Die grundsätzliche Frage [1]), ob das Recht der Nacheile auch besteht, wenn die Verfolgung außerhalb der Territorialgewässer in einer Schutzzone aufgenommen worden ist, innerhalb derer der Uferstaat die Ausübung gewisser Hoheitsrechte beansprucht, wird durch die Berichte nicht geklärt. Im übrigen vermißt man eine Begründung für die Empfehlung, der kanadischen Regierung den Betrag von $ 25.000 zu zahlen, zumal diese ein dahingehendes Verlangen gar nicht gestellt hatte.

Inwieweit der Schlußbericht als Präjudiz dafür anzusehen ist, daß ein internationaler Entschädigungsanspruch einer Gesellschaft abzuweisen ist, wenn die Zahlung tatsächlich den eigenen Staatsangehörigen des beklagten Staates zugute kommt, ist angesichts des besonderen Charakters der »Empfehlungen« der Kommission zweifelhaft.

Friede.

Entscheidungen nationaler Gerichte in völkerrechtlichen Fragen

BRITISCHES REICH

Bericht

Die Entscheidung der King's Bench Division vom 9. März 1934, *Banco de Vizcaya v. Don Alfonso de Borbon y Austria* ([1935] 1 K. B. 140), beruht auf der Anwendung des Satzes, daß **privatrechtliche Ansprüche vor englischen Gerichten nicht verfolgbar sind, wenn ihre Vollstreckung direkt oder indirekt die Durchsetzung einer strafrechtlichen Norm eines dritten Staates bedeuten würde.**

Der ehemalige König von Spanien hatte aus eigenen Mitteln Wertpapiere kaufen lassen, die durch die Zweigniederlassung der Westminster-Bank in Madrid an die Hauptniederlassung gesandt und dort für Order der Zweigniederlassung unter dem Rubrum »Don Alfonso de Borbon y Austria« verwahrt wurden. Nach Auflösung der Zweigniederlassung war die Klägerin, die Banco de Vizcaya, an deren Stelle im September 1923 als Agent des Beklagten getreten. Nach dem Sturz des Königs war am 19. Mai 1931 ein Dekret der neuen Regierung ergangen, wonach alles in Spanien belegene Vermögen des Königs beschlagnahmt und von den Banken, die solche Vermögensstücke in Besitz hätten, Ablieferung an das spanische Schatzamt verlangt wurde. Durch ein weiteres Dekret vom 26. November 1931 wurde der Beklagte des Hochverrats für schuldig erklärt; alle seine Vermögensstücke, die sich in Spanien befanden, waren zugunsten des Staates einzuziehen.

[1]) S. darüber G. Gidel, Le droit international public de la mer, T. III, Paris 1934, p. 490—492 (La Zone contiguë et le droit de poursuite en haute mer).

Die Forderung des Beklagten an die Westminster Bank, die Wertpapiere herauszugeben, lehnte diese ab, angeblich weil ihr Kunde nicht der Beklagte, sondern die Klägerin sei. Der darauf gegen sie erhobenen Klage entzog sie sich jedoch im Wege des »Interpleader«-Verfahrens [1]), sodaß nunmehr die Banco de Vizcaya gegen den Exkönig klagte mit der Behauptung, sie hätte Anspruch auf die Wertpapiere, die nach wie vor bei der Westminster Bank in London beruhten,

»... on the ground that the transaction which took place on September 7, 1923, was a contract under which the defendant's rights in respect of the securities became solely a right of action against the plaintiffs as depositaries; that that right of action was situated in Spain; that the effect of the above mentioned decrees was to transfer the defendant's right of action to the Spanish Republic; and that the rights of the plaintiffs against the Westminster Bank remained unimpaired.«

Justice Lawrence begründet die die Klage abweisende Entscheidung wie folgt:

»In such circumstances the judgment of the Judicial Committee of the Privy Council in *Huntington v. Attrill* [2]) lays down that I have to construe and apply an international rule and to determine, first, the substance of the right sought to be enforced, and in the second place whether its enforcement will directly or indirectly involve the execution of a penal law of another state.

In my judgment, the substance of the right sought to be enforced by the plaintiffs is the delivery to them of the securities in question and the enforcement of this right will directly or indirectly involve the execution of what are undoubtedly and admittedly penal laws of the Spanish Republic. The plaintiffs' whole case is that they are bound by virtue of the decrees to hand over the securities to the Spanish Government in defiance of the mandate of the defendant, and, that being so, it seems to be unarguable that the enforcement of the plaintiffs' right will not directly or indirectly involve the execution of the decrees.

