

## The Law Gone Awry: Bernstein v. Van Heyghen Freres

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### I.

The half truths of one generation tend at times to perpetuate themselves in the law as the whole truth of another, when constant repetition brings it about that qualifications, taken once for granted, are disregarded or forgotten.

THE recurrent judicial aberration against which the legal diagnostician Cardozo thus warned<sup>1</sup> is graphically exemplified in the far-reaching decision of the United States Circuit Court of Appeals for the Second Circuit in the case of *Bernstein v. Van Heyghen Frères*.<sup>2</sup>

The criticism that this case has evoked has been spontaneous, widespread and continuous.<sup>3</sup> No disinterested voice has defended it in its essential aspects. For spiritual precedent, it recalls the Dred Scott decision,<sup>4</sup> an equally labored attempt to justify the unjustifiable. In its philosophy it upholds at its most nefarious extreme the doctrine of the state versus the individual, in sharp conflict with historic American championship of the individual as against state usurpation, and with present-day American resistance to totalitarianism. It is appropriate, therefore, now that some time has elapsed, to review comprehensively the foundations upon which this decision rests, as well as its full implications.

*Bernstein v. Van Heyghen* involved the right of an American citizen<sup>5</sup> to secure redress in an American court for an extortion practiced

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<sup>1</sup> *Allegheny College v. National Chautauqua Bank* (1927) 246 N. Y. 369, 373, 159 N. E. 173, 174.

<sup>2</sup> 163 F. (2d) 246, decided July 10, 1947, by L. Hand, J., with whom Swan, J., concurred; *cert. denied*.

<sup>3</sup> See *Should Judicial Respect be Accorded to Nazi Acts of State?* (1947) 47 COL. L. REV. 1061; *Judicial Recognition of Nazi Acts of State* (1947) 15 U. OF CHI. L. REV. 415, which referred to the position in which the decision placed the government as "somewhat ludicrous"; 'Act of State' Immunity (1947) 57 YALE L. J. 108; (1947) 60 HARV. L. REV. 1351; (1948) N. Y. U.L. Q. REV. 311. Letters from law teachers and leaders of the bar received by the writer, who was of counsel to the plaintiff in the litigation, are uniformly critical of the decision.

<sup>4</sup> *Dred Scott v. Sanford* (1856) 60 U.S. 393.

<sup>5</sup> The plaintiff, Arnold Bernstein, well-known former German shipowner, was naturalized in 1940.

upon him in Nazi Germany in the late nineteen thirties, and to recover from a Belgian concern, which purchased with notice of the extortion, the value of the property extorted. The plaintiff in 1937, prior to his American naturalization, was taken forcibly into custody in Germany and imprisoned in Hamburg until July, 1939 by "Nazi officials," who compelled him, under duress, to execute documents purporting to transfer the stock of his wholly owned shipping company, the Arnold Bernstein Line, to one Marius Boeger, a "Nazi designee." The latter took possession of the company's assets, including the vessel, Gandia, and transferred that vessel, purportedly to be scrapped, to the defendant, a Belgian scrapping concern, which allegedly had full knowledge of the duress to which the plaintiff was subjected. The defendant paid approximately \$90,000 for the vessel, and shortly thereafter had it insured for about \$350,000. The vessel was sunk during the war, and about \$400,000 was paid over to the defendant's agent in England as insurance proceeds. This agent did business in New York, where the plaintiff in 1946 served upon it an attachment of the insurance proceeds as a debt owing the defendant. In his complaint the plaintiff sought damages for conversion and detention of the vessel, or, alternatively, recovery of the vessel's insurance proceeds and earnings while in the defendant's possession, as money had and received by the defendant for plaintiff's use.

The district court in New York, to which the case was removed on defendant's application, vacated the attachment and dismissed the complaint on the theory that the extortion was by "the German government under the Nazi regime,"<sup>6</sup> that the defendant, accordingly, held as transferee of a foreign sovereign, and that an American court, therefore, would not review defendant's title. The circuit court of appeals, in a two to one decision,<sup>7</sup> affirmed the district court, the majority holding that the plaintiff's allegation as to "Nazi officials" and description of Boeger as a "Nazi designee" conclusively connoted the alleged duress as official and the appropriation of plaintiff's assets by Boeger as a governmental "confiscation."<sup>8</sup>

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<sup>6</sup> This was the language of the district court.

<sup>7</sup> Clark, J., filed a stalwart dissent, hereafter referred to.

<sup>8</sup> The plaintiff contended that on preliminary motion his allegations should be broadly construed so as to permit him to establish that a non-official extortion, for purely private ends, was involved; but the circuit court of appeals held in effect that his allegations foreclosed him from such proof. After its decision, expiration of the time for application for a rehearing, and the filing of application and brief to the Supreme Court for a writ of certiorari, belated confirmation came from Germany that the former

To support its affirmance the court enunciated the following as the applicable judicial doctrine controlling American courts:

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.<sup>9</sup>

As a critic has pointed out, "although stated as a fundamental of international law, review of American cases does not support assertions that the doctrine is a venerable judicial concept."<sup>10</sup>

It will hereafter be shown that the statement of the doctrine by the circuit court of appeals omits important qualifications incorporated in the doctrine from its earliest enunciation, and disregards conditions laid down from the beginning for its applicability. The court thus slighted, precisely in the manner of Cardozo's warning, the very precedents upon which it purported to rely. This article will undertake to trace the origin and development of the doctrine and to delineate the proper area for its application.

## II.

*Origin.* The doctrine appears to have had its origin in the "separate principle" of a foreign sovereign's personal immunity from suit,<sup>11</sup> a principle which appears to have had its first reported enunciation (and delimitation) by our State Department in 1794. Secretary of State Pickering, in writing to advise the French Consul General that a civil action in Pennsylvania,<sup>12</sup> in which Governor Collot of the French Island of Guadeloupe had been arrested for seizing and condemning

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government there had never taken over plaintiff's property, and that a purely private taking was involved, Boeger, the so-called "Nazi designee," never having been a government official or agent.

The fact that a question of interpretation of pleadings was raised may have contributed to the Supreme Court's denial of certiorari. The respondent (defendant below) strongly urged upon the Supreme Court that it was bound by the lower court's construction of the pleadings, and that under the doctrine of such cases as *Wade v. Gates Rubber Co.* (1923) 205 App. Div. 17, 199 N. Y. Supp. 16, since jurisdiction was based upon an attachment, the original documents on which the attachment had been granted could not be amended. Following denial of certiorari, the plaintiff nevertheless moved in the district court for leave to amend. The case was settled after the filing of such motion.

<sup>9</sup> *Supra* note 2 at 249. The principle involved is variously referred to in legal literature as the "non-inquiry doctrine" or the "act of state" doctrine." In 163 F. (2d) at 249-250, it is also enunciated as follows: "... no court will exercise its jurisdiction to adjudicate the validity of the official acts of another state."

<sup>10</sup> (1947) 57 YALE L. J. 108, 111.

