Das Urteil des House of Lords in Sachen »Carl-Zeiss-Stiftung v. Rayner & Keeler Ltd. and others« (No. 2)*)

Das Urteil des House of Lords, das die Entscheidung des Court of Appeal[1]) aufhebt und die des erstinstanzlichen Richters wiederherstellt, befaßt sich mit der rechtlichen Lage der DDR und der Bedeutung ihrer Nichtanerkennung durch Großbritannien sowie mit Fragen des internationalen Privat- und Prozeßrechts. Im folgenden werden nur die Teile der Urteilsgründe auszugsweise wiedergegeben, die in den Arbeitsbereich dieser Zeitschrift gehören.

Lord Reid beginnt mit einer Schilderung der Entwicklung der Stiftung bis zur Besetzung Thüringens durch sowjetische Truppen am 1. Juli 1945. Dann fährt er fort (S. 543 f.):

"We do not have precise evidence about this, but it is said that in 1949 the U.S.S.R. set up the German Democratic Republic to govern that part of Germany then occupied by Russia, and purported to make it an independent state. Moreover it is further said that thereafter the German Democratic Republic purported to act as an independent state in legislating for and administering the Russian zone of Germany. That there is a body calling itself the German Democratic Republic and that it does operate in that zone is, I think, common knowledge. I do not think that common knowledge goes further than that, but for the purposes of this appeal I am prepared to assume that the U.S.S.R. did purport to confer independence on the Democratic Republic and that that body does purport to act as if it were an independent state." ...

"In the normal case a law is made either by the sovereign directly or by some body entitled under the constitution of the country to make it or by some person or body to which the sovereign has delegated authority to make it. On the other hand there are many cases where laws have been made against the will of the sovereign by persons engaged in a rebellion or revolution: then until such persons or the government which they set up have been granted de

*) Entscheidung vom 18. 5. 1966 [1966] 2 All E. R. 536.

[1]) Auszüge in ZaöRV Bd. 25 (1965), S. 516 ff. Siehe auch die kurze Schilderung der Prozeßgeschichte *ibid.*, S. 516 f. (Die Rückübersetzung aus dem Englischen hat dazu geführt, daß a. a. O. Dr. Schrade als angeblicher »Stiftungskommissar« bezeichnet wurde. Er tritt dagegen als »Bevollmächtigter der Carl-Zeiss-Stiftung« auf. Für den Hinweis auf diesen Irrtum danke ich Dr. W. David, Rechtsberater der Carl-Zeiss-Stiftung, Heidenheim).

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facto recognition by the government of this country, their laws cannot be recognised by the courts of this country, but after de facto recognition such laws will be recognised. So far there is no difficulty. The present case, however, does not fit neatly into any of these categories. We are considering whether the law of 1952 under which the Council of Gera was set up can be recognised by our courts and therefore we must ascertain what was the situation in East Germany in 1952. It is a firmly established principle that the question whether a foreign state ruler or government is or is not sovereign is one on which our courts accept as conclusive information provided by Her Majesty's government: no evidence is admissible to contradict that information".

Sodann zitiert er die Auskünfte *(certificates)* des Foreign Secretary, woraus sich ergibt, daß im Original auf den vom Court of Appeal wiedergegebenen, ZaöRV Bd. 25, S. 517 f. vor Anm. 6 abgedruckten Auszug noch der Satz folgt: "Her Majesty's government, however, regards the aforementioned governments as retaining rights and responsibilities in respect of Germany as a whole". Gemeint sind die Regierungen der vier Alliierten.

Lord Reid beurteilt die Auskunft folgendermaßen (S. 545 ff.):

"It was not argued that the matter which I am now considering is one affecting Germany as whole; so the rights of the other three allied governments do not affect this question, and I need only consider what the certificate says with regard to the U.S.S.R. and the inferences which must be drawn from it.

