

STUDIEBOG I

International Ret

EN SAMLING AF RETSAFGØRELSE
OG ANDET MATERIALE
TIL BRUG FOR UNDERVISNINGEN I FOLKERET
OG INTERNATIONAL PRIVATRET

2. udgave – 2. oplag

UDGIVET AF
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AF FORORDET TIL 1. UDGAVE

Som bekendt foregår den juridiske undervisning i U.S.A. for en stor del efter andre metoder end her til lands. Siden Langdell i 1871 offentliggjorde den første *case-book*, *A Selection of Cases on the Law of Contracts*, har *case*-metoden spillet og spiller stadig en fremtrædende rolle i undervisningen i Amerika. Kortest kan man måske sige, at den går ud på som grundlag for undervisningen at trykke det vi her på kontinentet plejer at putte ned i noter: Retsafgørelserne. Tanken er, at studenten ved at tilegne sig disse, udvalgt og ordnet efter hensigtsmæssige principper, skal have lejlighed til på egen hånd og gennem diskussion at se, hvorledes de retlige doktriner vokser frem som generaliseringer af en række konkrete afgørelser. Selvom hver enkelt af disse indenfor et vist problemområde er bundet til sine ganske konkrete sagforhold, er det dog muligt at tyde dem som forbundne gennem et ledende synspunkt, der ligesom vokser frem af enkeltafgørelserne og samtidig forfines, brydes og nuanceres ved stadig at konfronteres med ny livskonstellationer. Det er som om de mange afgørelser, skønt hver for sig particulære, ensidige og brudstykkemæssige, dog tilsammen afspejler en fælles retstanke. Sådan er retsreglerne — i de angelsaksiske lande — vokset frem, og efter samme mønster ønsker man, at studenten gennem *case*-metoden skal vinde frem til forståelse af retten og fortrolighed med dens teknik.

En sådan metode er særligt begrundet i lande, hvor retten som *Common Law* er vokset frem gennem *cases*. Men den har desuden store pædagogiske fortrin. Den er gennem sin appel til selvvirksomhed i overensstemmelse med de krav psykologen stiller til en læreproces. Dens stof er interessantere end dogmerne i deres nøgne abstrakthed og mere prægnant for hukommelsen. Og studenten opnår gennem denne metode en fortrolighed med den juridiske metode han ellers kun vanskeligt ville kunne tilegne sig.

Desværre er der flere omstændigheder — især den udstrakte kodificering af retten og den måde, hvorpå vore domme traditionelt affattes — der udelukker, at denne metode i almindelighed kan bringes til anvendelse i vore lande. Men på eet område, ihvertfald, er vi ikke anderledes stillet end andre: Folkeretten.

Denne studiebog (*case-book*) er da et forsøg på at skabe et nyt grundlag for undervisningen i dette fag. Jeg er klar over, at det er et eksperiment — og et vanskeligt eksperiment. For undervisningen efter denne metode stiller krav såvel til lærer som til elev, som ingen af os er trænete i at honorere.

Ved udvalget af retsafgørelserne har udgiverne lagt mere vægt på pædagogiske hensyn end på at samle, hvad der kan gælde som *leading cases*. Ud over retsafgørelser er der iøvrigt medtaget andet materiale — traktatbestemmelser, love, diplomatiske aktstykker o. lign. — der kan være egnet til at belyse de mellemfolkelige retsforhold.

Case-metoden har også sin begrænsning. Står den alene, kan det let komme til at skorte på oversigt, syntese og drøftelse af visse begreber og problemer, der kan være af betydning for den systematisk-videnskabelige bearbejdelse af retsstoffet, men som kun sjældent manifesterer sig i retsafgørelserne. Denne mangel — der ikke mindst ud fra vore retsvidenskabelige traditioner må anses for en mangel — afspejler sig i det forhold, at de nyere amerikanske *case-books* i stigende grad forsynes med indskudte, omfattende *editor's notes*, der giver en supplerende teoretisk oversigt og bearbejdning, der i mangt og meget svarer til, hvad der ydes i vore lærebøger. Når sådanne noter dog ikke findes i denne bog er det, fordi den fornødne teoretiske støtte allerede eksisterer i den foreliggende lærebog. Hvorledes iøvrigt forholdet mellem lærebogen og nærværende bog skal udformes, hvad der skal være det primære og hvad det sekundære, må det overlades til erfaringen at afgøre.***

København, september 1954.

Alf Ross

FORORD TIL 2. UDGAVE

Erfaringerne fra universitetsundervisningen i det tiår der er forløbet siden udgivelsen af denne bogs 1. udgave har tilfulde bekræftet at der er brug for en lærebog af denne type. Vi har derfor fundet det hensigtsmæssigt, samtidig med at foranstalte en ny udgave, at udvide bogen til også at omfatte en anden beslægtet disciplin, den internationale privatret.

Bogens 1. afdeling omfatter folkeretten. Der er foretaget en fuldstændig revision af stoffet for hvilken undertegnede Ross er ansvarlig. En betydelig del af det oprindelige materiale er udeladt, medens på den anden side adskilligt nyt stof er indføjet. Det ledende synspunkt for revisionen har været det pædagogiske: at udskille materiale der i undervisningen har vist sig mindre egnet eller påkrævet, og erstatte det med stof der bedre tjener bogens formål. Desuden er der naturligvis optaget nyere retsafgørelser og traktatbestemmelser egnet til at belyse den udvikling der har fundet sted i folkeretten i det sidste decennium.

Bogens 2. afdeling omfatter den internationale privatret. Den er i hovedsagen bygget op efter systematikken i O. A. Borum, Lovkonflikter 4. udg., og tænkes anvendt sammen med denne bog. Udvalget af studiemateriale, for hvilket undertegnede Philip er ansvarlig, er dog til dels sket uafhængigt af de i Lovkonflikter citerede afgørelser m. m., idet materialet er valgt for dets pædagogiske, snarere end for dets dokumentariske værdi. Jeg er mine medudgivere tak skyldig, fordi de har givet mig mulighed for at udvide studiebogen med et international privatretlig afsnit.

Nordiske samt engelske og tyske og nogle enkelte franske aktstykker er gengivet på originalsproget, andre aktstykker i oversættelse, normalt til dansk, undtagelsesvis har vi kunnet benytte en allerede foreliggende oversættelse til engelsk. Vi takker udgiveren af *International Law Reports*, Mr. E. Lauterpacht, for

velvillig tilladelse til at citere den ikke tidligere offentliggjorte afgørelse i sag nr. 108 (*Mergé Claim*) efter den i omtalte Reports for 1955 bragte oversættelse.

Redaktionelle indskud er angivet ved skarp parentes, redaktionelle udeladelser ved tre stjerner, medens tre prikker angiver udeladelser overtaget fra det originale dokument.

Sagerne er nummereret i den rækkefølge hvori de nu forekommer. I indholdsfortegnelsen er, for så vidt angår sager overtaget fra 1. udgave, tillige i parentes angivet sagens nummer i bogens 1. udgave. Dette er sket for at gøre det lettere at følge de henvisninger til Studiebogen der forekommer i Lærebogen i Folkeret.

København, januar 1964.

Alf Ross

Isi Foighel

Allan Philip

Indhold

1. AFDELING: FOLKERET

Kapitel I

FOLKERETTENS NATUR

1 (5).	Reparation for Injuries suffered in the Service of the United Nations	1
2 (3).	Pariserfredstraktaten af 30. marts 1856, art. 15, 16 og 17	2
3 (4).	Berlinertraktaten af 13. juli 1878, art. 53	5
4.	Treaty establishing the European Coal and Steel Community signed in Paris on April 18, 1951	5
5.	Danmarks Riges Grundlov, Lov Nr. 169 af 5. Juni 1953	7
6.	Effect of awards of compensation made by the U.N. Administrative Tribunal	7
7 (6).	Nürnbergdommen	10
8 (7).	Klingesaken	17
9.	Convention of the High Seas	23
10.	Konvention om forebyggelse af og straf for folkedrab	23
11 (8).	De Forenede Nationers pagt, art. 24 og 25	24
12 (11).	Russian Socialist Federated Soviet Republic v. Cibrario	25
13.	Regazzoni v. K. C. Sethia (1944) Ltd.	25

Kapitel II

FOLKERET OG INTERN RET

A. For nationalt forum: Sædvaneret.

14 (12).	Nogle forfatningsbestemmelser vedrørende inkorporation af almindelig folkeret	27
15 (13).	Mortensen v. Peters	27
16 (15).	Polites v. The Commonwealth and Another; Kandiliote v. The Commonwealth and Another	29
17 (18).	Julius F. Schierbechs Eftf. mod Københavns Byrets fogedafdeling II	33

B. For nationalt forum: Traktatsret.

18 (19).	Nogle forfatningsbestemmelser vedrørende automatisk transformation af traktater: De Forenede Stater, Frankrig	33
19 (20).	Missouri v. Holland	34
20 (21).	Indemnity Insurance Company of North America v. Pan-American Airways Inc. et al.	37
21 (24).	Imperial Estates Case	38
22 (25).	Grosserer H. G. Hansen mod Generaldirektoratet for Statsbanerne	39
23 (26).	Kotzias v. Tyser	42
24.	Lovbestemmelser om anticerperet transformation	43

C. For internationalt forum.

25 (27).	Case concerning the Payment of various Serbian Loans issued in France; Case concerning the Payment in Gold of the Brazilian Loans issued in France	44

Kapitel III

FOLKERETTENS KILDER

26 (29).	Statut for den Internationale Domstol, art. 38 og 39	49
27 (30).	The Case of the S. S. "Lotus"	49
28 (31).	Giesler gegen Giesler Erben	60
29 (32).	Eastern Extension Telegraph Co. v. United States	60
30 (33).	Colombian-Peruvian Asylum Case	64
31 (34).	De Forenede Nationers Pagt, art. 2 (6) og 103 samt 108	69
32.	Traktat om forbud mod kernevåbenforsøg i atmosfæren, det ydre rum og under vandet	70

Kapitel IV

FOLKERETTENS SUBJEKTER

A. Stater og statsforbindelser.

33 (36).	Parisertraktaten af 30. marts 1856, art. 7	71
34 (38).	Convention on Rights and Duties of States, art. 1	71
35 (39).	Statut for den Internationale Domstol, art. 34	71
36 (40).	Philip C. Jessups udtalelse i sikkerhedsrådet angående Israels optagelse som medlem af de Forenede Nationer 2. december 1948	71
37.	De Forenede Nationers 111 medlemslande, aug. 1963	73
38.	Schweizisk Forbundsforfatning af 1874 med senere ændringer	74
39 (42).	Abbagnato-affæren	75
40 (43).	Statham v. Statham and Gaekwar of Baroda	79
41 (44).	Dansk-Islandsk forbundslov af 30. november 1918	81
42.	Folkeforbundspagten	82
43.	De Forenede Nationers Pagt, art. 73	83
44.	Mandater og formynderskabsområder	84

B. Det lokale oprørsparti.

45 (45).	The Arantzazu Mendi	85
46.	Luigi Monto of Genoa v. Cechofracht Co. Ltd.	88

C. Den katolske kirke.

47 (48).	Lateranoverenskomsten af 11. februar 1929, art. 2, 3 og 4	88
48 (49).	Gustave Gaultier et al	88

D. Individet.

49 (50).	Nürnbergdommen	90
50 (51).	Klingesaken	90
51 (52).	Washingtonkonventionen af 20. december 1907, art. 1, 2 og 3	91
52 (53).	Versaillestraktaten af 28. juni 1919, art. 297	91
53.	Konvention til beskyttelse af menneskerettigheder og grundlæggende frihedsrettigheder	91

Kapitel V

ANERKENDELSE AF STATER OG REGERINGER

A. Anerkendelse i staternes praksis.

54 (55).	Meddelelse fra udenrigsministeriet af 9. januar 1950 om Danmarks anerkendelse af centralregeringen for den kinesiske folkerepublik	94
55 (56).	Uddrag af noteveksling mellem de Forenede Stater og Sovjetunionen af 16. november 1933	94

56 (57). Engelsk udtalelse om anerkendelse	95
57 (58). Amerikansk udtalelse om anerkendelse	96
58 (59). Udenrigsminister Stimson's note til Japan og Kina af 7. januar 1932 ..	97
59 (60). Folkeforbundsforsamlingens resolution af 11. marts 1932	97
60 (61). Washingtonkonventionen af 7. februar 1923	98
61 (62). Republic of China v. Merchants' Fire Assurance Corporation of New York	98
62. U.S. Policy on Nonrecognition of Communist China	99
<i>B. Anerkendelse for internationalt forum.</i>	
63 (65). The Tinoco Concessions	102
<i>C. Anerkendelse for nationalt forum.</i>	
<i>(1) Anerkendelsens bevismæssige betydning.</i>	
64 (66). Duff Development Co., Ltd. v. Government of Kelantan	107
65. Luigi Monta af Genoa v. Cechofracht Co. Ltd.	110
<i>(2) Den ikke-anerkendte stat (regering) som sagsøgt.</i>	
66 (68). Wulfsohn v. Russian Socialist Federated Sovjet Republic	112
67 (69). Felipe Campuzano mot Den spanske regering	114
<i>(3) Den ikke-anerkendte stat (regering) som sagsøger.</i>	
68 (70). Russian Socialist Federated Soviet Republic v. Cibrario	116
69 (71). Russian Trade Delegation in Turkey v. Levant Red Sea Coal Company and Others	120
<i>(4) Gyldigheden af den ikke-anerkendte stats (regerings) retsakter.</i>	
70 (72). Luther v. James Sagor & Co.	120
71 (73). Sokoloff v. National City Bank	124
<i>(5) De facto og de jure anerkendelse.</i>	
72 (74). The Arantzazu Mendi	127
73 (75). Haile Selassie v. Cable and Wireless, Ltd. (no. 2)	128

Kapitel VI

STATSSUCCESSION OG STATSKONTINUITET

<i>A. Traktatmæssige forpligtelser og rettigheder.</i>	
74 (76). Terlinden v. Ames	130
75 (78). Einverleibungsurteil	133
<i>B. Gældsforpligtelser.</i>	
76 (79). Wienerfreden af 30. oktober 1864	134
77 (80). Versaillestraktaten af 28. juni 1919	134
78 (81). Fiji-øernes gæld	135
79 (83). Kubas gæld	136
80 (84). Udtalelse af Sir Robert Phillimore, Law Officer of the Crown, 1867 ..	137
<i>C. Statsformuen.</i>	
81 (85). Fredstraktat med Italien af 1947	139
82 (86). Haile Selassie v. Cable and Wireless, Ltd. (no. 2)	140
83. Schwerdtfeger mod den danske regering, "Rønghavedommen"	141
<i>D. Statsborgerforhold.</i>	
84 (90). Fall des Grafen Platen-Hallermund	141
<i>E. Revolutionær omvæltning.</i>	
85 (91). Peru-Dreyfus affæren	142

Kapitel VII

STATSTERRITORIET

A. Suverænitet og territorialhøjhed.

86 (100).	The Fama	144
87 (102).	The Foltina	146
88.	The Minquiers and Ecrehos Case	147
89.	Case Concerning Sovereignty Over Certain Frontier Land	151

B. Territoriets bestanddele og udstrækning.

90.	Convention on the Territorial Sea and the Contiguous Zone	155
91 (97).	Convention on the Continental Shelf	157
92.	Convention on Fishing and Conservation of the Living Resources of the High Seas	158
93.	Convention on International Civil Aviation	159
94 (94).	Fisheries Case	159
95.	Nogle danske lovbestemmelser om søterritoriets udstrækning og tilstødende zone	167
96 (98).	Kgl. anordning nr. 356 af 25. juli 1951 om fremmede krigsskibes og militære luftfartøjeys adgang til dansk område under fredsforhold ..	167
97 (99).	Regina v. Anderson	168

C. Erhvervelse og fortabelse af territorium.

98 (100).	The Fama	169
99 (101).	Rønnavedømmen	169
100 (102).	The Foltina	171
101 (104).	Østgrønlands retsstilling	171
102 (105).	Sovjetrussisk erklæring om Antarktis, 1926	178

Kapitel VIII

STATSBEFOLKNINGEN

103 (106).	Haag-konventionen af 12. april 1930	179
104 (108).	Mexiko, forfatningen af 1857, art. 30	179
105 (109).	Mexiko, fremmedlov af 1886	179
106.	Nottebohm Case	180
107 (110).	Haag-konventionen af 12. april 1930, art. 3, 4 og 5	186
108.	Mergé Claim	186

Kapitel IX

TERRITORIALHØJHEDEN

109 (113).	The Case of the S.S. "Lotus"	191
110 (114).	Kämpfer gegen Zürich, Staatsanwaltschaft	191
111 (115).	Miko Jung et al. v. Rokusaburo Novaya	193
112 (116).	The Caroline Incident	194

Kapitel X

TERRITORIALHØJHEDENS BEGRÆNSNINGER:
DEN KVALIFICEREDE FREMMEDRET (EKSTERRITORIALITET)

113.	Convention on Diplomatic Relations	195
114 (122).	Statham v. Statham and Gaekwar of Baroda	199
115 (125).	Rex v. Rose	199

Kapitel XI

TERRITORIALHØJHEDENS BEGRÆNSNINGER:
DEN ALMINDELIGE FREMMEDRET*A. Civilisationens mindstekrav.*

116.	Konvention om beskyttelse af menneskerettigheder og grundlæggende frihedsrettigheder	204
117 (130).	Nogle danske lovbestemmelser om udlændinges retsstilling	204
118 (131).	Cutting-sagen	209
119 (132).	Neer Claim	212
120 (133).	Case of Sambiaggio	214
121 (134).	Youmans Claim	216
122 (135).	Abbagnato-affæren	220
123 (136).	De meksikanske landbrugssekspropriationer	221
124.	Resolution on Permanent Sovereignty over Natural Resources	224

B. Militærtjeneste.

125.	Lov om værnepligt nr. 210 af 11. juni 1954	225
126 (138).	Polites v. The Commonwealth and Another Kandilote v. The Commonwealth and Another	225

C. Respekt for fremmed ret og fremmede retsakter.

127 (139).	Luther v. James Sagor & Co.	225
128 (140).	Bánská a Hutní Společnost, Prag, mod Dr. Hahn, Rio de Janeiro, m. fl.	225
129.	Regazzoni v. K. C. Lethia (1944) Ltd.	226
130 (144).	The Case of the S.S. "Lotus"	226
131 (145).	Cutting-sagen	226
132 (142).	Borgerlig straffelov af 15. april 1930	226

Kapitel XII

TERRITORIALHØJHEDENS BEGRÆNSNINGER:
SÆRLIGE REGLER OM SKIBE

133.	Convention on the Territorial Sea and the Contiguous Zone, Wien 1958	228
134 (147).	Kgl. anordning nr. 356 af 25. juli 1951 om fremmede krigsskibes og militære luftfartøjers adgang til dansk område under fredsforhold	230
135 (151).	Anordning nr. 290 af 15. november 1932 om påtale af strafbare handlinger begåede om bord i fremmede fartøjer på dansk område	231
136 (152).	The Wildenhus' Case	232
137 (153).	Regina v. Anderson	236

Kapitel XIII

HAVETS FRIHED

138.	Convention on the High Seas, Wien 1958	237
139 (155).	The Grace and Ruby	238
140 (157).	Helsingforskonventionen af 19. august 1925	241

Kapitel XIV

TERRITORIALHØJHEDENS BEGRÆNSNINGER:
STATERNES GRUNDRETTIGHEDER*A. Intervention og anslag mod statens sikkerhed.*

141 (160).	Monroe-doktrinen	242
142 (161).	De Forenede Nationers pagt, art. 2 (4) og 2 (6)	244

XIV

INDHOLD

143 (162).	Uddrag af noteveksling mellem de Forenede Stater og Sovjetunionen af 16. november 1933	244
144 (163).	Emperor of Austria v. Day and Kossuth	245
	<i>B. Anslag mod Statens ære.</i>	
145 (164).	Aksel Larsen sagen	249
146 (165).	Borgerlig straffelov af 15. april 1930	249
	<i>C. Statens immunitet.</i>	
	<i>(1) Hvem kan gøre krav på immunitet?</i>	
147 (168).	Wulfsohn v. Russian Socialist Federated Sovjet Republic	250
148 (169).	Ulen & Co. v. Bank Gospodarstwa Krajowego	250
	<i>(2) Immunitetens omfang, betingelser og begrænsninger.</i>	
149 (171).	Duff Development Co., Ltd. v. Government of Kelantan	252
150 (173).	The Cristina	252
151 (175).	Lov om fremmede statsskibe m. v. nr. 198 af 16. maj 1950.. .. .	257

Kapitel XV

TRAKTATER

A. Traktaters gyldighed.

152 (176).	Nogle forfatningsbestemmelser vedrørende traktater: Danmark, Norge	259
153 (177).	De Forenede Nationers pagt, art. 110, 1	259
154 (178).	Østgrønlands retsstilling	260
155 (179).	De Forenede Nationers pagt, art. 102 (1) og (2)	260

B. Traktaters ratifikation og ikrafttræden.

156 (180).	Nogle fuldmagts- og ratifikationsdokumenter	260
157 (181).	Kotzias v. Tyser	264
158 (182).	The Eliza Ann	264
159.	Case concerning the arbitral award made by the King of Spain	266
160 (184).	Om forbehold ved ratifikation af mangesidede traktater	266

C. Traktaters retsvirkning i forhold til den interne ret.

Se ovenfor kapitel II.

D. Traktaters retsvirkning i forhold til trediestat.

161 (185).	The Free Zones of Upper Savoy and the District of Gex	268
162 (186).	Versaillestraktaten af 28. juni 1919	269
163 (187).	Pragerfreden af 23. august 1866	269
164 (188).	De Forenede Nationers pagt, art. 2 (6) og 103	270

E. Traktaters ophør

165 (190).	The Free Zones of Upper Savoy and the District of Gex	270

Kapitel XVI

DET FOLKERETLIGE RETSBRUD OG ANSVAR

A. De objektive retsmæssighedsgrunde.

166 (193).	The Caroline Incident	271
167 (194).	Naulilaa-affæren	273
168 (195).	Le Carthage	276
169 (196).	De Forenede Nationers pagt	277

B. Hvilke handlinger henregnes til staten?

170 (197).	Gust Adams Claim	277
171 (198).	G. P. Massey Claim	279

172 (199). The Case of the S.S. "Lotus"	283
173 (200). Cutting-sagen	283
174 (201). Case of Sambiaggio	283
175 (202). Youmans Claim	283
<i>C. Culparegel eller objektivt ansvar?</i>	
176 (203). Costa Rica Packet Incident	284
177 (204). The Kling Claim	288
178 (205). The W. A. Noyes Claim	291
179 (206). The Walwal Incident	293
<i>D. Middelbar hæftelse.</i>	
180 (208). Abbagnato-affæren	294
<i>E. Hvem kan gøre ansvar gældende?</i>	
181 (209). Administrative Decision no. 5	294
182. Interhandel Case	296
183 (211). The Tinoco Concessions	299
184 (214). Abbagnato-affæren	299
<i>F. Hvori består ansvaret?</i>	
185 (215). Laura M. B. Janes Claim	299

Kapitel XVII

BILÆGGELSE AF TVISTER MELLEM STATER

186 (217). Lehigh Valley Railroad Company & Others v. Germany	305
187. Case concerning right of passage over Indian territory (Portugal v. India)	309
188. Case of certain Norwegian loans (France v. Norway)	310
189. Case concerning right of passage over Indian territory (Portugal v. India). Preliminary objections	312

2. AFDELING: INTERNATIONAL PRIVATRET

Kapitel XVIII

DEN INTERNATIONALE PRIVATRETS FUNKTION

A. Kollisionsnormer.

190. Lov om ægteskabets retsvirkninger § 53	319
191. Veksellov §§ 79—86	319
192. Nordisk konvention om arv og dødsboskifte art. 1, stk. 1	319
193. Einführungsgesetz zum Bürgerlichen Gesetzbuche	319

B. Metoden.

194. Irma-Mignon sagen	320
195. A mod B	321
196. Eos-sagen	321
197. Kaj Hansen mod A/S Columbosemballage	322
198. Kurt Persson mod fa. Brdr. Jørgensen	322

C. Anvendelsesproblemer (Kvalifikation).

199. Brewitt & Dieckmeyer mod R. B. Jespersen	322
200. C. Carlstein mod Ingeborg Carlstein	323

XVI

INDHOLD

201. M/S Ostmarks rederi mod A/S Lorentz Nilssen	326
202. Venstres Ungdoms Rejseklub m. fl. mod chauffør Ejnar Larsen m. fl.	328
203. Harnischknyttter Adolf Zimmerbeutel mod I/S Alfred Berg	328
204. Haagerkonventionen 1960 vedrørende lovkonflikter med hensyn til testamentariske dispositioners form, art. 5	329

Kapitel XIX

DOMSTOLENES ANVENDELSE AF FREMMED RET

205. Bagermester H. P. Sørensen som tilsynsværge for Ana Luisa Pedersen Kielmann mod Frederiksberg Birks Skifteret m. fl.	330
206. Skibscapitain Bartlett mod F. Tutein & Co.	332
207. Skibscapitain A. J. Bakker mod N. Ammitzböll	332
208. Retsplejelovens § 293, stk. 2	333
209. F mod M	333
210. Veksellov § 87	333
211. A/S Det Sibiriske Kompagni mod A/S Københavns Handelsbank og Ahlmann & Boysen	333
212. M/S Hika mod m/s Merita	335

Kapitel XX

ORDRE PUBLIC

213. Eos-sagen	337
214. Retsplejelovens § 223 a	337
215. Nordisk domskonvention art. 12	337
216. Banská a Hutni Spolecnost mod Dr. Georg Heinrich Hahn	337
217. Vereeniging voor den Effectenhandel te Amsterdam mod Finansministeriet	337
218. Stefan Eismann mod A/S Københavns Bryggerier og Malterier Hafnia, Hoved-intervenant: Dresdner Bank, litis denunciatus: Firma Ludvig Eismann, Nürnberg	338
219. S. Bondy mod Edv. Poulsen	340
220. M mod H	342
221. Haagerkonvention 1951 til regulering af konflikter mellem den nationale lov og domicilloven. Art. 6	343
222. Haagerkonvention 1956 angående den på underholdsforpligtelser overfor børn anvendelige lov. Art. 4	343
223. Srinivasa v. Srinivasa	343

Kapitel XXI

RENVOI

224. Dina Soldath mod Emilie Topp m. fl.	344
225. Eos-sagen	344
226. Veksellov § 79, stk. 1, 2. pkt.	344
227. Haagerkonvention 1951 til regulering af konflikter mellem den nationale lov og domicilloven	344

Kapitel XXII

DOMICIL

228. Poul Erik Bentzen mod Emmy Karla Bentzen	346
229. Emmy Karla Bentzen mod Poul Erik Bentzens dødsbo m. fl.	349

230. Ellen Elisabeth Kirsten Wittrup Fischer mod Erik Fritz Emil Fischer	349
231. Nordisk konvention om ægteskab, adoption og værgemål, art. 1, stk. 1	351
232. Nordisk konvention om arv og dødsboskifte, art. 1, stk. 1	352
233. Statsskattelov	352
234. Haagerkonvention 1951 til regulering af konflikter mellem den nationale lov og domicilloven, art. 5	352
235. Konvention af 28. september 1954 om statsløse personers retsstilling	352
236. Restatement of the Law of Conflict of Laws. 1934	352

Kapitel XXIII

PERSONRETTE

237. Gebrüder Wiener, Hamborg, mod J. J. Kappen	354
238. Sophus Mortensen mod Leif Bloch Schrøder	355
239. M. Hansen mod W. Sørensen	356
240. Veksellov § 79	356
241. Lov om ægteskabets retsvirkninger § 53, stk. 1	356
242. Myndighedsloven § 67	357
243. Nordisk konvention om ægteskab, adoption og værgemål, art. 14—21	357

Kapitel XXIV

ÆGTESKABS INDGÆLSE OG OPLØSNING

244. Ingeborg Hussein-Zade Ibragimouff, født Pedersen, mod Sally Hussein-Zade Ibragimouff	358
245. Srinivasa Vasan mod Srinivasa Vasan	360
246. Nordisk konvention om ægteskab, adoption og værgemål, art. 1—2 og 7—10	362

Kapitel XXV

ÆGTESKABS RETSVIRKNINGER

247. Lov om ægteskabets retsvirkninger, § 53	363
248. Gerhard Christoffersen mod Sonja Christoffersen	363
249. Ellen Elisabeth Kirsten Wittrup Fischer mod Erik Fritz Emil Fischer	364
250. Nordisk konvention om ægteskab, adoption og værgemål, art. 3—5	364

Kapitel XXVI

BØRNS RETLIGE STILLING

A. Ægte Børn.

251. Bagermester H. P. Sørensen som tilsynsværge for Ana Luisa Pedersen Kiel- mann mod Frederiksberg Birks Skifteret m. fl.	365
252. F mod M	365

B. Børn udenfor Ægteskab.

253. Harry Alfred Emil Svendsen mod Johan Martin Theodor Schultz som for- myndet for Karl Heinz Brehme	366
254. M mod F	367
255. A mod B	368
256. Haagerkonventionen 1956 angående den på underholdsforpligtelser overfor børn anvendelige lov	372

C. Adoption

257. Boet efter fhv. oversergent Einar Søren Christoffer Knudsen	373
258. Nordisk konvention om ægteskab, adoption og værgemål, art. 11—13	376

Kapitel XXVII

ARVERET OG DØDSBOSKIFTE

A. Skifterettens Kompetence.

259. Emmy Karla Bentzen mod Poul Erik Bentzens dødsbo m. fl.	377
260. Skiftelovens § 87	380
261. Boet efter Simon Christensen	380
262. Nordisk konvention om arv og dødsboskifte	381

B. Legal Arveret.

263. Boet efter Hans Jensen Hansen	382
264. Nordisk konvention om arv og dødsboskifte, art. 1—7	382

C. Testaments Arveret.

265. Dina Soidath mod Emilie Topp m. fl.	382
266. Haagerkonventionen 1960 angående lovkonflikter i spørgsmål om testamen- tariske dispositioners form	385
267. Veksellov §§ 80 og 85	386
268. Jens Foss Christian Steenbergs dødsbo	386
269. Boet efter fhv. oversergent Einar Søren Christoffer Knudsen	388
270. Nordisk konvention om arv og dødsboskifte	388

Kapitel XXVIII

TINGSRETTE

271. Nordisk konkurskonvention	391
272. Nordisk konvention om arv og dødsboskifte	391
273. Reno Press v/ fru Anna Larsen mod Joachim Scheinhuber	392
274. Luther v. James Sagor & Co.	393
275. Bánská a Hutní Společnost, národní podnik, Prag, mod dr. Georg Heinrich Hahn m. fl.	393
276. USSR's Handelsrepræsentation i Danmark og Narva Flachs Manufactur vormals Flachs-Spinnerei Baron A. L. Stieglitz A.G. m. fl. mod Narva Flachs Manufaktur A/S og Peter Pelzer	396

Kapitel XXIX

KONTRAKTSSTATUTET

277. Thordur Einarsson, Island, mod Jacob Dahl	404
278. Checklov, § 61	406
279. Harnischknytter Adolf Zimmerbeutel, Wuppertal-Barmen, mod I/S Alfred Berg	406
280. Colcombet F.s. & Cie., St. Etienne, mod Hugo Brammer	407
281. Assurance-Compagniet Baltica A/S mod M. J. Vermaas Scheepvaart Bedrijf, Rotterdam	409
282. Kaj Hansen mod Columbus-emballage A/S	410
283. August Søderberg mod Københavns Telefon-Aktieselskab	411
284. Vereeniging voor den Effectenhandel te Amsterdam mod Finansministeriet	417
285. Kurt Persson, Malmø, mod Brdr. Jørgensen	418
286. Egil Blix m. fl. mod kaptajn Millward som forer af S/S Arctic Queen ..	420

287. A/S Det Sibiriske Kompagni mod A/S Københavns Handelsbank og Ahlmann & Boysen	422
288. Haagerkonvention 1951 om den på internationale køb af løsøre anvendelige lov	423

Kapitel XXX

FULDMAGT

289. Aktiebolaget Landéns hissar i Stockholm mod Hj. Hein & Møller-Holst ..	424
290. International Law Association. Udkast 1952 til konvention om international privatretlige regler om fuldmagt ved internationale køb af løsøre	425

Kapitel XXXI

ERSTATNINGSRETEN

291. S/S Willies ejer O. Lundquist mod A/S Dampskibsselskabet Vesterhavet ..	426
292. Eos-sagen	426
293. Irma-Mignon sagen	426
294. Harnischknytter Adolf Zimmerbeutel mod I/S Alfred Berg	426
295. Venstres Ungdoms Rejseklub m. fl. mod Ejnar Larsen, A. J. Thomsen m. fl.	428
296. Singergas A/S mod N. Th. Andersen	430

Kapitel XXXII

VÆRNETING

297. Soldatens og Orlogsgastens Fond mod Vagn Egeriis	431
298. B.M.C. Ltd. A/S mod Aktiebolaget Örebro Skjortfabrik	431
299. A/S Ferrosan mod Carl Dettel Feddersen	433
300. Retsplejeloven. §§ 236, stk. 2, 248, 448 d, 456 a og b	434

Kapitel XXXIII

ANERKENDELSE OG FULDBYRDELSE AF DOMME

301. Peter Nicolaysen mod August Weiss	435
302. Clarice Unna Tønnesen, Johannesburg, mod Rasmus Modeweg Tønnesen ..	436
303. M mod H	438
304. Retsplejelov, §§ 223 a og 479	438
305. Kgl. anordning nr. 148 af 13. april 1938	438
306. Nordisk konvention om anerkendelse og fuldbyrdelse af domme	439
307. Nordisk konvention om ægteskab, adoption og værgemål, art. 22	439
308. Nordisk konvention om arv og dødsboskifte	439

Refererede retsafgørelser

1. AFDELING: FOLKERET

Abbagnato-affæren	75
Administrative Decision No. 5	294
Aksel Larsen sagen	249
Arantzazu Mendi, The	85
Arbitral award made by the King of Spain, Case concerning	266
Caroline Incident, The	271
Carthage, Le	276
Colombian-Peruvian Asylum Case	64
Costa Rica Packet Incident	284
Cristine, The	252
Cutting-sagen	209
Duff Development Co., Ltd. v. Government of Kelantan	107
Eastern Extension Telegraph Co v. United States	60
Effect of awards of compensation made by the U.N. Administrative Tribunal	7
Einverleibungsurteil	133
Eliza Ann, The	264
Emperor of Austria v. Day and Kossuth	245
Fall des Grafen Platen-Hallermund	141
Fama, The	144
Felipe Campuzano mot Den spanske regering	114
Fisheries Case	159
Foltina, The	146
Free Zones of Upper Savoy and the District of Gex	268 og 270
Frontier Land, Case, Concerning Sovereignty over Certain	151
Giesler gegen Giesler Erben	60
G. P. Massey Claim	279
Grace and Ruby, The	238
Grosserer H. G. Hansen mod Generaldirektoratet for Statsbanerne	39
Gustave Gaultier et al	88
Haile Selassie v. Cable and Wireless, Ltd. (no. 2)	128
Imperial Estates Case	38
Indemnity Insurance Company of North America v. Pan-American Airways Inc., et al	37
Indian territory, Case concerning right of passage over	309 og 312
Interhandel Case	296
Janes Claim	299
Julius F. Schierbecks Eftf. mod Københavns Byrets fogedafdeling II	33
Kling Claim, The	288
Klingesaken	17
Kotzias v. Tyser	42
Kämpfer gegen Zürich, Staatsanwaltschaft	191
Lehigh Valley Railroad Company & Others v. Germany	305
Lotus S.S., The Case of	49

Luigi Monta of Genoa v. Cechotracht Co. Ltd.	110
Luther v. James Sagor & Co.	120
Miko Jung et al. v. Rokusaburo Novaya	193
Minquiers and Ecrehos Case, The	147
Missouri v. Holland	34
Mortensen v. Peters	27
Naulilaa-affæren	273
Neer Claim	212
Norwegian loans, Case of certain (France v. Norway)	310
Nottebohm Case	180
Noyes Claim, The W. A.	291
Nürnbergdommen	10
Peru-Dreyfus affæren	142
Polites v. The Commonwealth and Another Kandiliote v. The Commonwealth and Another	29
Regazzoni v. K. C. Sethia (1944) Ltd.	25
Regina v. Anderson	168
Reparation for Injuries suffered in the service of the United Nations	1
Republic of China v. Merchants' Fire Assurance Corporation of New York	98
Rex v. Rose	199
Russian Socialist Federated Soviet Republic v. Cibrario	116
Russian Trade Delegation in Turkey v. Levant Red Sea Coal Company and Others Rønhavedommen	120
Sambiaggio, Case of	169
Serbian and Brazilian Loan Case, The	214
Sokoloff v. National City Bank	44
Statham v. Statham and Gaekwar of Baroda	124
Terlinden v. Ames	79
Tinoco Concessions	130
Ulen & Co. v. Bank Gospodarstwa Krajowego	102
Walwal Incident, The	250
Wildenhus' Case, The	293
Wulfsohn v. Russian Socialist Federated Sovjet Republic	232
Youmans Claim	112
Østgrønlands retsstilling	216
	171

2. AFDELING: INTERNATIONAL PRIVATRET

A mod B	368
B.M.C. Ltd. A/S mod A.B. Ørebro Skjortfabrik	431
Bakker, Skibscaptain A. J., mod N. Ammitzböll	332
Baltica, Assurancecompagniet, A/S, mod M. J. Vermaas Scheepvaart Bedrijf	409
Bánská a Hutní Společnost mod dr. Georg Heinrich Hahn	393
Bartlett, Skibscaptain, mod F. Tutein & Co.	332
Bentzen, Emmy Karla, mod Poul Erik Bentzens dødsbo	377
Bentzen, Poul Erik, mod Emmy Karla Bentzen	346
Blix, Egil, m. fl. mod kaptajn Millward som fører af S/S Arctic Queen	420
Boet efter Simon Christensen	380
Boet efter Hans Jensen Hansen	382
Boet efter fhv. oversergent Einar Søren Christoffer Knudsen	373

Bondy, S., mod Edv. Poulsen	340
Brewitt & Dieckmeyer mod R. B. Jespersen	322
Carlstein, C., mod Ingeborg Carlstein	323
Christoffersen, Gerhard, mod Sonja Christoffer-en	363
Colcombet F.s & Cie. mod Hugo Brammer	407
Einarsson, Thordur, mod Jacob Dahl	404
Eismann, Stefan, mod A/S Københavns Bryggerier og Malterier Hafnia	338
Eos-sagen	321
F mod M	365
Ferrosan mod Carl Detlef Feddersen	433
Fischer, Ellen Elisabeth Kirsten Wittrup, mod Erik Fritz Emil Fischer	349
Gebrüder Wiener mod J. J. Kappen	354
Hansen, Kaj, mod Columbus Emballage A/S	410
Hansen, M., mod W. Sørensen	356
Hika, M/S, mod M/S Merita	335
Hussein-Zade Ibragimouff, Ingeborg, mod Sally Hussein-Zade Ibragimouff	358
Irma-Mignon sagen	320
Landéns hissar mod Hj. Hein & Møller-Holst	424
M mod F	367
M mod H	342
Mortensen, Sophus, mod Leif Bloch Schrøder	355
Narva Flachs-sagen	396
Nicolaysen, Peter, mod August Weiss	435
Ostmarks rederi, M/S, mod A/S Lorentz Nielsen	326
Persson, Kurt, mod Brdr. Jørgensen	418
Reno Press v/ fru Anna Larsen mod Joachim Scheinhuber	392
Sibiriske Kompagni, A/S Det, mod A/S Københavns Handelsbank og Ahlmann & Boysen	333
Singergas A/S mod N. Th. Andersen	430
Soldatens og Orlogsgastens fond mod Vagn Egeriis	431
Soldath, Dina, mod Emilie Topp m. fl.	382
Srini Vasan mod Srini Vasan	360
Steenbergs dødsbo, Jens Foss Christian	386
Svendsen, Harry Alfred Emil, mod Johan Martin Theodor Schultz som formynder for Karl Heinz Brehme	366
Søderberg, August, mod Københavns Telefon-Aktieselskab	411
Sørensen, Bagermester H. P., som tilsynsværge for Ana Luisa Pedersen Kielmann mod Frederiksberg Birks Skifteret m. fl.	330
Tønnesen, Clarice Una, mod Rasmus Modeweg Tønnesen	436
USSR's handelsrepræsentation i Danmark m. fl. mod Narva Flachs Manufaktur A/S og Peter Peltzer	396
Venstres Ungdoms Rejseklub m. fl. mod Ejnar Larsen m. fl.	428
Vereeniging voor den Effectenhandel te Amsterdam mod Finansministeriet	417
Willies ejer, S/S, O. Lundquist mod A/S D.S. Vesterhavet	427
Zimmerbeutel, Harnischknytter Adolf, mod I/S Alfred Berg	406

1. AFDELING

FOLK ERET

Folkerettens natur

1

Reparation for Injuries suffered in the Service of the United Nations

DEN INTERNATIONALE DOMSTOL, RESPONSUM, 1949
I. C. J. Reports, 1949, 174

[I efteråret 1948 blev den svenske greve Folke Bernadotte myrdet i Palæstina, medens han virkede som de Forenede Nationers mægler i striden mellem Israel og de arabiske stater. Sammen med grev Bernadotte dræbtes nogle medlemmer af hans stab, heriblandt en fransk general. På denne baggrund vedtog de Forenede Nationers generalforsamling den 3. december 1948 en resolution, hvorved den Internationale Domstol blev anmodet om at afgive et responsum, bl. a. omfattende det spørgsmål, der fremgår af efterfølgende uddrag af responset.]

[*Domstolen.*] ***The first question asked of the Court is as follows:

"In the event of an agent of the United Nations in the performance of his duties suffering injury in circumstances involving the responsibility of a State, has the United Nations, as an Organization, the capacity to bring an international claim against the responsible *de jure* or *de facto* government with a view to obtaining the reparation due in respect of the damage caused (a) to the United Nations, (b) to the victim or to persons entitled through him?"

It will be useful to make the following preliminary observations:

(a) The Organization of the United Nations will be referred to usually, but not invariably, as "the Organization".

(b) Questions I (a) and I (b) refer to "an international claim against the responsible *de jure* or *de facto* government". The Court understands that these questions are directed to claims against a State, and will, therefore, in this opinion, use the expression "State" or "defendant State".

(c) The Court understands the word "agent" in the most liberal sense, that is to say, any person who, whether a paid official or not, and whether permanently employed or not, has been charged by an organ of the Organization with carrying out, or helping to carry out, one of its functions—in short, any person through whom it acts.

(d) As this question assumes an injury suffered in such circumstances as to involve a State's responsibility, it must be supposed, for the purpose of this Opinion, that the damage results from a failure by the State to perform obligations of which the purpose is to protect the agents of the Organization in the performance of their duties.

(e) The position of a defendant State which is not a member of the Organization is dealt with later, and for the present the Court will assume that the defendant State is a Member of the Organization.

The questions asked of the Court relate to the "capacity to bring an international claim"; accordingly, we must begin by defining what is meant by that capacity, and consider the characteristics of the Organization, so as to determine whether, in general, these characteristics do, or do not, include for the Organization a right to present an international claim.

Competence to bring an international claim is, for those possessing it, the capacity to resort to the customary methods recognized by international law for the establishment, the presentation and the settlement of claims. Among these methods may be mentioned protest, request for an enquiry, negotiation, and request for submission to an arbitral tribunal or to the Court in so far as this may be authorized by the Statute.

This capacity certainly belongs to the State; a State can bring an international claim against another State. Such a claim takes the form of a claim between two political entities, equal in law, similar in form, and both the direct subjects of international law. It is dealt with by means of negotiation, and cannot, in the present state of the law as to international jurisdiction, be submitted to a tribunal, except with the consent of the States concerned.

When the Organization brings a claim against one of its Members, this claim will be presented in the same manner, and regulated by the same procedure. It may, when necessary, be supported by the political means at the disposal of the Organization. In these ways the Organization would find a method for securing the observance of its rights by the Member against which it has a claim.

But, in the international sphere, has the Organization such a nature as involves the capacity to bring an international claim? In order to answer this question, the Court must first enquire whether the Charter has given the Organization such a position that it possesses, in regard to its Members, rights which it is entitled to ask them to respect. In other words, does the Organization possess international personality? This is no doubt a doctrinal expression, which has sometimes given rise to controversy. But it will be used here to mean that if the Organization is recognized as having that personality, it is an entity capable of availing itself of obligations incumbent upon its Members.

To answer this question, which is not settled by the actual terms of the Charter, we must consider what characteristics it was intended thereby to give to the Organization.

The subjects of law in any legal system are not necessarily identical in their nature or in the extent of their rights, and their nature depends upon the needs of the community. Throughout its history, the development of international law has been influenced by the requirements of international life, and the progressive increase in the collective activities of States has already given rise to instances of action upon the international plane by certain entities which are not States. This development culminated in the establishment in June 1945 of an international organization whose purposes and principles are specified in the

Charter of the United Nations. But to achieve these ends the attribution of international personality is indispensable.

The Charter has not been content to make the Organization created by it merely a centre "for harmonizing the actions of nations in the attainment of these common ends" (Article 1, para. 4). It has equipped that centre with organs, and has given it special tasks. It has defined the position of the Members in relation to the Organization by requiring them to give it every assistance in any action undertaken by it (Article 2, para. 5), and to accept and carry out the decisions of the Security Council; by authorizing the General Assembly to make recommendations to the Members; by giving the Organization legal capacity and privileges and immunities in the territory of each of its Members; and by providing for the conclusion of agreements between the Organization and its Members. Practice—in particular the conclusion of conventions to which the Organization is a party—has confirmed this character of the Organization, which occupies a position in certain respects in detachment from its Members, and which is under a duty to remind them, if need be, of certain obligations. It must be added that the Organization is a political body, charged with political tasks of an important character, and covering a wide field namely, the maintenance of international peace and security, the development of friendly relations among nations, and the achievement of international co-operation in the solution of problems of an economic, social, cultural or humanitarian character (Article 1); and in dealing with its Members it employs political means. The "Convention on the Privileges and Immunities of the United Nations" of 1946 creates rights and duties between each of the signatories and the Organization (see, in particular, Section 35). It is difficult to see how such a convention could operate except upon the international plane and as between parties possessing international personality.

In the opinion of the Court, the Organization was intended to exercise and enjoy, and is in fact exercising and enjoying, functions and rights which can only be explained on the basis of the possession of a large measure of international personality and the capacity to operate upon an international plane. It is at present the supreme type of international organization, and it could not carry out the intentions of its founders if it was devoid of international personality. It must be acknowledged that its Members, by entrusting certain functions to it, with the attendant duties and responsibilities, have clothed it with the competence required to enable those functions to be effectively discharged.

Accordingly, the Court has come to the conclusion that the Organization is an international person. That is not the same thing as saying that it is a State, which it certainly is not, or that its legal personality and rights and duties are the same as those of a State. Still less is it the same thing as saying that it is "a super-State", whatever that expression may mean. It does not even imply that all its rights and duties must be upon the international plane, any more than all the rights and duties of a State must be upon that plane. What it does mean is that it is a subject of international law and capable of possessing international rights and duties, and that it has capacity to maintain its rights by bringing international claims.

The next question is whether the sum of the international rights of the Organization comprises the right to bring the kind of international claim described in Request for this Opinion. That is a claim against a State to obtain reparation in respect of the damage caused by the injury of an agent of the Organization in the course of the performance of his duties. Whereas a State possesses the totality of international rights and duties recognized by international law, the rights and duties of an entity such as the Organization must depend upon its purposes and functions as specified or implied in its constituent documents and developed in practice. The functions of the Organization are of such a character that they could not be effectively discharged if they involved the concurrent action, on the international plane, of fifty-eight or more Foreign Offices, and the Court concludes that the Members have endowed the Organization with capacity to bring international claims when necessitated by the discharge of its functions.***

2

Pariserfredstraktaten af 30. marts 1856

Art. 15. Efter at Wienerkongressens akt har opstillet principperne for sejlads på de floder, der afgrænser eller gennemløber flere stater, bestemmer de kontraherende magter indbyrdes, at de i fremtiden ligeledes vil anvende disse principper på Donau og dens munding. De erklærer, at denne bestemmelse for fremtiden er en del af Europas offentlige ret (*droit public de l'Europe*), og påtager sig garantien for den.

Donausejladsen kan ikke underkastes nogen hindring eller afgift, der ikke udtrykkelig fremgår af bestemmelserne i de følgende artikler. Følgelig kan der ikke kræves nogen afgift for den blotte besejling af floden eller nogen afgift på varer ombord på skibene. De ordens- og karantæne-regler, som må opstilles af hensyn til flodbredstaterne, skal affattes så gunstigt som muligt for sejladsen. Bortset fra disse reglementer må der ikke lægges nogen som helst hindring i vejen for den frie sejlads.

Art. 16. Med det formål at gennemføre den foregående artikels bestemmelser skal en kommission, hvori Storbritannien, Frankrig, Østrig, Preussen, Rusland, Sardinien og Tyrkiet hver vil være repræsenteret ved en delegeret, have til opgave at anvise og lade udføre de nødvendige arbejder fra Isatsja og udefter for at frigøre Donaus munding såvel som de tilstødende dele af havet for sandbanker og andre hindringer, som spærrer dem, og give denne del af floden og de nævnte dele af havet de bedst mulige sejlbarhedsbetingelser.

For at dække omkostningerne ved disse arbejder samt ved de indretninger, der skal sikre og lette sejladsen i Donaus munding, kan der opkræves faste afgifter af rimelig størrelse, som fastsættes af kommissionen ved simpelt flertal, dog på den udtrykkelige betingelse, at alle nationers flag i denne henseende, ligesom i alle andre, skal behandles fuldstændig ligeligt.

Art. 17. Der skal oprettes en kommission, bestående af delegerede fra Østrig, Bayern, Den Høje Port og Württemberg (én fra hver af disse magter), hvortil kommer befuldmægtigede fra de tre Donaufyrstendømmer, hvis udnævnelse skal godkendes af Porten. Denne kommission, som skal være permanent,

- 1) skal udarbejde reglementer for sejlads og flodpoliti;
- 2) skal bortfjerne alle endnu eksisterende hindringer for anvendelse af Wienertraktatens bestemmelse på Donau;
- 3) skal give ordre til og lade udføre de nødvendige arbejder langs hele floden; og
- 4) skal efter den europæiske kommissions opløsning overvåge, at sejlbarheden bevares i Donaus munding og de tilstødende dele af havet.

3

Berlinertraktaten af 13. juli 1878

Art. 53. Den europæiske Donaukommission, hvori Rumænien skal være repræsenteret, skal bevare sine funktioner og skal for fremtiden udøve dem indtil Galatz fuldstændig uafhængigt af den territoriale myndighed. Alle traktater, aftaler, akter og beslutninger med hensyn til dens rettigheder, privilegier, prærogativer og forpligtelser bekræftes¹.

4

Treaty establishing the European Coal and Steel Community signed in Paris on April 18, 1951

Traktatens autoritative tekst er affattet på fransk. Den her benyttede oversættelse er offentliggjort af Fællesskabets *Høje Myndighed*

Art. 9. The High Authority shall be composed of nine members designated for six years and chosen for their general competence.

A member shall be eligible for reappointment. The number of members of the High Authority may be reduced by unanimous decision of the Council.

Only nationals of the member States may be members of the High Authority.

The High Authority shall not include more than two members of the same nationality.

The members of the High Authority shall exercise their functions in complete independence, in the general interest of the Community. In the fulfilment of their duties, they shall neither solicit nor accept instructions from any government or from any organization. They will abstain from all conduct incompatible with the supranational character of their functions.

Each member State undertakes to respect this supranational character and

¹ Om Donau-regimets senere udvikling se Alf Ross, *Lærebog i Folkeret* (1951), § 2, note 7.

not to seek to influence the members of the High Authority in the execution of their duties.

The members of the High Authority shall not exercise any business or professional activities, paid or unpaid, nor acquire or hold, directly or indirectly, any interest in any business related to coal and steel during their term of office or for a period of three years thereafter.

Art. 13. The High Authority shall act by vote of a majority of its members.

Its quorum shall be fixed by its rules of procedure. However, this quorum must be greater than one-half of its members.

Art. 14. In the execution of the tasks entrusted to it by this Treaty and in accordance with the provisions thereof, the High Authority shall take decisions, formulate recommendations and issue opinions.

Decisions shall be binding in every respect.

Recommendations shall be binding with respect to the objectives which they specify but shall leave to those to whom they are directed the choice of appropriate means for attaining these objectives.

Opinions shall not be binding.

When the High Authority is empowered to take a decision, it may limit itself to formulating a recommendation.

Art. 31. The function of the Court is to ensure the rule of law in the interpretation and application of the present Treaty and of the regulations for its execution.

Art. 44. The rulings of the Court shall be enforced in the territory of the member States under the terms of Article 92 below.

Art. 49. The High Authority is empowered to procure the funds necessary to the accomplishment of its mission:

- by imposing levies on the production of coal and steel;
- by borrowing.

It may also receive grants.

Art. 58. 1. In case of a decline in demand, if the High Authority considers that the Community is faced with a period of manifest crisis and that the means of action provided for in Article 57 are not sufficient to cope with this situation, it must, after consulting the Consultative Committee and with the agreement of the Council, establish a system of production quotas, accompanied, as far as may be necessary, by the measures provided for in Article 74.***

Art. 92. The decisions of the High Authority imposing financial obligations on enterprises shall have executive force.

They shall be put into forced execution on the territory of member States by means of the legal procedure in effect in each State, after the formula of execution in use in the State on whose territory the decision is to be carried out has been appended; this shall be done with no other formality than the verification of the authenticity of such decisions. The execution of these formalities shall be the responsibility of a Minister whom each government shall designate for this purpose.

The forced execution of such decisions can be suspended only by a decision of the Court.

5

Danmarks Riges Grundlov

LOV NR. 169 AF 5. JUNI 1953

§ 20, stk. 1. Beføjelser, som efter denne grundlov tilkommer rigets myndigheder, kan ved lov i nærmere bestemt omfang overlades til mellemfolkelige myndigheder, der er oprettet ved gensidig overenskomst med andre stater til fremme af mellemfolkelig retsorden og samarbejde.

Stk. 2. Til vedtagelse af lovforslag herom kræves et flertal på fem sjettedele af folketingets medlemmer. Opnås et sådant flertal ikke, men dog det til vedtagelse af almindelige lovforslag nødvendige flertal, og opretholder regeringen forslaget, forelægges det folketingsvælgerne til godkendelse eller forkastelse efter de for folkeafstemninger i § 42 fastsatte regler.

6

**Effect of awards of compensation made by the
U. N. Administrative Tribunal**

DEN INTERNATIONALE DOMSTOL, RESPONSUM, 1954

I. C. J. Reports 1954, 47

[I begyndelsen af 1950'erne fandt der i de Forenede Stater, inspireret især af Senator McCarthy, en omfattende inkvisition sted for i alle forgreninger af det offentlige liv at udrense personer mistænkt for at have eller have haft kommunistiske forbindelse eller sympatier. Denne inkvisition rettede sig også mod den del af de Forenede Nationers sekretariatsstab der bestod af amerikanske statsborgere. Opmærksomheden samlede sig om 18 personer der under påberåbelse af *fifth amendment* ("no person shall be . . . compelled in any criminal case to be a witness against himself") nægtede at besvare spørgsmål under forhør for Senatets Inkvisitionskomite. Denne benyttelse af en forfatningssikret ret blev af generalsekretæren opfattet som et brud på tjenesteplichterne der efter tjenestereglementet berettigede til afskedigelse. Herefter blev alle 18 afskediget. 11 af disse havde fast ansættelse og indbragte deres afskedigelser for det administrative tribunal der var blevet oprettet i 1949 med myndighed til at træffe afgørelse i tvister om stabens ansættelsesforhold. Tribunalet kendte afskedigelserne ulovlige i henhold til tjenestereglementet og tilkendte de afskedigede betydelige erstatninger (§ 179.420). Den ophidsede amerikanske opinion ville imidlertid ikke bøje sig for tribunalets afgørelse som man krævede tilsidesat som fejlagtig af generalforsamlingen. Fra anden side bestred man generalforsamlingens kompetence hertil. Resultatet blev at generalforsamlingen vedtog at anmode den Internationale Domstol om et responsum om to spørgsmål af hvilke det første lød således:

"Having regard to the Statute of the United Nations Administrative Tribunal and to any other relevant instruments and to the relevant records, has the

General Assembly the right on any grounds to refuse to give effect to an award of compensation made by that Tribunal in favour of a staff member of the United Nations whose contract of service has been terminated without his assent?"

[*Domstolen.*] This examination of the first Question shows that the Court is requested to consider the general and abstract question whether the General Assembly is legally entitled to refuse to give effect to an award of compensation made by the Administrative Tribunal, properly constituted and acting within the limits of its statutory competence. The answer to this question depends on the provisions of the Statute of the Tribunal as adopted by the General Assembly on November 24th, 1949, and on the Staff Regulations and Rules as in force on December 9th, 1953. But the Court will also take into account the amendments which were made to the Statute on the latter date. The Court will first consider whether the Tribunal is established either as a judicial body, or as an advisory organ or a mere subordinate committee of the General Assembly.

Article I of the Statute provides: "A Tribunal is established by the present Statute to be known as the United Nations Administrative Tribunal." This Tribunal shall, according to Article 2, paragraph 1, "be competent to hear and pass judgment upon application", whereupon the paragraph determines the limits of the Tribunal's competence as already mentioned above.

Article 2, paragraph 3, prescribes:

"In the event of a dispute as to whether the Tribunal has competence, the matter shall be settled by the decision of the Tribunal."

Article 10 contains the following provisions:

"2. The judgments shall be final and without appeal."

"3. The judgments shall state the reasons on which they are based."

These provisions and the terminology used are evidence of the judicial nature of the Tribunal. Such terms as "tribunal", "judgment", competence to "pass judgment upon applications", are generally used with respect to judicial bodies. The above-mentioned provisions of Articles 2 and 10 are of an essentially judicial character and conform with rules generally laid down in statutes or laws issued for courts of justice, such as, for instance, in the Statute of the International Court of Justice, Article 36, paragraph 6, Article 56, paragraph 1, Article 60, first sentence.***

This examination of the relevant provisions of the Statute shows that the Tribunal is established, not as an advisory organ or a mere subordinate committee of the General Assembly, but as an independent and truly judicial body pronouncing final judgments without appeal within the limited field of its functions.

According to a well-established and generally recognized principle of law, a judgment rendered by such a judicial body is *res judicata* and has binding force between the parties to the dispute. It must therefore be examined who are to

be regarded as parties bound by an award of compensation made in favour of a staff member of the United Nations whose contract of service has been terminated without his assent.

Such a contract of service is concluded between the staff member concerned and the Secretary-General in his capacity as the chief administrative officer of the United Nations Organization, acting on behalf of that Organization as its representative. When the Secretary-General concludes such a contract of service with a staff member, he engages the legal responsibility of the Organization, which is the juridical person on whose behalf he acts. If he terminates the contract of service without the assent of the staff member and this action results in a dispute which is referred to the Administrative Tribunal, the parties to this dispute before the Tribunal are the staff member concerned and the United Nations Organization, represented by the Secretary-General, and these parties will become bound by the judgment of the Tribunal. This judgment is, according to Article 10 of the Tribunal's Statute, final and without appeal. The Statute has provided for no kind of review. As this final judgment has binding force on the United Nations Organization as the juridical person responsible for the proper observance of the contract of service, that Organization becomes legally bound to carry out the judgment and to pay the compensation awarded to the staff member. It follows that the General Assembly, as an organ of the United Nations, must likewise be bound by the judgment.***

The Court must now examine the principal contentions which have been put forward, in the written and in the oral statements, by the Governments that take the position that there are grounds which would justify the General Assembly in refusing to give effect to awards of the Administrative Tribunal.

The legal power of the General Assembly to establish a tribunal competent to render judgments binding on the United Nations has been challenged. Accordingly, it is necessary to consider whether the General Assembly has been given this power by the Charter.***

When the Secretariat was organized, a situation arose in which the relations between the staff members and the Organization were governed by a complex code of law. This code consisted of the Staff Regulations established by the General Assembly, defining the fundamental rights and obligations of the staff, and the Staff Rules, made by the Secretary-General in order to implement the Staff Regulations. It was inevitable that there would be disputes between the Organization and staff members as to their rights and duties. The Charter contains no provision which authorizes any of the principal organs of the United Nations to adjudicate upon these disputes, and Article 105 secures for the United Nations jurisdictional immunities in national courts. It would, in the opinion of the Court, hardly be consistent with the expressed aim of the Charter to promote freedom and justice for individuals and with the constant preoccupation of the United Nations Organization to promote this aim that it should afford no judicial or arbitral remedy to its own staff for the settlement of any disputes which may arise between it and them.

In these circumstances, the Court finds that the power to establish a tribunal, to do justice as between the Organization and the staff members, was essential to ensure the efficient working of the Secretariat, and to give effect to the paramount consideration of securing the highest standards of efficiency, competence and integrity. Capacity to do this arises by necessary intendment out of the Charter.***

The Court has accordingly arrived at the conclusion that the first Question submitted to it must be answered in the negative. The second Question does not therefore call for consideration.

For these reasons,

having regard to the Statute of the United Nations Administrative Tribunal and to any other relevant instruments and to the relevant records,

The Court is of Opinion,

by nine votes to three,

that the General Assembly has not the right on any grounds to refuse to give effect to an award of compensation made by the Administrative Tribunal of the United Nations in favour of a staff member of the United Nations whose contract of service has been terminated without his assent.

7

Nürnbergdommen

INTERNATIONAL MILITARY TRIBUNAL, NÜRNBERG, 1946
Official Documents, XXII, 411, 461-466, 497-498

[*Domstolen.*] Den 8. august 1945 blev der mellem det Forenede Kongerige Storbritannien og Nordirlands regering, Amerikas Forenede Staters regering, den franske Republiks provisoriske regering og de Socialistiske Sovjetrepublikers regering truffet en overenskomst om oprettelse af denne domstol til retsforfølgning af krigsforbrydere, hvis forbrydelser ikke har nogen særlig geografisk tilknytning.***

[I den *Statut for den Internationale Militærdomstol*, der blev knyttet til overenskomsten, blev de forbrydelser, der henhører under domstolens kompetence, bestemt således:

“Artikel 6.

Den i henhold til den i artikel 1 omhandlede overenskomst oprettede domstol til retsforfølgning mod og afstraffelse af de europæiske akselandes større krigsforbrydere skal være beføjet til at pådømme og straffe personer, der, idet de handlede i de europæiske akselandes interesse, enten i deres personlige egenskab eller som medlemmer af organisationer, har begået nogen af nedennævnte forbrydelser.

Følgende handlinger, eller enhver enkelt af dem, er forbrydelser, der henhører under domstolens kompetence, og for hvilke den enkelte kan drages til ansvar:

(a) Forbrydelser mod freden: det vil sige at planlægge, forberede, iværksætte eller føre angrebskrig eller krig i strid med internationale traktater, overenskomster eller tilsagn, eller deltage i en fælles plan eller sammensværgelse til fuldbyrdelse af nogen af de forannævnte handlinger;

(b) Krigsforbrydelser: det vil sige krænkelser af krigens love og sædvaner. Sådanne krænkelser indbefatter, men er ikke begrænset til, mord, mishandling eller deportation til tvangsarbejde eller i noget andet øjemed af civilbefolkning, der hører til eller befinder sig i et besat område, mord eller mishandling af krigsfanger eller søfarende, drab af gidsler, plyndring af offentlig eller privat ejendom, hensynsløs ødelæggelse af byer eller landsbyer eller ødelæggelse, der ikke retfærdiggøres af militær nødvendighed.

