as it reflects executive policy. Thus, it is not to be considered in connection with the "act of state" doctrine itself but only in connection with the question of whether our executive has acted to relieve the courts of the traditional restraint imposed by the "act of state" doctrine.

The principal rationale of the doctrine seems to be that in the conduct of foreign relations our executive should have a free hand.\(^10\) If the executive decides, however, that it is consonant with this government's foreign policy for the courts to take jurisdiction in certain cases, they should take such jurisdiction.\(^11\) If, therefore, the executive has repudiated the expropriatory acts of the

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\(^8\) 114 F. 2d 438 (C.C.A. 2d, 1940).

\(^9\) Ibid., at 444. It might be argued that the defendant was not entitled to rely on American judicial refusal to inquire into the validity of the transfer because previous to the sale of the ship our Executive had indicated his disapproval of Nazi anti-semitic acts. 1938 The Public Papers and Addresses of Franklin D. Roosevelt 596-97 (1941); 1939 Ibid., at 2-3, 165 (1941). This does not seem conclusive, however.

\(^10\) The reasons given for applying the "act of state" doctrine vary somewhat with the cases, but the principal reason seems to be that in the conduct of foreign relations our executive should have a free hand. Some of the reasons given by the courts are: it would "imperil the amicable relations between governments and vex the peace of nations." Oetjen v. Central Leather Co., 246 U.S. 297, 394 (1918); "it is a contradiction in terms to say that within its jurisdiction it is unlawful" for a foreign government to act. American Banana Co. v. United Fruit Co., 215 U.S. 347, 358 (1909); "persons who dealt with the.... government are entitled to rely upon the finality and legality of that government's acts...." Banco de España v. Federal Reserve Bank, 114 F. 2d 438, 444 (C.C.A. 2d, 1940); "the hands of the state department would be tied. Unwillingly it would find itself involved in disputes it might think unwise." Wulfsohn v. Russian Socialist Federated Republic, 234 N.Y. 372, 376, 138 N.E. 24, 26 (1923), appeal dismissed 266 U.S. 580 (1924).

Nazi government retroactively, the court should inquire into the present legal effect of the coercive act in the principal case. While executive policy has not consistently retroactively repudiated acts of expropriation, it would appear that it has been sufficiently repudatory to warrant a remand with instructions to submit a request to the State Department for a statement of the executive policy as it affects this case.

In the judgment of the International Military Tribunal, discriminatory acts against the Jews prior to September 1939 were not criminal under then-existing international law. The Tribunal has stated that anti-semitic acts prior to September 1939 were not “crimes against humanity.”

Neither do anti-semitic acts committed prior to September 1939 appear to constitute technical “war crimes.” The Tribunal’s charter defines “war crimes” as “violations of the laws or customs of war,” but Nazi Germany was not at war prior to September 1939. Finally, by inference from the Tribunal’s treatment of the Gestapo, it appears that anti-semitic acts prior to September 1939 were not “crimes against the peace.” It appears, therefore, that the coercive act of the German government upon which the plaintiff’s action depended was not criminal under then-existing international law and, thus, has not been repudiated by our government on this ground.

An examination of Control Council Law No. 2 reveals that the Nazi Party has merely been “abolished and declared illegal,” which seems to indicate that our executive recognizes the acts of the Party until the date of its abolition. In any event, it is extremely doubtful whether Control Council Law No. 2 may be deemed an executive directive to the American judiciary in litigation such as the Bernstein case.

Similarly, it would seem that if our executive had retroactively repealed the laws providing for the economic elimination of the Jews, our courts might be justified in inquiring into the legality of any act which resulted in deprivation of property without just compensation. But again, the language of Control Council Law No. 1 indicates that these Nazi laws have merely been “repealed.”

The language of Control Council laws is not conclusive, however, as is indi-
cated by the effect given to the Control Council Law restoring to Jews living abroad the German nationality which had been taken from them by the Nazi Eleventh Subsidiary Decree. This law has been said not to repeal that decree retroactively.

Furthermore, our executive's action in providing for the return of expropriated property may be taken to indicate a desire to handle the matter without interference from the courts. Military Government Laws 5237 and 5938 have provided means for the return of property under certain specified conditions. It may well be that executive policy is to provide for cases like the plaintiff's through organizations other than the American courts. It would seem that the best way to determine this would be to request a statement from our State Department.

A case can be made for the view that our government has retroactively repudiated expropriatory acts of the German government on the basis of the latest expression of policy by our government and certain Military Government laws providing for the return of expropriated property. A directive issued in July 1947, approved by the State, War, and Navy Departments, to the United States Commander in Germany states our present policy:

It is the policy of your government that persons and organizations deprived of their property as a result of National Socialist persecution should either have their property returned or be compensated therefor and that persons who suffered personal damages or injury through National Socialist persecution should receive indemnification in German currency.39

Considering this policy in the light of Military Government Laws No. 52 and 59, one may discover an executive policy to restore expropriated property whenever and wherever possible. Law No. 52 provided for the seizure and control by the Military Government of all property which has been "the subject of transfer under duress, wrongful acts of confiscation, dispossession or spoliation...."40 A considerable amount of property has been taken under control by virtue of this authority, and since June 25, 1947, owners of property located in Germany who live outside Germany have been permitted to apply for the release of such property to a German nominee.41 This did not apply to "duress properties," however, and in November 1947 Law No. 59 was announced by our State and Army Departments.42 This law permits release of property taken by duress if the property can be found within the United States zone. If the owner lives outside of Germany, he must appoint a German