<sup>11</sup> *Ibid.*

<sup>12</sup> *Waters v. Collot* (U.S. 1796) 2 Dallas 247.

the plaintiff's vessel in the course of his governorship, would be voluntarily withdrawn, stated:

I can not, however, dismiss this subject without observing, that if the General had shown to the court that his act which occasioned the injury complained of had been within his lawful powers as governor of Guadeloupe, the court would have discharged him long ago. . . . But the General refused, as I am informed, to say anything more than that he was, at the time, the governor of Guadeloupe, *as though a governor could commit no unlawful act for which he would be personally responsible*.<sup>13</sup> (Italics supplied)

*The Vessel Cases.* An early judicial pronouncement of this "separate principle" appears in a frequently cited decision by Chief Justice Marshall, *Schooner Exchange v. McFaddon*.<sup>14</sup> The Exchange, an American vessel seized by a French warship, was converted by Napoleon into a war vessel, and was later libelled by her American owners when she sailed into Philadelphia under the French flag. The United States appeared to defend the Emperor's right to exemption from suit and, consequently, to possession of the vessel. The district court dismissed the libel, the circuit court reversed, and on appeal by the United States Attorney the Supreme Court held, as stated in the headnote:

A public vessel of war of a foreign sovereign at peace with the United States, coming into our ports, and demeaning herself in a friendly manner, is exempt from the jurisdiction of the country.<sup>15</sup>

In his well considered opinion, Chief Justice Marshall commented:

In exploring an unbeaten path, with few, if any, aids from precedents or written law, the court has found it necessary to rely much on general principles, and on a train of reasoning, founded in some cases to some degree analogous to this.<sup>16</sup>

To the Court, it appears, that where, without treaty, the ports of the nation are open to the private and public ships of a friendly power, whose subjects have also liberty, without special license, to enter the country for business or amusement, a clear distinction is to be drawn between the rights accorded to private individuals or private trading

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<sup>13</sup> 2 MOORE, DIGEST OF INTERNATIONAL LAW 25 (1906).

<sup>14</sup> (U.S. 1812) 7 Cranch 116.

<sup>15</sup> In Curtis' edition (2 U.S. 478), the headnote reads: A public armed vessel, in the service of a sovereign at peace with the United States, is not within the ordinary jurisdiction of our tribunals while in a port of the United States.

But the sovereign power of the United States may interpose, and impart such a jurisdiction.

<sup>16</sup> The Exchange, *supra* note 14 at 136.

vessels, and those accorded to public armed ships which constitute a part of the military force of the nation.<sup>17</sup>

A prince, by acquiring private property in a foreign country, may possibly be considered as subjecting that property to the territorial jurisdiction. . . .<sup>18</sup>

In conclusion he held:

It seems then to the Court, to be a principle of public law, that national ships of war, entering the port of a friendly power open for their reception, are to be considered as exempted by the consent of that power from its jurisdiction.

Without doubt, the sovereign of the place is capable of destroying this implication.<sup>19</sup>

The decision, it will be noted, was carefully limited to the public vessels of war of a *friendly* foreign sovereign. More than one hundred years later, in *Ex parte Muir*,<sup>20</sup> the Supreme Court declined, upon the informal "suggestion" of private counsel to the British Embassy in Washington, to extend the doctrine of *The Exchange* to an *unarmed* transport requisitioned by the British Admiralty and under its control, but privately owned, stating that that "would be taking a long step."

In 1945 the Supreme Court, reviewing a series of foreign ship cases decided in various courts during the years since *The Exchange*, laid down in *Republic of Mexico v. Hoffman*<sup>21</sup> a definitive ruling on the scope and limitations of the principle by which a foreign sovereign may look to exemption from American judicial process in such cases. The question in this case, according to the Chief Justice, was "whether, in the absence of the adoption of any guiding policy by the Executive branch of the government, the federal courts should recognize the immunity from a suit in rem in admiralty of a merchant vessel solely because it is owned, though not possessed, by a friendly foreign government." The case is sufficiently relevant and recent to justify detailed reference here to its facts and to the Supreme Court's opinions.

The case arose out of a collision in Mexican waters between an American fishing vessel and the Baja California, owned by the Mex-

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<sup>17</sup> *Id.* at 143.

<sup>18</sup> *Id.* at 145.

<sup>19</sup> *Id.* at 145-146.

<sup>20</sup> (1921) 254 U. S. 522.

<sup>21</sup> (1945) 324 U. S. 30. The decision was by Chief Justice Stone, Mr. Justice Frankfurter concurring in a separate opinion.

ican government. The owners of the American craft libelled the Mexican vessel when she appeared in California waters, and put in issue a "suggestion," filed by the Mexican Ambassador in his government's behalf as the basis of a claim of immunity from suit, that at the time of the collision and of the seizure the Mexican vessel was in that government's "possession, public service or use." A communication from the State Department, transmitted to the district court at the direction of the Attorney General, "accepted as true" the contention that the Baja California was "the property of the Mexican government," but "took no position with respect to the claimed immunity of the vessel from suit."<sup>22</sup> The case proceeded to trial, where the evidence showed that the vessel was chartered to a private Mexican firm for a term of years under an agreement that the Mexican government should get fifty per cent of the net profits of her operations and bear no losses. Both lower courts denied immunity; the Supreme Court granted certiorari "on a petition which presented the question whether title of the vessel without possession in the Mexican government is sufficient to call for judicial recognition of the asserted immunity."<sup>23</sup>

Chief Justice Stone, citing numerous cases, stated that "ever since *The Exchange*, 7 Cranch 116, this Government has recognized such immunity from suit of a vessel in the possession and service of a friendly foreign sovereign," but held that "the decisions of the two courts below that the vessel was not in the possession or service of the Mexican government are supported by evidence." He continued:

. . . in *The Exchange*, Chief Justice Marshall introduced the practice, since followed in the federal courts, that their jurisdiction in rem acquired by the judicial seizure of the vessel of a friendly foreign government, will be surrendered on recognition, allowance and certification of the asserted immunity by the political branch of the government charged with the conduct of foreign affairs when its certificate to that effect is presented to the court by the Attorney General [citing cases]. This practice is founded upon the policy recognized both by the Department of State and the courts that the national interests will be best served when controversies growing out of the judicial seizure of vessels of friendly foreign governments are adjusted through diplomatic channels rather than by the compulsion of judicial proceedings [citing cases] . . . .

It is therefore not for the courts to deny an immunity which our government has seen fit to allow, or to allow an immunity on new grounds which the government has not seen fit to recognize. The

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<sup>22</sup> *Id.* at 32.

<sup>23</sup> *Id.* at 33.

judicial seizure of the property of a friendly state may be regarded as such an affront to its dignity and may so affect our relations with it, that it is an accepted rule of substantive law governing the exercise of jurisdiction of the courts that they accept and follow the executive determination that the vessel shall be treated as immune . . . .