(c) Forbrydelser mod menneskeheden: det vil sige mord, udryddelse, fornedrelse til slaveri, deportation og andre umenneskelige handlinger begået mod nogen civilbefolkning før eller under krigen¹, eller forfølgelse af politiske, racemæssige eller religiøse grunde ved udførelse af eller i forbindelse med nogen forbrydelse, der falder inden for domstolens kompetence, uden hensyn til, om handlingerne er i strid med den nationale ret i det land, hvor de er begået.

Enhver, der har ledet, tilrettelagt, tilskyndet eller været medvirkende til udarbejdelsen eller udførelsen af en fælles plan eller sammensværgelse om at begå nogen af de forannævnte forbrydelser, er ansvarlig for alle handlinger, foretaget af enhver person ved udførelsen af en sådan plan."

Af dommen citeres videre kun afsnit af betydning for spørgsmålet om individets stilling som folkeretssubjekt.]

***Domstolens kompetence er defineret i overenskomsten og vedtægten, og de forbrydelser, der falder ind under domstolens kompetence, og for hvilke der kan gøres individuelt ansvar gældende, er nævnt i artikel 6. Den lov, der her igennem er givet, er bindende i almindelighed, og bindende for domstolen.

Vedtægten blev oprettet af den suveræne lovgivningsmagt i de lande, der modtog Tysklands betingelsesløse overgivelse. Disse landes ubestridte ret til at lovgive for de besatte områder er godkendt af den civiliserede verden. Vedtægten medfører ikke en vilkårlig magtudøvelse fra de sejrende nationers side. Domstolens opfattelse er, som det påvises nedenfor, at den manifesterer internationale love, der eksisterede på det tidspunkt, da den blev skabt. I den henseende er den selv et bidrag til international lov.

Signatarmagterne gav ved oprettelsen af denne domstol udtryk for den lov, den skulle udøve, og drog omsorg for, at retssagen kunne føres retfærdigt. Derved har de i fællesskab handlet således som hver enkelt af dem kunne have gjort. For det kan ikke bestrides, at hver nation har ret til at oprette en særlig domstol til at udøve retten. Med hensyn til domstolens sammensætning kan de tiltalte kun kræve at blive prøvet retfærdigt på grundlag af beviserne og loven.

Ifølge vedtægten er det en forbrydelse at planlægge og føre angrebskrig i strid med internationale traktater. Det er derfor ikke strengt nødvendigt at undersøge, om og i hvilken udstrækning angrebskrig var en forbrydelse før Londonoverenskomsten trådte i kraft. Men i betragtning af den store betydning, der tillægges dette spørgsmål, har domstolen påhørt alle argumenter

¹ I den oprindelige tekst stod her et semikolon. Dette blev ved Berliner Protokollen af 6. oktober 1945 rettet til et komma, jfr. Alf Ross, *Om Ret og Retfærdighed* (1953), 148—49.

både fra anklagemyndighed og forsvar, og vil selv give udtryk for sit syn på sagen.

Det er blevet hævdet af de tiltalte, at det er et grundlæggende princip i al lovgivning — international så vel som national — at man ikke kan straffe en mand for en forbrydelse, uden at loven eksisterede, da forbrydelsen blev begået. "Nullum crimen sine lege, nulla poena sine lege".

Det blev hævdet, at straf "ex post facto" (på grundlag af en lov, givet efter fuldført handling) strider mod retsopfattelsen i alle civiliserede nationer, at ingen suveræn magt havde gjort angrebskrig til en forbrydelse på det tidspunkt, da de påståede forbryderiske handlinger blev begået, at begrebet "angrebskrig" ikke er defineret i nogen statut, at der ikke er fastsat nogen straf herfor, at ingen domstol var blevet nedsat til at forfølge og dømme overtrædelserne.

For det første bør man bemærke, at reglen "nullum crimen sine lege" ikke rummer nogen begrænsning af suveræniteten, men er et almindeligt retfærdighedsprincip. At hævde, at det er uretfærdigt at straffe dem, der i strid med traktater og forsikringer har angrebet nabostater uden varsel, er i sig selv en usandhed, for under de omstændigheder må den angribende part vide, at han handler forkert, og det ville da være langt mere uretfærdigt at lade hans handling gå ustraffet hen end at straffe ham. I betragtning af de stillinger, de tiltalte indtog i den tyske regering, må de alle, eller i hvert fald nogle af dem, have været vidende om de traktater, der var underskrevet af Tyskland og som gjorde tilflugten til krig for at afgøre internationale stridigheder til en forbrydelse. De må have vidst, at de handlede imod enhver international lov, når de med forsæt iværksatte deres planer om invasion og angrebskrig. Allerede ved at se sagen fra den synsvinkel står det klart, at ovennævnte regel ikke kan anvendes på de foreliggende tilfælde.

Dette synspunkt får stærk støtte, hvis man betragter den internationale rets holdning i 1939 overfor begrebet angrebskrig. Den almindelige traktat af 27. august 1928, der afviser krigen som middel, sædvanligvis kendt som Briand-Kelloggpagten, var ved krigsudbrudet i 1939 bindende for 63 nationer, deriblandt for Tyskland, Italien og Japan.

I fortalen erklærede signatarmagterne, at de var sig "den højtidelige pligt stærkt bevidst, der påhviler dem, og som skulle bidrage til menneskehedens velfærd. De var overbevist om, at den tid var kommet, da en åben fordømmelse af krigen som nationalpolitisk middel skulle ske, i den hensigt, at de fredelige og venskabelige forhold, der nu eksisterede mellem deres folk, skulle fortsætte ... Enhver ændring af relationerne mellem dem indbyrdes skulle kun søges fremmet ved fredelige midler ... idet verdens civiliserede lande således forenedes i en fælles frasigelse af krigen som middel for deres udenrigspolitik ..."

De to første artikler lyder således:

"Artikel 1: De høje kontraherende parter erklærer i deres respektive folks navn højtideligt, at de fordømmer tilflugten til krig ved løsning af internationale tvistigheder og afstår fra den som nationalpolitisk middel i deres indbyrdes relationer.

Artikel 2: De høje kontraherende parter beslutter, at løsningen af enhver tvistigheder eller konflikt, af hvad art og oprindelse den være må, der måtte

opstå imellem dem, aldrig skal søges fremmet ved andet end fredelige midler.“

Spørgsmålet er: Hvad er den juridiske virkning af denne pagt? Alle nationer, der havde underskrevet pagten eller rettede sig efter den, afviste ubetinget tilflugten til krig som politisk middel, og frasagde sig udtrykkeligt brugen deraf. Efter underskrivelsen af pagten vil det, at en nation tyer til krig som statspolitisk middel, være ensbetydende med et brud på pagten. I rettens øjne medfører den højtidelige erklæring om frasigelse af krigen som middel for statspolitik nødvendigvis den konsekvens, at en sådan krig derefter er ulovlig ifølge international ret. Det medfører ligeledes, at de, som planlægger og fører en sådan krig med dens uundgåelige frygtelige konsekvenser, i sig selv derved begår en forbrydelse. Anvendelsen af krig ved løsning af internationale konflikter, brugt som et middel til fremme af statspolitiske formål, medfører således i sig selv, at krigen er en angrebskrig, og den pågældende krig er derved gjort ulovlig ved denne pagt.

De Forenede Staters udenrigsminister, mr. Henry L. Stimson, udtrykte det således i 1932:

“Underskriverne af Briand-Kelloggpagten afstod fra krig mellem nationerne. Det betyder, at krig er blevet ulovlig i praktisk taget hele verden. Hvis to nationer efter dette går ind i en væbnet konflikt, må enten den ene eller begge stemples som krænkere af den lov, som denne traktat giver almen gyldighed . . . Vi fordømmer dem i det tilfælde som lovbyggere.”

Men det hævdes, at pagten ikke udtrykkeligt bestemmer, at sådanne krige er forbrydelser, og at den heller ikke indeholder bestemmelser om domstole, der skal forfølge dem, der begynder den slags krige. Det gælder i samme henseende for de krigsartikler, der indeholdes i Haagkonventionen. Haagkonventionen af 1907 forbød at gribe til visse slags krigsførelse. Det var forbudt at behandle krigsfanger umenneskeligt og at anvende forgiftede våben. Falsk anvendelse af parlamentærflag og lignende ting var også forbudt. Mange af disse forbud havde vundet hævde længe før konventionens vedtagelse. Men efter 1907 har overtrædelse af dem været en faktisk forbrydelse, der kunne straffes som en overtrædelse af krigsartiklerne. Og dog erklæres det intetsteds i Haagkonventionen, at sådan fremgangsmåde er strafbar, ligesom der heller ikke foreskrives straffe eller nævnes noget om en domstol, der skal forfølge og straffe dem, der overtræder bestemmelserne. Men i mange år har krigsretten imidlertid forfulgt og straffet personer, der var skyldige i overtrædelse af de landkrigsartikler, der var vedtaget i konventionen. Domstolen finder, at de, som fører angrebskrig, gør sig i samme grad skyldige i ulovlige handlinger, og det med hensyn til betydeligt vigtigere ting end brud på Haagkonventionens regler.

Når man tolker pagtens ord, må man huske, at international ret ikke er et produkt af en international lovgivning, og at sådanne internationale overenskomster som Parispagten behandler lovens almindelige principper og ikke lovens anvendelse i praksis. Krigsretten findes ikke alene i traktaterne, men også i staternes sædvane og praksis, således som det gradvis har vundet international hævde, og i de almindelige retsprincipper, der bruges af juristerne og kommer til anvendelse i krigsretterne.

Denne ret er ikke statisk, men tilpasses de stadig ændrede krav, der stilles

til den. I mange tilfælde er pagter intet andet end en mere nøjagtigt udtrykt henvisning til retsprincipper, der allerede eksisterer.

Den tolkning af pagten, som domstolen lægger til grund, støttes af den verdenshistoriske udvikling, der gik forud. I året 1923 udarbejdede folkeforbundet udkastet til en gensidig bistandspagt. I artikel 1 af denne erklæredes, at "angrebskrig er en international forbrydelse", og at parterne ville "gå ind på, at ingen af dem vil gøre sig skyldige deri". Traktatudkastet blev forelagt 29 stater, af hvilke omkring halvdelen var stemt for at vedtage teksten. Det viste sig, at den væsentligste indvending var vanskeligheden ved at definere handlinger, der var ensbetydende med "angrebskrig", og ikke en eventuel tvivl om, hvorvidt "angrebskrig" var forbryderisk. I fortalen til folkeforbundets protokol af 1924 om fredelig bilæggelse af internationale tvistigheder ("Genèveprotokollen") erklæres det, efter at have henvist til solidariteten indenfor det internationale samfund, at "angrebskrig udgør en krænkelse af denne solidaritet og er en international forbrydelse". Der fortsættes med at erklære, at de kontraherende parter "længtes efter at bidrage til en total anvendelse af det system, der er vedtaget i folkeforbundspagten med hensyn til fredelig løsning af tvistigheder mellem staterne og til sikring af, at internationale forbrydelser forhindres". Protokollen blev anbefalet af forbundets 48 medlemmer ved enstemmig vedtagelse i plenarforsamlingen. Blandt medlemmerne var Italien og Japan, men Tyskland var på dette tidspunkt ikke medlem af forbundet.

Selvom protokollen aldrig blev ratificeret, blev den underskrevet af verdens ledende statsmænd som repræsentanter for en overvældende majoritet af alle civiliserede stater og folk, og kan betragtes som et stærkt vidnesbyrd om viljen til at stemple angrebskrigen som international forbrydelse.

På folkeforbundets plenarforsamlingsmøde den 24. september 1927 vedtog alle tilstedeværende delegationer (deriblandt den tyske, italienske og japanske), enstemmigt en deklaration vedrørende angrebskrige. I fortalen til deklarationen fastslås det, at:

"Forsamlingen,

der anerkender den solidaritet, i hvilken nationernes samfund er forenet, der nærer et stærkt ønske om opretholdelse af den almindelige fred, der er overbevist om, at angrebskrig aldrig kan tjene som middel til at bilægge internationale tvistigheder, idet den er en følge af international forbrydelse . . ."

På den sjette panamerikanske konference i Havana blev der den 18. februar 1928 af 21 amerikanske republikker vedtaget en erklæring om, at "angrebskrig er en international forbrydelse imod menneskeheden".

Alle disse højtideligt fremsatte opinionstilkendegivelser og mange andre, der kunne nævnes, støtter den fortolkning af Parispagten, som retten anvender og som går ud på, at angrebskrig ikke alene slet og ret er ulovlig, men at den er direkte forbryderisk. Det forbud mod angrebskrig, som verdens samvittighed forlangte, findes udtrykt i den serie pagter og traktater, som retten har henvist til ovenfor.

Det er også vigtigt at huske, at artikel 227 i Versaillestraktaten giver adgang til nedsættelsen af en særlig domstol, sammensat af repræsentanter fra fem af de allierede og associerede magter, som kæmpede mod Tyskland i den første

verdenskrig. Nævnte domstol skulle behandle retssagen mod den tidligere tyske kejser for den højeste forbrydelse imod den internationale moral og pagternes ukrænkelighed. Hensigten med denne retssag erklæredes at være "at hævde de alvorlige forpligtelser, man påtager sig gennem internationale garantier og gyligheden af den hævdvundne internationale moral".

I traktatens artikel 228 anerkendte den tyske regering udtrykkeligt de allierede magters ret til "at stille sådanne personer for krigsret, som er under tiltale for at have begået handlinger i strid med krigens love og sædvaner".

Det er påstået, at international ret regulerer suveræne staters handlinger og ikke åbner mulighed for at straffe individer. Det er ydermere påstået, at hvis der er tale om en stats handlinger, er de, der udfører dem, ikke personligt ansvarlige, men beskyttes af doktrinen om statens suverænitet. Retten finder, at begge disse påstande bør afvises. Det er for længe siden anerkendt, at international lovgivning pålægger såvel individer som stater pligter. I det nyligt stedfundne tilfælde *Ex Parte Quirin* (1942 307 US 1) ved De Forenede Staters højesteret, blev et antal personer under krigen tiltalt for at have landet i De Forenede Stater for at spionere og begå sabotage. Afdøde overdommer Stone udtalte da som rettens opfattelse følgende:

"Fra den dag, da denne domstol blev nedsat, har den opfattet krigsretten som omfattende den del af den internationale ret, der fastsætter fjendnationernes såvel som fjendtlige statsborgeres retslige stilling, rettigheder og pligter."

Han gav også en oversigt over de retssager, der var behandlet ved domstol, og i hvilke personer var tiltalt for forbrydelser imod international ret, særlig krigsretten. Man kunne citere mange andre fortilfælde, men her er allerede anført tilstrækkeligt til at bevise, at personer kan straffes for overtrædelse af international ret. Forbrydelser mod international ret begås af mennesker, ikke af abstrakte væsener (entities), og kun ved at straffe personer, som begår sådanne forbrydelser, kan den internationale rets regler hævdes.

Artikel 228 i Versaillestraktaten, som retten tidligere har henvist til, belyser og hævder denne opfattelse af personligt ansvar.

De af den internationale rets principer, som under visse omstændigheder beskytter en stats repræsentanter, kan ikke anvendes på handlinger, som er strafbare ifølge international ret. Gerningsmændene til sådanne handlinger kan ikke forsvare sig gennem at påberåbe sig deres officielle stilling og derved befri sig selv for straf, når de tiltales. Artikel 7 i vedtægten for denne ret fastslår udtrykkeligt:

"De tiltalte officielle stilling, det være sig som statsoverhoved eller ansvarlige embedsmænd i ministerier, skal ikke befri dem for ansvar eller være formildende omstændigheder ved strafudmålingen."

På den anden side er selve vedtægtens hovedindhold dette, at personer har internationale forpligtelser, som går foran den lydighedspligt, den enkelte stat pålægger dem. Den, som forbryder sig imod krigslovene, kan ikke opnå beskyttelse imod straf, fordi han handler på sin stats vegne, hvis staten ved at godkende hans handlemåde overskrider den kompetence, den har i henhold til international ret.

Det blev påstået ved forsvaret af de fleste af de tiltalte, at de kun handlede i

overensstemmelse med Hitlers ordrer, når de udførte deres handlinger, og at de derfor ikke kan gøres ansvarlige for de handlinger, der er udført, idet de parerede ordre. I den vedtægt, der ligger til grund for denne ret, siges der netop i paragraf 8: "At den tiltalte handlede ifølge ordre fra sin regering eller overordnede, kan ikke befri ham for ansvar, men kan medføre nedsættelse af straffen."

Indholdet af denne paragraf er i overensstemmelse med loven i alle lande. Det har aldrig været betragtet som gyldigt forsvar for brutalitet, at en soldat var beordret til at dræbe eller pine i strid med international ret. Det afgørende er ikke eksistensen af en ordre, men om det i virkeligheden var muligt at træffe et valg i overensstemmelse med moralen, og denne regel finder man anvendt med varierende styrke i de fleste landes straffelovgivning.***

Domstolen er naturligvis bundet af vedtægten, når den skal definere krigsforbrydelser og forbrydelser mod menneskeheden. Med hensyn til krigsforbrydelser var, som tidligere nævnt, de forbrydelser, som defineres i artikel 6, afsnit (b) af vedtægten, allerede på forhånd anerkendt som krigsforbrydelser i henhold til international ret. De dækkes af artiklerne 46, 50, 52 og 56 i Haagkonventionen af 1907, og artiklerne 2, 3, 4, 46 og 51 i Genevekonventionen af 1929. At overtrædelser af disse paragraffer er forbrydelser, der hjemler straf for personer, som findes skyldige i dem, er klart og behøver ikke nogen nærmere prøvelse.

Men det påstås, at Haagkonventionen ikke kan anvendes på det foreliggende tilfælde, idet der henvises til paragraffen om "almindelig deltagelse" i denne konventions artikel 2. I paragraffen hedder det:

"De bestemmelser, der foreskrives i det regulativ (landkrigsartiklerne), hvortil der refereres i artikel 1 såvel som i denne konvention, kan kun bringes i anvendelse mellem de kontraherende parter, og da kun, hvis alle krigsførende parter er bundet af konventionen."

Adskillige af de krigsførende parter i den nyligt afsluttede krig var ikke bundet af denne konvention.

Retten er af den opfattelse, at dette spørgsmål ikke behøver at afgøres. De landkrigsartikler, som indeholdes i konventionen, var utvivlsomt et fremskridt i forhold til den internationale ret, der eksisterede, da de blev vedtaget. Men i konventionen hævdes det udtrykkeligt, at den er et forsøg "på at revidere krigens almindelige love og sædvaner", som altså derigennem anerkendtes som allerede eksisterende. I 1939 anerkendtes de regler, der nedfældedes i konventionen, af alle civiliserede nationer, og opfattedes som en fortolkning af de krigslove og krigssædvaner, som vedtægtens artikel 6 (b) henviser til.

Det er endvidere påstået, at Tyskland i adskillige af de lande, der blev besat under krigen, ikke mere var bundet af landkrigsartiklerne, idet Tyskland jo havde undertvunget disse lande totalt og indlemmet dem i riget, hvorved Tyskland fik myndighed til at behandle de besatte lande, som om de var dele af det tyske rige. Domstolen finder, at det i foreliggende tilfælde er unødvendigt at afgøre, hvorvidt denne doktrin om undertvingelse, der er afhængig af en militær erobring, kan finde anvendelse eftersom undertvingelsen er et resultat af en forbrydelse: Angrebskrigen. Ingen har nogensinde før anset denne doktrin for an-

vendelig, så længe der fandtes en hær i felten i den hensigt at tilbagegive de besatte lande til deres rette ejere. I dette tilfælde kan doktrinen altså ikke anvendes på noget af de områder, der blev besat efter 1. september 1939. Hvad angår krigsforbrydelser, begået i Böhmen og Mähren, er det tilstrækkeligt at anføre, at disse områder aldrig blev indlemmet i riget, men at der etableredes et protektorat m. h. t. dem.

Med henblik på forbrydelser mod menneskeheden er der ingen tvivl om, at nazisterne dræbte politiske modstandere i Tyskland før krigen, og at mange af dem blev holdt indespærret i koncentrationslejre under de mest forfærdende og grusomme forhold. Man benyttede i høj grad terror som politisk middel, i mange tilfælde organiseret systematisk.

Den politik, der gik ud på forfølgelse og undertrykkelse af samt mord på civilpersoner i Tyskland, der sandsynligvis var fjendtligt stemt mod regeringen, og som fandt sted før krigen 1939, blev gennemført med største ubarmhjerthighed. Der er ført uomstødeligt bevis for, at jødeforfølgelser fandt sted i samme periode. Men for at de forhandlinger, der gik forud for krigsudbruddet, skal være forbrydelser mod menneskeheden, må de have fundet sted under udførelse af eller i forbindelse med en eller anden forbrydelse, som ligger indenfor rettens kompetence.

Men retten er af den anskuelse, at omend mange af disse forbrydelser var oprørende og forfærdelige, så er det dog ikke blevet tilstrækkeligt bevist, at de blev begået i forbindelse med eller under udførelsen af en sådan forbrydelse. Retten må derfor afstå fra at fastslå, at disse handlinger før år 1939 var forbrydelser mod menneskeheden i den forstand som omtales i den vedtægt, der ligger til grund for domstolen. Men fra krigsudbruddet i 1939 blev krigsforbrydelser, som samtidig var forbrydelser mod menneskeheden, begået i stor stil. Og i den udstrækning, hvor de umenneskelige handlinger, nævnt i anklageskriftet og begået efter krigsudbruddet, ikke kommer ind under begrebet krigsforbrydelser, dækkes de af begrebet "forbrydelser mod menneskeheden", da de blev forøvet under udførelsen af eller i tilslutning til angrebskrigen.

8

Klingesaken

NORGE, HØYESTERET, 1946

Norsk Rettstidende 1946, 198

[*Dommer Skau.*] Eidsivating lagmannsrett avsa den 8 desember 1945 dom med slik domsslutning: "Tiltalte Karl-Hans Herman Klinge dømmes til døden for forbrytelse mot straffelovens §§ 228 og 229, jfr. provisorisk anordning av 4 mai 1945 om straff for utenlandske krigsforbrytere § 3 a, b og c, jfr. § 1, sammenholdt med straffelovens § 62."

Domfelte har påanket dommen. Anken gjelder lovanvendelsen for så vidt som det hevdes at lagmannsretten med urette har anvendt den provisoriske anordning av 4 mai 1945, da de handlinger som domfelte er dømt for, er fore-

tatt før anordningen ble gitt. Domfelte mener at straffen derfor rettelig skulle ha vært utmålt innen den strafferamme som gjelder etter straffelovens §§ 228 og 229, jfr. § 62.

Subsidiært ankes det over straffutmålingen idet domfelte hevder at den idømte straff er for streng selv om anordningen av 4 mai 1945 kan brukes.

Om saksforholdet og domfeltes personlige forhold viser jeg til lagmannsrettens domsgrunner.

Jeg skal først behandle den del av anken som går ut på at det i dette tilfelle ikke er lovlig adgang til å anvende en strengere straff enn den som straffelovens § 228 og 229, jfr. § 62, hjemler.

Forsvarerens begrunnelse av anken på dette punkt er i det vesentlige følgende:

1. Norsk rett gir ikke hjemmel for en strengere straff.

Anordningen av 4 mai 1945 kan ikke brukes, da dette ville stride mot bestemmelsen i Grunnlovens § 97 om at "ingen lov må gis tilbakevirkende kraft."

2. Selv om folkeretten tillater anvendelse av strengere straff inntil dødsstraff — så er folkeretten ikke noen del af norsk rett. En folkerettslig regel som nevnt, kan derfor ikke uten formelt å være inkorporert i norsk rett, gi hjemmel for anvendelse av den strengere straff i dette tilfelle.

3. Når hverken den nasjonale norske rett eller folkeretten hver for seg gir hjemmel for en slik straff, kan heller ikke en kombinasjon av disse rettssystemer gjøre det uten på den måte som er nevnt under punkt 2.

Etter denne begrunnelse blir det et springende punkt i saken om bestemmelsen i Grunnlovens § 97 må antas å være til hinder for at anordningen av 4 mai 1945 anvendes på handlinger som er begått før anordningen ble gitt. Det fremgår av anordningen og motivene til den, at det er forutsatt at den skal anvendes også på eldre handlinger.

Forsvareren har pekt på at det er en i norsk teori og rettspraksis anerkjent oppfatning at på strafferettens område er forbudet i Grunnlovens § 97 mot at en lov gis tilbakevirkende kraft, absolutt — hva enten den nye lov kriminaliserer et forhold som tidligere var straffritt, eller den medfører en strengere bedømmelse av et allerede tidligere straffbart forhold.

Jeg er enig i at de hensyn som ligger til grunn for bestemmelsen i § 97 i alminnelighet vil føre til at den faktisk får virkning som et absolutt forbud. Og jeg erkjenner også fullt ut styrken av de betenkeligheter som forsvareren har fremholdt mot en innsnevring av den slagvidde som bestemmelsen som nevnt er antatt å ha. Jeg er videre enig med forsvareren i at en ekstraordinær situasjon i og for seg ikke vil gjøre det berettiget — eller overhovedet gi adgang til — å foreta noen lemping i anvendelsen av denne Grunnlovens bestemmelse. Tvertom — nettop i slike situasjoner kan bestemmelsen ha sin største misjon. Jeg anser det således utvilsomt at om en større eller mindre fraksjon av borgere, som måtte komme til å overta styremakten — det være seg på lovlig eller ulovlig vis — skulle ville vedta lover som kriminaliserte tidligere handlinger av motstanderne, handlinger som etter den nye styremakts oppfatning er straffverdige, så ville Grunnlovens § 97 være en absolutt hindring mot slike tiltak, og det uansett hvor stor tilslutning de måtte ha.

Når jeg likevel er kommet til det resultat at domfeltes anke på dette punkt ikke fører frem, er det fordi jeg mener at det foreliggende tilfelle i virkeligheten ikke skaper noen konflikt med § 97 og at det for øvrig ligger utenfor rammen av det område som denne grunnlovsbestemmelse har til hensikt å regulere.

Tiltalte er dømt for en rekke grove tilfelle av tortur. Tortur er ikke bare uttrykkelig forbudt ifølge norsk lov — Grunnlovens § 96, 2net punktum. Den er også i strid med "menneskelighetens lover" og "den offentlige samvittighets krav" (Haagkonvensjonen IV, innledningen, landkriksreglementet art. 46 og krigsfangekonvensjonen art. 61). De handlinger som tiltalte i denne sak er dømt for, er derfor etter "krigens lover og sedvaner" **k r i g s f o r b r y t e l s e r**. I den listen over krigsforbrytelser som ble utarbeidet til bruk for fredskonferansen i Versailles i 1919 er tortur oppført under III. Men for krigsforbrytelser kan ifølge de samme krigens lover og sedvaner de strengeste straffer — også dødsstraff — anvendes. Jeg viser herom til bl. a. Oppenheim — Lauterpacht: "International Law" 6te utg. 1940) s. 459 og til Verdross: Die Völkerrechtswidrige Kriegshandlung und der Straafanspruch der Staaten, Berlin 1920, s. 12, 20—33 og 98, hvor det er redegjort for statenes praksis under den forrige verdenskrig, og hvori det er gjengitt de britiske krigshåndbøker fra 1884 og 1911. Med andre ord: For handlinger som de som domfelte gjorde seg skyldig i, var såvel straffbarheten som rammen for straffereaksjonen på forhånd gitt i folkerettens regler om "krigens lover og sedvaner". Og folkerettens regler om "krigens lover og sedvaner" gjelder også for Norge som krigsførende.

Om en norsk domstol på grunn av bestemmelsen i Grunnlovens § 96 om at "ingen kan dømmes uten etter lov", under disse omstendigheter skulle være avskåret fra å dømme for forbrytelser av denne art umiddelbart med hjemmel i de nevnte folkerettsregler, anser jeg det etter mit syn på saken ikke nødvendig å gå inn på. Avgjørende for så vidt er det at en eventuell slik hindring i og for seg er fjernet ved anordningen av 4 mai 1945. Ved denne anordning er de folkerettslige regler om krigsforbrytelser inkorporert i norsk rett i den utstrekning som det av den da lovgivende myndighet blev funnet nødvendig.

Spørsmålet blir så om bestemmelsen i Grunnlovens § 97 er til hinder for at denne inkorporasjon får virkning for de før anordningen begåtte krigsforbrytelser. Jeg mener at svaret på dette spørsmål må bli nei. De utenlandske krigsforbrytere som dømmes i Norge vil ikke bli dømt for et forhold som ikke tidligere var straffbart eller bli idømt en straff som ikke tidligere kunne idømmes — selv om en antar at n o r s k domstol ikke uten anordningen av 1945 kunne gjøre det. Men her legger jeg da avgjørende vekt på at det karakteristiske ved de handlinger det her dreier seg om ikke er det at de er forbrytelser etter norsk lov, men det at de er **k r i g s f o r b r y t e l s e r**. forbrytelser mot "menneskelighetens lover", mot "krigens lover og sedvaner". Og jeg understreker videre den tilsvarende internasjonale karakter av oppgjøret med — avstraffelsen av — krigsforbryterne. Dette i motsetning til oppgjøret med de enkelte allierte nasjoners quislinger, et moment som jeg senere kommer tilbake til.

At oppgjøret med krigsforbryterne gikk inn som et viktig ledd i de allierte nasjoners krigsmål, ga president Roosevelt og premierminister Churchill uttrykk for allerede i erklæringen av 25 oktober 1941. En høytidelig erklæring om

avstraffelse av krigsforbryterne ble den 13 januar 1942 avgitt av regjeringene i de allierte land hvis territorium var besatt av fienden, deriblant også den norske regjering (St. James-erklæringen). Jeg nevner videre Moskva-deklarasjonen av 1 november 1943 som gir klart uttrykk for det samme. Endelig minner jeg om det arbeid som har vært utført av de forente nasjoners krigsforbryterkommisjon til forberedelse av oppgjøret med krigsforbryterne og de avtaler som er inngått mellom de allierte nasjoner om hvorledes oppgjøret skal fordeles mellom de enkelte stater.

Etter dette må jeg erklære meg enig med lagmannsretten i at det her ikke foreligger noen grunnlovstridig tilbakevirkning. Tiltalte i denne sak er blitt dømt for handlinger som, på det tidspunkt da de ble foretatt, etter folkeretten var forbrytelser og kunne straffes med den strengeste straff. Jeg kan da ikke se at det i realiteten oppstår noen konflikt med Grunnlovens § 97 — eller de hensyn som ligger til grunn for denne bestemmelse. Utferdigelsen av anordningen av 1945 var et ledd i — eller en konsekvens av — Norges avtale med de allierte nasjoner om avstraffelse av krigsforbryterne og om fordelingen av dette oppgjør. Selve straffekravet for de allierte krigsførende nasjoner — derunder Norge — oppstod i kraft av folkerettens regler om krigens lover og sedvaner, og med et av disse bestemt innhold, i og med at krigsforbrytelsene ble begått. Virkningen av anordningen av 1945 blir i realiteten da bare den, at den under hensyntagen til bestemmelsen i Grunnlovens § 96, åpner adgang for de norske domstoler til — i samsvar med de derom inngåtte avtaler — å gjøre det allerede ervervede straffekrav gjeldende.

Når jeg således antar at Grunnlovens § 97 ikke er til hinder for at anordningen af 4 mai 1945 anvendes på det foreliggende tilfelle, mener jeg som allerede nevnt, at dette resultat må følge også derav at et tilfelle som dette ligger utenfor det område som bestemmelsen i Grunnlovens § 97 har hatt til hensikt å regulere.

Bestemmelsen i § 97 er et ledd i det vern som Grunnloven under litra E: "Alminnelige bestemmelser", har villet etablere mot uberettigede inngrep fra styremaktens side overfor borgerne. Jeg er enig med forsvareren i at dette vern ikke bare — og heller ikke først og fremst — er git av hensynet til den enkelte borger, men i samfunnets interesse. Den vilkårlighet og usikkerhet som en uinnskrenket adgang til å bringe nye lovbestemmelser til anvendelse på eldre forhold kunne medføre, ville skade vitale samfunnsinteresser. Det er et alminnelig rettferdskrav at borgerne i et samfunn skal kunne føle seg trygge for uberettigede inngrep fra styremaktens side.

Men når dette er så, synes det meg urimelig å anta at den samme bestemmelse som er gitt til vern om samfunnet også skulle kunne påberopes av fremmede voldsmenn, borgere av en stat som har gått til angrep på det samme samfunn i den hensikt å underlegge seg det, og som et ledd i forsøket på undertrykkelsen har anvendt de mest hensynsløse og brutale midler. Et slikt tilfelle kan ikke grunnloviverne ha hatt for øye. Det fremgår etter min mening klart også av de historiske forutsetninger for bestemmelsen i Grunnlovens § 97. Og jeg ser det slik at en motsatt løsning nettopp ville krenke den høye rettsfølelse som ligger til grunn for § 97 og det rettferdskrav som den er bærer av.

Det har vært fremholdt fra forsvarerens side at det ikke forelå noen nøds-situasjon for våre styremakter for så vidt som Kongen og den norske regjering i London hadde full adgang til å holde lovgivningen ajour også på dette område. I den forbindelse er det henvist til provisorisk anordning av 22 januar 1942 om tillegg til straffelovens kapitler 19, 21 og 22. Ved denne anordning ble det åpnet adgang til — for forbrytelser foretatt så lenge Norge er i krig — å idømme dødsstraff for forbrytelser bl. a. etter bestemmelsene i straffelovens kap. 22 angående forbrytelse mot liv, legeme og helbred, når det etter de samme bestemmelser kunne idømmes fengsel inntil på livstid. Da straffen for de i §§ 228 og 229 nevnte forbrytelser i alle tilfelle er tidsbegrenset fengsel, ville det følgelig for de forbrytelser som tiltalte er dømt for, ikke kunne idømmes strengere straff med hjemmel i anordningen av 22 januar 1942. Derimot kan anordningen i visse tilfelle føre til at det blir adgang til å idømme dødsstraff for forbrytelser etter straffelovens § 231 jfr. § 232. Etter anordningen av 1945 vil den strengeste straff — inntil dødsstraff — under de i anordningens § 3, 2net ledd nevnte betingelser kunne idømmes også for forbrytelser etter §§ 228 og 229. I den utvidelse av adgangen til å anvende de strengere straffer, som anordningen av 1945 gir sammenlignet med anordningen av 1942, ser forsvareren et uttrykk for at vurderingen av de handlinger som innfanges av den siste anordning, har undergått en forandring siden anordningen av 1942 ble gitt.

Hva den første del av denne betraktning angår — at det såvel faktisk som rettslig var adgang til under okkupasjonen å holde vår straffelovgivning på dette område ajour, så får den etter den begrunnelse jeg har gitt for mitt resultat, ingen betydning.

Hva siste del angår — at anordningen av 1945 skulle bygge på en endret, skjerpet vurdering av de handlinger som den innfanger utover dem som gikk inn under anordningen av 1942, skal jeg bemerke:

Det er ikke opplyst noe om grunnen eller grunnene til at en anordning som den av 4 mai 1945 ikke ble gitt tidligere. Jeg skal bare peke på det forhold at anordningen av 1945 — i motsetning til den av 1942 — ikke bare åpner adgang til å idømme en strengere straff enn det tidligere etter vår nasjonale rett var adgang til — men den gir selve karakteristikken av handlinger som dem som tiltalte her er dømt for — de er krigsforbrytelser og skal straffes etter norsk lov (jfr. Grunnlovens § 96) når de etter sin art går inn under norske straffebestemmelser. For så vidt hadde det etter min mening vært riktig at domfelte hadde vært tiltalt og dømt for forbrytelse mot anordningen av 4 mai 1945, jfr. straffelovens §§ 228 og 229, og ikke omvendt. Som jeg tidligere har sagt: Anordningen av 1945 inkorporerer folkerettens regler om krigsforbrytelser og straff for disse. Det ligger da nær å anta at tidspunktet for anordningens utferdigelse står i forbindelse med de forhandlinger som ble før mellom de allierte nasjoner om oppgjøret med krigsforbryterne. Jeg tror derfor at det heller ikke er riktig å se anordningen som uttrykk for en endret vurdering av de handlinger den rammer. I denne forbindelse peker jeg på at det vel var de færreste — utenom kretsen av dem som ble direkte rammet — som hadde begrepp om eller oversikt over arten og utstrekningen av Gestapos voldsmetoder her hjemme

før de etter kapitulasjonen ble avslørt. Og om det norske folk ved krigens begynnelse hadde visst at Gestapo skulle ha opptrådt som de gjorde, så er jeg for min del ikke i tvil om at en alminnelig og homogen rettsfølelse ville ha krevet den samme strenge bedømmelse av disse krigsforbrytelser som anordningen av 1945 gir uttrykk for. Jeg er for så vidt ikke enig i den uttalelse fra forarbeidene til landssvikanordningen som forsvareren i denne forbindelse har påberopt seg og hvor det heter at det under de forhold vi hadde under krigen — med landet hærtatt, Kongen og regjeringen utenlands — storting og Høyesterett ute av funksjon — ikke "har vært mulig å holde straffelovgivningen ajour med den rettsfølelse som har vokset seg frem i vårt folk i denne tid." Hvis den her fremhevede setning skal forstås slik at det norske folks rettsfølelse har undergått en endring i løpet av krigsårene, så mener jeg det er galt. Da er det vel riktigere å si at det norske folks rettsfølelse med henblikk på de umenneskelige forbrytelser vi her står overfor, først kunne gi seg uttrykk etter som disse forbrytelser kom til folkets kunnskap.

Det følger av den begrunnelse jeg har gitt for mitt resultat at jeg mener det ikke er noen motstrid mellom dette og Høyesteretts standpunkt i de landsviksaker hvor spørsmålet om forholdet mellom Grunnlovens § 97 og de anordninger som kommer til anvendelse har vært avgjort eller drøftet. Jeg minner her om hva jeg har uttalt om krigsforbrytelsenes karakter som forgåelser mot folkerettslige regler — "krigens lover og sedvaner" — og den tilsvarende almene karakter av oppgjøret med forøverne. Dette i motsetning til de forbrytelser som de enkelte allierte nasjoners quislinger har gjort seg skyldig i, hvor det — selv i de tilfelle hvor det dreier seg om torturister — er den landsforræderske side ved deres forbryterske forhold som kommer i forgrunnen og det derfor er krenkelsen av vedkommende lands nasjonale lovgivning som blir det karakteriserende trekk. Forøvrig viser jeg angående fortolkningen av Grunnlovens § 97 i dens anvendelse på strafferettens område, til Høyesteretts dom i saken mot Carl Stephanson, Rt. 1945 s. 26. Førstvoterende, til hvem de øvrige i det vesentlige sluttet seg, uttalte her: "Grunnlovens § 97 er etter min oppfatning til hinder for at en lov setter straff for tidligere rettmessige handlinger, og i prinsippet også for at loven skjerper straffen for tidligere straffbare handlinger." Jeg forstår det slik at førstvoterende ved den reservasjon som ligger i uttrykket "i prinsippet" har villet la åpent spørsmålet om hvorvidt en straffskjerpelse i kraft av en senere vedtatt lov i alle høve vil være utelukket som følge av bestemmelsen i Grunnlovens § 97. Og når det i teorien har vært lært med bred penn at den skranke som Grunnlovens § 97 setter på strafferettens område er absolutt, så har sikkert ingen tenkt på slike forhold som danner bakgrunnen for det tilfelle som vi her behandler.

Idet jeg altså ikke finner at det er grunn til å tilsidesette anordningen av 4 mai 1945 — jfr. loven av 6 juli samme år — som grunnlovsstridig anvendt på det tilfelle som behandles i denne sak, går jeg over til anken over straffutmålingen.

Om de handlinger som tiltalte er dømt for, viser jeg til den utførlige beskrivelse og til den karakteristikk som er gitt i lagmannsrettens domsgrunner.

Jeg er enig med lagmannsretten i at dødsstraff må anvendes i dette tilfelle.

Jeg viser til den begrundelse som lagmannsretten har gitt, og som jeg i alt vesentlig kan tiltre. Jeg er altså også enig med lagmannsretten i at det i det foreliggende tilfelle ikke er grunn til å anvende en mildere straff i medhold av bestemmelse i anordningen av 4 mai 1945 § 5 om at straffen kan nedsettes når gjerningsmannen har handlet i henhold til befaling av overordnet. For meg er det i så henseende avgjørende hva lagmannsretten har funnet bevist, nemlig at tiltalte for så vidt har handlet fritt — han har i de fleste tilfelle handlet på eget tiltak men i forståelse med sine foresatte.

Forsvareren har pekt på det uhørte press som det nazistiske system la på tyskerne og at de underordnede ble villedet med hensyn til rettmessigheten av å anvende de metoder som de brukte. Til dette har jeg å si at de mishandlinger som tiltalte har gjort seg skyldlig i er en så grov krenkelse av "menneskelighetens lover", at han, tross all propaganda, ikke kan ha vært i tvil om at de — uansett formålet — var, ikke bare i høyeste grad moralsk forkastelige, men også rettsstridige.

Etter dette mener jeg lagmannsrettens dom må opprettholdes.

Jeg stemmer for kjennelse med slik *slutning*: *Anken forkastes.****

[Domstolens flertal sluttet seg til dette resultat, for nogle dommeres vedkommende dog med anden begrundelse.]

9

Convention on the High Seas

Genève, 29. april 1958

Art. 13. Every State shall adopt effective measures to prevent and punish the transport of slaves in ships authorized to fly its flag, and to prevent the unlawful use of its flag for that purpose. Any slave taking refuge on board any ship, whatever its flag, shall ipso facto be free.

Art. 14. All States shall co-operate to the fullest possible extent in the repression of piracy on the high seas or in any other place outside the jurisdiction of any State.

10

Konvention om forebyggelse af og straf for folkedrab

Vedtaget af de Forenede Nationers generalforsamling den 9. december 1948, ratificeret af Danmark den 25. maj 1951, jfr. bkg. C. nr. 21 af 26. maj 1952

Art. I. De kontraherende parter bekræfter, at folkedrab, hvad enten det begås i fredstid eller i krigstid, efter folkeretten er en forbrydelse, som de forpligter sig til at forhindre og straffe.

Art. II. I nærværende konvention forstås ved folkedrab enhver af nedenævnte handlinger, der begås i den hensigt helt eller delvis at ødelægge en national, etnologisk, racemæssig eller religiøs gruppe som sådan:

- a) at dræbe medlemmer af gruppen,
- b) at tilføje medlemmer af gruppen betydelig legemlig eller åndelig skade,
- c) med forsæt at påføre gruppen levevilkår, beregnede på at bevirke gruppens fuldstændige eller delvise fysiske ødelæggelse,
- d) at gennemføre forholdsregler, der tilsigter at hindre fødsler indenfor gruppen,
- e) med magt at overføre en gruppes børn til en anden gruppe.

Art. III. Følgende handlinger skal være strafbare:

- a) folkedrab,
- b) sammensværgelse for at begå folkedrab,
- c) direkte og offentlig tilskyndelse til folkedrab,
- d) forsøg på folkedrab,
- e) meddelagtighed i folkedrab,

Art. IV. Personer, der begår folkedrab eller en anden i artikel III nævnt handling, skal straffes, hvad enten de er forfatningsmæssigt ansvarlige stats-overhoveder, tjenestemænd eller private personer.

Art. V. De kontraherende parter påtager sig i overensstemmelse med deres forfatninger at gennemføre den lovgivning, der er nødvendig for at sætte nærværende konventions bestemmelser i kraft, og især at foreskrive effektive straffe for personer, der er skyldige i folkedrab eller en af de andre i artikel III angivne handlinger.

11

De Forenede Nationers Pagt

San Francisco, 26. juni 1945

Atr. 24. 1. For at sikre omgående og effektive skridt fra de Forenede Nationers side overdrager medlemmerne sikkerhedsrådet hovedansvaret for opretholdelse af mellemfolkelig fred og sikkerhed og er enige om, at sikkerhedsrådet under udøvelsen af de pligter som dette ansvar pålægger det, handler på deres vegne.

2. Under opfyldelsen af disse pligter skal sikkerhedsrådet handle i overensstemmelse med de Forenede Nationers formål og grundsætninger. De særlige beføjelser som er tillagt sikkerhedsrådet med henblik på opfyldelsen af disse pligter, er fastsat i kapitlerne VI, VII, VIII og XII.

3. Sikkerhedsrådet forelægger plenarforsamlingen årlige og, når det er nødvendigt, særlige beretninger til behandling.

Art. 25. Medlemmerne af de Forenede Nationer går ind på at anerkende og udføre sikkerhedsrådets beslutninger i overensstemmelse med nærværende pagt.

12

Russian Socialist Federated Soviet Republic v. Cibrario

DE FORENEDE STATER, COURT OF APPEALS OF NEW YORK, 1923

Se nedenfor sag nr. 68

13

Regazzoni v. K. C. Sethia (1944) Ltd.

ENGLAND, HOUSE OF LORDS, 1957

[I september 1948 blev en kontrakt indgået ifølge hvilken det sagsøgte selskab forpligtede sig til at sælge til appellanten 500.000 B "twils" (en slags jute-sæk) at levere fra Indien september—oktober c. i. f. Genua til en pris af 248 sh. pr. hundrede. Sælgerne var klare over at partiet skulle videreleveres til Sydafrika. Parterne var begge bekendt med at eksport af jute til Sydafrika var forbudt efter indisk ret. Da sælgerne nægtede at opfylde kontrakten anlagde køberen ved engelsk domstol erstatningssøgsmål for ikke-opfyldelse. Sagen skulle bedømmes efter engelsk ret. Efter at Court of Appeal havde frifundet sagsøgte appellerede køberen til House of Lords. Viscount Simons udtalte:]

I do not think it necessary to state at length the facts of the case. They have been found by Sellers J. and his findings were accepted by the Court of Appeal. No other conclusion was, in my opinion, possible than that (in the words of the learned judge) "both parties . . . contemplated and intended that the contract goods would be shipped from India and be made available in Genoa so that the plaintiff might make a resale or fulfil a bargain of resale to the South African buying agency." Nor is it to be doubted that both parties were well aware of the restrictions imposed by the order of July 17, 1946.***

The question then arises—and it is, as I say, the only question for your Lordships' consideration—whether the respondents were justified in repudiating the contract. They claim to be justified on the ground that I have already stated. Their broad proposition is that whether or not the proper law of the contract is English law, an English court will not enforce a contract, or award damages for its breach, if its performance will involve the doing of an act in a foreign and friendly State which violates the law of that State. For this they cite the authority of the well-known case of *Foster v. Driscoll*, and much of the debate in this House has been whether that case was rightly decided, and if so, whether it is distinguishable from the present case. The appellant contends that it was not rightly decided, and further invokes a familiar principle which he states in these wide but questionable terms, "An English court will not have regard to a foreign law of a penal, revenue, or political character," and claims that the Indian law here in question is of such a character.

My Lords, in the consideration of this matter I deem it of the utmost importance to bear in mind that we are not here concerned with a suit by a foreign State to enforce its laws. The recent case in this House of *Government of India*

v. *Taylor*³ shows beyond all doubt that an English court will not enforce the penal or revenue laws of another country at the suit of that country. That proposition was there exhaustively examined and nothing remains to be said about it except that there is still a question how far, if at all, the doctrine extends to laws which are described as having a "political" or "public" character. It is clear at least, as Denning L. J. said in this case, that¹ "these courts do not sit to collect taxes for another country or to inflict punishments for it." But as I say, we are not concerned with such a case, but with a very different question, viz., whether in a suit between private persons the court will enforce a contract which involves the doing in a foreign country of an act which is illegal by, and violates, the law of that country. When I say "foreign country" I mean a foreign and friendly country and will not repeat the phrase. In the statement of the question I call particular attention to the words "the doing in a foreign country," for it may well be that different considerations will arise and a different conclusion will be reached if the law of the contract can be wholly performed in England, or at least in some other country than that whose law makes the act illegal (see *Kleinwort, Sons & Co. v. Ungarische Baumwolle Industrie Aktiengesellschaft*⁵). There are points at which the two questions appear to touch each other, and sometimes the one proposition has been treated as an exception on the other. But there is, I think, a fundamental difference. It can hardly be regarded as a matter of comity that the courts of this country will not entertain a suit by a foreign State to enforce its revenue laws. It is, on the other hand, nothing else than comity which has influenced our courts to refuse as a matter of public policy to enforce, or to award damages for the breach of, a contract which involves the violation of foreign law on foreign soil, and it is the limits of this principle that we have to examine. If the principle is, as I think it clearly is, based on public policy, your Lordships will not hesitate, while disclaiming any intention to create any new head of public policy, to apply an old principle to new circumstances.*** The appeal should, in my opinion, be dismissed with costs.

[De øvrige dommere var enige i denne afgørelse. Lord Keith of Avonholm udtalte:]

In the present case I see no escape from the view to recognize the contract between the appellant and the respondent as an enforceable contract would give a just cause for complaint by the Government of India and should be regarded as contrary to conceptions of international comity. On grounds of public policy, therefore, this is a contract which our courts ought not to recognize. It is said that the Indian legislation is discriminatory legislation against a country which is a member of the Commonwealth and with which this country is on friendly terms. But that, in my opinion, is irrelevant. The English courts cannot be called on to adjudicate upon political issues between India and South Africa. The Indian law is not a law repugnant to English conception of what may be regarded as within the ordinary field of legislation or administrative order even in this country. It is the illegality under the foreign law that is to be considered and not the effect of the foreign law on another country.

Folkeret og intern ret

A. FOR NATIONALT FORUM: SÆDVANERET

14

Nogle forfatningsbestemmelser vedrørende inkorporation af almindelig folkeret

DEN TYSKE FORBUNDSREPUBLIK, FORFATNING 1949

Art. 25. Die allgemeinen Regeln des Völkerrechtes sind Bestandteil des Bundesrechtes. Sie gehen den Gesetzen vor und erzeugen Rechte und Pflichten unmittelbar für die Bewohner des Bundesgebietes.

ITALIEN, FORFATNING 1948

Art. 10. Det italienske juridiske system er i overensstemmelse med folkerettens almindeligt anerkendte principper.

Udlændinges retlige status er reguleret ved lov i overensstemmelse med internationale regler og traktater.

15

Mortensen v. Peters

STORBRITANNIEN, HIGH COURT OF JUSTICIARY OF SCOTLAND, 1906
8 Session Cases, 5th Series, 93

[Emmanuel Mortensen, der var dansk statsborger, førte en i Norge indregistreret trawler. Den 30. november 1905 drev han fiskeri, otter-trawling, i Moray Firth i Skotland ca. 5 miles fra kysten. Denne fiskerimetode var forbudt ifølge den skotske sildefiskerilov af 1899, og ved the Sheriff Court of Dornoch blev han idømt en bøde på 50 £.

Mortensen appellerede sagen til the High Court of Justiciary og påstod, at den skotske lov måtte fortolkes i overensstemmelse med folkeretten og ikke kunne finde anvendelse på en udlænding, der befandt sig udenfor britisk territorium.]

[*Lord Justice General.**** I apprehend that the question is one of construction, and of construction only. In this Court we have nothing to do with the question of whether the Legislature has or has not done what foreign powers

may consider a usurpation in a question with them. Neither are we a tribunal sitting to decide whether an Act of the Legislature is *ultra vires* as in contravention of generally acknowledged principles of international law. For us an Act of Parliament duly passed by Lords and Commons and assented to by the King, is supreme, and we are bound to give effect to its terms. The counsel for the appellant advanced the proposition that statutes creating offences must be presumed to apply only (1) to British subjects; and (2) to foreign subjects in British territory; and that short of express enactment their application should not be further extended. The appellant is admittedly not a British subject, which excludes (1); and he further argued that the *locus delicti*, being in the sea beyond the three-mile limit, was not within British territory; and that consequently the appellant was not included in the prohibition of the statute. Viewed as general propositions the two presumptions put forward by the appellant may be taken as correct. This, however, advances the matter but little, for like all presumptions they may be redargued, and the question remains whether they have been redargued on this occasion.

The first thing to be noted is that the prohibition here, a breach of which constitutes the offence is not an absolute prohibition against doing a certain thing, but against doing it in a certain place. Now, when the Legislature, using words of admitted generality,—“It shall not be lawful,” etc., “Every person who,” etc.—conditions an offence by territorial limits, it creates, I think, a very strong inference that it is, for the purposes specified, assuming a right to legislate for that territory against all persons whomsoever. This inference seems to me still further strengthened when it is obvious that the remedy to the mischief sought to be obtained by the prohibition would be either defeated or rendered less effective if all persons whosoever were not affected by the enactment. It is obvious that the latter consideration applies in the present case. Whatever may be the views of anyone as to the propriety of expediency of stopping trawling, the enactment shews on the face of it that it contemplates such stopping; and it would be most clearly ineffective to debar trawling by English subjects while the subjects of other nations were allowed so to fish.

It is said by the appellant that all this must give way to the consideration that International Law has firmly fixed that a *locus* such as this is beyond the limits of territorial sovereignty, and that consequently it is not to be thought that in such a place the Legislature could seek to affect any but the King's subjects.

It is a trite observation that there is no such thing as a standard of international law extraneous to the domestic law of a kingdom, to which appeal may be made. International law, so far as this Court is concerned, is the body of doctrine regarding the international rights and duties of states which has been adopted and made a part of the law of Scotland. Now, can it be said to be clear by the law of Scotland that the *locus* here is beyond what the Legislature may assert right to affect by legislation against all whomsoever for the purpose of regulating methods of fishing?

I do not think I need say anything about what is known as the three-mile limit. It may be assumed that within the three miles the territorial sovereignty

would be sufficient to cover any such legislation as the present. It is enough to say that that is not a proof of the counter proposition that outside the three miles no such result could be looked for. The *locus* although outside the three-mile limit, is within the bay known as the Moray Firth, and the Moray Firth, says the respondent, is *intra fauces terrae*. Now, I cannot say that there is any definition of what *fauces terrae* exactly are. But there are at least three points which go far to shew that this spot might be considered as lying therein.

1st. The *dicta* of the Scottish institutional writers seem to show that it would be no usurpation, according to the law of Scotland, so to consider it.***

2d. The same statute puts forward claims to what are at least analogous places. If attention is paid to the schedule appended to section 6, many places will be found far beyond the three-mile limit—e.g., the Firth of Clyde near its mouth. I am not ignoring that it may be said that this in one sense is proving *idem per idem*, but none the less I do not think the fact can be ignored.

3rd. There are many instances to be found in decided cases where the right of a nation to legislate for waters more or less landlocked or landembraced, although beyond the three-mile limit, has been admitted. They will be found collected in the case of the *Direct United States Cable Company v. Anglo-American Telegraph Company*, 2 A.C. 394 [1877], the bay there in question being Conception Bay, which has a width at the mouth of rather more than 20 miles.

It seems to me therefore, without laying down the proposition that the Moray Firth is for every purpose within the territorial sovereignty, it can at least be clearly said that the appellant cannot make out his proposition that it is inconceivable that the British Legislature should attempt for fishery regulation to legislate against all and sundry in such a place. And if that is so, then I revert to the considerations already stated which as a matter of construction made me think that it did so legislate.***

I am therefore of opinion that the conviction was right, that both questions should be answered in the affirmative, and that the appeal should be dismissed.***

16

Polites v. The Commonwealth and Another Kandiliote v. The Commonwealth and Another

AUSTRALIEN, HIGH COURT OF AUSTRALIA, 1945
[1945] 70 C. L. R. 60

[*Domstolen, Latham, C. J.*] These demurrers raise the question of the validity of Reg. 7 of the National Security (Aliens Service) Regulations as appearing in Statutory Rules, 1942, No. 39, and of Part II of the National Security (Aliens Service) Regulations as enacted in substitution for that regulation by Statutory Rules, 1943, No. 108.

The plaintiff, Speros Polites, is a national of the Kingdom of Greece, and is 29 years of age. A notice was served upon him in pursuance of the first-

mentioned regulation requiring him to serve in the military forces of the Commonwealth. The plaintiff in the second action, Orpheus Kandiliotes, is also a Greek national, and is 25 years of age. He was required to serve with the military forces of the Commonwealth by a notice given to him in pursuance of Reg. 6 contained in Part II of the later Regulations mentioned. The two sets of regulations are substantially identical. They purport to authorize an area officer to serve a notice requiring any male allied national, with certain exceptions which are not material to the present cases, to serve in the military forces of the Commonwealth. When a notice under the Regulations has been served, the Allied national becomes subject to the Defence Act and any regulations in force thereunder—under the earlier regulation “as if” (he) “were” (a) “British subject”, and under the later regulation “to the same extent as if he were serving under Part IV. of” the Defence Act.

“Allied national” is defined in both sets of regulations as meaning “a national of any country which is or may be allied or associated with His Majesty in any war in which His Majesty is or may be engaged.”

Under the provisions of these Regulations, the service of a notice by an area officer imposes an obligation of military service upon certain allies. It is argued for the plaintiffs, first, that there is a general rule of construction of statutes according to which, unless the contrary intention is clear, it is to be presumed that they do not violate any recognized rule of international law; secondly, that there is a well-established rule of international law that aliens cannot be compelled to serve in the military forces of a foreign State in which they happen to be; thirdly, that the Regulations are made under a provision in the National Security Act, 1939 as amended, namely s. 13A, which refers to persons generally; that these general words must be limited in some way, as otherwise they would apply to all persons in the world, and that one proper limitation is to be found in the recognition and application of the rule of international law to which reference has been made. By this course of reasoning, it is sought to establish the propositions that the Regulations are a clear breach of an established rule of international law, and that s. 13A of the National Security Act should be constructed as not intended to authorize such a violation of established principle.

The first proposition for which the plaintiffs contend is well established by many authorities. Perhaps it is most conveniently stated in *Bloxam v. Favre* (1883), 8 P.D. 101, at p. 107, where Sir James Hannen approved the statement in Maxwell on *Interpretation of Statutes*, 8th ed. (1937), p. 130, that “every statute is to be so interpreted and applied, as far as its language admits, as not to be inconsistent with the comity of nations or with the established rules of international law”. See also Craies on *Statute Law*, 4th ed. (1936), p. 379, and Oppenheim, *International Law*, 5th ed. (1937), vol. I, p. 37.

But all the authorities in English law also recognize that courts are bound by the statute law of their country, even if that law should violate a rule of international law.*** The Commonwealth Parliament can legislate on these matters in breach of international law, taking the risk of international complications. This is recognized as being the position in Great Britain—cf. Craies

on *Statute Law*, 4th ed. (1936), p. 393: "Each State can, at its own international risks, reject the opinions of other States as to international law". The position is the same in the United States of America.*** It must be held that legislation otherwise within the power of the Commonwealth Parliament does not become invalid because it conflicts with a rule of international law, though every effort should be made to construe Commonwealth statutes so as to avoid breaches of international law and of international comity. The question therefore is not a question of the power of the Commonwealth Parliament to legislate in breach of international law, but is a question whether in fact it has done so.

The next step in the plaintiff's argument depends upon the establishment of the proposition that there is a rule of international law which prevents a State from imposing an obligation of military service upon aliens resident within its territory. In order to establish this proposition, Mr. Phillips referred to the writings of jurists, to diplomatic practice, and, in particular, to the practice and the policy adopted by Great Britain. He clearly showed that there was a rule which prevented the imposition upon resident aliens of an obligation to serve in the armed forces of the country in which they resided, unless the State to which they belonged consented to waive this ordinarily recognized exemption. (No such consent is alleged in the present cases). This rule, however, does not prevent compulsory service in a local police force, or, apparently, compulsory service for the purpose of maintaining public order or repelling a sudden invasion. Authority for these propositions is to be found in Oppenheim, *International Law*, 5th ed. (1937), vol. I, pp. 541, 542; Walker's *Manual of Public International Law* (1895), p. 47; Pitt Cobbett's *Cases on International Law*, 5th ed. (1937), vol. I, p. 203; Hall, *Treatise on International Law*, 8th ed. (1924), pp. 259, 260, where the distinction is drawn between the use of military forces for ordinary national or political objects and police action to preserve social order or to protect the population against an invasion by savages.***

The Regulations which are challenged enforce ordinary military service without regard to any of the exceptions which have been suggested. The rule as to such military service is plain, even though there is some difference of opinion as to the extent of the right (internationally considered) to require aliens to perform police duties. The Regulations provide for compulsory service of aliens in Australian armed forces and place the aliens in the same position as British subjects in Australia. They must be held to be contrary to an established rule of international law.***

[Dommeren går derefter over til at undersøge det spørgsmål, om the National Security Act virkelig indeholder hjemmel for, at der kan pålægges udlændinge værnepligt, og kommer til det resultat, at dette er tilfældet. I overensstemmelse hermed træffer han denne afgørelse:]

In my opinion, the regulations are valid and the demurrers should be allowed. As the decision upon the demurrers disposes of all the issues in the actions, there should be judgment in the actions for the defendants.

[*Starke, J.*] International law or the law of nations is a law for the inter-

course of States with one another and not a law for individuals: see Oppenheim, *International Law*, 4th ed. (1928), vol. I, Peace, s. 1, p. 5. The law of nations, as I understand it, concedes that all persons or things within the territory of a State fall under its territorial supremacy and are subject to its jurisdiction, legislative, administrative and judicial: see Oppenheim, 4th ed. (1928), vol. I, Peace, s. 144, p. 280. And the Commonwealth is in much the same position as a sovereign State in relation to the powers conferred upon it by the Constitution. Its authority is as plenary and as ample within the limits prescribed by the Constitution as the Imperial Parliament in the plenitude of its power possessed or could bestow (*Hodge v. The Queen* (1883), 9 App. Cas. 117, at p. 132). No doubt sovereign States have, and have often exercised, the right of protecting their nationals abroad against oppression, discrimination and so forth. But that is a very different proposition to that advanced in the present case, namely, that the legislative power of the Commonwealth is subject to, and that all its legislation, whether by the Parliament itself or by any subordinate authority, is limited by, or must be construed so as not to contravene, the rules of the law of nations. So to limit the constitutional power of sovereign States or their subordinate authorities denies the supremacy of those States within their own territory, which is contrary to the principles of the law of nations itself. And to refuse to give words in legislation their grammatical and ordinary signification because of some practice or rule of the law of nations is contrary, as I think, to settled principles of construction. Cases of ambiguity I leave on one side, for there is no ambiguity in the meaning of the present regulations.

It is desirable, however, to consider the law, practice or rule of nations upon which reliance is placed. Hall, *Treatise on International Law*, 7th ed. (1917); s. 61, p. 219, states that it is in accordance with general principle to say, as in effect said by M. Bluntschli, that:

"1. It is not permissible to enrol aliens, except with their own consent, in a force to be used for ordinary national or political objects.

2. Aliens may be compelled to help to maintain social order, provided that the action required of them does not overstep the limits of police, as distinguished from political action.

3. They may be compelled to defend the country against an external enemy when the existence of social order or of the population itself is threatened, when, in other words, a state or part of it is threatened by an invasion of savages or uncivilized nations."

During the Civil War in America, the British Government, however, instructed its ambassador that there was no rule or principle of international law which prohibits the government of any country from requiring aliens resident within its territories to serve in the militia or police of the country or to contribute to the support of such establishments (Hall, *Treatise on International Law*, 7th ed. (1917), at p. 218). The practice or rule of civilized nations is thus rather vague and undefined. And to limit constitutional powers by the rule suggested would be subversive of the sovereignty of the State itself. And to construe the legislation of sovereign States or their subordinate

legislative authorities by reference to such a rule would often be in direct contradiction of the legislation itself and in any case beyond the ordinary functions of courts of law. The truth is that the so-called law is a practice or rule which every State enjoys as a right for the protection of its subjects abroad (see Oppenheim, *International Law*, 4th ed. (1928), vol. I, *Peace*, s. 320, p. 558) and it is a right which is exercised through diplomatic action. To treat the rule as a restriction upon the legislative capacity of sovereign States or as an overriding principle governing the construction of legislative acts ignores the fundamental principle of government that a State is sovereign within its territory, and it is, moreover, so vague and indefinite that courts of law would find it difficult, if not impossible, of application. But this is not to say that the plaintiffs have no remedy: they may represent their cases to the Commonwealth, which would not, I should think, send them into the battle line, or in case of need apply for protection through the representatives of their national government.***

17

**Julius F. Schierbecks Eftf. mod Københavns Byrets
fogedafdeling II**

DANMARK, ØSTRE LANDSRET, 1942
U. f. R. 1942, 1002

[*Domstolen.*] År 1942 den 20. juni blev*** afsagt sålydende kendelse:

Den påkærede afgørelse er truffet af Københavns Byrets fogedafdeling II i en påtegning af 4. juni 1942 på en rekvisition af 2. s. m., hvori den kærende, firmaet Julius F. Schierbecks efterfølger, begærer arrest foretaget i et nærmere omhandlet skib, liggende i Gasværkshavnen, og tilhørende det sovjetrussiske Statsrederi, og går ud på, at den begærte arrestforretning ikke vil kunne berammes til foretagelse, da skibet, hvori arrest begæres foretaget, ejes af en fremmed stat.