It was contended on behalf of the plaintiffs that, though the decrees may be penal, the plaintiffs' claim is not a penal action, because they are not asserting the right of the Spanish Government, but their own contractual right to the securities as against the Westminster Bank. I am unable to accept this contention. The plaintiffs are not asserting their contractual rights as they originally existed, but as altered by the decrees of the Spanish Republic. Nor are they in substance asserting their own rights at all, but the rights of the Spanish Republic. It is true, as is pointed out in *Huntington v. Attrill* [2]), that some actions for penalties are not penal actions within the meaning of the above mentioned international rulewhere, for instance, the penalties are not exigible by the State in the interest of the community, but by private persons in their own interest. But in the present case the penalty imposed is seizure by the State for its own

[1]) Vgl. über dieses Verfahren Halsbury, The Laws of England 1911 Bd. XVII. S. 577 ff.

[2]) [1893] A. C. 150, 155.

benefit of all the defendant's properties, rights, and grounds of action, and this penalty is imposed in terms for high treason, and the only way in which the plaintiffs are able to assert their claim that they are entitled as against the defendant is by virtue of these decrees, and they are compelled to admit that they have no personal right or title to the property in the securities. In the words of Lord Loughborough in *Folliott v. Ogden* [1]): "The penal laws of foreign countries are strictly local, and affect nothing more than they can reach and can be seized by virtue of their authority; a fugitive who passes hither, comes with all his transitory rights; he may recover money held for his use, stock, obligations and the like; and cannot be affected in this country, by proceedings against him in that which he has left, beyond the limits of which such proceedings do not extend." These words have frequently been cited with approval, and in my judgment they are directly applicable to the present case. I therefore hold that H. M. Don Alfonso and not the plaintiffs is entitled to the securities in question.«

Die Entscheidung des Court of Appeal vom 30. November 1933, *Sutherland v. Administrator of German Property* (50 T. L. R. 107), befaßt sich mit der **Frage, inwieweit** der Kläger, **der »Alien Property Custodian of the United States«, Forderungsrechte gegen englische Staatsangehörige in England geltend machen kann,** die zum Vermögen amerikanischer Zweigniederlassungen deutscher Versicherungsgesellschaften gehörten, und **die vom englischen »Administrator of German Property« eingezogen worden waren.**

Im Jahre 1912 war ein englisches Schiff auf der Fahrt von Baltimore nach Hamburg verschollen. Ein Teil der Ladung war bei den New Yorker Niederlassungen deutscher Versicherungsgesellschaften versichert gewesen, die auch die Versicherungssumme gezahlt hatten, denen dafür aber alle Ansprüche der Versicherten gegen die Schiffseigner, britische in England wohnhafte Staatsangehörige, übertragen worden waren. Klagen gegen die Eigentümer führten schließlich zu einem Vergleich; die Vergleichssumme wurde an den Beklagten gezahlt. Auf diese Summe macht der Kläger Anspruch, da es sich bei der Forderung, die nur auf Grund der sich in Amerika befindlichen Ladepapiere etc. hätte geltend gemacht werden können, die jetzt in Händen des Klägers waren, um in Amerika belegenes Vermögen einer deutschen Gesellschaft handle, auf das er nach der Gesetzgebung der Vereinigten Staaten Anspruch habe.

Lord Justice Scrutton faßt die Rechtsfrage wie folgt zusammen:

»Who is to have that sum? The English Administrator of German Property said: "I am entitled to it under the Treaties of Peace." The American Custodian of Alien Property said: "I am entitled to it either by the United States legislation which vested it in me at the end of 1918 and the beginning of 1919, or I am entitled to it because I have letters of subrogation from the Mannheim." It seems to me that if the American Custodian puts his claim on that ground he would be in the

[1]) (1789) I. H. Bl. 124, 135.

difficulty that he would be suggesting that American legislation had dealt with a matter the situs of which was in England — namely, a claim against the English shipowners in damages either for tort or in contract. I think probably his best way of putting his title, if at all, would be under the American legislation, which may be quite independant, of course, of any other rigths; subject to this, that the American legislation, unless extremely clear words are used, cannot change the title to claims of Englishmen in England; that would be beyond the jurisdiction of American legislation...

Here is a chose in action, a claim for damages either for breach of contract or in tort; a claim is made against an English subject resident in England. What is the situs of that chose in action? There is very considerable authority for saying that the situs of such a chose in action is where it can be recovered — namely, where the defendant against whom the claim is made is residing. The attempt made here, as I understand it, to defeat that general rule is this: It is said that this claim could not be brought without production of the bills of lading, and they were in America, and the fact that the bills of lading were in America makes the situs of the chose in action, which is to be enforced by means of them, in America. I cannot think that that is the true view of the situation.«

Unter Berufung auf eine nicht veröffentlichte Entscheidung des Gerichts (Administrator of German Property v. Russian Bank for Foreign Trade) kommt er unter Zustimmung der übrigen Richter zur Zurückweisung der Berufung:

»... money has been recovered by virtue of a chose in action, an action brought in the United Kingdom against English citizens, the owners of the ship, an action brought either for damages for breach of contract or for damages for tort. The situs, in my view, of such a chose in action is in the United Kingdom, and that being so it is within the provisions of the Peace Order. It is true that the bills of lading at one time were out of the United Kingdom, but to say that that changes the situs of the chose in action is, as the learned Lord Chancellor said in the *Russian Bank for Foreign Trade* case, to confuse the right itself with the means of proving the right.