In the absence of recognition of the claimed immunity by the political branch of the Government, the courts may decide for themselves whether all the requisites of immunity exist.<sup>24</sup>

The Chief Justice concluded that the decisions of the lower courts denying immunity to the *Baja California* were correct and should be sustained, quoting the following language of Chief Justice Waite:

Property does not necessarily become a part of the sovereignty because it is owned by the sovereign. To make it so it must be devoted to the public use and must be employed in carrying on the operations of the government.<sup>25</sup>

It is interesting to note that Mr. Justice Frankfurter, in his concurring opinion, declared "the concept of possession . . . too tenuous" to make it alone a ground for denying immunity, and gave as his view:

. . . courts should not disclaim jurisdiction which otherwise belongs to them in relation to vessels owned by foreign governments however operated except when "the department of the government charged with the conduct of our foreign relations," or of course Congress, explicitly asserts that the proper conduct of these relations calls for judicial abstention. Thereby responsibility for the conduct of our foreign relations will be placed where power lies. And unless constrained by the established policy of our State Department, courts will best discharge their responsibility by enforcement of the regular judicial processes.<sup>26</sup>

Mr. Justice Frankfurter welcomed the decision as, in effect, overruling *Berizzi Bros. Co. v. The Pesaro*,<sup>27</sup> where the Supreme Court "for the first time" allowed immunity of a merchant vessel, owned by a foreign government and in its possession and service, although the State Department had declined to recognize the immunity.

It is pertinent to note here that the State Department volunteered no opinion in *Bernstein v. Van Heyghen*, and that the suggestion in the dissenting opinion that the case be remitted to secure the Department's views was disregarded by the majority judges of the circuit court of appeals.

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<sup>24</sup> *Id.* at 34-36.

<sup>25</sup> *THE FIDELITY* (1879) Fed. Cas. No. 4, 758.

<sup>26</sup> *Supra* note 21 at 41-42.

<sup>27</sup> (1926) 271 U.S. 562.

The particular appositeness of these ship cases to the situation in *Bernstein v. Van Heyghen* will be hereafter referred to.

*The Civil War Cases.* Following the Civil War, a number of cases involving the respect to be accorded official acts of the Confederacy and its officials reached the Supreme Court. The rulings of these cases have been aptly summarized as follows:

Conceding the status of the Confederacy "as an actual, though unlawful government," (See *Texas v. White & Chiles*, 7 Wall. 700, 733 (U. S. 1868); cf. Mr. Justice Clifford, concurring in *Ford v. Surget*, 97 U. S. 594, 612 (1878)) the Court inquired in each case into the character of the governmental act. The distinction arrived at was that "acts necessary to peace and good order among citizens" would be regarded as valid, whereas "acts in furtherance or support of rebellion . . . , or intended to defeat the just rights of citizens . . . must, in general, be regarded as invalid and void." (See *Texas v. White & Chiles*, supra). Under this test legislative acts of incorporation were upheld, (*United States v. Insurance Cos.*, 22 Wall. 99 (U. S. 1875)), but all effect was denied to statutes ordering the destruction of cotton about to fall into the hands of Union troops, (See *Ford v. Surget*, 97 U. S. 594, 605 (1878)) or providing for confiscation of debts owed to citizens of Union States, (see *Williams v. Bruffy*, 96 U. S. 176, 188, 192 (1877)).<sup>28</sup>

To the cases cited in this quotation may be added *Freeland v. Williams*,<sup>29</sup> upholding a West Virginia constitutional provision conferring criminal and civil immunity upon combatants on either side for acts "done according to the usages of civilized warfare, in the prosecution of said war"<sup>30</sup> [the Civil War], and, on the other hand, *Dewing v. Perdicaries*,<sup>31</sup> holding the title of Northern owners to shares in Southern corporations unaffected by Southern confiscation.

*Foreign Judicial and Legislative Acts.* A judgment is a judicial "act of state" and theoretically as much an expression of sovereignty as an executive or administrative act; yet, courts of the municipality have not hesitated to question the validity of judicial acts of foreign states, and to accord no recognition to foreign judgments not measuring up to the forum's concepts of justice. The American law on the subject is exhaustively treated and authoritatively determined by the

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<sup>28</sup> (1947) 47 COL. L. REV. 1061, 1067.

<sup>29</sup> (1889) 131 U. S. 405.

<sup>30</sup> W. VA. CONST. ART. VIII § 35.

<sup>31</sup> (1877) 96 U. S. 193.

Supreme Court in the classic case of *Hilton v. Guyot*,<sup>32</sup> a decision occupying a full one hundred pages of printed text.

A law review comment sums up, with ample supporting citation, the attitude toward judicial determinations:

Determinations of the judicial branch of a government, however, have not been accorded the same respect [i.e., as executive, administrative and legislative acts]; foreign judgments have been examined for fairness of procedure, existence of jurisdiction, absence of fraud, and have also been denied conclusive effect where there has been a lack of reciprocity.<sup>33</sup>

Even as to legislative acts of foreign states, the circuit court of appeals itself, in *Bernstein v. Van Heyghen*, clearly indicated that the courts would not hesitate to deny them conclusive effect if utterly odious to our own accepted standards. The majority opinion stated:

Hence, if in 1937 it had been the law of the Third Reich that any private person might seize a Jew and by threats of imprisonment or by torture force him to transfer his property, by hypothesis no court of New York would recognize such transfer as affecting the victim's title . . .<sup>34</sup>

### III.

*The Non-Inquiry Doctrine.* With the foregoing preliminary, it is appropriate to turn without further discussion to *Underhill v. Hernandez*.<sup>35</sup> In this case the United States Circuit Court of Appeals for the Second Circuit, in 1895, rendered an opinion which is commonly regarded as the classic starting point of the so-called "non-inquiry" or "act of state" doctrine. The Supreme Court adopted the theses of this opinion in its affirmance two years later.<sup>36</sup>

Both the district court and circuit court of appeals in *Bernstein v. Van Heyghen* cited *Underhill v. Hernandez* as a basis of decision; hence the facts as well as the decision call for elucidation here. The plaintiff, Underhill, an American citizen, had constructed a water-works system for the City of Bolivar, Venezuela, where he resided and carried on a machinery repair business. In August, 1892, General Hernandez, commanding revolutionary troops, captured the city of Bolivar. Underhill's application for a passport to leave the city was

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<sup>32</sup> (1895) 159 U.S. 113.

<sup>33</sup> (1947) 47 COL. L. REV. 1061, 1062; see also 57 YALE L. J. 116-117.

<sup>34</sup> 163 F. (2d) 246, 249.

<sup>35</sup> (1895) 65 Fed. 577.

<sup>36</sup> (1897) 168 U.S. 250.

refused by Hernandez, who for several months stationed a military guard around Underhill's house, permitted him to leave only with military escort, and compelled him to keep his machinery repair business and the water-works system operating.

The revolution succeeded, and the revolutionary government was recognized by the United States as the legitimate government of Venezuela. Thereafter, Underhill secured jurisdiction over Hernandez in New York and sued him there for false imprisonment and assault and battery incident to the actions referred to above. The latter, in defense, claimed immunity, a claim which Judge Hoyt Wheeler sustained on the ground that the acts of which the plaintiff complained were, according to evidence adduced at the trial, "those of a military commander, representing a *de facto* government in the prosecution of a war,"<sup>37</sup> for which he could not be held civilly responsible.