The purpose of a certificate is to provide information about the status of foreign governments and states and, therefore, the statement that since June, 1945,

'Her Majesty's government [has] recognised the state and government of the Union of Soviet Socialist Republics as de jure entitled to exercise governing authority in respect of that zone'

cannot merely mean that H.M. government has granted this recognition so as to leave the courts of this country free to receive evidence whether in fact the U.S.S.R. are still entitled to exercise governing authority there. The courts of this country are no more entitled to hold that a sovereign, still recognised by our government, has ceased in fact to be sovereign de jure, than they are entitled to hold that a government not yet recognised has acquired sovereign status. So this certificate requires that we must take it as a fact that the U.S.S.R. have been since 1945 and still are de jure entitled to exercise that governing authority. The certificate makes no distinction between the period before and the period after the German Democratic Republic was set up. So we are bound to hold that the setting up of that republic made no difference in the right of the U.S.S.R. to exercise governing authority in the zone; and it must follow from that that the U.S.S.R. could at any time lawfully bring

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to an end the German Democratic Republic and its government and could then resume direct rule of the zone. That is quite inconsistent, however, with there having in fact been any abdication by the U.S.S.R. of its rights when the German Democratic Republic was set up".

"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 organisation through which the U.S.S.R. is entitled to exercise indirect rule. I do not think that we are concerned to enquire or to know to what extent the U.S.S.R. in fact exercise their right of control. At a late stage in the argument before your lordships counsel for the respondents made an application that further questions should be addressed to Her Majesty's government. That would be a perfectly proper thing to do if your lordships were of opinion that the existing certificate is ambiguous or insufficient; but I can see no ambiguity or insufficiency in this certificate, and therefore I agree that this application was properly refused.

It was argued that the present case is analogous to cases where subjects of an existing sovereign have rebelled and have succeeded in gaining control of a part of the old sovereign's dominions. When they set up a new government in opposition to the de jure sovereign that new government does not and cannot derive any authority or right from the de jure sovereign, and our courts must regard its acts and the acts of its organs or officers as nullities until it has established and consolidated its position to such an extent as to warrant our government according de facto recognition of it".

"The present case is, however, essentially different. The German Democratic Republic was set up by the U.S.S.R. and it derived its authority and status from the government of the U.S.S.R. So the only question could be whether or not it was set up as a sovereign state; but the certificate of our government requires us to hold that it was not set up as a sovereign state because it requires us to hold that the U.S.S.R. remained de jure sovereign and therefore did not voluntarily transfer its sovereignty to the German Democratic Republic. Moreover, if the German Democratic Republic did not become a sovereign state at its inception, there is no suggestion that it has at any subsequent time attempted to deprive the U.S.S.R. of rights which were not granted to it at its inception. The courts of this country must disregard any declarations of the government of the U.S.S.R. in so far as they conflict with the certificate of Her Majesty's Secretary of State, and we must therefore hold that the U.S.S.R. set up the German Democratic Republic not as a sovereign state, but as an organisation subordinate to the U.S.S.R. If that is so, then mere declarations by the government of the German Democratic Republic that it is acting as the government of an independent state cannot be regarded as proof that its initial status has been altered, and we must regard the acts of the German Democratic Republic, its government organs and officers as acts done with the consent of the government of the U.S.S.R. as the government entitled to exercise governing authority.

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It appears to me to be impossible for any de jure sovereign governing authority to disclaim responsibility for acts done by subordinate bodies which it has set up and which have not attempted to usurp its sovereignty. So in my opinion the courts of this country cannot treat as nullities acts done by or on behalf of the German Democratic Republic. De facto recognition is appropriate–and in my view is only appropriate–where the new government have usurped power against the will of the de jure sovereign. I would think that where a sovereign has granted independence to a dependency any recognition of the new state would be a recognition de jure". ...

Sodann zitiert Lord Reid eine Erklärung des Foreign Secretary vor dem House of Commons vom 21. März 1951[2]) und fährt fort (S. 548):

"Recognition implies independence and refusal to recognise the German Democratic Republic or its government is entirely consistent with that statement if independence was never in fact granted by the U.S.S.R., for no one suggests that the German Democratic Republic has or could have seized independence in defiance of the U.S.S.R. So there can in my view be no question of awaiting de facto recognition before we can recognise as lawful the acts of the German Democratic Republic. We recognise them not because they are acts of a sovereign state but because they are acts done by a subordinate body which the U.S.S.R. set up to act on its behalf.