I come, therefore, to the conclusion that the fact that certain documents relating to the claim were at the time when the American Custodian took possession of them in the United States does not authorize him to say that the situs of the chose in action was in the United States and therefore passed or belonged to him. In my view, the situs of the chose in action was in the United Kingdom, where the persons against whom the claim was made resided. The fact that certain documents necessary to prove the right were not in the United Kingdom is immaterial.

In those circumstances the claim of the American Custodian fails in this case, and the appeal must be dismissed, with the usual consequences.«

Die Entscheidung des Privy Council vom 3. November 1933, »*The Bathori*« ([1934] A. C. 91) [1]), berührt unter anderem die **Frage, in-**

[1]) Vgl. auch British Yearbook of International Law 1934, S. 172 ff.

wieweit Ungarn im Vertrage von Trianon (§ 2 der Anlage zu Art. 232) auf prisenrechtliche Ansprüche ehemaliger Staatsangehöriger habe verzichten können, und liefert einen Beitrag zur Frage des **Verhältnisses zwischen Völkerrecht und Landesrecht.**

Der Dampfer »Bathori«, der einer Schiffahrtsgesellschaft mit dem Sitz in Fiume, der Klägerin, gehörte, die vor und während des Krieges ungarische Staatsangehörige war, jetzt eine italienische Gesellschaft ist, war am 1. Januar 1915 von einem englischen Kriegsschiff versenkt worden, trotzdem ein von dem englischen Generalkonsul in Le Havre bestätigter französischer Geleitbrief vorlag. Auf Vorstellungen der österreichisch-ungarischen Regierung hatte die britische Regierung zugegeben, daß die Versenkung auf einem Irrtum beruht habe, und Berücksichtigung der Entschädigungsforderung bei der künftigen Friedensregelung in Aussicht gestellt.

Im Jahre 1930 klagte die Gesellschaft im Prisenverfahren auf Entschädigung. Die Zulässigkeit der Klage im Prisenverfahren wurde zwar an sich bejaht, der Anspruch jedoch abgewiesen, da ihm die Bestimmung des § 2 der Anlage zu Art. 232 des Vertrages von Trianon [1]) entgegenstände.

Zur Begründung der Berufung gegen die Entscheidung der Admiralty Division vom 20. Oktober 1932 hatte die Klägerin unter anderem angeführt, daß sich die genannte Bestimmung, wie Art. 232 überhaupt, nur auf Ansprüche bezüglich Beeinträchtigung in Feindesland befindlichen Vermögens beziehe; die »Bathori« sei aber auf hoher See versenkt worden. Demgegenüber stellt Lord Atkin, der die Entscheidung des Privy Council verkündete, (S. 96) fest:

> »Their Lordships... have no doubt that the plaintiffs' right, if any, to claim in prize before an English Prize Court would be property in England, and that clause 2 of the annex operates to defeat this right of property.«

Die Klägerin hatte ferner geltend gemacht, sie habe durch den Vertrag von Rapallo zwischen Italien und Jugoslawien, der Fiume als unabhängigen Staat anerkannte, und den England seinerseits anerkannt habe, vor dem Inkrafttreten des Vertrages von Trianon die ungarische Staatsangehörigkeit verloren. Der § 2 der Anlage zu Art. 232 müsse

[1]) § 2 der Anlage zu Art. 232: »No claim or action shall be made or brought against any Allied or Associated Power or against any person acting on behalf of or under the direction of any legal authority or department of the Government of such a Power by Hungary or by any Hungarian national or by or on behalf of any national of the former Kingdom of Hungary wherever resident in respect of any act or omission with regard to his property, rights or interests during the war or in preparation for the war. Similarly, no claim or action shall be made or brought against any person in respect of any act or omission under or in accordance with the exceptional war measures, laws or regulations of any Allied or Associated Power«.

so ausgelegt werden, daß er nur Anwendung auf Personen finde, die zur Zeit des Inkrafttretens ungarische Staatsangehörige gewesen seien. Kein Staat könne Rechte von Privatpersonen aufgeben, die nicht zu diesem Zeitpunkt ihm angehörten. Ein solcher Verzicht sei völkerrechtlich unwirksam, und § 2 sei dementsprechend einschränkend auszulegen. Der Privy Council lehnt diese Argumentation unter Berufung auf die Tatsache ab, daß die Bestimmung des § 2 nach der Treaty of Peace (Hungary) Act 1921 vom 12. Mai 1921 und der auf Grund derselben ergangenen Treaty of Peace (Hungary) Order in Council vom 10. August 1021 »full force and effect as law« habe (S. 97):