40 U.S. Military Government Gazette, Germany, Issue A, p. 27 (June 1, 1946).
nominee, and if a claim is disputed it will be adjudicated by a restitution chamber, a branch of the German courts. It appears, therefore, that our government has permitted recovery of identifiable property taken by duress if the property can be found within the American zone. Our government may thus be regarded as having retroactively repudiated those expropriatory acts of the German government which resulted in the taking of property now to be found in the American zone. But such acts which involved property now in that zone are hardly more reprehensible than like acts involving property now located elsewhere. Rather, the reason for restriction of this retroactive repudication to acts involving property now found in the American zone would seem to be that this is the only property over which the Military Governor has jurisdiction. Thus, so far as executive policy is concerned, it is arguable that the executive has retroactively repudiated all expropriatory acts which involved the taking of property, but, necessarily, has restricted the enforcement of the particular law embodying this policy to the area in which the administrator of the law has authority. Our courts would seem justified, on this reasoning, in inquiring into the legality of expropriatory acts whenever they have jurisdiction over the property. To hold otherwise places the government in the somewhat ludicrous position of forcing possessors of looted property now in the American zone to return it to the rightful owner, but of permitting persons to keep such property where they have managed to get it into the United States.

The plaintiff in the principal case, however, would have some difficulty in using this argument because the property he claimed was not the chattel itself but money representing the chattel. Military Government Law No. 59 does not cover "claims arising from war damage and injury not connected with the wrongful taking of identifiable property." It is not clear whether the insurance proceeds are "identifiable property," but it is arguable from both American and German law that they can be so considered.

It is realized that a determination requiring ascertainment of and compliance with executive policy must seem a poor solution to a victim of Naziism who sees "his" property being enjoyed by another in this country. But the problem of settling these claims is a very difficult one. The economic losses suffered at the hands of the Nazis have been tremendous. But Germany's resources are

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43 Ibid.

44 Rest., Restitution §§ 202, 203 (1937); German Civil Code of 1896 §§ 812, 818. Even if a policy statement by the State Department permitted inquiry by the court, the plaintiff in the principal case would probably be unable to recover in this action because he was claiming in his own name, a chattel which he never owned personally. Green v. Victor Talking Machine Co., 24 F. 2d 378 (C.C.A. 2d, 1928).

But it is possible that in the near future the British government may permit Bernstein to regain the corporate shares taken by the "Nazi officials." Restitution of Property Seized by the Axis, The Law Journal, No. 4268, at 615 (Nov. 14, 1947). Bernstein might then bring suit in the name of the corporation.

45 For estimates of the number of Jews from whom property has been taken see Institute of Jewish Affairs, Hitler's Ten-Year War on the Jews 303–11 (1943).
so limited that it is unlikely that it will be able to pay in full for the damage done.\footnote{Goldschmidt, Legal Claims against Germany 161 (1945); Cole, Reparations and the Future of German Industry 17 (1945).} Our government has made some provision for the return of identifiable property, but it may well be that with respect to other types of claims the only equitable solution will be for those injured to share the resources available. This does not mean in the principal case that if the insurance proceeds are not considered identifiable, the Belgian corporation will necessarily be able to keep them. It might be required to turn them over to an Allied commission, but this would seem to be a matter to be settled by the Allied governments.

Moreover, even with respect to identifiable property in the United States it is arguable that to insure uniformity of treatment these claims, as well as all others, should be handled by a single agency.\footnote{Goldschmidt, Legal Claims against Germany 168 (1945).} Intricate questions as to the measure of damages and what constitutes duress will arise, and it might be that a court acting within Germany could best handle these problems.

At any rate, it seems clear that the problems are so complex that they should be left to the executive until such time as he permits the courts to take jurisdiction.

**SHAREHOLDER DERIVATIVE SUIT AS CHECK ON CORPORATE ANTI-LABOR POLICIES**

The fiduciary obligations of corporate directors may have been strikingly enlarged as a consequence of a recent New York decision which upheld the sufficiency of a stockholder complaint alleging that the Remington Rand Company had suffered monetary losses because of the anti-labor policy pursued by its board of directors during the period 1934–1937. The chief allegations were that the directors had ordered the dismantling and removal of corporate plants and the curtailment of production with a resulting loss to the corporation in excess of a million dollars, that these acts were not within the scope of reasonable business judgment but were designed solely to intimidate the corporation's employees, and that the directors permitted themselves to be dominated with respect to the corporation's labor policies by one who, it was asserted, was actuated by anti-labor bias and personal prejudices. The New York lower court dismissed the complaint and the Appellate Division affirmed on the ground that "stripped of its conclusionary statements" it "shows only a reasonable exercise of business judgment by the directors" and that "no facts are set forth which show that appellants [defendants] had interests adverse to the corporation or that they dealt with the corporation for their own benefit or that they were guilty of waste or fraud."\footnote{Abrams v. Allen, 271 App. Div. 326, 65 N.Y.S. 2d 421, 422 (1946).} The New York Court of Appeals reversed, however, holding that if