I am reinforced in my opinion by a consideration of the consequences which would follow if the view taken by the Court of Appeal (11) were correct. Counsel for the respondents did not dispute that in that case we must not only disregard all new laws and decrees made by the German Democratic Republic or its government, but we must also disregard all executive and judicial acts done by persons appointed by that government because we must regard their appointments as invalid. The result of that would be far reaching. Trade with the Eastern zone of Germany is not discouraged; but the incorporation of every company in East Germany under any new law made by the German Democratic Republic or by the official act of any official appointed by its government would have to be regarded as a nullity so that any such company could neither sue nor be sued in this country. Any civil marriage under any such new law or owing its validity to the act of any such official would also have to be treated as a nullity so that we should have to regard the children as illegitimate; and the same would apply to divorces and all manner of judicial decisions whether in family or commercial questions. That would affect not only status of persons formerly domiciled in East Germany but also property in this country the devolution of which depended on East German law." ((11) [1965] 1 All E.R. 300; [1965] Ch. 596).

Im Anschluß daran läßt er offen, ob englische Gerichte eine gewisse Milderung dieser Grundsätze im Anschluß an amerikanische Entscheidungen vor-

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[2]) Parliamentary Debates, H. o. C., Bd. 485, Sp. 2410.

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nehmen könnten. Lord Reid befaßt sich sodann mit der Wirkung einer Entscheidung des Bundesgerichtshofes (BGH) und der Entscheidungen von Gerichten der DDR für die zu beurteilende Frage[3]). Zur Zuständigkeit der Gerichte in beiden Teilen Deutschlands bemerkt er (S. 558):

> "The West German courts have no jurisdiction over East Germany. The two parts of Germany are at present under different sovereignties: they have separate legal systems and are separate jurisdictions. According to the commonly accepted doctrine of private international law the courts of one state or jurisdiction cannot of their own knowledge determine what is the law in a different state or jurisdiction. That has to be proved by evidence and, if it is clear as in this case it was and is, that all courts in one state or jurisdiction have decided and will decide a particular question in one way, the courts of another state or jurisdiction have no right to decide that that question ought to ⟨be⟩ have been decided in a different way".

Er schließt seine *opinion* mit einem Ausblick auf die noch offene Frage (S. 559):

> "That brings me to an important question which was raised in the West German case and before CROSS, J. The respondents found on the principle that English courts will not assist the enforcement of foreign confiscatory laws, and argue that therefore the appellant cannot be given the relief which it seeks in this case. Your lordships did not permit that matter to be argued in this appeal because it is not relevant on the only question now before this House – the authority of the solicitors to act for the Stiftung. The respondents will be free to raise that issue in their pleadings and at the trial of this action, and nothing that CROSS, J. may have said on this matter can hamper or limit the power of the trial judge to deal with it".

Lord Hodson billigt in der Anerkennungsfrage in vollem Umfang die Ausführungen von Lord Reid. Zu den Fragen des auf die Stiftung anwendbaren Rechts und der Zuständigkeit der Gerichte der Bundesrepublik führt er aus (S. 562):

> "The re[s]pondents argued that the law applicable to the matters in dispute between the parties should, in any event, be the law of the Federal German Republic. They relied on the language of the second Foreign Office certificate given on Nov. 5, 1964. This contained an extract from a Foreign Ministers' communiqué which stated:
>
> > 'Pending the unification of Germany the three governments consider the government of the Federal German Republic as the only German government freely and legitimately constituted and, therefore entitled to

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[3]) Die Entscheidung des BGH vom 15. 11. 1960 scheint nicht veröffentlicht zu sein. Vgl. aber zum Zeiss-Komplex die veröffentlichten Entscheidungen des BGH vom 24. 7. 1957, Juristenzeitung (JZ) 1958, S. 241, und vom 14. 4. 1965, JZ 1965, S. 680.

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speak for Germany as the representative of the German people in international affairs'.

This is followed in the certificate by the following words–

'This statement does not constitute recognition of the Government of the Federal Republic of Germany as the de jure government of all Germany'.

It was argued that the determination of the status of and the right to represent a body incorporated under the law of the State of Germany prior to 1945 and now having its ›sitz‹ in the territory of the zone allocated to the U.S.S.R. are matters which affect Germany as a whole and, if arising outside Germany, are within the scope of the Foreign Office communiqué.