»This contention gave rise to interesting arguments which involved the nationality of residents of Fiume at different dates after the war. It further raised the important question mentioned above as to the validity in international law of stipulations in treaties purporting to affect the private property of ex-nationals no longer nationals of the contracting states. In the opinion of their Lordships, it is unnecessary to decide these problems in the present dispute. Whether the plaintiffs were or were not Hungarian nationals at the effective date of the treaty, their Lordships have come to the conclusion that the clause in question plainly was intended to cover them. The treaty was the treaty of peace between Hungary and the Allied Powers, and it appears reasonably clear that the intention of the parties was that for acts or omissions done to the property of Hungarian nationals during the war those nationals should have no redress whether they did or did not continue to be Hungarian nationals up to the date of the treaty. Whether for acts done before the acquisition of new nationality the new state can or will exercise protection, or whether the former state can exercise protection, may be debatable; but in the circumstances attending a peace treaty it appears very natural that the former state should be required to renounce protection for its ex-nationals, and in the present treaty it seems clear that Hungary did so act.

This, however, determines only the question of construction. If the treaty operated by international law only, the tribunal in Prize might well have had to determine how far Hungary's attempt to affect the rights of ex-nationals could be treated as effective. But for an English Court, whether in Prize or not, this question is precluded by the terms of the Treaty of Peace (Hungary) Act, 1921. The Orders in Council made under it are to have effect as if enacted in the Act. The Order provides that the scheduled sections of the treaty are to have full force and effect as law. If, therefore, the clause in question bears the construction which has already been imputed to it, that construction must be enforced in British Courts as law. It follows that the claim of the plaintiffs is barred by the clause.«

Die **Rechtsstellung der von den russischen Nationalisierungsdekreten betroffenen russischen Banken** [1]) war Gegenstand der Ent-

[1]) Zu dem in diesen Entscheidungen behandelten Problem vgl. auch Wortley, The Dissolution of Foreign Corporations in Private International Law in the Light of the "Russian Bank Cases", British Yearbook of International Law, 1933, 1 ff.; Cheshire, Private International Law, Oxford 1935, 376 ff.

scheidungen des High Court of Justice, Chancery Division, *Russian & English Bank v. Baring Brothers & Co. Ltd.*, vom 1. Dezember 1933, ([1934] I Ch. 276) und des Court of Appeal vom 20. November 1934, ([1935] I Ch. 120).

Die Londoner Zweigniederlassung einer russischen Bank, die in Sowjetrußland 1918 von den Nationalisierungsmaßnahmen der Sowjetregierung betroffen war, hatte im Jahre 1921 auf Auszahlung gewisser Geldsummen geklagt. Bis 1929 ist die Klage nicht weiter verfolgt worden. Unmittelbar nach der Entscheidung der King's Bench Division in Sachen Lazard Brothers & Co. v. Midland Bank [1]) entschied im Januar 1932 die Chancery Division, daß auch in Sachen Russian & English Bank v. Baring Brothers & Co. das Verfahren einzustellen sei (Order to stay the action) ([1932] I Ch. 435), da die Klägerin ihre rechtliche Existenz wie in Rußland, so auch in Großbritannien verloren habe. Im März 1932 wurde die Zwangsliquidierung der Russian & English Bank auf Grund sec. 338 (2) des Companies Act 1929 (19 & 20 Geo. 5, c. 23) angeordnet (In re Russian and English Bank [1932] I Ch. 663). Daraufhin beantragte die Bank Zurücknahme der im Januar 1932 angeordneten Einstellung des Verfahrens, wurde aber durch das erste der oben angeführten Urteile mit folgender Begründung abgewiesen:

> »In my judgment, from the moment when Eve J. made his order in January, 1932, the action in which the present motion is made was dead — dead, because there was no plaintiff to maintain it; and I can see nothing in the language of s. 338 which reanimates the plaintiff or avoids the dissolution brought about by the foreign law. Therefore there is to-day no action in which the present application can be made. It is dead for all purposes. That is all that it is necessary for me to say to dispose of the present application.«

Eine weitere Klage wurde dann vom Liquidator der Bank in deren Namen unter Berufung auf s. 191 des Companies Act 1929 [2]) eingereicht. Aber auch diese Klage ist durch den Richter Clauson abgewiesen worden ([1935] I Ch. 120) in der Procedure Summons am 9. Oktober 1934:

> »I understand that section to mean this, that it is the duty of the liquidator to enforce in the name of the company and on behalf of the

[1]) Im November 1931 entschied der High Court of Justice, King's Bench Division, daß die Nationalisierungsdekrete der Sowjetregierung die rechtliche Existenz der Banken aufgehoben haben (Lazard Brothers & Co. v. Midland Bank, Ltd. [1932] I K. B. 617): das House of Lords hat sich 1933 dieser Auffassung angeschlossen (Lazard Brothers & Co. v. Midland Bank, Ltd. [1933] A. C. 289) und somit seine frühere These, laut derer der Wortlaut der Nationalisierungsdekrete nicht auf die Aufhebung der Rechtspersönlichkeit der Banken schließen läßt (Russian Commercial Industrial Bank v. Comptoir d'Escompte de Mulhouse [1925] A. C. 112), aufgegeben.

