FOREIGN CLAIMS SETTLEMENT COMMISSION
OF THE UNITED STATES
WASHINGTON 25, D. C.

IN THE MATTER OF THE CLAIM OF

HERBERT BROWER

Claim No. PO-1246

Decision No. PO- 1634

Under the Polish Claims Agreement of 1960 and the International Claims Settlement Act of 1949, as amended

PROPOSED DECISION

This claim, for $93,500, is based upon the asserted ownership and loss of real property located in the city of Wroclaw (formerly Breslau) and the loss of a business enterprise, furniture, art objects, jewelry and a motor car. Claimant, HERBERT BROWER, has been a national of the United States since his naturalization on May 11, 1943.

Under the Polish Claims Agreement of 1960, claims by nationals of the United States for "(a) the nationalization or other taking by Poland of property and of rights and interests in and with respect to property . . ." are settled and discharged. (Agreement with the Government of the Polish People's Republic Regarding Claims of Nationals of the United States, July 16, 1960, 11 U.S.T. & O.I.A. 1953, T.I.A.S. No. 4545 (1960), Article II).

The Agreement further defines "claims of nationals of the United States" as including

> rights and interests in and with respect to property nationalized, appropriated or otherwise taken by Poland which, from the date of such nationalization, appropriation or other taking to . . . /July 16, 1960/, have been continuously owned . . .(a) directly by natural persons who were nationals of the United States. . . (Polish Claims Agreement of 1960, supra, at Annex Paragraph A. See also 14 FCSC Semiann. Rep. 186 (Jan.-June 1961)).

On the basis of the evidence submitted by the claimant and of the Commission's independent investigation conducted in Poland, the Commission finds that the business enterprise and other personal property, as well as the buildings located at 25 Kollataj Street (Neuse Taschenstrasse) and 26 Stawowa Street (Teichstrasse) in Wroclaw were either totally destroyed as a result of military action during World War II in the area of Wroclaw or otherwise disposed of by actions of the German Government.

The Polish Claims Agreement of 1960 provides for the payment of compensation for property which was nationalized, appropriated or otherwise taken by the Government of Poland. It does not settle or discharge claims based upon damage to or destruction of property during World War II, or the taking of property by forces occupying Poland during the war. (See Claim of Przybylinski, No. PO-1358.) Accordingly, the portion of the claim based upon the business enterprise, the personal property, and the improvements on the land is denied.

With regard to the properties located at 25 Kollataj Street and 26 Stawowa Street in Wroclaw (a city in that area of Poland which was part of Germany (Breslau) prior to the end of World War II), however, the evidence of record before the Commission indicates that prior to World War II claimant's father, Hyman Brower, was the record owner of these properties; that in 1940, the city of Wroclaw then being part of Germany, the properties were confiscated by the Nazi Government of Germany pursuant to anti-Jewish laws, and transferred to third persons. The record further discloses that such confiscation and transfer by the Nazi Government of Germany was executed for reasons of racial and political discrimination under the then existing anti-Jewish laws of Germany.

Since the Potsdam conference in the summer of 1945, the city of Wroclaw has been under the administration of the Polish Government and has been considered by that government as part of Poland. (See Halecki, East Central Europe under the Communists: Poland 14 (1957).)

In 1946, pursuant to Article 34 of the Decree of March 8, 1946, (Dz. U. 1946, No. 13, it. 87), the Government of Poland provided for the taking of real property considered as abandoned, on the expiration of ten years from the end of the year in which World War II terminated (January 1, 1956).

Claimant contends that the prior Nazi decree operating to divest the former record owner of title is in fact invalid, that the property descended to claimant and his sister, and that the property was therefore actually taken pursuant to the subsequent Polish decree on January 1, 1956.

The issue thus presented is whether the Commission shall give effect to the confiscation and transfer of property under duress by the Nazi Government of Germany under the anti-Semitic laws of that time. If such transfer were regarded by the Commission as valid, or if the Commission were precluded from reviewing the decree, the legal effect would be to divest the former owner of title and render his claim (or that of his successors in interest) before the Foreign Claims Settlement Commission not compensable under the Polish Claims Agreement of 1960.