Judge Wallace's scholarly opinion for the circuit court of appeals reviewed the Civil War cases, exempting Confederate soldiers from civil liability for "acts done, as members of the insurgent forces, during the Rebellion . . .";<sup>38</sup> English cases, including *Duke of Brunswick v. King of Hanover*,<sup>39</sup> in which the Hanoverian ruler, although a subject of Great Britain, was exempted from liability in British courts;<sup>40</sup> the Attorney General's action in the matter of Collot and his analogous subsequent rulings; and, the New York case of *Hatch v. Baez*,<sup>41</sup> in which "the New York Supreme Court decided that an action could not be maintained in the courts of the state against the former president of the Dominican republic, for acts done by him in his official capacity, although he had ceased to be president when the suit was brought."<sup>42</sup> In connection with the last mentioned case, Judge Wallace quoted the following from the New York court's opinion:

The fact that the defendant has ceased to be president of St. Domingo does not destroy his immunity. That springs from the capacity in which the acts were done, and protects the individual who did them, because they emanate from a foreign and friendly government.<sup>43</sup>

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<sup>37</sup> *Supra* note 35 at 579.

<sup>38</sup> *Id.* at 582.

<sup>39</sup> (1848) 2 H. L. Cas. 1.

<sup>40</sup> Exemption was not upon the basis of "the personal immunity of the sovereign from suit, but upon the principle that no court in England would sit in judgment upon the act of a sovereign, effected by virtue of his sovereign authority abroad." *Supra* note 35 at 580.

<sup>41</sup> (1876) 7 Hun. 596.

<sup>42</sup> *Supra* note 35 at 580.

<sup>43</sup> *Supra* note 41 at 600.

Analyzing the evidence, Judge Wallace affirmed the judgment based upon the directed verdict below:

The evidence upon the trial indicated that the purpose of the defendant, in his treatment of the plaintiff, was to coerce the plaintiff to operate his water works and his repair works *for the benefit of the community and the revolutionary forces. It was not sufficient to have warranted a finding by the jury that the defendant was actuated by malice, or any personal or private motive.* . . . The important question presented by the assignments of error arises upon the exception to the direction of a verdict for the defendant. This ruling proceeded upon the ground that because the acts of the defendant were those of a military commander, representing a *de facto* government in the prosecution of a war, he was not civilly responsible therefor.

Considerations of comity, and the highest expediency, require that the conduct of states, whether in transactions with other states or with individuals, their own citizens or foreign citizens, should not be called in question by the legal tribunals of another jurisdiction. The citizens of a state have an adequate redress for any grievances at its hands by an appeal to the courts or the other departments of their own government. Foreign citizens can rely upon the intervention of their respective governments to redress their wrongs, even by a resort, if necessary, to the arbitrament of war.<sup>44</sup> It would be not only offensive and unnecessary, but *it would imperil the amicable relations between governments, and vex the peace of nations*, to permit the sovereign acts or political transactions of states to be subjected to the examination of the legal tribunals of other states. Influenced by these reasons, and because the acts of the *official representatives of the state* are those of the state itself, *when exercised within the scope of their delegated powers*, courts and publicists have recognized the immunity of public agents from suits brought in foreign tribunals for acts done within their own states in the exercise of the sovereignty thereof.<sup>45</sup> (Italics supplied.)

The Supreme Court's opinion of affirmance concluded with this direct reference to Judge Wallace's reasoning:

We agree with the circuit court of appeals that "*the evidence upon the trial indicated that the purpose of the defendant in his treatment of the plaintiff was to coerce the plaintiff to operate his waterworks and his repair works for the benefit of the community and the revolutionary forces,*" and that "*it was not sufficient to have warranted a finding by the jury that the defendant was actuated by malice or any personal or private motive,*" and we concur in its disposition of

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<sup>44</sup> The thesis of this and the preceding sentence was evidently derived by Judge Wallace from *L'Invincible*, 1 Wheaton 238, decided by the Supreme Court in 1816.

<sup>45</sup> *Supra* note 35 at 579.

the rulings below. The decree of the circuit court is affirmed. (*Italics supplied*).<sup>46</sup>

The Supreme Court's reliance upon Judge Wallace's reasoning, and its adoption of the bases and express qualifications of the non-inquiry doctrine set out in his opinion, was pointedly evidenced when it again had occasion to consider that doctrine, twenty-one years later, in *Oetjen v. Central Leather Co.*<sup>47</sup> It quoted, not from its own opinion in *Underhill v. Hernandez*, but from Judge Wallace's opinion, the italicized words in the following excerpt:

. . . . to permit the validity of the acts of one sovereign state to be reexamined and perhaps condemned by the courts of another would very certainly "*imperil the amicable relations between governments and vex the peace of nations.*"<sup>48</sup>

In the *Oetjen* case the Mexican General Villa, in command of the Carranza forces in the revolution against the government of General Huerta, captured the City of Torreon and proposed to levy a military contribution *for the support of his army* on its inhabitants. One Martinez, an adherent of Huerta and a wealthy dealer in hides, fled the city and failed to pay an assessment to meet General Villa's demands. *By Villa's order* Martinez' hides were seized, sold and paid for in Mexico, and thereupon shipped to the United States, where the plaintiff, claiming through Martinez, attempted to replevy them from the defendant Central Leather Company, into whose possession they had come. The Carranza forces having, in the meantime, prevailed and his government having been recognized, first *de facto* and then *de jure*, the Supreme Court affirmed the Court of Errors and Appeals of New Jersey in sustaining a directed verdict by the trial court in favor of the defendant. In addition to its reference to *Underhill v. Hernandez*, the Supreme Court was careful to point out that the proceeds of the hides were a "military contribution" to "a duly commissioned military commander."

Similarly, in *Ricaud v. American Metal Co.*,<sup>49</sup> decided the same day, another Carranza general commandeered lead bullion, subse-

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<sup>46</sup> *Underhill v. Hernandez*, *supra* note 36 at 254. Chief Justice Fuller here enunciated the doctrine itself as follows: "Every sovereign State is bound to respect the independence of every other sovereign State, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory" (at 252).

<sup>47</sup> (1918) 246 U.S. 297.

<sup>48</sup> *Id.* at 303.

<sup>49</sup> (1918) 246 U.S. 304.

quently claimed by the American Metal Company, from a Mexican corporation, sold it to Ricaud, and applied its proceeds toward the purchase of arms, food and clothing for his troops. Ricaud's title was sustained, on the authority of the *Oetjen* case.

From the preceding Supreme Court cases, upon which the decisions of the district court and the circuit court of appeals in *Bernstein v. Van Heyghen* were premised,<sup>50</sup> and from the background against which they were adjudicated, certain generalizations concerning the so-called non-inquiry doctrine appear justified:

(1) The doctrine does not derive from statutory law or ordinance, but is a self-imposed judicial doctrine of "abstention"<sup>51</sup> from exercise of jurisdiction, to avoid conflict with the executive in his conduct of foreign relations or with the legislative branch. Since the executive and legislative branches of government are not subject to the doctrine, it cannot be regarded as a principle of international law.