[2]) S. 191, sub—s. 1 lautet: »The liquidator in a winding up by the court shall have power with the sanction either of the court or of the committee of inspection —

a) to bring or defend any action or other legal proceeding in the name and on behalf of the company . . .«

company any right of action which the company suing in its own name could enforce. But it does not appear to me that that section creates in the liquidator a new cause of action in the name of the company which the company itself could not enforce by action. I do not understand how a liquidator can sue on behalf of a non-existent company.«

Auf Berufung der Bank wurde das Urteil des Richters Clauson bestätigt. Richter Slesser stellte fest:

» ... s. 191, sub-s. 1 (a), cannot here apply, because this company has no name and no entity for the liquidator to act on its behalf.«

Richter Roche war gleichfalls der Meinung, daß s. 191 nicht angewandt werden konnte, fügte aber hinzu, daß

»if the liquidator desires to proceed at all he must proceed under s. 190.«[1])

und gab seiner unverbindlichen persönlichen Meinung dahin Ausdruck, daß sec. 190 auf den vorliegenden Tatbestand Anwendung finde.

Die **rechtliche Grundlage des Mandatsverhältnisses** und der **Umfang der Gesetzgebungsbefugnis des australischen Parlaments hinsichtlich des Mandatsgebiets Neu-Guinea** wird in der Entscheidung des High Court of Australia, *Jolley v. Mainka*, vom 31. August 1933, (49. C. L. R. 242 [1933]) erörtert, die der Berufung gegen eine Entscheidung des Central Court of the Territory of New Guinea stattgab.

Die Frage war, ob die im Mandatsgebiet zahlbaren Zinsen für mehrere in Pfund bestimmte mortgages, die an Grundstücken im Mandatsgebiet im Jahre 1926 bestellt worden waren mit der ausdrücklichen Abmachung, »that all repayments of principal or payments of interest due and payable hereunder shall be made in gold or in currency equivalent thereto at the market or exchange rate current at the time when such payment is actually made«, in entwerteten australischen Pfundnoten zum Nennbetrag gültig gezahlt werden könnten.

Die Antwort hing unter anderem von der Entscheidung der Frage ab, ob die Commonwealth Bank Act 1920, die am 14. Dezember 1920 in Kraft trat, und die bestimmte, daß australische Noten gesetzliches Zahlungsmittel seien, »throughout the Commonwealth and throughout all territories under the control of the Commonwealth«, auch für Neu-Guinea gelte, obwohl die New Guinea Act 1920 erst am 9. Mai 1921 in Geltung trat und in ihrem Artikel 13 bestimmte:

»Except as provided in this or any Act, the Acts of the Parliament of the Commonwealth shall not be in force in the Territory unless expressed to extend thereto, or unless applied to the Territory by ordinance made by the Governor-General under this Act.«

[1]) s. 190 des Companies Act 1929 räumt dem Gericht die Befugnis ein, auf Antrag des Liquidators zu bestimmen »that all or any part of the property of whatsoever description belonging to the Company or held by trustees on its behalf shall vest in the liquidator by his official name«. Daraufhin darf der Liquidator »bring or defend in his official name any action or other legal proceeding which relates to that property«.

Es war bestritten worden, daß das Mandatsgebiet zu den »Territories under the control of the Commonwealth« im Sinne der Commonwealth Bank Act gehöre. Dies gab dem Richter Starke Veranlassung, obwohl die Gültigkeit der New Guinea Act selbst nicht bestritten war, die Frage zu untersuchen, ob unter Section 122 der Constitution, die die Gesetzgebungsbefugnis des australischen Parlaments umgrenzt, auch das Mandatsgebiet falle (S. 250):

»The Constitution, section 122, provides: 'The Parliament may make laws for the government of any territory surrendered by any State to and accepted by the Commonwealth, or of any territory placed by the Queen under the authority of and accepted by the Commonwealth, or otherwise acquired by the Commonwealth...'

A' territory placed by the Queen under the authority of and accepted by the Commonwealth' is in the nature of a mandated territory, and is dealt with on the footing that it is a territory acquired by the Commonwealth. Consequently I see no difficulty in construing the words 'otherwise acquired by the Commonwealth' as sufficiently large to include a territory placed under the authority of the Commonwealth by mandate from the League of Nations. The Commonwealth thus acquires plenary control of the territory, subject to and during the subsistence of the mandate. But the Permanent Mandate Commissions refuse to recognize the sovereignty of the mandatory in this control (*R. v. Christian* [1]); *Berriedale Keith, An Introduction to British Constitutional Law* (1931), pp. 204, 205, and *The Constitutional Law of the British Dominions* (1933), pp. 372, 373). The territory over which the mandate is conferred is doubtless a new form of acquisition, but that it is an acquisition, something gained or obtained by the Commonwealth, does not admit of doubt. It is thus a territory 'otherwise acquired by the Commonwealth' within the meaning of sec. 122 of the Constitution.«