It is true that the judicial system is an organ of the sovereign power, but the explanatory footnote to the communiqué indicates the limits to be put on the Foreign Office certificate and does not support the contention that the West German courts, as courts of the Federal German Republic are entitled to speak for Germany as a whole. That the communiqué is directed to political representation only is, I think, clear from the language of the certificate, which makes clear that the government of the Federal Republic is not thereby to be regarded as being recognised as the de jure government of all Germany. There are in the two parts of Germany two separate legal systems operating independently of one another, the East German courts deriving their authority from the sovereignty of the U.S.S.R. and the West German courts from the sovereignty which lies in the Federal Republic of Germany as at present constituted. I do not think that there is any justification for the view that the law common to the whole of Germany as distinguished from zonal law should be applied on the ground that the Carl-Zeiss-Stiftung came into existence many years ago before Germany was divided and that this case concerns operations and issues outside Germany as a whole, namely, in England and not in the Soviet zone itself. The law in the two parts of Germany not being the same we must apply the law of the Eastern zone".

Lord Guest schließt sich zur Bedeutung der Auskunft des Foreign Secretary und der Nichtanerkennung der DDR gleichfalls Lord Reid an (S. 564). Die Maßgeblichkeit der Entscheidungen von DDR-Gerichten für die Frage, welches Recht dort gilt, begründet er u. a. mit der überraschenden Feststellung (S. 568):

"The only criticism which is made by the West German lawyers of the East German judgment is that there are no free judges in East Germany and that no East German Court would dare to come to a contrary conclusion; but this is only the opinion of the West German lawyers, and there is not a shred of evidence to support it. On the question of fact as to what the East German law is, the evidence is really all the one way, consisting of the judgment of the highest court in East Germany and the opinion of the East and West German lawyers who gave evidence".

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Lord Upjohn hat den Ausführungen von Lord Reid in den hier interessierenden Punkten nichts hinzuzufügen (S. 569).

Lord Wilberforce dagegen befaßt sich noch einmal eingehend mit den Problemen. Nachdem er festgestellt hat, daß nach Auffassung der Gegner des Appeals die Nichtanerkennung der DDR die Nichtanerkennung aller ihrer Hoheitsakte zur Folge hat, so daß von Großbritannien her gesehen ein *legal vacuum* in diesem Bereich besteht, soweit nicht möglicherweise altes Recht noch angewendet werden kann, legt Lord Wilberforce zunächst dar (S. 577):

"My lords, if the consequences of non-recognition of the East German 'government' were to bring in question the validity of its legislative acts, I should wish seriously to consider whether the invalidity so brought about is total, or whether some mitigation of the severity of this result can be found. As Locke said: 'A government without laws is, I suppose, a mystery in politics, inconceivable to human capacity and inconsistent with human society' and this must be true of a society – at least a civilised and organised society – such as we know to exist in East Germany. In the United States some glimmerings can be found of the idea that non-recognition cannot be pressed to its ultimate logical limit, and that where private rights, or acts of every-day occurrence, or perfunctory acts of administration are concerned (the scope of these exceptions has never been precisely defined) the courts may, in the interest of justice and commonsense, where no consideration of public policy to the contrary has to prevail, give recognition to the actual facts or realities found to exist in the territory in question. These ideas began to take shape on the termination of the Civil War (see *U.S.* v. *Home Insurance Co.* (110)), and have been developed and reformulated, admittedly as no more than dicta, but dicta by judges of high authority, in later cases. I mention two of these: *Sokoloff* v. *National City Bank of New York* (111) and *Upright* v. *Mercury Business* (112), a case which was concerned with a corporate body under East German law. Other references can be found conveniently assembled in PROFESSOR O'CONNELL'S INTERNATIONAL LAW (1965) pp. 189 ff. No trace of any such doctrine is yet to be found in English law, but equally, in my opinion, there is nothing in those English decisions, in which recognition has been refused to particular acts of non-recognised governments, which would prevent its acceptance or which prescribes the absolute and total validity of all laws and acts flowing from unrecognised governments. In view of the conclusion which I have reached on the effect to be attributed to non-recognition in this case, it is not necessary here to resort to this doctrine but, for my part, I should wish to regard it as an open question, in English law, in any future case whether and to what extent it can be invoked". ((110) (1874), 89 U.S. 99; (111) (1924), 239 N.Y. 158; (112) (1961), 13 A.D. (2nd) 361).