(2) The doctrine is a comparatively recent federal judicial extension to the *acts and transactions* in his own territory of a foreign sovereign, and also of his officials and agents,<sup>52</sup> of the immunity from American judicial inquiry and process previously accorded by decision to such sovereign's *person*, to the *person of his agents*, and to his *property*. Cognate principles govern the applicability of the doctrine in the original and the expanded field.

(3) The doctrine applies in favor of a *friendly* foreign state, in order that judicial inquiry here of its transactions shall not "imperil the amicable relations between governments, and vex the peace of nations." Accordingly, its application would appear uncalled for in the case of a defeated and defunct enemy government.

(4) Where private rights are involved, the application of the doctrine assumes an existing government to whose courts an individual

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<sup>50</sup> A fourth Supreme Court decision cited in *Bernstein v. Van Heyghen*, *United States v. Belmont* (1917) 301 U.S. 324, related to the title the United States received under the Litvinov assignment to American deposits of Russian corporations nationalized by the Soviet government, and involved an intergovernmental transaction of little relevancy, if any, to the situation in *Bernstein v. Van Heyghen*.

<sup>51</sup> Cf. *Frankfurter, J. in the Republic of Mexico v. Hoffman*, *supra* note 21 at 41-42.

<sup>52</sup> This distinction (between the sovereign and his officials and agents) possibly is of significance in such a case as *Banco de Espana v. Federal Reserve Bank of New York* (C. C. A. 2d 1940) 114 F. (2d) 438, in which the *evidence*, meticulously marshalled, established that the transaction in question was the formally legalized and indisputable official act of the Spanish Loyalist government, later overthrown, with the United States government as the other contracting party, and not one affecting individual rights or involving conduct of just individual officials and their authority.

may look for "adequate redress" or, if he be an American, our State Department may address demands in his behalf, to be backed up, if necessary, by resort to "the arbitrament of war."

(5) The acts and transactions involved, to be entitled to respect, must have a "community" or governmental objective; they may not be "actuated by malice, or any personal or private motive."

(6) Where acts of foreign officials are involved, to be exempt from inquiry in our courts they must be shown to be acts "exercised within the scope of their [such officials'] delegated powers."

(7) The doctrine is to be applied consistently with the policies of the executive, and not in contravention thereof. Where doubt exists concerning the executive policy, inquiry may be made of the executive;<sup>53</sup> failing response, such policy may be determined by the court itself.<sup>54</sup>

(8) The doctrine has been extended to favor governments recognized *de facto* or *de jure* as of a time subsequent to the transaction sought to be subjected to inquiry,<sup>55</sup> and to an inter-governmental transaction with a friendly government subsequently overthrown,<sup>56</sup> but never, before *Bernstein v. Van Heyghen*, to a government expressly repudiated.

(9) When the factual basis for application of the doctrine is disputed, evidence taken at a trial has invariably been required, prior to *Bernstein v. Van Heyghen*, to resolve such preliminary issue.<sup>57</sup>

#### IV.

*Applicability to Bernstein v. Van Heyghen.* It should require little elaboration of detail to demonstrate that the facts in *Bernstein v. Van Heyghen* present the very antithesis of the conditions under which the non-inquiry doctrine was applied in the precedents that the court relied upon; and that the qualifications of the doctrine set forth in those precedents called for exceeding reserve in the application of the doctrine to that case.

Thus, a more direct impingement upon foreign sovereign property rights than the judicial seizure of a vessel owned by a foreign sover-

<sup>53</sup> The method is laid down in *Ex parte Muir*, *supra* note 20, and discussed in (1947) 57 YALE L. J. 108, 121-122.

<sup>54</sup> *Republic of Mexico v. Hoffman*, *supra* note 21.

<sup>55</sup> *Underhill v. Hernandez*, *supra* note 36; *Oetjen v. Central Leather Co.*, *supra* note 47; and *Ricaud v. American Metal Co.*, *supra* note 49.

<sup>56</sup> *Banco de Espana v. Federal Reserve Bank of New York*, *supra* note 52.

<sup>57</sup> Cases cited note 55 *supra* and notes 69, 71, 73, 74, 76, 77 *infra*; cf. *Land v. Dollar* (1946) 330 U. S. 731.

eign would seem difficult to conceive. If any invasion of a foreign sovereign's property would appear calculated to "imperil the amicable relations between governments, and vex the peace of nations," this would seem to be it. Nevertheless, from the earliest days of this nation, as we have seen, the courts have not hesitated to scrutinize minutely claims to immunity of such property from American judicial process, and to limit the grant of immunity to cases where the vessel in question is not merely owned by, but also is in the "possession and service" of, the claiming sovereign. Thus, in *Republic of Mexico v. Hoffman*,<sup>58</sup> the fact that the *Baja California* was a government owned vessel and that Mexico was entitled to half the profits of her operation did not suffice to persuade the court to confer immunity, in view of the fact that she had been chartered to a private Mexican business concern for operation. Moreover, in every case involving the conferment of such immunity, or even the claim of it, the fact that the foreign sovereign making the claim was a "friendly" foreign sovereign was emphasized in the decision.

In *Bernstein v. Van Heyghen*, also, a vessel was involved, and the insurance proceeds of such vessel. No foreign sovereign claimed her; our Executive made no representations. Viewed most strongly for the defendant, the claimant was a private business corporation deriving title from an agent of a sovereign.<sup>59</sup> That sovereign was not a "friendly" sovereign, but a beaten enemy whose invasion of rights, public and private, our Executive had repeatedly excoriated. No "amicable relations" with that sovereign existed to be imperilled, and that sovereign had itself "vexed the peace of nations" beyond reprieve.

Again, in their solicitude for the protection of private right, the American courts which first enunciated the non-inquiry doctrine pointed out that in the cases to which they visualized it as applicable there would be an "existing" government with courts to grant "adequate redress"; failing this, in the case of an American citizen, our State Department could intercede by demands to be backed up, if necessary, by resort to the "arbitrament of war." Germany has no existing government to which an individual may look for "adequate redress" by either judicial appeal or the diplomatic path. Our military government and that of our allies being in control, there exists no reason founded on respect for that country's sovereignty for our courts

<sup>58</sup> *Supra* note 21.

<sup>59</sup> This the plaintiff in *Bernstein v. Van Heyghen* denied, and the record in fact demonstrated that an ostensibly private German business enterprise (the plaintiff's own former company) was the claimant's transferror.

to refrain from the adjudication of American citizens' or residents' rights concerning which they have actual jurisdiction.