I henhold til de i den påkærede afgørelse således indeholdte grunde bestemmes: Den påkærede afgørelse stadfæstes.

B. FOR NATIONALT FORUM: TRAKTATSRET

18

**Nogle forfatningsbestemmelser vedrørende automatisk
transformation af traktater**

DE FORENEDE STATER, FORFATNING 1787

Art. II, afsnit 2, stk. 2. He [the President] shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur;***

Art. VI, stk. 2. This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be

made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

HOLLAND, FORFATNING 1815 med senere ændringer

§ 60 e. The legal provisions in force within the Kingdom shall not apply if the application should be incompatible with agreements which have been published in accordance with Article 60 f either before or after the enactment of the provisions.

§ 60 f. Rules with regard to the publication of agreements shall be laid down in the law. Agreements shall be binding on anyone in so far as they will have been published.

FRANKRIG, FORFATNING 1958

Art. 55. Ordensmæssigt ratificerede traktater eller overenskomster gælder, så snart de er offentliggjort, med en retskraft højere end lovens, under forbehold for hver enkelt overenskomst eller traktat af dens anvendelse af den anden part.

19

Missouri v. Holland

DE FORENEDE STATER, SUPREME COURT, 1920
252 U. S. 416

[*Holmes, J.*] This is a bill*** brought by the State of Missouri to prevent a game warden of the United States from attempting to enforce the Migratory Bird Treaty Act of July 3, 1918, c. 128, 40 Stat. 755, and the regulations made by the Secretary of Agriculture in pursuance of the same. The ground of the bill is that the statute is an unconstitutional interference with the rights reserved to the States by the Tenth Amendment, and that the acts of the defendant done and threatened under that authority invade the sovereign rights of the State and contravene its will manifested in statutes. The State also alleges a pecuniary interest, as owner of the wild birds within its borders and otherwise, admitted by the Government to be sufficient, but it is enough that the bill is a reasonable and a proper means to assert the alleged quasi sovereign rights of a State. *Kansas v. Colorado*, 185 U.S. 125, 142, 22 S. Ct. 552; *Georgia v. Tennessee Copper Co.*, 206 U.S. 230, 237, 27 S. Ct. 618; *Marshall Dental Manufacturing Co. v. Iowa*, 226 U.S. 460, 462, 33 S. Ct. 168. A motion to dismiss was sustained by the District Court on the ground that the Act of Congress is constitutional. 258 F. 479. Acc. *United States v. Thompson* (D.C.) 258 F. 257; *United States v. Rockefeller* (D.C.) 260 F. 346. The State appeals.

On December 8, 1916, a treaty between the United States and Great Britain was proclaimed by the President. It recited that many species of birds in their

annual migrations traversed many parts of the United States and of Canada, that they were of great value as a source of food and in destroying insects injurious to vegetation, but were in danger of extermination through lack of adequate protection. It therefore provided for specified closed seasons and protection in other forms, and agreed that the two powers would take or propose to their lawmaking bodies the necessary measures for carrying the treaty out. 39 Stat. 1702. The above mentioned act of July 3, 1918, entitled an act to give effect to the convention, prohibited the killing, capturing or selling any of the migratory birds included in the terms of the treaty except as permitted by regulations compatible with those terms, to be made by the Secretary of Agriculture. Regulations were proclaimed on July 31, and October 25, 1918. 40 Stat. 1812, 1863. It is unnecessary to go into any details, because, as we have said, the question raised is the general one whether the treaty and statute are void as an interference with the rights reserved to the States.

To answer this question it is not enough to refer to the Tenth Amendment, reserving the powers not delegated to the United States, because by Article 2, Section 2, the power to make treaties is delegated expressly, and by Article 6 treaties made under the authority of the United States, along with the Constitution and laws of the United States made in pursuance thereof, are declared the supreme law of the land. If the treaty is valid there can be no dispute about the validity of the statute under Article 1, Section 8, as a necessary and proper means to execute the powers of the Government. The language of the Constitution as to the supremacy of treaties being general, the question before us is narrowed to an inquiry into the ground upon which the present supposed exception is placed.

It is said that a treaty cannot be valid if it infringes the Constitution, that there are limits, therefore, to the treaty-making power, and that one such limit is that what an act of Congress could not do unaided, in derogation of the powers reserved to the States, a treaty cannot do. An earlier act of Congress that attempted by itself and not in pursuance of a treaty to regulate the killing of migratory birds within the States had been held bad in the District Court. *United States v. Shauver*, 214 F. 154; *United States v. McCullagh*, 221 F. 288. Those decisions were supported by arguments that migratory birds were owned by the States in their sovereign capacity for the benefit of their people, and that under cases like *Geer v. Connecticut*, 161 U.S. 519, 16 S. Ct. 600, this control was one that Congress had no power to displace. The same argument is supposed to apply now with equal force.

Whether the two cases cited were decided rightly or not they cannot be accepted as a test of the treaty power. Acts of Congress are the supreme law of the land only when made in pursuance of the Constitution, while treaties are declared to be so when made under the authority of the United States. It is open to question whether the authority of the United States means more than the formal acts prescribed to make the convention. We do not mean to imply that there are no qualifications to the treaty-making power; but they must be ascertained in a different way. It is obvious that there may be matters of the sharpest exigency for the national well being that an act of Congress

could not deal with but that a treaty followed by such an act could, and it is not lightly to be assumed that, in matters requiring national action, "a power which must belong to and somewhere reside in every civilized government" is not to be found. *Andrews v. Andrews*, 188 U.S. 14, 33, 23 S. Ct. 237. What was said in that case with regard to the powers of the States applies with equal force to the powers of the nation in cases where the States individually are incompetent to act. We are not yet discussing the particular case before us but only are considering the validity of the test proposed. With regard to that we may add that when we are dealing with words that also are a constituent act, like the Constitution of the United States, we must realize that they have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters. It was enough for them to realize or to hope that they had created an organism; it has taken a century and has cost their successors much sweat and blood to prove that they created a nation. The case before us must be considered in the light of our whole experience and not merely in that of what was said a hundred years ago. The treaty in question does not contravene any prohibitory words to be found in the Constitution. The only question is whether it is forbidden by some invisible radiation from the general terms of the Tenth Amendment. We must consider what this country has become in deciding what that amendment has reserved.

The State as we have intimated founds its claim of exclusive authority upon an assertion of title to migratory birds, an assertion that is embodied in statute. No doubt it is true that as between a State and its inhabitants the State may regulate the killing and sale of such birds, but it does not follow that its authority is exclusive of paramount powers. To put the claim of the State upon title is to lean upon a slender reed. Wild birds are not in the possession of anyone; and possession is the beginning of ownership. The whole foundation of the State's rights is the presence within their jurisdiction of birds that yesterday had not arrived, tomorrow may be in another State and in a week a thousand miles away. If we are to be accurate we cannot put the case of the State upon higher ground than that the treaty deals with creatures that for the moment are within the state borders, that it must be carried out by officers of the United States within the same territory, and that but for the treaty the State would be free to regulate this subject itself.

As most of the laws of the United States are carried out within the States and as many of them deal with matters which in the silence of such laws the State might regulate, such general grounds are not enough to support Missouri's claim. Valid treaties of course "are as binding within the territorial limits of the States as they are elsewhere throughout the dominion of the United States." *Baldwin v. Franks*, 120 U.S. 678, 683, 7 S. Ct. 656, 657. No doubt the great body of private relations usually fall within the control of the State, but a treaty may override its power. We do not have to invoke the later developments of constitutional law for this proposition; it was recognized as early as *Hopkirk v. Bell*, 3 Cranch 454, with regard to statutes of limitation, and even earlier, as to confiscation, in *Ware v. Hylton*, 3 Dall. 199. It was assumed by Chief Justice Marshall with regard to the escheat of land to the State in

Chirac v. Chirac, 2 Wheat. 259, 275; *Hauenstein v. Lynham*, 100 U.S. 483; *DeGeofroy v. Riggs*, 133 U.S. 258, 10 S. Ct. 295; *Blythe v. Hinckley*, 180 U.S. 333, 340, 21 S. Ct. 390. So as to a limited jurisdiction of foreign consuls within a State. *Wildenhus' Case*, 120 U.S. 1, 7 S. Ct. 385. See *Ross v. McIntyre*, 140 U.S. 453, 11 S. Ct. 897. Further illustration seems unnecessary, and it only remains to consider the application of established rules to the present case.

Here a national interest of very nearly the first magnitude is involved. It can be protected only by national action in concert with that of another power. The subject-matter is only transitorily within the State and has no permanent habitat therein. But for the treaty and the statute there soon might be no birds for any powers to deal with. We see nothing in the Constitution that compels the Government to sit by while a food supply is cut off and the protectors of our forests and our crops are destroyed. It is not sufficient to rely upon the States. The reliance is vain, and were it otherwise, the question is whether the United States is forbidden to act. We are of opinion that the treaty and statute must be upheld. *Carey v. South Dakota*, 250 U.S. 118, 39 S. Ct. 403.

Decree affirmed.

20

Indemnity Insurance Company of North America v. Pan-American Airways Inc., et al

DE FORENEDE STATER, DISTRICT COURT, SOUTHERN DISTRICT, NEW YORK, 1944
58 F. Supp. 338

[Som følge af, at sagsøgeren måtte udbetale ulykkesforsikringssum i anledning af, at en person blev dræbt ved flyveulykke i Lissabon den 22. februar 1943, anlagde sagsøgeren sag mod flyveselskabet for at få erstatning. Selskabet gjorde under sagen bl. a. gældende, at dettes erstatningspligt i henhold til Warzsavakonventionen af 1929 om den civile luftfart er begrænset. Sagsøgeren hævdede: (1) at konventionen er forfatningsstridig, da den griber ind i Kongressens beføjelser til at regulere handelsforhold, og (2) at konventionen er uvirksom, da den — skønt ikke *self-executing* — ikke er transformeret ved lov.]

[*Rifkind, D.J.*] 1. The alleged conflict between the Treaty and the Constitution is asserted to reside in the fact that the Treaty professes to regulate commerce, a power entrusted exclusively to Congress by article I, section 8, clause 3, without having received the approval of both Houses of Congress. The Warsaw Convention, it is not disputed, was made by the President with the advice and consent of the Senate, two-thirds of the Senators present concurring. Article 2, section 2, clause 2. No reported decision has been called to my attention wherein the validity of a treaty duly ratified in the manner prescribed by the Constitution has been challenged on the ground that it conflicts with the power vested in Congress to regulate commerce. While the novelty of an argument is not to be taken against it, nevertheless one cannot fail to observe the uninterrupted uniformity of the practice by which treaties of commerce, from the earliest days of the Republic, have been made in the

manner now challenged, without arousing so much as a doubt as to the propriety of the course taken. The broad sweep of the treaty-making power is in good measure reflected in the absence of any decision holding a treaty unconstitutional.***

2. Whether a treaty is self-executing or requires implementing legislation depends upon its terms, whether they call for further action or whether they are enforceable without legislation.*** As I read the treaty and particularly the provisions pleaded in the answer, I construe them to be self-executing.***

The argument, that the enactment of legislation by the British Parliament to put the Convention into effect is evidence of its character as not self-executory, is without substance since, unlike the United States Constitution, Art. 6, cl. 2, English law does not regard treaties as the law of the land until made law by an Act of Parliament.***

3. The ineffectiveness of the contract of transportation to limit defendant's liability is predicated upon the invalidity or inoperativeness of the treaty. Since the premise fails the argument must fall.***

21

Imperial Estates Case

TJEKOSLOVAKIET, HØJESTERET, 1938

Vaz. 16, 978 civ.¹

[Sagsøgeren var ansat ved administrationen af den østrigske kejsers private ejendomme. I 1913 blev han afskediget som følge af en påstået disciplinær forseelse. Med hjemmel i en mellem Østrig og Tjekoslovakiet i 1923 indgået traktat anlagde han sag mod den tjekkiske stat og påstod løn eller pension fra afskedigelsens tidspunkt, idet han hævdede at være uberettiget afskediget.]

[*Domstolen.*] ***It has been held in many decisions of this Court*** that the Czechoslovak State has come into being in an original way and that it is not the legal successor either of former Austria, or of the Austrian-Hungarian Monarchy, or of the private funds of the former Austrian-Hungarian dynasty. It has acquired the estates of this dynasty according to Article 208 of the peace treaty with Austria concluded in St. Germain and Articles 1 and 3 of the Czechoslovak Statute, No. 354, ex. 1921. What took place was an independent and original mode of acquisition of property. It was only by the treaty with Austria*** that Czechoslovakia took over the obligation of granting and paying pensions to the former officials connected with the administration of those estates. It is true that no statute executing this treaty has been passed, but both Houses of the National Assembly agreed to it in conformity with Article 64, para. 1, No. 1, of the Constitution.*** This consent need not be given in the form of a statute as long no change of or addition to the Constitution is in question, in which latter case the consent would have to be

¹ Oversættelse fra *Annual Digest of International Law*, 1938–1940, 464–466.

given in the form of a statute amending the Constitution. This is not the position in the present case. As far as the treaty deals with a matter which is normally dealt with by the legislative authority, it is not necessary that there should be passed, in addition, a special statute, since the consent of the National Assembly to the negotiation and ratification of the treaty has already been expressed. It would be contrary to the intention of the legislator, expressed in Article 64, para. I, No. 1, of the Constitution, if the legislative body, after having already expressed its consent to the treaty by a vote taken in the way prescribed by law, had the power to deny later on—at the time when the treaty is in force—the internal validity of the treaty. Furthermore, the Czechoslovak Constitution contains no provision to the effect that the individuals and the officials of the State are bound by statutes only. Article 6 of the Constitution, in particular, does not provide that the legislative power is exercised by way of statute only.*** The Judge is, therefore, also bound by treaties which are recognised by the Constitution and which are therefore, law. Although the National Assembly has not given its assent to the treaty in question in the form of a statute, this treaty, none the less, binds the officials of the State and the individuals by the very fact that the treaty has been concluded by the President in conformity with Article 64, para. 1, No. 1, of the Constitution and by the fact that—after the assent by the National Assembly had been given—it has been published in the official Collection of Statutes and Orders. As the dismissal of the plaintiff from the administration of the former imperial estates was wrongful—the appellants do not deny this—the claim of the plaintiff is founded in law under the treaty cited above.***

22

**Grosserer H. G. Hansen mod Generaldirektoratet
for Statsbanerne**

DANMARK, ØSTRE LANDSRET, 1953

U. f. R. 1953, 595

[*Københavns Byret.*] Ved en ordrebekræftelse af 8. maj 1951 købte sagsøgte, Ansi Træindustri ved H. G. Hansen, en vognladning fyrre- og granbrædder, leveret frit på banevogn på Vårgårda station i Sverige. Varepartiet blev afsendt i henhold til et den 16. juli 1951 udfærdiget fragtbrev, der formentlig ved en fejl fra det svenske jernbanepersonales side under transporten blev påført bemærkningen "Fritt gränsen". Da vognladningen antagelig den 28. juli 1951 blev udleveret, blev der som følge heraf kun afkrævet sagsøgte fragt for transporten i Danmark samt toldarbejdspenge i Helsingborg, ialt 226 kr. 52. øre. Da det blev opklaret, at der ikke var betalt fragt for strækningen i Sverige, afkrævede godsekspeditionen på Københavns godsbanegård antagelig i begyndelsen af december 1951 sagsøgte fragten fra Vårgårda til Helsingborg, der udgjorde 482 kr. 36 øre. Da sagsøgte ikke ville betale, har sagsøgerne, Generaldirektoratet for Statsbanerne, under nærværende sag på-

stået sagsøgte dømt til at betale nævnte fragtbetøb 482 kr. 36 øre med renter 6 pct. p. a. fra den 12. december 1951.

Sagsøgte har påstået frifindelse.

Til støtte for deres påstand har sagsøgerne henvist til bestemmelserne i artikel 18 i den internationale overenskomst om godsbeholdning på jernbaner, hvoraf fremgår, at i tilfælde af urigtige anvendelser af tarif eller fejl i udregningen af fragt og omkostninger skal det for lidt beregnede beløb efterbetales. Den internationale overenskomst er i medfør af statsbanelovens § 2, stk. 2, bekendtgjort i lovtidende C for 1938, med tilføjelse om, at den træder i kraft i Danmark den 1. oktober 1938, og som følge heraf må den være gældende for godstransporter fra udlandet. Såfremt forholdet skulle bedømmes efter danske regler, erkender sagsøgerne, at kravet på efterbetaling ville være forældet, idet krav på berigtigelse af urigtig beregnet fragt efter bestemmelsen i § 52, stk. 6, i statsbaneloven nr. 336 af 27. juni 1946 skal fremsættes inden 3 måneder, efter at fragtoverenskomsten er sluttet. Sagsøgerne mener imidlertid, at overenskomsten fortrænger de nationale regler, jfr. overenskomstens § 53, hvorefter de nationale bestemmelser kun skal komme til anvendelse på forhold, som overenskomsten ikke indeholder regler om. Dette stemmer også med forholdets natur, idet forældelsesfristen i statsbaneloven ville være urimelig kort ved gods, der blev afsendt fra fjerne lande.

Sagsøgte har til støtte for sin frifindelsespåstand anført, at bestemmelsen i statsbanelovens § 52 og ikke den internationale overenskomst må være afgørende, idet overenskomsten er en traktat, der alene regulerer forholdet mellem de forskellige landes jernbaner og ikke kan være retsgrundlag for forholdet mellem banerne og publikum. Iøvrigt har sagsøgte henvist til, at der ikke ved udlevering af vognladningen blev taget noget forbehold, og da specifikationen af det fragtbetøb, der blev afkrævet sagsøgte, ikke angiver, for hvilken strækning fragten er beregnet, måtte sagsøgte få indtryk af, at betalingen var endelig. Efterkravet er først fremsat på et tidspunkt, hvor sagsøgte forlængst har disponeret over partiet, og da efterkravet skyldes en fejl fra de svenske jernbaners side, må den stedfundne betaling antages at være endelig ud fra lignende betragtninger, som gælder ved reglerne om *condictio indebiti*.

Retten skal hertil bemærke følgende:

Forældelsesbestemmelsen i § 52 i statsbaneloven er ifølge dennes § 2, stk. 1, udtrykkelig begrænset til at gælde for transporter over statsbanernes egne jernbanestrækninger, og er således ikke direkte anvendelig på det i nærværende sag omhandlede forhold. Forholdet er ikke i sig selv et lovgivningsanliggende, men må betragtes som et vilkår for fragtkontrakten, og når der desuagtet findes en lovbestemmelse herom, skyldes det formentlig alene den omstændighed, at jernbanedriften i Danmark er et statsanliggende. Som følge heraf, og under hensyn til, hvad der er anført i slutningen af ovenstående referat af sagsøgernes procedure, kan forældelsesreglen i statsbaneloven ikke komme til anvendelse analogisk, og det kan heller ikke være afgørende, at reglerne i den internationale overenskomst ikke har lovkraft, eller at de kun er optaget i lovtidende C.*** Retten mener herefter at måtte give sagsøgerne medhold i, at den internationale overenskomsts bestemmelser må komme til anven-

delse på forholdet, og efter overenskomstens art. 45 er forældelsesfristen 1 år.

Som følge heraf vil der være at give dom efter sagsøgernes påstand, idet hver part dog bør bære sine omkostninger.***

[*Østre Landsret.*] ***Til støtte for sin påstand har appellanten for landsretten gentaget sine anbringender for byretten om, at bestemmelserne i den internationale overenskomst om godsbefordring ikke i sig selv kan være bindende for borgerne, forsåvidt de strider mod de her i landet gældende retsregler. Appellanten har herved nærmere anført, at bestemmelsen i § 2, stk. 2, i den danske statsbanelov — nu lovbekendtgørelse nr. 209 af 30. april 1951 — hvorefter "regeringen er bemyndiget til at tiltræde overenskomster med fremmede stater om befordring af — — — gods — — —, og at bekendtgøre sådanne overenskomster i Lovtidende", alene giver regeringen den fornødne hjemmel til traktaternes afslutning, men ikke kan fritage for at tilvejebringe den lov-hjemmel, der i det enkelte tilfælde måtte være nødvendig for at gøre traktatens bestemmelser bindende for borgerne. Herefter savnes der efter appellants formening hjemmel til i nærværende tilfælde at bringe bestemmelsen i den internationale overenskomsts art. 18, jfr. art. 45, der med hensyn til forældelsesfristen er ugunstigere for borgerne end den tilsvarende regel i den danske statsbanelovs § 52, stk. 6, til anvendelse overfor appellanten. Det kan heller ikke efter appellants videre anbringende antages, at overenskomstens art. 45 er bindende for appellanten som et almindeligt vilkår for fragtkontrakten, idet appellanten, der er modtager af varerne, ikke, således som tilfældet er for afsenderens vedkommende, har kontraheret med banerne vedrørende forsendelsen.

Retten skal bemærke følgende:

Med hensyn til nogle tidligere indgåede internationale overenskomster om godsbefordring på jernbaner m. v. af 23. oktober 1924 blev det ved lov nr. 41 af 5. marts 1927 bestemt, at regeringen bemyndiges til at ratificere de pågældende overenskomster samt til "at bekendtgøre disse Overenskomster i Lovtidende med Lovkraft for de Bestemmelser Vedkommende, der medfører Ændring i bestaaende Love". De omhandlede overenskomster blev derefter bekendtgjort ved Bekendtgørelserne nr. 231 og 232 af 4. september 1928.

Ved lov nr. 55 af 22. januar 1935 om ændring i lov nr. 111 af 13. maj 1911 om Statsbanernes takster m. m. bestemmes blandt andet: "Regeringen er bemyndiget til at tiltræde Overenskomster med fremmede Stater om Befordring af — — — Gods — — — og til Efterlevelse at bekendtgøre saadanne Overenskomster i Lovtidende".

I bemærkningerne til lovforslaget hedder det blandt andet: "— — — søges der ved foranstaaende Lovforslag Hjemmel til, at den danske Regering fremtidig kan tiltræde saadanne Overenskomster og bekendtgøre dem i Lovtidende med Lovkraft. — — —"

Den citerede bestemmelse i loven af 2. januar 1935 er senere optaget i § 2, stk. 2, i statsbaneloven af 27. juni 1946, dog med den ændring, at ordene "til efterlevelse" er udeladt.

Efter det således foreliggende må det antages, at den i nærværende sag omhandlede overenskomst om godsbefordring, der er ratificeret og bekendtgjort

i Lovtidende i medfør af den ved fornævnte bestemmelse i loven af 22. januar 1935 givne bemyndigelse, er bindende over for borgerne her i landet, uanset om dens bestemmelser afviger fra de regler, der ifølge den danske statsbanelov er gældende for befordring over Statsbanernes egne strækninger.

Idet det herefter tiltrædes, at den indankede dom har anset bestemmelsen i den internationale overenskomsts art. 18 for anvendelig på det i nærværende sag omhandlede forhold, vil dommen være at stadfæste.***

23

Kotzias v. Tyser

STORBRITANNIEN, KING'S BENCH DIVISION, 1920
[1920] 2 K. B. 69

[*Roche, J.*] This is an action upon a policy of insurance dated November 2, 1918, by which in consideration of a premium paid by the plaintiff as the assured the underwriters, of whom the defendant is one, agree to pay to the brokers of the plaintiff on behalf of the plaintiff as principal the amount of their separate subscriptions "in the event of peace between Great Britain and Germany not being concluded on or before June 30, 1919." The plaintiff claims payment from the defendant of the sum underwritten by him as for a loss under the policy on the ground that peace between Great Britain and Germany was not concluded on or before June 30, 1919. The only question to be decided is whether peace was or was not concluded between these countries on or before the date specified.***

This policy was effected on November 2, 1918, before hostilities between this country and Germany had ceased, but when the parties contemplated that they might soon cease. It is not contended on behalf of the defendant that the parties in effecting the policy meant by the conclusion of peace on or before June 30, 1919, a mere cessation of hostilities on or before that date; it is admitted that they meant a cessation of hostilities followed at the least by the making of a treaty of peace before that date. It is said on behalf of the defendant that the words meant that and no more and that peace was concluded on or before the date in question, because a Treaty of Peace between these countries was signed before that date. It is said on behalf of the plaintiff, on the other hand, that peace was not concluded on or before that date within the meaning of the policy, because, although the Treaty of Peace was signed before that date, ratifications of the Treaty by the high contracting parties thereto were not exchanged on or before that date, or indeed until January 10, 1920.

I accept the view contended for on behalf of the plaintiff and I do so for several reasons. In the first place, the authorities show that, in the absence of any specific statutory or contractual provision to the contrary, the general rule of international law is that as between civilized Powers who have been at war, peace is not concluded until a treaty of Peace is finally binding upon the bel-

ligerents, and that that stage is not reached until ratifications of the treaty of peace have been exchanged between them.

In the present instance however, the matter does not rest there. The Termination of the Present War (Definition) Act, 1918 (8 & 9 Geo. 5, c. 59) which was passed during the war, and is entitled an Act to make provision for determining the date of its termination, provided by s. 1, sub-s. 1, that His Majesty in Council may declare what date is to be treated as the date of the termination of the present war, and that the war shall be treated as having ended on that date for the purposes, except where the context otherwise requires, of any provision in any contract, deed or other instrument, referring to the war; and, by s. 1, sub-s. 2, that the date so declared shall be as nearly as may be the date of the exchange or deposit of ratifications of the Treaty of Peace. It is to be observed that the Act speaks of the date of the termination of the war, and that the policy of insurance deals with the date of the conclusion of peace, but both must be treated as referring to the same event, and therefore to the same date. The Act contemplates that an Order in Council or Proclamation may be issued declaring what date is to be treated as the date on which hostilities terminated and peace was concluded. It is not disputed that no Order in Council or Proclamation in pursuance of the Act has yet been issued. That fact tends to confirm me in the opinion that peace had not been concluded on or before June 30, 1919.

It is also, I think, material in this connection to consider the provisions of the Treaty of Peace itself. In the recital or preliminary part of the Treaty it is stated that the Powers have agreed that from the coming into force of the Treaty the state of war will terminate. Art. 440 of the Treaty provides that a first *procès-verbal* of the deposit of ratifications will be drawn up as soon as the Treaty has been ratified by the Powers, that from the date of that first *procès-verbal* the Treaty will come into force between the Powers who have ratified it, and that in all other respects it will enter into force for each Power at the date of the deposit of its ratification. The Treaty of Peace thus provides that it is to come into force, or, in other words, that peace is to be concluded, by a deposit of ratifications of the Treaty, and a *procès-verbal* thereof. That was not accomplished until the present month of January, 1920, and consequently it had not been accomplished on or before June 30, 1919, the date mentioned in the policy.***

Judgment for Plaintiff.

24

Lovbestemmelser om anticiperet transformation

Næringslov nr. 138 af 28. april 1931 § 5. Personer, der ikke er i besiddelse af dansk indfødsret, kan, når de opfylder de øvrige i § 3 opstillede betingelser, erhverve næringsbrev, for så vidt og i det omfang adgang hertil er åbnet ved traktatmæssig aftale.***

Lov om Værnepligt nr. 210 af 11. juni 1954 § 1. (1) Enhver dansk mand er værnepligten undergivet.

(2) Den, der tillige er statsborger i et fremmed land, kan ved gensidig overenskomst fritages for værnepligten.

Lov om Rettens pleje, lbkg. nr. 265 af 5. september 1953 § 223 a og § 479, se ndf. sag nr. 00.

C. FOR INTERNATIONALT FORUM

25

Case concerning the Payment of various Serbian Loans issued in France

Case concerning the Payment in Gold of the Brazilian Loans issued in France

DEN FASTE DOMSTOL FOR MELLEMFOLKELIG RETSPLEJE, DOM, 1929
P. C. I. J. Series A, No. 20/21

[I årene 1895—1913 udbød den serbiske regering — bl. a. i Frankrig — forskellige lån. Ydelserne for lånet skulle udbetales i "guld-franc". — Efter at de private kreditorer igennem en årrække havde accepteret renter m. v. i franc efter den til enhver tid gældende kurs, krævede kreditorerne i 1925 fremtidigt at få betaling i franc, udregnet på basis af guldværdien. Den franske regering indbragte, efter resultatløse diplomatiske forhandlinger, sagen for Den faste Domstol for mellemfolkelig Retspleje.

Sagen vedrørende de brasilianske lån omhandlede et lignende problem.

Domstolen statuerede, at kreditorerne var berettigede til at få betaling udregnet efter guldværdi.

Om domstolens kompetence og om forholdet til national ret udtales bl. a. følgende i dommene:]

[*Domstolen.*] ***The Court feels that it should define, with reference, to the provisions governing its jurisdiction and functions, the task entrusted to it by the Special Agreement.

This is made necessary because of the fact that the jurisdiction which the Court is called upon to exercise under the Agreement between France and the Serb-Croat-Slovene State, seems at first sight to constitute a departure from the principles which the Court, in previous judgments, has laid down with regard to the conditions under which a State may bring before it cases relating to the private rights of its nationals.

According to Article 14 of the Covenant, the Court is competent to hear and determine "any dispute of an international character which the Parties thereto submit to it"; and, according to Article 36 of its Statute, "the jurisdiction of the Court comprises all cases which the Parties refer to it". Having been brought before the Court by a Special Agreement between the Government of the French Republic and the Government of the Serb-Croat-Slovene

Kingdom, the present case appears on this ground to be admissible as far as considerations of form are concerned.

Nevertheless, according to the strict terms of the Special Agreement, the controversy submitted to the Court does not appear as a dispute between the two Governments, but as one between the Government of the Serb-Croat-Slovene Kingdom and the French bondholders of certain Serbian loans: it is this dispute, concerning the question on what monetary bases the service of these loans should be effected, which the said Government and the Government of the French Republic would appear to have submitted to the Court by agreement. Now, Article 34 of the Statute expressly provides that "only States or Members of the League of Nations can be Parties in cases before the Court".***

It is however to be noted that the question whether the manner in which the Serb-Croat-Slovene Government is conducting the service of its loans is in accordance with the obligations accepted by it, is no longer merely the subject of a controversy between that Government and its creditors. When the holders of the Serbian loans, considering that their rights were being disregarded, appealed to the French Government, the latter intervened on their behalf with the Serb-Croat-Slovene Government. Diplomatic negotiations followed: but whatever took place during these negotiations, it is common ground that the Serb-Croat-Slovene Government did not reject the intervention of the French Government, but contended that the service of the loans was being affected by it in full conformity with the obligations resulting from the contracts. This view however was not shared by the Government of the French Republic. As from this point, therefore, there exists between the two Governments a difference of opinion which, though fundamentally identical with the controversy already existing between the Serb-Croat-Slovene Government and its creditors, is distinct therefrom; for it is between the Governments of the Serb-Croat-Slovene Kingdom and that of the French Republic, the latter acting in the exercise of its right to protect its nationals. It is this difference of opinion between the two Governments and not the dispute between the Serb-Croat-Slovene Government and the French holders of the loans, which is submitted by the Special Agreement to the Court. The case therefore is admissible not merely from the point of view of form: it also relates to a dispute between Parties of the category contemplated by Article 14 of the Covenant and Article 34 of the Statute. It thus only remains to consider whether the actual subject of the dispute referred to the Court which relates only to questions of fact and of municipal law, prevents the Court from dealing with it. From a general point of view, it must be admitted that the true function of the Court is to decide disputes between States or Members of the League of Nations on the basis of international law: Article 38 of the Statute contains a clear indication to this effect.

But it would scarcely be accurate to say that only questions of international law may form the subject of a decision of the Court. It should be recalled in this respect that paragraph 2 of Article 36 of the Statute provides that States may recognise as compulsory the jurisdiction of the Court in legal disputes

concerning "the existence of any fact which, if established, would constitute a breach of an international obligation". And Article 13 of the Covenant includes disputes of the sort above mentioned "among those which are generally suitable for submission to arbitration or judicial settlement". Clearly, amongst others, disputes concerning pure matters of fact are contemplated, for the States concerned may agree that the fact to be established would constitute a breach of an international obligation; it is unnecessary to add that the facts the existence of which the Court has to establish may be of any kind.

Is the case altered if the point at issue between two States is a question which must be decided by application of the municipal law of a particular country? There are cases—as the Court has already had occasion to observe in Judgment No. 8—in which an action cannot be brought before an international tribunal when there are legal remedies still open to the individuals concerned. But, apart from cases of this kind, and when the two States have agreed to have recourse to the Court, the latter's duty to exercise its jurisdiction cannot be affected, in the absence of a clause in the Statute on the subject, by the circumstance that the dispute relates to a question of municipal law rather than to a pure matter of fact. The very wide wording of the first paragraph of Article 36, which refers especially to cases which—like the present proceedings—are brought before the Court by Special Agreement, supports this conclusion.

Article 38 of the Statute cannot be regarded as excluding the possibility of the Court's dealing with disputes which do not require the application of international law, seeing that the Statute itself expressly provides for this possibility. All that can be said is that cases in which the Court must apply international law will, no doubt, be the more frequent, for it is international law which governs the relations between those who may be subject to the Court's jurisdiction.

On the one hand, the dispute submitted to the Court is, as has been explained, a controversy between France and the Serb-Croat-Slovene State, while on the other hand, it relates exclusively to a *nexus* of municipal law between the Serb-Croat-Slovene State as borrower and the holders of certain Serbian loans. In these circumstances, the question arises whether facts of a character which would determine the relations under international law between the two States may also have an effect upon the relations under the municipal law upon which the Court, at the request of these States, has to give judgment in this case.***

The Court, having in these circumstances to decide as to the meaning and scope of a municipal law, makes the following observations: For the Court itself to undertake its own construction of municipal law, leaving on one side existing judicial decisions, with the ensuing danger of contradicting the construction which has been placed on such law by the highest national tribunal and which, in its results, seems to the Court reasonable, would not be in conformity with the task for which the Court has been established and would not be compatible with the principles governing the selection of its members. It would be a most delicate matter to do so, especially in cases concerning public

policy—a conception the definition of which in any particular country is largely dependent on the opinion prevailing at any particular time in such country itself—and in cases where no relevant provisions directly relate to the question at issue. It is French legislation, as applied in France, which really constitutes French law, and if that law does not prevent the fulfilment of the obligations in France in accordance with the stipulations made in the contract, the fact that the terms of legislative provisions are capable of a different construction is irrelevant.***

Brazilian Case

***The Special Agreement under which this case has been submitted to the Court contains the following in Article VI:

In estimating the weight to be attached to any municipal law of either country which may be applicable to the dispute, the Permanent Court of International Justice shall not be bound by the decisions of the respective courts.

There are two possible interpretations. According to one—keeping more strictly to the literal meaning of the words—the Court is not to regard itself as legally bound to follow the doctrine of the courts of the country the law of which it is applying; it remains however free to do so if it considers that its task should be limited to applying the municipal law in accordance with the construction placed thereon by the national courts. According to another interpretation—which might find support more particularly in the fact that questions similar to that submitted to the Court had already formed the subject of decision in French Courts—the Court's duty would be to disregard the doctrine of the municipal courts and itself to determine that interpretation of the relevant legislation which seems, in its opinion, to be the most reasonable in the present case.

The Court, in choosing between these two interpretations, must adopt that one which is in principle compatible with a proper appreciation of its nature and functions.

Though bound to apply municipal law when circumstances so require, the Court, which is a tribunal of international law, and which, in this capacity, is deemed itself to know what this law is, is not obliged to know the municipal law of various countries. All that can be said in this respect is that the Court may possibly be obliged to obtain knowledge regarding the municipal law which has to be applied. And this it must do, either by means of evidence furnished it by the Parties or by means of any researches which the Court may think fit to undertake or cause to be undertaken.

Once the Court has arrived at the conclusion that it is necessary to apply the municipal law of a particular country, there seems no doubt that it must seek to apply it as it would be applied in that country. It would not be applying the municipal law of a country if it were to apply it in a manner different from that in which that law would be applied in the country in which it is in force.

It follows that the Court must pay the utmost regard to the decisions of the municipal courts of a country, for it is with the aid of their jurisprudence that it will be enabled to decide what are the rules which, in actual fact, are applied in the country the law of which is recognised as applicable in a given case. If the Court were obliged to disregard the decisions of municipal courts, the result would be that it might in certain circumstances apply rules other than those actually applied; this would seem to be contrary to the whole theory on which the application of municipal law is based.***

Folkerettens kilder

26

Statut for den Internationale Domstol

DE FORENEDE NATIONERS PAGT AF 26. JUNI 1945

Art. 38. 1. Domstolen, hvis opgave er at afgøre de tvister, der forelægges den, i overensstemmelse med mellemfolkelig ret, skal anvende:

a. Mellemfolkelige konventioner af almindelig eller særlig art, som hjemler regler, der udtrykkeligt er anerkendt af de stridende stater.

b. Den mellemfolkelige sædvane som udtryk for en almindelig praksis, der er anerkendt som retsregel.

c. De almindelige retsgrundsætninger, som anerkendes af civiliserede nationer.

d. Med den begrænsning, som følger af art. 59, retsafgørelser samt de forskellige nationers mest ansete forfatters meninger som hjælpemiddel ved konstateringen af, hvad der er gældende ret.

2. Nærværende bestemmelse skal ikke være til hinder for, at domstolen, hvis parterne er enige derom, kan træffe en afgørelse efter ret og billighed.

Art. 59. Domstolens afgørelse er kun bindende for de stridende parter og for den sag, som er blevet afgjort.

27

The Case of the S. S. "Lotus"

DEN FASTE DOMSTOL FOR MELLEMFOLKELIG RETSPLEJE, DOM, 1927

P. C. I. J. Series A, No. 10

[Den 2. august 1926 kolliderede den franske damper *Lotus* med det tyrkiske skib *Boz-Kourt* på det åbne hav, hvorved *Boz-Kourt* sank og 8 tyrkere omkom. Efter at have gjort alt, hvad der var muligt for at redde eventuelle overlevende, fortsatte *Lotus* til Konstantinopel. De tyrkiske myndigheder indledte straks proces mod den vagthavende franske officer i sammenstødsøjeblikket, Demons, og mod det tyrkiske skibs kaptajn. Demons blev arresteret og idømt en bøde på 22 tyrkiske pund samt 80 dages fængsel, medens den tyrkiske kaptajn blev idømt en noget strengere straf.

De tyrkiske myndigheders handlemåde overfor Demons gav anledning til diplomatiske henvendelser fra Frankrig, der dels protesterede mod arrestationen og dels krævede sagen overført til franske domstole, og ved aftale af 12. oktober 1926 enedes parterne om, at spørgsmålet om Tyrkiets straffe-kompetence skulle forelægges Den faste Domstol for mellemfolkelig Retspleje, der den 7. september 1927 afsagde dom i Tyrkiets favør.]

[*Domstolen.*] The Court, having to consider whether there are any rules of international law which may have been violated by the prosecution in pursuance of Turkish law of Lieutenant Demons, is confronted in the first place by a question of principle which, in the written and oral arguments of the two Parties, has proved to be a fundamental one. The French Government contends that the Turkish Courts, in order to have jurisdiction, should be able to point to some title to jurisdiction recognized by international law in favour of Turkey. On the other hand, the Turkish Government takes the view that Article 15¹ allows Turkey jurisdiction whenever such jurisdiction does not come into conflict with a principle of international law.

The latter view seems to be in conformity with the special agreement itself, No. 1 of which asks the Court to say whether Turkey has acted contrary to the principles of international law and, if so, what principles. According to the special agreement, therefore, it is not a question of stating principles which would permit Turkey to take criminal proceedings, but of formulating the principles, if any, which might have been violated by such proceedings.

This way of stating the question is also dictated by the very nature and existing conditions of international law.

International law governs relations between independent States. The rules of law binding upon States therefore emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law and established in order to regulate the relations between these co-existing independent communities or with a view to the achievement of common aims. Restrictions upon the independence of States cannot therefore be presumed.

Now the first and foremost restriction imposed by international law upon a State is that—failing the existence of a permissive rule to the contrary—it may not exercise its power in any form in the territory of another State. In this sense jurisdiction is certainly territorial; it cannot be exercised by a State outside its territory except by virtue of a permissive rule derived from international custom or from a convention.

It does not, however, follow that international law prohibits a State from exercising jurisdiction in its own territory, in respect of any case which relates to acts which have taken place abroad, and in which it cannot rely on some permissive rule of international law. Such a view would only be tenable if international law contained a general prohibition to States to extend the application of their laws and the jurisdiction of their courts to persons, property and acts outside their territory, and if, as an exception to this general prohibition, it allowed States to do so in certain specific cases. But this is certainly not the case under international law as it stands at present. Far from laying down a general prohibition to the effect that States may not extend the application of their laws and the jurisdiction of their courts to persons,

¹ I Lausanne-konventionen af 24. juli 1923, der bestemmer, at "**** all questions of jurisdiction shall, as between Turkey and the other contracting Powers, be decided in accordance with the principles of international law."

property and acts outside their territory, it leaves them in this respect a wide measure of discretion which is only limited in certain cases by prohibitive rules; as regards other cases, every State remains free to adopt the principles which it regards as best and most suitable.

This discretion left to States by international law explains the great variety of rules which they have been able to adopt without objections or complaints on the part of other States; it is in order to remedy the difficulties resulting from such variety that efforts have been made for many years past, both in Europe and America, to prepare conventions the effect of which would be precisely to limit the discretion at present left to States in this respect by international law, thus making good the existing lacunæ in respect of jurisdiction or removing the conflicting jurisdictions arising from the diversity of the principles adopted by the various States.

In these circumstances, all that can be required of a State is that it should not overstep the limits which international law places upon its jurisdiction; within these limits, its title to exercise jurisdiction rests in its sovereignty.

It follows from the foregoing that the contention of the French Government to the effect that Turkey must in each case be able to cite a rule of international law authorizing her to exercise jurisdiction, is opposed to the generally accepted international law to which Article 15 of the Convention of Lausanne refers. Having regard to the terms of Article 15 and to the construction which the Court has just placed upon it, this contention would apply in regard to civil as well as to criminal cases, and would be applicable on conditions of absolute reciprocity as between Turkey and the other contracting Parties; in practice, it would therefore in many cases result in paralyzing the action of the courts, owing to the impossibility of citing a universally accepted rule on which to support the exercise of their jurisdiction.

Nevertheless, it has to be seen whether the foregoing considerations really apply as regards criminal jurisdiction, or whether this jurisdiction is governed by a different principle: this might be the outcome of the close connection which for a long time existed between the connection of supreme criminal jurisdiction and that of a State, and also by the especial importance of criminal jurisdiction from the point of view of the individual.

Though it is true that in all systems of law the principle of the territorial character of criminal law is fundamental, it is equally true that all or nearly all these systems of law extend their action to offences committed outside the territory of the State which adopts them, and they do so in ways which vary from State to State. The territoriality of criminal law, therefore, is not an absolute principle of international law and by no means coincides with territorial sovereignty.

This situation may be considered from two different standpoints corresponding to the points of view respectively taken up by the Parties. According to one of these standpoints, the principle of freedom, in virtue of which each State may regulate its legislation at its discretion, provided that in so doing it does not come in conflict with a restriction imposed by international law, would also apply as regards law governing the scope of jurisdiction in criminal cases.

According to the other standpoint, the exclusively territorial character of law relating to this domain constitutes a principle which, except as otherwise expressly provided, would, *ipso facto*, prevent States from extending the criminal jurisdiction of their courts beyond their frontiers; the exceptions in question, which include for instance extraterritorial jurisdiction over nationals and over crimes directed against public safety, would therefore rest on special permissive rules forming part of international law.

Adopting, for the purposes of the argument, the standpoint of the latter of these two systems, it must be recognized that, in the absence of a treaty provision, its correctness depends upon whether there is a custom having the force of law establishing it. The same is true as regards the applicability of this system—assuming it to have been recognized as sound—in the particular case. It follows that, even from this point of view, before ascertaining whether there may be a rule of international law expressly allowing Turkey to prosecute a foreigner for an offence committed by him outside Turkey, it is necessary to begin by establishing both that the system is well-founded and that it is applicable in the particular case. Now, in order to establish the first of these points, one must, as has just been seen, prove the existence of a principle of international law restricting the discretion of States as regards criminal legislation.

Consequently, whichever of the two systems described above be adopted, the same result will be arrived at in this particular case: the necessity of ascertaining whether or not under international law there is a principle which would have prohibited Turkey, in the circumstances of the case before the Court, from prosecuting Lieutenant Demons. And moreover, on either hypothesis, this must be ascertained by examining precedents offering a close analogy to the case under consideration; for it is only from precedents of this nature that the existence of a general principle applicable to the particular case may appear. For if it were found, for example, that, according to the practice of States, the jurisdiction of the State whose flag was flown was not established by international law as exclusive with regard to collision cases on the high seas, it would not be necessary to ascertain whether there were a more general restriction; since, as regards that restriction—supposing that it existed—the fact that it had been established that there was no prohibition in respect of collision on the high seas would be tantamount to a special permissive rule.

The Court therefore must, in many event, ascertain whether or not there exists a rule of international law limiting the freedom of States to extend the criminal jurisdiction of their courts to a situation uniting the circumstances of the present case.

The Court will now proceed to ascertain whether general international law, to which Article 15 of the Convention of Lausanne refers, contains a rule prohibiting Turkey from prosecuting Lieutenant Demons.

For this purpose, it will in the first place examine the value of the arguments advanced by the French Government, without however omitting to take into account other possible aspects of the problem, which might show the existence of a restrictive rule applicable in this case.

The arguments advanced by the French Government, other than those considered above, are, in substance, the three following:

(1) International law does not allow a State to take proceedings with regard to offences committed by foreigners abroad, simply by reason of the nationality of the victim; and such is the situation in the present case because the offence must be regarded as having been committed on board the French vessel.

(2) International law recognizes the exclusive jurisdiction of the State whose flag is flown as regards everything which occurs on board a ship on the high seas.

(3) Lastly, this principle is especially applicable in a collision case.

As regards the first argument, the Court feels obliged in the first place to recall that its examination is strictly confined to the specific situation in the present case, for it is only in regard to this situation that its decision is asked for.

As has already been observed, the characteristic features of the situation of fact are as follows: there has been a collision on the high seas between two vessels flying different flags, on one of which was one of the persons alleged to be guilty of the offence, whilst the victims were on board the other.

This being so, the Court does not think it necessary to consider the contention that a State cannot punish offences committed abroad by a foreigner simply by reason of the nationality of the victim. For this contention only relates to the case where the nationality of the victim is the only criterion on which the criminal jurisdiction of the State is based. Even if that argument were correct generally speaking—and in regard to this the Court reserves its opinion—it could only be used in the present case if international law forbade Turkey to take into consideration the fact that the offence produced its effects on the Turkish vessel and consequently in a place assimilated to Turkish territory in which the application of Turkish criminal law cannot be challenged, even in regard to offences committed there by foreigners. But no such rule of international law exists. No argument has come to the knowledge of the Court from which it could be deduced that States recognize themselves to be under an obligation towards each other only to have regard to the place where the author of the offence happens to be at the time of the offence. On the contrary, it is certain that the courts of many countries, even of countries which have given their criminal legislation a strictly territorial character, interpret criminal law in the sense that offences, the authors of which at the moment of commission are in the territory of another State, are nevertheless to be regarded as having been committed in the national territory, if one of the constituent elements of the offence, and more especially its effects, have taken place there. French courts have, in regard to a variety of situations, given decisions sanctioning this way of interpreting the territorial principle. Again, the Court does not know of any cases in which governments have protested against the fact that the criminal law of some country contained a rule to this effect or that the courts of a country construed their criminal law

in this sense. Consequently, once it is admitted that the effects of the offence were produced on the Turkish vessel, it becomes impossible to hold that there is a rule of international law which prohibits Turkey from prosecuting Lieutenant Demons because of the fact that the author of the offence was on board the French ship. Since, as has already been observed, the special agreement does not deal with the provision of Turkish law under which the prosecution was instituted, but only with the question whether the prosecution should be regarded as contrary to the principles of international law, there is no reason preventing the Court from confining itself to observing that, in this case, a prosecution may also be justified from the point of view of the so-called territorial principle.

Nevertheless, even if the Court had to consider whether Article 6 of the Turkish Penal Code was compatible with international law, and if it held that the nationality of the victim did not in all circumstances constitute a sufficient basis for the exercise of criminal jurisdiction by the State of which the victim was a national, the Court would arrive at the same conclusion for the reason just set out. For even were Article 6 to be held incompatible with the principles of international law, since the prosecution might have been based on another provision of Turkish law which would not have been contrary to any principle of international law, it follows that it would be impossible to deduce from the mere fact that Article 6 was not in conformity with those principles, that the prosecution itself was contrary to them. The fact that the judicial authorities may have committed an error in their choice of the legal provision applicable to the particular case and compatible with international law only concerns municipal law and can only affect international law in so far as a treaty provision enters into account, or the possibility of a denial of justice arises.

It has been sought to argue that the offence of manslaughter cannot be localized at the spot where the mortal effect is felt; for the effect is not intentional and it cannot be said that there is, in the mind of the delinquent, any culpable intent directed towards the territory where the mortal effect is produced. In reply to this argument it might be observed that the effect is a factor of outstanding importance in offences such as manslaughter, which are punished precisely in consideration of their effects rather than of the subjective intension of the delinquent. But the Court does not feel called upon to consider this question, which is one of interpretation of Turkish criminal law. It will suffice to observe that no argument has been put forward and nothing has been found from which it would follow that international law has established a rule imposing on States this reading of the conception of the offence of manslaughter.

The second argument put forward by the French Government is the principle that the State whose flag is flown has exclusive jurisdiction over everything which occurs on board a merchant ship on the high seas.

It is certainly true that—apart from certain special cases which are defined by international law—vessels on the high seas are subject to no authority except

that of the State whose flag they fly. In virtue of the principle of the freedom of the seas, that is to say, the absence of any territorial sovereignty upon the high seas, no State may exercise any kind of jurisdiction over foreign vessels upon them. Thus, if a war vessel, happening to be at the spot where a collision occurs between a vessel flying its flag and a foreign vessel, were to send on board the latter an officer to make investigations or to take evidence, such an act would undoubtedly be contrary to international law.

But it by no means follows that a State can never in its own territory exercise jurisdiction over acts which have occurred on board a foreign ship on the high seas. A corollary of the principle of the freedom of the seas is that a ship on the high seas is assimilated to the territory of the State the flag of which it flies, for, just as in its own territory, that State exercises its authority upon it, and no other State may do so. All that can be said is that by virtue of the principle of the freedom of the seas, a ship is placed in the same position as national territory; but there is nothing to support the claim according to which the rights of the State under whose flag the vessel sails may go farther than the rights which it exercises within its territory properly so called. It follows that what occurs on board a vessel on the high seas must be regarded as if it occurred on the territory of the State whose flag the ship flies. If, therefore, a guilty act committed on the high seas produces its effects on a vessel flying another flag or in foreign territory, the same principles must be applied as if the territories of two different States were concerned, and the conclusion must therefore be drawn that there is no rule of international law prohibiting the State to which the ship on which the effects of the offence have taken place belongs, from regarding the offence as having been committed in its territory and prosecuting, accordingly, the delinquent.

This conclusion could only be overcome if it were shown that there was a rule of customary international law which, going further than the principle stated above, established the exclusive jurisdiction of the State whose flag was flown. The French Government has endeavoured to prove the existence of such a rule, having recourse for this purpose to the teachings of publicists, to decisions of municipal and international tribunals, and especially to conventions which, whilst creating exceptions to the principle of the freedom of the seas by permitting the war and police vessels of a State to exercise a more or less extensive control over the merchant vessels of another State, reserve jurisdiction to the courts of the country whose flag is flown by the vessel proceeded against.

In the Court's opinion, the existence of such a rule has not been conclusively proved.

In the first place, as regards teachings of publicists, and apart from the question as to what their value may be from the point of view of establishing the existence of a rule of customary law, it is no doubt true that all or nearly all writers teach that ships on the high seas are subject exclusively to the jurisdiction of the State whose flag they fly. But the important point is the significance attached by them to this principle; now it does not appear that in general, writers bestow upon this principle a scope differing from or wider

than that explained above and which is equivalent to saying that the jurisdiction of a state over vessels on the high seas is the same in extent as its jurisdiction in its own territory. On the other hand, there is no lack of writers who, upon a close study of the special question whether a State can prosecute for offences committed on board a foreign ship on the high seas, definitely come to the conclusion that such offences must be regarded as if they had been committed in the territory of the State whose flag the ship flies, and that consequently the general rules of each legal system in regard to offences committed abroad are applicable.

In regard to precedents, it should first be observed that, leaving aside the collision cases which will be alluded to later, none of them relates to offences affecting two ships flying the flags of two different countries, and that consequently they are not of much importance in the case before the Court. The case of the *Costa Rica Packet* is no exception, for the prauw on which the alleged depredations took place was adrift without flag or screw, and this circumstance certainly influenced, perhaps decisively, the conclusion arrived at by the arbitrator.

On the other hand, there is no lack of cases in which a State has claimed a right to prosecute for an offence, committed on board a foreign ship, which it regarded as punishable under its legislation. Thus Great Britain refused the request of the United States for the extradition of John Anderson, a British seaman who had committed homicide on board an American vessel, stating that she did not dispute the jurisdiction of the United States but that she was entitled to exercise hers concurrently. This case, to which others might be added, is relevant in spite of Anderson's British nationality, in order to show that the principle of the exclusive jurisdiction of the country whose flag the vessel flies is not universally accepted.

The cases in which the exclusive jurisdiction of the State whose flag was flown has been recognized would seem rather to have been cases in which the foreign State was interested only by reason of the nationality of the victim, and in which, according to the legislation of that State itself or the practice of its courts, that ground was not regarded as sufficient to authorize prosecution for an offence committed abroad by a foreigner.

Finally, as regards conventions expressly reserving jurisdiction exclusively to the State whose flag is flown, it is not absolutely certain that this stipulation is to be regarded as expressing a general principle of law rather than as corresponding to the extraordinary jurisdiction which these conventions confer on the stateowned ships of a particular country in respect of ships of another country on the high seas. Apart from that, it should be observed that these conventions relate to matters of a particular kind, closely connected with the policing of the seas, such as the slave trade, damage to submarine cables, fisheries, etc., and not to commonlaw offences. Above all it should be pointed out that the offences contemplated by the conventions in question only concern a single ship; it is impossible therefore to make any deduction from them in regard to matters which concern two ships and consequently the jurisdiction of two different States.

The Court therefore has arrived at the conclusion that the second argument put forward by the French Government does not, any more than the first, establish the existence of a rule of international law prohibiting Turkey from prosecuting Lieutenant Demons.

It only remains to examine the third argument advanced by the French Government and to ascertain whether a rule specially applying to collision cases has grown up, according to which criminal proceedings regarding such cases come exclusively within the jurisdiction of the State whose flag is flown.

In this connection, the Agent for the French Government has drawn the Court's attention to the fact that questions of jurisdiction in collision cases, which frequently arise before civil courts, are but rarely encountered in the practice of criminal courts. He deduces from this that, in practice, prosecutions only occur before the courts of the State whose flag is flown and that that circumstance is proof of a tacit consent on the part of States and, consequently, shows what positive international law is in collision cases.

In the Court's opinion, this conclusion is not warranted. Even if the rarity of the judicial decisions to be found among the reported cases were sufficient to prove in point of fact the circumstance alleged by the Agent for the French Government, it would merely show that States had often, in practice, abstained from instituting criminal proceedings, and not that they recognized themselves as being obliged to do so; for only if such abstention were based on their being conscious of having a duty to abstain would it be possible to speak of an international custom. The alleged fact does not allow one to infer that States have been conscious of having such a duty; on the other hand, as will presently be seen, there are other circumstances calculated to show that the contrary is true.

So far as the Court is aware there are no decisions of international tribunals in this matter; but some decisions of municipal courts have been cited. Without pausing to consider the value to be attributed to the judgments of municipal courts in connection with the establishment of the existence of a rule of international law, it will suffice to observe that the decisions quoted sometimes support one view and sometimes the other. Whilst the French Government have been able to cite the *Ortigia—Oncle-Joseph* case before the Court of Aix and the *Franconia—Strathclyde* case before the British Court for Crown Cases Reserved, as being in favour of the exclusive jurisdiction of the State whose flag is flown, on the other hand the *Ortigia—Oncle-Joseph* case before the Italian Courts and the *Ekkbatana—West-Hinder* case before the Belgian Courts have been cited in support of the opposing contention.

Lengthy discussions have taken place between the Parties as to the importance of each of these decisions as regards the details of which the Court confines itself to a reference to the Cases and Counter-Cases of the Parties. The Court does not think it necessary to stop to consider them. It will suffice to observe that, as municipal jurisprudence is thus divided, it is hardly possible to see in it an indication of the existence of the restrictive rule of international law which alone could serve as a basis for the contention of the French Government.

On the other hand, the Court feels called upon to lay stress upon the fact that it does not appear that the States concerned have objected to criminal proceedings in respect of collision cases before the courts of a country other than that the flag of which was flown, or that they have made protests: their conduct does not appear to have differed appreciably from that observed by them in all cases of concurrent jurisdiction. This fact is directly opposed to the existence of a tacit consent on the part of States to the exclusive jurisdiction of the State whose flag is flown, such as the Agent for the French Government has thought it possible to deduce from the infrequency of questions of jurisdiction before criminal courts. It seems hardly probable, and it would not be in accordance with international practice, that the French Government in the *Ortigia—Onclé-Joseph* case and the German Government in the *Ekbatana—West-Hinder* case would have omitted to protest against the exercise of criminal jurisdiction by the Italian and Belgian Courts, if they had really thought that this was a violation of international law.

As regards the *Franconia* case (R. v. Keyn 1877, L. R. 2 Ex. Div. 63) upon which the Agent for the French Government has particularly relied, it should be observed that the part of the decision which bears the closest relation to the present case is the part relating to the localization of the offence on the vessel responsible for the collision.

But, whatever the value of the opinion expressed by the majority of the judges on this particular point may be in other respects, there would seem to be no doubt that if, in the minds of these judges, it was based on a rule of international law, their conception of that law, peculiar to English jurisprudence, is far from being generally accepted even in common-law countries. This view seems moreover to be borne out by the fact that the standpoint taken by the majority of the judges in regard to the localization of an offence, the author of which is situated in the territory of one State whilst its effects are produced in another State, has been abandoned in more recent English decisions (R. v. Nillins, 1884, 53 L. J. 157; R. v. Godfrey, L. R. 1923, 1 K. B. 24). This development of English case-law tends to support the view that international law leaves States a free hand in this respect.

In support of the theory in accordance with which criminal jurisdiction in collision cases would exclusively belong to the State of the flag flown by the ship, it has been contended that it is a question of the observance of the national regulations of each merchant marine and that effective punishment does not consist so much in the infliction of some months' imprisonment upon the captain as in the cancellation of his certificate as master, that is to say, in depriving him of the command of his ship.

In regard to this, the Court must observe that in the present case a prosecution was instituted for an offence at criminal law and not for a breach of discipline. Neither the necessity of taking administrative regulations into account (even ignoring the circumstance that it is a question of uniform regulations adopted by States as a result of an international conference) nor the impossibility of applying certain disciplinary penalties can prevent the application of criminal law and of penal measures of repression.

The conclusion at which the Court has therefore arrived is that there is no rule of international law in regard to collision cases to the effect that criminal proceedings are exclusively within the jurisdiction of the State whose flag is flown.

This conclusion moreover is easily explained if the manner in which the collision brings the jurisdiction of two different countries into play be considered.

The offence for which Lieutenant Demons appears to have been prosecuted was an act—of negligence or imprudence—having its origin on board the *Lotus*, whilst its effects made themselves felt on board the *Boz-Kourt*. These two elements are, legally, entirely inseparable, so much so that their separation renders the offence non-existent. Neither the exclusive jurisdiction of either State, nor the limitations of the jurisdiction of each to the occurrences which took place on the respective ships would appear calculated to satisfy the requirements of justice and effectively to protect the interests of the two States. It is only natural that each should be able to exercise jurisdiction and to do so in respect of the incident as a whole. It is therefore a case of concurrent jurisdiction.

The Court, having arrived at the conclusion that the arguments advanced by the French Government either are irrelevant to the issue or do not establish the existence of a principle of international law precluding Turkey from instituting the prosecution which was in fact brought against Lieutenant Demons, observes that in the fulfilment of its task of itself ascertaining what the international law is, it has not confined itself to a consideration of the arguments put forward, but has included in its researches all precedents, teachings and facts to which it had access and which might possibly have revealed the existence of one of the principles of international law contemplated in the special agreement. The result of these researches had not been to establish the existence of any such principle. It must therefore be held that there is no principle of international law, within the meaning of Article 15 of the Convention of Lausanne of July 24th, 1923, which precludes the institution of the criminal proceedings under consideration. Consequently, Turkey, by instituting, in virtue of the discretion which international law leaves to every sovereign State, the criminal proceedings in question, has not, in the absence of such principles, acted in a manner contrary to the principles of international law within the meaning of the special agreement.

In the last place the Court observes that there is no need for it to consider the question whether the fact that the prosecution of Lieutenant Demons was "joint" (*connexe*) with that of the captain of the *Boz-Kourt* would be calculated to justify an extension of Turkish jurisdiction. This question would only have arisen if the Court had arrived at the conclusion that there was a rule of international law prohibiting Turkey from prosecuting Lieutenant Demons; for only in that case would it have been necessary to ask whether that rule might be overridden by the fact of the "connexité" (*connexité*) of the offences.

28

Giesler gegen Giesler Erben

SCHWEIZ, BUNDESGERICHT, 1935

1935 Amtliche Sammlung 61, I, 258

[Appellanten, der var schweizer, og appelindstævnte, der var af tysk nationalitet, havde indgået en kontrakt, hvorefter alle tvistigheder vedrørende kontrakten skulle indbringes for domstolen i Epernay i Frankrig. Uanset denne bestemmelse havde appelindstævnte foretaget arrest i appellantens formue i Luzern, hvorefter appelindstævnte med hjemmel i schweiziske procedure-regler anlagde sag ved retten i Luzern mod appellant for et krav i henhold til parternes kontrakt.]

For bundsdomstolen gjorde appellant gældende, at schweiziske domstole manglede kompetence bl. a. som følge af almindelige retsgrundsætninger af folkeretlig karakter.

Forbundsdomstolen fastslog, at domstolen var kompetent og afviste, at der skulle eksistere folkeretlige grundsætninger, der indskrænkede kompetencen i den foreliggende sag.]