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Er erörtert sodann die Entstehung der DDR und führt zu der Bedeutung der amtlichen Auskunft folgendes aus (S. 580):

"The certificates, therefore, in my opinion, establish the U.S.S.R. as de jure entitled to exercise governing authority and in full control of the area of the Eastern zone.

This makes possible a determination of what is the legal character of enactments by the 'German Democratic Republic'. To say that this is an unrecognised government, though in a sense correct, may be misleading: it is so in a sense quite different from the sense in which the expression was used of, for example, the Russian revolutionary government prior to (de facto) recognition in 1921, whose status and the validity of whose legislation was considered in *Luther* v. *Sagor* (123). If that government was not recognised, there was nothing which could give international validity to its laws; but the 'German Democratic Republic' is making laws in and as to a territory where a recognised 'sovereign' exists. Is there, then, any reason for denying validity to its acts? The respondents say that there is: that no documentary authority has been proved to show that the 'German Democratic Republic' had power, under the U.S.S.R., to make the law in question, or any law; that there must be either a constitution, or some enabling provision, or some express authority from the 'sovereign' or proof positive of some other connexion with the government, to avoid the consequence that the law is simply a nullity, and that none such has been proved.

This argument, in my opinion, is unduly formalistic. The U.S.S.R. and the other allied powers assumed power in Germany after a military collapse followed by a declaration that they had done so : an exceptional, if not unprecedented step which, and the consequences of which, however, we are bound to recognise. Thereafter, for a period, they exercised their power directly through their military commander-in-chief. After a time they set up or allowed to be set up zonal or regional authorities to carry out tasks of government or administration. The United States military authorities, as we know, set up or allowed a 'government' in the Land of Thüringia, which was continued by the U.S.S.R. when they took over. It is unnecessary in circumstances such as these to seek for a formal constitutional chain of power. Given the continuance of de jure authority and complete control, it follows that acts done by what are (as we are bound to hold) necessarily subordinate bodies are done under the governing authority of the occupying power". ((123) [1921] All E.R. Rep. 138; [1921] 3 K.B. 532).

Nachdem er festgestellt hat, daß für die Beurteilung dessen, was in Jena geltendes Recht ist, nach normalen Grundsätzen des internationalen Privatrechts die Entscheidungen der dort zuständigen Gerichte der DDR heranzuziehen seien, fährt er fort (S. 589 f.):

"The respondents contest this conclusion on several grounds. They submit

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that the questions of law as to the constitution of the Stiftung should properly be considered to be questions not of East German law but of German law. The questions relate, they say, to the issue how the Stiftung may be represented in Germany as a whole and internationally and how, if at all, it may protect assets outside the Eastern zone. Formally, the questions of law concern the interpretation or application of the German civil code, under which the Stiftung was formed, not of any zonal law. As to such a legal question the decisions of courts of the Federal Republic of Germany have a superior or (alternatively) an equal right to international recognition as compared with those of East German courts.

The claim for superior status was based principally on the terms of the certificate of the Secretary of State given on Nov. 6, 1964, already considered in another context and set out in the opinion of my noble and learned friend. LORD REID. This certificate makes it clear, so it is said, that the rights of the U.S.S.R. as de jure 'sovereign' in the Eastern zone are confined to that zone and explicitly recognises (following a communiqué of the Western allies on Sept. 19, 1950), the government of the Federal Republic as 'entitled to speak for Germany as the representative of the German people in international affairs'. So it is argued, in what is essentially an international matter, the courts of the Federal Republic should be accepted as the proper organ to declare what the law of Germany is.

I recognise the ingenuity of this argument, but I am not convinced by it. Read as a whole, the certificate gives recognition to the U.S.S.R. as de jure entitled to exercise governing authority in respect of the Eastern zone; and (negatively) the certificate also states, after the passage on which the respondents rely, that the communiqué of 1950 does not constitute recognition of the government of the Federal Republic as the de jure government of all Germany. The right to exercise governing authority includes, in my opinion, the right to set up or maintain courts and the recognition of the one carries with it the recognition, as a source of law, of the decisions of the courts. The right to 'speak for Germany as the representative of the German people in international affairs' is a right of diplomatic representation, which is not coincident with, and does not impinge on, the right of the governing authority in each part of Germany to make and state the law in the part over which it has power. Furthermore, it by no means follows from the fact that the present claim of the Stiftung extends beyond the frontiers of East Germany that the legal question which we are considering is one of international or interzonal concern".

