Some concern might be expressed at some suggestions made by Barry J., in his discussion of the concepts of actual and legal custody in relation to the Gaols Act 1958.[20] His Honour felt that a statutory offence of general application be introduced whereby being absent from legal custody be made indictable. Such an offence would add to the ever-growing list of "status" offences and, would not only avoid the defence of automatism (since a "status" offence really has no actus reus in the strict sense) but if it were to put a duty upon the escapee to give himself up it would offend the defendant's right against self-incrimination. The offence would admit no defence other than a challenge to the legality of the custody, although Barry J. remarks may have been influenced by some disquiet at the appellant's success on appeal despite the rather fanciful nature of his story. However, the discretion of the jury should be relied on rather than creating another "status" offence.

T. D. O'CONNOR.

[20] (1967) V.R. 276, 280.

## CARL ZEISS STIFTUNG v. RAYNER & KEELER LTD. and OTHERS[1]

*International Law — Effect of Non-Recognition — Action Commenced by English Solicitors on Instructions from Governing Body of Organization — Governing Body of Organization Deriving Authority from Unrecognized Government — Whether Solicitors have Proper Authority to Act. Conflict of Laws — Whether Issue Estoppel can be Founded on Foreign Judgment.*

The litigation before the House of Lords arose out of a summons, taken out by the respondents in 1956, to stay proceedings commenced by English solicitors purporting to act for the Carl Zeiss Stiftung of East Germany, in which the Stiftung sought to restrain the respondents, *inter alia,* from passing off optical instruments using the Stiftung's trade name. The summons, alleging that the action was commenced and was being maintained without the authority of the foundation, was dismissed by Cross J. who held that under the articles of the foundation the proper body to authorize such action was its "Special Board" and that the "Special Board" had in fact authorized it.

From this decision, an appeal was taken to the Court of Appeal[2] where, upon grounds first raised in that court, the judgment of Cross J. was reversed, the summons upheld, and the original action dismissed. The plaintiffs appealed to the House of Lords.

The Carl Zeiss Stiftung was established in 1896 as an organization

[1] (1966) 3 W.L.R. 125. (House of Lords: Lord Reid, Lord Hodson, Lord Guest, Lord Upjohn, Lord Wilberforce.)

[2] *Carl Zeiss Stiftung v. Rayner & Keeler Ltd. and Others* 1965 Ch 525. (Court of Appeal: Harman, Danckwerts and Diplock L.JJ.)

with industrial, scientific and charitable objects. Under Article 4 of its constitution, its affairs were to be managed by a "Special Board" as defined in Article 113. For the purposes of the case, the salient facts are that after the second world war Jena (wherein the Stiftung was to have its legal domicil under Article 3) had become a part of the Soviet zone of occupation. In 1949 the U.S.S.R. had purported to constitute the German Democratic Republic as an independent sovereign state and in 1952 the German Democratic Republic had, by decree, carried out a division of its territory into administrative zones. Jena thereby came under the jurisdiction of the Council of Gera which was itself set up by this decree. So far as the Stiftung was concerned, the Council of Gera had thus become the "Special Board".

The issue raised in the Court of Appeal by the respondents was based on the fact that the government of the United Kingdom had not accorded recognition, either *de facto* or *de jure,* to the German Democratic Republic and that English courts were therefore not entitled to recognize and give force to the decrees of the East German government. Hence, the Council of Gera having been constituted under such a decree, the court could not recognize it and was bound to hold that the action could not have been authorized by the "Special Board" of the Stiftung.

There were before the court two certificates from the Foreign Secretary. The first stated that:

> Her Majesty's Government has not granted any recognition de jure or de facto to a) the 'German Democratic Republic' or b) its "Government".[3]

The second certificate elaborated by stating that:

> . . . Her Majesty's Government have recognized the state and Government of the Union of Soviet Socialist Republics as de jure entitled to exercise governing authority in respect of that zone.[4]

In the Court of Appeal judicial notice was taken of the fact that the U.S.S.R. had purported to create a sovereign independent state in its East German zone of occupation. Diplock L.J. put it thus: "All that I am prepared to assume — and I think it is a matter of which I can take judicial notice — is that the Government of the U.S.S.R. recognizes the 'Government of the German Democratic Republic' as the independent sovereign government of an independent sovereign state for whose territory the Government of the U.S.S.R. claims no power to make laws."[5] Harman L.J. agreed.[6]

Having thus removed the U.S.S.R. from the picture, the court found itself bound by *Banco de Bilbao v. Sancha*[7] and *Luther v. Sagor*[8] to

[3] *Op. cit.* p. 133.
[4] *Loc. cit.*
[5] *Op. cit.* p. 664.
[6] *Ibid.* p. 651.
[7] (1938) 2 K.B. 176.
[8] (1921) 1 K.B. 456.

treat the acts of the unrecognized East German Government "as a mere nullity, and as matters which cannot be taken into account in any way . . .".[9]

On the interpretation of the Foreign Secretary's certificates taken in the Court of Appeal, there is no doubt that the court could not decide otherwise. The House of Lords was not, however, disposed to view the certificates in the same way. The opinion of the House may be summed up in the words of Lord Reid:[10]

> . . . the learned judges of the Court of Appeal do not appear to have had their attention directed to the true import of the certificate of the Secretary of State. The U.S.S.R. may have purported to confer independence or sovereignty on the German Democratic Republic but, in my judgment, that certificate clearly requires us to hold that, whatever the U.S.S.R. may have purported to do, they did not in fact set up the German Democratic Republic as a sovereign or independent state.