[Domstolen.] ***Wenn die Gerichte dieses anderen Staates dennoch die Anhandnahme der bei ihnen erhobenen Klage mit Rücksicht auf die frühere Prorogation der Prozesparteien zu gunsten eines ausländischen Gerichtes ablehnen, so tun sie dies, vom Vorliegen eines Staatsvertrages abgesehen, nicht auf Grund einer völkerrechtlichen Bindung, sondern der eigenen internen Prozessgesetzgebung und der dieser zu Grunde liegenden Anschauungen über die richtige Abgrenzung der inländischen Gerichtsbarkeit im internationalen Verhältnis (*Nussbaum*, Internationales Privatrecht, S. 402 Abs. 3). Selbst wenn die Praxis in den verschiedenen Staaten durchaus überwiegend dahin gehen sollte, so vermöchte infolgedessen daraus ein Grundsatz des völkerrechtlichen Gewohnheitsrechtes, der die abweichende positivrechtliche Ordnung in einem bestimmten Staate als unzulässigen Eingriff in eine fremde Souveränität erscheinen liesse, nicht hergeleitet zu werden. Vielmehr würde einfach eine inhaltliche Übereinstimmung der internen Gesetzgebungen und der auf ihnen beruhenden Rechtsprechung in der Mehrheit der Staaten für eine bestimmte Frage vorliegen. Diese Erscheinung kommt aber auch sonst vor, ohne dass daraus auf eine völkerrechtliche Beschränkung des einzelnen Staates in der Ausgestaltung seiner Rechtsordnung geschlossen werden könnte.***

29

Eastern Extension Telegraph Co. v. United States

DE FORENEDE STATER-STORBRITANNIEN, CLAIMS ARBITRATION, 1923

Nielsen's Report, 73

[*Voldgiftsretten*.] ***This is a claim presented by His Britannic Majesty's Government on behalf of the Eastern Extension, Australasia and China Telegraph Company, Limited, a British corporation, for at sum of £ 912 5s. 6d.,

being the amount which this company had to expend upon the repair of the Manila-Hong Kong and the Manila-Capiz submarine telegraph cables which had been cut by the United States naval authorities during the Spanish-American war in 1898.*

Under concessions granted by the Spanish Government and dated, respectively, December 14, 1878, and April 14, 1897, the Eastern Extension Company had laid down certain submarine telegraph cables connecting Manila and Hong Kong and Manila and Capiz, which the Company was operating in 1898. In April, 1898, war broke out between the United States and Spain, and on May 1, 1898, the United States naval forces, under the command of Commodore, afterwards Admiral, Dewey, entered Manila Bay and destroyed or captured the Spanish warships lying in that harbour. On the same day Commodore Dewey, through the British consul at Manila, proposed to the Spanish Captain General that both the United States and the Spanish authorities should be allowed to transmit messages by cable to Hong Kong. That proposition having been refused, on the morning of the following day, *viz.*, on May 2, 1898, the Manila-Hong Kong cable was cut by order of the American Commodore, this cutting being effected within Manila Bay and consequently within the territorial waters of the enemy.

On May 10 the Company, acting on a formal order of the Spanish Government under the provisions of the concession above referred to, sealed the end of the cable at Hong Kong, thereby preventing any use of the cable by the United States forces. Subsequently, the United States Navy Department proposed to the Company to re-establish cable communication between Manila and Hong Kong, and the Company refused, informing the American Navy Department that the Company was under the orders of the Spanish Government and that the transmission of messages from the Philippine Islands to Hong Kong had been prohibited by that Government. Furthermore, as appears from the oral argument on behalf of His Britannic Majesty's Government, the British Government themselves, acting in the interest of shipping, subsequently asked the Madrid Government if they would consent to the reopening of the cables; but the Spanish Government refused to accede to this request, except on terms which the United States could not accept. On May 23 the Manila-Capiz cable was cut, also inside Manila Bay.

These facts are not contested; and further it is admitted on behalf of Great Britain that the severance of the cable between Manila and Hong Kong, as well as between Manila and Capiz, was a proper military measure on the part of the United States, taken with the important object of interrupting communication whether with other parts of the Spanish possessions in the Philippine Islands or with the Spanish Government and the outside world.

The question is whether or not the United States Government is bound to pay to the Company, as damages, the cost incurred by the Company in repairing the cables.

The British Government admits that there was not in existence in 1898 any treaty or any rule of international law imposing on the United States the legal obligation to pay compensation for the cutting of these cables; but they

contend that, under article 7 of the Special Agreement establishing this Tribunal, such compensation may be awarded on the ground of equity, and that the United States Government, having paid compensation to some other foreign cable company for similar cuttings during the same war, is, therefore, legally bound to compensate the British company, and, finally, that in the absence of any rule of international law on the point, it is within the powers, if it be not the duty, of this Tribunal to lay down such a rule.

The United States Government contends that the cutting of the cables by its naval authorities was a necessity of war giving rise to no obligation to make compensation therefore; that the United States were entitled to treat the said cables as having the character of enemy property, on the ground that their terminals were within enemy territory and under the control of the enemy's military authorities, and that the sealing of the terminal at Hong Kong, on neutral territory, was a hostile act of itself impressing this cable with enemy character. Further, the United States Government contends that there is no rule of international law imposing any legal liability on the United States, but that, on the contrary, the action of the United States naval authorities and the refusal to pay compensation are justified by international law and that the United States Government is not bound to pay compensation to the British Company merely because more favourable treatment was meted out to another foreign company, the facts underlying whose claim were, in any case, different. Further, the United States Government say that it is not the duty, nor within the power, of this Tribunal to lay down any new rule of international law, but only to construe and apply such rules or principles as existed at the time of the cutting of these cables.

It may be said that article 15 of the International Convention for the Protection of Submarine Cables of 1884, enunciating the principle of the freedom of Governments in time of war, had thereby recognised that there was no special limitation, by way of obligatory compensation or otherwise, to their right of dealing with submarine cables in time of war. In our opinion, however, even assuming that there was in 1898 no treaty and no specific rule of international law formulated as the expression of a universally recognised rule governing the case of the cutting of cables by belligerents, it can not be said that there is no principle of international law applicable. International law, as well as domestic law, may not contain, and generally does not contain, express rules decisive of particular cases; but the function of jurisprudence is to resolve the conflict of opposing rights and interests by applying, in default of any specific provision of law, the corollaries of general principles, and so to find—exactly as in the mathematical sciences—the solution of the problem. This is the method of jurisprudence; it is the method by which the law has been gradually evolved in every country resulting in the definition and settlement of legal relations as well between States as between private individuals.

Now, it is almost unnecessary to recall that principle of international law which recognises that the legitimate object of sea warfare is to deprive the enemy of those means of communication, which the high seas, in their character as *res nullius* or *res communis* afford to every nation. The user by the enemy

of that communication by sea, every belligerent, if he can, is entitled to prevent, subject to a due respect for innocent neutral trade; he is even entitled to prevent its user by neutrals, who use it to afford assistance to the enemy either by carrying contraband, by communicating with blockaded coasts, or by transporting hostile despatches, troops, enemy agents, and so on. In such cases the neutrals do not, properly speaking, lose their neutral character; but their action itself loses that character, such action being, as it is said, impressed with a hostile character. Thus it may be said that a belligerent's principal object in a maritime warfare is to deprive the enemy of communication over the high seas while preserving it unimpeded for himself.

It is difficult to contend in the same breath that a belligerent is justified by international law in depriving the enemy of the benefit of the freedom of the high seas, but is not justified in depriving him of the use of the seas by means of telegraphic cables.***

As to the contention that, having regard to the terms of article 7 of the Special Agreement providing for the settlement of these claims, this Tribunal is to decide "in accordance, with treaty rights and with the principles of international law and of equity", compensation in this case should be paid on the ground of equity, the following observations may be made:

If the strict application of a treaty or of a specific rule of international law conduct to a decision which, however justified from a strictly legal point of view, will result in hardship, unjustified having regard to the special circumstances of the case, then it is the duty of this Tribunal to do their best to avoid such a result, so far as it may be possible, by recommending for instance some course of action by way of grace on the part of the correspondent Government.

In this case it is to be observed that the Eastern Extension Company was well aware of its own risk in Spanish territory. As has been shown, their concessions expressly provided for it.***

In the opinion of this Tribunal, there is no ground of equity, upon which the United States should be adjudged to pay compensation for the materialization of this risk in the form of an act of war the legitimacy of which is admitted.

The British Government contend that, as a matter of right, the Eastern Extension Company is entitled to receive compensation because some other foreign cable company, *viz.*, La Compagnie Française des Câbles Télégraphiques, working cables between the United States of America, Haiti, and Cuba, received from the United States Government compensation for the cutting of its cables. It is urged that, when acts of war by a belligerent have resulted in personal injury to individuals in certain territory or in damage to their property in that territory, if the Government of that territory pays the claims of the nationals of one country, it must also pay the claims of the nationals of other countries without discrimination; and further, as the argument would seem to imply, that, if it be established that a Government has paid compensation to its own citizens, then it is bound to pay compensation to foreigners whose person or property was damaged; and authority is said to be found for the last proposition in cases arising out of the Mexican insurrection.

Whether viewed as a general principle, or in its particular application to

the facts of this claim, such a proposition appears to us to be impossible of acceptance. It is perfectly legitimate for a Government, in the absence of any special agreement to the contrary, to afford to subjects of any particular Government treatment which is refused to the subjects of other Governments, or to reserve to its own subjects treatment which is not afforded to foreigners. Some political motive, some service rendered, some traditional bond of friendship, some reciprocal treatment in the past or in the present, may furnish the ground for discrimination.***

As to the contention of the British Government that, in the absence of any rule governing the matter of cable cutting, it is the duty of this Tribunal to frame a new rule, we desire to say:

First, the duty of this Tribunal, in our opinion, under article 7 of the Special Agreement, is not to lay down new rules. Such rules could not have retroactive effect, nor could they be considered as being anything more than a personal expression of opinion by members of a particular tribunal, deriving its authority from only two Governments;

Secondly, in any case this Tribunal, as has been already stated, is of opinion that the principles of international law, applicable to maritime warfare, existing in 1898, are sufficient to enable us to decide this case.

Now therefore: The Tribunal decides that the claim of His Britannic Majesty's Government be disallowed.

30

Colombian-Peruvian Asylum Case

DEN INTERNATIONALE DOMSTOL, DOM, 1950
I. C. J. Reports 1950, 266

[I oktober 1948 fandt en militær opstand sted i Peru. Denne blev hurtigt slået ned, og kort efter offentliggjordes en arrestordre bl. a. mod Victor Raul Haya de la Torre, der var leder af et politisk parti "The American People's revolutionary Alliance" og sigtet for at have organiseret den militære opstand.

Den 3. januar 1949 anmodede Haya de la Torre den colombianske ambassadør i Lima om asyl, hvilket blev indrømmet ham, samtidig med at ambassadøren gav den peruanske udenrigsminister underretning herom, idet han påberåbte sig Havanna-Konventionen af 1928 om asyl, undertegnet af begge parter. Ambassadøren anmodede udenrigsministeren om frit lejde for Haya de la Torre til at forlade landet. Den 14. januar 1949 meddelte ambassadøren, at den colombianske regering havde anerkendt Haya de la Torre som politisk flygtning.

Peru bestred, at Colombia havde ret til ensidigt at kvalificere Haya de la Torre som politisk flygtning, og efter forgæves forsøg på at løse denne strid, enedes parterne om at forelægge spørgsmålet for den Internationale Domstol.]

[Domstolen.] ***The Colombian Government has presented two submissions, of which the first asks the Court to adjudge and declare

"That the Republic of Colombia, as the country granting asylum, is competent to qualify the offence for the purpose of the said asylum, within the limits of the obligations resulting in particular from the Bolivarian Agreement on Extradition of July 18th, 1911, and the Convention on Asylum of February 20th, 1928, and of American international law in general."

If the Colombian Government by this submission intended to allege that Colombia, as the State granting asylum, is competent to qualify the offence only provisionally and without binding effect for Peru, the solution would not remain a matter of doubt. It is evident that the diplomatic representative who has to determine whether a refugee is to be granted asylum or not must have the competence to make such a provisional qualification of any offence alleged to have been committed by the refugee. He must in fact examine the question whether the conditions required for granting asylum are fulfilled. The territorial State would not thereby be deprived of its right to contest the qualification. In case of disagreement between the two States, a dispute would arise which might be settled by the methods provided by the Parties for the settlement of their disputes.

This is not, however, the meaning which the Colombian Government has put on its submission. It has not claimed the right of qualification for the sole purpose of determining its own conduct. The written and oral arguments submitted on behalf of that Government show that its claim must be understood in the sense that Colombia, as the State granting asylum, is competent to qualify the nature of the offence by a unilateral and definitive decision binding on Peru. Colombia has based this submission partly on rules resulting from agreement, partly on an alleged custom.

The Colombian Government has referred to the Bolivarian Agreement of 1911, Article 18, which is framed in the following terms:

"Aside from the stipulations of the present Agreement, the signatory States recognize the institution of asylum in conformity with the principles of international law."

In recognizing "the institution of asylum", this article merely refers to the principles of international law. But the principles of international law do not recognize any rule of unilateral and definitive qualification by the State granting diplomatic asylum.

The Colombian Government has also relied on Article 4 of this Agreement concerning extradition of a criminal refugee from the territory of the State in which he has sought refuge. The arguments submitted in this respect reveal a confusion between territorial asylum (extradition), on the one hand, and diplomatic asylum, on the other.

In the case of extradition, the refugee is within the territory of the State of refuge. A decision with regard to extradition implies only the normal exercise of the territorial sovereignty. The refugee is outside the territory of the State where the offence was committed, and a decision to grant him asylum in no way derogates from the sovereignty of that State.

In the case of diplomatic asylum, the refugee is within the territory of the State where the offence was committed. A decision to grant diplomatic asylum

involves a derogation from the sovereignty of that State. It withdraws the offender from the jurisdiction of the territorial State and constitutes an intervention in matters which are exclusively within the competence of that State. Such a derogation from territorial sovereignty cannot be recognized unless its legal basis is established in each particular case.

For these reasons, it is not possible to deduce from the provisions of agreements concerning extradition any conclusion which would apply to the question now under consideration.

The Colombian Government further relies on the Havana Convention on Asylum of 1928. This Convention lays down certain rules relating to diplomatic asylum, but does not contain any provision conferring on the State granting asylum a unilateral competence to qualify the offence with definitive and binding force for the territorial State. The Colombian Government contends, however, that such a competence is implied in that Convention and is inherent in the institution of asylum.

A competence of this kind is of an exceptional character. It involves a derogation from the equal rights of qualification which, in the absence of any contrary rule, must be attributed to each of the States concerned; it thus aggravates the derogation from territorial sovereignty constituted by the exercise of asylum. Such a competence is not inherent in the institution of diplomatic asylum. This institution would perhaps be more effective if a rule of unilateral and definitive qualification were applied. But such a rule is not essential to the exercise of asylum.

These considerations show that the alleged right of unilateral and definitive qualification cannot be regarded as recognized by implication in the Havana Convention. Moreover, this Convention, in pursuance of the desire expressed in its preamble of "fixing the rules" which the Governments of the States of America must observe for the granting of asylum, was concluded with the manifest intention of preventing the abuses which had arisen in the previous practice, by limiting the grant of asylum. It did so in a number of ways and in terms which are unusually restrictive and emphatic ("It is not permissible for States...."; "Asylum may not be granted except in urgent cases and for the period of time strictly indispensable....", etc.).

The Colombian Government has invoked Article 2, paragraph 1, of the Havana Convention, which is framed in the following terms:

"Asylum granted to political offenders in legations, warships, military camps or military aircraft, shall be respected to the extent in which allowed as a right or through humanitarian toleration, by the usages, the conventions or the laws of the country in which granted and in accordance with the following provisions:"

This provision has been interpreted by that Government in the sense that the usages, conventions and laws of Colombia relating to the qualification of the offence can be invoked against Peru. This interpretation, which would mean that the extent of the obligation of one of the signatory States would depend upon any modifications which might occur in the law of another, cannot be accepted. The provision must be regarded as a limitation of the

extent to which asylum shall be respected. What the provision says in effect is that the State of refuge shall not exercise asylum to a larger extent than is warranted by its own usages, conventions or laws and that the asylum granted must be respected by the territorial State only where such asylum would be permitted according to the usages, conventions or laws of the State of refuge. Nothing therefore can be deduced from this provision in so far as qualification is concerned.

The Colombian Government has further referred to the Montevideo Convention on Political Asylum of 1933. It was in fact this Convention which was invoked in the note of January 14th, 1949, from the Colombian Ambassador to the Peruvian Minister for Foreign Affairs. It is argued that, by Article 2 of that Convention, the Havana Convention of 1928 is interpreted in the sense that the qualification of a political offence appertains to the State granting asylum. Articles 6 and 7 of the Montevideo Convention provide that it shall be ratified and will enter into force as and when the ratifications are deposited. The Montevideo Convention has not been ratified by Peru, and cannot be invoked against that State. The fact that it was considered necessary to incorporate in that Convention an article accepting the right of unilateral qualification, seems to indicate that this solution was regarded as a new rule not recognized by the Havana Convention. Moreover, the preamble of the Montevideo Convention states in its Spanish, French and Portuguese texts that it modifies the Havana Convention. It cannot therefore be considered as representing merely an interpretation of that Convention.

The Colombian Government has finally invoked "American international law in general". In addition to the rules arising from agreements which have already been considered, it has relied on an alleged regional or local custom peculiar to Latin-American States.

The Party which relies on a custom of this kind must prove that this custom is established in such a manner that it has become binding on the other Party. The Colombian Government must prove that the rule invoked by it is in accordance with a constant and uniform usage practised by the States in question, and that this usage is the expression of a right appertaining to the State granting asylum and a duty incumbent on the territorial State. This follows from Article 38 of the Statute of the Court, which refers to international custom "as evidence of a general practice accepted as law".

In support of its contention concerning the existence of such a custom, the Colombian Government has referred to a large number of extradition treaties which, as already explained, can have no bearing on the question now under consideration. It has cited conventions and agreements which do not contain any provision concerning the alleged rule of unilateral and definitive qualification such as the Montevideo Convention of 1889 on international penal law, the Bolivarian Agreement of 1911 and the Havana Convention of 1928. It has invoked conventions which have not been ratified by Peru, such as the Montevideo Conventions of 1933 and 1939. The Convention of 1933 has, in fact, been ratified by not more than eleven States and the Convention of 1939 by two States only.

It is particularly the Montevideo Convention of 1933 which Counsel for the Colombian Government has also relied on in this connexion. It is contended that this Convention has merely codified principles which were already recognized by Latin-American custom, and that it is valid against Peru as a proof of customary law. The limited number of States which have ratified this Convention reveals the weakness of this argument, and furthermore, it is invalidated by the preamble which states that this Convention modifies the Havana Convention.

Finally, the Colombian Government has referred to a large number of particular cases in which diplomatic asylum was in fact granted and respected. But it has not shown that the alleged rule of unilateral and definitive qualification was invoked or—if in some cases it was in fact invoked—that it was, apart from conventional stipulations, exercised by the States granting asylum as a right appertaining to them and respected by the territorial States as a duty incumbent on them and not merely for reasons of political expediency. The facts brought to the knowledge of the Court disclose so much uncertainty and contradiction, so much fluctuation and discrepancy in the exercise of diplomatic asylum and in the official views expressed on various occasions, there has been so much inconsistency in the rapid succession of conventions on asylum, ratified by some States and rejected by others, and the practice has been so much influenced by considerations of political expediency in the various cases, that it is not possible to discern in all this any constant and uniform usage, accepted as law, with regard to the alleged rule of unilateral and definitive qualification of the offence.

The Court cannot therefore find that the Colombian Government has proved the existence of such a custom. But even if it could be supposed that such a custom existed between certain Latin-American States only, it could not be invoked against Peru which, far from having by its attitude adhered to it, has, on the contrary, repudiated it by refraining from ratifying the Montevideo Conventions of 1933 and 1939, which were the first to include a rule concerning the qualification of the offence in matters of diplomatic asylum.

In the written Pleadings and during the oral proceedings, the Government of Colombia relied upon official communiqués published by the Peruvian Ministry of Foreign Affairs on October 13th and 26th, 1948, and the Government of Peru relied upon a Report of the Advisory Committee of the Ministry of Foreign Affairs of Colombia dated September 2nd, 1937; on the question of qualification, these documents state views which are contrary to those now maintained by these Governments. The Court, whose duty it is to apply international law in deciding the present case, cannot attach decisive importance to any of these documents.

For these reasons, the Court has arrived at the conclusion that Colombia, as the State granting asylum, is not competent to qualify the offence by a unilateral and definitive decision, binding on Peru.***

[Udfaldet af sagen blev, at domstolen videre forkastede også Colombias anden påstand, gående ud på, at Peru var pligtig at tilstå Haya de la Torre

frit lejde, men derimod godkendte Perus påstand, forsåvidt denne gik ud på, at tilståelsen af asyl var sket i strid med Havanna-Konventionen. Hermed var sagen dog ikke bragt ud af verden. Dommen blev afsagt den 20. november 1950. Allerede samme dag indgav den colombianske regering en skrivelse til domstolen hvori den udbad sig en fortolkning af dommen i overensstemmelse med statutternes art. 60. Det spørgsmål Colombia ønskede besvaret var især, om dommen skulle forstås således, at den medførte forpligtelse for Colombia til at udlevere Haya de la Torre til de peruanske myndigheder. Ved dom af 27. november 1950 afviste domstolen sagen med den begrundelse at begæringen i virkeligheden gik ud på at få et spørgsmål afgjort som parterne ikke havde indbragt for domstolen. Da de to stater herefter ikke kunne enes om hvorledes dommen skulle bringes til opfyldelse, indbragte Colombia dette spørgsmål for domstolen i et nyt selvstændigt spørgsmål. Begge parter nedlagde i enighed påstand om at domstolen skulle statuere på hvilken måde dommen af 20. november 1950 skulle bringes til udførelse. Domstolen afviste denne begæring. Videre gjorde Peru gældende (1) at asyllet burde være bragt til ophør umiddelbart efter dommens afsigelse; og (2) at Colombia var pligtig at udlevere den omstridte person til de peruanske myndigheder. Domstolen gav Peru medhold på det første, men ikke på det andet punkt, hvilket altså vil sige at Colombia vil være pligtig at bringe asyllet til ophør, men dog ikke til at gøre dette just ved at udlevere Haya de la Torre. Da det imidlertid faktisk var vanskeligt at bringe asyllet til ophør på anden måde gik sagen påny i hårdknude. Haya de la Torre forblev gennem en årrække i asyl i den colombianske ambassade i Lima indtil der i 1954 blev truffet en overenskomst gående ud på at han skulle udleveres til den peruanske justitsminister der derefter uden ophold ville udvise ham af Peru. Den 6. april 1954 bragte et fly ham til Mexico.]

31

De Forenede Nationers Pagt

SAN FRANCISCO, 26. JUNI 1945

Art. 2(6). Organisationen skal sikre at stater, der ikke er medlemmer af de Forenede Nationer, handler i overensstemmelse med disse grundsætninger, såvidt det måtte være nødvendigt til opretholdelse af mellemfolkelig fred og sikkerhed.

Art. 103. I tilfælde af konflikt mellem de forpligtelser, der påhviler de Forenede Nationers medlemmer ifølge denne pagt, og deres forpligtelser ifølge enhver anden mellemfolkelig overenskomst går deres forpligtelser ifølge denne pagt forud for de sidstnævnte.

Art. 108. Ændringer til nærværende pagt skal træde i kraft for alle medlemmer af de Forenede Nationer, når de er blevet vedtaget af to trediedele af medlemmerne af plenarforsamlingen og ratificeret af to trediedele af de Forenede Nationers medlemmer, derunder alle de faste medlemmer af sikkerhedsrådet, i overensstemmelse med deres respektive forfatningsmæssige fremgangsmåder.

32

**Traktat om forbud mod kernevåbenforsøg i atmosfæren,
det ydre rum og under vandet**

MOSKVA, 1963

Art. II. 1. Enhver deltager kan foreslå ændringer i denne traktat. Teksten til ethvert forslag til ændring skal forelægges for depositarmagternes regeringer, som skal sende den til alle deltagere i denne traktat. Derefter skal depositarmagternes regeringer på begæring af mindst en trediedel af deltagerne sammenkalde en konference, hvortil alle deltagerne skal indbydes, for at behandle et sådant forslag til ændring.

2. Enhver ændring i denne traktat skal godkendes af et flertal af samtlige de i denne traktat deltagende parter, herunder alle de oprindelige deltagere. Ændringen skal træde i kraft for alle deltagere, når et flertal af dem, herunder samtlige oprindelige deltagere, har deponeret deres ratifikationsinstrumenter.

Folkerettens subjekter

A. STATER OG STATSFORBINDELSER

33

Pariserfredstraktaten af 30. marts 1856

Art. 7. Hendes Majestæt Dronningen af det Forenede Kongerige og Irland, Hans Majestæt Kejseren af Østrig, Hans Majestæt Kejseren af Frankrig, Hans Majestæt Kongen af Preussen, Hans Majestæt Kejseren af Rusland, og Hans Majestæt Kongen af Sardinien erklærer, at den Høje Port er berettiget til at deltage i de fordele, der er forbundet med den europæiske offentlige ret og koncert. Deres Majestæter forpligter sig til, hver for sin part, at respektere det Ottomanske Imperiums uafhængighed og territoriale integritet, og garanterer i fællesskab den nøjeste overholdelse af denne forpligtelse, og vil i konsekvens heraf overveje enhver handling, der måtte true det, som et spørgsmål af fælles interesse.

34

Convention on Rights and Duties of States

MONTEVIDEO, 26. DECEMBER 1953

T. S. no. 81

Art. 1. The State as a person of international law should possess the following qualifications: (a) a permanent population; (b) a defined territory; (c) government; and (d) capacity to enter into relations with the other States.

35

Statut for den Internationale Domstol

Art. 34. 1. Kun stater kan optræde som parter for domstolen.

36

Phillip C. Jessups udtalelse i sikkerhedsrådet angående Israels optagelse som medlem af de Forenede Nationer, 2. december 1948

S. C. O. R., 3rd year, no. 128

***The first question which may be raised in analyzing Article 4 of the Charter and its applicability to the membership of the State of Israel, is the

question of whether Israel is a State, as that term is used in Article 4 of the Charter. It is common knowledge that, while there are traditional definitions of a State in international law, the term has been used in many different ways. We are all aware that, under the traditional definition of a State in international law, all the great writers have pointed to four qualifications: first, there must be a people; second, there must be a territory; third, there must be a government; and, fourth, there must be capacity to enter into relations with other States of the world.

In so far as the questions of capacity to enter into relations with other States of the world is concerned, learned academic arguments can be and have been made to the effect that we already have, among the Members of the United Nations, some political entities which do not possess full sovereign freedom to form their own international policy, which traditionally has been considered characteristic of a State. We know, however, that neither at San Francisco nor subsequently has the United Nations considered that complete freedom to frame and manage one's own foreign policy was an essential requisite of United Nations membership.

I do not dwell upon this point because anyone has ever questioned that, in this respect, Israel is free and unhampered. On this point, I believe that there would be unanimity that Israel exercises complete independence of judgment and of will in forming and in executing its foreign policy. The reason for which I mention the qualification of this aspect of the traditional definition of a State is to underline the point that the term "State", as used and applied in Article 4 of the Charter of the United Nations, may not be wholly identical with the term "State" as it is used and defined in classic textbooks of international law.

When we look at the other classic attributes of a State, we find insistence that it must also have a Government. No one doubts that Israel has a Government. I think the world has been particularly impressed with the way in which the people of Israel have organized their government and have established a firm system of administration and of law-making under the most difficult conditions. Although, pending their scheduled elections, they still modestly and appropriately call themselves the Provisional Government of Israel, they have a legislative body which makes laws, they have a judiciary which interprets and applies those laws, and they have an executive which carries out the laws and which has at its disposal a considerable force responsive to its will.

According to the same classic definition, we are told that a State must have a people and a territory. Nobody questions the fact that the State of Israel has a people. It is an extremely homogeneous people, a people full of loyalty and of enthusiastic devotion to the State of Israel.

The argument seems chiefly to arise in connexion with territory. One does not find in the general classic treatment of this subject any insistence that the territory of a State must be exactly fixed by definite frontiers. We all know that, historically, many States have begun their existence with their frontiers unsettled. Let me take as one example my own country, the United States of America. Like the State of Israel in its origin, it had certain territory along

the seacoast. It had various indeterminate claims to an extended territory westward. But, in the case of the United States, that land had not even been explored, and no one knew just where the American claims ended and where French and British and Spanish claims began. To the North, the exact delimitation of the frontier with the territories of Great Britain was not settled until many years later. And yet, I maintain that, in the light of history and in the light of the practice and acceptance by other States, the existence of the United States of America was not in question before its final boundaries were determined.

The formulae in the classic treatises somewhat vary, one from the other, but both reason and history demonstrate that the concept of territory does not necessarily include precise delimitation of the boundaries of that territory. The reason for the rule that one of the necessary attributes of a State is that it shall possess territory is that one cannot contemplate a State as a kind of disembodied spirit. Historically, the concept is one of insistence that there must be some portion of the earth's surface which its people inhabit and over which its Government exercises authority. No one can deny that the State of Israel responds to this requirement.***

37

De Forenede Nationers 111 medlemslande

AUGUST 1963

Afghanistan	Cypern
Albanien	*Czekoslovakiet
Algeriet	Dahomey
*Argentina	*Danmark
*Australien	*Den arabiske Republik Syrien
*Belgien	*Dominikanske Republik
*Bolivia	*Ecuador
*Brasilien	Elfenbenskysten
Bulgarien	*El Salvador
Burma	Finland
Burundi	*Forenede arabiske Republik
Cambodia	*Frankrig
Cameroun	Føderationen Malaya
*Canada	Gabon
Centralafrikanske Republik	Ghana
Ceylon	*Grækenland
*Chile	*Guatemala
*Colombia	Guinea
Congo (Brazzaville)	*Haiti
Congo (Leopoldville)	*Honduras
*Costa Rica	*Hviderussiske socialistiske
*Cuba	Sovjetrepublik

*Indien	*Peru
Indonesien	*Philippinerne
*Irak	*Polen
*Iran	Portugal
Irland	Rwanda
Island	Rumænien
Israel	*Saudi-Arabien
Italien	Senegal
Jamaica	Sierra Leone
Japan	*Socialistiske Sovjetrepublikkers
Jordan	Union
*Jugoslavien	Somalia
*Kina	Spanien
Kuwait	*Storbritannien
Laos	Sudan
*Libanon	Sverige
*Liberia	*Sydafrikanske Union
Libyen	Tanganyika
*Luxembourg	Tchad
Madagascar	Thailand
Mali	Togo
Marokko	Trinidad-Tobago
Mauretanien	Tunis
*Mexico	*Tyrkiet
Mongolske Folkerepublik	Uganda
*Nederlandene	*Ukrainske socialistiske Sovjet-
Nepal	republik
*New Zealand	Ungarn
*Nicaragua	*Uruguay
Niger	*USA
Nigeria	*Venezuela
*Norge	Yemen
Pakistan	*Æthiopien
*Panama	Østrig
*Paraguay	Øvre Volta

*Oprindelige medlemmer 1945

38

Schweizisk Forbundsforfatning af 1874 med senere ændringer

Art. 1. Folkene i Schweiz' toogtyve suveræne kantoner, forenede i nærværende alliance, nemlig *** udgør i deres helhed det schweiziske Forbund.

Art. 3. Kantonerne er suveræne i det omfang deres suverænitet ikke er begrænset ved forbundsforfatningen, og som sådanne udøver de alle rettigheder der ikke er delegeret til forbundsmagten.

Art. 8. Forbundet alene har ret til at erklære krig og slutte fred, ligesom til at afslutte alliancer og traktater med fremmede stater, især handels- og toldtraktater.

Art. 9. Kantonerne beholder som en undtagelse retten til med fremmede stater at afslutte traktater om anliggender vedrørende den offentlige økonomi, nabo- og politiforhold; disse traktater må dog intet indeholde der strider mod forbundet eller andre kantons rettigheder.

Art. 10. De officielle forbindelser mellem kantonerne og de fremmede regeringer eller disses repræsentanter finder sted formidlet gennem forbundsrådet.

Kantonerne kan dog korrespondere direkte med en fremmed stats tjenestemænd og underordnede myndigheder, for så vidt det drejer sig om anliggender som nævnt i foregående artikel.

39

Abbagnato-affæren

DE FORENEDE STATER-ITALIEN, NOTEVEKSLING, 1891

Antonio Abbagnato, der var født i Italien, udvandrede omkring 1884 til U.S.A., hvor han bosatte sig i New Orleans i staten Louisiana.

Den 15. oktober 1890 dræbtes New Orleans politichef, D. C. Hennesy, og Abbagnato samt 20 andre personer af italiensk oprindelse blev arresterede som sigtede for at være skyldige i drabet. I de sidste 25 år var der i New Orleans sket en lang række drab, som alle blev tilskrevet Mafia'en, der skulle være en italiensk terroristorganisation, og de nu arresterede 21 personer sigtedes for at være implicerede i denne Mafia.

Den 13. marts 1891 blev nogle af de anklagede frifundet, men tilbageholdt i fængslet af hensyn til appelsagen, medens de øvrige stadig ventede på deres dom. I den anledning blev der offentliggjort et opråb til byens borgere om, at det nu var nødvendigt for offentligheden selv at sørge for, at retfærdigheden kunne ske fyldest, og den 14. om morgenen samledes i tusindvis af mennesker i gaderne. Der blev afholdt et offentligt møde, hvor en del talere yderligere hidsede folkestemningen op mod de anholdte italienere, og til sidst var hele byen på benene. Seks à otte tusinde mennesker, hvoriblandt adskillige prominente personer, samledes i nærheden af fængslet, hvorpå ca. 50 bevæbnede personer trængte ind og dræbte 11 af de pågældende italienere, deriblandt Abbagnato.

Allerede forinden disse begivenheder fandt sted, havde den italienske minister i Washington, baron Fava, nedlagt protest overfor de amerikanske myndigheder, nemlig i anledning af, at italienerne var blevet utilbørligt behandlet i fængslet, og efter den amerikanske statssekretær mr. Blaine's henstilling tog mr. Nicholls, der var guvernør i Louisiana, skridt til at straffe de fængselsfunktionærer, der havde forset sig, og erklærede samtidig, at den dårlige behandling af italienerne intetomhelst havde at gøre med deres nationalitet.

Da folkemasserne begyndte at samles i gaderne den 14. marts 1891 og

indtog en mere og mere truende holdning, forlangte den stedlige italienske konsul, at guvernøren skulle trække tropper til for at forhindre overgreb, men Nicholls svarede, at han ikke var kompetent til at foretage et sådant skridt på egen hånd. Hertil udkrævedes borgmesterens samtykke, og det var i øjeblikket ikke muligt at komme i forbindelse med denne, da han ikke var til stede.

Da drabet havde fundet sted, indberettede den italienske konsul det skete til baron Fava. Denne indhentede instruktion hos marquis Rudini, der var Italiens udenrigsminister. Rudini beordrede baron Fava til at meddele det skete til U.S.A.s regering og forlange "øjeblikkelige og energiske repressive skridt til beskyttelse af den italienske koloni, der var i fare, samt streng afstraffelse af de skyldige."

Den 15. marts bragte baron Fava disse betragtninger videre til mr. Blaine. Han nedlagde protest mod, at de lokale myndigheder "opretholdt en fuldstændig passiv holdning, medens massakren af italienerne foregik i fængslet", og forlangte, at "de skyldige parter, hvad enten de var gerningsmænd, medskyldige eller anstiftere til de massakrer, som fandt sted i går, skal hurtigt tiltales for retten." Iøvrigt forbeholdt baron Fava sig at kræve den yderligere oprejsning, som den italienske regering måtte finde rimelig.

Blaine telegraferede straks til Nicholls og meddelte ham, at mindst tre af de dræbte var italienske statsborgere, og at den amerikansk-italienske traktat af 23. november i artikel 3 garanterede italienske borgere i U.S.A. den mest fuldkomne beskyttelse for liv og ejendom samt fuldstændig ligestilling med landets egne borgere på dette punkt. Yderligere gjorde Blaine opmærksom på, at præsidenten i høj grad beklagede, at New Orleans i den grad desavouerede deres egne domstole, at de lod en folkehobs lidenskabelige justits gå forud for en normal og rolig prøvelse for retten ad lovlig vej. Han håbede, at guvernøren ville samarbejde med ham til opfyldelse af U.S.A.s forpligtelser overfor italienske borgere, til standsning af yderligere blodsudgydelse og til retlig tiltale mod alle, der havde overtrådt retsordenen.

Først den 21. marts svarede Nicholls, og i sit svar gjorde han opmærksom på, at højst to eller tre af de dræbte var italienske statsborgere, men iøvrigt tiltrådte han præsidentens synspunkter, og en grand jury var netop i færd med at undersøge sagen.

Den italienske regering indrømmede, at den kun kunne have krav med hensyn til de af de dræbte, der ikke var naturaliserede amerikanere, men samtidig anmodede man om, at sagen måtte blive fremskyndet, da stemningen i Italien var blevet meget utålmodig. Da der stadig intet skete i sagen, meddelte Rudini den 24. og 25. marts telegrafisk baron Fava, at man så sig nødsaget til at hjemkalde ham, hvis der ikke øjeblikkelig blev taget konkrete skridt til afstrafning af de skyldige samt tilvejebringelse af en erstatning til ofrene. Baron Fava viderebragte straks disse synspunkter til mr. Blaine.

Den 31. marts afleverede baron Fava en note til mr. Blaine. I denne står der bl. a.:

"Den af kongens regering forlangte oprejsning, som jeg har haft den ære at informere Dem om ved vore sammenkomster i de sidste par dage, bestod af følgende punkter: (1) Unionsregeringens officielle forsikring om, at de skyl-

dige vil blive stillet for en domstol; (2) en principiel anerkendelse af, at ofrenes efterladte har krav på erstatning.

Deres eksellence havde den godhed at erklære over for mig, at da unionsregeringen ikke mente at kunne betragte sagen ud fra disse synspunkter, var den utilbøjelig til at tage de to nævnte krav under nærmere overvejelse.

Under disse omstændigheder har Hans Majestæts regering beordret mig til at trække mig tilbage på orlov, da den betragter de retsmæssige aktioner, som kongens minister i Washington foretager, som ineffektive."

Samme dag forklarede mr. Porter, der var U.S.A.s minister i Rom, det italienske udenrigsministerium, at grunden til, at sagen skred så langsomt frem, var, at unionsregeringen ikke kunne udøve direkte magt over enkeltstaternes domstole, men han forsikrede om, at alle forpligtelser overfor Italien skulle blive opfyldt, og henviste til, at i tidligere tilfælde, hvor fremmede stater havde beklaget sig over en langsommelig fremgangsmåde, var sagerne dog blevet afsluttet til alles tilfredshed.

Den 1. april sendte mr. Blaine en svarnote til marquis Imperiali, der var italiensk chargé d'affaires i Washington, og som førte legationens forretninger videre. I denne påpegedes, at U.S.A. aldeles ikke afslog Italiens krav blankt, men at man tværtimod udtrykkeligt anerkendte det princip, at de italienere, der måtte være blevet krænket i strid med løfterne i traktaten af 1871, havde krav på skadesløsholdelse. Imidlertid kunne man ikke fremskynde sagen yderligere, da man først ad rettens vej måtte have klarlagt alle sagens detaljer.

I sit svar af 2. april udtrykte den italienske regering sin glæde over, at U.S.A. havde erklæret sig villig til at betale erstatning, men at dette beroede på en misforståelse fremgik af mr. Blaines note af 14. april, hvori det hed, at det først skulle undersøges, om der overhovedet forelå noget traktatbrud. Krav om erstatning for en folkemængdes handlinger kan indbringes for domstolene af såvel ind- som udlændinge. Udlændinge kan endog indbringe spørgsmålet direkte for unionens domstole. Men forudsætningen må i alle tilfælde være, at myndighederne har været i ledtog med folkemængden eller groft har tilsidesat deres pligter. "Ingen regering, uanset hvor høj dens civilisation er, og uanset hvor beredvillige og ubøjelige dens kriminelle myndigheder er, er i stand til at sikre dens egne borgere imod enkeltpersoners had eller imod pludselige offentlige tumulter.*** Fremmede indbyggere udgør ikke nogen privilegeret klasse.*** Den fremmede indbygger må være tilfreds med*** at opnå den samme oprejsning, som retsordenen byder landets egne borgere, og han har ikke nogen retfærdig grund til at beklage sig eller nogen ret til at søge sit hjemlands indblanding, hvis domstolene yder ham oprejsning for lidt skader på lige fod med øvrige borgere."

Imidlertid indrømmede mr. Blaine, at omstændighederne ved begivenhederne i New Orleans efter al sandsynlighed ville vise, at myndighederne havde givet sit stiltiende samtykke, men spørgsmålet blev i øjeblikket undersøgt af rigsadvokaten (Attorney-General), der skulle undersøge, om der kunne rejses anklage for unionsdomstolene. Skulle det vise sig, at kun Lousianas domstole var kompetente, kunne præsidenten ikke gøre andet end at henlede Louisianas myndigheds opmærksomhed på deres pligt til øjeblikkeligt at rejse tiltale

imod de skyldige. Skulle statens domstole ikke gøre deres pligt, ville de Forenede Stater føle det som magtpåliggende at finde andre udveje til at yde oprejsning, og man ville i så fald lade kongressen overveje mulighederne for at hjælpe familjerne til de italienske borgere, der havde mistet livet ved ulovlige volds-handlinger.

Den italienske regering var stadig ikke tilfreds. Den indrømmede, at dens krav beroede på, om traktaten var overtrådt, men den måtte anse dette for hævet over enhver tvivl, når italienske borgere var blevet dræbt i et statsfængsel, uden at der blev taget noget skridt for at beskytte dem. Videre tilføjedes det:

“Vi har fremsat, og vi fremsætter atter vore krav. Lad så unionsregeringen på sin side overveje, om det er hensigtsmæssigt at overlade overholdelsen af traktater til hver enkelt unionsstats nåde, når denne unionsstat ikke er ansvarlig overfor fremmede lande, og når traktatens effektive overholdelse er et pant for hele nationers troskab og ære.”

Den 5. maj afsagde New Orleans' distriktsdomstols grand jury sin kendelse, hvoraf det fremgik, at der ikke kunne rettes bebrejdelser imod nogen, der havde deltaget i angrebet på fængslet, hvorfor der ingen anklage kunne rejses. Efter dette var unionsdomstolene efter den amerikanske retsorden ikke kompetente til at optage sagen, og der blev derfor ikke foretaget yderligere i sagen.

Den 9. december 1891 afgav præsident Harrison sit årlige budskab til kongressen. Heri kom han også ind på konflikten med Italien og udtrykte sin beklagelse af det skete. Han tilføjede:

“Jeg tror, at kongressen ville have haft kompetence til at gøre unionsdomstolene kompetente til at behandle krænkelser af de traktatmæssige rettigheder, som tilkommer udlændinge, der er bosatte i de Forenede Stater. Dette er imidlertid ikke sket, og unionsmyndighederne eller unionsdomstolene har ingen ret til at blande sig i sådanne sager hverken til beskyttelse af de udenlandske borgere eller til afstraffelse af deres mordere. Det synes at følge af denne retstilstand, at enkeltstaternes politimæssige eller judicielle embedsmænd, i betragtning af de internationale problemer, som sådanne episoder kan give anledning til, i disse henseender må betragtes som unionens repræsentanter, der kan pådrage regeringen ansvar for deres handlinger i tilfælde, hvor de Forenede Stater ville have været ansvarlige for ikke at have benyttet den konstitutionelle magt til at definere og straffe krænkelser af andres traktatmæssige rettigheder.”

I en senere udtalelse af statssekretæren hedder det endelig:

“Den italienske regering var ikke tilfreds med de Forenede Staters holdning, men krævede yderligere, at folkemængdens ledere skulle sættes under strafforfølgning og straffes efter loven.

Dette forlangende kunne de Forenede Staters regering ikke opfylde, hvor villig den end var til at gøre det. Det er velkendt, at unionsdomstolene ikke ifølge common law har nogen jurisdiktion i strafferetlige sager; det var derfor umuligt at indlede en strafferetlig undersøgelse mod disse personer ved de nævnte domstole, og da staterne er fuldstændig uafhængige af unionsregeringen med hensyn til en sådan jurisdiktion, var det ligeså umuligt at tvinge regeringen i staten Louisiana til at indlede sådanne undersøgelser. De Forenede Staters regering var derfor ganske hjælpeløs med hensyn til denne side af sagen

og kunne kun lytte til Italiens klager og prøve at forklare dets statsmænd, hvor intrikat de Forenede Staters forfatning er.

Kongressen har uden tvivl kompetence til at gøre unionsdomstolene kompetente i denne slags sager; men indtil nu er det ikke sket.

I betragtning af sagens særlige beskaffenhed synes det at fremgå, at de Forenede Stater, som tilfældet virkelig er, skulle have indrømmet sin ansvarlighed for en folkemængdes handlinger. For det første var disse personer i enkeltstatregeringens varetægt og i relation til folkeretten i den nationale regerings og havde derfor krav på særlig beskyttelse. Og for det andet forelå der ikke fra de virkelige myndigheders side noget alvorligt forsøg på at få bugt med urolighederne; og det antages i almindelighed, at en regering er internationalt ansvarlig for skader, der tilføjes fremmede indbyggere af en folkemængde, der ved tilbørlig omhu (due diligence) kunne have været undertrykt.

Den italienske regering trak til sidst sit krav om afstraffelse af de personer, der havde optrådt i denne affære, tilbage og akcepterede i stedet en pengeerstatning."

Dette sidste skete ved en noteveksling af 12. april 1892 imellem mr. Blaine og marquis Imperiali. I mr. Blaines note hedder det, at skønt skaden "ikke var direkte hidført af de Forenede Stater, følte præsidenten det alligevel som en højtidelig pligt og som en stor glæde for den nationale regering at betale en tilfredsstillende erstatning. Den tilbudte erstatning var på 125.000 francs. I en svarnote af samme dato akcepterede Imperiali erstatningen "uden præjudicering af det retlige skridt, som parterne måtte finde det passende at tage."

I 1894 blev der ved en lokal domstol i Louisiana anlagt en sag imod byen New Orleans i anledning af begivenhederne den 14. april 1891. Det var Abbagnatos i Italien bosatte moder, der krævede erstatning af byens myndigheder for det ved Abbagnatos død forvoldte tab. Ved underretten havde Abbagnatos moder fået tilkendt 5000 dollars, men sagen blev appelleret til Circuit Court of Appeals¹, og her blev myndighederne frifundet. Ganske vist blev det ikke benægtet, at byens myndigheder havde tilsidesat deres pligter, men *common law* hjemler ikke erstatning for skade på person, når skaden medfører dennes død. Hertil kræves udtrykkelig hjemmel i *statute law*, og sådan fandtes ikke i Louisianas lovbog. Underrettens dom blev derfor omstødt, og Abbagnatos moder fik ingen erstatning.

40

Statham v. Statham and Gaekwar of Baroda

STORBRITANNIEN, PROBATE, DIVORCE AND ADMIRALTY DIVISION, 1911
1912 Probate 92

[*Bargrave Deane, J.*] In this case Mr. George Wellington Statham has filed a petition praying the Court to dissolve his marriage on the ground of the adultery of his wife, Beatrix Alice Statham, with his Highness Maharaja

¹ City of New Orleans v. Abbagnato, Circuit Court of Appeals, Fifth Circuit, 1894. 62 Fed. 240.

Gaekwar Sir Saraji Rao III of Baroda, who has been added as a co-respondent in the suit under s. 28 of the Divorce Act, 1857.

The first question which I have to determine is raised by summons on behalf of the co-respondent, in which the Court is asked to dismiss him from the suit on the ground that he is a reigning sovereign and by the rules of international law is not amenable to the jurisdiction of this Court***

There is no doubt that an independent reigning sovereign cannot by the rules of international law be made against his will a party to proceedings in our Courts. He may choose to sue, and if so a counterclaim may be raised against him as plaintiff, but he cannot be made a defendant.

What then is the statute of the Gaekwar of Baroda?

So far as I have been able to ascertain by my researches the princes of Baroda date their importance from the Mahratta Confederacy, which in the eighteenth century was a powerful body of confederated ruling chiefs in India. During the last thirty-two years of the eighteenth century the house of Baroda fell a prey to family feuds, and in 1800 the succession fell to a prince feeble in mind. Internal troubles arising, British troops were sent in defence of the hereditary ruler against all claimants, and in 1802 a treaty was signed by which the independence of the reigning prince of all except the British Crown was assured, but which, on the other hand, secured his dependence on the British Crown. Several weak but troublesome princes succeeded in succession to the throne of Baroda, and in 1874 the then reigning Gaekwar was by order of the British Government brought to trial on a charge of attempting to poison the British resident at his court. The trial was conducted before a mixed commission of eminent British officers and natives of the highest rank. A unanimous verdict was not obtained, and in the result, the then Viceroy of India, Lord Northbrook, deposed the Gaekwar and appointed another member of the royal house of Baroda to reign in his place.

In October, 1911, an action was brought in the King's Bench Division of the High Court in England by one Ernest Emmanuel against the present reigning Gaekwar, and Lush, J., upon hearing counsel for both sides and having obtained a certificate from the India Office as to the status of the Gaekwar of Baroda, ordered that the writ in the action be set aside and all proceedings stayed on the ground that the defendant was an independent sovereign and not a subject of His Majesty the King. The certificate from the India Office is as follows:

The Gaekwar of Baroda has been recognized by the Government of India as a ruling chief governing his own territories under the suzerainty of His Majesty. He is treated as falling within the class referred to in the Interpretation Act, 1889, section 18, sub-sec. 5, as that of native princes or chiefs under the suzerainty of His Majesty exercised through the Governor-General of India. The British Government does not regard or treat his Highness' territory as being part of British India or His Majesty's dominions, and it does not regard or treat him or his subjects as subjects of His Majesty.

But, though his Highness is thus not independent, he exercises as ruler

of his State various attributes of sovereignty, including internal sovereignty, which is not derived from British law, but is inherent in the ruling chief of Baroda, subject, however, to the suzerainty of His Majesty the King of England and to the exercise by the Government of India of such of the rights and powers of territorial sovereignty as have by treaty, usage, or otherwise passed to and are exercised by the suzerain, such as, for instance, the exercise of jurisdiction over Europeans and Americans in Baroda, of interference to settle disputes as to succession to the State or to put a stop to gross misrule in the State, or to regulate armaments and the strength of the military forces, *etc.*

What is the meaning of the word "suzerainty" and what are its essentials? Sir Courtenay Ilbert in his work on the Government of India gives a digest of statutory enactments relating to India, and in a supplemental part to that digest are contained definitions of expressions in the digest. He adopts the interpretations given in the Interpretation Act, 1889, and the Indian General Clauses Act, 1897, and in a note says the expression "suzerainty" is substituted by the Interpretation Act for the older expression "alliance" as indicating more accurately the relation between the rulers of these States and the British Crown as the paramount authority throughout India.

Thus "suzerainty" is a term applied to certain international relations between two sovereign States whereby one, whilst retaining a more or less limited sovereignty, acknowledges the supremacy of the other. Such a relation may be either in the nature of a fief, or conventional, *i.e.*, by some treaty of peace or alliance in contrast with the fief, which is a sovereignty granted by a lord paramount over some defined territory accompanied with an express grant of jurisdiction.***

Vattel says a weak State which in order to provide for its safety places itself under the protection of a more powerful one and engages to perform in return several offices equivalent to that protection, without, however, divesting itself of the right of government and sovereignty, does not cease to rank among the sovereigns who acknowledge no other law than the law of nations.

In my opinion this aptly states the true status of the present Gaekwar of Baroda and is consistent with the status of that sovereign prince as defined by the certificate from the India Office, and it follows that his Highness by international law is not capable of being made a co-respondent in a suit for dissolution of marriage in the High Court in England, and his name must be struck out as a co-respondent. I, however, give leave to the petitioner to proceed without making any co-respondent as to those paragraphs of the petition in which his Highness' name appears.

41

Dansk-Islandsk forbundslov af 30. november 1918

§ 7. Danmark varetager på Islands vegne dettes udenrigsanliggender.

I udenrigsministeriet ansættes der efter den islandske regerings ønske og

efter samråd med denne en med islandske forhold kendt kommitteret til behandling af islandske sager.

På steder, hvor gesandt eller udsendt konsul ikke er ansat, bliver der efter den islandske regerings ønske og efter samråd med denne at ansætte en sådan, imod at Island godtgør de derved forårsagede udgifter. Under samme forudsætninger bliver der ved bestående gesandtskaber eller konsulater at ansætte attachéer, som er kyndige i islandske forhold. Hvis den islandske regering skulle ønske på egen bekostning at udsende delegerede til at føre forhandlinger om særlige islandske forhold, kan dette ske efter nærmere aftale med udenrigsministeren.

De mellem Danmark og andre lande indgaaede og bekendtgjorte overenskomster er, forsåvidt de angår Island, også gældende for dette. De af Danmark efter nærværende forbundslovs stadfæstelse indgaaede mellemstatlige overenskomster er ikke forpligtende for Island uden vedkommende islandske myndigheders samtykke.

42

Folkeforbundspagten

VERSAILLESTRAKTAT 28. JUNI 1919

Art. 22. Paa saadanne Kolonier og Omraader, der som Følge af Krigen har ophørt med at staa under Højhed af de Stater, som tidligere styrede dem, og som beboedes af Folkeslag, der endnu ikke er i Stand til at styre sig selv under den moderne Verdens særlige vanskelige Forhold, skal den Grundsætning bringes til Anvendelse, at saadanne Folkeslags Velvære og Udvikling udgør en hellig Pligt for Civilisationen, samt at Garantier for Virkeliggørelsen af denne Pligt skal optages i nærværende Forbundspagt.

Den bedste Maade, paa hvilken der kan gives denne Grundsætning praktisk Anvendelse, er at betro Formynderskabet for saadanne Folkeslag til fremskredne Nationer, der som Følge af deres Hjelpekilder, deres Erfaring eller deres geografiske Beliggenhed bedst kan paatage sig dette Ansvar, og som er villige til at paatage sig det, samt at dette Formynderskab skal udøves af dem som Befuldmægtigede for Forbundet og i dettes Navn.

Fuldmagtens Art maa være forskellig efter det paagældende Folkeslags Udviklingstrin, Omraadets geografiske Beliggenhed, dets økonomiske Forhold og andre lignende Omstændigheder.

Visse Folkesamfund, som tidligere hørte til det tyrkiske Rige, har naaet et Udviklingstrin, som gør det muligt foreløbig at anerkende deres Bestaaen som uafhængige Nationer under Forudsætning af, at der ydes dem Raad og Bistand til deres Forvaltning af en befuldmægtiget Stat indtil det Tidspunkt, da de er i Stand til at styre sig selv. Ved Valget af den befuldmægtigede Stat bør først og fremmest disse Folkesamfunds egne Ønsker komme i Betragtning.

Andre Folkeslag, særlig i Centralafrika, staar paa et saadant Trin, at den befuldmægtigede Stat maa være ansvarlig for Bestyrelsen af det paagældende Omraade under Betingelser, der sikrer Samvittigheds- og Religionsfrihed, alene med den Begrænsning, som Opretholdelse af den offentlige Orden og Moral

kræver, Forhindring af Misbrug saasom Slavehandel, Vaabenhandel og Brændevinshandel og Forhindring af Oprettelsen af Fæstninger eller land- og sømilitære Støttesteder eller de Indfødtes militære Uddannelse til andre Formaal end Politiformaal og det paagældende Omraades Forsvar, og som endvidere sikrer de andre Medlemmer af Forbundet den samme Adgang til Handel og Vareudveksling.

Endelig er der Omraader som Sydvestafrika og visse Øer i den sydlige Del af Stillehavet, som paa Grund af deres faatallige Befolkning, deres ringe Størrelse, deres Fjernhed fra Civilisationens Midtpunkter, deres geografiske Nærhed ved den befuldmægtigede Stats Omraade eller andre Omstændigheder bedst kan styres under den befuldmægtigede Stats Love som en integrerende Bestanddel af dens Omraade paa Betingelse af ovennævnte Garantier i den indfødte Befolknings Interesser.

I ethvert Fuldmagtstilfælde skal den befuldmægtigede Stat afgive en aarlig Beretning til Raadet angaaende det Omraade, der er blevet betroet til dens Om-sorg.

Arten af den Myndighed og det Tilsyn eller den Bestyrelse, der skal udøves af den befuldmægtigede Stat, skal udtrykkelig fastsættes af Raadet i hvert enkelt Tilfælde, hvis der ikke i Forvejen er truffet Aftale derom mellem Forbundets Medlemmer.

Der skal nedsættes et staaende Udvalg til at modtage og undersøge de befuldmægtigede Staters aarlige Beretninger og til at give Raadet Meddelelse om alle Spørgsmaal, der angaar Fuldmagtsforholdenes Overholdelse.

43

De Forenede Nationers Pagt

SAN FRANCISCO 26. JUNI 1945

Art. 73. Medlemmer af de Forenede Nationer, som har eller paatager sig Ansvaret for Administrationen af Omraader, hvis Folk endnu ikke i fuldt Maal har opnaaet Selvstyre, anerkender den Grundsætning, at disse Omraaders Indbyggeres Interesser er af altovervejende Betydning. De paatager sig som et hel-ligt Hverv Forpligtelser til, indenfor det ved nærværende Pagt oprettede mellemfolkelige Freds- og Sikkerhedssystem, at fremme til det yderste disse Omraa-der Indbyggeres Velfærd og med dette Formaal for Øje:

a. at sikre, med behørig Hensyntagen til de paagældende Folks Kultur, deres politiske, økonomiske, sociale og undervisningsmæssige Fremgang, retfærdig Behandling af dem og Beskyttelse af dem mod Misbrug,

b. at fremme Selvstyre, at tage behørigt Hensyn til Folkenes politiske Ønsker og støtte dem i den fremadskridende Udvikling af deres frie politiske Institu-tioner overensstemmende med hvert Omraades og dets Befolknings særlige Forhold samt disses forskellige Udviklingsgrad;

c. at fremme mellemfolkelig Fred og Sikkerhed:

d. at fremme opbyggende og udviklende Foranstaltninger, at opmuntre til Forskning, samt at samarbejde med hverandre og, naar og hvor det er hensigts-mæssigt, med særlige mellemfolkelige Organer med Henblik paa den praktiske

Gennemførelse af de i denne Artikel nævnte sociale, økonomiske og videnskabelige Formaal; og

e. at fremsende regelmæssigt til Generalsekretæren til Underretning, med saadanne Begrænsninger, som Sikkerhed og forfatningsmæssige Hensyn maatte kræve, statistiske og andre Oplysninger af teknisk Natur vedrørende økonomiske, sociale og undervisningsmæssige Forhold i de Omraader, for hvilke de hver især er ansvarlige, bortset fra de Omraader, med Hensyn til hvilke Kapitlerne XII og XIII kommer til Anvendelse.

44

Mandater og formynderskabsområder

Område	Administrerende stat	Selvstændighed
<i>Mandater klasse A</i>		
Libanon	Frankrig	1944
Syrien	Frankrig	1945
Palæstina	Forenede Kongedømme	1948
Transjordanien	” ”	1946
Irak	” ”	1932
<i>Mandater, klasse B, senere formynderskabsområder</i>		
Togoland, britisk ¹	Forenede Kongedømme	1957
Kameron, britisk ²	” ”	1961
Tanganyika ³	” ”	1961
Togoland, fransk ⁴	Frankrig	1960
Kameron, fransk ⁵	Frankrig	1960
Ruanda-Urundi ⁶	Belgien	1962
<i>Mandater klasse C, senere formynderskabsområder</i>		
Sydvest Afrika ⁷	Sydafrikanske Union	
Pacificøerne	Japan—USA	
New Guinea	Australien	
Nauru	Australien	
West Samoa ⁸	New Zealand	1962
<i>Tidligere italiensk koloni, senere formynderskabsområde</i>		
Somaliland ⁹	Italien	1960

1. Som følge af en folkeafstemning forenedes britisk Togoland med Guldkysten i den selvstændige stat Ghana.
2. Som følge af stedfundne afstemninger sluttede den nordlige del af området sig som en selvstændig provins til federationen Nigeria medens den sydlige del indgik i republikken Kameron.
3. Uafhængig som stat under samme navn.
4. Uafhængig under navn af republikken Togo.
5. Uafhængig under navn af republikken Kameron.
6. Uafhængig som to stater under navn af republikken Rwanda og kongedømmet Burundi.

7. Sydvest Afrika er på grund af Unionens modstand herimod ikke blevet underkastet formynderskab, men styres enerådigt af Unionen, der ikke vil anerkende nogen forpligtelse i forhold til de Forenede Nationer.
8. Uafhængig under navn af Vestsamoa.
9. Uafhængig under navn af republikken Samoli.

B. DET LOKALE OPRØRSPARTI

45

The Arantzazu Mendi

STORBRITANNIEN, HOUSE OF LORDS, 1939
(1939) A. C. 256

[Skibet *Arantzazu Mendi* tilhørte *Compañía Naviera Sota y Aznars S.A.*, der var et privatejet selskab med sæde i Bilbao. Den 19. juni 1937 blev Bilbao erobret af general Francos oprørsstyrker. Den 28. juni 1937 udstedte den republikanske regering i Spanien i henhold til et samme dag bekendtgjort dekret en rekvisition over skibet, der befandt sig udenfor spansk territorialfarvand. Rekvisitionen forpligtede skibets ejer til at holde skibet til disposition for regeringen.

Den 11. august 1937 ankom skibet til London, og den 24. samme måned udtog skibets ejer stævning for — uanset den spanske regerings rekvisition — at blive anerkendt som dispositionsberettiget over skibet. Der blev herefter af de engelske myndigheder — The British Admiralty Marshall — foretaget arrest i skibet.

Den 5. april 1938 meddelte Francos agent i London, at oprørsstyrkerne den 2. marts 1938 havde rekvireret skibet til brug for Francos nationalistregering. Herefter valgte skibets kaptajn at anerkende nationalistregeringens rekvisition, hvilket blev bekræftet af rederiet den 13. april 1938. Arresten blev imidlertid ikke ophævet, da parterne ikke have betalt de med arresten forbundne omkostninger.

Medens skibet således stadigt var under arrest, udtog den spanske regering den 13. april 1938 stævning i nærværende sag for at få anerkendt, at rådheden over skibet tilkom den republikanske regering. Der blev samtidigt påny gjort arrest i skibet. Francos nationalistregering intervererede i sagen og påstod denne afvist, da den angik en fremmed suveræn regering (den nationalistiske), der ikke ønskede at anerkende domstolens kompetence.

Som en følge heraf forespurgte domstolen det engelske udenrigsministerium om, hvorvidt den spanske nationalistregering var anerkendt af England som en regering for en fremmed suveræn stat.

Udenrigsministeriet svarede den 28. maj 1938 følgende:

- (1) His Majesty's Government recognise Spain as a foreign sovereign state.
- (2) His Majesty's Government recognise the Government of the Spanish Republic now having its seat in Barcelona as the de jure Government of Spain.
- (3) No Government other than that referred to in the preceding sub-paragraph is recognised by His Majesty's Government as the de jure Government

of Spain or any part thereof. (4) The Nationalist Government of Spain is a Government in conflict with the Government of the Spanish Republic established at Barcelona. It claims to be the Government of Spain and is seeking to overthrow the Government of the Spanish Republic and to establish its authority over the whole of Spain. (5) His Majesty's Government recognise the Nationalist Government as a Government which at present exercises de facto administrative control over the larger portion of Spain. (6) His Majesty's Government recognise that the Nationalist Government now exercises effective administrative control over all the Basque Provinces of Spain. (7) His Majesty's Government have not accorded any other recognition to the Nationalist Government. (8) The Nationalist Government is not a Government subordinate to any other Government in Spain. (9) The question whether the Nationalist Government is to be regarded as that of a foreign sovereign state appears to be a question of law to be answered in the light of the preceding statements and having regard to the particular issue with respect to which the question is raised.

I henhold hertil blev sagen afvist, hvilken afgørelse blev bekræftet af *the Court of Appeal*. Sagen blev herefter appelleret.]