Stellungnahme

1. Zu begrüßen ist es, daß mit diesem Urteil ein erster Schritt der britischen Gerichte auf die Anerkennung von Akten nichtanerkannter Regime

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getan sein dürfte[4]). Lord Wilberforce bezeichnet das Problem ausdrücklich als offen, seine Ausführungen zeigen aber deutlich, daß er einer differenzierten Lösung zuneigt, die die Anerkennung gewisser Hoheitsakte des nichtanerkannten Regimes ermöglicht. Lord Reid ist noch zurückhaltender, will aber eine derartige Lösung auch nicht ausschließen. Daß diese Erklärungen *obiter dicta* sind, heißt nicht, daß sie bedeutungslos wären[5]).

2. Da britische Gerichte in Fragen, die den Status eines Gebietes betreffen, an die Auskunft des Foreign Secretary gebunden sind, mußte das House of Lords davon ausgehen, daß allein die UdSSR *governing authority* im Gebiet der DDR ausüben könne. Wenn das Gericht nicht den unter 1. angedeuteten Weg gehen wollte, so konnte es nur die Existenz der DDR und ihrer Akte überhaupt negieren, wie der Court of Appeal es getan hatte, oder es mußte die gerichtsbekannte Tatsache, daß im Gebiet der nach 1945 von der UdSSR besetzten Zone ein Gebilde existiert, das sich DDR nennt, widerspruchslos in die Erklärung des Foreign Office einfügen. Diesen Weg hat das House of Lords eingeschlagen, indem es die DDR als *organisation subordinate to the USSR* qualifizierte[6]). Hoheitsakte der DDR sind damit in Wahrheit Hoheitsakte der UdSSR. Man kann bezweifeln, ob mit dieser These eine befriedigende Erklärung der Rechtsbeziehungen, in denen die DDR steht, möglich ist[7]). Daß das House of Lords das praktisch allein vernünftige Ergebnis erreicht hat, Akte der DDR-Organe in Großbritannien nicht generell für unbeachtlich zu erklären, ist jedenfalls zu begrüßen.

3. Hinsichtlich der Wirkung der Entscheidung des Bundesgerichtshofes über die Identität der Carl-Zeiss-Stiftung mit Sitz in Heidenheim mit der alten Stiftung mußte das House of Lords vor allem Fragen des internationalen Privat- und Prozeßrechts erörtern, die hier nicht interessieren. Das gilt jedoch nicht für das Argument der Gegner des Appeals, das Urteil des Bundesgerichtshofes verdiene deswegen Beachtung, weil die Rechtsfragen der Carl-Zeiss-Stiftung nach gesamtdeutschem Recht zu entscheiden seien und hierfür allein die Organe der Bundesrepublik zuständig sein könnten. Die Begründung für diese These fanden die Gegner des Appeals in der Erklärung der westlichen Alliierten, wonach die Bundesregierung berechtigt sei "to speak for Germany as the representative of the German people in international affairs". Die Lords haben dieses Argument einstimmig zurück-

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[4]) Vgl. ZaöRV Bd. 25 (1965), S. 522 f.

[5]) Vgl. auch W e n g l e r, JZ 1966, S. 751.

[6]) Daß die Lords auch von *sovereignty* der UdSSR im nach 1945 von ihr besetzten Gebiet sprechen, ist mit der Auskunft des Foreign Office nicht vereinbar, wo nur von *governing authority* in der *zone of occupation* die Rede ist.

[7]) Der Verfasser hofft, demnächst eine größere Arbeit über die völkerrechtliche Stellung von *de facto*-Regimen vorlegen zu können.