Both the circuit court of appeals and the Supreme Court in *Underhill v. Hernandez*,<sup>60</sup> the pioneer authority for the non-inquiry doctrine, as well as the Supreme Court in subsequent cases,<sup>61</sup> expressly qualified their applications of that doctrine by findings that the *evidence at the trial* indicated that the acts complained of were "for the benefit of the community" or other public purposes, and would not have warranted jury determinations that the perpetrators were "actuated by malice or any personal or private motive." The inference is inescapable that had these findings not been warranted, the doctrine would have been held inapplicable.

In *Bernstein v. Van Heyghen* the now familiar pattern of Nazi spoliation for individual ends is implicit. The plaintiff's property was the subject of no decree, order, administrative or judicial proceeding, or military direction appropriating it to German governmental or public uses. On the contrary, the complaint alleged threats by "Nazi officials," while the plaintiff was imprisoned on false charges of violation of German foreign exchange regulations, to the life, limb and liberty of himself and members of his family if he did not sign the properties over to a "Nazi designee," and that he was in fact thereafter released from his imprisonment only on payment of a "ransom" by American friends. The court might well have taken judicial notice of published official reports of forced "aryanisations" by Nazi underlings "actuated by malice" as well as "personal or private motive."<sup>62</sup> Instead, on a preliminary motion to vacate an attachment, based entirely on the plaintiff's own papers, it determined, without further inquiry and without evidence, that the alleged participation of "Nazi officials" in the extortions of which the plaintiff complained constituted them transactions of "the German government under the Nazi regime" and therefore immune from American judicial inquiry, regardless of motivation or result.

Since the days of the Governor of Guadeloupe<sup>63</sup> it has been axiomatic that official representatives of a foreign state invoking the principle of sovereign immunity in any of its aspects must establish that

<sup>60</sup> *Supra* notes 35, 36.

<sup>61</sup> *Oetjen v. Central Leather Co.*, *supra* note 47, and *Ricaud v. American Metal Co.*, *supra* note 49.

<sup>62</sup> *E.g.*, 4 NAZI CONSPIRACY AND AGGRESSION 283, 288, 302-305, 427, note 18 (U.S. Gov. Printing Office).

<sup>63</sup> 2 MOORE, *op. cit.* *supra* note 13 at 24.

in the transactions under inquiry they exercised authority "within the scope of their delegated powers." Judge Wallace referred explicitly to this in *Underhill v. Hernandez*.<sup>64</sup> It is clear that sovereignty does not necessarily attach to all acts of government officials, and that it is essential to look behind the official title and ascertain whether the individual concerned acted within its scope. If not, he is, in the language of the Supreme Court, "stripped of his official character; and, confessing a personal violation of the plaintiff's rights for which he must personally answer, he is without defense."<sup>65</sup> It has been held that even the direct assertion that one is an agent of a government does not in and of itself necessitate the conclusion, without proof, that an act of his under inquiry is an "act of state."<sup>66</sup>

In *Bernstein v. Van Heyghen*, the court was apparently bemused by the references to "Nazi officials" in plaintiff's papers. Influenced by a lay awareness that the Nazi regime regarded with tolerant eye individual outrages perpetrated by Nazi "officials" upon helpless minorities, it assumed that all such transactions, in fact, possessed official sanction and status. Parenthetically, one may well wonder, in view of post-war revelations, that an American court should have thought it of consequence whether or not such practices had the official cachet of a government itself essentially bandit in character;<sup>67</sup> but assuming that to be of consequence, the record is clear that, at least until late 1938, forced sales and dispossessions of the private property of Jews in Germany, though notorious, lacked legal sanction.<sup>68</sup>

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<sup>64</sup> Text at note 45, *supra*.

<sup>65</sup> *Poindexter v. Greenhow* (1884) 114 U.S. 270, 288; *cf.* *Compania Espanola v. The Navemar* (1938) 303 U.S. 68; *Baker Castor Oil Co. v. Ins. Co. of North America* (C. C. A. 2d 1946) 157 F. (2d) 3.

<sup>66</sup> *Horn v. Mitchell* (D. C. Mass. 1915) 223 Fed. 549, *aff'd* (C. C. A. 1st 1916) 232 Fed. 819, appeal dismissed (1917) 243 U.S. 247.

<sup>67</sup> The *de jure* status of the Nazi regime has in fact been seriously questioned by German legal authority. The use of the phrase "Nazi officials" rather than "German officials" in *Bernstein v. Van Heyghen* may therefore be assumed to have been by design, so as to reserve a right to question the valid governmental status, in any event, of the former.

<sup>68</sup> The *Order eliminating Jews from German Economic Life*, covering a limited range of enterprises, was promulgated on November 12, 1938; it appears in translation in 4 NAZI CONSPIRACY AND AGGRESSION 172 as Document 1662-PS. The *Order Concerning the Utilization of Jewish Property*, covering all business fields, was dated December 3, 1938; it appears in translation in 4 NAZI CONSPIRACY AND AGGRESSION 1 as Document 1409-PS. These decrees for the first time legally sanctioned compulsion upon the owners of Jewish concerns to sell or liquidate their enterprises to Nazis, the government extracting a licensing fee from such transactions. The date of the forced transfer in

None of its own half dozen previous decisions cited by the circuit court of appeals to justify *Bernstein v. Van Heyghen* disregards, as it does, the conditions thus laid down for application of the non-inquiry doctrine; on the contrary, each of them meets the test of these conditions and qualifications. *Hewitt v. Speyer*<sup>69</sup> involved a definitely governmental act by an existing friendly foreign government, Ecuador, for its own benefit, and Judge Rodgers ruled, consistently with *Underhill v. Hernandez*, that:

We take the principle to be incontrovertible in both countries [Ecuador and the United States] that our courts not only will not adjudicate upon the validity of the acts of a foreign nation *performed in its sovereign capacity*, but also that persons involved with such government in the performance of *such* acts cannot be subjected to a civil liability therefor.<sup>70</sup> (Italics supplied)

In *The Claveresk*,<sup>71</sup> an admiralty case, citizens of the United States and of Great Britain, existing and friendly governments, were involved, and Judge Hough said distinctly:

The fundamental essential of restraint of rulers is that the restraining act should be governmental.<sup>72</sup>

*Banco de Espana v. Federal Reserve Bank of New York*, already referred to,<sup>73</sup> dealt with a transaction proved to be the formally legalized agreement of our government with a friendly foreign government, loyalist Spain, overthrown after the lower court heard the case.

In *Union Shipping & Trading Co. v. United States*,<sup>74</sup> in admiralty, Judge Learned Hand, referring to France and the United States respectively, stated:

When public officers of a foreign country perform *official acts in avowed pursuance of their authority*, the court of another power will accept these acts as lawful and will not undertake to examine their validity under the local law.<sup>75</sup> (Italics supplied)

In *United States ex rel. Steinvorth v. Watkins*<sup>76</sup> and *United States*

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*Bernstein v. Van Heyghen* is not disclosed in the pleadings, but consistently therewith might have occurred (and in fact did occur) prior to the dates of the decrees here mentioned.

<sup>69</sup> (1918) 250 Fed. 367.

<sup>70</sup> *Id.* at 371.

<sup>71</sup> (C. C. A. 2d 1920) 264 Fed. 276.