Er kommt somit zu dem Ergebnis (S. 252):

»New Guinea, although accepted under mandate from the League of Nations, is nevertheless in my opinion a territory 'otherwise acquired by the Commonwealth' within the meaning of sec. 122 of the Constitution, and necessarily therefore a territory 'under the control of the Commonwealth' within the words of the *Commonwealth Bank Act* 1920. Indeed, the *New Guinea Act* 1920 expressly declares it a territory under the authority of the Commonwealth. It is true that New Guinea is not specifically named as a territory in the section of the *Commonwealth Bank Act* providing that Australian notes shall be a legal tender. But the *New Guinea Act* 1920 does not require that New Guinea shall be thus specifically named; and the *Commonwealth Bank Act* 1920 has used a phrase — 'all territories under the control of the Commonwealth' — which renders enumeration of territories unnecessary and yet clearly includes them all. In my opinion that is an ample expression of intention that the provision of the *Commonwealth Bank Act* shall extend to New Guinea.«

Richter Dixon, dem sich sein Kollege Rich anschließt, ist gleichfalls der Auffassung, daß die Commonwealth Bank Act 1920 auf das

[1]) (1924) App. D. (S. Af.) 101.

Mandatsgebiet Anwendung finde, ohne auf die Grundlage der Gesetzgebungsbefugnis näher einzugehen. Dagegen sind die Ausführungen des Richters Evatt zu diesem Punkt von Interesse, die im Gegensatz zu denen von Starke stehen.

Er stellt zunächst fest (S. 274):

»Whilst Australia, South Africa and New Zealand has each administered the three mandated territories committed to their respective charge as though they were 'integral portions of its territory', subject to the important safeguards which are defined in the instruments of the mandate, conflicting lines of reasoning as to the true legal basis of such administration have been adopted by the Courts of the three Dominions.«

Nach Erörterung der Entscheidungen Rex v. Christian ([1924] App. D. [S. Af.], 101) und Tagaloa v. Inspector of Police (Supreme Court of New Zealand [1927] N. Z. L. R., 883) [1]) fährt er fort (S. 277):

»In Australia, the legal authority of the Commonwealth Parliament and Government over the Mandated Territory of New Guinea has long been regarded as indisputable, despite the fact that the Commonwealth Parliament, unlike those of South Africa or New Zealand, has been invested with legislative powers only in relation to a specified number of topics. The question came before this Court in *Mainka v. Custodian of Expropriated Property* [2]). There it was argued that sec. 122 of the Commonwealth Constitution gave the Commonwealth Parliament the necessary legal authority. That section reads: ...

But, unfortunately for this argument, the Mandated Territory was never 'placed by the King under the authority of and accepted by the Commonwealth.' The documents, in the case of the Commonwealth, negative any such action on the part of His Majesty or of the Commonwealth. The sources to which alone the exercise of Commonwealth control must be referred are recited both in the *New Guinea Act* 1920 and in the mandate itself. They consist of (1) Germany's renunciation of all her rights in favour of the principal Allied and associated Powers, (2) the agreement of the principal Allied and associated Powers that the Commonwealth of Australia should be the mandatory, (3) the issue under art. 22 of the mandate for the control of the territory, and (4) the acceptance of such mandate by the Commonwealth. These sources completely exclude any 'placing by the King' of New Guinea under Commonwealth authority. And there are no other sources.

Nor is it possible to regard the mandated area as ever having been 'acquired' by the Commonwealth. The area is not, in law or in fact, so 'acquired'. No legal title has been vested in the Commonwealth. Legislative and administrative jurisdiction, and their exercise, are quite consistent with absence of dominion or title. The mandated territory is not part of, but outside, His Majesty's Dominions. Very strong, if not conclusive, evidence of that fact is furnished by two Imperial Orders in Council — No. 648 of 1923 and No. 1030 of 1928. The first was made under sec. 737 of the *Merchant Shipping Act* 1894, the second under sec. 30 of the *Fugitive Offenders Act* 1881. Each not only recites, but is ex-

[1]) Vgl. auch Evatt, The British Dominions as Mandatories. Melbourne 1934.
[2]) (1924) 34 C. L. R. 297.

pressly based upon the position that, in law and in fact, the Mandated Territory of New Guinea is a place 'outside' or 'out of' His Majesty's Dominions.

Further, sec. 122 not only looks to the 'acquisition' of territory, but to the possibility of the representation of every such territory in the Commonwealth Parliament itself. The process envisaged is one of a gradual approach of the acquired territory towards inclusion within the existing organization of the Commonwealth. In the Mandated Territory, the process envisaged by art. 22 is exactly the reverse. It is to be controlled as if it were, contrary to the fact, an integral portion of the Commonwealth; but its development is to be not towards, but away from, absorption by the Commonwealth. 'It is never,' as *Corbett* says, 'to be incorporated in the territory of the mandatory' unless, of course, by further international action (*British Year Book of International Law* (1924), at p. 135).