[*House of Lords per Lord Atkin.*] ***The question is whether the Nationalist Government of Spain represent a foreign sovereign state in the sense that entitles them to immunity from being impleaded in these courts, and, if so, whether they are impleaded in the action by reason of being in possession of the ship in question.***

My Lords, this letter [fra the Foreign Office] appears to me to dispose of the controversy. By "exercising de facto administrative control" or "exercising effective administrative control", I understand exercising all the functions of a sovereign government, in maintaining law and order, instituting and maintaining courts of justice, adopting or imposing laws regulating the relations of the inhabitants of the territory to one another and to the Government. It necessarily implies the ownership and control of property whether for military or civil purposes, including vessels whether warships or merchant ships. In those circumstances it seems to me that the recognition of a Government as possessing all those attributes in a territory while no subordinate to any other Government in that territory is to recognize it as sovereign, and for the purposes of international law as a foreign sovereign State. It does not appear to be material whether the territory over which it exercises sovereign powers is from time to time increased or diminished. In the present case we appear to be dealing with a claim based upon a legislative decree affecting merchant shipping registered at Bilbao in the Basque Provinces, the territory specially designated in the sixth paragraph of the Foreign Office letter. That the decree therefore emanated from the sovereign in that territory there can be no doubt. There is ample authority for the proposition that there is no difference for the present purposes between a recognition of a State de facto as opposed to de jure. All the reasons for immunity which are the basis of the doctrine in international law as incorporated into our law exist. There is the same necessity for reciprocal rights of immunity, the same feeling of injured pride if juris-

diction is sought to be exercised, the same risk of belligerent action if Government property is seized or injured. The non-belligerent State which recognizes two Governments, one *de jure* and one *de facto*, will not allow them to transfer their quarrels to the area of the jurisdiction of its municipal Courts.

For these reasons I think that it was established by the Foreign Office letter that the Nationalist Government of Spain at the date of the writ was a foreign sovereign State and should not be impleaded.

On the question whether that Government was in possession of the ship, so that the claim of the writ was to take possession from it and transfer it to the plaintiffs, there seems to me little difficulty. Following a decree for requisition made by the Nationalist Government it is proved that on April 13, 1938, the owners agreed to the vessel being requisitioned at the free disposal of the National Government, while on April 5 the master had undertaken to retain possession at the disposal of the National Government. The vessel had in fact been arrested on August 24, 1937, in a possession action by the owners, *The Compañía Sota y Aznar*, against the *Bay of Biscay Co., Ltd.*, *Don Ramo de la Sota Aburto* and others, which was terminated by a consent order dated March 28, 1938. During this period the ship had been lying in the Surrey Commercial Dock with a master and crew on board, and the Marshal's representative, "the ship keeper", maintaining the arrest. After the consent order the ship keeper remained on board under a claim for the daily expenses "while the ship is in the custody of the Marshall", as expressed in the Supreme Court Fees Order, 1930, s. IV.b 93. As a result the arrest was not withdrawn at the time of the arrest in the present action. Founding on this the plaintiffs say that the ship was in the possession of the Marshal and could not therefore be in the possession of the Nationalist Government. This seems to me based upon a misapprehension of the position created by the arrest. The ship arrested does not by the mere fact of arrest pass from the possession of its then possessors to a new possession of the Marshal. His right is not possession but custody. Any interference with his custody will be properly punished as a contempt of the Court which ordered arrest, but, subject to his complete control of the custody, all the possessory rights which previously existed continue to exist, including all the remedies which are based on possession. There may be some doubt even whether the sheriff's officer, who has levied under a *fieri facias*, is in fact in possession. But his case is quite different, for he acts under a direction of the Court to make of the goods of the defendant so much money: he has the right to sell and therefore to hand over possession to the purchaser. His case therefore need not be discussed here. But a bare arrest appears to me clearly to give custody and not possession. The argument on this footing fails, and the simple fact emerges that the Nationalist Government was in possession of this ship at the material date by the master and crew acting with the consent of the owners. For these reasons, my Lords, the appeal was, in my opinion, rightly dismissed.

46

Luigi Monta of Genoa v. Cechofracht Co. Ltd.

ENGLAND, HIGH COURT OF JUSTICE, 1956
LR (1956) 2 QB, 552

Se nedenfor sag nr. 65

C. DEN KATOLSKE KIRKE

47

Lateranoverenskomsten af 11. februar 1929

ITALIEN - DEN KATOLSKE KIRKE

Art. 2. Italien anerkender den Hellige Stols suverænitet på det internationale område som en egenskab, der ligger i dens natur, i overensstemmelse med dens tradition og de krav, dens mission i verden stiller.

Art. 3. Italien anerkender den Hellige Stols fulde ejendomsret og udelukkende magt og suveræne myndighed over Vatikanet, som det foreligger i øjeblikket, med alle dets tilbehør og dotationer, hvorved dannes Vatikanstaten med de specielle formål og under de betingelser, som nærværende traktat fastsætter.***

Art. 4. Den suverænitet og udelukkende jurisdiktion, som Italien anerkender for den Hellige Stol over Vatikanstaten, betyder, at den italienske regering ikke indenfor denne må foretage nogen indblanding, og at der ikke kan være nogen anden myndighed her end den Hellige Stols.

48

Gustave Gaultier et al

FRANKRIG, KASSATIONSRETEN, 1911
116 Bulletin 453¹

[I anledning af Jeanne d'Arc's helgenkåring den 4. juli 1909, blev der i byen Mans i Frankrig flaget med det pavelige flag fra adskillige bygninger. Tiltale blev rejst mod de pågældende, der havde flaget, for overtrædelse af et dekret af 16. februar 1894, der indskrænkede adgangen til offentlig flagning. Sagen blev i 1. instans behandlet ved politiretten i Mans.]

[*Domstolen.*] Whereas, M. X. has been prosecuted for having displayed, on July 4 last, from the window of his house overlooking the public street, flags of the Holy See, and for having thus violated the Prefectoral Decree of February 16, 1894, reading as follows:

¹ Oversættelse fra Scott, *Cases on International Law*, 49.

"Article 1. The displaying and the bearing of flags, either on public streets or in buildings, grounds and places, freely open to the public are interdicted in the Department of La Sarthe.

Article 2. The flags of French or foreign national colors and those serving as insignia for authorized or approved societies are excepted from this measure;"

Whereas, all the citizens, without exception, are subject to the laws regularly promulgated, as well as to the regulations legally issued by the administrative authorities;

Whereas, the application of these regulations should be restricted to the cases for which they provide, and, whereas, the present case is concerned solely with determining whether the Pontifical flag should be included or not in the category of flags exceptionally authorized;

Whereas, the personal flag of a sovereign enjoys the same privilege as that of a State;

Whereas, until the law of December 9, 1905, was passed, the quality of the sovereign was, without dispute, accorded to the Pope by all foreign Powers, with all the prerogatives attached to sovereignty, among them that of having a special flag with colors distinctive of this sovereignty, and whereas, up to the same period it is just as certain that this flag enjoyed the exception provided for by the aforementioned decree;

Whereas, the law of December 9, 1905, which regulates a question of internal politics, has not had and could not have the effect of modifying the status previously acquired by the Holy See, and still less the effect of suppressing ipso facto the papacy and the character of sovereign attached to is representative;

Whereas, the latter, moreover, has not lost this character with regard to persons who have continued to be officially represented before it, and before whom it has not ceased to be officially represented;

Whereas, the suppression of diplomatic relations between France and the Papacy, which intervened after this law, cannot have any other consequences than those which would result from the suppression and interruption of such relations between France and any other foreign Power, a suppression or interruption which would not suffice to cause this Power to disappear from among the nations and to cause the colors which belong to it to be considered in future as non-existent, and, in consequence, interdicted;

Whereas, consequently, the Pontifical flag should continue to be included among the foreign flags enjoying the exception provided for by Article 2 of the Prefectoral Decree of February 16, 1894, and whereas in displaying it the accused could not be guilty of violating the said decree;

For these reasons:

Dismisses the complaint against X. and acquits him without costs.

[Denne afgørelse blev appelleret til kassationsretten, der den 5. maj 1911 afsagde følgende dom:]

The Court, having heard Maitre La Borde, councillor, in his report, Maitre Félix Bonnet, practicing attorney, in his statements, and M. Baudouin, attorney general, in his motions:

In view of the eighteen appeals made by the office of the public prosecutor before the Police Court of Mans from eighteen judgments, dated July 26, 1909, by virtue of which this Court pronounced the release of:***

Whereas, the judgments, rendered on the same day, are conceived in the same terms and impugned for the same reasons;

Joining the appeals and rendering judgment by one sole decree;

In view of the petition of the office of the public prosecutor before the Police Court of Mans;

In view of the Decree of the Prefect of La Sarthe of February 16, 1894,***

In view also of Article 471, No. 15, of the Penal Code:

Whereas, the Pontifical flag of white and yellow, is no longer a flag of foreign national colors; whereas, in fact, the sovereignty of which it was formerly the symbol, has ceased to exist as a result of the reunion of the Pontifical states with the Kingdom of Italy;

Whereas, on the other hand, the Pope does not represent a society in the sense of Article 2 of the aforementioned Decree; whereas, his flag cannot, therefore, be considered as the insignia of an authorized or approved society;

Whereas, is its established by the impugned judgments that the accused displayed upon a public street flags of white and yellow; whereas, their release is based on the fact that these flags were included in the exception pronounced by Article 2 of the Decree which served as a basis of the prosecutions;

Whereas, it is established by the impugned judgments that the accused and violated Article 471, No. 15, of the Penal Code;

For these reasons,

Quashes and annuls the eighteen judgments of the Police Court of Mans, mentioned at the beginning of the present decree; and refers the cases and the accused for a new decision to the Police Court of La Flèche, designated for this purpose by special deliberation held in the Council Chamber.***

D. INDIVIDET

49

Nürnbergdommen

INTERNATIONAL MILITARY TRIBUNAL, NÜRNBERG, 1946

Se ovenfor sag nr. 7

50

Klingesaken

NORGE, HØYESTERETT, 1946

Se ovenfor sag nr. 8

51

Washingtonkonventionen af 20. december 1907

Art. 1. Ved nærværende overenskomst er de høje kontraherende parter enige om at oprette og opretholde en permanent domstol, som skal kaldes "Den centralamerikanske Domstol", og for hvilken de forpligter sig til at forelægge alle uoverensstemmelser og spørgsmål, som måtte opstå dem imellem, af hvilken art og oprindelse de end måtte være, i tilfælde hvor de respektive udenrigsministerier ikke har været i stand til at komme til en forståelse.

Art. 2. Denne domstols kompetence skal også omfatte de spørgsmål, som enkeltpersoner i en af de centralamerikanske stater måtte rejse overfor enhver af de andre kontraherende regeringer på grund af krænkelse af traktater eller overenskomster, samt andre sager af international karakter, uanset om deres egen regering støtter et sådant krav eller ej, og forudsat at de retsmidler, som den pågældende stat yder mod en sådan krænkelse, er udnyttede, eller det bevises, at retsnægtelse har fundet sted.

Art. 3. Den skal endvidere have kompetence med hensyn til sager mellem enhver af de kontraherende regeringer og enkeltpersoner, når der er almindelig enighed om at forelægge sådanne sager for den.

52

Versaillestraktaten af 28. juni 1919

Art. 297. Spørgsmålet om private goder, rettigheder og interesser i en fjendtlig stat skal løses efter grundsætningerne i dette afsnit og bestemmelserne i det vedføjede tillæg.

e) Personer, der er statsborgere i de allierede og associerede stater, har krav på erstatning for den skade eller ulempe, der er tilføjet deres goder, rettigheder eller interesser, herunder interesser i selskaber eller sammenslutninger, på tysk territorium, som det forelå den 1. august 1914, ved krigsforholdsregler eller overdragelsesbeslutninger af den i vedføjede tillægs §§ 1 og 3 nævnte art. De i denne anledning af de pågældende personer rejste erstatningskrav skal prøves, og erstatningens størrelse fastsættes af den i afsnit VI omtalte blandede voldgiftsdomstol eller af en voldgiftsdommer, som er udpeget af nævnte voldgiftsdomstol.

f) ***

53

Konvention til beskyttelse af menneskerettigheder og grundlæggende frihedsrettigheder

ROM 1950, BKG. C nr. 20. AF 11. JUNI 1953

Art. 19. For at sikre opfyldelsen af de af de høje kontraherende parter i nærværende konventions påtagne forpligtelser skal der oprettes:

- 1) En europæisk kommission for menneskerettigheder, i det følgende benævnt "Kommissionen";
- 2) En europæisk domstol for menneskerettigheder, i det følgende benævnt "Domstolen".

Art. 25(1). Kommissionen kan modtage andragender, stilet til Det europæiske Råds generalsekretær, fra enhver person, enhver ikke-guvernemantal organisation eller gruppe af enkeltpersoner, der hævder af en af de høje kontraherende parter at være blevet krænkede i de ved denne konvention anerkendte rettigheder, forudsat at den høje kontraherende part, mod hvem klagen rettes, har erklæret, at den anerkender Kommissionens kompetence til at modtage sådanne andragender. De af de høje kontraherende parter, der har udstedt en sådan erklæring, forpligter sig til ikke på nogen måde at lægge hindringer i vejen for den effektive udøvelse af denne ret.

Art. 26. Kommissionen må kun optage sagen til behandling, når alle hjemlandets retsmidler er blevet udtømt i overensstemmelse med de af folkeretten almindeligt anerkendte regler og indenfor et tidsrum af seks måneder fra den dato, på hvilken hjemlandets endelige afgørelse blev truffet.

Art. 27. 1) Kommissionen må ikke behandle noget i henhold til artikel 25 forelagt andragende, som

- a) er anonymt,
- b) i det væsentlige er identisk med en sag, der allerede er blevet undersøgt af Kommissionen eller allerede har været underkastet anden form for international undersøgelse eller afgørelse og ikke indeholder nye oplysninger af betydning.

2) Kommissionen skal afvise et andragende, der forelægges den i henhold til art. 25, når den anser det for uforeneligt med bestemmelserne i nærværende konvention, for åbenbart ugrundet eller for at være misbrug af retten til at rette henvendelse til Kommissionen.

3) Kommissionen skal afvise enhver sag, der indbringes for den, når den anser den for uforenelig med det i art. 26 anførte.

Art. 28. Når kommissionen antager en sag, der er indbragt for den, skal den:

- a) med henblik på at udrede kendsgerningerne foretage en gennemgang af sagen i forening med parternes repræsentanter, og om nødvendigt foranstalte en undersøgelse, til hvis effektive gennemførelse vedkommende stater skal stille alle midler til rådighed efter at have drøftet spørgsmålet med Kommissionen;
- b) stille sig til rådighed for vedkommende parter med det formål at opnå en mindelig løsning af sagen på grundlag af respekt for menneskerettighederne som defineret i denne konvention.

Art. 31. 1) Hvis en løsning ikke opnås, skal Kommissionen udarbejde en beretning om kendsgerningerne og anføre sin opfattelse med hensyn til, om disse åbenbarer, at vedkommende stat har brudt sine forpligtelser ifølge konventionen. Samtlige kommissionsmedlemmers opfattelse af dette punkt kan anføres i beretningen.

2) Beretningen skal oversendes til Ministerudvalget. Den skal også oversendes til vedkommende stater, der ikke er berettiget til at offentliggøre den.

3) Ved oversendelsen af beretningen til Ministerudvalget kan Kommissionen stille sådanne forslag, som den finder egnede.

Art. 32. 1) Hvis sagen ikke indbringes for Domstolen i overensstemmelse med artikel 48 i denne konvention indenfor et tidsrum af tre måneder fra datoen for beretningens oversendelse til Ministerudvalget, skal Ministerudvalget med to trediedeles flertal af de medlemmer, der er berettiget til at sidde i Udvalget, afgøre, om der foreligger en krænkelse af konventionen.

2) I bekræftende fald skal Ministerudvalget fastsætte en frist, indenfor hvilken vedkommende høje kontraherende part skal træffe de forholdsregler, som Ministerudvalgets afgørelse medfører.

3) Hvis vedkommende høje kontraherende part ikke har truffet tilfredsstillende forholdsregler indenfor den foreskrevne frist, skal Ministerudvalget med det i stk. 1 nævnte flertal afgøre, hvilken virkning der skal tillægges dets oprindelige afgørelse, og offentliggøre beretningen.

4) De høje kontraherende parter forpligter sig til at betragte enhver afgørelse, som Ministerudvalget måtte træffe i medfør af stk. 1—3 som bindende.

Art. 48. Nedennævnte kan indbringe en sag for Domstolen, forudsat at vedkommende høje kontraherende part, hvis der kun er én, eller vedkommende høje kontraherende parter, hvis der er flere end én, er obligatorisk underkastet Domstolens myndighed eller, hvis dette ikke er tilfældet, med samtykke af vedkommende høje kontraherende part, hvis der kun er én, eller af vedkommende høje kontraherende parter, hvis der er flere end én:

- a) Kommissionen;
- b) en høj kontraherende part, hvis statsborger angives at være krænkede;
- c) en høj kontraherende part, der har indbragt sagen for Kommissionen;
- d) en høj kontraherende part, mod hvilken klagen blev rejst.

Anerkendelse af stater og regeringer

A. ANERKENDELSE I STATERNES PRAKSIS

54

Meddelelse fra udenrigsministeriet af 9. januar 1950 om Danmarks anerkendelse af centralregeringen for den kinesiske folkerepublik

Den danske regering har i dag anerkendt centralregeringen for den kinesiske folkerepublik de jure.

Anerkendelsen har fundet sted ved et telegram fra udenrigsministeren til den kinesiske udenrigsminister. Telegrammet har følgende ordlyd:

“Jeg har den ære at underrette Deres excellence om, at den danske regering har anerkendt folkerepublikken de jure. Jeg benytter denne lejlighed til at udtale den danske regerings oprigtige ønske om at fortsætte og yderligere udvikle de gode og venskabelige forbindelser, som i århundreder har bestået mellem Danmark og Kina, og dens ønske om at optage diplomatisk forbindelse med centralregeringen for den kinesiske folkerepublik.”

I telegrammet anmodedes den kinesiske udenrigsminister videre om at modtage gesandt Alexis Mørch, der for tiden befinder sig i Shanghai, og som er blevet instrueret om at forespørge, om det vil være belejligt for udenrigsministeren at tage imod ham i nær fremtid.

Chiang Kai-sheks kinesiske regering har i det sidste års tid i Danmark været repræsenteret af gesandt *Chen Koo-lien*. Gesandtskabet består foruden ministeren af to legationssekretærer.

55

Uddrag af noteveksling mellem de Forenede Stater og Sovjetunionen af 16. november 1933¹

28 A. J. I. L., Supp., 1934, 1-3

The White House

My dear Mr. Litvinov.

Washington, November 16, 1933

I am very happy to inform you that as a result of our conversations the Government of the United States has decided to establish normal diplomatic

¹ Se endvidere nedenfor sag nr. 143.

relations with the Government of the Union of Sovjet Socialist Republics and to exchange ambassadors.

I trust that relations now established between our peoples may forever remain normal and friendly, and that our nations henceforth may coöperate for their mutual benefit and for the preservation of the peace of the world.

I am, my dear Mr. Litvinov,

Very sincerely yours,

Franklin D. Roosevelt

Mr. Maxim M. Litvinov
People's Commissar for Foreign Affairs
Union of Sovjet Socialist Republics

Washington, November 16, 1933

My dear Mr. President.

I am very happy to inform you that the Government of the Union of Sovjet Socialist Republics is glad to establish normal diplomatic relations with the Government of the United States and to exchange ambassadors.

I, too, share the hope that the relations now established between our peoples may forever remain normal and friendly, and that our nations henceforth may coöperate for their mutual benefit and for the preservation of the peace of the world.

I am, my dear Mr. President,

Very sincerely yours,

Maxim Litvinoff

Mr. Franklin D. Roosevelt
President of the United States of America
The White House

56

Engelsk udtalelse om anerkendelse

1948, U. N. Doc. A/CN. 4/2

[På de Forenede Nationers konference for international organisation i 1945 fremsatte Panama forslag til deklaration om staternes rettigheder og pligter. Forslagets artikel 2 indeholdt følgende bestemmelse:

Every State is entitled to have its existence recognized. The recognition of the existence of a State merely signifies that the State recognizing it accepts the person of the State recognized, together with all the rights and duties which arise out of international law. Recognition is unconditional and irrevocable.

I henhold til de Forenede Nationers generalforsamlings resolution af 11. december 1946, blev Panamas forslag sendt til medlemsstaterne til udtalelse. Storbritannien fremsatte følgende kommentar til ovennævnte artikel:]

His Majesty's Government consider that the second point to be dealt with is the question of recognition of States, which appears in articles 2 and 3 of

the present draft. They suggest that it should consist of two propositions: (a) that where an entity fulfils the conditions of statehood as laid down in the definition, there is a duty on all other States to recognize it; (b) that there is also a duty on all States not to recognize as a State any entity which does not fulfil these conditions. Though neither point is free from controversy in current doctrine, His Majesty's Government agree with the draft declaration in considering that (i) the recognition and non-recognition of States is a matter of legal duty and not of policy. Inevitably there is bound to be considerable scope for political judgment in deciding whether an entity fulfils the conditions for recognition as a State. They consider, nevertheless, that the interests of international law require that the sphere, necessarily left to a purely political judgment, should be reduced to as narrow limits as possible and that international relations will benefit by the question of recognition and non-recognition being regarded, as far as possible, as a matter of legal duty and removed to the utmost practical extent from the political sphere; (ii) the existence of a State should not be regarded as depending upon its recognition but on whether in fact it fulfils the conditions which create a duty for recognition. It should be made clear that recognition of an entity as a State in no way requires the entry into diplomatic, or any other particular relations with, the entity so recognized. Whether a State enters into diplomatic or other relations with another State is, and must remain, a matter for purely political decision. On the other hand, the entry into diplomatic or other relations with an entity does necessarily imply that the entity is recognized as something. Whether it implies recognition *de jure* or *de facto* as a State, or as a belligerent community, or as an insurgent Government, will depend upon the particular facts with regard to the relations so entered upon.***

57

Amerikansk udtalelse om anerkendelse

1948, S. C. O. R., 3rd Year 16

[Den 14. maj 1948 ophørte Englands mandat over Palæstina. Samtidigt proklameredes i Tel-Aviv staten Israel i overensstemmelse med de Forenede Nationers generalforsamlings beslutning af 29. november 1947. Umiddelbart efter proklamationen blev den provisoriske israelske regering anerkendt *de facto* af de Forenede Stater.

Under en debat i sikkerhedsrådet den 18. maj 1948 fremsatte den syriske repræsentant stærk kritik af de Forenede Staters anerkendelse, idet han hævdede, at denne var afgivet i strid med folkeretten og de Forenede Nationers principper, ligesom han udtalte, at spørgsmålet burde forelægges den Internationale Domstol.

De Forenede Staters repræsentant, Warren Austin, svarede hertil:]

***I should regard it as highly improper for me to admit that any country on earth can question the sovereignty of the United States of America in the

exercise of that high political act of recognition of the *de facto* status of a State. Moreover, I would not admit here, by implication or by direct answer, that there exists a tribunal of justice or of any other kind, anywhere, that can pass judgment upon the legality or the validity of that act of my country.

There were certain powers and certain rights of a sovereign State which were not yielded by any of the Members who signed the United Nations Charter and in particular this power to recognize the *de facto* authority of a provisional Government was not yielded. When it was exercised by my Government, it was done as a practical step, in recognition of realities: the existence of things, and the recognition of a change, that had actually taken place. I am certain that no nation on earth has any right to question that, or to lay down a proposition that a certain length of time of the exercise of *de facto* authority must elapse before that authority can be recognized.***

58

Udenrigsminister Stimson's note til Japan og Kina af 7. januar 1932

26 A. J. I. L., 1932, 342

In view of the present situation and of its own rights and obligations therein the American Government deems it to be its duty to notify both the Government of the Chinese Republic and the Imperial Japanese Government that it cannot admit the legality of any situation *de facto* nor does it intend to recognize any treaty or agreement entered into between these governments, or agents thereof, which may impair the treaty rights of the United States or its citizens in China, including those which relate to the sovereignty, the independence or the territorial and administrative integrity of the Republic of China, or to the international policy relative to China, commonly known as the Open Door Policy; and it does not intend to recognize any situation, treaty, or agreement which may be brought about by means contrary to the covenants and obligations of the Pact of Paris of August 27, 1928, to which treaty both China and Japan, as well as the United States, are parties.

59

Folkeforbundsforsamlingens resolution af 11. marts 1932

LEAGUE OF NATIONS, DOC., 1932

The Assembly*** declares that it is incumbent upon the members of the League of Nations not to recognize any situation, treaty, or agreement which may be brought about by means contrary to the Covenant of the League of Nations or the Pact of Paris.

60

Washingtonkonventionen af 7. februar 1923

Art. 2. I ønsket om at sikre Mellemamerikas republikker de fordele, som følger af opretholdelse af frihedsinstitutionerne, og samtidig bidrage til at styrke deres stabilitet og udvikle den prestige, de bør omgives med, erklærer republikkerne, at enhver handling, disposition eller forholdsregel, som måtte forandre den forfatningsmæssige organisation i en af dem, skal betragtes som en trusel mod de nævnte republikers fred, enten disse handlinger er en offentlig myndigheds værk, eller de stammer fra borgere.

Som følge heraf vil de kontraherende parter regeringer ikke i nogen af de fem republikker anerkende en regering, som måtte tage magten ved et statskup eller en revolution imod en anerkendt regering, før folkets repræsentanter efter et frit valg har reorganiseret landet på forfatningsmæssigt grundlag. Selv i dette tilfælde forpligter de sig til ikke at indrømme denne anerkendelse, hvis en af de personer, der er valgt til præsident, vicepræsident eller statschef, befinder sig i en stilling, der svarer til et af følgende tilfælde:

1) Hvis denne person er leder eller en af lederne af statskuppet eller revolutionen, eller hvis han er knyttet til denne leder eller en af disse ledere ved blodets eller ægteskabets bånd; hvis han er beslægtet i op- eller nedstigende linje med, eller er broder til disse ledere;

2) Hvis han har været statssekretær eller har udfyldt en højere militær kommando under statskuppet, i løbet af revolutionen, i valgperioden, eller hvis han har udfyldt disse funktioner eller denne kommando i de sidste seks måneder før statskuppet, revolutionen eller valgene.

Desuden kan en regering, som skulle lade en borger komme til magten, hvem hans lands forfatning tydeligt og ubestrideligt forbyder adgang til magten efter valg, som præsident, vicepræsident eller statschef, i intet tilfælde anerkendes.

61

**Republic of China v. Merchants' Fire Assurance
Corporation of New York**

DE FORENEDE STATER, CIRCUIT COURT OF APPEALS, NINTH CIRCUIT, 1929
30 F. (2d) 278

[Appelsag fra the United States Court for China, hvor sagen var blevet afvist.]

[*Rudkin, C. J.*] The Republic of China commenced an action in the United States Court for China to recover a fire loss under a policy issued by the Merchants' Fire Assurance Corporation of New York to the Chinese Government Telephone Administration at Wuchang, a department of the Republic of China, covering a building occupied by the Telephone Administration. After the policy issued and after the fire loss occurred, the military forces of the national government captured the city of Wuchang and became the custodian

of the policy and the property covered thereby. At the time of the commencement of this action, the National Government was in control in 15 of the 18 provinces of China, comprising about three-fourths of its total area, but had not as yet been recognized by the United States. The insurance company appeared specially in the court below, and filed a plea in abatement on the ground that the plaintiff was not the Republic of China, but was a revolutionary organization known as the National Government of China, unrecognized by the government of the United States of America and was without legal capacity to sue. The plea in abatement was sustained, and from the judgment of dismissal this appeal is prosecuted.

The courts of this country cannot recognize the existence of a government which originates in revolution or revolt, until it has first been recognized by the political department of the government, and inasmuch as there had been no such recognition of the National Government of China at the time of the trial in the court below, it would seem to follow that that government had no existence in contemplation of law and no legal capacity to sue in the courts of this country. But since the trial below, there has been a material change in the situation, and of this change we must take judicial notice. *Jones v. United States*, 137 U.S. 202.

On July 25, 1928, the Envoy Extraordinary and Minister Plenipotentiary to China, appointed by the President of the United States, and the Minister of Finance, appointed by the National Government of the Republic of China, entered into a treaty of commerce; and while this treaty has not as yet been ratified by the Senate, it contains a clear recognition by the Executive Department of this government of both the National Government of the Republic of China and of its accredited representative. This recognition by the Executive Department would seem to satisfy the requirements of the law; but, if this is not enough, we have been advised by a telegram from the Secretary of State that the Minister Plenipotentiary and Envoy Extraordinary of the National Government of China has been officially received by this government, so that there recognition of the former is now settled beyond question. "Recognition is not necessarily express; it may be implied, as when a state enters into negotiations with the new state, sends its diplomatic agents, receives such agents officially, gives exequaturs to its consuls, form with it conventional relations." 1 Moore's Digest of International Law, p. 73.

The judgment of the court below must therefore be reversed.***

62

U. S. Policy on Nonrecognition of Communist China

Memorandum sent by the Department of State to its missions abroad 39 Dept. of State Bulletin (1958) 385

The basic considerations on which United States policy toward China rests are twofold. First, the Soviet bloc, of which Communist China is an important

part, is engaged in a long-range struggle to destroy the way of life of the free countries of the world and bring about the global dominion of communism. The Chinese Communist regime has made no secret of its fundamental hostility to the United States and the free world as a whole nor of its avowed intention to effect their downfall. Today its defiance of and attacks on the non-Communist world have reached a level of intensity that has not been witnessed since the Korean war. The second basic factor is that East Asia is peculiarly vulnerable to the Communist offensive because of the proximity of the free countries of that area to Communist China, the inexperience in self-government of those which have recently won their independence, their suspicions of the West inherited from their colonial past, and the social, political, and economic changes which inevitably accompany their drive toward modernization.***

In the effort to block Peiping's attempts to extend Communist rule in Asia the withholding of diplomatic recognition is an important factor. The extension of diplomatic recognition by a great power normally carries with it not only increased access to international councils but enhanced international standing and prestige as well. Denial of recognition on the other hand is a positive handicap to the regime affected and one which makes it that much the more difficult for it to pursue its foreign policies with success. One basic purpose of United States nonrecognition of Communist China is to deny it these advantages and to that extent limit its ability to threaten the security of the area.

In the case of China there are special considerations which influence United States policy with regard to recognition. For one thing, although the Chinese Communists have seized the preponderant bulk of China, they have not completed their conquest of the country. The generally recognized legitimate Government of China continues to exist and in Taiwan is steadily developing its political, economic, and military strength. The Government of the Republic of China controls the strategic island of Taiwan and through its possession of a sizable military force—one of the largest on the side of the free world in Asia—presents a significant deterrent to renewed Chinese Communist aggression. Recognition of Communist China by the United States would seriously cripple, if not destroy altogether, that Government. On the other hand, continued United States recognition and support of the Republic of China enables it to challenge the claim of the Chinese Communists to represent the Chinese people and keeps alive the hopes of those Chinese who are determined eventually to free their country of Communist rule.

Recognition of Communist China by the United States would have an adverse effect on the other free governments of Asia which could be disastrous to the cause of the free world in that part of the world. Those nations which are closely allied to the United States and are striving to maintain their independence on the perimeter of Chinese Communist power, especially Korea and Viet-Nam, would be profoundly confused and demoralized. They would interpret such action as abandonment of their cause by the United States. They might reason that their only hope for survival lay in desperate measures, not caring whether these threatened the peace of the area and the world. Governments further removed from the borders of China would see in American re-

cognition of Communist China the first step in the withdrawal of the United States from the Far East. Without the support of the United States they would be unable long to defy the will of Peiping; and some would probably conclude that their wisest course would be speedily to seek the best terms obtainable from Peiping. Needless to say, these developments would place the entire free world position in Asia in the gravest peril.***

Still another factor which must be considered in the case of China is the effect which recognition of the Communist regime would have on the United Nations. Recognition of Peiping by the United States would inevitably lead to the seating of Peiping in that body. In the view of the United States this would vitiate, if not destroy, the United Nations as an instrument for the maintenance of international peace. The Korean war was the first and most important effort to halt aggression through collective action in the United Nations. For Communist China, one of the parties against which the effort of the United Nations was directed, to be seated in the United Nations while still unpurged of its aggression and defying the will of the United Nations in Korea would amount to a confession of failure on the part of the United Nations and would greatly reduce the prospects for future successful action by the United Nations against aggression. Moreover, the Republic of China is a charter member in good standing of the United Nations, and its representatives there have contributed importantly to the constructive work of that organization. If the representatives of the Chinese Communist regime were to be seated in their place and given China's veto in the Security Council, the ability of that body in the future to discharge the responsibility it has under the charter for the maintaining of international peace and security would be seriously impaired.

Those who advocate recognition of the Chinese Communists often assume that by the standards of international law applied to such cases the Peiping regime is "entitled" to diplomatic recognition. In the view of the United States diplomatic recognition is a privilege and not a right. Moreover, the United States considers that diplomatic recognition is an instrument of national policy which it is both its right and its duty to use in the enlightened self-interest of the nation. However, there is reason to doubt that even by the tests often cited in international law the Chinese Communist regime qualifies for diplomatic recognition. It does not rule all China, and there is a substantial force in being which contests its claim to do so. The Chinese Communist Party, which holds mainland China in its grip, is a tiny minority comprising less than 2 percent of the Chinese people, and the regimentation, brutal repression, and forced sacrifices that have characterized its rule have resulted in extensive popular unrest. To paraphrase Thomas Jefferson's dictum, this regime certainly does not represent "the will of the populace, substantially declared." Finally, it has shown no intention to honor its international obligations. One of its first acts was to abrogate the treaties of the Republic of China, except those it chose to continue. On assuming power it carried out a virtual confiscation without compensation of the properties of foreign nationals, including immense British investments notwithstanding the United Kingdom's prompt recognition of it. It has failed to honor various commitments entered into since, including various provi-

sions of the Korean armistice and the Geneva accord on Viet-Nam and Laos, as well as the agreed announcement of September 1955 by which it pledged itself to permit all Americans in China to return home "expeditiously."***

In public discussions of China policy one of the proposals that has attracted widest attention is that known as the "two Chinas solution." Briefly, advocates of this arrangement propose that the Chinese Communist regime be recognized as the government of mainland China while the Government at Taipei remains as the legal government of Taiwan. They argue that this approach to the Chinese problem has the merit of granting the Communists only what they already control while retaining for the free world the militarily strategic bastion of Taiwan. However, it overlooks or ignores certain facts of basic importance. The Republic of China would not accept any diminution of its sovereignty over China and could be expected to resist such an arrangement with all the means at its disposal. If a "two Chinas solution" were to be forcefully imposed against its will, that Government's effectiveness as a loyal ally to the free-world-cause would be destroyed. Peiping, too, would reject such an arrangement. In fact, over the past year Chinese Communist propaganda has repeatedly and stridently denounced the "two Chinas" concept and, ironically, has been accusing the United States Government of attempting to put it into effect. Peiping attaches great importance to the eventual acquisition of Taiwan and has consistently reserved what it calls its "right" to seize Taiwan by force if other means fail. There is no prospect that it would ever acquiesce in any arrangement which would lead to the permanent detachment of Taiwan from China.

The "two Chinas" concept is bitterly opposed by both Peiping and Taipei. Hence, even if such a solution could be imposed by outside authority, it would not be a stable one. Constant policing would be required to avert its violent overthrow by one side or the other.***

B. ANERKENDELSE FOR INTERNATIONALT FORUM

63

The Tinoco Concessions

STORBRIANNIEN-COSTA RICA; CLAIMS ARBITRATION, 1923
1923 Reports of International Arbitral Awards I, 369

[I 1917 styrtede *Tinoco* Costa Ricas regering, og efter at have afholdt valg kundgjorde han i juni 1917 en ny forfatning. I 1919 forlod han Costa Rica, hans regering måtte gå af, og den nye regering genoplivede den gamle forfatning.

I august 1922 vedtoges en lov, hvorefter alle aftaler, der i Tinocos regeringsperiode var truffet mellem den udøvende magt og private personer skulle betragtes som nulliteter. Loven omfattede bl. a. en koncession, som Tinocos regering havde overdraget til et britisk selskab samt adskillige gældsforplig-

telser, som regeringen havde påtaget sig over for *the Royal Bank of Canada*, der ligeledes var et britisk selskab.

Storbritannien bestred retsmæssigheden af denne lov, for så vidt den omfattede britiske borgeres interesser.]

[*Taft, Arbitrator.*] ***Great Britain contends, first, that the Tinoco government was the only government of Costa Rica *de facto* and *de jure* for two years and nine months; that during that time there is no other government disputing, its sovereignty, that it was in peaceful administration of the whole country, with the acquiescence of its people.

Second, that the succeeding government could not by legislative decree avoid responsibility for acts of that government affecting British subjects, or appropriate or confiscate rights and property by that government except in violation of international law; that the act of Nullities is as to British interests, therefore itself a nullity, and is to be disregarded, with the consequence that the contracts validly made with the Tinoco government must be performed by the present Costa Rican Government, and that the property which has been invaded or the rights nullified must be restored.

To these contentions the Costa Rican Government answers: First, that the Tinoco government was not a *de facto* or *de jure* government according to the rules of international law. This raises an issue of fact.

Second, that the contracts and obligations of the Tinoco government, set up by Great Britain on behalf of its subjects, are void, and do not create a legal obligation, because the government of Tinoco and its acts were in violation of the constitution of Costa Rica of 1871.

Third, that Great Britain is stopped by the fact that it did not recognise the Tinoco government during its incumbency, to claim on behalf of its subjects that Tinoco's was a government which could confer rights binding on its successor.

Fourth, that the subjects of Great Britain, whose claims are here in controversy, were either by contract or the law of Costa Rica bound to pursue their remedies before the courts of Costa Rica and not to seek diplomatic interference on the part of their home government.***

First, what are the facts to be gathered from the documents and evidence submitted by the two parties as to the *de facto* character of the Tinoco government?

In January, 1917, Frederico A. Tinoco was Secretary of War under Alfredo Gonzalez, the then President of Costa Rica. On the ground that Gonzalez was seeking re-election as President in violation of a constitutional limitation, Tinoco used the army and navy to seize the government, assume the provisional headship of the Republic and become Commander-in-Chief of the army. Gonzalez took refuge in the American Legation, thence escaping to the United States. Tinoco constituted a provisional government at once and summoned the people to an election for deputies to a constituent assembly on the first of May, 1917. At the same time he directed an election to take place for the Presidency and himself became a candidate. An election was held. Some 61,000 votes were cast for Tinoco and 259 for another candidate. Tinoco then was inaugurated as the

President to administer his powers under the former constitution until the creation of a new one. A new constitution was adopted June 8, 1917, supplanting the constitution of 1871. For a full two years Tinoco and the legislative assembly under him peaceably administered the affairs of the Government of Costa Rica, and there was no disorder of a revolutionary character during that interval. No other government of any kind asserted power in the country. The courts sat, Congress legislated, and the government was duly administered. Its power was fully established and peaceably exercised. The people seemed to have accepted Tinoco's government with great good will when it came in, and to have welcomed the change.***

The truth is that throughout the record as made by the case and counter case, there is no substantial evidence that Tinoco was not in actual and peaceable administration without resistance or conflict or contest by anyone until a few months before the time when he retired and resigned.***

The question is, must his government be considered a link in the continuity of the Government of Costa Rica? I must hold that from the evidence the Tinoco government was an actual sovereign government.

But it is urged that many leading Powers refused to recognise the Tinoco government, and that recognition by other nations is the chief test and best evidence of the birth, existence and continuity of succession of a government. Undoubtedly recognition by other Powers is an important evidential factor in establishing proof of the existence of a government in the society of nations.***

Possibly because of the leadership of the United States***, her then Allies in the war, Great Britain, France and Italy, declined to recognise the Tinoco government. Costa Rica was, therefore, not permitted to sign the Treaty of Peace at Versailles, although the Tinoco government had declared war against Germany.***

The non-recognition by other nations of a government claiming to be a national personality, is usually appropriate evidence that it has not attained the independence and control entitling it by international law to be classed as such. But when recognition *vel non* of a government is by such nations determined by inquiry, not into its *de facto* sovereignty and complete governmental control, but into its illegitimacy or irregularity of origin, their non-recognition loses something of evidential weight on the issue with which those applying the rules of international law are alone concerned. What is true of the non-recognition of the United States in its bearing upon the existence of a *de facto* government under Tinoco for thirty months is probably in a measure true of the non-recognition by her Allies in the European War. Such recognition for any reason, however, cannot outweigh the evidence disclosed by this record before me as to the *de facto* character of Tinoco's government, according to the standard set by international law.

Second. It is ably and earnestly argued on behalf of Costa Rica that the Tinoco government cannot be considered a *de facto* government, because it was not established and maintained in accord with the constitution of Costa Rica of 1871. To hold that a government which establishes itself and maintains

a peaceful administration, with the acquiescence of the people for a substantial period of time, does not become a *de facto* government unless it conforms to a previous constitution would be to hold that within the rules of international law a revolution contrary to the fundamental law of the existing government cannot establish a new government. This cannot be, and is not, true. The change by revolution upsets the rule of the authorities in power under the then existing fundamental law, and sets aside the fundamental law in so far as the change of rule makes it necessary. To speak of a revolution creating a *de facto* government, which conforms to the limitations of the old constitution, is to use a contradiction in terms. The same government continues internationally, but not the internal law of its being. The issue is not whether the new government assumes power or conducts its administration under constitutional limitations established by the people during the incumbency of the government it has overthrown. The question is, has it really established itself in such a way that all within its influence recognise its control, and that there is no opposing force assuming to be a government in its place? Is it discharging its functions as a government usually does, respected within its own jurisdiction?

Reference is further made, on behalf of Costa Rica, to the Treaty of Washington, December 20, 1907, entered into by the Republics of Central America, in which it was agreed that—

“The governments of the contracting parties will not recognise anyone who rises to power in any of the five republics in consequence of a *coup d'état* or by a revolution against a recognised government until the representatives of the people by free elections have reorganised the country in constitutional form.”

Such a treaty could not affect the rights of subjects of a government not a signatory thereto, or amend or change the rules of international law in the matter of *de facto* governments. Their action under the treaty could not be of more weight in determining the existence of a *de facto* government under Tinoco than the policy of the United States, already considered.***

Third. It is further objected by Costa Rica that Britain by her failure to recognise the Tinoco government is estopped now to urge claims of her subjects dependent upon the acts and contracts of the Tinoco government. The evidential weight of such non-recognition against the claim of its *de facto* character I have already considered and admitted. The contention here goes further and precludes a government from appearing in an international tribunal in behalf of its nationals to claim any rights based on the acts of such government.

To sustain this view a great number of decisions in English and American courts are cited to the point that a municipal court cannot, in litigation before it, recognise or assume the *de facto* character of a foreign government which the executive department of foreign affairs of the government of which the court is a branch has not recognised. This is clearly true. It is for the executive to decide questions of foreign policy and not courts. It would be most unseemly

to have a conflict of opinion in respect to foreign relations of a nation between its department charged with the conduct of its foreign affairs and its judicial branch. But such cases have no bearing on the point before us. Here the executive of Great Britain takes the position that the Tinoco government which it did not recognise, was nevertheless a *de facto* government that could create rights in British subjects which it now seeks to protect. Of course, as already emphasised, its failure to recognise the *de facto* government can be used against it as evidence to disprove the character it now attributes to that government, but this does not bar it from changing its position. Should a case arise in one of its own courts after it has changed position, doubtless that court would feel it incumbent upon it to note the change in its further rulings.***

I do not understand the arguments on which an equitable estoppel in such case can rest. The failure to recognise the *de facto* government did not lead the succeeding government to change its position in any way upon the faith of it. Non-recognition may have aided the succeeding government to come into power; but subsequent presentation of claims based on the *de facto* existence of the previous government and its dealings does not work an injury to the succeeding government in the nature of a fraud or breach of faith. An equitable estoppel to prove the truth must rest on previous conduct of the person to be estopped, which has led the person claiming the estoppel into a position in which the truth will injure him. There is no such case here.***

The *fourth* point made on behalf of Costa Rica against the claims here pressed is that both claimants are bound either by their own contractual obligation entered into with the Government of Costa Rica, to which they subscribed, not to present their claims by way of diplomatic intervention of their home government, but to submit their claims to the Courts of Costa Rica. This is in effect a plea in abatement to the jurisdiction of the arbitrator, which under the terms of the arbitration, Costa Rica has the right to advance.***

(The) limitations (in the concession) do not seem to include within their scope such a question as the power of the Tinoco government to grant the concession, or the obligation of the present government of Costa Rica to recognise it. They cover the interpretation and construction of the contract rather than the fundamental question of its existence.***

It has been held in a number of important arbitrations, and by several foreign secretaries, that such restrictions are not binding upon a home government and will not prevent it from exercising its diplomatic functions to protect its nationals against the annulment of the rights secured to them by the laws of the country in force when the obligations arose.***

However this may be, these restrictions upon each claimant would seem to be inapplicable to a case like the present where is involved the obligation of a restored government for the acts or contracts of a usurping government. The courts of the restored government are bound to administer the law of the restored government under its constitution and their decisions are necessarily affected by the limitations of that instrument. This may prevent the courts from giving full effect to international law that may be at variance with the municipal law which under the restored constitution the national courts have

to administer. It is obvious that the obligations of a restored government for the acts of the usurping *de facto* government it succeeds cannot, from the international standpoint, be prejudiced by a constitution which, though restored to life, is for purposes of this discussion, exactly as if it were new legislation which was not in force when the obligations arose.***

A consideration of the issues before us recurs to the merits of the two claims. The decision of them must be governed by the answer to the question whether the claims would have been good against the Tinoco government as a government, unaffected by the Law of Nullities, and unaffected by the Costa Rican Constitution of 1871.***

The most serious objection to the concession is that it was granted by a body without power to grant it. Its validity is *** to be determined by the law in existence at the time of its granting; and that means the law of the Government of Costa Rica under Tinoco.*** The government of Tinoco itself could have defeated this concession on the ground of a lack of power in the Chamber of Deputies to approve it.***

My award is that the Law of Nullities in its operation upon the claim in behalf of the Royal Bank will work no injury of which Great Britain can complain (if Costa Rica assigned to the Bank certain interests in the estate of Tinoco's deceased brother).***

My award further is that the Law of Nullities in decreeing the invalidity of the concession worked no injury to the (British company) of which Great Britain can complain, because the concession was in fact invalid under the Constitution of 1917.***

C. ANERKENDELSE FOR NATIONALT FORUM

(1) *Anerkendelsens bevismæssige betydning*

64

Duff Development Co., Ltd. v. Government of Kelantan

STORBRITANNIEN, HOUSE OF LORDS, 1924
(1924) A. C. 797

[Det sagsøgende selskab havde i anledning af en kontrakt en tvist med regeringen af Kelantan, en malayisk stat, der uden at gøre sin suverænitet gældende gik med til at lade sagen afgøre ved voldgift. Denne gik regeringen imod. Selskabet søgte derefter ved britisk domstol eksekution af kendelsen. Regeringen protesterede herimod under påberåbelse af immunitet som suveræn stat. På dommerens forespørgsel oplyste koloniministeriet at Kelantan er en uafhængig stat; at sultanen af Kelantan almindelig talt uden tvivl udøver alle suverænitets sædvanlige attributter; og at den britiske Krone ikke udøver eller gør krav på nogen suverænitetsrettighed eller jurisdiktion over Kelantan. Ministeriet vedlagde forskellige dokumenter indeholdende nærmere historiske oplysninger om Kelantans tidligere afhængighed i forhold til Siam og om den senere

udvikling af dette forhold. På dette grundlag blev der i underinstanserne truffet afvigende afgørelser endende med at Court of Appeal anerkendte Kelantans suverænitet og derfor afviste eksekutionsbegæringen. Under appel til House of Lords gjorde selskabet gældende at skønt koloniministeriet havde anerkendt Kelantans uafhængighed og suverænitet viste de ledsagende dokumenter at det faktisk ikke forholdt sig således. Spørgsmålet var herefter i første række om domstolene er bundet til at acceptere ministeriets opfattelse, eller på egen hånd kan tage stilling til suverænitetsspørgsmålet.]

[*Lord Sumner.*] My Lords, I should not trouble your Lordships at any length with my reasons for thinking that this appeal fails, if it were not for the novelty of this important subject in your Lordship's House.

The principle is well settled, that a foreign sovereign is not liable to be impleaded in the municipal Courts of this country, but is subject to their jurisdiction only when he submits to it, whether by invoking it as a plaintiff or by appearing as a defendant without objection. For present purposes it is not necessary to examine the particular theory of law on which this principle is rested. The practice is also well settled that the Court may and generally should make its own inquiry of the competent Secretary of State in order to ascertain, in case of need, whether a particular State is a sovereign State, or a particular person is the head, hereditary or elected, of such a state.

Your Lordships were frankly told at the Bar that this case is virtually an appeal against *Mighell v. Sultan of Johore*, [1894] 1 Q.B. 149, in which that practice was approved. The questions there put to the Colonial Office by direction of the Court were not simply answered "aye" or "no", but were answered affirmatively with the addition of details explaining the Treaty relations of Johore with Her Majesty Queen Victoria. In *The Charkieh*, L.R. 4 Admiralty and Ecclesiastical, 59, 86, a similar question was put to the Foreign Office with regard to the Khedivate of Egypt and was answered in the negative in the terms "the Khedive has not been and is not now recognized by Her Majesty as reigning sovereign of the State of Egypt." In *The Annette*, [1919] P. 105, the reply was that His Majesty was provisionally co-operating with the new Government, in opposition to the Soviet Government, but had not yet formally recognized it as the Government of a sovereign independent State. In *The Gagara*, [1919] P. 95, the statement by the Foreign Office was that Esthonia was recognized as a sovereign State, but provisionally. Thus in one case a clear answer was given that there had been no recognition; in another that the State was sovereign and was so recognized, but with further information as to the Crown's treaty relations with it; in the third that common action had taken place but without recognition of sovereignty; in the fourth that there was only provisional recognition, but still the State had been recognized as sovereign. Two are cases of States of some antiquity; two are cases of Governments of recent and troublous origin. The same procedure was, however, followed in them all.

Certain expressions used by Brett, M. R., and Kay, L. J., in giving judgment in the Sultan of Johore's Case appear to suggest that the reason why the answer of the Colonial Office ought to be accepted without further discussion, is, that

in effect it is something which the Crown deigns to declare to its Courts of law, and therefore it cannot be criticized or supplemented, since that would be disrespectful to the Crown itself. That this view of the meaning of the Court of Appeal has had its effect is shown by the language used by Farwell, J., in *Foster v. Globe Venture Syndicate*, [1900] 1 Ch. 811. The appellants, however, desire to go a little behind the form observed. They not unreasonably say: "An official of the Colonial Office advises the Sultan to go to arbitration, and the same official of the Colonial Office, or some other, advises him to dispute the award, and then the Colonial Office, in the name of the Crown, says that the Sultan is a sovereign and so is bound to nothing, not even to pay for what the Colonial Office has advised him to do. What then is the statement that the Sultan is a sovereign? Is it the voice of the sovereign of this country or is it in reality nothing but the contention of some one in the Colonial Office?"

Without contesting in the least either the inconvenience or the impropriety of any conflict between the High Court and the Secretary of State upon the grave question of the sovereignty of the Sultan of Kelantan, I venture to think that the mere obligation of deference to any statement made in His Majesty's name hardly constitutes the whole legal basis for the rule laid down in the *Johore Case*.

The status of foreign communities and the identity of the high personages who are the chiefs of foreign states, are matters of which the Court of this country take judicial notice. Instead of requiring proof to be furnished on these subjects by the litigants, they act on their own knowledge or, if necessary, obtain the requisite information for themselves. I take it that in so doing the Courts are bound, as they would be on any other issue of fact raised before them, to act on the best evidence and, if the question is whether some new State or some older State, whose sovereignty is not notorious, is a sovereign State or not, the best evidence is a statement, which the Crown condescends to permit the appropriate Secretary of State to give on its behalf. It is the prerogative of the Crown to recognize or to withhold recognition from States or chiefs of States, and to determine from time to time the status with which foreign powers are to be deemed to be invested. This being so, a foreign ruler, whom the Crown recognizes as a sovereign, is such a sovereign for the purposes of an English Court of law, and the best evidence of such recognition is the statement duly made with regard to it in His Majesty's name. Accordingly where such a statement is forthcoming no other evidence is admissible or needed. I think this is the real judicial explanation why it was held that the Sultan of Johore was a foreign sovereign. In considering the answer given by the Secretary of State, it was not the business of the Court to inquire whether the Colonial Office rightly concluded that the Sultan was entitled to be recognized as a sovereign by international law. All it had to do was to examine the communication in order to see if the meaning of it really was that the Sultan had been and was recognized as a sovereign.

There may be occasions, when for reasons of State full, unconditional or permanent recognition has not been accorded by the Crown, and the answer to the question put has to be temporary if not temporising, or even where

some vaguer expression has to be used. [1919] P. 105. In such cases not only has the Court to collect the true meaning of the communication for itself, but also to consider whether the statements as to sovereignty made in the communication and the expressions "sovereign" or "independent" sovereign used in the legal rule mean the same thing. Best, C. J., says in *Yrisarri v. Clement*, 2 Carrington & Payne, 223, 225, that recognition is conclusive, but, if there is no recognition yet given, the independence becomes matter of proof. I conceive that, if the Crown declined to answer the inquiry, as in changing and difficult times policy might require it to do, the Court might be entitled to accept secondary evidence in default of the best, subject, of course, to the presumption that, in the case of a new organization, which has *de facto* broken away from an old State, still existing and still recognized by His Majesty, the dominion of the old State remains unimpaired until His Majesty is pleased to recognize the change. In *The Charkieh*, L.R. 4 Admiralty & Ecclesiastical, 59, the Foreign Office returned a definitive and unambiguous answer that the Crown had never recognized the Khedive Ismail or his predecessors as sovereigns, but only as provincial authorities, albeit hereditary ones, who derived their authority and status from the Sultan of Turkey. This was conclusive, and hence it is that Brett, M.R., indicated his opinion, that the further inquiries made by Sir R. Phillimore were unnecessary. In the present case there is a precise and sufficient statement as to the status of the Sultan of Kelantan, as recognized by His Majesty, with nothing ambiguous about it.***

My Lords, I agree that the appeal should be dismissed.***

65

Luigi Monta of Genoa v. Cechofracht Co. Ltd.

ENGLAND, HIGH COURT OF JUSTICE, 1956
L. R. (1956) 2 Q. B. 552

[Den 31. juli 1953 blev S/S *Marilu*, der tilhørte sagsøgeren og var befragtet af sagsøgte, på en rejse fra det nordlige Kina til Singapore opbragt af et krigsskib der førte den kinesiske nationalistregerings flag og indbragt til en havn på Formosa hvor dets ladning blev beslaglagt. Certepartiet indeholdt en klausul om krigsrisiko i hvilken det var bestemt at skibet ansvarsfrit skulle kunne efterkomme ordrer givne af den regering under hvis flag skibet sejler eller af nogen anden regering. Da befragteren nægtede at betale fragten blev sagen indbragt for en voldgiftsmand, der gav rederen medhold. Det blev under sagen oplyst, at den britiske regering ikke i juli 1953 anerkendte nogen regering på Formosa. Voldgiftskendelsen blev indbragt for de ordinære domstole.]

[*Sellers J.*] There would, therefore, I apprehend, have been little if any controversy on the main issue if the Foreign Office of the British Government, from whom evidence was sought, had, at the date of the arrest and deviation, recognized the so-called Nationalist Government of China as being either a de

jure or de facto government of the Republic of China, or in fact the Government of Formosa as a supreme or sovereign and not subservient government.

In so far as recognition of the Italian Government might matter (and on behalf of the shipowner it was argued that the Italian Government's view prevailed or was of vital importance as evidence) the Italian Government did recognize the Government in Formosa at the material time as the Government of the Republic of China. On the contrary, however, the British Foreign Office stated that Her Majesty's Government did not recognize that any government was located in Formosa in July and August, 1953.

If the view of the Foreign Office is not to be held as conclusive, or as exclusive of all other evidence, it was not submitted by the charterers that there was no evidence to establish or justify the finding in the award. It was, however, strongly submitted that the court could not go behind or beyond the Foreign Office statement.***

As a matter of construction of the charterparty, an ordinary trading or commercial contract, there would seem to me to be no ground for saying that the authority giving the orders or directions has to be a government recognized as such by Her Majesty's Government here. It does not say so and I see no circumstances which require such a construction or which would give rise to any implication to that effect. The umpire, in my judgment, has not erred in that respect.

Is there a rule or law which restricts the evidence to be considered to that provided by the Foreign Office, or which precludes the tribunal of fact from finding that there was a government in Formosa on all the evidence which was adduced?

It was urged on behalf of the charterers that the umpire erred in not treating the Foreign Office statement as final and conclusive, and reliance was placed on *White, Child and Beney v. Simmons*, and *Duff Development Company Ltd. v. Government of Kelantan*, and other cases. In my judgment, the authorities, so far as they have been cited or are known to me, do not establish the proposition contended for and did not require the umpire to disregard any of the evidence put before him as to whether or not there was a government in Formosa.

It seems to me to be a very different question from a sovereign seeking immunity from the jurisdiction of our courts. The principle of the *Kelantan* case was concisely stated by Lord Dunedin in these words: "It seems to me that once you trace the doctrine for the freedom of a foreign sovereign from interference by the courts of other nations to comity, you necessarily concede that the home sovereign has in him the only power and right of recognition. If our sovereign recognizes and expresses the recognition through the mouth of his minister that another person is a sovereign, how could it be right for the courts of our own sovereign to proceed upon an examination of that person's supposed attributes to examine his claim and, refusing that claim, to deny to him the comity which their own sovereign had conceded?" It may well be undesirable that in such a matter a conflict should arise between Her Majesty's Government and a British court. But even on such an issue as that, Lord Sumner*** continued later

in his speech to say: "There may be occasions, when for reasons of State full, unconditional or permanent recognition has not been accorded by the Crown, and the answer to the question put has to be temporary if not temporising, or even where some vaguer expression has to be used. In such cases not only has the court to collect the true meaning of the communication for itself, but also to consider whether the statements as to sovereignty made in the communication and the expressions 'sovereign' or 'independent' sovereign used in the legal rule mean the same thing. Best C. J. says in *Yrisarri v. Clement* that recognition is conclusive, but, if there is no recognition yet given, the independence becomes matter of proof. I conceive that, if the Crown declined to answer the inquiry, as in changing and difficult times policy might require it to do, the court might be entitled to accept secondary evidence in default of the best, subject, of course, to the presumption that, in the case of a new organization, which has de facto broken away from an old State, still existing and still recognized by His Majesty, the dominion of the old State remains unimpaired until His Majesty is pleased to recognize the change."***

Apparently, the government situated and functioning in Formosa was at one time recognized by this country, and it does not follow because recognition has ceased that the government, once recognized, has in any way altered its activities or lost such powers and authority as it had been exercising. Without the recognition of our Government in the *Simmons* case it might well have been impossible for the court to have found on the evidence that the usurping forces had reached such ascendancy that they had supplanted the existing government. It was held that the usurping forces had supplanted the existing government at a time when our country had not recognized the substitution, and it does not appear to me to be an authority for the proposition that if there is no recognition there is no government. Nor would it seem that recognition or non-recognition would in any way affect the risk of a vessel being accosted on her voyage.***

For these reasons I hold that the shipowner is entitled to recover the sum claimed and provisionally awarded to him by the award and that the charterers are not entitled to recover at all on their counterclaim. *Award affirmed.*

(2) *Den ikke-anerkendte stat (regering) som sagsøgt*

66

Wulfsohn v. Russian Socialist Federated Soviet Republic

DE FORENEDE STATER, COURT OF APPEALS OF NEW YORK, 1923
138 N. E. 24

[Sagsøgeren havde et lager af pelsværk i Rusland. Skindene blev konfiskeret af den sovjetrussiske regering, hvorfor sagsøgeren påstod erstatning.

På tidspunktet for sagens behandling havde de Forenede Stater endnu ikke anerkendt sovjetregeringen.]

[*Andrews, J.*] ***The litigation is not in regard to title to property situated

within the jurisdiction of our courts, where the result depends upon the effect to be given to the action of some foreign government. Under such circumstances it might be that the theory of the comity of nations would have a place.*** A different case is presented to us. The government itself is sued for an exercise of sovereignty within its own territories on the theory that such an act, if committed by an individual here, would be a tort under our system of municipal law. It is said that, because of non-recognition by the United States, such an action may be maintained. There is no relation between the premise and the conclusion.

The result we reach is based upon more basic considerations than recognition or non-recognition by the United States. Whether or not a government exists, clothed with the power to enforce its authority within its own territory, obeyed by the people over whom it rules, capable of performing the duties and fulfilling the obligations of an independent Power, able to enforce its claims by military force, is a fact, not a theory. For its recognition does not create the State, although it may be desirable. So only are diplomatic relations permitted. Treaties made by the government which it succeeds may again come into effects. It is a testimony of friendly intentions. Also in the country granting the recognition that act is conclusive as to the government recognised.*** Again, recognition may become important where the actual existence of a government created by rebellion or otherwise becomes a political question affecting our neutrality laws, the recognition of the decrees of prize courts, and similar questions. But, except in such circumstances, the fact of the existence of such a government whenever it becomes material may be proved in other ways.

Here, however, we need no proof. The fact is conceded. We have an existing government, sovereign within its own territories. There necessarily its jurisdiction is exclusive and absolute. It is susceptible of no limitation not imposed by itself. This is the result of its independence. It may be conceded that its actions should accord with natural justice and equity. If they do not, however, our courts are not competent to review them. They may not bring a foreign sovereign before our bar, not because of comity, but because he has not submitted himself to our laws. Without his consent he is not subject to them. Concededly that is as to a foreign government that has received recognition.***

But, whether recognised or not, the evil of such an attempt would be the same. "To cite a foreign potentate into a municipal court for any complaint against him in his public capacity is contrary to the law of nations, and an insult which he is entitled to resent," *De Haber v. Queen of Portugal*. In either case, to do so would "vex the peace of nations". In either case the hands of the State department would be tied. Unwillingly it would find itself involved in disputes it might think unwise. Such is not the proper method of redress, if a citizen of the United States is wronged. The question is a political one, not competent to the courts, but to another department of government. Whenever an act done by a sovereign in his sovereign character is questioned, it becomes a matter of negotiation, or of reprisals or of war.***

67

Felipe Campuzano mot Den spanske regjering

NORGE, HØYESTERETT, 1938

Norsk Rettstidende, 1938, 804

[Da den spanske borgerkrig var udbrudt, sluttete den spanske legationssekretær i Norge, Campuzano, sig til Francoregeringen og nægtede at udlevere legationens arkiv til den spanske regerings nyudnævnte diplomatiske repræsentant. Den spanske regjering anlagde følgelig sag mod Campuzano og nedlagde påstand om arkivets udlevering. Herredsretten tog denne påstand til følge, hvorefter sagen appelleredes.]

[Dommer *Grette*.] Den 15 mars 1938 avsa Aker herredsrett dom i denne sak med sådan domsslutning: "Den spanske regjering ved chargé d'affaires dr. Joaquin Alvares Pastor kjennes overfor hr. Felipe Campuzano besiddelsesberettiget til: a) de av hr. Felipe Campuzano i A/S Schies Transportkompani deponerte gjenstander og b) de gjenstander som blev satt ut av hr. Campuzanos besiddelse ved midlertidig forføining avholdt av namsmannen i Vestre sak med sådan domsslutning: "Den spanske regjering ved chargé d'affaires dr. Joaquin Alvarez Pastor kjennes i forhold til hr. Felipe Campuzano berettiget til å få utlevert fra Schies Transportkompagni A/S de ovenfor under a) og b) nevnte gjenstander, samt fra namsmannen i Vestre Aker den hos ham deponerte notarialprotokoll. I saksomkostninger betaler hr. Felipe Campuzano til den spanske regjering ved chargé d'affaires dr. Joaquin Pastor kr. 200."***

For Høiesterett er det fremlagt en del nye dokumenter, hvorav jeg skal nevne utdrag av to dommer avsagt ved engelske domstoler, den ene avsagt av Court of Appeal den 17 mars 1938 i sak: Banco de Bilbao mot Antonio Rey, den annen avsagt i første instans ved Admiralty Divisjon den 17 juni 1938 i en sak hvis parter i den fremlagte oversettelse er betegnet som Nasjonalist-Regjeringen i Spania og Spanias republikanske regjering. Av nytt for Høiesterett nevner jeg videre avskrift av en pressemeddelelse fra Utenriksdepartementet, datert 5 oktober 1938. I denne pressemeddelelse heter det: "I betraktning av at general Francos styre nå strekker sig over den største delen av det spanske landområdet, har den norske regjering nå avtalt en ordning med ham slik at hver av partene utnevner en agent til å vareta sine landsmenns interesser i den andre parts land. Dessuten blir det efter nærmere avtale adgang til å utnevne underagenter som kommer til å utføre konsulære gjøremål." Pressemeddelelsen slutter med en bemerkning om at det i denne ordning ikke er innbefattet nogen de jure eller de facto anerkjennelse.***

Jeg er kommet til samme resultat som herredsretten.