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gewiesen. Sie haben sich darauf berufen, daß nach Auskunft des Foreign Secretary diese Erklärung nicht die Anerkennung der Bundesregierung als *de jure*-Regierung Gesamtdeutschlands bedeute. Nachdem sich die Lords einmal für die Möglichkeit der Anwendung des von Organen der DDR gesetzten Rechts entschieden hatten, wäre es erstaunlich gewesen, wenn sie den Gerichten der Bundesrepublik das Recht zuerkannt hätten, mit Wirkung für das Gebiet der DDR Recht zu sprechen. Ob es überhaupt völkerrechtlich möglich wäre, eine derartige Zuständigkeit der Organe der Bundesrepublik anzunehmen, ist zweifelhaft[8]). Es ist aber vor allem nicht ersichtlich, daß die Gerichte der Bundesrepublik eine derartige Kompetenz beanspruchen. Richtigerweise dürfte die Entscheidung des BGH, wonach die Carl-Zeiss-Stiftung, Heidenheim, mit der früher in Jena ansässigen Stiftung identisch ist, nur bedeuten, daß für das Recht der Bundesrepublik diese Identität feststeht.

4. Das House of Lords hat bisher nur festgestellt, daß in Jena eine Carl-Zeiss-Stiftung ihren Sitz hat, die in Großbritannien prozeßfähig ist. Daß ihr alle Rechte der alten Carl-Zeiss-Stiftung zustehen, ist damit noch nicht entschieden. Allerdings scheint es für das House of Lords festzustehen, daß die Carl-Zeiss-Stiftung in Jena mit der alten Stiftung identisch ist. Ob daneben auch eine Identität der Stiftung in Heidenheim mit der alten Stiftung möglich bleibt, ist sehr zweifelhaft, weil das House die Frage der Identität ebenso wie das Schweizerische Bundesgericht nach dem am Sitz der ursprünglichen Stiftung geltenden Recht entscheiden will und danach auch die Zulässigkeit einer Sitzverlegung zu bestimmen sein dürfte[9]). Die Gegner des Appeals hatten demgegenüber vorgetragen, Sitz der Stiftung sei ganz Deutschland gewesen und es sei nicht möglich, die betreffenden Fragen nach dem in Jena geltenden Recht zu entscheiden. Für den Sonderfall der Spaltung einer bisher einheitlichen Rechtsordnung unter den Bedingungen der deutschen Lage nach 1945 scheint es in der Tat zweifelhaft, ob die Anknüpfung an den Sitz hier zu befriedigenden Ergebnissen führen kann. Als Alternative käme die Bestimmung der Identität nach dem Recht beider Teile Deutschlands in Frage, was zur Existenz zweier mit der alten Stiftung »identischer« Stiftungen führen müßte, deren Rechte dann nach angemessenen sachbezogenen Gesichtspunkten gegeneinander abzugrenzen wären. Die andere und wohl glücklichere Möglichkeit wäre die, für die Identitäts-

[8]) Näheres dazu in der Anm. 7 angekündigten Arbeit. Vgl. auch Wengler, JZ 1966, S. 752.

[9]) Die Entscheidung des Schweizerischen Bundesgerichts, JZ 1965, S. 761 ff., prüft die Frage der Identität zwar nicht ausdrücklich. Durch die Anwendung des in Jena geltenden Rechts auf die etwaige Sitzverlegung ergibt sich die Identität der in Jena bestehenden mit der alten Stiftung inzidenter.

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bestimmung einen Strukturvergleich zwischen den rivalisierenden Subjekten anzustellen. Das dürfte bei Gesellschaften, deren Kapital in privater Hand war, möglich sein. Bei Stiftungen ist es schwieriger. Immerhin sind die Stiftungsbetriebe in Jena in einen »Volkseigenen Betrieb« überführt worden, und es wäre zu untersuchen, ob die wohl nur als »Mantel« fortbestehende Stiftung in Jena danach für den englischen Richter noch als identisch mit der alten gelten konnte[10]).