<sup>72</sup> *Id.* at 280.

<sup>73</sup> *Supra* note 52.

<sup>74</sup> (C. C. A. 2d 1942) 127 F. (2d) 771.

<sup>75</sup> *Id.* at 774.

<sup>76</sup> (C. C. A. 2d 1947) 159 F. (2d) 50.

*ex rel. von Heymann v. Watkins*,<sup>77</sup> both immigration cases decided by Judge Chase, it was held, consistently with pertinent prior law, that the validity of official acts in Costa Rica, such as a presidential proclamation that the relator was not a Costa Rican citizen, would not be inquired into here. The prerequisites above referred to for application of the non-inquiry doctrine were all clearly present.

It is noteworthy, furthermore, that in each of these six cases, as well as in the cases previously referred to that went to the Supreme Court,<sup>78</sup> the facts justifying the conferment of immunity were required to be established at a trial, either before a court and jury or before a court alone. *Bernstein v. Van Heyghen* is the only case that a diligent search has disclosed in which the party opposing a claimed immunity has been denied the right to require that the facts justifying it be proved.

Finally, the non-inquiry doctrine as applied in *Bernstein v. Van Heyghen* flies directly in the face of declared American executive policy. In doing this, it disregards the rule laid down by the Supreme Court in *Republic of Mexico v. Hoffman*:

It is therefore not for the courts to deny an immunity which our government has seen fit to allow, or to allow an immunity on new grounds which the government has not seen fit to recognize . . .<sup>79</sup>

and violates Mr. Justice Frankfurter's admonition, in his concurring opinion in the same case, that:

and unless constrained by the established policy of our State Department, courts will best discharge their responsibility by enforcement of the regular judicial processes.<sup>80</sup>

On July 11, 1947 a directive approved by the State, War and Navy Departments of the United States<sup>81</sup> was issued to General Lucius D. Clay, as commanding general of the United States forces of occupation and as Military Governor in Germany, to constitute "a statement of the objectives of your Government in Germany and of the basic policies to which your Government wishes you to give

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<sup>77</sup> (C. C. A. 2d 1947) 159 F. (2d) 650.

<sup>78</sup> Except *United States v. Belmont*, *supra* note 50, which was based on pleadings acknowledging the transactions involved as governmental.

<sup>79</sup> *Supra* note 21 at 35.

<sup>80</sup> *Id.* at 42.

<sup>81</sup> Dep't State Pub. No. 2913, printed in its entirety in N. Y. Times, July 16, 1947, p. 8, superseding DIRECTIVE JCS 1067 (Dep't State Pub. No. 2423 pp. 40-59).

effect from the present time forward . . . ."<sup>82</sup> In it appears the following categorical declaration:

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 damage or injury through National Socialist persecution should receive indemnification in German currency. . . .<sup>83</sup>

Pursuant to such Directive, Military Law No. 59<sup>84</sup> was thereafter promulgated by the American Military Government in Germany "to effect to the largest extent possible the speedy restitution of identifiable property (tangible and intangible property and aggregates of tangible and intangible property) to persons who were 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."<sup>85</sup>

Military Law No. 59 specifically provides:

It shall be presumed in favor of any claimant that the following transactions entered into between January 30, 1933 and May 8, 1945, constitute acts of confiscation. . . .

(i) Any transfer or relinquishment of property made during a period of persecution by any person who was directly exposed to persecutory measures. . . .

(ii) Any transfer or relinquishment of property made by a person who belonged to a class of persons which on any of the grounds set forth in § 3.75 was to be eliminated in its entirety from the cultural and economic life of Germany by measures taken by the State or the NSDAP.<sup>86</sup>

The highest court in Prussia is reported to have held, in a recent decision, that under this law property sold by " 'collective duress'—that is, force or threat of force by the Nazis against the persecuted groups in general," is subject to restitution.<sup>87</sup>

The directive and military laws referred to merely bear out what had been theretofore repeatedly indicated as American policy.<sup>88</sup>

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<sup>82</sup> Directive of July 11, 1947, para. 1.

<sup>83</sup> *Id.*, para. 17(d).

<sup>84</sup> 12 Fed. Reg. 7983 (1947).

<sup>85</sup> *Id.* § 3.75.

<sup>86</sup> *Id.* § 3.76(b). The initials "NSDAP" signify the Nazi party.

<sup>87</sup> (1947) N. Y. L. J. 1662; *cf.* Doreau v. Marshall (C. C. A. 3rd 1948) 17 U. S. L. Week 2092, and cases therein cited; Tadayasu Abo v. Clark (D. C. Cal. 1948) 77 F. Supp. 806.

<sup>88</sup> See, *inter alia*, DIRECTIVE JSC 1067, issued April 1945, Dep't State Pub. No. 2423 at 40-59; also dissenting opinion of Clark, J., in *Bernstein v. Van Heyghen*.

In matters within the competence of the Executive, the federal courts within the United States are no less amenable to executive policy than the officials within the American zone in Germany. This, if ever in doubt, follows clearly from the Supreme Court's recent holding, already quoted, in *Republic of Mexico v. Hoffman*:

It is therefore not for the courts to deny an immunity which our government has seen fit to allow, or to allow an immunity on new grounds which the government has not seen fit to recognize.<sup>89</sup>

The net result of the foregoing is a proclaimed policy of the American Executive to afford individual redress for lootings of property, under whatever guise, by the Nazis, and to provide legal machinery for the restoration of such property found within the American Executive's jurisdiction in German or former Axis territory to its owners. Yet, in *Bernstein v. Van Heyghen* we find judicial abdication of jurisdiction to achieve the same result in an American court, in the face of the Supreme Court's recent adjuration to follow the policy of the executive branch in matters of sovereign immunity.<sup>90</sup> Thus, within the territory of the former foreign sovereign its acts or supposed acts get no respect; but in an American court, on United States soil, they become sacrosanct.

On the basis of an "objective appraisal of international relations," one commentator on *Bernstein v. Van Heyghen* has not hesitated to state:

. . . The act of state doctrine as applied by our courts constitutes a completely contradictory use of one branch of American governmental power to support Nazi conversion of Jewish assets into wealth required for its plans. It was a use of American authoritative power to support Nazi goal-seeking at a time when all other American resources were being marshalled against the Germans. . . .

From the perspective of its actual results, refusal of an American court to question a property transaction fostered by a Nazi racial decree can scarcely be described as neutral. On the contrary, its effect is to marshal to the defense of such property the full societal protection of American courts, police facilities, fire departments, and other governmental agencies. It is thus as effective support for the decree as that given by a German court. . . .<sup>91</sup>

Arguing that "extensions of 'comity' should be a matter of policy and not of automatic judicial rule," that they are "anomalous" when

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<sup>89</sup> *Supra* note 21 at 35.