It is improbable that sec. 122 would ever have been regarded as relevant but for the fact that the word 'territory' is used in that section and in the mandate alike. This is, of course, merely a coincidence, due to the fact that art. 22 itself speaks of 'territories', and describes the C class of mandates in a clause commencing: 'There are *territories* such as South-West Africa and certain of the South Pacific Islands.'«

Evatt stellt bezüglich des Verhältnisses des Commonwealth of Australia zu dem Mandatsgebiet Neu-Guinea fest (S. 280):

»(1) The King's Executive Government of the Commonwealth was possessed of sufficient authority (a) to become a party to the Treaty of Versailles and to the Covenant of the League of Nations, and (b) as a member of the League, to accept the position of mandatory with all its incidental rights and obligations.

(2) The Commonwealth Parliament having full power to legislate with respect to 'external affairs' — sec. 51 (xxix.) — was thereby vested with authority to pass the *New Guinea Act* 1920, as a law for the fulfilment of the duties imposed upon, and the exercise of the rights of administration committed to, the Commonwealth as mandatory power.«

Zu letzterem Punkt führt er noch weiter aus (S. 286):

»The real question is whether the legislative power exercised by the Commonwealth Parliament in the *New Guinea Act* is one truly in respect of 'external affairs' under sec. 51 (xxix.) of the Constitution? The answer is: Yes. The legislation pertains to external affairs and in no way to matters occurring within the Commonwealth. It is legislation directed solely towards performing Australia's obligations to the other members of the League of Nations. Powers of administration and government are assumed solely towards that end, and over matters and things without the area of the Commonwealth and its territories.«

Er kommt zu folgenden Schlußfolgerungen (S. 289 f.):

»(1) That the lawful source of the Commonwealth's government of the Mandated Territory of New Guinea is not to be found in sec. 122 of the Constitution.

(2) That the Commonwealth's *de facto* government of the Territory has its lawful source in (a) legislation under sec. 51 (xxix.) of the Commonwealth Constitution following upon (b) the Commonwealth's international right and duty to administer New Guinea according to the terms of the mandate.

(3) That such area is not one of the territories referred to in sec. 122.

(4) But it is, none the less, a territory lawfully 'under the control of the Commonwealth.'

I am therefore of opinion that there is no reason for saying that the Mandated Territory is not one of the 'territories under the control of the Commonwealth' within the meaning of sec. 60 H (1) (b) of the *Commonwealth Bank Act* 1920.«

Was die Geltung der Commonwealth Bank Act 1920 in Neu-Guinea anlangt, so verdient, abgesehen von der Feststellung, daß tatsächlich schon während der militärischen Besetzung des Gebiets australische Noten als gesetzliches Zahlungsmittel betrachtet wurden, die Bemerkung Evatts über sec. 13 der New-Guinea-Act 1920 Erwähnung (S. 291):

»I regard the provisions of sec. 13 as very important. It is a clear recognition of the Commonwealth's special international duties in relation to the Territory and its inhabitants.«

Er nimmt im übrigen an, daß die Commonwealth Bank Act 1920 unter die in den Eingangsworten der sec. 13 vorgesehenen Ausnahmen von der Regel falle und daher auch im Mandatsgebiet Geltung habe.

Mit der **Frage, ob zu dem Begriff des völkerrechtlichen Delikts der Seeräuberei der Tatbestand des Raubes gehört,** befaßt sich ein Gutachten des Judicial Committee of the Privy Council (*In re a reference under the Judicial Committee Act, 1833, in re Piracy Jure Gentium*, vom 26. Juli 1934, 51 T. L. R. 12).

Das zuständige Gericht in Hong-kong hatte chinesische Staatsangehörige, die auf hoher See ein chinesisches Frachtboot mit Waffen angegriffen hatten, die dabei aber von herzueilenden Schiffen festgenommen, nach Hong-kong gebracht und dort der Seeräuberei angeklagt worden waren, rechtskräftig freigesprochen, weil keine Beraubung (robbery) stattgefunden habe. Dieser Fall bot Anlaß, dem Judicial Committee of the Privy Council ganz allgemein durch Order in Council die Frage vorzulegen:

»Whether actual robbery is an essential element of the crime of piracy *jure gentium* or whether a frustrated attempt to commit a piratical robbery is not equally piracy *jure gentium*.«

Der Attorney General vertrat entgegen der Meinung des Secretary of State for the Colonies die Ansicht, daß nach Völkerrecht vollendeter Raub ein wesentliches Tatbestandselement für das Verbrechen des Seeraubs sei.

Das Judicial Committee kommt zu folgender Antwort:

»Actual robbery is not an essential element in the crime of piracy *jure gentium*. A frustrated attempt to commit a piratical robbery is equally piracy *jure gentium*«.