5. Selbst wenn das House of Lords die Identität der Stiftung allein nach dem in Jena geltenden Recht beurteilt, bleibt es durchaus möglich, daß die Richter die Geltendmachung von Rechten der alten Carl-Zeiss-Stiftung durch die heute in Jena ansässige Stiftung deswegen nicht zulassen, weil die wirtschaftliche Substanz der Stiftung in Jena entschädigungslos enteignet worden sei. Darauf hat Lord Reid mit aller Deutlichkeit hingewiesen. Diese Frage wird im jetzt anhängigen Hauptprozeß im Vordergrund stehen. Die besondere Schwierigkeit wird sich hier wieder aus der Rechtsnatur der Stiftung ergeben. Daß eine in der DDR rechtlich fortbestehende Gesellschaft, deren Inhaber entschädigungslos enteignet worden sind, in Großbritannien belegenes Vermögen nicht in Anspruch nehmen könnte, wenn dieses Vermögen gleichzeitig von den früheren Inhabern der Gesellschaft beansprucht wird, dürfte für den englischen Richter wie für die Richter der meisten Staaten mangels besonderer Regelungen die angemessenste Lösung sein[11]).

Jochen Frowein, Bonn

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[10]) Wengler, JZ 1965, S. 766, stellt zutreffend fest, daß auch dem Schweizerischen Bundesgericht diese wichtige Frage entgangen ist. Ebenso Schaumann, Entschädigungslose Konfiskationen vor dem Schweizerischen Bundesgericht, Schweizerische Juristenzeitung, Bd. 62 (1966), S. 33, 41. Vgl. auch Wengler, JZ 1966, S. 752.

[11]) Vgl. dazu etwa Mann, Die Konfiskation von Gesellschaften, Gesellschaftsrechten und Gesellschaftsvermögen im internationalen Privatrecht, Rabels Zeitschrift für ausländisches und internationales Privatrecht, Bd. 27 (1962), S. 1, 25 ff., 31; Schaumann, a. a. O.; Seidl-Hohenveldern, Internationales Konfiskations- und Enteignungsrecht (1952); der niederländische Hoge Raad hat kürzlich keine Bedenken gehabt, die Vertretung einer in der DDR unter Zwangsverwaltung gestellten ausländischen Firma durch die eingesetzten Zwangsverwalter zuzulassen, Nederlands Tijdschrift voor International Recht, Bd. 13 (1966), S. 203 ff. Er hat die Zwangsverwaltung nicht als konfiskatorischen Eingriff angesehen, was bedenklich erscheint, da die Verordnung über die Verwaltung und den Schutz ausländischen Eigentums in der DDR vom 6. 9. 1951 (Gesetzblatt S. 839) die Berechtigten von jedem Einfluß auf das Unternehmen sowie von einer Beteiligung am Gewinn ausschließt.

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Summary

The Decision of the House of Lords in the Case «Carl-Zeiss-Stiftung v. Rayner & Keeler Ltd. and others» (N. 2)

1. The dicta of Lords Reid and Wilberforce might be the first steps towards the application of the law of non-recognised regimes in the English courts in specific cases. 2. Since the Lords were bound by the certificates of the Foreign Secretary they had to ask how the existence of the DDR can be combined with the jurisdiction of the USSR recognised by the certificates. They found a way by holding the DDR a subordinate organisation of the USSR. 3. It seems to follow therefrom that the courts of the Federal Republic are not entitled to decide upon the law in the area under the jurisdiction of the USSR. The courts of the Federal Republic do not seem to claim such a competence. 4. Apparently the House of Lords considers the existence of a Carl-Zeiss-Stiftung in Jena, the old domicil of the Carl-Zeiss-Stiftung, as sufficient basis for the decision that this *Stiftung* in Jena is identic with the old one. Since there is another Carl-Zeiss-Stiftung in the Federal Republic claiming identity with the old one it would seem proper not only to rely on the old domicil, which must lead to unreasonable results in the situation of the German separation. As alternative one should consider: the possibility of recognising two *Stiftungen*, each one identic with the old one for one area of jurisdiction in Germany; the better way seems to be, however, to decide the question of identity after a comparison of the structure of the rival-Stiftungen with the old one. One wonders if tle *Stiftung* in Jena, whose enterprises are socialised, can be compared with the old Carl-Zeiss-Stiftung. 5. Even if the House of Lords sees the *Stiftung* in Jena as the only one identic with the old *Stiftung* it is by no means certain that this one can claim the rights of the old *Stiftung* in England. Lord Reid has expressly mentioned the possibility that English courts could decide against the *Stiftung* in Jena because they will not assist the enforcement of foreign confiscatory laws. This question will be the main issue at the trial of the action now pending.

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