<sup>90</sup> *Ibid.*

<sup>91</sup> (1947) 57 *YALE L. J.* 108, 120.

extended to unrecognized and defunct governments, and "untenable" when extended to "a government which the United States has destroyed and whose laws we have abrogated," the same writer concludes:

... the present judicial practice of granting unquestioned act of state immunity when the executive has not spoken appears to be an abdication of the judicial function of safeguarding public policy within the limits established, and when the executive has set a definite policy it appears to be a denial of executive control over foreign affairs.<sup>92</sup>

There is, too, a matter of American public policy that merits mention here. The majority of the circuit court of appeals in *Bernstein v. Van Heyghen*, dealing with this "public policy" aspect, declared:

And indeed it is a well settled exception to the usual doctrine that a court of the forum will take as its model the rights and liabilities which have arisen where the transactions took place, that the foreign rights and liabilities must not be abhorrent to the moral notions of its own state. . . . Hence, if in 1937 it had been the law of the Third Reich that any private person might seize a Jew and by threats of imprisonment or by torture force him to transfer his property, by hypothesis no court of New York would recognize such a transfer as affecting the victim's title, and, if the spoliator came to New York with the property in his possession, the victim could reclaim it. We will moreover assume for argument that anyone who knew how the spoliator had acquired the property would be in like case.<sup>93</sup>

It is difficult to justify logically the accordence of judicial respect to the transactions of a repudiated, overthrown government which are sufficiently "abhorrent to the moral notions" of the forum to be disregarded, *even though authorized by foreign law*, if private persons had been the participants. To accord such respect is to subordinate the public policy that gives vitality to the sovereignty under which the court itself exists to the caprice of a destroyed and discredited foreign regime. Whatever the justification for doing this where the foreign government involved is "existing" and "friendly," none survives when it is neither.

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<sup>92</sup> *Id.* at 122. This comment, and Judge Frankfurter's admonition respecting "judicial abstention" (text at note 24), prompt the incidental but, it seems, pertinent observation that American courts are maintained at considerable public expense so as to do justice, and not to search out reasons for refraining from exercising their allotted jurisdiction. Judicial abstention does little at best to justify a judicial system, and its recent manifestations indicate a tendency to expansion that deserves definitely to be discouraged.

<sup>93</sup> 163 F. (2d) 246, 249.

*Confusion Worse Confounded.* Error has a curious way of compounding itself; reasoning insecure in its foundation clutches at straws for buttress. So in *Bernstein v. Van Heyghen*.

Having grievously misapplied the non-inquiry doctrine, the majority of the court proceeded collaterally to justify its conclusion by completely confusing "restitution" with "reparations." Accordingly, the majority opinion asserted that if recovery were allowed against the defendant in the *Van Heyghen* case, defendant—a Belgian corporation—would have a claim against the Reich for its loss, since it relied upon an act of the German government; that such claim would have to be adjudicated as an item in the general claim for reparations against Germany; and, therefore, that the only tribunal to adjudicate the claim would be the one to which the ascertainment of reparations will be committed.

This view is unsound, as well as entirely unrealistic. A person injured has the right to redress against private persons or corporations for their acts, including their wrongful appropriation of his property. The determination of this right is a judicial question. Reparations, on the other hand, involve a political question, since they are not based on legal rights, but on the ability of victorious countries to impose terms on a defeated nation.

The very existence, in the zones of occupation of Germany, of military laws providing for restitution of looted property, implies that such property as is restorable to the victims is not to be considered as part of any program of reparations. Only property that is not restorable may properly be deemed property subject to any plan of reparations. Certainly the Paris Conference on Reparations of December 21, 1945, giving to the signatory governments percentage shares of industrial equipment and other German assets, did not purport to dispose of property belonging to specific individuals and identifiable by them as such in the hands of other individuals.<sup>94</sup>

The majority's theorem presumes, too, that Belgium would make a claim on behalf of a subject who could not have placed any justifiable reliance upon the diplomatic recognition of the Hitler regime by his own country, since Belgian courts do not refrain from passing

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<sup>94</sup> See Sunday feature article in N. Y. Herald Tribune, November 28, 1948, § II, p. 1, *War Loot That is Going Back to Its Owners*, fully confirming the text on this score. Furthermore, the article mentions specifically restitutions made in cases of forced sales such as that alleged in *Bernstein v. Van Heyghen*.

on foreign acts of state.<sup>95</sup> The recognition of a foreign state is governed by political motives. It does not necessarily imply approval of its acts or legal methods. In the *Bernstein* case the defendant is charged with knowledge of the duress, and, if sued in Belgian courts by its victim, would not be protected by Belgian law.<sup>96</sup>

In his dissenting opinion<sup>97</sup> Circuit Judge Clark forcefully noted that, while all the precedents upon which the non-inquiry doctrine of American courts is based postulate recognition of the foreign government, none of these cases "deal with or even appear to visualize the situation where our Executive acts later to repudiate the recognition which it has granted and to declare the acts of that nation as wrongful and void to be wiped out by a tremendous war effort and by acts of restitution and retribution at the war's end." The policy of our Executive Department, as revealed in the Nuremberg trials, the Atlantic Charter and the various directives to the military government of the occupied zone, is one of non-recognition of Nazi oppression and, as Judge Clark pointed out, our courts are bound to observe it, since it is the policy of our own Executive Department that must guide the court in applying the non-inquiry doctrine. The policies of our allies in other zones of occupation are irrelevant, as Judge Clark noted. Whatever regulations may be made by the allied governments and our own as to the disposition of recovered loot, and whatever restitution laws may prevail in the different occupied zones, American courts must be guided solely by American policy in determining whether the non-inquiry doctrine necessitates their abstention from adjudicating proper claims of owners of property for redress against persons who dealt illegally with that property. The courts, as well as the Executive, are charged with the duty of upholding our declared public policy, and that duty cannot be discharged unless the courts, in applying the non-inquiry doctrine, take cognizance of all its limitations and restrictions.

#### V.

*Conclusion.* Judged by the applicable criteria, *Bernstein v. Van Heyghen* emerges as an aberration of the judicial process for whose speedy correction one must hope as a matter of principle, lest it be per-

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<sup>95</sup> Mann, *The Sancrosanctity of the Foreign Act of State* (1943) 59 L. Q. REV. 42, 45, 51, note 2.

<sup>96</sup> The purchaser of property taken by duress from the true owner is not protected under Belgian law if he takes with notice of the duress. Belgian Civil Code, Section 1109.

<sup>97</sup> 163 F. (2d) 246, 253-255.

petuated as a precedent. A realistic reconsideration of the non-inquiry doctrine is urgently called for, so that its application will conform to accepted American tenets and will not stultify American foreign policy.

It is impossible to avoid the conclusion, moreover, that *Bernstein v. Van Heyghen* represents an exaltation of the State over the individual that is distinctly foreign to the traditional American concept; that it constitutes a grave set-back to the cause of man's dignity and right as an individual, comparable indeed, in this day of global interdependence, to the decision that indentured Dred Scott. Law is not an end in itself. The decision in *Bernstein v. Van Heyghen* fails to measure up to what the United States represents. Basically, and disturbingly, it represents a failure to keep the faith. That, doubtlessly, accounts for the intuitive disquiet that the decision has evoked wherever discussed.