Aus der Begründung, die der Lord Chancellor gab, sind folgende allgemeine Erwägungen hervorzuheben:

»In considering such a question the Board is permitted to consult and act on a wider range of authority than that which it examines when the question for determination is one of municipal law only. The sources from which international law is derived include treaties between various States, State papers, municipal Acts of Parliament, and the decisions of municipal Courts, and last, but not least, opinions of jurisconsults or text-book writers. It is a process of inductive reasoning. It must be remembered that in the strict sense international law still has no Legislature, no executive, and no judiciary, though in a certain sense there is now an international judiciary in The Hague Tribunal, and attempts are being made by the League of Nations to draw up codes of international law. Speaking generally, in embarking upon international law their Lordships are to a great extent in the realm of opinion, and in estimating the value of opinion it is permissible not only to seek a consensus of views but to select what appear to be the better views upon the question.

With regard to crimes as defined by international law, that law has no means of trying or punishing them. The recognition of them as constituting crimes and the trial and punishment of the criminals are left to the municipal law of each country. But whereas according to international law the criminal jurisdiction of municipal law is ordinarily restricted to crimes committed on its *terra firma* or territorial waters or its own ships, and to crimes by its own nationals wherever committed, it is also recognized as extending to piracy committed on the high seas by any national on any ship, because a person guilty of such piracy has placed himself beyond the protection of any State. He is no longer a national, but *hostis humani generis*, and as such he is justiciable by any State anywhere. Grotius (1583—1645) "De Jure Belli ac Pacis", Vol. II., cap. 20, section 40.«

Nach einer eingehenden Untersuchung der Gesetzgebung, der Rechtsprechung und der Literatur zur Frage des Seeraubs fährt die Begründung fort:

»However that may be, their Lordships do not themselves propose to hazard a definition of piracy.

They remember the words of M. Portalis, one of Napoleon's commissioners, who said: "We have guarded against the dangerous ambition of wishing to regulate and to foresee everything. ... A new question springs up: then how is it to be decided? To this question it is replied that the office of the law is to fix by enlarged rules the general maxims of right and wrong, to establish firm principles fruitful in consequences, and not to descend to the detail of all questions which may arise upon each particular topic." (Quoted by Lord Halsbury, L. C., in Halsbury's Laws of England, Introduction, p. ccxi.)

A careful examination of the subject shows a gradual widening of the earlier definition of piracy to bring it from time to time more in con-

sonance with situations either not thought of or not in existence when the older jurisconsults were expressing their opinions.

All that their Lordships propose to do is to answer the question put to them, and, having examined all the various cases, all the various statutes, and all the opinions of the various jurisconsults cited to them, they have come to the conclusion that the better view and the proper answer to give to the question addressed to them is that stated at the beginning . . .«

Auburtin.

NORDISCHE LÄNDER

Bericht

I

Das *norwegische Höchste Gericht* hat in zwei Entscheidungen vom 24. August 1934 (Norsk Retstidende 1934, S. 727 ff., 731 ff.) grundsätzliche Ausführungen über die **Abgrenzung der Territorialgewässer** gemacht.

Beide gehen in Übereinstimmung mit der von jeher vertretenen, u. a. auch in dem Schreiben der norwegischen Regierung an die Kodifikationskommission des Völkerbundes vom 3. März 1927 [1]) zum Ausdruck gelangten norwegischen Rechtsanschauung davon aus, daß sich das norwegische Territorialgewässer vier Seemeilen in die offene See hinein erstreckt, berechnet von Linien, die die äußersten Inseln, Holme oder Schären verbinden, die nicht ständig von der See überspült werden [2]).

Buchten werden dabei ohne Rücksicht auf die Mündungsbreite als inneres norwegisches Gewässer betrachtet. Das Höchste Gericht erklärt es dementsprechend in dem ersten Erkenntnis, durch das ein deutscher Schiffer wegen unbefugten Fischens in norwegischen Küstengewässern verurteilt worden ist, für gerechtfertigt, die Ausdehnung des Territorialgewässers vor dem Varangerfjord von einer Linie (Kibergsnes — Grense Jakobselv) aus zu berechnen, die zwischen den beiden äußersten, 30,5 Seemeilen auseinanderliegenden Punkten der Bucht verläuft. In dem Votum des Berichterstatters, dem die übrigen Mitglieder des Gerichts beigetreten sind, heißt es hierzu:

»Es kann ..... nicht zweifelhaft sein, daß die Grenze des Seeterritoriums im vorliegenden Fall so gezogen werden muß, wie es das

[1]) Vgl. Rapport au Conseil de la Société des Nations sur les questions qui paraissent avoir obtenu le degré de maturité suffisant pour un règlement international, Doc. C. 196. M. 70. 1927. V, S. 172 ff.

[2]) Zu dem gleichartigen Standpunkt des schwedischen Rechts vgl. Entscheidung des schwedischen Höchsten Gerichts vom 14. November 1927: ds. Zeitschr. Bd. I, 2, S. 218 ff.