The International Claims Settlement Act of 1949, as amended, specifically provides that "In the decision of claims under this title the Commission shall apply the following in the following order: (1) The provisions of the applicable claims agreement as provided in this subsection; and (2) The applicable principles of international law, justice, and equity." (International Claims Settlement Act of 1949, as amended, 64 Stat. 12 (1950), 22 U.S.C. § 1623(a) (1958).) Since the Polish Claims Agreement of 1960 is silent as to the issue at hand, the Commission is bound to apply the "applicable principles of international law, justice, and equity."

A discussion of these principles may begin with the case of Bernstein v. Van Heyghen Freres Societe Anonyme, 163 F. 2d 246 (2d Cir. 1947), cert. denied, 332 U.S. 772 (1947), decided by the Circuit

Court of Appeals for the Second Circuit in 1947. In the Bernstein case, the plaintiff, Bernstein, a German national of Jewish faith, was a victim of Nazi governmental persecution. He was taken forcibly into custody by "Nazi officials in Germany", and while imprisoned, "by means of duress. . ." was compelled to execute documents which purported to transfer all the shares of the "Arnold Bernstein Line" to a German "trustee". Defendant, A Belgian corporation, "acquired" the vessel "Gandia" from the Nazi "trustee". Subsequently, the vessel was sunk and insurance amounting to £ 100,000 had been paid for the loss. Plaintiff brought action for damages for conversion of the vessel, for money had and received for its earnings, and for the proceeds of the insurance paid for its loss at sea. The action, originally brought in the state court, was removed to the U. S. District Court for the Southern District of New York. From an order quashing the writ of attachment of the insurance fund being held for defendant's account, and dismissing the complaint, plaintiff appealed to the Circuit Court of Appeals.

Applying the law of New York State, the Circuit Court of Appeals affirmed the holding of the district court in a two to one decision. In so doing, that court gave expression to the classic "act of state" doctrine as follows:

> We have repeatedly declared, for over a period of at least thirty years that a court of the forum will not undertake to pass upon the validity under the municipal law of another state of the acts of officials of that state, purporting to act as such. (Bernstein v. Van Heyghen Freres Societe Anonyme, 163 F. 2d 246, 249 (2d Cir. 1947) (emphasis added).)

By the application of that doctrine, judicial review of the legality of the acts of the agents of the defunct German government was thereby precluded.

This holding was widely criticized (see, e.g., House, The Law Gone Awry: Bernstein v. Van Heyghen Freres, 37 Calif. L. Rev. 38 (1949), and discussion in Re, "Confiscation by the Defunct Nazi Regime" in Foreign Confiscations in Anglo-American Law 146 (1951)). Nevertheless, the Court had made its position clear:

> The difficulty lies, not in any defect in the law. . . . as to conflict of laws, but because of that other doctrine which we have mentioned; i.e., that no court will exercise its jurisdiction to adjudicate the validity of the official acts of another state. (Bernstein v. Van Heyghen Freres Societe Anonyme, 163 F. 2d 246, 249 (2d Cir. 1947)(emphasis added).)

That decision, adhering strictly to the "act of state" doctrine, forcefully demonstrated the injustice that may result from the application of this doctrine in spite of an overwhelmingly clear public policy demanding its non-application to the acts of the particular government.

The case, however, contained an important element. Although the court accepted the principle of non-review, it was of the opinion that the principle would be inapplicable if there had been a determination by the Executive to that effect. (Bernstein v. Van Heyghen Freres Societe Anonyme, 163 F. 2d 246, 249 (2d Cir. 1947).) That is, the court regarded the principle of non-review as a judicial limitation from which the court might have been freed by a declaration or determination by the Executive that the principle should not apply in a given situation.

However, after a consideration of the Executive policy as gleaned from the materials then available, the court concluded that there was no positive determination by the Executive removing the restraint of non-review. Consequently, the order of the district court was affirmed.

Subsequently, the plaintiff Bernstein, in another action, Bernstein v. Nederlandsche-Amerikaansche Stoomvaart-Maatschappij, 76 F. Supp. 335 (S.D.N.Y. 1948), aff'd in part, modified in part, 173 F.2d 71 (2d Cir. 1949), calculated to recover other assets of which he had been despoiled in a similar manner, amended his complaint to omit certain details. This second Bernstein case was decided on different grounds and did not discuss the principle of judicial non-review. A subsequent appeal, however, brought the same issue once again before the United States Court of Appeals for the Second Circuit, Bernstein v. Nederlandsche-Amerikaansche Stoomvaart-Maatschappij, 210 F. 2d 375 (2d Cir. 1954).