Det spørsmål som den ankende part har stillet i forgrunnen under sin prosedyre for Høiesterett, er om det er adgang til å fremme denne sak ved norsk domstol. Det gjøres i så henseende gjeldende fra den ankende parts side at det er Francos regjering søksmålet i virkeligheten er rettet mot, at Franco-regjeringen er en virkelig regjering som efter folkerettens regler har rett til immunitet overfor saksanlegg ved norsk domstol, og at saken derfor må avvises.

I anledning av det spørsmål som her foreligger, skal jeg med hensyn til selve partsforholdet bemerke at søksmålet fremtrer som rettet mot personen Felipe Campuzano. Som nevnt i herredsrettens domsgrunner er det imidlertid på det rene at Campuzano ikke mener å ha nogen privat eiendomsrett eller besiddelsesrett til de gjenstander som saken gjelder. Det er på vegne av Franco-regjeringen han mener sig berettiget til å utøve rådigheten over disse gjenstander, og efter det som er oplyst i saken må jeg også gå ut fra at det her foreligger et virkelig representasjonsforhold, således at Campuzano har rett til å optræ på Francostyrets vegne i dette forhold. Under disse omstendigheter antar jeg at det krav som gjøres gjeldende gjennom det foreliggende søksmål, ved bedømmelsen av domstolskompetansen må betraktes som rettet mot Felipe Campuzano som representant for Franco-regjeringen og ikke mot Campuzano som privatmann.

Når det fra den ankende parts side fremholdes at Francos regjering har rett til immunitet overfor saksanlegg ved norsk domstol, er denne opfatning under prosedyren for Høiesterrett ikke begrunnet med at de norske domstoler, som situasjonen er idag, har å betrakte Franco-regjeringen som den virkelige regjering for hele Spania. Hvad den ankende part gjør gjeldende er at det gjennom Francos styre nu utøves en eksklusiv myndighet, en virkelig statsmyndighet, over en vesentlig del av Spania. På grunnlag av dens myndighetsutøvelse må Franco-regjeringen, fremholdes det, betraktes og behandles som en regjering for en suveren stat, en stat hvis landområde omfatter de deler av Spania som er i general Francos besiddelse. Gjennom den avtale som for kort tid siden er ingått med den norske regjering, er Franco-regjeringen, anføres det videre, også anerkjent de facto av Norge som en suveren stats regjering, uten at det i så henseende kan tillegges nogen betydning at en annen opfatning er uttalt i Utenriksdepartementets pressemeddelelse av 5 oktober 1938. Den ankende part fremholder for øvrigt at selv om en sådan anerkjennelse fra den norske regjerings side ikke skulde ansees å foreligge, vil dette ikke være avgjørende, idet spørsmålet om Franco-regjeringen inntar en sådan stilling at den har rett til immunitet, må høre under domstolenes selvstendige bedømmelse.

Efter min opfatning er det ikke i anledning av den foreliggende sak nødvendig å gå inn på de betraktninger som her er fremholdt eller på spørsmålet i sin almindelighet om Franco-regjeringen har rett til immunitet overfor søksmål som reises ved norsk domstol. Uten hensyn til hvordan dette spørsmål i andre tilfelle måtte stille sig, mener jeg nemlig at det ikke finnes tilstrekkelig grunnlag for å anta at det krav som er denne saks gjenstand, ligger utenfor de norske domstoles myndighetsområde.

Ved bedømmelsen av det spørsmål om domstolkompetansen som foreligger i denne sak må det efter min mening være det avgjørende at saken er reist av den regjering som av Norge er anerkjent som Spanias — den spanske stats — regjering, at saken gjelder et krav om utlevering av gjenstander som befinner sig i Norge, at disse gjenstander uomstridt tilhører den spanske stat og at de likefrem er bestemt til å være hjelpemidler — og har vært brukt som hjelpemidler — ved utøvelsen av selve regjeringsmyndigheten. At de norske domstoler

skulde savne myndighet til å ta dette søksmål under behandling, kan jeg ikke anta. Når det er regjeringen i Barcelona Norge anerkjenner som den spanske stats regjering, kan jeg ikke se annat enn at denne regjering må tilstedes adgang til å fremme ved norsk domstol et krav av det innhold og reist på det grunnlag det her gjelder, uden at Francostyrets herredømme over en del — en vesentlig del — av det spanske landområde kan sette nogen skranke forsåvidt for utøvelsen av norsk myndighet. Jeg bemerker i denne forbindelse at det spørsmål om domstolkompetansen som foreligger i denne sak, efter min opfatning er helt forskjellig fra de spørsmål som efter de dokumenterte rettsavgjørelser fra England har vært reist for engelske domstoler.

Som jeg tidligere har nevnt, har den ankende part til begrunnelse for avvisningspåstanden også henvist til den ordning som nylig er truffet i forholdet mellom den norske regjering og Franco-regjeringen. Jeg skal i anledning av det som her er fremholdt fra den ankende parts side, innskrenke mig til å bemerke at opplysningene om denne ordning efter min opfatning ikke gir tilstrekkelig grunnlag for noget annet syn på spørsmålet om domstolenes kompetanse til å behandle den her foreliggende sak enn det jeg tidligere har gitt uttrykk for.

Efter det jeg har nevnt antar jeg med herredsretten at den avvisningspåstand som Campuzano har nedlagt ikke kan tas til følge.

Hvad sakens realitet angår, er jeg også kommet til samme resultat som herredsretten, og jeg kan forsåvidt i det vesentlige tiltre den begrunnelse som herredsretten har gitt. Jeg stemmer efter dette for at herredsrettens dom stadfestes. Saksomkostningene finner jeg bør opheves for begge retter.***

(3) *Den ikke anerkendte stat (regjering) som sagsøger*

68

Russian Socialist Federated Soviet Republic v. Cibrario

DE FORENEDE STATER, COURT OF APPEALS OF NEW YORK, 1923
235 N. Y. 255

[*Andrews, J.*] In *Wulfsohn v. Russian Federated Soviet Republic* (234 N.Y. 372) we held that our courts would not entertain jurisdiction of an action brought without its consent against an existing foreign government, in control of the political and military power within its own territory, whether or not such government had been recognized by the United States. We have now to determine whether such a government may itself become a plaintiff here.

If recognized, undoubtedly it may. (*Republic of Honduras v. De Soto*, 112 N.Y. 310; *United States of America v. Wagner*, L.R. 2 Ch. App. 582; *King of Spain v. Machado*, 4 Russ. 560; *King of Prussia v. Kuepper*, 22 Mo. 550.) Conceivably this right may depend on treaty. But if no treaty to that effect exists the privilege rests upon the theory of international comity. This is so with regard to all foreign corporations.*** And except as limited

by constitutional provisions the same thing is true of those not citizens of our state. Much more true is it that the right of a foreign government to sue is likewise based upon the same consideration. Neither a natural person nor a corporation, ordinarily we could not recognize it as a proper party plaintiff. [*W. & A. R. R. Co. v. Dalton Marble Works*, 122 Ga. 774]. It represents, however, the general interests of the nation over which it has authority. We permit it to appear and protect those interests as a body analogous to one possessing corporate rights, but solely because of comity. [*Republic of Honduras v.* 112 N.Y. 310; *Hullet & Co. v. King of Spain*, 1 Dow & Clark, 169, 175; *Duke of Brunswick v. King of Hanover*, 6 Beav. 1, 37; *The Sapphire*, 78 U.S. [11 Wall.] 164.)

Comity may be defined as that reciprocal courtesy which one member of the family of nations owes to the others. It presupposes friendship. It assumes the prevalence of equity and justice. Experience points to the expediency of recognizing the legislative, executive, and judicial acts of other powers. We do justice that justice may be done in return. "What is termed the comity of nations is the formal expression and ultimate result of that mutual respect accorded throughout the civilized world by the representatives of each sovereign power to those of every other in considering the effects of their official acts. Its source is a sentiment of reciprocal regard, founded on identity of position and similarity of institutions." (*Fisher, Brown & Co. v. Fielding*, 67 Conn. 91, 108.)

As defined by Webster, comity "is in general terms that there are between nations at peace with one another rights both national and individual resulting from the comity or courtesy due from one friendly nation to another. Among these is the right to sue in their courts respectively." (6 Webster Works, 117.) It may, however, not be demanded as a right. It is yielded as a favor. Not an arbitrary favor. Nor is it the favor of the courts. "It is not the comity of the courts, but the comity of the nations which is administered." (*Bank of Augusta v. Earle*, 13 Pet. 519). Rules of comity are a portion of the law that they enforce. Precedents mark the line that they should follow. Both in England and in the United States so universally and for such a length of time have actions by alien corporations and individuals been allowed that the right to bring them in a proper case has become fixed. Unless restrained by legislative fiat no court may now deny it. (*Hollis v. Drew Theological Seminary*, 95 N.Y. 166, 175; *Stone v. Penn Yan, K. P. and B. Railway Co.*, 197 N.Y. 279; *Christian Union v. Yount*, 101 U.S. 352). So long as the plaintiff does not reside in a country at war with the United States we inquire no further. The original basis of the right has fallen into the background. If trade is permitted between him and ourselves we do not ask whether he comes from Mexico or from France. But no like current of authority controls us in the case before us. Undisturbed the rule of comity is our only guide. This rule is always subject, however, to one consideration. There may be no yielding, if to yield is inconsistent with our public policy. We might give effect to the French decree in *Gould v. Gould* (235 N.Y. 14) only because it was consonant with our theories of marriage and divorce. Such public policy may be interpreted by the courts. It is fixed

by general usage and morality or by executive or legislative declaration. Especially is the definition of our relations to foreign nations confided not to the courts, but to another branch of the government. The branch determines our policy toward them. It only remains for the courts to enforce it.

The use of the word "comity" as expressing the basis of jurisdiction has been criticized. It is, however, a mere question of definition. The principles lying behind the word are recognized. Whether or not we sum them up by one expression or another, the truth remains that jurisdiction depends upon the law of the forum, and this law in turn depends upon the public policy disclosed by the acts and declarations of the political departments of the government.

Does any rule of comity then require us to permit a suit by an unrecognized power? In view of the attitude of our government should we permit an action to be brought by the Soviet government? To both queries we must give a negative answer.

We may state at the outset that we find no precedent that a power not recognized by the United States may seek relief in our courts. Such intimations as exist are to the contrary. Statements are that "a recognized government may be a plaintiff."** [Forskellige præjudikater citeres.]

What then is the meaning and effect to recognition in its relation to comity? It is difficult to find a clear discussion of this question, either in reports or in text-books. Where a new government has seized power, "no official intercourse is possible between the powers refusing recognition and the state concerned." "Through recognition the other states declare that they are ready to negotiate with such individual (a new ruler) as the highest organ of his state." (Oppenheim, *International Law* [3rd Ed.] Vol. 1, Sections 77, 342.) Speaking of the recognition of a new state, Wheaton (*International Law* [2d Ed.] p. 39) says: "So long, indeed, as the new state confines its action to its own citizens and to the limits of its own territory, it may well dispense with such recognition. But if it desires to enter into the great society of nations, all the members of which recognize rights to which they are mutually entitled, and duties which they may be called upon reciprocally to fulfill, such recognition becomes essentially necessary to the complete participation of the new state in all the advantages of this society."** The new state becomes entitled to the exercise of its external sovereignty as to those states only by whom that sovereignty has been recognized." In Hyde's *International Law* (Vol. 1, Sec. 37) is the statement that "the mode of recognition is not material, provided there be an unequivocal act indicating clearly that the new state is dealt with as such and is deemed to be entitled to exercise the privileges of statehood in the society of nations."

More assistance may be found in the reasons underlying various decisions of the courts as to the effect to be given to the acts of foreign governments. This effect depends upon our acknowledgment of the comity of nations."** [Forskellige præjudikater citeres.]

We reach the conclusion, therefore, that a foreign power brings an action in our courts not as a matter of right. Its power to do so is the creature of comity. Until such government is recognized by the United States, no such

comity exists. The plaintiff concededly has not been so recognized. There is, therefore, no proper party before us. We may add that recognition and consequently, the existence of comity, is purely a matter for the determination of the legislative or executive departments of the government. Who is the sovereign of a territory is a political question. In any case where that question is in dispute the courts are bound by the decision reached by those departments. [*Jones v. U.S.*, 137 U.S. 202; *Luther v. Sagor*, *supra*, 556.] It is not for the courts to say whether the present governments of Russia or Mexico or Great Britain should or should not be recognized. They are or they are not. That is as far we may inquire. Nor is anything here decided inconsistent with *Wulfsohn v. Soviet Republic* (*supra*). Upon the facts in that case, if the defendant was not an existing government it might not be sued. There was no party before the court. If it were, as was alleged and admitted, the same result followed not because of comity, but because an independent government is not answerable for its acts to our courts.

We are the more ready to reach this conclusion because to hold otherwise might tend to nullify the rule that public policy must always prevail over comity. More than once during the last 70 years our relations with one or another existing but unrecognized government have been of so critical a character that to permit it to recover in our courts funds which might strengthen it or which might even be used against our interests would be unwise. We should do nothing to thwart the policy which the United States has adopted. Yet unless recognition is the test of the right to sue, we do not see why Maximilian as emperor of Mexico might not have maintained an action here.

With regard to the present Russian government the case is still stronger, even did comity not depend on recognition. We not only refuse to recognize it. Our State Department gives the reasons. Secretary Colby has stated them in an official note, dated August 10, 1920. He begins by saying that our government will not participate in any plan for the expansion of the armistice negotiations between Russia and Poland into a general European conference, "which would in all probability involve two results, from both of which this country strongly recoils, viz.: The recognition of the Bolshevist regime and a settlement of the Russian problem almost inevitably upon the basis of a dismemberment of Russia."

Our government has not receded from this position. Secretary Hughes in rejecting trade proposals of the Soviet, said on March 25, 1921, "It is only in the productivity of Russia that there is any hope for the Russian people, and it is idle to expect resumption of trade until the economic bases of production are securely established. Production is conditioned upon the safety of life, the recognition by firm guaranties of private property, the sanctity of contract and the rights of free labor," and he postpones any consideration of trade relations until such time as our government has convincing evidence of fundamental changes that will fulfill these conditions.

In the face of these declarations it is impossible to hold that to-day any such relations exist between the United States and Russia as call upon our

courts to enforce rules in favor of the latter depending on the comity of nations.***

69

Russian Trade Delegation in Turkey v. Levant Red Sea Coal Company and Others

ÆGYPTEN, TRIBUNAL OF ALEXANDRIA, 1933
62 (1935) Clunet 199

[Den russiske handelsdelegation anlagde sag for at få opfyldt nogle kontrakter, som sagsøgeren på sovjetregeringens vegne havde indgået med det sagsøgte selskab. Selskabet gjorde gældende, at sagsøgeren manglede søgsmålskompetence, da sovjetregeringen ikke var anerkendt af Ægypten.]

Domstolen afviste selskabets synspunkt, da den russiske stat i denne sag måtte opfattes som en privatperson, der udøvede sine private rettigheder.]

[*Domstolen.*] ***The enjoyment of sovereignty belongs to a State immediately it comes into existence, but the exercise of sovereignty vis-à-vis other States is not possible until it has been recognised by them. It is otherwise with regard to the civil personality of the State whose government has not been recognised. This exists by reason of the fact that the State exists, and it exists towards everyone. The recognition or non-recognition of the Government by other States cannot add to or take away anything from this civil personality. Because there is a State there is also a civil personality which is the subject of rights and duties. This civil personality is capable of performing juridical acts vis-à-vis third parties and is even capable of appearing before the tribunals of States which have not recognised its government.*** Recognition is only addressed to the government as representative of the sovereign State and not to the government as the representative organ of the civil personality.***

(4) *Gyldigheden af den ikke-anerkendte stats (regerings) retsakter*

70

Luther v. James Sagor & Co.

STORBRITANNIEN, COURT OF APPEAL, 1921
[1921] 3 K. B. 532

[Appel af underrettsdom afsagt af Roche, J.]

[*Bankes, L. J.*] The action was brought to establish the plaintiff company's right to a quantity of veneer or plywood which had been imported by the defendants from Russia. The plaintiffs' case was that they are a Russian company having a factory or mill at Staraja Russa in Russia for the manufacture of veneer of plywood, and that in the year 1919 the so-called Republican

Government of Russia without any right or title to do seized all the stock at their mill and subsequently purposed to sell the quantity in dispute in this action to the defendants. The plaintiffs contended that the so-called Republican Government had no existence as a government, that it had never been recognized by His Majesty's Government, and that the seizure of their goods was pure robbery. As an alternative they contended that the decree of the so-called government nationalizing all factories, as a result of which their goods were seized, is not a decree which the Courts of this country would recognize.

The answer of the defendants was two-fold. In the first place they contended that the Republican Government which had passed the decree nationalizing all factories was the *de facto* Government of Russia at the time, and had been recognized by His Majesty's Government as such, and that the decree was one to which the courts of this country could not refuse recognition. Secondly they contended that the plaintiff company was an Estonian and not a Russian company, and that as a result of the provisions of the treaty of peace between Russia and Estonia the plaintiff's complaint must be dealt with by a commission set up in pursuance of Art. xiv. of that treaty. Roche, J., decided the two main points in the plaintiffs' favour. Upon the evidence which was before the learned judge I think that his decision was quite right. As the case was presented in the Court below the appellants relied on certain letters from the Foreign Office as establishing that His Majesty's Government had recognized the Soviet Government as the *de facto* Government of Russia. The principal letters are referred to by the learned judge in his judgment. He took the view that the letters relied on did not establish the appellants' contention. In this view I entirely agree.

In this Court the appellants asked leave to adduce further evidence, and as the respondents raised no objection, the evidence was given. It consisted of two letters from the Foreign Office dated respectively April 20 and 22, 1921. The first is in reply to a letter dated April 12, which the appellants' solicitors wrote to the Under-Secretary of State for Foreign Affairs, asking for a "certificate for production to the Court of Appeal that the Government of the Russian Socialist Federal Soviet Republic is recognized by His Majesty's Government as the *de facto* Government of Russia." To this request a reply was received dated April 20, 1921, in these terms: "I am directed by Earl Curzon of Kedleston to refer to your letter of April 12, asking for information as to the relations between His Majesty's Government and the Soviet Government of Russia. I am to inform you that His Majesty's Government recognize the Soviet Government as the *de facto* Government of Russia." The letter of April 22 is in reply to a request for information whether His Majesty's Government recognized the Provisional Government of Russia, and as to the period of its duration, and the extent of its jurisdiction. The answer contains (*inter alia*) the statement that the Provisional Government came into power on March 14, 1917, that it was recognized by his Majesty's Government as the then existing Government of Russia, and that the Constituent Assembly remained in session, until December 13, 1917, when it was dispersed by the Soviet authorities. The statement contained in the letter of April 20 is accepted

by the respondents' counsel as the proper and sufficient proof of the recognition of the Soviet Government as the *de facto* Government of Russia.

Under these circumstances the whole aspect of the case is changed, and it becomes necessary to consider the matters which were not material in the Court below. The first is a question of law of very considerable importance—namely, what is the effect of the recognition by His Majesty's Government in April, 1921, of the Soviet Government as the *de facto* Government of Russia upon the past acts of that Government, and how far back, if at all, does that recognition extend. The second is a question of fact, whether sufficient evidence was given to establish the identity of the Soviet Government now recognized by His Majesty's Government with the Government which seized and confiscated and sold the appellants' goods.

On the first point counsel have been unable to refer the Court to any English authority. Attention has been called to three cases decided in the Supreme Court of the United States: *Williams v. Bruffy*, 96 U.S. 176, 24 L.Ed. 716; *Underhill v. Hernandez*, 168 U.S. 250, 18 S.Ct. 83, 42 L.Ed. 456; *Oetjen v. Central Leather Co.*, 246 U.S. 297, 38 S.Ct. 309, 62 L.Ed. 726.

In none of these cases is any distinction attempted to be drawn in argument between the effect of a recognition of a government as a *de facto* government and a recognition of a government as a government *de jure*, nor is any decision given upon that point; nor, except incidentally, is any mention made as to the effect of the recognition of a government upon its past acts. The mention occurs in two passages, one in the judgment of Field J. in *Williams v. Bruffy*, where, after discussing the essential differences between the Government of the Confederate States and the two kinds of *de facto* governments which he says may exist, he explains that the second of the two kinds exists where a portion of the inhabitants of a country have separated themselves from the parent State and established an independent government. "The validity of its acts", he says, "both against the parent State and its citizens or subjects, depends entirely upon its ultimate success. If it fail to establish itself permanently, all such acts perish with it. If it succeed, and become recognised, its act from the commencement of its existence are upheld as those of an independent nation." The second mention of the point occurs in the judgment of Fuller C. J. in *Underhill v. Hernandez*. He says, in speaking of civil war: "If the party seeking to dislodge the existing government succeeds, and the independence of the government it has set up is recognised, then the acts of such government from the commencement of its existence are regarded as those of an independent nation."

These are weighty expressions of opinion on a question of international law. Neither learned Judge cites any authority for his proposition. Each appears to treat the matter as one resting on principle. On principle the views put forward by these learned Judges appear to me to be sound, though there may be cases in which the Courts of a country whose government has recognized the government of some other country as the *de facto* government of that country may have to consider at what stage in its development the government so recognized can, to use the language to which I have already referred of those

learned Judges, be said to have "commenced its existence." No difficulty of that kind arises in the present case, because upon the construction which I place upon the communication of the Foreign Office to which I have referred, this Court must treat the Soviet Government, which the Government of this country has now recognized as the *de facto* Government of Russia, as having commenced its existence at a date anterior to any date material to the dispute between the parties to this appeal.

An attempt was made by the respondents' counsel to draw a distinction between the effect of a recognition of a government as a *de facto* government and the effect of a recognition of a government as a government *de jure*, and to say, that the latter form of recognition might relate back to acts of state of a date earlier than the date of recognition, whereas the former could not. Wheaton (5th ed., at p. 36), quoting from Montague Bernard, states the distinction between a *de jure* and a *de facto* government thus: "A *de jure* government is one which, in the opinion of the person using the phrase, ought to possess the powers of sovereignty, though at the time it may be deprived of them. A *de facto* government is one which is really in possession of them, although the possession may be wrongful or precarious." For some purposes no doubt a distinction can be drawn between the effect of the recognition by a sovereign State of the one form of government or of the other, but for the present purpose, in my opinion, no distinction can be drawn. The government of this country having, to use the language just quoted, recognized the Soviet Government as the government really in possession of the powers of sovereignty in Russia, the acts of that government must be treated by the Courts of this country with all the respect due to the acts of a duly recognized foreign sovereign State.

It becomes material now to consider whether the appellants have given sufficient evidence to establish that the confiscation and subsequent sale of the respondents' property were the acts of the government which his Majesty's Government have now recognized as the *de facto* government of Russia. In my opinion they have.*** Upon these materials I consider that it is established that the decree of confiscation of June 20, 1918, the seizure of the plaintiffs' goods in January, 1919, and the subsequent sale of them to the defendants in August, 1920, were all acts of the Soviet Government which has now been recognized by His Majesty's Government as the *de facto* Government of Russia, and must be accepted by the Courts of this country as such.

It is necessary now to deal with the point made by the appellants that the decree of confiscation of June 20, 1918, even if made by the Government which is now recognized by His Majesty's Government as the *de facto* Government of Russia, is in its nature, so immoral and so contrary to the principles of justice as recognized by this country, that the Courts of this country ought not to pay any attention to it. This is a bold proposition. The question before the Court is not one in which the assistance of the Court is asked to enforce the law of some foreign country to which legitimate objection might be taken, as in *Hope v. Hope*, 8 De Gex, Mac. & G. 731, and *Kaufman v. Gerson*, [1904] 1 K.B. 591. The question before the Court is as to the title to goods lying in a foreign

country which a subject of that country, being the owner of them by the law of that country, has sold under a f. o. b. contract for export to this country. The Court is asked to ignore the law of the foreign country under which the vendor acquired his title, and to lend its assistance to prevent the purchaser dealing with the goods. I do not think that any authority can be produced to support the contention.***

The respondents' position is rendered all the more difficult from the fact that the vendor in the present case is a duly recognized sovereign State whose law conferred the title which is challenged. Even if it was open to the Courts of this country to consider the morality or justice of the decree of June 20, 1918, I do not see how the Courts could treat this particular decree otherwise than as the expression by the *de facto* Government of a civilized country of a policy which it considered to be in the best interest of that country. It must be quite immaterial for present purposes that the same views are not entertained by the Government of this country, are repudiated by the vast majority of its citizens, and are not recognized by our laws. Taking the view I do of the point I do not consider it necessary to discuss the authorities to which our attention has been called.***

71

Sokoloff v. National City Bank

DE FORENEDE STATER, COURT OF APPEALS OF NEW YORK, 1924
239 N. Y. 158

[*Cardozo, J.*] The case is here upon the pleadings. In June, 1917, the plaintiff to the defendant, the National City Bank in the city of New York, \$30,225 upon its promise to open an account in favor of the plaintiff in its Petrograd branch, and to repay him this sum in rubles at the rate of 23 $\frac{1}{4}$ cents per ruble, or a total 130,000 rubles, at such times and in such amounts as he by his written orders might demand. The plaintiff, after stating this agreement alleges that the account was opened; that the plaintiff from time to time drew against it till the balance was reduced to \$28,365 or 122,000 rubles; and that thereafter, in November, 1917, and again in February, 1918, checks for the balance were presented and dishonored.

The questions certified to us for answer are directed to two defenses.

The first defense states that there was a revolution in Russia in November, 1917, which resulted in the formation of the Russian Socialist Federated Soviet Republic; that in the same month the said government decreed the nationalization of all private joint-stock banks organized under the laws of Russia or operating therein; that it took possession of said banks by force of arms, and decreed that they be merged in the State Bank of Russia; that all the assets and liabilities of the liquidated banks were taken over by the State Bank acting for the Soviet government; that by force of said decree the government assumed the liability, if any, then owing to the plaintiff; that the defendant's Russian

assets consisted of money on deposit in other banks, Russian state obligations, securities held in custody for clients, and certain other assets, of the value of over 240,000,000 rubles; that the liabilities of the said branch to its depositors were over 240,000,000 rubles; that the government following the seizure proceeded to the liquidation of the banks whose activities it had ended; and that by a subsequent decree all deposit accounts were confiscated and were credited to the account of a revolutionary tax. The recital of these happenings is followed by an averment that the plaintiff was fully aware of the probability of future political and governmental changes, and that it was intended by the parties that the agreement should be performed in Russia, and that the performance thereof should be governed by the laws of Russia and by any orders or decrees of any government which might exercise authority therein. By reason of these facts the plaintiff's deposit account is said to have been seized, his title thereto divested, and the defendant's liability discharged.

The second defense is the same as the first, except that it pleads the facts as a partial defense rather than a complete one.

The government of the United States refuses recognition of the Soviet Republic as the government of Russia. Problems not easy to solve have followed in the wake of the refusal. We have had occasion to deal with some of them in cases recently before us. *Wulfsohn v. Russian Socialist Federated Soviet Republic*, 234 N.Y. 372, 138 N.E. 24, decided that the government of Russia, though unrecognized, was immune from suit in its corporate capacity at the instance of a plaintiff who asserted its existence as a government and sought to hold it to account for governmental acts within its territorial jurisdiction. *Russian Socialist Federated Soviet Republic v. Cibrario*, 235 N.Y. 255, 139 N.E. 259, decided that the same government had no standing to sue as plaintiff in our courts till recognition was accorded. These judgments are not decisive of the case before us now. The Russian government is not here either as plaintiff or as defendant. A domestic corporation pleads the acts and mandates of that government to excuse a default and discharge an obligation.

Courts of high repute have held that confiscation by a government to which recognition has been refused has no other effect in law than seizure by bandits or by other lawless bodies. *Russian Commercial & Industrial Bank v. Comptoir D'Escompte de Mulhouse*, [1923] 2 K.B. 630, 638; s.c., H. of L., 40 T.L.R. 837; *Banque Internationale v. Goukassow*, [1923] 2 K.B. 682; *A. M. Luther v. James Sagor & Co.*, [1921] 1 K.B. 456; s.c., [1921] 3 K.B. 532. Cf. *White, Child & Beney, Ltd., v. Simmons*, [1922] 127 L.T. 571. It would be hazardous, none the less, to say that a rule so comprehensive and so drastic is not subject to exceptions under pressure of some insistent claim of policy or justice. In our own country, *Oetjen v. Central Leather Co.*, 246 U.S. 297, and *Ricaud v. American Metal Co., Ltd.*, 246 U.S. 304, are cited sometimes as pronouncements of equal generality, but in truth the point involved was narrower. 31 *Yale L.J.*, 535. Property in Mexico, hides and bullion, had been seized under requisitions by Villa and Pereyra, generals of Carranza. The ruling was that title had been thus divested, since, following the seizure, the Carranza government had been recognized as the lawful government of Mexico. There was no occasion

to determine whether, in default of recognition, a like effect would have been ascribed to a levy of contributions by a commander in the field.*** We think the case at hand is not so governed by authority but that it may be dealt with upon principle.

Juridically, a government that is unrecognized may be viewed as no government at all, if the power withholding recognition chooses thus to view it. In practice, however, since juridical conceptions are seldom, if ever, carried to the limit of their logic, the equivalence is not absolute, but is subject to self-imposed limitations of common sense and fairness, as we learned in litigations following our Civil War. In those litigations acts or decrees of the rebellious governments, which, of course, had not been recognized as governments *de facto*, were held to be nullities when they worked injustice to citizens of the Union, or were in conflict with its public policy. *Williams v. Bruffy*, 96 U.S. 176, 187. On the other hand, acts or decrees that were just in operation and consistent with public policy were sustained not infrequently to the same extent as if the governments were lawful. *U. S. v. Insurance Companies*, 22 Wall. 99; *Sprott v. U. S.*, 20 Wall. 459; *Texas v. White*, 7 Wall. 700, 733; *Mauran v. Ins. Co.*, 6 Wall. 1; *Baldy v. Hunter*, 171 U.S. 388. Cf. Dickinson, "Unrecognized Governments," 22 *Michigan L.R.* 29, 42. These analogies suggest the thought that, subject to like restrictions, effect may at times be due to the ordinances of foreign governments which, though formally unrecognized, have notoriously an existence as governments *de facto*. Consequences appropriate enough when recognition is withheld on the ground that rival factions are still contending for the mastery may be in need of readjustment before they can be fitted to the practice, now a growing one, of withholding recognition whenever it is thought that a government, functioning unhampered, is unworthy of a place in the society of nations. Limitations upon the general rule may be appropriate for the protection of one who has been the victim of spoliation, though they would be refused to the spoliator or to others claiming under him. We leave these questions open. At the utmost, they suggest the possibility that a body or group which has vindicated by the course of events its pretensions to sovereign power, but which has forfeited by its conduct the privileges or immunities of sovereignty, may gain for its acts and decrees a validity quasi-governmental, if violence to fundamental principles of justice or to our own public policy might otherwise be done.

We think the defendant, though we were to assume the existence of such exceptions to the need of recognition, has not brought itself within them. There is room for debate whether relief from liability would follow if the acts set up in its answer were those of a government *de jure*. Whether that is so or not, we find no such injustice or impolicy in enforcing liability as to necessitate an exception to the rule that acts or decrees, to be ranked as governmental, must proceed from some authority recognized as a government *de facto*. The defendant is not a bailee for the plaintiff, nor were any of its assets earmarked to the plaintiff's use. If that were its position, there would be other tests of liability. Surrender to overwhelming force would excuse the loss or destruction of the subject of a bailment whether the force that overwhelmed was legitimate or

lawless. That is not the case before us. The *res* belonging to the plaintiff was not a physical object committed to the defendant's keeping, but an intangible right, a chose in action, the right to receive rubles in the future under an executory contract. This contract the defendant has not performed, yet it refuses to return the dollars that were paid to it by the plaintiff upon its promise of performance. Two acts that must be kept distinct in thought are said to justify this refusal. One is the decree nationalizing the banks of Russia with the accompanying seizure of their assets. The other is the later decree confiscating the accounts of the depositors as a "revolutionary tax."

The defendant's liability was unaffected by the attempt to terminate its existence and the seizure of its assets. A government of Russia could not terminate its existence either by dissolution or by merger, for it was a corporation formed under our laws, and its corporate life continued until the law of its creation declared that it should end. What a Russian government could do was to deprive it of the privilege of doing business upon Russian soil. But the ending of its Russian business was not the ending of its duty to make restitution for benefits received without requital. As to this, there would be no dispute if its assets had been left intact. The situation in a legal aspect is not changed by the fact that the property of the Russian branch has been scattered or despoiled. Plaintiff did not pay his money to the defendant, and become the owner of this chose in action, upon the security of the Russian assets. He paid his money to a corporation organized under our laws upon the security of all its assets, here as well as elsewhere. Everything in Russia might have been destroyed by fire or flood, by war or revolution, and still the defendant would have remained bound by its engagement. The plaintiff had no means of knowing whether the assets physically in Russia were large or small. He might fairly assume, if he gave thought to it at all, that the reserve in cash or bullion at the disposal of the Russian branch would be only a small proportion of the Russian liabilities. Even now the defendant does not state it kept any more rubles or securities in Russia after its agreement with the plaintiff than before.***

[Domstolen bestemte følgelig, at sagsøgeren skulle have sit tilgodehavende tilbagebetalt.]

(5) *De facto og de jure anerkendelse*

72

The Arantzazu Mendi

STORBRIANNIEN, HOUSE OF LORDS, 1939

Se ovenfor sag nr. 49.

73

Haile Selassie v. Cable and Wireless, Ltd. (No. 2)

STORBRITANNIEN, COURT OF APPEAL, 1939

[1939] Ch. 182, 195

[*Sir Wilfrid Greene, M. R.*] This is an appeal from a judgment of Bennett J. in an action by the late Emperor of Abyssinia against Cable and Wireless Limited. The claim in the action was for an account of all dealings between the plaintiff and the defendant company under a certain agreement, and payment of the amount found due. The agreement in question was an agreement between the competent Minister of the then Government of Ethiopia and the defendant company in relation to the establishment of a wireless station at Addis Ababa, the capital city of Abyssinia. Under that agreement certain sums admittedly became due from the defendant company. The dispute between the parties turned on the fact that the defendants asserted that the plaintiff had no title to sue for those moneys. Bennett J. decided in favor of the plaintiff.***

At the date of the trial the evidence available which was before the learned Judge, so far as it relates to the essential question raised in this appeal, showed that the annexation of Ethiopia by His Majesty the King of Italy had not yet been recognized by His Majesty's Government, but that His Majesty's Government recognized the plaintiff as the *de jure* Emperor of Ethiopia, and that His Majesty's Government recognized the Italian Government as the Government *de facto* of virtually the whole of Ethiopia, and such recognition had existed since the second half of December, 1936, that is to say, since a date earlier than the date of the issue of the writ, which was issued on January 4, 1937. Bennett J., held that the events which had taken place in Ethiopia and the other matters which were established before him were not sufficient to divest the plaintiff as still *de jure* Emperor of Ethiopia, of the right to recover the debt in suit in this country. From that judgment this appeal is brought. The appeal stood in the list for hearing on November 3 last, and it was called to our attention by Mr. Wynn Parry that, on the day before, an announcement had been made by the Prime Minister in the House of Commons from which it appeared that in the course of a few days, or at any rate a very short time, it was the intention of His Majesty's Government to recognize His Majesty the King of Italy as Emperor of Abyssinia, that is to say, that his position would be recognized *de jure* and no longer merely *de facto*. It was obvious from that announcement that, if it were carried into effect, the situation of this action would be profoundly affected, because circumstances would then be brought to the knowledge of the Court which would have a very important bearing upon the position of the plaintiff and his rights in respect of the debt in question in the action. Accordingly we thought right to adjourn the hearing of the appeal until a date after the probable date of recognition.***

What has happened is this. As appears from a certificate signed by the direction of His Majesty's Principal Secretary of State for Foreign Affairs,

dated November 30, 1938, His Majesty's Government no longer recognizes His Majesty Haile Selassie as de jure Emperor of Ethiopia; His Majesty's Government now recognizes His Majesty the King of Italy as de jure Emperor of Ethiopia. From that certificate two things emerge as the result of the recognition thereby evidenced. It is not disputed that in the Courts of this country His Majesty the King of Italy as Emperor of Abyssinia is entitled by succession to the public property of the State of Abyssinia, and the late Emperor of Abyssinia's title thereto is no longer recognized as existent. Further, it is not disputed that that right of succession is to be dated back at any rate to the date when the de facto recognition, recognition of the King of Italy as the de facto Sovereign of Abyssinia, took place. That was in December 1936. Accordingly the appeal comes before us upon a footing quite different to that upon which the action stood when it was before Bennett J. We now have the position that in the eye of the law of this country the right to sue in respect of what was held by Bennett J. to be (and no dispute is raised with regard to it) part of the public State property, must be treated in the Courts of this country as having become vested in His Majesty the King of Italy as from a date, at the latest, in December, 1936, that is to say before the date of the issue of the writ in this action. Now that being so, the title of the plaintiff to sue is necessarily displaced. When the matter was before Bennett J., the de jure recognition not having taken place, the question that he had to deal with was whether the effect of the de facto conquest of Abyssinia and the recognition de facto of the Italian Government's position in Abyssinia, operated to divest the plaintiff of his title to sue. Whether that decision was right or whether it was wrong is a question we are not called upon to answer, but what is admittedly the case is that if Bennett J. had had before him the state of affairs which we have before us, his decision would have been the other way.

Statssuccession og Statskontinuitet

A. TRAKTATMÆSSIGE FORPLIGTELSE OG RETTIGHEDER

74

Terlinden v. Ames

DE FORENEDE STATER, SUPREME COURT, 1902
184 U. S. 270

[*Fuller, C. J.*] The treaty of June 16, 1852, between the United States and the Kingdom of Prussia, and other states of the Germanic Confederation included in or which might accede to that convention, provided that the parties thereto should, upon requisition, "deliver up to justice*** [persons charged with certain crimes]" 10 Stat. 964, 966.

Pursuant to section 5270 of the Revised Statutes (18 U.S.C.A. § 651) and the acts from which that section was brought forward, complaint was duly made before a commissioner appointed and authorized by the district court of the United States for the northern district of Illinois to hear applications for extradition and to issue warrants therefor, charging Terlinden with having as a subject of the Kingdom of Prussia, and within the jurisdiction of that Kingdom, committed the crimes of forgery, counterfeiting, and the utterance of forged instruments, and with being a fugitive from the justice of said Kingdom.***

The commissioner issued his warrant and Terlinden was apprehended, whereupon and before the commissioner had entered upon the hearing, Terlinden petitioned and obtained from the district court the writ of *habeas corpus* under consideration.***

This brings us to the question, namely, the denial of the existence of a treaty of extradition between the United States and the Kingdom of Prussia, or the German Empire. In these proceedings the application was made by the official representative of both the Empire and the Kingdom of Prussia, but was based on the extradition treaty of 1852. The contention is that, as the result of the formation of the German Empire, this treaty had been terminated by operation of law.

Treaties are of different kinds and terminable in different ways. The 5th article of this treaty provided, in substance, that it should continue in force until 1858, and thereafter until the end of a twelve months' notice by one of the parties of the intention to terminate it. No such notice has ever been

given, and extradition has been frequently awarded under it during the entire intervening time.

Undoubtedly treaties may be terminated by the absorption of powers into other nationalities and the loss of separate existence, as in the case of Hanover and Nassau, which became by conquest incorporated into the Kingdom of Prussia in 1866. Cessation of independent existence rendered the execution of treaties impossible. But where sovereignty in that respect is not extinguished, and the power to execute remains unimpaired, outstanding treaties cannot be regarded as avoided because of impossibility of performance.

This treaty was entered into by His Majesty the King of Prussia in his own name and in the names of eighteen other states of the Germanic Confederation, including the Kingdom of Saxony and the Free City of Frankfort, and was acceded to by six other states, including the Kingdom of Wurtemberg, and the free Hanseatic city of Bremen, but not including the Hanseatic free cities of Hamburg and Lubeck. The war between Prussia and Austria in 1866 resulted in the extinction of the Germanic Confederation and the absorption of Hanover, Hesse, Cassel, Nassau, and the free city of Frankfort, by Prussia.

The North German Union was then created under the *præsidium* of the Crown of Prussia, and our minister to Berlin, George Bancroft, thereupon recognized officially, not only the Prussian Parliament, but also the Parliament of the North German United States, and the collective German Customs and Commerce Union, upon the ground that by the paramount Constitution of the North German United States, the King of Prussia, to whom he was accredited, was at the head of those several organizations or institutions; and his action was entirely approved by this government. Messages and Documents, Dep. of State, 1867—68, part I, p. 601; Dip. Correspondence, Secretary Seward to Mr. Bancroft, Dec. 9, 1867.

February 22, 1868, a treaty relative to naturalization was concluded between the United States and His Majesty, the King of Prussia, on behalf of the North German Confederation, the third article of which read as follows: "The convention for the mutual delivery of criminals, fugitives from justice, in certain cases, concluded between the United States on the one part and Prussia and other states of Germany on the other part, the sixteenth day of June, one thousand eight hundred and fifty-two, is hereby extended to all the states of the North German Confederation." 15 Stat. at L. 615. This recognized the treaty as still in force, and brought the Republics of Lubeck and Hamburg within its scope. Treaties were also made in that year between the United States and the Kingdoms of Bavaria and Wurtemberg, concerning naturalization, which contained the provision that the previous conventions between them and the United States in respect of fugitives from justice should remain in force without change.

Then came the adoption of the Constitution of the German Empire. It found the King of Prussia, the chief executive of the North German Union, endowed with power to carry into effect its international obligations, and those of his Kingdom, and it perpetuated and confirmed that situation. The official promulgation of that Constitution recited that it was adopted instead of the

Constitution of the North German Union, and its preamble declared that "His Majesty the King of Prussia, in the name of the North German Union, His Majesty the King of Bavaria, His Majesty the King of Württemberg, His Highness the Grand Duke of Baden, and His Royal Highness the Grand Duke of Hesse and by Rhine for those parts of the Grand Duchy of Hesse which are situated south of the Main, conclude an eternal alliance for the protection of the territory of the Confederation, and of the laws of the same, as well as for the promotion of the welfare of the German people." As we have heretofore seen, the laws of the Empire were to take precedence of those of the individual states, and it was vested with the power of general legislation in respect of crimes.***

It is contended that the words in the preamble translated "an eternal alliance" should read "an eternal union," but this is not material, for admitting that the Constitution created a composite state instead of a system of confederated states, and even that it was called a confederated Empire rather to save the *amour propre* of some of its component parts than otherwise. it does not necessarily follow that the Kingdom of Prussia lost its identity as such, or that treaties theretofore entered into by it could not be performed either in the name of its King or that of the Emperor. We do not find in this Constitution any provision which in itself operated to abrogate existing treaties or to affect the status of the Kingdom of Prussia in that regard. Nor is there anything in the record to indicate that outstanding treaty obligations have been disregarded since its adoption. So far from that being so, those obligations have been faithfully observed.

And without considering whether extinguished treaties can be renewed by tacit consent under our Constitution, we think that on the question whether this treaty has never been terminated, governmental action in respect to it must be regarded as of controlling importance. During the period from 1871 to the present day, extradition from this country to Germany, and from Germany to this country, has been frequently granted under the treaty, which has thus been repeatedly recognized by both governments as in force. Moore's Report on Extradition (1890).

In 1889, in response to a request for information on international extradition as practised by the German government, the Imperial Foreign Office transmitted to our *chargé* at Berlin a memorial on the subject in the note accompanying which it was said: . . . "With the United States of America, also, extradition is regulated by various treaties, as, besides, the treaty of June 16, 1852, which applies to all of the states of the former North German Union, and also to Hesse, south of the Main, and to Württemberg, there exist separate treaties with Bavaria and Baden, of September 12, 1853, and January 30, 1857, respectively." Moore's Report, 93, 94.

Thus it appears that the German government has officially recognized, and continues to recognize, the treaty of June 16, 1852, as still in force, as well as similar treaties with other members of the Empire, so far as the latter has not taken specific action to the contrary or in lieu thereof. And see Laband, *Das Staatsrecht des Deutschen Reiches* (1894) 122, 123, 124, 142.

It is out of the question that a citizen of one of the German states, charged with being a fugitive from its justice, should be permitted to call on the courts of this country to adjudicate the correctness of the conclusions of the Empire as to its powers and the powers of its members, and especially as the executive department of our government has accepted these conclusions and proceeded accordingly.

The same is true as respects many other treaties of serious moment with Prussia, and with particular states of the Empire, and it would be singular, indeed, if after the lapse of years of performance of their stipulations, these treaties must be held to have terminated because of the inability to perform during all that time of one of the parties.***

We concur in the view that the question whether power remains in a foreign State to carry out its treaty obligations is in its nature political and not judicial, and that the courts ought not to interfere with the conclusions of the political department in that regard.***

The District Court was right, and its final order is affirmed.

75

Einverleibungsurteil

TYSKLAND, BUNDESGERICHT, 1891
37 Bruns Fontes A. I. 368

[Domstolen.] ***Die Entscheidung des Berufungsgerichtes beruht auf einer von der landgerichtlichen abweichenden Auslegung des zwischen dem Grossherzogtume Baden und dem vormaligen Königreich Frankreich geschlossenen Grenzvertrags vom 5. April 1840 (Bad. Reg. Bl. Nr. XIX) insbesondere des Artikels 5 dieses Vertrages, welcher sich als Vollzugsvertrag zu § 5 des Artikels 3 des Pariser Friedens vom 30. Mai 1814 und des § 2 des Artikels 1 des Pariser Friedens vom 20. November 1815, die sich auf die Hoheitsgrenze zwischen Frankreich und Baden und auf die Feststellung der Eigentumsverhältnisse der Rheininseln beziehen, darstellt. Derselbe ist an die Stelle eines ähnlichen früheren Vertrages (von 30. Januar 1827) getreten und in unbestrittener Geltung geblieben, nachdem das Deutsche Reich durch die Einverleibung des Grenzlandes Elsass-Lothringen in die Rechte von Frankreich eingetreten ist. Er enthält eine Reihe von Rechtsnormen, namentlich auch in dem noch näher zu behandelnden Artikel 5, welche für das Gebiet der kontrahierenden Staaten bzw. für das Gebiet des Grossherzogtums Baden und des Reichslandes Elsass-Lothringen Geltung haben, womit die Voraussetzung des § 511 der Zivilprozessordnung gegeben ist. An der Revisibilität dieser Rechtsnormen kann mit Rücksicht auf § 1 der Kaiserlichen Verordnung vom 28. September 1879 nicht etwa aus dem Grunde gezweifelt werden, weil die Voraussetzung ihrer Geltung "für den ganzen Umfang mindestens zweier deutscher Bundesstaaten oder zweier Provinzen Preussens oder einer Preussischen Provinz und eines anderen Bundesstaates" insofern nicht vorliege, als Elsass-Lothringen nach staatsrecht-

lichen Grundsätzen nicht als deutscher Bundesstaat zu betrachten sei. Im Sinne der angeführten Kaiserlichen Verordnung gilt auch das Reichsland als Bundesstaat.***

B. GÆLDSFORPLIGTELSE

76

Wienerfreden af 30. oktober 1864

Art. 8. For at opnaae en billig Fordeling af det danske Monarkies Statsgjæld i Forhold til Kongerigets og Hertugdømmernes respective Folketal og for derhos at afhjælpe de uoverstigelige Vanskeligheder, som en detailleret Opgjørelse af de gjensidige Rettigheder og Fordringer vilde frembyde, have de høie contraherende Parter fastsat den Andeel af det Danske Monarkies Statsgjæld, der skal falde Hertugdømmerne til Last, til en rund Sum af ni og tyve Millioner Rigsdaler (Dansk Rigsmønt).

Art. 17. Den nye Regjering i Hertugdømmerne indtræder i de Rettigheder og de Forpligtelser, som følge af Contracter, der paa regelmæssig Maade ere indgaaede af den Kongelige Danske Administration med Hensyn til Anliggender af almeen Interesse, som særlig vedkomme de afstaaede Landsdele.

Man er bleven enig om, at alle de Forpligtelser, som følge af Contracter, som den danske Regjering har indgaaet af Hensyn til Krigen og til Forbunds-Executionen, ikke ere indbefattede under den ovennævnte Bestemmelse.

Hertugdømmernes nye Regjering anerkjender enhver i Hertugdømmerne af fysiske og juridiske Personer lovlig erhvervet Ret.

I Tilfælde af Tvist er det Domstolene, som have at afgjøre Sager af denne Art.

77

Versaillestraktaten af 28. juni 1919

Art. 254. De magter, til hvem tyske territorier er overdragne, skal under hensyntagen til de i art. 253 fastsatte bestemmelser påtage sig at betale:

- 1) en del af det tyske riges statsgæld pr. 1. august 1914 beregnet efter forholdet mellem gennemsnittet i de 3 finansår 1911, 1912 og 1913 af sådanne indtægter fra det overdragne territorium og gennemsnittet i de samme år for hele det tyske rige af sådanne indtægter, som erstatningskommissionen måtte anse for bedst egnet til at repræsentere de pågældende territoriers betalingsevne.
- 2) en del af den på den tyske enkeltstat, til hvilken det afståede territorium hørte, pr. 1. august 1914 hvilende gæld, fastsat i overensstemmelse med de ovenanførte principper.

Disse dele skal fastsættes af erstatningskommissionen.

Art. 255. 1. I betragtning af, at Tyskland i 1871 nægtede at overtage en del af den franske gæld, skal Frankrig, for så vidt angår Alsace-Lorraine, som en undtagelse fra ovenstående bestemmelser, være fritaget for enhver betaling i henhold til art. 254.

[I forbindelse med fredsforhandlingerne i 1919 udvekslede ententemagterne og Tyskland noter, der blandt andet indeholdt følgende vedrørende Frankrigs forpligtelse til at overtage en del af Tysklands gæld:]

***It should be added that it is easy to justify the exception made in favour of France to the general principle admitted in the Treaty, according to which the State receiving territory takes over part of the public debt of the ceding State and pays for the property of the said State in the ceded territory. In 1871, Germany, when she seized Alsace and Lorraine, refused to take over any part of the French debt; she paid nothing for any French State property, and Herr von Bismarck boasted of this in the Reichstag on May 25th, 1871. To-day the Allied and Associated Powers mean France to recover Alsace and Lorraine under exactly the same conditions, and consequently that she should take over no part of the German debt nor pay for any State property. This solution is just, for if German State property includes railways, the French owners of which Germany compensated in 1871 by sums drawn from the war indemnity, and if these railways have been developed since 1871, Germany on the contrary not having, at that time, assumed liability either for that portion of the French debt which belonged to Alsace and Lorraine or for the State property, the loss (capital and interest) imposed on France under this head exceeds the sum to which Germany makes a claim.

As regards the local debt of Alsace and Lorraine and of the public institutions of the Provinces which existed before August the 1st, 1914, it has always been understood between the Allied and Associated Governments that France should accept liability for them.***

78

Fiji-øernes gæld

SKRIVELSE FRA STORBRITANNIENS KOLONIMINISTER
TIL GUVERNØREN FOR FIJI, 1875
Moore, *International Law Digest* I, 350

[Med henblik på Storbritanniens annekktion af Fiji-erne lod koloniministeren foretage en undersøgelse af øgruppens gældsforhold. Denne undersøgelse, foretaget af Sir Robinson, dannede grundlaget for regeringens holdning til spørgsmålet om Storbritanniens pligt til at overtage gælden. Regeringens synspunkt blev meddelt guvernøren for Fiji i skrivelse af 4. marts 1875, der bl. a. indeholdt følgende:]

6. You will cause it to be very clearly understood that Her Majesty's Government and the Colonial Government absolutely and entirely decline to admit that they are necessarily under any obligation to take up the liabilities incurred by those who have purported to administer the affairs of the Islands. No claim

of the kind preferred by way of demand or as of right can for a moment be entertained, and to prevent any possible misconception of such a question it may be desirable to relieve the Government from any attempts to press such claims by passing an Ordinance declaring that no action shall lie against the Crown or the Colonial Government in respect of liabilities incurred by the late King or by any persons not in the employment of the Crown or the Colonial Government.

7. But although I think it necessary to define in the strongest manner the refusal of Her Majesty's Government to accept, or allow the Colonial Government to accept, any direct liability or obligation connected with the acts of persons for whom it has been in no way responsible, I am nevertheless of opinion that it will be for the credit of the newly constituted Government that voluntarily, and as an act of grace, it should offer to undertake the payment of so much of the debts incurred before the cession as after proper inquiry it may appear just and fair for it to assume. As Sir H. Robinson has pointed out, it will be necessary for this purpose to examine carefully all claims put forward, and as at present advised, I am of opinion that the four classes of the creditors of the so-called Fijian Government may be dealt with on the general principles laid down in paragraph 9 of his despatch of 20th October. But with regard to the time and manner in which any such payments are to be made, the Government of Fiji must reserve to itself the fullest discretion.

8. I am disposed to think that the best course will be for you to notify publicly, as soon as convenient after your assumption of the Government, that while the Government of Fiji declines to be responsible for any debts or liabilities incurred by or in the name of Thakombau or any other persons purporting to represent any Government of Fiji prior to the cession, it is nevertheless willing to consider any proofs that may be brought forward of money or supplies having been actually provided for public purposes; but the persons so applying to be reimbursed must be made clearly to understand that it will rest entirely with the Colonial Government (subject, if necessary, to a reference to the Secretary of State) to decide in each case whether the sum claimed, or a part of it, should be paid, and if so, at what time and in what manner the payment shall be made.

79

Kubas gæld

MEMORANDUM FRA DEN AMERIKANSKE FREDSDELEGATION, 1898
Moore, *International Law Digest*, I, 358

[Efter at Kuba i 1898 med amerikansk støtte havde losrevet sig fra Spanien, opstod mellem U.S.A. og Spanien en disput vedrørende U.S.A.s pligt til at overtage den del af den spanske gæld, der angik Kuba. U.S.A. ville ikke anerkende nogen sådan forpligtelse og anførte som støtte for sine synspunkter bl. a. følgende:]

***From no point of view can the debts above described be considered as

local debts of Cuba or as debts incurred for the benefit of Cuba. In no sense are they obligations properly chargeable to that island. They are debts created by the Government of Spain, for its own purposes and through its own agents, in whose creation Cuba had no voice.

From the moral point of view, the proposal to impose them upon Cuba is equally untenable. If, as is sometimes asserted, the struggles for Cuban independence have been carried on and supported by a minority of the people of the island, to impose upon the inhabitants as a whole the cost of suppressing the insurrections would be to punish the many for the deeds of the few. If, on the other hand, those struggles have, as the American Commissioners maintain, represented the hopes and aspirations of the body of the Cuban people, to crush the inhabitants by a burden created by Spain in the effort to oppose their independence would be even more unjust.

80

Udtalelse af Sir Robert Phillimore, Law Officer of the Crown, 1867

F. O. 83/2225

I am honored with Your Lordship's commands, signified in Mr. Hammond's Letter of the 9th Instant stating that he was directed to transmit to me a Letter from Messrs. Jewell and Chamberlain forwarding a memorial from the holders of the Confederate Cotton Loan together with a legal opinion which they have obtained on the subject of their claims; and to request that I would take these papers into consideration and furnish Your Lordship with my opinion thereupon:—

In obedience to Your Lordship's commands I have taken this case into consideration and have the honor to *Report*

That the positions for which the Petitioners contend appear to be these.—

(1) That the late Confederate States have been recognized as *de facto* belligerent by Her Majesty's Government and by the Tribunals of the United States, and are to be considered exactly in the same light as a Foreign Enemy whose Territory has been conquered and passes *cum onere* to the conqueror, that is with the obligation to discharge its debts contracted with the other Foreign States, binding upon him.—

(2) That the debts in this case were contracted on behalf of separate States which had independently of their temporary Union under a Confederacy, by their prior original political constitution as acknowledged by the United States power to contract such debts, and that the Confederate Government was only the Agent of each or all of these States separately competent to contract *per se* the Loan.—

(3) That these States have been prevented from discharging their debts by the Conqueror, the United States, and have been forced to repudiate them.—

(4) That the United States has possessed itself as Conqueror of all the resources of the States available for the discharge of the debt and even of the Cotton which was especially pledged for the repayment of the Foreign Creditor.

Upon these grounds principally, if not exclusively, the Memorialists apply to Her Majesty's Government to intervene on their behalf with the Government of the United States and obtain from them payment of the bonds issued by the late *de facto* Confederate Government.***

The argument from the recognition of the Confederates as *de facto* belligerents fails altogether as an argument for the interference of Her Majesty's Government.—

Her Majesty proclaimed a strict neutrality and enjoined it upon her subjects, admonishing them that if they aided either belligerent they would do so at their own peril—and without any claim upon her assistance, if evil consequences ensued to them therefrom.—

To furnish a belligerent with money is to render him the most material aid, to supply him with the very sinews of war.—Let me moreover suggest some tests by which both the duty of the neutral Government towards its subjects, and the *jus victoris*, may be tried.—

If the money, *in specie*, advanced by the Memorialists to the Southerners had been captured on its way out to them?—If the United States Army had seized the money *in specie* in the Treasury of the Confederates? If instead of money munitions of war, ships, cannons, and the like had been furnished by the Memorialists, and the United States Army had seized these articles for which Cotton Bonds had been given as a security, and afterwards the very Cotton itself which was pledged for their payment? In any or all of these instances the unfitness of any intervention on the part of Her Majesty's Government would be apparent:—but it would not be easy to distinguish, in principle, the right of Her Majesty's Government to demand, on behalf of the Memorialists, from the United States repayment of the money, which had actually reached the hands of the Confederate Government, and been expended by them; from the right to do so, when the money had been captured on the high seas, or on land, or when the loan had been contracted by an exchange—immediate or promised of commodities (e.g.—So much munitions of war for so much Cotton) and these commodities had been seized *jure belli* by the Conqueror.

I do not think that Her Majesty's Government is bound to consider the remaining question—namely, as to the obligation of the United States, towards the private British Creditor of the late Confederacy; if my opinion be founded, that this creditor has no claim to the official intervention of Her Majesty's Government on his behalf.

But I will offer upon this part of the case also a few observations.—The United States' Government may not unfairly contend that the general obligation of the conquering State to discharge the debts, previously contracted with foreign creditors, by the conquered State, does not extend to the case, where these debts have not been the subject of an engagement previous to the war,

but have been contracted during, and for the express purpose of carrying on, the war:—inasmuch as this doctrine would compel the Conqueror to defray the cost not only of his own conquest, but of the resistance of his enemy.—

But that at all events it cannot be said to apply to the case of a debt contracted by Provinces or States, which, before the war, were subject to the authority of the Power from which they revolted and by which they have been, after a short struggle by force of arms, recovered.—

This war (the United States Government may observe) was not closed by a Treaty which contained stipulations that the Conqueror should, either altogether, or in a specified proportion, pay the debts of the conquered, according to the usage which has long prevailed on this subject.—No Foreign State intervened in the war, or made any demand at the close of it, that a Foreign debt should be recognised by the Conqueror.—The Creditors, in this case, entered of their own free-will into a speculation which, if the Confederates had prospered, would have been lucrative, but which their failure has rendered the reverse.

Whether they have any right to complain that their debtors, the States of the late Confederacy, yielded without making terms, on their behalf, with the Conqueror; or that they accepted the repudiation of the debt as a condition of their being restored to the union, or that they do not now contrive some means of fulfilling their engagements with their creditors, are questions which the Government of the United States may well refuse to entertain.—

The importance of the subject has led me to report at greater length than I could have wished, but, for the reasons which I have stated, I am clearly of opinion that Her Majesty's Government ought not to comply with the prayer of the Memorial from the holders of the Confederate Cotton Loan.

C. STATSFORMUEN

81

Fredstraktat med Italien af 1947

2743 Department of State 99

ANNEX XIV ECONOMIC AND FINANCIAL PROVISIONS RELATING TO CEDED TERRITORIES

1. The Successor State shall receive, without payment, Italian State and para-statal property within territory ceded to it under the present Treaty, as well as all relevant archives and documents of an administrative character or historical value concerning the territory in question, or relating to property transferred under this paragraph.

The following are considered as State or para-statal property for the purpose of this Annex: movable and immovable property of the Italian State, of

local authorities and of public institutions and publicly owned companies and associations, as well as movable and immovable property formerly belonging to the Fascist Party or its auxiliary organizations.

2. All transfers effected after September 3, 1943, of Italian State and para-statal property as defined in paragraph 1 above shall be deemed null and void. This provision shall not, however, extend to lawful acts relating to current operations of State and para-statal agencies in so far as they concern the sale, within normal limits, of goods ordinarily produced or sold by them in the execution of normal commercial arrangements or in the normal course of governmental administrative activities.***

6. The Government of the Successor State shall be exempt from the payment of the Italian public debt, but will assume the obligations of the Italian State towards holders who continue to reside in the ceded territory, or who, being juridical persons, retain their *siège social* or principal place of business there, in so far as these obligations correspond to that portion of this debt which has been issued prior to June 10, 1940, and is attributable to public works and civil administrative services of benefit to the said territory but not attributable directly or indirectly to military purposes.

Full proof of the source of such holdings may be required from the holders.

The Successor State and Italy shall conclude arrangements to determine the portion of the Italian public debt referred to in this paragraph and the methods for giving effect to these provisions.

9. The property, rights and interests of Italian nationals permanently resident in the ceded territories at the coming into force of the present Treaty shall, provided they have been lawfully acquired, be respected on a basis of equality with the rights of nationals of the Successor State.

The property, rights and interests within the ceded territories of other Italian nationals and also of Italian juridical persons, provided they have been lawfully acquired, shall be subject only to such legislation as may be enacted from time to time regarding the property of foreign nationals and juridical persons generally.

Such property, rights and interests shall not be subject to retention or liquidation under the provisions of Article 79 of the present Treaty, but shall be restored to their owners freed from any measures of this kind and from any other measure of transfer, compulsory administration or sequestration taken between September 3, 1943, and the coming into force of the present Treaty.***

82

Haile Selassie v. Cable and Wireless, Ltd. (no. 2)

STORBRITANNIEN, COURT OF APPEAL, 1939

Se ovenfor sag nr. 78.

83

Schwertfeger mod den danske regering "Rønhavedommen"

DANMARK, HØJESTERET, 1923
U. f. R. 1924, 64

Se nedenfor sag nr. 99.

D. STATSBOGGERFØRHOOLD

84

Fall des Grafen Platen-Hallermund

PREUSSEN, STAATSGERICHTSHOF, 1868
v. Holtzendorffs Allg. Deutsche Strafrechtszeitung, 1868, 305

[Grev Platen-Hallermund var i 1866 udenrigsminister hos Kong Georg V af Hannover. Efter at Preussen samme år havde erklæret Hannover krig, forlod han i kongens følge Hannover og forblev sammen med kongen udenfor hannoveransk og preussisk statsområde. Efter at Preussen havde erobret og indlemmet Hannover, blev der for den preussiske statsdomstol rejst anklage mod ham for højforræderi ved, at han efter erobringen havde arbejdet for provinsens løsrivelse fra Preussen. Som fraværende blev han dømt til 15 års tugthus.]