From this premise, Lord Reid continued, the actions of the East German Government must be considered as actions taken by a subordinate of the U.S.S.R.[11]

> If we are bound to hold that the German Democratic Republic was not in fact set up as a sovereign independent state, the only other possibility is that it was set up as a dependent or subordinate organization through which the U.S.S.R. is entitled to exercise indirect rule.

By a judicial leap of faith the House of Lords held unanimously that the acts of the East German Government, being the acts of a delegate of the de jure authority, were not a "mere nullity".

It is submitted that although the House of Lords was able to avoid the more draconic aspects of the non-recognition rule as stated in *Luther v. Sagor*,[12] it did so in a way which leaves much to be desired. The result reached in the instant case will no doubt command approval from most writers who have expressed dissatisfaction with the rule that all acts of unrecognized governments are to be considered of no effect in our courts. However, although the House of Lords acted with unquestionable propriety in deciding the case of the peculiar facts of the East German situation, it is submitted that a fine opportunity was allowed to slip by for assimilating this case into a wider principle.

To begin with, it was by no means an unavoidable conclusion that the acts of the East German Government had to be taken as the acts of a subordinate authority. The U.S.S.R. had not purported to delegate

[9] *Banco de Bilbao v. Sancha* (1938) 2 K.B. 176, 195-196.
[10] *Op. cit.* p. 135.
[11] *Loc. cit.* See also opinions of Lord Hodson p. 153; Lord Guest p. 159; Lord Upjohn p. 166; and Lord Wilberforce 6. 183-184.
[12] *Op. cit.*

any authority. It purported to abdicate it. If, as the House of Lords held, the court could only have regard to the executive's certificate and hold such abdication impossible, the court might well have held that it had *no* cognizance of anything done by any power other than the U.S.S.R. Imputing delegation is certainly a highly artificial approach and is least of all required by "logic".

Having said this, it is suggested that the House of Lords might more soundly have based its decision on a reappraisal of the non-recognition rule. In fact Lord Wilberforce states that had he not been able to resolve the problem by viewing the East German Government's acts as acts of a delegate, he would "wish seriously to consider whether the invalidity so brought about [by the accepted rule] is total, or whether some mitigation of the severity of this result can be found".[13] There was no decision which bound the House, even before the recent Practice Statement of the Lord Chancellor, to the views expressed in the *Banco de Bilboa* case[14] and in *Luther v. Sagor*.[15]

There were at least three ways in which the House could have approached the problem.

First, there was nothing to prevent the House from approaching the problem as one of Private International Law.[16] There is much merit in this type of approach to overcome the hardship in dealing with cases of matrimonial status, legitimacy, inheritance where the "subordinate" loophole is not present as it is not, for instance, in North Vietnam. To deny that one might ask: what is the law obtaining in the particular territory, is surely to deny much of the raison d'etre of Private International Law.

Secondly, there is the line of American authority dating back to the Civil War which suggests that, for legal purposes, a court may take judicial cognizance of the *de facto* existence of a non-recognized government.[17]

Thirdly, from a public policy point of view, there is no reason why the courts should not distinguish between acts which are those of a sovereign and other legislative and administrative acts not having the public law attributes of the exercise of sovereignty.[18]

The difficulties in this area of the law have largely arisen from the fact that nowadays it has become a regrettable fact, at least so far as

[13] *Op. cit.* p. 177.
[14] (1938) 2 K.B. 176.
[15] (1921) 1 K.B. 456.
[16] Mann; Judiciary and Executive in Foreign Affairs (1943) 39 *Tr. Gr. Soc.* 143, 158.
[17] The cases, especially *U.S. v. Insurance Companies* (1875) 89 U.S. 99; *Sokoloff v. National City Bank* 145 N.E. 917; *Upright v. Mercury Business Machines Co. Inc.* (1961) 13 App Div 2d 36 are discussed by Lord Wilberforce at p. 177-178.
[18] Greig; The Carl Zeiss Case and the Position of Unrecognized Governments in English Law, (1967) *L.Q.R.* 96, 138.

international law is concerned, that governments withhold recognition as a purely political gesture and will not grant it though the new regime fulfills the generally agreed on standards of control and permanence.

The second aspect of the case arose from an earlier decision by the Federal Supreme Court of West Germany. In that action, "the Carl Zeiss Stiftung of Jena represented by the Council of the District of Gera" sued a West German firm in order to restrain it from using the name Carl Zeiss.[19] The Federal Supreme Court upheld an objection that the Stiftung was not properly before it. The respondents sought to establish that this decision now estopped the appellants from re-litigating the issue.

The whole House accepted that at least since *Goddard v. Gray*[20] there was little doubt that a foreign judgment could found an estoppel and that issue estoppel as well as estoppel *per rem judicatum* could be raised. It was stressed, however, that in dealing with a foreign judgment added caution ought to be used to see that all the requirements for founding an estoppel had been met. Lord Reid also pointed out[22] that whereas a domestic on court's judgment could only be based either on want of jurisdiction or fraud, a foreign judgment could also be challenged for "perversity", for example, a deliberate refusal to recognize an accepted rule of Private International Law.[23]

In this case the House (Lord Wilberforce dissenting) found that there had been no complete identity between the parties and that the plea of estoppel could not therefore succeed. Lord Wilberforce, though finding identity of parties, held that the decision of the Federal Supreme Court was not final *in* West Germany itself because it did not preclude other proceedings between the parties.

R. RICHTER.

[19] For details of the suit, see Lord Reid's judgment at p. 138-139.
[20] (1870) L.R. 6 Q.B. 139.
[21] *e.g. per* Lord Reid p. 147.
[22] *Ibid.* p. 146.
[23] *Loc. cit.*