This time, however, that Court noted that a "supervening expression of Executive policy" now existed. The court cited a State Department Press Release (No. 296 of April 27, 1949) entitled "Jurisdiction of United States Courts Re Suits for Identifiable Property Involved in Nazi Forced Transfers." The court went on to quote the substance of the release as follows:

> 'As a matter of general interest, the Department publishes herewith a copy of a letter of April 13, 1949 from Jack B. Tate, Acting Legal Advisor, Department of State, to the Attorneys for the plaintiff in Civil Action No. 31-555 in the United States District Court for the Southern District of New York.
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> 'The letter repeats this Government's opposition to forcible acts of dispossession of a discriminatory and confiscatory nature practiced by the Germans on the countries or peoples subject to their controls; states that it is this Government's policy to undo the forced transfers and restitute identifiable property to the victims of Nazi persecution wrongfully deprived of such property; and sets forth that the policy of the Executive, with respect to claims asserted in the United States for restitution of such property, is to relieve American courts from any restraint upon the exercise of their jurisdiction to pass upon the validity of the acts of Nazi officials.' (Bernstein v. Nederlandsche-Amerikaansche Stoomvaart-Maatschappij, 210 F. 2d 375, 376 (2d Cir. 1954)(emphasis added).)

The court further quoted significant excerpts from that letter:

> '1. This Government has consistently opposed the forcible acts of dispossession of a discriminatory and confiscatory nature practiced by the Germans on the countries or peoples subject to their controls . . .
>
> '3. The policy of the Executive, with respect to claims asserted in the United States for the restitution of identifiable property (or compensation in lieu thereof) lost through force, coercion, or duress as a result of Nazi persecution in Germany, is to relieve American courts from any restraint upon the exercise of their jurisdiction to pass upon the validity of the acts of Nazi officials.' (Ibid.)

"In view of this supervening expression of Executive Policy", concluded the court, "we amend our mandate in this case by striking out all restraints based on the inability of the court to pass on acts of officials in Germany during the period in question. See 173 F. 2d at pages 75-76." (Ibid.)

In spite of the ultimate private settlement of the litigation, the Bernstein cases nevertheless represent the most significant development in the evloution of the principle that the courts of one country will not sit in judgment on the acts of government of another. (Bernstein v. Van Heyghen Freres Societe Anonyme, 163 F. 2d 246 (2d Cir. 1947), cert. denied, 332 R. S. 772, (1947); Bernstein v. Nederlandsche-Amerikaansche Stoomvaart-Maatschappij, 76 F. Supp. 335 (S.D.N.Y. 1948), aff'd in part, modified in part, 173 F. 2d 71 (2d Cir. 1949); Bernstein v. Nederlandsche-Amerikaansche Stoomvaart-Maatschappij, 117 F. Supp. 898 (S.D.N.Y. 1953); Bernstein v. Nederlandsche-Amerikaansche Stoomvaart-Maatschappij, 210 F. 2d 375 (2d Cir. 1954).)

The point of these cases is to the effect that the principle normally does apply; however, the presumption of its applicability may be rebutted by a determination by the Executive to that effect. (See materials cited in Re, Judicial Development in Sovereign Immunity and Foreign Confiscations, 1 New York Law Forum, 160, 197 et seq. (1955).) This view, as developed in the Bernstein cases, has since been enunciated in several other cases concerning confiscations and related areas, see Banco Nacional de Cuba v. Sabbatino, 307 F. 2d 845 (2d Cir. 1962), cert. granted, 372 U. S. 905 (1963); Rodriguez v. Pan American Life Ins. Co., 311 F. 2d 429 (5th Cir. 1962); Compania Ron Bacardi, S.A. v. Bank of Nova Scotia, 193 F. Supp. 814 (S.D.N.Y. 1961); Ioannou v. New York, 83 S. Ct. 6 (1962). But see Pons v. Republic of Cuba, 294 F. 2d 925 (D.C. Cir. 1961), cert. denied, 368 U. S. 960 (1962). Cf. Latvian State Cargo & Pass. S. S. Line v. McGrath, 188 F. 2d 1000 (D. C. Cir. 1951); Wyman v. United States, 166 F. Supp. 766 (U. S. Ct. Cl. 1958); Rozenfeld v. Commissioner, 181 F. 2d 388 (2d Cir. 1950); Mayer v. United States, 111 F. Supp. 251 (126 Ct. Cl. 1, 1953).