[*Domstolen.*] ***Nachdem der Angeklagte unter Anklage wegen Hochverraths gestellt worden, nachdem die Vorladung desselben den gesetzlichen Bestimmungen gemäss erlassen und der Angeklagte nicht erschienen ist, so muss derselbe als geständig erachtet werden: in den Jahren 1867 und 1868 im Auslande als kgl. preussische Unterthan die Lossreissung der Provinz Hannover mit Anderen verabredet zu haben, ohne indessen schon zum Beginn von Handlungen gekommen zu sein, durch welche die beabsichtigte That unmittelbar zur Ausführung gebracht werden sollte. Es steht ferner fest, dass der Angeklagte als Preusse im Auslande Handlungen begangen hat, in denen alle wesentlichen Merkmale des Hochverraths enthalten sind, wie derselbe nach Art. 118 und 119 des hannöverschen und nach §§ 61 und 63 des preussischen Strafgesetzes definirt ist. Das preussische Gesetz ist das mildere und war dasselbe daher zur Anwendung zu bringen. Bei Abmessung der Strafe ist erwogen, dass es sich hier um ein Unternehmen von bedeutender Tragweite handelte, dass eine grosse Zahl von Personen zu diesem Zwecke gedungen worden sind und zwar mit sehr erheblichen Geldmitteln zu einer Zeit, wo Kriegsgefahr von aussen drohte. Wenn hiernach gegen die früher Verurtheilten eine zehnjährige Zuchthausstrafe erkannt ist, so musste gegen den Grafen Platen eine schärfere Ahndung für angemessen erachtet werden, weil derselbe als derjenige zu betrachten ist, durch dessen Vermittelung das ganze Unternehmen ins Leben gerufen und gefördert worden ist.***

E. REVOLUTIONÆR OMVÆLTNING

85

Peru-Dreyfus affæren¹

Ved en kontrakt af 17. august 1869 solgte staten Peru to millioner tons guano til det franske firma Dreyfus Frères et Cie. i Paris. Samtidig fik firmaet monopol på salget i Europa med kolonier, og ved samme lejlighed påtog det sig at skaffe Peru et lån. Gennem disse og andre transaktioner opnåede Dreyfus Frères nogle krav imod Perus regering, hvilket gav anledning til flere retssager ved peruanske domstole.

Før disse konflikter var løst, udbød der krig imellem Peru og Chile, hvilket Perus finansminister Nicolas de Pierola benyttede til et statskup, hvorved han styrtede den siddende regering og selv overtog hele magten som diktator. Pierolas regering blev bl. a. anerkendt af England, Frankrig, Tyskland og Belgien. Den 3. april 1880 skrev Dreyfus Frères et Cie. et brev til Perus nye præsident, hvorefter de anmodede ham om at afgøre stridighederne og lovede at rette sig efter hans afgørelse. Efter nye forhandlinger med det franske firma udstedte Pierola en række dekreter, hvori han anerkendte de franske krav til et vist beløb, og dette godkendtes af det franske firma.

Den 28. juni 1881, inden beløbet var blevet betalt, trådte Pierola imidlertid tilbage, og den gamle regering overtog atter magten. Den 25. oktober 1886 udstedtes en lov, der med hjemmel i forfatningens artikel 10 erklærede alle Pierolas interne regeringsakter for ugyldige. Forfatningens artikel 10 erklærede alle sådanne akter for ugyldige, som var udfærdiget af personer, der havde tilranet sig magten imod forfatningen og lovene.

Peru nægtede nu at anerkende de franske krav og sagsøgte endog Dreyfus Frères ved engelsk domstol til at udbetale et beløb, som dette firma netop havde fået tilkendt ved engelsk domstol i en sag imod Perus guano kompagni for eksport af guano. Man påberåbte sig herved, at alle Pierolas handlinger ifølge loven af 25. oktober 1886 var ugyldige. Dommen gik dog imod dette synspunkt bl. a. med følgende ord:

“Det er vanskeligt at se, hvorledes dette [gyldigheden af aftalerne med Pierolas regering] kan afgøres af Perus ret. Det er et folkeretligt spørgsmål af yderste vigtighed, om borgerne i en fremmed stat kan eller ikke kan have sådanne forbindelser, som fandtes i den foreliggende sag, med en regering, som en sådan stat har anerkendt. — Jeg må anse det for gældende ret, at en englænder eller en franskmænd trygt kunne kontrahere med senor Pierolas regering, om ikke før, så i hvert fald efter, at den var blevet anerkendt af henholdsvis Englands og Frankrigs regering.”

Dommen lagde vægt på, at Pierola havde haft kompetence til at forpligte Peru, og sluttede med at fastslå, at den senere regering derefter havde pligt

¹ James Brown Scott, *The Hague Court Reports*, 2. Series (1932), 31—38. 16 *A.J.I.L.* (1922) 480.

til at opfylde de forpligtelser, som Pierola havde pådraget staten. Resultatet blev derfor, at Dreyfus Frères blev frifundet.

Efter langvarige forhandlinger mellem Perus regering, Dreyfus Frères og den franske regering undertegnedes den 2. februar 1914 i Lima en fransk-peruansk aftale om at lade tvisten afgøre ved den såkaldte faste voldgiftsdomstol i Haag i overensstemmelse med reglerne i kap. 4 i 1. Haag-konvention af 18. oktober 1907 om fredelig bilæggelse af internationale tvister. Samtidig skulle en række mindre krav fra andre franske borgere påkendes.

Efter at parterne havde udpeget voldgiftsmændene og aftalt nærmere regler om voldgiften, trådte retten sammen i Haag, hvor kendelsen blev afsagt den 11. oktober 1921.

Voldgiftkendelsen fastslår, at Nicolas de Pierola var republikken Perus øverste chef og var anerkendt af flere europæiske lande. Han måtte derfor kunne forpligte Peru overfor udlandet, således at den efterfølgende (og op-rindelige) regering måtte være bundet af hans aftaler. Endvidere siges det: "Det er af underordnet betydning, at en peruansk lov af 25. oktober 1886 har erklæret 'alle interne regeringsakter udstedte af Nicolas Pierola ugyldige', eftersom denne lov ikke kan anvendes på udlændinge, der har handlet i god tro."

Resultatet blev derfor, at Pierolas dekreter blev lagt til grund, og Peru blev dømt til at betale.

Statsterritoriet

A. SUVERÆNITET OG TERRITORIALHØJHED

86

The Fama

STORBRITANNIEN, HIGH COURT OF ADMIRALTY, 1804
5 C. Rob. Adm. 106

[I maj 1803, da England og Frankrig var i krig, beslaglagde englænderne forskelligt gods tilhørende en købmand, der var på rejse fra Louisiana, hvor han hørte hjemme, til Maryland. Købmanden krævede erstatning, idet han gjorde gældende, at Louisiana i 1803 var spansk område, uanset at Spanien og Frankrig i 1796 havde indgået traktat om overdragelse af Louisiana til Frankrig.]

[*Sir W. Scott.*] ***The present question is a general one, respecting the situation, in which the people of a distant settlement are placed, by a Treaty of the State to which they undoubtedly belong, and by which they are stipulated to be transferred to another power. The case proceeded for a considerable time without dispute as to principle, on a mere enquiry into the fact of possession; under an understanding, as I apprehended, that if possession had not been taken by France, the French character could not be deemed to have attached. The question has however now been fully argued as to the principle of law, whether the Treaty did not in itself confer full sovereignty and right of dominion, and whether the inhabitants were not so ceded by that Treaty, as to become immediately French subjects.***

It is to be observed then, that all corporeal property depends very much upon occupancy. With respect to the origin of property, this is the sole foundation, Quod nullius est ratione naturali occupanti id conceditur. So with regard to transfer also, it is universally held in all systems of jurisprudence, that to consummate the right of property, a person must unite the right of the thing with possession.*** This is the general law of property, and applies, I conceive, no less to the right of territory than to other rights. Even in newly discovered countries, where a title is meant to be established, for the first time, some act of possession is usually done and proclaimed as a notification of the fact. In transfer, surely, whether the former rights of others are to be superseded, and extinguished, it cannot be less necessary that such a change should be indicated by some public acts, that all who are deeply interested in the event, as the inhabitants of such settlements, may be informed under whose dominion, and under what laws they are to live. This I conceive to be the general pro-

priety of principle on the subject, and no less applicable to cases of territory, than to property of every other description.

It will be only necessary to enquire then, whether the practice has been conformable to what we might conceive to be the true principle of law. On this point no doubt can be entertained. The Corps Diplomatique is full of instances of this kind: Where stipulations of Treaties for ceding particular countries are to be carried into execution, solemn instruments of cession are drawn up, and adequate powers are formally given to the persons, by whom the actual delivery is to be made. In modern times, more especially, such a proceeding is become almost a matter of necessity, with regard to the colonial establishments of the States of Europe, in the new world. The Treaties by which they are affected may not be known to them for months after they are made. Many articles must remain executory only, and not executed, till carried into effect; and until that is done by some public act, the former sovereignty must remain. Amongst the instances that might be cited to shew what the practice has been on this subject, I will mention only a few.***

I am of opinion, therefore, that on all the several grounds of reason or practice, and judicial recognition, until possession was actually taken, the inhabitants of New Orleans continued under the former sovereignty of Spain. Then as to the fact of possession. There are undoubtedly some expressions in these letters, which might raise a supposition, that the person who had arrived, had taken possession on the part of the French Government. A letter from a French Loyalist expresses "the expectation of French troops and a civil officer to take possession, and make Frenchmen of us, who are now Spaniards." It is afterwards said that Citizen Laussart had arrived to take possession. A proclamation is issued by him, which is drawn up very much in the present tense; but that mode of speaking is used also, I observe, relative to some circumstances which had certainly not taken place, as "that the military Prefect brings with him troops, &c." when it is certain that not a soldier had appeared. From other parts of the evidence, I think it is sufficiently clear that he was either not the person who was charged with the act of taking possession, or that some considerations had induced him to defer it. A letter written by him states, "if the taking possession had passed," etc. There is also the Convention entered into: "That the French flag should enjoy the same privileges, as if the possession had actually been taken." These passages strongly indicate that the actual delivery had not passed. Then comes the certificate of the Spanish Governor, accompanied by an instruction equally formal, from the American Consul. These are, I think, decisive as to the fact. They state, that Citizen Laussart had arrived in March to make the necessary arrangements, but that no cession had taken place, and that he had never exercised any jurisdiction. On the whole of this evidence I am led to conclude, either that Mr. Laussart was not the person authorized to take possession, or that the act of cession had from some causes been deferred. In this situation of things, it appears to me, upon the grounds before stated, that the colony must be considered as continuing, at the time of capture, under the dominion of Spain, and consequently that these persons, as Spanish subjects, are entitled to restitution.

87

The Foltina

STORBRITANNIEN, HIGH COURT OF ADMIRALTY, 1814

I Dodson 450

[Under den dansk-engelske krig 1807—1814 overgav den danske ø Helgoland sig til de engelske søstridskræfter. Overgivelsen fandt sted den 5. september 1807, da øen blev taget i besiddelse af englænderne, men den formelle overdragelse fandt først sted ved krigens afslutning, jfr. Kielerfreden af 14. januar 1814, artikel 3, der bestemmer følgende:

“Hans Majestæt Kongen af det Forenede Kongerige Storbritannien og Irland samtykker i at tilbagegive til Hans Majestæt Kongen af Danmark alle de besiddelser og kolonier, der er erobret af de britiske styrker i løbet af den foreliggende krig, med undtagelse af øen Helgoland, over hvilken Hans britiske Majestæt forbeholder sig den fulde og hele suverænitet.”

Den 15. december 1811 bemægtigede englænderne sig et fjendtligt skib, Foltina, der lå for anker på Helgolands red, og stillede det for admiralitetsretten, der skulle afgøre, om skib og ladning kunne konfiskeres til fordel for the Lord High Admiral. Det afgørende var her, om stedet for bemægtigelsen kunne siges at være britisk territorium.]

[*Sir W. Scott.*] This is the case of a vessel which was taken in the roadstead of Heligoland, not at the time of the surrender of the island, but afterwards, and the seizure is represented to have taken place within the harbor.***

But the chief point to be considered is, whether, at the time this seizure was made, Heligoland formed part of the dominions of the crown of Great Britain or not. The island, it appears, had been conquered and taken possession of by British forces, but the conquest had not been confirmed to this country by a treaty of peace. It was a firm capture in war, but was still subject to a kind of latent title in the enemy, by which he might have recovered it at the conclusion of the war, provided this country would have consented to its restitution.

It is somewhat extraordinary that, in the course of the numerous and long wars in which this country has been engaged, no case should have been determined which might serve as a guide to the court in the decision of the present question.***

No point is more clearly settled in courts of common law than that a conquered country forms immediately part of the king's dominions. (*Campbell v. Hall*, *Cowper's Rep.* 208). In a late instance, we know that an island so acquired (Guadaloupe) was transferred to a third power, subject, undoubtedly, to the shadowy right of the former proprietor. It is said, that a conquest of this kind may be re-acquired *flagranti bello* by the state from which it was taken; but so may other possession, though forming part of the original and established dominions of the crown of this country, if the enemy has it in his power to make the conquest. The same observation is applicable to the Isle of Wight, as well as to Heligoland, for the enemy has the same right to make

a conquest of one as the other. It is said that the enemy may recover back the island of Heligoland when peace takes place; but it is equally true that the conqueror may retain it if he can; and, if nothing is said about it in the treaty, it remains with the possessor, whose title cannot afterwards be called in question. The distinction between the two species of territories is, in fact, rather more formal than real and substantial, at least I must profess my inability to see any distinction between them that can materially affect the present question. The power of the British government was full and complete; and, though the Lords Commissioners of the Admiralty might not have interposed the particular authority with which they are invested, yet the crown had exercised its authority, and the admiralty, as the grantee of the crown, would succeed to its rights. It might have erected a court there, for the exercise of admiralty jurisdiction; and, if it did not, I presume that it only refrained from so doing because it was not thought that public convenience required it. The enemy certainly had no right to say that a court of that kind should not be there erected. Under the circumstances, I think there is no solid ground for the distinction that has been taken; and though I am by no means disposed, at this time of day, to enlarge the bounds of the ancient grant from the crown to the Lord High Admiral, which is now become of less consequence, yet it is the duty of the court to maintain ancient landmarks. I shall pronounce for the claim of the admiralty, and condemn this ship as *droits of admiralty*.

88

The Minquiers and Ecrehos Case

DEN INTERNATIONALE DOMSTOL, DOM 1953

I. C. J. Reports 1953, 47

· [Minquiers og Ecrehos grupperne er beliggende mellem den britiske kanal-ø Jersey og den franske kyst og består hver for sig af to eller tre beboelige små-øer, mange mindre holme, og et stort antal klippeskær. Såvel det Forenede Kongedømme som Frankrig mente sig i besiddelse af suveræniteten over disse øgrupper. I 1950 afsluttede de to stater en særlig overenskomst hvorefter spørgsmålet skulle forelægges den Internationale Domstol til afgørelse.]

[*Domstolen:*] Both Parties contend that they have respectively an ancient or original title to the Ecrehos and the Minquiers, and that their title has always been maintained and was never lost. The present case does not therefore present the characteristics of a dispute concerning the acquisition of sovereignty over *terra nullius*.

The United Kingdom Government derives the ancient title invoked by it from the conquest of England in 1066 by William, Duke of Normandy. By this conquest England became united with the Duchy of Normandy, including the Shannel Islands, and this union lasted until 1204 when King Philip Augustus of France drove the Anglo-Norman forces out of Continental Normandy. But his attempts to occupy also the Islands were not successful, except for brief pe-

riods when some of them were taken by French forces. On this ground the United Government submits the view that all of the Channel Islands, including the Ecrehos and the Minquiers, remained, as before, united with England and that this situation of fact was placed on a legal basis by subsequent Treaties concluded between the English and French Kings.

The French Government does not dispute that the Islands of Jersey, Guernsey, Alderney, Sark, Herm and Jethou continued to be held by the King of England; but it denies that the Ecrehos and Minquiers groups were held by him after the dismemberment of the Duchy of Normandy in 1204. After that event, these two groups were, it is asserted, held by the King of France together with some other islands close to the continent, and reference is made to the same medieval Treaties as those which are invoked by the United Kingdom Government.***

[Domstolen går derefter over til at undersøge disse traktater samt andre historiske dokumenter og forhold som parterne havde påberåbt sig, men kommer til det resultat at man ikke på dette grundlag alene kan drage definitive konklusioner med hensyn til suveræniteten over øgrupperne, hvorfor afgørelsen må bero på bevisligheder vedrørende den faktiske besiddelse af øgrupperne. Først undersøges forholdene vedrørende Ecrehos-gruppen. Efter at have skildret udviklingen fra middelalderen og op til det 18. århundrede fortsætter dommen:]

From the beginning of the nineteenth century the connection between the Ecrehos and Jersey became closer again because of the growing importance of the oyster fishery in the waters surrounding the islets, and Jersey authorities took, during the subsequent period, action in many ways in respect of the islets. Of the manifold facts invoked by the United Kingdom Government, the Court attaches in particular, probative value to the acts which relate to the exercise of jurisdiction and local administration to legislation.

In 1826 criminal proceedings were instituted before the Royal Court of Jersey against a Jerseyman for having shot at a person on the Ecrehos. Similar judicial proceedings in Jersey in respect of criminal offences committed on the Ecrehos took place in 1881, 1883, 1891, 1913 and 1921. On the evidence produced the Court is satisfied that the Courts of Jersey, in criminal cases such as these, have no jurisdiction in the matter of a criminal offence committed outside the Bailiwick of Jersey, even though the offence be committed by a British subject resident in Jersey, and that Jersey authorities took action in these cases because the Ecrehos were considered to be within the Bailiwick. These facts show therefore that Jersey courts have exercised criminal jurisdiction in respect of the Ecrehos during nearly a hundred years.

Evidence produced shows that the law of Jersey has for centuries required the holding of an inquest on corpses found within the Bailiwick where it was not clear that death was due to natural causes. Such inquests on corpses found at the Ecrehos were held in 1859, 1917 and 1948 and are additional evidence of the exercise of jurisdiction in respect of these islets.

Since about 1820, and probably earlier, persons from Jersey have erected and maintained some habitable houses or huts on the islets of the Ecrehos, where they have stayed during the fishing season. Some of these houses or huts have,

for the purpose of parochial rates, been included in the records of the Parish of St. Martin in Jersey, which have been kept since 1889, and they have been assessed for the levying of local taxes. Rating schedules for 1889 and 1950 were produced in evidence.

A register of fishing boats for the port of Jersey shows that the fishing boat belonging to a Jersey fisherman, who lived permanently on an islet of the Ecrehos for more than forty years, was entered in that register in 1872, the port or place of the boat being indicated as "Ecrehos Rocks", and that the licence of that boat was cancelled in 1882. According to a letter of June, 1876, from the Principal Customs Officer of Jersey, an official of that Island visited occasionally the Ecrehos for the purpose of endorsing the licence of that boat.

It is established that contracts of sale relating to real property on the Ecrehos islets have been passed before the competent authorities of Jersey and registered in the public registry of deeds of that island. Examples of such registration of contracts are produced for 1863, 1881, 1884 and some later years.

In 1884, a custom-house was established in the Ecrehos by Jersey customs authorities. The islets have been included by Jersey authorities within the scope of their census enumerations, and in 1901 an official enumerator visited the islets for the purpose of taking the census.

These various facts show that Jersey authorities have in several ways exercised ordinary local administration in respect of the Ecrehos during a long period of time.

By a British Treasury Warrant of 1875, constituting Jersey as a Port of the Channel Islands, the "Ecrehos Rocks" were included within the limits of that port. This legislative Act was a clear manifestation of British sovereignty over the Ecrehos at a time when a dispute as to such sovereignty had not yet arisen. The French Government protested in 1876 on the ground that this Act derogated from the Fishery Convention of 1839. But this protest could not deprive the Act of its character as a manifestation of sovereignty.

Of other facts which throw light upon the dispute, it should be mentioned that Jersey authorities have made periodical official visits to the Ecrehos since 1885, and that they have carried out various works and constructions there, such as a slipway in 1895, a signal post in 1910 and the placing of a mooring buoy in 1939.

The French Government, in addition to the alleged original feudal title considered above, has invoked the fact that the States of Jersey in 1646 prohibited the inhabitants of Jersey from fishing without special permission at the Ecrehos and the Chausey Islands, and that they restricted visits to the Ecrehos in 1692 because of the war between England and France. This shows, it is contended, that the Ecrehos were not considered as British territory. But the Court does not consider that this is the necessary or natural inference to be drawn from these facts.

In the course of the diplomatic exchanges between the two Governments in the beginning of the nineteenth century concerning fisheries off the coast of Cotentin, the French Ambassador in London addressed to the Foreign Office a Note, dated June 12th, 1820, attaching two charts sent from the French Mini-

stry of Marine to the French Ministry of Foreign Affairs purporting to delimit the areas within which the fishermen of each country were entitled to exclusive rights of fishery. In these charts a blue line marking territorial waters was drawn along the coast of the French mainland and round the Chausey Islands, which were indicated as French, and a red line marking territorial waters was drawn round Jersey, Alderney, Sark and the Minquiers, which were indicated as British. No line of territorial waters was drawn round the Ecrehos group, one part of which was included in the red line for Jersey and consequently marked as belonging to Great Britain and the other part apparently treated as *res nullius*. When the French Government in 1876 protested against the British Treasury Warrant of 1875 and challenged British sovereignty over the Ecrehos, it did not itself claim sovereignty, but continued to treat the Ecrehos as *res nullius*. In a letter of March 26th, 1884, from the French Ministry of Foreign Affairs to the French Minister of Marine, it was stated that the British Government had not ceased to claim the Ecrehos as a dependency to the Channel Islands, and it was suggested that French fishermen should be prohibited access to the Ecrehos. It does not appear that any such measure was taken, and subsequently, in a Note to the Foreign Office of December 15th, 1886, the French Government claimed for the first time sovereignty over the Ecrehos "*à la lumière des nouvelles données historiques et géologiques*".

The Court, being now called upon to appraise the relative strength of the opposing claims to sovereignty over the Ecrehos in the light of the facts considered above, finds that the Ecrehos group in the beginning of the thirteenth century was considered and treated as an integral part of the fief of the Channel Islands which were held by the English King, and that the group continued to be under the dominion of that King, who in the beginning of the fourteenth century exercised jurisdiction in respect thereof. The Court further finds that British authorities during the greater part of the nineteenth century and in the twentieth century have exercised State functions in respect of the group. The French Government, on the other hand, has not produced evidence showing that it has any valid title to the group. In such circumstances it must be concluded that the sovereignty over the Ecrehos belongs to the United Kingdom.***

[Derefter undersøges Minquiers-gruppens forhold med tilsvarende resultat, hvorefter der konkluderes:]

In such circumstances, and having regard to the view expressed above with regard to the evidence produced by the United Kingdom Government, the Court is of opinion that the sovereignty over the Minquiers belongs to the United Kingdom.

For these reasons,

The Court,

unanimously,

finds that the sovereignty over the islets and rocks of the Ecrehos and Minquiers groups, in so far as these islets and rocks are capable of appropriation, belongs to the United Kingdom.

89

Case Concerning Sovereignty Over Certain Frontier Land

DEN INTERNATIONALE DOMSTOL, DOM 1959

I. C. J. Reports 1959, 209

[I 1957 blev der mellem den belgiske og den hollandske regering indgået en overenskomst hvorefter den Internationale Domstol skulle afgøre hvem af parterne der havde suveræniteten over nogle småarealer på grænsen mellem Belgien og Holland der i ældre dokumenter er kendt under betegnelsen "Nos. 91 og 92, Section A, Zondereygen." Grænsen mellem den belgiske kommune Baerle-Duc og den hollandske kommune Baarle-Nassau forløber ikke, som sædvanligt, langs en linie, men hver af kommunerne har enklaver beliggende i den anden. Parcellerne nos. 91 og 92 er beliggende i den hollandske kommune, men hævdedes af Belgien at udgøre enklaver af den belgiske kommune, hvilket blev bestridt fra hollandsk side. Uklarheden om retstilstanden hang sammen med en uoverensstemmelse mellem to historisk betydningsfulde dokumenter. I årene efter de to staters adskillelse havde man søgt grænsen mellem de to kommuner, der nu tillige var blevet statsgrænse, reguleret og fikseret. I 1841 blev der af de to kommuner oprettet og undertegnet en protokol (i dommen betegnet "the Communal Minute") om fordelingen der under "Section A Zondereygen" indeholder følgende bestemmelse:

"Lodderne numrene 78 til 111 inclusive tilhører kommunen Baarle-Nassau".

På regeringsplan blev der i 1842 indgået en grænsetraktat der bl. a. bestemte at *status quo* skulle opretholdes for så vidt angår de her omhandlede kommuner. Efter traktaten skulle en blandet grænsekommision fikse grænsen i overensstemmelse hermed. Dette skete ved en beskrivelsesprotokol ("Descriptive Minute"), knyttet til en grænsekonvention af 8. august 1943, der vedrørende Sektion A indeholdt følgende bestemmelse:

"Lodderne numrene 78 til 90 inclusive tilhører kommunen Baarle-Nassau.

Lodderne numrene 91 og 92 tilhører Baerle-Duc.

Lodderne numrene 93 til 111 inclusive tilhører Baarle-Nassau."

[*Dommen*.:] The Belgian Government relies upon the above quoted terms of the Communal Minute as they appear in the Descriptive Minute annexed to the Boundary Convention and as having the same force and effect as if inserted therein, for the purpose of showing that the disputed plots have thus been recognized as belonging to the commune of Baerle-Duc. It follows, in its view, that in accordance with the terms of the Boundary Convention sovereignty over these plots belongs to Belgium.

On its side, the Netherlands Government itself claims to have a title to sovereignty over the disputed plots and at the same time it challenges the validity of the title invoked by the Belgian Government. It relies upon the following grounds:

In the first place, it maintains that the Boundary Convention of 1843 did not by its terms do any more than recognize the existence of the *status quo* and

did not determine what that *estatus quo* was; that accordingly the *status quo* must be determined in accordance with the Communal Minute under which sovereignty over the disputed plots was recognized as vested in the Netherlands.

Alternatively, the Netherlands Government maintains that, even if the Boundary Convention purported to determine the sovereignty over the disputed plots, this was vitiated by mistake and did not carry out the intention of the Parties. It contends that a mere comparison between the terms of the Communal Minute and the Descriptive Minute establishes this. It states that it is not necessary to establish the origin of the mistake because the mistake itself is apparent on the face of the two documents. In support, however, of its contention that a mistake did occur, it advances an hypothesis, as to the origin and consequences of the alleged mistake, which will be adverted to later.

As a further alternative, the Netherlands Government submits that, should it be held that the Boundary Convention determined the sovereignty in respect of the disputed plots and it is not vitiated by mistake, acts of sovereignty exercised by it since 1843 over the plots have displaced the legal title flowing from the Boundary Convention and have established sovereignty in the Netherlands.

The Court will proceed to deal with these three grounds in the order in which they have been presented by the Netherlands.***

[Efter at domstolen har afvist de to første af disse hollandske påstande vender den sig til den tredje:]

The final contention of the Netherlands is that if sovereignty over the disputed plots was vested in Belgium by virtue of the Boundary Convention, acts of sovereignty exercised by the Netherlands since 1843 have established sovereignty in the Netherlands.

This is a claim to sovereignty in derogation of title established by treaty. Under the Boundary Convention, sovereignty resided in Belgium. The question for the Court is whether Belgium has lost its sovereignty, by non-assertion of its rights and by acquiescence in acts of sovereignty alleged to have been exercised by the Netherlands at different times since 1843.

As to the question whether Belgium ever relinquished its sovereignty over the disputed plots, it is to be observed that Belgian military staff maps since their first publication in 1874 have shown these plots as Belgian territory. The plots were included in Belgian survey records from 1847 to 1852, when one plot for some reason was struck out but restored about 1890, since which time both have continued to appear therein. Transfer deeds relating to one of the plots were entered in the Records of the Survey authorities at Baerle-Duc in 1896 and 1904.

In 1843, the plots were uncultivated land, of which one was described by the Netherlands as being in 1860–1863 “a clearing of heathland”. The Netherlands state that since 1866 the use to which both plots have been put has changed a number of times, although the nature and dates of these changes are not stated. Prior to 1906 some transfers of land were recorded in the Office of Baarle-Nassau. In 1906 some houses were erected upon part of plot 91 and thereafter further transfers of lands were recorded in that Office. Since that

time also, registrations of births, deaths and marriages of inhabitants of these houses have been entered in the Baarle-Nassau Communal Register. It is stated by Belgium that these houses, constructed round the Baarle-Nassau (frontier) station built by the Netherlands Government, were occupied by Netherlands officials.

Some time after their erection, a Belgian inspector of survey, having visited Baarle-Nassau, found that plots 91 and 92, entered in the Belgian survey, were also entered in the Netherlands survey. Official Belgian enquiries were then initiated, and finally, in July 1914, the Director of the Survey at Antwerp informed the Belgian Minister for Finance that he thought it necessary for the matter to be submitted to the Belgian Ministry for Foreign Affairs. The First World War then intervened. In December 1919 the file was transmitted to that Ministry.

Following examination by that Ministry, the Belgian Minister at The Hague in August 1921 drew the attention of the Netherlands Government to the fact that the two disputed plots and two other plots belonging to Baerle-Duc were entered in the survey documents of both States. The Netherlands Minister for Foreign Affairs replied on 6 October 1922, when he acknowledged that the two other plots were Belgian and should be struck out of the Netherlands survey documents, but for the first time it was claimed that the Communal Minute had been inaccurately reproduced in the Descriptive Minute and that plots 91 and 92 belonged to the Netherlands. Since then, sovereignty over these two plots has been the subject of dispute between the two States.

The Netherlands relies, in addition to the incorporation of the plots in the Netherlands survey, the entry in its registers of land transfer deeds and registrations of births, deaths and marriages in the communal register of Baarle-Nassau, on the fact that it has collected Netherlands land tax on the two plots without any resistance or protest on the part of Belgium.

Belgium's reply is that it was quite unaware that tax was being collected; that neither plot was under Belgian law liable to its land tax, since both plots were until recent years uncultivated and one of them was State property. This explanation is disputed by the Netherlands Government.

Reliance is also placed by the Netherlands upon certain proceedings taken by the commune of Baerle-Duc before a Breda tribunal in 1851. These proceedings were concerned with a proposed sale of a large area of heathland over which the commune of Baerle-Duc claimed to have certain rights of usufruct. This area included part of the disputed plots.

A further act relied upon by the Netherlands is the sale by the Netherlands State, publicly announced in the year 1853, of the heathland above referred to. The Belgian Government states that the fact that this area included part of the disputed plots escaped its notice.

The Netherlands also claims that Netherlands laws, more particularly in regard to rents, were applied to houses built on the plots.

Finally, the Netherlands places reliance upon the grant of a railway concession which related to a length of line, a small portion of which passed through the disputed plots.

The weight to be attached to the acts relied upon by the Netherlands must be determined against the background of the complex system of intermingled enclaves which existed. The difficulties confronting Belgium in detecting encroachments upon, and in exercising, its sovereignty over these two plots, surrounded as they were by Netherlands territory, are manifest. The acts relied upon are largely of a routine and administrative character performed by local officials and a consequence of the inclusion by the Netherlands of the disputed plots in its Survey, contrary to the Boundary Convention. They are insufficient to displace Belgian sovereignty established by that Convention.

During the years 1889 to 1892 efforts were made by the two States to achieve a regular and continuous frontier line between them in this region through exchanges of territory. A new Mixed Boundary Commission, which met during those years, finally prepared a Convention which was signed by the plenipotentiaries of the two States in 1892, but which was never ratified. Under the terms of the Convention, Belgium agreed to cede to the Netherlands, *inter alia*, the two disputed plots. The Netherlands urged that this should not be read against it since the Convention was not ratified and since little importance had attached to the two plots in question and it had allowed itself to be misled by the text Descriptive Minute and the significance of any cession was not the subject of consideration.

The unratified Convention of 1892 did not, of course, create any legal rights or obligations, but the terms of the Convention itself and the contemporaneous events show that Belgium at that time was asserting its sovereignty over the two plots, and that the Netherlands knew it was so doing. In a letter of 20 August 1890, the Belgian Minister for Foreign Affairs had informed the Netherlands Minister in Brussels that an enclave, intersected by the railway from Turnhout to Tilburg, had been omitted from the list of territories to be ceded by Belgium to the Netherlands. This enclave comprised the disputed plots; they were incorporated in the Convention of 1892 and subsequently specifically covered by a separate Declaration of December of that year. The Netherlands did not in 1892, or at any time thereafter until the dispute arose between the two States in 1922, repudiate the Belgian assertion of sovereignty.

Having examined the situation which has obtained in respect of the disputed plots and the facts relied upon by the two Governments, the Court reaches the conclusion that Belgian sovereignty established in 1843 over the disputed plots has not been extinguished.

For these reasons,

The Court,

by ten votes to four,
finds that sovereignty over the plots shown in the survey and known from 1836 to 1843 as Nos. 91 and 92, Section A, Zondereygen, belongs to the Kingdom of Belgium.

B. TERRITORIETS BESTANDDELE OG UDSTRÆKNING

90

Convention on the Territorial Sea and the Contiguous Zone

Genève 1958

Art. 1. 1. The sovereignty of a State extends, beyond its land territory and its internal waters, to a belt of sea adjacent to its coast, described as the territorial sea.

2. This sovereignty is exercised subject to the provisions of these articles and to other rules of international law.

Art. 2. The sovereignty of a coastal State extends to the air space over the territorial sea as well as to its bed and subsoil.

Art. 3. Except where otherwise provided in these articles, the normal baseline for measuring the breadth of the territorial sea is the low-water line along the coast as marked on large-scale charts officially recognized by the coastal state.

Art. 4. 1. In localities where the coast line is deeply indented and out into, or if there is a fringe of islands along the coast in its immediate vicinity, the method of straight baselines joining appropriate points may be employed in drawing the baseline from which the breadth of the territorial sea is measured.

2. The drawing of such baselines must not depart to any appreciable extent from the general direction of the coast, and the sea areas lying within the lines must be sufficiently closely linked to the land domain to be subject to the régime of internal waters.

3. Baselines shall not be drawn to and from low-tide elevations, unless light-houses or similar installations which are permanently above sea level have been built on them.

4. Where the method of straight baselines is applicable under the provisions of paragraph 1, account may be taken, in determining particular baselines, of economic interests peculiar to the region concerned, the reality and the importance of which are clearly evidenced by a long usage.

5. The system of straight baselines may not be applied by a State in such a manner as to cut off from the high seas the territorial sea of another State.

6. The coastal State must clearly indicate straight baselines on charts, to which due publicity must be given.

Art. 5. 1. Waters on the landward side of the baseline of the territorial sea form part of the internal waters of the State.

2. Where the establishment of a straight baseline in accordance with article 4 has the effect of enclosing as internal waters areas which previously had been considered as part of the territorial sea or of the high seas, a right of innocent passage, as provided in articles 14 to 23, shall exist in those waters.

Art. 6. The outer limit of the territorial sea is the line every point of which is at a distance from the nearest point of the baseline equal to the breadth of the territorial sea.

Art. 7. 1. This article relates only to bays the coasts of which belong to a single State.

2. For the purposes of these articles, a bay is a well-marked indentation whose penetration is in such proportion to the width of its mouth as to contain land-locked waters and constitute more than a mere curvature of the coast. An indentation shall not, however, be regarded as a bay unless its area is as large as, or larger than, that of the semi-circle whose diameter is a line drawn across the mouth of that indentation.

3. For the purpose of measurement, the area of an indentation is that lying between the low-water mark around the shore of the indentation and a line joining the low-water marks of its natural entrance points. Where, because of the presence of islands, an indentation has more than one mouth, the semi-circle shall be drawn on a line as long as the sum total of the lengths of the lines across the different mouths. Islands within an indentation shall be included as if they were part of the water area of the indentation.

4. If the distance between the low-water marks of the natural entrance points of a bay does not exceed twenty-four miles, a closing line may be drawn between these two low-water marks, and the waters enclosed thereby shall be considered as internal waters.

5. Where the distance between the low-water marks of the natural entrance points of a bay exceeds twenty-four miles, a straight baseline of twenty-four miles shall be drawn within the bay in such a manner as to enclose the maximum area of water that is possible with a line of that length.

6. The foregoing provisions shall not apply to so-called "historic" bays, or in any case where the straight baseline system provided for in article 4 is applied.

Art. 10. 1. An island is a naturally-formed area of land, surrounded by water, which is above water at high-tide.

2. The territorial sea of an island is measured in accordance with the provisions of these articles.

Art. 24. 1. In a zone of the high seas contiguous to its territorial sea, the coastal State may exercise the control necessary to:

- (a) Prevent infringement of its customs, fiscal, immigration or sanitary regulations within its territory or territorial sea;
- (b) Punish infringement of the above regulations committed within its territory or territorial sea.

2. The contiguous zone may not extend beyond twelve miles from the baseline from which the breadth of the territorial sea is measured.

3. Where the coasts of two States are opposite or adjacent to each other, neither of the two States is entitled, failing agreement between them to the contrary, to extend its contiguous zone beyond the median line every point of which is equidistant from the nearest points on the baselines from which the breadth of the territorial seas of the two States is measured.

91

Convention on the Continental Shelf

Genève 1958

Art. 1. For the purpose of these articles, the term "continental shelf" is used as referring (a) to the seabed and subsoil of the submarine areas adjacent to the coast but outside the area of the territorial sea, to a depth of 200 metres or, beyond that limit, to where the depth of the superjacent waters admits of the exploitation of the natural resources of the said areas; (b) to the seabed and subsoil of similar submarine areas adjacent to the coasts of islands.

Art. 2. 1. The coastal State exercises over the continental shelf sovereign rights for the purpose of exploring it and exploiting its natural resources.

2. The rights referred to in paragraph 1 of this article are exclusive in the sense that if the coastal State does not explore the continental shelf or exploit its natural resources, no one may undertake these activities, or make a claim to the continental shelf, without the express consent of the coastal State.

3. The rights of the coastal State over the continental shelf do not depend on occupation, effective or national, or on any express proclamation.

4. The natural resources referred to in these articles consist of the mineral and other non-living resources of the sea-bed and subsoil together with living organisms belonging to sedentary species, that is to say, organisms which, at the harvestable stage, either are immobile on or under the sea-bed or are unable to move except in constant physical contact with the sea-bed or the subsoil.

Art. 3. The rights of the coastal State over the continental shelf do not affect the legalstatus of the superjacent waters as high seas, or that of the airspace above those waters.

Art. 4. Subject to its right to take reasonable measures for the exploration of the continental shelf and the exploitation of its natural resources, the coastal State may not impede the laying or maintenance of submarine cables or pipe lines on the continental shelf.

Art. 5. 1. The exploration of the continental shelf and the exploitation of its natural resources must not result in any unjustifiable interference with navigation, fishing or the conservation of the living resources of the sea, nor result in any interference with fundamental oceanographic or other scientific research carried out with the intention of open publication.

2. Subject to the provisions of paragraphs 1 and 6 of this article, the coastal State is entitled to construct and maintain or operate on the continental shelf installations and other devices necessary for its exploration and the exploitation of its natural resources, and to establish safety zones around such installations and devices and to take in those zones measures necessary for their protection.

3. The safety zones referred to in paragraph 2 of this article may extend to a distance of 500 metres around the installations and other devices which have been erected, measured from each point of their outer edge. Ships of all nationalities must respect these safety zones.

4. Such installations and devices, though under the jurisdiction of the coastal

State, do not possess the status of islands. They have no territorial sea of their own, and their presence does not affect the delimitation of the territorial sea of the coastal State.

5. Due notice must be given of the construction of any such installations, and permanent means for giving warning of their presence must be maintained. Any installations which are abandoned or disused must be entirely removed.

6. Neither the installations or devices, nor the safety zones around them, may be established where interference may be caused to the use of recognized sea lanes essential to international navigation.

7. The coastal State is obliged to undertake, in the safety zones, all appropriate measures for the protection of the living resources of the sea from harmful agents.

8. The consent of the coastal State shall be obtained in respect of any research concerning the continental shelf and undertaken there. Nevertheless, the coastal State shall not normally withhold its consent if the request is submitted by a qualified institution with a view to purely scientific research into the physical or biological characteristics of the continental shelf, subject to the proviso that the coastal State shall have the right, if it so desires, to participate or to be represented in the research and that in any event the results shall be published.

92

Convention on Fishing and Conservation of the Living Resources of the High Seas

Genève 1958

Art. 6. 1. A coastal State has a special interest in the maintenance of the productivity of the living resources in any area of the high seas adjacent to its territorial sea.

Art. 7. 1. Having regard to the provisions of paragraph 1 of article 6, any coastal State may, with a view to the maintenance of the productivity of the living resources of the sea, adopt unilateral measures of conservation appropriate to any stock of fish or other marine resources in any area of the high seas adjacent to its territorial sea, provided that negotiations to that effect with the other States concerned have not led to an agreement within six months.

2. The measures which the coastal State adopts under the previous paragraph shall be valid as to other States only if the following requirements are fulfilled:

- (a) That there is a need for urgent application of conservation measures in the light of the existing knowledge of the fishery;
- (b) That the measures adopted are based on appropriate scientific findings;
- (c) That such measures do not discriminate in form or in fact against foreign fishermen.

3. These measures shall remain in force pending the settlement, in accordance with the relevant provisions of this Convention, of any disagreement as to their validity.

4. If the measures are not accepted by the other States concerned, any of the parties may initiate the procedure contemplated by article 9. Subject to paragraph 2 of article 10, the measures adopted shall remain obligatory pending the decision of the special commission.

5. The principles of geographical demarcation as defined in article 12 of the Convention on the Territorial Sea and the Contiguous Zone shall be adopted when coasts of different States are involved.

Art. 9. 1. Any dispute which may arise between States under articles 4, 5, 6, 7 and 8 shall, at the request of any of the parties, be submitted for settlement to a special commission of five members, unless the parties agree to seek a solution by another method of peaceful settlement, as provided for in Article 33 of the Charter of the United Nations.

93

Convention on International Civil Aviation

CHICAGO 1944

Art. 1. The contracting States recognize that every state has complete and exclusive sovereignty over the airspace above its territory.

Art. 2. For the purpose of this Convention the territory of a state shall be deemed to be the land areas and territorial waters adjacent thereto under the sovereignty, suzerainty, protection or mandate of such state.

94

Fisheries Case

DEN INTERNATIONALE DOMSTOL, DOM, 1951

I. C. J. Reports 1951, 116

[Den 28. september 1949 indgav Storbritannien anmeldelse til den Internationale Domstol om søgsmål mod Norge. Stridens genstand blev heri angivet således: "The subject of the dispute is the validity or otherwise under international law of the lines of delimitation of the Norwegian fisheries zone laid down by the Royal Decree of 1935 for that part of Norway which is situated northward of 66°28,8' North Latitude." Og videre: "... the question at issue between the two Governments is whether the lines prescribed by the Royal Decree of 1935 as the base-lines for the delimitation of the fisheries zone have or have not been drawn in accordance with the applicable rules of international law."

Der blev under proceduren opnået enighed om, (1) at Norge er berettiget til et søterritorium af 4 sømils bredde, og (2) at Norge i kraft af historisk adkomst til fjorde og sunde kan gøre krav på de vandarealer, der ligger mellem øbræmmer og Norges hovedland, enten som indre farvande eller som søterri-

torium. Det var herved præciseret, at striden alene drejede sig om hvorvidt basislíner kan drages uden om den norske skjærgård, og i så fald efter hvilke principper. Det Forenede Kongedømmes påstand blev herefter udformet på den måde, at man først opstillede en række principper herfor, og derefter påstod, at Norge ikke overfor det Forenede Kongedømme er berettiget til at håndhæve krav på vande, der ikke dækkes, når søterritoriet bestemmes i overensstemmelse med de opstillede principper. Den norske regerings påstand lød således:

"Having regard to the fact, that the Norwegian Royal decree of July 12th, 1935, is not inconsistent with the rules of international law binding upon Norway, and

having regard to the fact that Norway possesses, in any event an historic title to all the waters included within the limits laid down by that decree,

May it please the Court,

in one single judgment,

rejecting all submissions to the contrary,

to adjudge and declare that the delimitation of the fisheries zone fixed by the Norwegian Royal Decree of July 12th, 1935, is not contrary to international law."

I det følgende udelades den del af dommen, der refererer sig til spørgsmålet om Norges historiske adkomst.]

[*Domstolen.*] ***The facts which led the United Kingdom to bring the case before the Court are briefly as follows.

The historical facts laid before the Court establish that as the result of complaints from the King of Denmark and of Norway, at the beginning of the seventeenth century, British fishermen refrained from fishing in Norwegian coastal waters for a long period, from 1616—1618 until 1906.

In 1906 a few British fishing vessels appeared off the coasts of Eastern Finnmark. From 1908 onwards they returned in greater numbers. These were trawlers equipped with improved and powerful gear. The local population became perturbed, and measures were taken by the Norwegian Government with a view to specifying the limits within which fishing was prohibited to foreigners.

The first incident occurred in 1911 when a British trawler was seized and condemned for having violated these measures. Negotiations ensued between the two Governments. These were interrupted by the war in 1914. From 1922 onwards incidents recurred. Further conversations were initiated in 1924. In 1932, British trawlers, extending the range of their activities, appeared in the sectors off the Norwegian coast west of the North Cape, and the number of warnings and arrests increased. On July 27th, 1933, the United Kingdom Government sent a memorandum to the Norwegian Government complaining that in delimiting the territorial sea the Norwegian authorities had made use of unjustifiable base-lines. On July 12th, 1935, a Norwegian Royal Decree was enacted delimiting the Norwegian fisheries zone north of 66° 28.8' North latitude.

The United Kingdom made urgent representations in Oslo in the course

of which the question of referring the dispute to the Permanent Court of International Justice was raised. Pending the result of the negotiations, the Norwegian Government made it known that Norwegian fishery patrol vessels would deal leniently with foreign vessels fishing a certain distance within the fishing limits. In 1948, since no agreement had been reached, the Norwegian Government abandoned its lenient enforcement of the 1935 Decree; incidents then became more and more frequent. A considerable number of British trawlers were arrested and condemned. It was then that the United Kingdom Government instituted the present proceedings.

The Norwegian Royal Decree of July 12th, 1935, concerning the delimitation of the Norwegian fisheries zone sets out in the preamble the considerations on which its provisions are based. In this connection it refers to "well-established national titles of right", "the geographical conditions prevailing on the Norwegian coasts", "the safeguard of the vital interests of the inhabitants of the northernmost parts of the country"; it further relies on the Royal Decrees of February 22nd, 1812, October 16th, 1869, January 5th, 1881, and September 9th, 1889.

The Decree provides that "lines of delimitation towards the high sea of the Norwegian fisheries zone as regards that part of Norway which is situated northward of 66° 28.8' North latitude . . . shall run parallel with straight base-lines drawn between fixed points on the mainland, on islands or rocks, starting from the final point of the boundary line of the Realm in the easternmost part of the Varangerfjord and going as far as Træna in the County of Nordland". An appended schedule indicates the fixed points between which the base-lines are drawn.

The subject of the dispute is clearly indicated under point 8 of the Application instituting proceedings: "The subject of the dispute is the validity or otherwise under international law of the lines of delimitation of the Norwegian fisheries zone laid down by the Royal Decree of 1935 for that part of Norway which is situated northward of 66° 28.8' North latitude". And further on: "... the question at issue between the two Governments is whether the lines prescribed by the Royal Decree of 1935 as the base-lines for the delimitation of the fisheries zone have or have not been drawn in accordance with the applicable rules of international law".

Although the Decree of July 12th, 1935, refers to the Norwegian fisheries zone and does not specifically mention the territorial sea, there can be no doubt that the zone delimited by this Decree is none other than the sea area which Norway considers to be her territorial sea. That is how the Parties argued the question and that is the way in which they submitted it to the Court for decision.

The Submissions presented by the Agent of the Norwegian Government correspond to the subject of the dispute as indicated in the Application.

The propositions formulated by the Agent of the United Kingdom Government at the end of his first speech and revised by him at the end of his oral

reply under the heading of "Conclusions" are more complex in character and must be dealt with in detail.

Points 1 and 2 of these "Conclusions" refer to the extent of Norway's territorial sea. This question is not the subject of the present dispute. In fact, the 4-mile limit claimed by Norway was acknowledged by the United Kingdom in the course of the proceedings.

Points 12 and 13 appear to be real Submissions which accord with the United Kingdom's conception of international law as set out under points 3 to 11.

Points 3 to 11 appear to be a set of propositions which, in the form of definitions, principles or rules, purport to justify certain contentions and do not constitute a precise and direct statement of a claim. The subject of the dispute being quite concrete, the Court cannot entertain the suggestion made by the Agent of the United Kingdom Government at the sitting of October 1st, 1951, that the Court should deliver a Judgment, which for the moment would confine itself to adjudicating on the definitions, principles or rules stated, a suggestion which, moreover, was objected to by the Agent of the Norwegian Government at the sitting of October 5th, 1951. These are elements which might furnish reasons in support of the Judgment, but cannot constitute the decision. It further follows that even understood in this way, these elements may be taken into account only in so far as they would appear to be relevant for deciding the sole question in dispute, namely, the validity or otherwise under international law of the lines of delimitation laid down by the 1935 Decree.

Point 14, which seeks to secure a decision of principle concerning Norway's obligation to pay to the United Kingdom compensation in respect of all arrests since September 16th, 1948, of British fishing vessels in waters found to be high seas, need not be considered, since the Parties had agreed to leave this question to subsequent settlement if it should arise.

The claim of the United Kingdom Government is founded on what it regards as the general international law applicable to the delimitation of the Norwegian fisheries zone.

The Norwegian Government does not deny that there exist rules of international law to which this delimitation must conform. It contends that the propositions formulated by the United Kingdom Government in its "Conclusions" do not possess the character attributed to them by that Government. It further relies on its own system of delimitation which it asserts to be in every respect in conformity with the requirement of international law.

The Court will examine in turn these various aspects of the claim of the United Kingdom and of the defence of the Norwegian Government.

The coastal zone concerned in the dispute is of considerable length. It lies north of latitude 66° 28.8' N., that is to say, north of the Arctic Circle, and it includes the coast of the mainland of Norway and all the islands, islets, rocks and reefs, known by the name of the "skjærgaard" (literally, rock rampart), together with all Norwegian internal and territorial waters. The coast of the mainland, which, without taking any account of fjords, bays and

minor indentations, is over 1,500 kilometres in length, is of a very distinctive configuration. Very broken along its whole length, it constantly opens out into indentations often penetrating for great distances inland: the Porsangerfjord, for instance, penetrates 75 sea miles inland. To the west, the land configuration stretches out into the sea: the large and small islands, mountainous in character, the islets, rocks and reefs, some always above water, others emerging only a low tide, are in truth but an extension of the Norwegian mainland. The number of insular formations, large and small, which make up the "skjærgaard", is estimated by the Norwegian Government to be one hundred and twenty thousand. From the southern extremity of the disputed area to the North Cape, the "skærgaard" lies along the whole of the coast of the mainland; east of the North Cape, the "skjærgaard" ends, but the coast line continues to be broken by large and deeply indented fjords.

Within the "skjærgaard", almost every island has its large and its small bays; countless arms of the sea, straits, channels and mere waterways serve as a means of communication for the local population which inhabits the islands as it does the mainland. The coast of the mainland does not constitute, as it does in practically all other countries, a clear dividing line between land and sea. What matters, what really constitutes the Norwegian coast line, is the outer line of the "skjærgaard".

The whole of this region is mountainous. The North Cape, a sheer rock little more than 300 metres high, can be seen from a considerable distance; there are other summits rising to over a thousand metres, so that the Norwegian coast, mainland and "skjærgaard", is visible from far off.

Along the coast are situated comparatively shallow banks, veritable underwater terraces which constitute fishing grounds where fish are particularly abundant; these grounds were known to Norwegian fishermen and exploited by them from time immemorial. Since these banks lay within the range of vision, the most desirable fishing grounds were always located and identified by means of the method of alignments ("*meds*"), at points where two lines drawn between points selected on the coast or on islands intersected.

In these barren regions the inhabitants of the coastal zone derive their livelihood essentially from fishing.

Sush are the realities which must be borne in mind in appraising the validity of the United Kingdom contention that the limits of the Norwegian fisheries zone laid down in the 1935 Decree are contrary to international law.

The Parties being in agreement on the figure of 4 miles for the breadth of the territorial sea, the problem which arises is from what base-line this breadth is to be reckoned. The Conclusions of the United Kingdom are explicit on this point: the base-line must be low-water mark on permanently dry land which is a part of Norwegian territory, or the proper closing line of Norwegian internal waters.

The Court has no difficulty in finding that, for the purpose of measuring the breadth of the territorial sea, it is the low-water mark as opposed to the high-water mark, or the mean between the two tides, which has generally been adopted in the practice of States. This criterion is the most favourable to the

coastal State and clearly shows the character of territorial waters as appurtenant to the land territory. The Court notes that the Parties agree as to this criterion, but that they differ as to its application.

The Parties also agree that in the case of a low-tide elevation (drying rock) the outer edge at low water of this low-tide elevation may be taken into account as a base-point for calculating the breadth of the territorial sea. The Conclusions of the United Kingdom Government add a condition which is not admitted by Norway, namely, that, in order to be taken into account, a drying rock must be situated within 4 miles of permanently dry land. However, the Court does not consider it necessary to deal with this question, inasmuch as Norway has succeeded in proving, after both Parties had given their interpretation of the charts, that in fact none of the drying rocks used by her as base point is more than 4 miles from permanently dry land.

The Court finds itself obliged to decide whether the relevant low-water mark is that of the mainland or of the "skjærgaard". Since the mainland is bordered in its western sector by the "skjærgaard", which constitutes a whole with the mainland, it is the outer line of the "skjærgaard" which must be taken into account in delimiting the belt of Norwegian territorial waters. This solution is dictated by geographic realities.

Three methods have been contemplated to effect the application of the low-water mark rule. The simplest would appear to be the method of the *tracé parallèle*, which consists of drawing the outer limit of the belt of territorial waters by following the coast in all its sinuosities. This method may be applied without difficulty to an ordinary coast, which is not too broken. Where a coast is deeply intended and cut into, as is that of Eastern Finnmark, or where it is bordered by an archipelago such as the "skjærgaard" along the western sector of the coast here in question, the base-line becomes independent of the low-water mark, and can only be determined by means of a geometric construction. In such circumstances the line of the low-water mark can no longer be put forward as a rule requiring the coast line to be followed in all its sinuosities; nor can one speak of exceptions when contemplating so rugged a coast in detail. Such a coast, viewed as a whole, calls for the application of a different method. Nor can one characterize as exceptions to the rule the very many derogations which would be necessitated by such a rugged coast. The rule would disappear under the exceptions.

It is true that the experts of the Second Sub-Committee of the Second Committee of the 1930 Conference for the codification of international law formulated the low-water mark rule somewhat strictly ("following all the sinuosities of the coast"). But they were at the same time obliged to admit many exceptions relating to bays, islands near the coast, groups of islands. In the present case this method of the *tracé parallèle*, which was invoked against Norway in the Memorial, was abandoned in the written Reply, and later in the oral argument of the Agent of the United Kingdom Government. Consequently, it is no longer relevant to the case. "On the other hand", it is said in the Reply, the *courbe tangente*—or, in English, 'envelopes of arcs of circles'—method is the method which the United Kingdom considers to be the correct one".

The arcs of circles method, which is constantly used for determining the position of a point or object at sea, is a new technique in so far as it is a method for delimiting the territorial sea. This technique was proposed by the United States delegation at the 1930 Conference for the codification of international law. Its purpose is to secure the application of the principle that the belt of territorial waters must follow the line of the coast. It is not obligatory by law, as was admitted by Counsel for the United Kingdom Government in his oral reply. In these circumstances, and although certain of the Conclusions of the United Kingdom are founded on the application of the arcs of circles method, the Court considers that it need not deal with these Conclusions in so far as they are based upon this method.

The principle that the belt of territorial waters must follow the general direction of the coast makes it possible to fix certain criteria valid for any delimitation of the territorial sea; these criteria will be elucidated later. The Court will confine itself at this stage to noting that, in order to apply this principle, several States have deemed it necessary to follow the straight base-lines method and that they have not encountered objections of principle by other States. This method consists of selecting appropriate points on the low-water mark and drawing straight lines between them. This has been done, not only in the case of well-defined bays, but also in cases of minor curvatures of the coast line where it was solely a question of giving a simpler form to the belt of territorial waters.

It has been contended, on behalf of the United Kingdom, that Norway may draw straight lines only across bays. The Court is unable to share this view. If the belt of territorial waters must follow the outer line of the "skjærgaard", and if the method of straight base-lines must be admitted in certain cases, there is no valid reason to draw them only across bays, as in Eastern Finnmark, and not also to draw them between islands, islets and rocks, across the sea areas separating them, even when such areas do not fall within the conception of a bay. It is sufficient that they should be situated between the island formations of the "skjærgaard", *inter fauces terrarum*.***

The Court now comes to the question of the length of the base-lines drawn across the waters lying between the various formations of the "skjærgaard". Basing itself on the analogy with the alleged general rule of ten miles relating to bays, the United Kingdom Government still maintains on this point that the length of straight lines must not exceed ten miles.

In this connection, the practice of States does not justify the formulation of any general rule of law. The attempts that have been made to subject groups of islands or coastal archipelagoes to conditions analogous to the limitations concerning bays (distance between the islands not exceeding twice the breadth of the territorial water, or ten or twelve sea miles), have not got beyond the stage of proposals.

Furthermore, apart from any question of limiting the lines to ten miles, it may be that several lines can be envisaged. In such cases the coastal State would seem to be in the best position to appraise the local conditions dictating the selection.***

Thus the Court, confining itself for the moment to the Conclusions of

the United Kingdom, finds that the Norwegian Government in fixing the base-lines for the delimitation of the Norwegian fisheries zone by the 1935 Decree has not violated international law.

It does not at all follow that, in the absence of rules having the technically precise character alleged by the United Kingdom Government, the delimitation undertaken by the Norwegian Government in 1935 is not subject to certain principles which make it possible to judge as to its validity under international law. The delimitation of sea areas has always an international aspect; it cannot be dependent merely upon the will of the coastal State as expressed in its municipal law. Although it is true that the act of delimitation is necessarily a unilateral act, because only the coastal State is competent to undertake it, the validity of the delimitation with regard to other States depends upon international law.

In this connection, certain basic considerations inherent in the nature of the territorial sea, bring to light certain criteria which, though not entirely precise, can provide courts with an adequate basis for their decisions, which can be adapted to the diverse facts in question.

Among these considerations, some reference must be made to the close dependence of the territorial sea upon the land domain. It is the land which confers upon the coastal State a right to the waters off its coasts. It follows that while such a State must be allowed the latitude necessary in order to be able to adapt its delimitation to practical needs and local requirements, the drawing of base-lines must not depart to any appreciable extent from the general direction of the coast.

Another fundamental consideration, of particular importance in this case, is the more or less close relationship existing between certain sea areas and the land formations which divide or surround them. The real question raised in the choice of base-lines is in effect whether certain sea areas lying within these lines are sufficiently closely linked to the land domain to be subject to the regime of internal waters. This idea, which is at the basis of the determination of the rules relating to bays, should be liberally applied in the case of a coast, the geographical configuration of which is as unusual as that of Norway.

Finally, there is one consideration not to be overlooked, the scope of which extends beyond purely geographical factors: that of certain economic interests peculiar to a region, the reality and importance of which are clearly evidenced by a long usage.***

[I et senere afsnit af dommen undersøges, hvorvidt de ved den kongelige resolution af 12. juli 1935 fastlagte basislinier i det enkelte tilfælde er trukne i overensstemmelse med disse principper. Spørgsmålet besvares bekræftende. I domskonklusionen statueres det

med 10 stemmer mod 2:

“that the method employed for the delimitation of the fisheries zone by the Royal Norwegian Decree of July 12th, 1935, is not contrary to international law”, og

med 8 stemmer mod 4:

“that the base-lines fixed by the said Decree in application of this method are not contrary to international law”.]

95

Nogle danske lovbestemmelser om søterritoriets udstrækning og tilstødende zone

1. *Lov om saltvandsfiskeri* nr. 500 af 19. december 1951 § 13 (4) omtaler “den 3-sømilegrænse, der for fiskeriets vedkommende hævdes som grænse for dansk søterritorium”.

2. *Toldloven*, lbkg. nr. 156 af 12. april 1960.

§ 5 (1). Toldområdet omfatter de danske landområder og indre territoriale vande samt ydre territoriale farvande i en afstand af 4 sømil (7408 m) fra kystlinien eller fra sådanne rette basislinier, som er eller måtte blive fastsat i overensstemmelse med folkerettens regler.

3. *Anordning nr. 156 af 24. april 1963 om ændring i anordning om fiskeripolitiet i havet omkring Færøerne*.

§ 1 [1]. Den grænse, indenfor hvilken alene færinger og andre danske statsborgere skal være berettiget til at drive fiskeri, er en linie 12 sømil fra de i stk. 2 beskrevne basislinier, trukket som vist på det som bilag til nærværende anordning vedføjede kort.

4. *Anordning nr. 191 af 27. maj 1963 om afgrænsningen af søterritoriet ved Grønland*.

§ 1. Grønlands søterritorium udgøres af indre og ydre territorielt farvand.

Stk. 2. Det ydre territoriale farvand omfatter de områder af havet, som indtil er begrænset af de i § 2 nævnte linier og udadtil er begrænset af linier trukket således, at afstanden fra ethvert punkt af den indre grænselinie er 3 sømil (5.556 m).

Stk. 3. Det indre territoriale farvand omfatter de vandområder, som havne, havneindløb, rede, bugter, fjorde, sunde, bælder og andet farvand, der er beliggende inden for de i § 2 nævnte linier.

§ 2. De linier, som i henhold til § 1 lægges til grund ved fastsættelsen af grænserne for ydre og indre territoriale farvande, består af kystlinien (lavtvandsmærket ved middelspringtid) eller af rette linier mellem følgende punkter***

96

Kgl. anordning nr. 356 af 25. juli 1951 om fremmede krigsskibes og militære luftfartøyers adgang til dansk område under fredsf forhold

Se nedenfor sag nr. 147

Regina v. Anderson

STORBRITANNIEN, COURT OF CRIMINAL APPEAL, 1868
11 Cox's Criminal Cases 198

[*Domstolen.*] James Anderson, an American citizen, was indicted for murder on board a vessel, belonging to the port of Yarmouth in Nova Scotia. She was registered in London, and was sailing under the British flag.

At the time of the offense committed the vessel was in the river Garonne, within the boundaries of the French Empire, on the way up to Bordeaux, which city is by the course of the river about ninety miles from the open sea. The vessel had proceeded about half-way up the river, and was at the time of the offense about three hundred yards from the nearest shore, the river at that place being about half a mile wide. The tide flows up to the place and beyond it. No evidence was given whether the place was or was not within the limits of the port of Bordeaux.

It was objected for the prisoner that the offense having been committed within the Empire of France, the vessel being a colonial vessel, and the prisoner an American citizen, the court had no jurisdiction to try him.*** The prisoner was convicted of manslaughter.