In Banco Nacional de Cuba v. Sabbatino, for instance, the Court of Appeals for the Second Circuit summed up the present state of the law concerning the recognition of Nazi confiscatory decrees as follows:

> However, when the executive branch of our Government announces that it does not oppose inquiry by American courts into the legality of foreign acts, an exception to the judicial abnegation required by the act of state doctrine has arisen and has been recognized both in this circuit and elsewhere. In Bernstein v. N. V. Nederlandsche Amerikaansche Stoomvaart-Maarschappij, 210 F. 2d 375 (2d Cir. 1954)(per curiam), when we received word from the State Department that it was State Department policy to permit American courts to pass on the validity of acts done by Nazi officials, our court rescinded its earlier mandate by which, based upon the act of state doctrine, we had prevented the district court from questioning the validity of the acts of the German Nazi government. See 173 F. 2d 71 (2d Cir. 1949). See also Bernstein v. Van Heyghen Freres S. A., 163 F. 2d 246, 252 (2d Cir.), cert.denied, 332 U.S. 772, 68 S. Ct. 88, 92 L. Ed.357 (1947); Restatement, Foreign Relations Law of the United States § 44 (Proposed Official Draft, 1962); Kane v. National Institute of Agrarian Reform (Fla. Cir. Ct.), 18 Fla. Supp. 116 /No. 61 L 730, June 8, 1961/; Association of the Bar of the City of New York, Committee on International Law, Report, A Reconsideration of the Act of State Doctrine in United States Courts 13 (May 1959). . . (Banco Nacional de Cuba v. Sabbatino, 307 F. 2d 845, 857-58 (2d Cir. 1962), cert. granted, 372 U. S. 905 (1963). See also Rodriguez v. Pan American Life Ins. Co., 311 F. 2d 429, 435 (5th Cir. 1962).)

In light of the foregoing, the Foreign Claims Settlement Commission will follow the clear, and unequivocal expression of Executive policy with regard to Nazi confiscations. (See Letter of April 13, 1949 from Jack B. Tate, Acting Legal Advisor, Department of State, to the Attorneys for plaintiff in Civil Action No. 31-555, United States District Court for the Southern District of New York; Department of State Press Release No. 296 (April 27, 1949), cited in Bernstein v. Nederlandsche-Amerikaansche Stoomvaart-Maatschappij, 210 F. 2d 375, 376 (2d Cir. 1954).) The Commission further notes that the United States Court of Claims, in a related case, has specifically said the "This executive policy . . . relates to undoing forced transfers of property and restoring identifiable property which has been transferred under such Nazi decrees." (Wyman v. United States, 166 F. Supp. 766. 770 (U. S. Ct. Cl. 1958). See also Mayer v. United States, 111 F. Supp. 251 (126 Ct. Cl. 1, 1953); Rozenfeld v. Commissioner, 181 F. 2d 388 (2d Cir. 1950).)

Thus relieved of the restraint of the so-called "act of state" doctrine, the Commission may proceed to give effect to the governing principles of substantive international law. In so doing, the Commission will apply the international standard of justice to determine if the act of the foreign government constitutes a denial of justice as that standard is understood in international law. (See 5 Hackworth, International Law 522, 537-538 (1943); Comment, Harvard Research in International Law, The Law of Responsibility of States for Damage Done in Their Territory to the Person and Property of Foreigners, 23 Am. J. Int'l L. 154 (1929); Lissitzyn, The Meaning of the Term Denial of Justice in International Law, 30 Am. J. Int'l L. 632 (1936).)

The record before the Commission in the instant claim indicates that prior to World War II claimant's father, Hyman Brower, was the record owner of the properties located at 25 Kollataj Street and 26 Stawowa Street in Wroclaw (then Breslau); that in 1940 the properties were confiscated by the Nazi Government of Germany pursuant to anti-Jewish laws, and transferred to third persons. The record further reveals that claimant's father died in 1942 in a concentration camp; and that claimant and his sister, Alice Lowenstein (not a claimant before this Commission), but for the Nazi decree, would have inherited Hyman Brower's property in equal shares.

This Commission has consistently regarded as settled principles of international law, justice, and equity, that private property may not be taken without the payment of prompt, adequate, and effective compensation, and that no person can be deprived of his property solely on the ground of his nationality, religion, race, or creed. (Cf. Czechoslovak Confiscatory Decree Case (American Zone), Court of Appeals of Nuremberg, Germany, 1949, 1949 Ann. Dig. 19 (No. 10); Confiscation of Property of Sudeten Germans Case, Germany, Amtsgericht of Dingolfing (1948), 1948 Ann. Dig. 24 (No. 12)). The Commission therefore concurs in the observations set forth in Anglo-Iranian Oil Co., Ltd., v. S.U.P.O.R. Co., Italy, Civil Ct. of Rome (1954), 1955 Int'l L. Rep. 23, 40:

> . . .discriminatory laws, enacted out of hatred, against aliens or against persons of any particular race or category or against persons belonging to specific social or political groups cannot be applied. . . because they run counter to the initially accepted principle of the equality of individuals before the law.
>
> "Such principles, developed by international doctrine, are generally accepted by the jurisprudence of the various countries."

The Commission, applying the principles of international law, justice, and equity to the facts of the present claim, therefore finds that the acts of the defunct Nazi regime with regard to this property constituted a denial of justice and a violation of the international standard of justice as that standard is understood in international law. Consequently, the Commission holds that the Nazi decree in question was invalid and ineffective to transfer or divest title from claimant's father; and that after World War II, claimant in fact owned a one-half interest in the property now consisting of two building lots in Wroclaw.

The Commission's independent investigation of the property in Poland reveals that this property was within the purview of Article 34 of the Decree of March 8, 1946 (Dz. U. 1946, No. 13, it. 87). That decree provided for the taking of real property considered as abandoned, on the expiration of ten years from the end of the year in which World War II terminated, January 1, 1956. In the absence of evidence to the contrary, the Commission therefore finds that claimant's property was taken on that date, January 1, 1956. (See Claim of Sturm, No. PO-4375.)

The Commission's investigation in this case further reveals that at the time of taking, claimant's lot at 25 Kollataj Street, measuring 1029 square meters, had a value of $2,000.00; and that the value of his lot at 26 Stawowa Street, measuring 730 square meters, was $1,500.00, or a total of $3,500.00.

Accordingly, the Commission finds that the claimant, pursuant to the terms of the Polish Claims Agreement of 1960, is entitled to an award for his one-half interest in the property, in the amount of $1,750.00.

In granting awards on claims under the Polish Claims Agreement of 1960, the Commission has further held that interest shall be allowed at the rate of 6% per annum from the date of loss to July 16, 1960, the effective date of the Agreement. (See Claim of Proach, No. PO-3197). Accordingly, the Commission further orders the amount of the award to be increased to that extent.

A W A R D

An award is hereby made to HERBERT BROWER in the principal amount of One Thousand Seven Hundred Fifty Dollars ($1,750.00) with interest thereon at the rate of 6% per annum from January 1, 1956 to July 16, 1960, the date of the Polish Claims Agreement, in the amount of Four Hundred Seventy-six Dollars and Eighty-eight Cents ($476.88).

Dated at Washington, D. C.,
and entered as the Proposed
Decision of the Commission.

SEP 25 1963

Edward D. Re, Chairman

Theodore Jaffe, Commissioner

NOTICE: Pursuant to the Regulations of the Commission, if no objections to this Proposed Decisare are filed within 20 days of service thereof, the decision will, upon the expiration of 60 days after such service or receipt of notice, be entered as the Final Decision of the Commission unless the Commission otherwise orders. (FCSC Reg., 45 C.F.R. § 531.5(e) and (g) (1961)).

PO-1246