[*Bovill, C. J.*] There is no doubt that the place where the offence was committed was within the territory of France, and that the prisoner was therefore subject to the laws of France, which the local authorities of that realm might have enforced if so minded; but at the same time, in point of law, the offence was also admitted within British territory, for the prisoner was a seaman on board a merchant vessel, which, as to her crew and master, must be taken to have been at the time under the protection of the British flag, and, therefore, also amenable to the provisions of the British law. It is true that the prisoner was an American citizen, but he had with his own consent embarked on board a British vessel as one of the crew. Although the prisoner was subject to the American jurisprudence as an American citizen, and to the law of France as having committed an offence within the territory of France, yet he must also be considered as subject to the jurisdiction of British law, which extends to the protection of British vessels, though in ports belonging to another country. From the passage in the treatise of Ortolan, it appears that, with regard to offences committed on board of foreign vessels within the French territory, the French nation will not assert their police law unless invoked by the master of the vessel, or unless the offence leads to a disturbance of the peace of the port; and several instances where that course was adopted are mentioned.***

In the present case, if it were necessary to decide the question on the 17 & 18 Vict. c. 104, I should have no hesitation in saying that we now not only legislate for British subjects on board of British vessels, but also for all those who form the crews thereof, and that there is no difficulty in so construing the statute; but it is not necessary to decide that point now. Independently of that statute, the general law is sufficient to determine this case. Here the offence

was committed on board a British vessel by one of the crew, and it makes no difference whether the vessel was within a foreign port or not. If the offence had been committed on the high seas it is clear that it would have been within the jurisdiction of the admiralty, and the Central Criminal Court has now the same extent of jurisdiction. Does it make any difference because the vessel was in the river Garonne half-way between the sea and the head of the river? The place where the offence was committed was in a navigable part of the river below bridge, and where the tide ebbs and flows, and great ships do lie and hover. An offence committed at such a place, according to the authorities, is within the admiralty jurisdiction, and it is the same as if the offence had been committed on the high seas. On the whole I come to the conclusion that the prisoner was amenable to the British law, and that the conviction was right.***

Conviction affirmed.

C. ERHVERVELSE OG FORTABELSE AF TERRITORIUM

98

The Fama

STORBRITANNIEN, HIGH COURT OF ADMIRALTY, 1804
5 C. Rob. Adm. 106

Se ovenfor sag nr. 86.

99

Schwerdtfeger mod den danske regering ("Rønhavedommen")

DANMARK, HØJESTERET, 1923
U. f. R. 1924, 64

[*Østre Landsret.*] Ved den ved Parisertraktaten af 5. juli 1920 skete overdragelse til Danmark af suveræniteten over de sønderjyske landsdele fra den 15. juni s. å. at regne overgik til den danske stat — i overensstemmelse med art. 256 i Versailles-traktaten af 28. juni 1919 — de i landsdelene liggende, hidtil præjssiske statsdomæner, herunder 36 domænegårde, der var blevet opkøbt af den præjssiske stat i løbet af årene 1897—1916, og som af den var blevet bortforpagtet, som regel for en forpagtningsperiode af 18 år. Af disse gårde var Rønhave på Als ved kontrakt af 4./27. april 1905 bortforpagtet til sagsøgeren under nærværende sag, O. Schwerdtfeger, for tiden fra 1. juli 1904 til 1. juli 1922 for en forpagtningsafgift, der for tiden fra 1. juli 1910 til 1. juli 1922 var fastsat til 21,600 mark årlig.

Da det efter afslutningen af våbenstilstanden den 11. november 1918 mellem Tyskland og de allierede og associerede magter og under de påfølgende

fredsforhandlinger var at forudse, at Als ville overgå til Danmark, og da sagsøgeren meget ønskede forpagtningen af Rønhave fornyet efter dens udløb i 1922, men befrygtede, at dette ikke ville ske, når domænen var overgået i den danske stats eje, rettede han henvendelse om forpagtningens fornyelse til den prøjsiske domæneforvaltning, og ved skrivelse af 21. juni 1919 bemyndigede det prøjsiske landbrugsministerium regeringen i Slesvig til at slutte kontrakt med sagsøgeren om en sådan fornyelse for tiden fra 1. juli 1922 til 30. juni 1940 mod en til 33,000 mark forhøjet årlig forpagtningsafgift. Herom oprettedes der den 10./22. juli 1919 skriftlig kontrakt mellem regeringen i Slesvig og sagsøgeren.

Efter suverænitetens overgang til Danmark har det danske landbrugsministerium, under hvilket bestyrelsen af domænerne blev henlagt, ikke villet anerkende gyldigheden af denne fornyelseskontrakt, og sagsøgeren påstår nu den danske regering dømt til at anerkende kontrakten som bindende, forsåvidt angår tidsrummet fra 1. juli 1922 til 30. juni 1923, medens den danske regering påstår sig frifundet. Der er mellem parterne enighed om at betragte sagens udfald som afgørende også for resten af forpagtningstiden.

Sagsøgeren har oplyst, at Rønhave i sin tid har tilhørt hans fader, efter hvis død den i 1904 af enken blev solgt til den prøjsiske stat, og at der under salgsforhandlingerne af den prøjsiske regerings repræsentant blev givet tilsagn om, at gården såvidt muligt skulle blive bevaret for familien Schwerdtfeger ved at blive overladt sønnen i forpagtning. — Til støtte for sin påstand har sagsøgeren iøvrigt gjort gældende, at spørgsmålet om forpagtningskontraktens gyldighed må afgøres efter almindelige privatretlige regler, idet statens forhold til dens domæner må betragtes som en privat ejendomsret og ikke som udslag af statens højhedsret. Ved landafståelser efter fredsslutninger er det almindelig anerkendt, at private formuerettigheder, der knytter sig til de afståede landsdele, ikke berøres af de ændrede statsretlige forhold. Den prøjsiske regering var, da den den 21. juni 1919 indgik på at forny forpagtningskontrakten rette ejer af domænen, og den nye kontrakt må derfor efter sagsøgerens formening efter det stedfundne ejerskifte være bindende for den danske stat som ny ejer.

I disse betragtninger kan der ikke gives sagsøgeren medhold. Den danske stats adkomst til de sønderjyske domæner er ikke af privatretlig, men af folkeretlig oprindelse, idet den ikke støtter sig på en privatretlig erhvervelse, men på Tysklands traktatmæssige afståelse af domænerne til de allierede og associerede magter og disse magters traktatmæssige overdragelse af domænerne til den danske stat. De i tysk eller dansk ret gældende regler om en forpagters retsstilling overfor den, der med privatretlig adkomst erhverver den bortforpagtede ejendom, lader sig derfor ikke uden videre anvende i et tilfælde som det foreliggende.

Selv om det nu i vidt omfang må antages, at tidligere stiftede brugsrettigheder over domænegodset skal respekteres også i tilfælde af ejerskifte på folkeretligt grundlag, vil dette efter sagens natur i hvert fald ikke kunne statueres med hensyn til brugsrettigheder, der med et som nær forestående forudset folkeretligt ejerskifte for øje er stiftet netop med det formål at sikre brugeren på bekostning af den senere ejers fri rådighed og som derfor ville være egnet

til at tilintetgøre eller svække betydningen af den forestående folkeretlige erhvervelse. Da denne betragtning er anvendelig på den heromhandlede forpagtningskontrakt og idet bemærkes, at den danske regering ved slutprotokollen vedrørende undertegnelsen af traktaten mellem Danmark og Tyskland angående de som følge af suverænitetsens overgang opståede spørgsmål har forbeholdt sig at være frit stillet med hensyn til spørgsmålet om indtrædelse bl. a. i den heromhandlede kontrakt, vil sagsøgte være at frifinde, medens sagens omkostninger efter omstændighederne findes at burde ophæves.***

[Højesteret stadfæstede dommen i henhold til dens grunde.]

100

The Foltina

STORBRITANNIEN, HIGH COURT OF ADMIRALTY, 1814

J. Dodson 450

Se ovenfor sag nr. 93.

101

Østgrønlands retsstilling

DEN FASTE DOMSTOL FOR MELLEMFOLKELIG RETSPLEJE, DOM, 1933

P. C. I. J., Series A/B, no. 53

[Domstolen.] Ved stævning, som i overensstemmelse med statuternes art. 40 og reglementets art. 35 den 12. juli 1931 blev indleveret til domstolens retsskriverkontor, har den kgl. danske regering under henvisning til den valgfri bestemmelse i statuternes art. 36, 2. stk. indstævnet den kgl. norske regering for Den faste Domstol for mellemfolkelig Retspleje på grund af, at den norske regering den 10. juli 1931 udstedte en proklamation, gående ud på, at den nævnte regering havde foretaget okkupation af visse områder i Østgrønland, som den danske regering anså for undergivet den danske krones suverænitet.***

I sit indlæg har den danske regering i overensstemmelse med reglementets art. 40 nedlagt følgende allerede i stævningen indeholdte påstand:

“At det kendes for ret,

at udstedelsen af den ovennævnte okkupationserklæring og alle i denne henseende af den norske regering tagne forholdsregler udgør en krænkelse af den bestående retstilstand og derfor er retsstridige og ugyldige”.

I henhold til samme artikel i reglementet har den norske regering i sit modindlæg nedlagt følgende påstand:

“At det kendes for ret,

at Danmark ikke har suveræniteten over Erik Raudes land;

at Norge har erhvervet suveræniteten over Erik Raudes land;

at det pålægges den danske regering at udrede de omkostninger, der pådrages den norske regering ved denne retssag”.***

Den danske hovedpåstand i den skriftlige procedure om, at den norske okkupation af 10. juli 1931 er ugyldig, støttes på den opfattelse, at det okkuperede område i okkupationsejeblikket var underkastet dansk suverænitet, at området er en del af Grønland, og at i okkupationsejeblikket Danmarks suverænitet omfattede hele Grønland, så at området følgelig ikke kunne okkuperes af nogen magt.

Til støtte for denne påstand hævder Danmark to ting: for det første, at Danmarks nuværende suverænitet over Grønland er af gammel dato og er blevet udøvet uafbrudt og fredeligt og indtil den nuværende konflikt ikke er blevet bestridt af nogen magt. Dette vil Danmark godtgøre som en kendsgerning. For det andet, at Norge ved traktat og på anden måde selv har anerkendt den danske suverænitet over Grønland som helhed og derfor ikke nu kan bestride den.

De norske hovedpåstande går ud på, at Danmark ikke har suveræniteten over det område, som Norge okkuperede den 10. juli 1931, og at området i okkupationsejeblikket var *terra nullius*. Norge hævder, at området lå uden for grænserne for de danske kolonier i Grønland, og at den danske suverænitet ikke strakte sig videre end til disse koloniernes grænser.

Der er også blevet fremsat andre påstande under proceduren.

Fra dansk side gøres det gældende, at det tilsagn, som den norske udenrigsminister i 1919 på sin regerings vegne gav den danske diplomatiske repræsentant i Christiania, afskar Norge fra at foretage okkupation af noget område i Grønland, selvom Norge ikke på anden måde havde anerkendt en bestående dansk suverænitet der.

I denne forbindelse har Danmark anført forskellige andre forpligtelser, som Norge har påtaget sig, f. eks. de internationale aftaler, som det nævnte land har indgået om fredelig bilæggelse af dets stridigheder med andre lande i almindelighed og med Danmark i særdeleshed.

Fra norsk side har man hævdet, at den holdning, som Danmark indtog mellem 1915 og 1921, da det rettede henvendelser til forskellige magter for at opnå anerkendelse af sin stilling i Grønland, ikke kan forenes med påstanden om, at Danmark allerede havde suveræniteten over hele Grønland, og at Danmark derfor nu er afskåret fra at påberåbe sig en fra gammel tid bestående suverænitet over hele landet.

De to af den danske regering hævdede hovedargumenter vil blive undersøgt hver for sig.

I.

Det første danske argument går ud på, at den norske okkupation af en del af Grønlands østkyst er ugyldig, fordi Danmark gennem lange tider har gjort krav på og udøvet suveræne rettigheder over Grønland som helhed og derved erhvervet en gyldig suverænitetsadkomst. Det tidspunkt, på hvilket en dansk suverænitet må have bestået for at gøre den norske okkupation ugyldig, er den dag, på hvilken okkupationen fandt sted, nemlig den 10. juli 1931.

Det danske krav støttes ikke på nogen bestemt okkupationshandling, men påberåber sig en adkomst, der — for at benytte udtrykket i Den faste Voldgifts-

rets kendelse af 4. april 1928 om øen Palmas — "støttes på den fredelige og uafbrudte udfoldelse af statsmyndighed over øen". Det hviler på det synspunkt, at Danmark nu sidder inde med alle de rettigheder, som kongen af Danmark og Norge havde over Grønland indtil 1814. Disse rettigheders eksistens og udstrækning må derfor tages i betragtning ved siden af det danske suverænitetsskrav efter det nævnte tidspunkt.

Det må imidlertid erindres, at da det kritiske tidspunkt er den 10. juli 1931, er det ikke nødvendigt, at suveræniteten over Grønland skal have bestået gennem hele det tidsrum, i hvilket den af den danske regering hævdes at foreligge. Selvom det bevismateriale, der er forelagt domstolen, måtte anses for utilstrækkeligt til at godtgøre, at denne suverænitet bestod i de ældste tider, ville dette ikke være til hinder for at fastslå, at bevismaterialet er tilstrækkeligt til at godtgøre en gyldig adkomst i det tidsrum, der gik umiddelbart forud for okkupationen.

Inden de domstolen forelagte beviser undersøges nærmere, kan det være på sin plads at fastslå, at et suverænitetsskrav, der ikke hviler på nogen bestemt handling eller adkomst, såsom en overdragelsestraktat, men blot på fortsat myndighedsudøvelse, indeholder to bestanddele, som begge må bevises at foreligge, nemlig hensigten eller viljen til at handle som suveræn og nogen faktisk udøvelse eller udfoldelse af sådan myndighed.

En anden omstændighed, som må tages i betragtning af enhver ret, der skal pådømme et suverænitetsskrav angående et bestemt område, er det omfang, i hvilket en anden magt også gør krav på suveræniteten. I de fleste af de sager om territorialhøjhed, der hidtil har foreligget for en international domstol, har der været to konkurrerende suverænitetsskrav, og retten har så måttet afgøre, hvilket af de to krav, der var bedst begrundet. Et af de karakteristiske træk ved den foreliggende sag er, at indtil 1931 har ingen anden magt end Danmark gjort krav på suveræniteten over Grønland. Ja, indtil 1921 har ingen magt bestridt det danske suverænitetsskrav.

Man kan ikke undersøge de tidligere afgørelser i sager om territorialhøjhed uden at lægge mærke til, at vedkommende domstol i mange tilfælde har ladet sig nøje med meget lidt i retning af faktisk udøvelse af højhedsrettigheder, forudsat at den anden stat ikke kunne godtgøre et bedre krav. Dette gælder navnlig om krav på suveræniteten over områder i tyndt befolkede lande og i lande uden fast bebyggelse.***

[Herefter går domstolen over til at undersøge omfanget af dansk suverænitetssudøvelse i forskellige tidsafsnit. Heraf citeres:

a. vedrørende det 18. århundrede:] Efter grundlæggelsen af Hans Egedes kolonier i 1721 er højhedsrettigheder blevet udøvet og tilkendegivet i det mindste i en del af Grønland. Følgelig forelå de elementer, der udkræves til at skabe en gyldig suverænitetssadkomst, nemlig viljen og dens udøvelse, men spørgsmålet er nu, hvor langt virkningen af disse elementer strakte sig.

Kongens suverænitetssfordring på den tid, da kolonierne blev grundlagt, er tilstrækkelig til at bevise, at hensigten eller viljen forelå, og som ovenfor sagt var disse krav ikke begrænset til nogen bestemt del af landet.

Men var udøvelsen af højhedsrettigheder tilstrækkelig til at skabe en gyldig

suverænitésadkomst til hele landet? Da kolonierne blev grundlagt, udstedtes et monopol på handelen, og inden længe blev det anset for nødvendigt at give lovbestemmelser for at beskytte monopolet og sikre dets overholdelse. I de gamle plakater fra 1740—1751, som udstedtes, da Jacob Severin var monopolindehaver, var handelsforbudet begrænset til kolonierne, men disse plakater indeholdt også et forbud mod mishandling af grønlanderne, og dette var ikke begrænset til kolonierne, men gjaldt i Grønland som helhed. Desuden skulle handelsforbudet gælde ikke blot i de daværende kolonier, men i alle, som måtte blive oprettet i fremtiden. Lovgivning er en af de klareste former for udøvelse af suverænitetsmyndighed, og det er klart, at gennemførelsen af disse bestemmelser ikke var begrænset til kolonierne. Heraf følger, at den suverænitet, i kraft af hvilken lovbestemmelserne blev udstedt, ikke kan have været indskrænket til kolonierne.***

[b. vedrørende det 19. århundrede:] Når disse kendsgerninger ses i forbindelse med de danske lovbestemmelser, der var udstedt som gældende for Grønland i almindelighed, med de talrige traktater, i hvilke Danmark med den anden kontraherende parts tilslutning har truffet bestemmelse om, at traktaten ikke skal gælde for Grønland i almindelighed, og når det tages i betragtning, at ingen anden magt havde fremsat nogetsomhelst krav på suveræniteten over Grønland, må Danmark anses for i dette tidsrum fra 1814 til 1915 at have udøvet sin myndighed over den ikke-koloniserede del af landet i tilstrækkeligt omfang til at skabe en gyldig suverænitésadkomst.***

[c. vedrørende tiden 1921—1931:] I tidsrummet efter at den danske regering havde udstedt den ovenfor omtalte bekendtgørelse af 10. maj 1921, fandt der en væsentlig forøgelse sted af den danske regerings virksomhed på Grønlands østkyst.

Denne bekendtgørelse efterfulgtes af bekendtgørelsen af 16. juni s. å. om besejlingen af havet omkring Grønland, hvori det fastsættes, at samtlige de til Grønland hørende kyster og øer er lukket for danske og fremmede skibe. Skønt denne strenge forholdsregel blev lempet, da overenskomsten af 1924 blev sluttet, er det stadig reglen, at al skibsfart er forbudt, medmindre der gives adgang ved traktat, bekendtgørelse eller særlig tilladelse.

I 1925 blev der udstedt lovbestemmelser til ordning af jagt, fangst og fiskeri, og samme år blev Grønland inddelt i tre landsdele ved en lov, som forbeholdt den danske stat al handelsvirksomhed.

Denne lovgivning om jagt, fangst og fiskeri og loven om landets inddeling i landsdele fortjener at bemærkes, ligesom den adgang, som franske og britiske statsborgere fik til mestbegunstigelsesbehandling i Østgrønland i henhold til noter, der i 1925 blev udvekslet mellem Danmark og den britiske og den franske regering.

I alle disse tilfælde udøvede Danmark regeringsfunktioner med hensyn til det nu omstridte territorium.

Disse danske statshandlinger ændrer ikke karakter ved de protester eller forbehold, som den norske regering fra tid til anden fremsatte.

De nævnte statshandlinger sammen med de danske statsstøttede jagt-ekspeditioners virksomhed, det stigende antal videnskabelige ekspeditioner,

som med regeringens tilladelse og støtte var i færd med at kortlægge og udforske landet — selvom disse ekspeditioner måtte have været udrustet af ikke-officielle institutioner — endvidere det staten tilhørende skib *Godthaabs* gentagne udsendelse til Østgrønland på ekspeditionstjeneste under midlertidig kommando af en søofficer, og endelig de danske myndigheders udstedelse af adgangstilladelser, i overensstemmelse med de i 1920 fastsatte regler, til personer, der besøgte østkysten, alt dette godtgør på tilstrækkelig måde, selvom man ser bort fra de foregående tidsrums historie, de to bestanddele, der kræves til at skabe en gyldig suverænitetsadkomst, nemlig hensigten og viljen til at udøve sådan suverænitet og det ydre udtryk for statsvirksomhed.

Skønt Norge undertegnede overenskomsten af 1924, som senere må omtales igen, på det grundlag, at det fastholdt sit synspunkt med hensyn til Østgrønlands retlige stilling (*terra nullius*) og at overenskomstens indgåelse ikke præjudicerede dette synspunkt, så afskærer overenskomsten ikke Danmark fra at opretholde sit synspunkt, nemlig at Danmark havde ret til og faktisk også besad suveræniteten over hele Grønland. Overenskomsten afskærer heller ikke Danmark fra at godtgøre, at de bestanddele, som udkræves til et gyldigt suverænitetskrav, begges forelå.

Bortset fra den redaktionelle forandring, at udtrykket "Grønlands område" anvendes hyppigere end "Grønland", bestemmer de af Danmark i dette tidsrum indgåede handelstraktater stadig, at traktaten fra dansk side ikke skal anvendes på Grønland, hvilket viser, at de stater, Danmark sluttede disse traktater med, ikke ville bestride dets krav på at være herre over det område, som traktaten betegner som Grønland. Ligesom det er tilfældet for de forudgående tidsrums vedkommende, påhviler det Norge at bevise, at ordet "Grønland" i disse traktater er brugt i en særlig betydning, som ikke omfattende den ukoloniserede del af østkysten, men efter domstolens mening har Norge ikke ført bevis for, at det forholder sig således.

Selvom tidsrummet fra 1921 til 10. juli 1931 tages for sig uden forbindelse med de forudgående tidsrum, er domstolen kommet til det resultat, at Danmark i dette tidsrum anså sig selv for indehaver af suveræniteten over hele Grønland og udfoldede og udøvede sine højhedsrettigheder i tilstrækkeligt omfang til at skabe en gyldig suverænitetsadkomst. Når dette tidsrum ses i sammenhæng med kendsgerningerne i de foregående, bekræftes og bestyrkes sagen til gunst for Danmark.

Af ovenstående fremgår, at det efter domstolens mening er lykkedes Danmark at godtgøre sin påstand om, at det på det kritiske tidspunkt, nemlig den 10. juli 1931, sad inde med en gyldig adkomst til suveræniteten over hele Grønland.

Dette resultat er i sig selv tilstrækkelig grund til at afgøre, at okkupationen af 10. juli 1931 og alle af den norske regering i denne henseende tagne forholdsregler var retsstridige og ugyldige.***

II.

Domstolen vil nu undersøge den anden danske hovedpåstand, ifølge hvilken Norge har givet visse forpligtende tilsagn, der anerkendte den danske suve-

rænitet over hele Grønland. Disse forpligtelser er blevet udførligt drøftet af de to parter, og i tre tilfælde mener domstolen, at sådanne tilsagn blev givet.***

[Af de tre tilfælde udelades de to første.]

3. Foruden de ovenfor omhandlede forpligtelser må Ih lens erklæring, d. v. s. det svar, som den norske udenrigsminister Ih len den 22. juli 1919 gav den danske gesandt, også tages i betragtning.

De danske advokater har lagt denne Ih lens erklæring til grund som en anerkendelse af en bestående dansk suverænitet i Grønland. Domstolen kan ikke slutte sig til dette synspunkt. En omhyggelig undersøgelse af de benyttede udtryk og af de omstændigheder, under hvilke de blev brugt, såvel som af de senere begivenheder viser, at Ih len ikke kan have tilsigtet på stående fod at give en endelig anerkendelse af den danske suverænitet over Grønland og endvidere, at den daværende danske regering ikke kan have opfattet erklæringen således. I teksten til Ih lens af den norske regering fremlagte referat, der ikke er blevet bestridt af den danske regering, er den af Ih len anvendte sætning affattet i fremtidig form: "ikke vilde gøre vanskeligheder"; det var blevet ham meddelt, at det var på fredskonferencen, at den danske regering havde i sinde at rejse spørgsmålet, og to år senere — da den danske regering havde modtaget anerkendelseserklæringerne fra de allierede hovedmagter — henvendte den sig igen til den norske regering for at få den ønskede anerkendelse af Danmarks suverænitet over hele Grønland.

Ikke desmindre må det nu undersøges, om Ih lens erklæring — selvom den ikke udgør en endelig anerkendelse af den danske suverænitet — ikke var et tilsagn, der forpligtede Norge til at afholde sig fra at okkupere nogen del af Grønland.

Ih len har gjort rede for den danske henvendelse og sit svar i et referat, der lyder således:

"I. Den danske minister meddelte mig idag at hans regering havde faat underretning fra Paris om at Spitsbergenspørgsmålet vilde bli behandlet av en kommission paa 4 medlemmer (amerikansk, britisk, fransk og italiensk). Dersom den danske regering skulde faa nogen forespørsel fra nævnte kommission vilde den danske regering være beredt til at svare at Danmark ingen interesser hadde paa Spitsbergen og at Danmark ingen grund hadde til at modsætte sig Norges ønsker for spørgsmålets ordning.

Endvidere meddelte den danske minister følgende:

Den danske regering har i flere år beskæftiget sig med spørgsmålet om at erholde samtlige interesserte magters anerkjendelse av Danmarks overhøiheet over hele Grønland og er sinnet at fremføre dette spørgsmål samtidig for den pågældende kommission. Under forhandlingerne med Amerikas Forenede Stater om overdragelse av de danske Vest-Indiske Øer reiste den danske regering dette spørgsmål forsåvidt angik anerkjendelse fra Amerikas Forenede Staters regjerings side og opnådde at denne samtidig med avslutningen av konventionen for overdragelsen av nævnte øer avgav en erklæring i hvilken uttales at de Forenede Stater ikke vilde modsætte sig at den danske regering utvider sine politiske og økonomiske interesser til hele Grønland.

Den danske regering stolte paa at den norske regering ikke vilde gøre vanskeligheder med denne saks ordning. — Jeg svarte at saken skulde bli overveiet.

14.—7.—19. Ih."

“II. Jeg sa idag danske minister at den norske regj. ikke vilde gjøre vanskeligheter ved denne saks ordning.

22.—7.—19. Ih.”

Sagen drejer sig altså først og fremmest om den holdning, Danmark ville indtage over for den af fredskonferencen i Paris nedsatte kommission om Spitzbergen, og denne holdning var, at Danmark ikke ville “modsætte sig Norges ønske angående ordningen af dette spørgsmål”; disse ønsker tog som bekendt sigte på suveræniteten over Spitzbergen. Dernæst viste henvendelsen, at “den danske regering stoledes på, at den norske regering ikke ville gøre vanskeligheder” ved ordningen af Grønlandsspørgsmålet; det, som Danmark tilsigtede med hensyn til den sidstnævnte, var at opnå samtlige interesserede magters anerkendelse af Danmarks suverænitet over hele Grønland, og at få sikkerhed for, at “udvidelsen af Danmarks politiske og økonomiske interesser til hele Grønland” ikke skulle møde modstand. Af de danske aktstykker, der ligger forud for den danske gesandts henvendelse i Christiania den 14. juli 1919, fremgår det klart, at Danmarks holdning i Spitzbergen-spørgsmålet og Norges holdning i Grønlandsspørgsmålet fra dansk side blev betragtet som stående i indbyrdes sammenhæng, og denne sammenhæng synes også at afspejle sig i Ih lens referat af samtalen. Selvom man ikke vil anse det for godtgjort, at der forelå en sådan indbyrdes sammenhæng, som på grund af det bekræftende svar fra den norske regering, på hvis vegne udenrigsministeren talte, ville have affødt en tosidet forpligtelse, lader det sig vanskeligt bestride, at det, som Danmark anmodede Norge om (“ikke at gøre vanskeligheder ved [Grønlands] sags ordning”), var det samme som det, Danmark erklærede sig rede til i Spitzbergen-spørgsmålet (ikke at modsætte sig “Norges ønsker om spørgsmålets ordning”). Hvad Danmark ønskede at opnå af Norge, var, at Norge ikke foretog noget, der kunne lægge hindringer i vejen for de danske planer med hensyn til Grønland. Den erklæring, som udenrigsministeren den 22. juli 1919 afgav på de norske regerings vegne, var bestemt bekræftende: “Jeg sa idag danske minister at den norske regj. ikke vilde gjøre vanskeligheter ved denne saks ordning”.

Domstolen anser det for hævet over enhver tvivl, at et sådant svar afgivet af udenrigsministeren på regeringens vegne i besvarelse af en henvendelse fra en fremmed magts diplomatiske repræsentant i en sag, der ligger inden for udenrigsministerens embedsområde, binder det land, han tilhører.***

Det er af disse grunde, at domstolen med tolv stemmer mod to

1) kender for ret, at den af den norske regering den 10. juli 1931 udstedte okkupationserklæring og alle af samme regering i denne henseende tagne forholdsregler udgør en krænkelse af den bestående retstilstand og derfor er retsstridige og ugyldige;

2) forkaster den norske regerings herimod stridende påstande;

3) bestemmer, at der ikke er grund til at fravige den almindelige regel i statuternes art. 64 om, at hver af parterne bærer sine egne sagsomkostninger.***

102

Sovjetrussisk erklæring om Arktis, 1926SOBRANIE ZAKONOV I RASPORIAZHENII S. S. S. R., 1926¹

The Presidium of the Central Executive Committee of the Union of Soviet Socialist Republics decrees:

All lands and islands situated in the Arctic to the North, between the coastline of the Union of Soviet Socialist Republics and the North Pole, both already discovered and those which may be discovered in the future, which at the time of the publication of the present decree are not recognized by the Government of the Union of Soviet Socialist Republics as the territory of any foreign State, are [hereby] declared territory of the Union, [namely, in the area] between the meridian 32° 4' 35" longitude, East of Greenwich, passing over the Eastern side of the Bay of Vaida by the triangulation mark on the Cape of Kekursk, and the meridian 168° 49' 30" longitude, West of Greenwich, passing over the middle of the strait between the Ratmanov and Kruzenshtern islands, of the group of Diomid islands in the Strait of Bering.

¹ Oversættelse fra Hudson, *Cases on International Law* (1936), 380.

Statsbefolkningen

103

Haag-konventionen af 12. april 1930

Art. 1. Det tilkommer hver stat gennem sin lovgivning at afgøre, hvem der er dens statsborgere. Denne lovgivning skal respekteres af andre stater, forudsat at den er i overensstemmelse med de internationale konventioner, den internationale sædvane og de retsprincipper, der er almindeligt anerkendt med hensyn til nationalitet.

104

Mexiko, forfatningen af 1857

Art. 30. Mexicanere er:***

III. De udlændinge, som erhverver fast ejendom i republiken, eller som har mexikanske børn, medmindre de giver udtryk for deres beslutning om at bevare deres nationalitet.

105

Mexiko, fremmedlov af 1886

Art. 1. Følgende er mexikanske statsborgere:***

(9) Udlændinge, som erhverver fast ejendom i republiken, forudsat at de ikke afgiver erklæring om deres hensigt at bevare deres nationalitet. Ved erklæringens afgivelse skal udlændingen til den fungerende notarius eller dommer afgive erklæring om, hvorvidt han ønsker at erhverve mexikansk statsborgerret, som hjemlet ved artikel 30, paragraf 3, i forfatningen, eller ej, og udlændingens afgørelse af dette spørgsmål skal indeholdes i dokumentet. Såfremt han vælger mexikansk statsborgerret, eller såfremt han undlader at afgive nogen erklæring i denne henseende, kan han inden for ét år rette henvendelse til Udenrigsministeriet for at opfylde de i artikel 19 indeholdte krav og opnå mexikansk statsborgerret.

106

Nottebohm Case

DEN INTERNATIONALE DOMSTOL, DOM, 1955
I. C. J. Reports 1955, 4

[Nottebohm var født i Tyskland i 1881 og tysk statsborger af fødsel. 24 år gammel (1905) udvandrede han til Guatemala, hvor han forblev bosat gennem 34 år, d. v. s. indtil 1939. Han oparbejdede en betydelig forretningsvirksomhed, men forblev tysk statsborger og vedblev at have forretningsforbindelse med Tyskland. Kort efter den 2. verdenskrigs udbrud begav N. sig til Liechtenstein. Den 9. oktober 1939 indgav han ansøgning om naturalisation. Denne blev bevilget af fyrsten af Liechtenstein allerede den 13. oktober og bevidnet i et naturalisationscertifikat dateret den 20. oktober. Der var dispenseret fra det krav om mindst tre års ophold der ifølge Liechtensteins lovgivning normalt udkræves som betingelse for naturalisation. N. havde i ansøgningen i tilfælde af naturalisation forpligtet sig til at betale et kontant beløb af 37.500 schweiziske francs en gang for alle, og en naturalisationsskat af 1000 schweiziske francs årligt, hvortil yderligere kom gebyr for ansøgningens behandling og deponering af en sikkerhedssum på 30.000 schweiziske francs. I begyndelsen af 1940 vendte N. tilbage til Guatemala. I 1941 indtrådte denne stat i krigen mod Tyskland. I 1943 blev N. arresteret og interneret i US (hans navn stod på de allieredes "sorte liste"). Samtidig skred Guatemala ind overfor hans ejendom som tilhørende fjendtlig borger. I 1951 anlagde Liechtenstein sag mod Guatemala for folkeretsstridigt indgreb i ejendom tilhørende en borger i en neutral stat. Guatemala påstod sagen afvist (contended that this claim was inadmissible), først og fremmest fordi den foretagne naturalisation var uden folkeretlig gyldighed i forhold til Guatemala.]

[*Domstolen.*] In order to decide upon the admissibility of the Application, the Court must ascertain whether the nationality conferred on Nottebohm by Liechtenstein by means of an naturalization which took place in the circumstances which have been described, can be validly invoked as against Guatemala, whether it bestows upon Liechtenstein a sufficient title to the exercise of protection in respect of Nottebohm as against Guatemala and therefore entitles it to seize the Court of a claim relating to him. In this connection, Counsel for Liechtenstein said: "the essential question is whether Mr. Nottebohm, having acquired the nationality of Liechtenstein, that acquisition of nationality is one which must be recognized by other States". This formulation is accurate, subject to the twofold reservation that, in the first place, what is involved is not recognition for all purposes but merely for the purposes of the admissibility of the Application, and, secondly, that what is involved is not recognition by all States but only by Guatemala.***

In order to establish that the Application must be held to be admissible, Liechtenstein has argued that Guatemala formerly recognized the naturalization which it now challenges and cannot therefore be heard to put forward a contention which is inconsistent with its former attitude.***

Since no proof has been adduced that Guatemala has recognized the title to the exercise of protection relied upon by Liechtenstein as being derived from the naturalization which it granted to Nottebohm, the Court must consider whether such an act of granting nationality by Liechtenstein directly entails an obligation on the part of Guatemala to recognize its effect, namely, Liechtenstein's right to exercise its protection. In other words, it must be determined whether that unilateral act by Liechtenstein is one which can be relied upon against Guatemala in regard to the exercise of protection. The Court will deal with this question without considering that of the validity of Nottebohm's naturalization according to the law of Liechtenstein.

It is for Liechtenstein, as it is for every sovereign State, to settle by its own legislation the rules relating to the acquisition of its nationality, and to confer that nationality by naturalization granted by its own organs in accordance with that legislation. It is not necessary to determine whether international law imposes any limitations on its freedom of decision in this domain. Furthermore, nationality has its most immediate, its most far-reaching and, for most people, its only effects within the legal system of the State conferring it. Nationality serves above all to determine that the person upon whom it is conferred enjoys the rights and is bound by the obligations which the law of the State in question grants to or imposes on its nationals. This is implied in the wider concept that nationality is within the domestic jurisdiction of the State.

But the issue which the Court must decide is not one which pertains to the legal system of Liechtenstein. It does not depend on the law or on the decision of Liechtenstein whether that State is entitled to exercise its protection, in the case under consideration. To exercise protection, to apply to the Court, is to place oneself on the plane of international law. It is international law which determines whether a State is entitled to exercise protection and to seise the Court.

The naturalization of Nottebohm was an act performed by Liechtenstein in the exercise of its domestic jurisdiction. The question to be decided is whether that act has the international effect here under consideration.

International practice provides many examples of acts performed by States in the exercise of their domestic jurisdiction which do not necessarily or automatically have international effect, which are not necessarily and automatically binding on other States or which are binding on them only subject to certain conditions: this is the case, for instance, of a judgment given by the competent court of a State which it is sought to invoke in another State.

In the present case it is necessary to determine whether the naturalization conferred on Nottebohm can be successfully invoked against Guatemala, whether, as has already been stated, it can be relied upon as against that State, so that Liechtenstein is thereby entitled to exercise its protection in favour of Nottebohm against Guatemala.

When one State has conferred its nationality upon an individual and another State has conferred its own nationality on the same person, it may occur that each of these States, considering itself to have acted in the exercise of its domestic jurisdiction, adheres to its own view and bases itself thereon in so far its

own actions are concerned. In so doing, each State remains within the limits of its domestic jurisdiction.

This situation may arise on the international plane and fall to be considered by international arbitrators or by the courts of a third State. If the arbitrators or the courts of such a State should confine themselves to the view that nationality is exclusively within the domestic jurisdiction of the State, it would be necessary for them to find that they were confronted by two contradictory assertions made by two sovereign States, assertions which they would consequently have to regard as of equal weight, which would oblige them to allow the contradiction to subsist and thus fail to resolve the conflict submitted to them.

In most cases arbitrators have not strictly speaking had to decide a conflict of nationality as between States, but rather to determine whether the nationality invoked by the applicant State was one which could be relied upon as against the respondent State, that is to say, whether it entitled the applicant State to exercise protection. International arbitrators, having before them allegations of nationality by the applicant State which were contested by the respondent State, have sought to ascertain whether nationality had been conferred by the applicant State in circumstances such as to give rise to an obligation on the part of the respondent State to recognize the effect of that nationality. In order to decide this question arbitrators have evolved certain principles for determining whether full international effect was to be attributed to the nationality invoked. The same issue is now before the Court: it must be resolved by applying the same principles.

The courts of third States, when confronted by a similar situation, have dealt with it in the same way. They have done so not in connection with the exercise of protection, which did not arise before them, but where two different nationalities have been invoked before them they have had, not indeed to decide such a dispute as between the two States concerned, but to determine whether a given foreign nationality which had been invoked before them was one which they ought to recognize.

International arbitrators have decided in the same way numerous cases of dual nationality, where the question arose with regard to the exercise of protection. They have given their preference to the real and effective nationality, that which accorded with the facts, that based on stronger factual ties between the person concerned and one of the States whose nationality is involved. Different factors are taken into consideration, and their importance will vary from one case to the next: the habitual residence of the individual concerned is an important factor, but there are other factors such as the centre of his interests, his family ties, his participation in public life, attachment shown by him for a given country and inculcated in his children, etc.

Similarly, the courts of third States, when they have before them an individual whom two other States hold to be their national, seek to resolve the conflict by having recourse to international criteria and their prevailing tendency is to prefer the real and effective nationality.

The same tendency prevails in the writings of publicists and in practice. This notion is inherent in the provisions of Article 3, paragraph 2, of the Statute of

the Court. National laws reflect this tendency when, *inter alia*, they make naturalization dependent on conditions indicating the existence of a link, which may vary in their purpose or in their nature but which are essentially concerned with this idea. The Liechtenstein Law of January 4th, 1934, is a good example.

The practice of certain States which refrain from exercising protection in favour of a naturalized person when the latter has in fact, by his prolonged absence, severed his links with what is no longer for him anything but his nominal country, manifests the view of these States that, in order to be capable of being invoked against another State, nationality must correspond with the factual situation. A similar view is manifested in the relevant provisions of the bilateral nationality treaties concluded between the United States of America and other States since 1868, such as those sometimes referred to as the Bancroft Treaties, and in the Pan-American Convention, signed at Rio de Janeiro on August 13th, 1906, on the status of naturalized citizens who resume residence in their country of origin.

The character thus recognized on the international level as pertaining to nationality is in no way inconsistent with the fact that international law leaves it to each State to lay down the rules governing the grant of its own nationality. The reason for this is that the diversity of demographic conditions has thus far made it impossible for any general agreement to be reached on the rules relating to nationality, although the latter by its very nature affects international relations. It has been considered that the best way of making such rules accord with the varying demographic conditions in different countries is to leave the fixing of such rules to the competence of each State. On the other hand, a State cannot claim that the rules it has thus laid down are entitled to recognition by another State unless it has acted in conformity with this general aim of making the legal bond of nationality accord with the individual's genuine connection with the State which assumes the defence of its citizens by means of protection as against other States.

The requirement that such a concordance must exist is to be found in the studies carried on in the course of the last thirty years upon the initiative and under the auspices of the League of Nations and the United Nations. It explains the provision which the Conference for the Codification of International Law, held at The Hague in 1930, inserted in Article 1 of the Convention relating to the Conflict of Nationality Laws, laying down that the law enacted by a State for the purpose of determining who are its nationals "shall be recognized by other States in so far as it is consistent with . . . international custom, and the principles of law generally recognized with regard to nationality". In the same spirit, Article 5 of the Convention refers to criteria of the individual's genuine connections for the purpose of resolving questions of dual nationality which arise in third States.

According to the practice of States, to arbitral and judicial decisions and to the opinions of writers, nationality is a legal bond having as its basis a social fact of attachment, a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties. It may be said to

constitute the juridical expression of the fact that the individual upon whom it is conferred, either directly by the law or as the result of an act of the authorities, is in fact more closely connected with the population of the State conferring nationality than with that of any other State. Conferred by a State, it only entitles that State to exercise protection vis-à-vis another State, if it constitutes a translation into juridical terms of the individual's connection with the State which has made him its national.***

Since this is the character which nationality must present when it is invoked to furnish the State which has granted it with a title to the exercise of protection and to the institution of international judicial proceedings, the Court must ascertain whether the nationality granted to Nottebohm by means of naturalization is of this character or, in other words, whether the factual connection between Nottebohm and Liechtenstein in the period preceding, contemporaneous with and following his naturalization appears to be sufficiently close, so preponderant in relation to any connection which may have existed between him and any other State, that it is possible to regard the nationality conferred upon him as real and effective, as the exact juridical expression of a social fact of a connection which existed previously or came into existence thereafter.

Naturalization is not a matter to be taken lightly. To seek and to obtain it is not something that happens frequently in the life of a human being. It involves his breaking of a bond of allegiance and his establishment of a new bond of allegiance. It may have far-reaching consequences and involve profound changes in the destiny of the individual who obtains it. It concerns him personally, and to consider it only from the point of view of its repercussions with regard to his property would be to misunderstand its profound significance. In order to appraise its international effect, it is impossible to disregard the circumstances in which it was conferred, the serious character which attaches to it, the real and effective, and not merely the verbal preference of the individual seeking it for the country which grants it to him.

At the time of his naturalization does Nottebohm appear to have been more closely attached by his tradition, his establishment, his interests, his activities, his family ties, his intentions for the near future to Liechtenstein than to any other State?

The essential facts appear with sufficient clarity from the record.***

At the date when he applied for naturalization Nottebohm had been a German national from the time of his birth. He had always retained his connections with members of his family who had remained in Germany and he had always had business connections with that country. His country had been at war for more than a month, and there is nothing to indicate that the application for naturalization then made by Nottebohm was motivated by any desire to dissociate himself from the Government of his country.

He had been settled in Guatemala for 34 years. He had carried on his activities there. It was the main seat of his interests. He returned there shortly after his naturalization, and it remained the centre of his interests and of his business activities. He stayed there until his removal as a result of war measures in 1943. He subsequently attempted to return there, and he now complains of Guatema-

la's refusal to admit him. There, too, were several members of his family who sought to safeguard his interests.

In contrast, his actual connections with Liechtenstein were extremely tenuous. No settled abode, no prolonged residence in that country at the time of his application for naturalization: the application indicates that he was paying a visit there and confirms the transient character of this visit by its request that the naturalization proceedings should be initiated and concluded without delay. No intention of settling there was shown at that time or realized in the ensuing weeks, months or years—on the contrary, he returned to Guatemala very shortly after his naturalization and showed every intention of remaining there. If Nottebohm went to Liechtenstein in 1946, this was because of the refusal of Guatemala to admit him. No indication is given of the grounds warranting the waiver of the condition of residence, required by the 1934 Nationality Law, which waiver was implicitly granted to him. There is no allegation of any economic interests or of any activities exercised or to be exercised in Liechtenstein, and no manifestation of any intention whatsoever to transfer all or some of his interests and his business activities to Liechtenstein. It is unnecessary in this connection to attribute much importance to the promise to pay the taxes levied at the time of his naturalization. The only links to be discovered between the Principality and Nottebohm are the short sojourns already referred to and the presence in Vaduz of one of his brothers: but his brother's presence is referred to in his application for naturalization only as a reference to his good conduct. Furthermore, other members of his family have asserted Nottebohm's desire to spend his old age in Guatemala.

These facts clearly establish, on the one hand, the absence of any bond of attachment between Nottebohm and Liechtenstein and, on the other hand, the existence of a long-standing and close connection between him and Guatemala, a link which his naturalization in no way weakened. That naturalization was not based on any real prior connection with Liechtenstein, nor did it in any way alter the manner of life of the person upon whom it was conferred in exceptional circumstances of speed and accommodation. In both respects, it was lacking in the genuineness requisite to an act of such importance, if it is to be entitled to be respected by a State in the position of Guatemala. It was granted without regard to the concept of nationality adopted in international relations.

Naturalization was asked for not so much for the purpose of obtaining a legal recognition of Nottebohm's membership in fact in the population of Liechtenstein, as it was to enable him to substitute for his status as a national of a belligerent State that of a national of a neutral State, with the sole aim of thus coming within the protection of Liechtenstein but not of becoming wedded to its traditions, its interests, its way of life or of assuming the obligations—other than fiscal obligations—and exercising the rights pertaining to the status thus acquired.

Guatemala is under no obligation to recognize a nationality granted in such circumstances. Liechtenstein consequently is not entitled to extend its protection to Nottebohm vis-à-vis Guatemala and its claim must, for this reason, be held to be inadmissible.

The Court is not therefore called upon to deal with the other pleas in bar put forward by Guatemala or the Conclusions of the Parties other than those on which it is adjudicating in accordance with the reasons indicated above.

For these reasons,

The Court,

by eleven votes to three,

Holds that the claim submitted by the Government of the Principality of Liechtenstein is inadmissible.

107

Haag-konventionen af 12. april 1930

Art. 3. Under forbehold af bestemmelserne i nærværende konvention kan en person, der har to eller flere nationaliteter, betragtes som undersøgt af enhver af de stater, hvis nationalitet han besidder.

Art. 4. En stat kan ikke udøve diplomatisk beskyttelse til fordel for en af sine statsborgere overfor en stat, hvor han tillige er statsborger.

Art. 5. I en tredjestat kan en person, der har flere nationaliteter, behandles som om han kun havde haft én. Med forbehold af tredjestatens retsregler om den personlige status samt af gældende konventioner kan denne stat blandt de nationaliteter, personen er i besiddelse af, nøjes med at anerkende enten nationaliteten i det land, hvor han har sin faste bopæl, eller i det land, hvortil han efter omstændighederne nærmest er knyttet.

108

Mergé Claim

ITALIAN-UNITED STATES CONCILIATION COMMISSION; 1955

Unpublished decision quoted from *International Law Reports* 1955, 443-57

[Ved fredstraktat med Italien af 1947 art. 78 har Italien forpligtet sig til, under visse nærmere betingelser, at yde personer der er statsborgere i nogen af de Forenede Nationer, og også havde denne status den 3. september 1943, erstatning for krigsskade lidt på ejendom i Italien. Fru. F. S. Mergé rejste som amerikansk statsborger krav i henhold til denne bestemmelse. Italien afviste hendes krav under henvisning til at hun også havde italiensk statsborgerret. Fra amerikansk side gjorde man gældende at kravet burde nyde fremme da fredstraktaten ikke havde taget noget forbehold for dobbelt statsborgerret.

Fru Mergé var født i de Forenede Stater og havde dermed erhvervet amerikansk statsborgerret. I 1933 indgik hun i Rom ægteskab med en italiener og erhvervede derved italiensk statsborgerret uden at miste sin amerikanske. Ægteparret levede i Rom fra 1937—1940 og i Tokio (hvor hendes mand var ansat i den italienske ambassade) fra 1940—1946. Fra december 1946 til september 1947 opholdt hun sig i de Forenede Stater, hvorefter hun sammen med sin mand har haft bopæl i Italien.

Efter at Kommissionen har fastslået at det ikke er muligt at afgøre spørgsmålet ved fortolkning af traktaten vender den sig til folkerettens almindelige principper om dobbelt nationalitet og siger:]

As the Treaty contains no provisions governing the case of dual nationality, the Commission must turn to the general principles of international law. In this connection two solutions are possible: (a) the principle according to which a State may not afford diplomatic protection to one of its nationals against the State whose nationality such person also possesses; (b) the principle of effective or dominant nationality.

(1) *The Hague Convention of 1930*.—The two principles just mentioned are defined in this Convention: the first (Art. 4) within the system of public international law; the second (Art. 5) within the system of private international law.

Art. 4 (approved in plenary session by 29 votes to 5) is as follows:

"A State may not afford diplomatic protection to one of its nationals against a State whose nationality such person also possesses".

The same Convention, in Art. 5, indicates effective nationality as the criterion to be applied by a third State in order to resolve the conflicts of laws raised by dual nationality cases. Such State

"... shall, of the nationalities which any such person possesses, recognize exclusively in its territory either the nationality of the country in which he is habitually and principally resident, or the nationality of the country with which in the circumstances he appears to be most closely connected."

This rule, although referring to the domestic jurisdiction of a State, nevertheless constitutes a guiding principle also in the international system.***

The Hague Convention, although not ratified by all the Nations, expresses a *communis opinio juris*, by reason of the nearunanimity with which the principles referring to dual nationality were accepted.

(2) *Precedents*.—Uniformity of precedents in this field does not exist, but it can be stated that the *ratio* of nearly all the arbitral and judicial decisions on the international level is either one or the other of the two afore-mentioned principles. We shall cite a few by way of example.***

(3) *Legal literature*.***

V. Considerations of Law

(1) The rules of the Hague Convention of 1930 and the customary law manifested in international precedents and in the legal writings of the authors attest the existence and the practice of two principles in the problem of diplomatic protection in dual nationality cases. The first of these, specifically referring to the scope of diplomatic protection, as a question of public international law, is based on the sovereign equality of the States in the matter of nationality and bars protection in behalf of those who are simultaneously also nationals of the defendant State. The second of the principles had its origin in *private* international law, in those cases, that is, in which the courts of a third

State had to resolve a conflict of nationality laws. Thus, the principle of effective nationality was created with relation to the individual. But decisions and legal writings, because of its evident justice, quickly transported it to the sphere of *public* international law.

(2) It is not a question of adopting one nationality to the exclusion of the other. Even less when it is recognized by both Parties that the claimant possesses the two nationalities. The problem to be explained is, simply, that of determining whether diplomatic protection can be exercised in such cases.

(3) A prior question requires a solution: are the two principles which have just been set forth incompatible with each other, so that the acceptance of one of them necessarily implies the exclusion of the other? If the reply is in the affirmative, the problem presented is that of a choice; if it is in the negative, one must determine the sphere of application of each one of the two principles.

The Commission is of the opinion that no irreconcilable opposition between the two principles exists; in fact, to the contrary, it believes that they complement each other reciprocally. The principle according to which a State cannot protect one of its nationals against a State also considers him its national and the principle of effective, in the sense of dominant, nationality, have both been accepted by the Hague Convention (Articles 4 and 5) and by the International Court of Justice (Advisory Opinion of April 11, 1949, and the *Nottebohm* decision of April 6, 1955). If these two principles were irreconcilable, the acceptance of both by the Hague Convention and by the International Court of Justice would be incomprehensible.

(4) The International Court of Justice, in its recent decision in the *Nottebohm Case*, after having said that "... international law leaves to each State to lay down the rules governing the grant of its own nationality", adds:

"On the other hand, a State cannot claim that the rules it has thus laid-down are entitled to recognition by another State unless it has acted in conformity with this general aim of making the legal bond of nationality accord with the individual's genuine connection with the State which assumes the defence of its citizens by means of protection as against other States... Conferred by a State, it only entitles that State to exercise protection vis-à-vis another State, if it constitutes a translation into juridical terms of the individual's connection with the State which has made him its national". (Judgment of April 6, 1955, p. 23).

For even greater reason, this theory must be understood to be applicable to the problem of dual nationality which concerns the two contesting States, in view of the fact that in such case effective nationality does not mean only the existence of a real bond, but means also the prevalence of that nationality over the other, by virtue of facts which exist in the case.

(5) The principle, based on the sovereign equality of States, which excludes diplomatic protection in the case of dual nationality, must yield before the principle of effective nationality whenever such nationality is that of the claiming State. But it must not yield when such predominance is not proved, because the first of these two principles is generally recognized and may constitute a criterion of practical application for the elimination of any possible uncertainty.

(6) The question of dual nationality obviously arises only in cases where the claimant was in possession of both nationalities at the time the damage occurred and during the whole of the period comprised between the date of the Armistice (September 3, 1943) and the date of the coming into force of the Treaty of Peace (September 15, 1947). In view of the principles accepted, it is considered that the Government of the United States of America shall be entitled to protect its nationals before this Commission in cases of dual nationality, United States and Italian, whenever the United States nationality is the effective nationality. In order to establish the prevalence of the United States nationality in individual cases, habitual residence can be one of the criteria of evaluation, but not the only one. The conduct of the individual in his economic, social, political, civic and family life, as well as the closer and more effective bond with one of the two States must also be considered.

(7) It is considered that in this connection the following principles may serve as guides:

(a) The United States nationality shall be prevalent in cases of children born in the United States of an Italian father and who have habitually lived there.

(b) The United States nationality shall also be prevalent in cases involving Italians who, after having acquired United States nationality by naturalization and having thus lost Italian nationality, have re-acquired their nationality of origin as a matter of law as a result of having sojourned for more than two years, without the intention of re-transferring their residence permanently to Italy.

(c) With respect to cases of dual nationality involving American women married to Italian nationals, the United States nationality shall be prevalent in cases in which the family has had habitual residence in the United States and the interests and the permanent professional life of the head of the family were established in the United States.

(d) In case of dissolution of marriage, if the family was established in Italy and the widow transfers her residence to the United States of America, whether or not her new residence is of an habitual nature must be evaluated, case by case, bearing in mind also the widow's conduct, especially with regard to the raising of her children, for the purpose of deciding which is the prevalent nationality.

(8) United States nationals who did not possess Italian nationality but the nationality of a third State can be considered "United Nations nationals" under the Treaty, even if their prevalent nationality was the nationality of the third State.

(9) In all other cases of dual nationality, Italian and United States, when, that is, the United States nationality is not prevalent in accordance with the above, the principle of international law, according to which a claim is not admissible against a State, Italy in our case, when this State also considers the claimant as its national and such bestowal of nationality is, as in the case of Italian law, in harmony (Article I of the Hague Convention of 1930) with international custom and generally recognized principles of law in the matter of nationality, will re-acquire its force.

VI. *Decision*

Examining the facts of the case in bar, in the light of the aforementioned criteria, especially paragraph (6), in relation to paragraph (7) (c), the Commission holds that [the claimant] can in no way be considered to be dominantly a United States national within the meaning of Article 78 of the Treaty of Peace, because the family did not have its habitual residence in the United States and the interests and the permanent professional life of the head of the family were not established there. In fact, Mrs. Mergé has not lived in the United States since her marriage, she used an Italian passport in travelling to Japan from Italy in 1937, she stayed in Japan from 1937 until 1946 with her husband, an official of the Italian Embassy in Tokyo, and it does not appear that she was ever interned as a national of a country enemy to Japan.

Inasmuch as [the claimant] for the foregoing reasons, cannot be considered to be dominantly a United States national within the meaning of Article 78 of the Treaty of Peace, the Commission is of the opinion that the Government of the United States of America is not entitled to present a claim against the Italian Government in her behalf.

Territorialhøjheden

109

The Case of the S. S. "Lotus"

DEN FASTE DOMSTOL FOR MELLEMFOLKELIG RETSPLEJE, DOM, 1927

Se ovenfor sag nr. 27

110

Kämpfer gegen Zürich, Staatsanwaltschaft

SCHWEIZ, KASSATIONSHOF, 1939
65 Amtliche Sammlung (1939) 39

[Tyske myndigheder foretog i 1938 nogle undersøgelser for at konstatere, hvorvidt et tysk selskab, der kontrollerede et schweizisk kartel, havde overtrådt tyske valutabestemmelser. Som et led i disse undersøgelser forlangte de tyske myndigheder, at selskabet skulle lade en autoriseret revisor gennemgå firmaets bøger og afgive beretning herom direkte til myndighederne. Revisoren, Kämpfer, der fik til opgave at undersøge også det schweiziske selskabs bøger, modtog detaillerede instrukser fra de tyske myndigheder, ligesom han fik overgivet sagens akter.

Kämpfer ankom til Zürich den 19. juli 1938 og begyndte umiddelbart sin inspektion. Han blev herunder arresteret og senere straffet for at have overtrådt art. 1 (I) i forbundsdekretet af 21. juni 1935, idet han på schweizisk område havde udført regeringsvirksomhed for en fremmed stat.

Kämpfer appellerede afgørelsen.]

[*Domstolen.*] ***Der Bundesbeschluss betrifft nach seinem Titel den Schutz der Sicherheit der Eidgenossenschaft. Dieser Schutz bezieht sich naturgemäss auf das Gebiet und den autonomen Bestand der Eidgenossenschaft als Ganzes und in ihrer Organisation. Der unmittelbare Zweck des Bundesbeschlusses ist darnach in erster Linie die Wahrung der Unverletzlichkeit des Gebietes und der Gebietshoheit. Angriffe darauf sollen abgewehrt werden. Zu diesen Angriffen gehören die offene und direkte Betätigung fremder Behörden und Beamten auf dem schweizerischen Gebiet im Namen oder für einen fremden Staat. Solche Übergriffe sind selten und leicht zu verhindern. Art. 1 BB geht weiter. Allerdings nennt das Marginale verbotene Amtshandlungen (im französischen Text: *actes officiels*); der Wortlaut spricht aber von Handlungen, die an sich einer Behörde oder einem Beamten zukommen, die französische

Fassung sogar weitergehend von "actes qui, *normalement*, relèvent des pouvoirs publics", von Handlungen, die normalerweise, für den Regelfall, der Behörde zustehen. Damit ist mit aller wünschenswerten Deutlichkeit zum Ausdruck gebracht, dass nicht nur Massnahmen darunter fallen, die von Behörden oder Beamten ausgeführt werden, sondern Handlungen für einen fremden Staat, die für sich betrachtet, d. h. nach ihrem Wesen und Zweck sich als Amtstätigkeit charakterisieren, unbekümmert, ob ein Beamter dabei tätig war oder nicht. Gerade diese getarnten und deswegen gefährlichen Angriffe auf die Gebietshoheit sollen nach Zweck und Wortlaut des Gesetzes getroffen werden.

Es kommt daher nicht darauf an, ob der Beschwerdeführer als deutscher Beamter gehandelt habe, sondern massgebend ist allein, ob seine Tätigkeit in der Schweiz ihrem Wesen nach amtlichen Charakter trug. Nicht nach deutschem Recht, sondern demjenigen des Tatortes entscheidet sich auch, ob eine Amtshandlung objektiv vorliege. Da der Schutz des Bundesbeschlusses u. a. der schweizerischen Gebietshoheit gilt, bestimmt sich sein Umfang darnach, wie weit die Ausübung der Hoheitsrechte reicht und wie weit der Geschäftsbereich gezogen ist, der durch die Ausstattung mit öffentlicher Autorität vom Staat beansprucht und als behördlich oder amtlich gekennzeichnet ist.

Dass der Beschwerdeführer für die Interessen der deutschen Devisenbehörden und damit für einen fremden Staat gehandelt hat, ist nicht zweifelhaft. Seine Tätigkeit umfasste zu einem wesentlichen Teil Untersuchungshandlungen zu steuer-, devisen- und strafrechtlichen Zwecken, also zur Erfüllung von staatlichen Aufgaben.***

Solche Handlungen kommen nach schweizerischer Auffassung nur Beamten, den Steuer- oder Strafverfolgungsbehörden zu. Sie sind daher, von irgendwem für fremde Staaten ohne behördliche Bewilligung vorgenommen, nach Art. 1 Abs. 1 BB verboten.

Die Auffassung des Beschwerdeführers, das Gesetz treffe nur Handlungen, die auf dem Wege der Rechtshilfe hätten vorgenommen werden müssen, wird durch den Gesetzeswortlaut nicht gestützt. Der Umstand, dass die Rechtshilfe wahrscheinlich nicht gewährt worden wäre, berechtigte nicht dazu, zur Selbsthilfe zu schreiten. Übrigens ist die Rechtshilfe nicht nachgesucht worden.***

3. — Der Beschwerdeführer bestreitet zu Unrecht, vorsätzlich gehandelt zu haben. Denn ihm waren alle wesentlichen Tatumstände bewusst.*** Er musste erkennen, dass er teilweise für staatliche Zwecke des deutschen Reiches auf schweizerischem Gebiet tätig zu sein hatte. Seine Feststellungen waren Erhebungen und Materialsammlung für deutsche Finanz- und Strafbehörden. Aus den amtlichen Akten ersah er — abgesehen von deren Zweck — Inhalt und Charakter seiner Aufgabe und musste daraus feststellen, dass ihm Untersuchungshandlungen zufielen, die nach deutscher Anschauung ebenso wie nach der schweizerischen ausschliesslich den staatlichen Organen vorbehalten sind. Trotz Kenntnis der massgebenden Umstände ist er auf schweizerischen Gebiet tätig geworden. Er hat den unerlaubten Erfolg, die Verletzung der schweizerischen Gebietshoheit darnach nicht nur erkannt, sondern auch gewollt und damit vorsätzlich gehandelt.***

Der Vorsatz ist allerdings nur dann ein rechtswidriger, wenn er das Bewusstsein der Rechtswidrigkeit der Handlung einschliesst. Dazu ist aber nicht die Kenntnis des gesetzlichen Erlasses nötig, durch den eine bestimmte Handlung verboten und unter Strafe gestellt ist, sondern es genügt das Bewusstsein der Unrechtmässigkeit (BGE 50 I S. 327; 60 I S. 417 ff.). Das Bewusstsein, unrecht zu handeln, musste sich für den Beschwerdeführer schon daraus ergeben, dass er auf fremdem Staatsgebiet Funktionen amtlichen Charakters ausübte, ein Verhalten, das nach den Feststellungen des angefochtenen Urteils auch in Deutschland in weitgehendem Masse bestraft wird. Bei seiner Bildung und beruflichen Stellung musste sich daher der Beschwerdeführer darüber klar sein, dass sein Verhalten strafbar sei.

4. — Darauf, dass die Betroffenen, d. h. die an der Schwelmgroupe Beteiligten mit der Prüfung einverstanden gewesen seien, kann sich der Beschwerdeführer nicht als Strafausschliessungsgrund berufen. Denn die Verbote des Bundesbeschlusses sind nicht in erster Linie zur Wahrung der Rechte Privater, sondern um der öffentlichen Ordnung und Sicherheit willen aufgestellt. Verletzt ist die schweizerische Gebietshoheit. Ein verbotener Angriff darauf kann nicht durch die Zustimmung von Privaten zu einer erlaubten Handlung werden.***

111

Miko Jung et al. v. Rokusaburo Novaya

DE FORENEDE STATER, DOMESTIC RELATIONS COURT OF CITY
OF NEW YORK, 1944
47 N. Y. S. 2d 48

[Miko Jung, der var moder til fem børn, anlagde sag mod børnenes fader og påstod ham sat i bidrag til børnenes underhold. Det var en forudsætning for sagsøgtets bidragspligt, at børnene kunne betragtes som ægtebørn. Sagsøgerinden påberåbte sig New York Domestic Relations Court Act Section 101 Subdivision 6, der indeholdt følgende regel:

A child born of a ceremonial marriage shall be deemed the legitimate child if its parents for alle the purposes of this Act regardless of the validity of such marriage.

Sagsøgerinden hævdede, at en vielsesceremoni af den i bestemmelsen omhandlede art havde fundet sted mellem hende og sagsøgte i det japanske konsulat i New York.]

[Domstolen.] The question is whether a ceremony performed pursuant to the laws of a foreign government in a Consulate of that foreign government can be regarded or assumed to be a ceremonial marriage within the meaning of subdivision 6 of Section 101 of the Domestic Relations Court Act.

No foreign government can set up a government within the territory of the United States. Whether or not the respondent and the petitioner went through a marriage ceremony which might be or might not be valid on Japanese territory, such a marriage cannot be regarded as valid if entered into on United

States territory. The marriage laws of the land must be complied with to constitute a valid marriage.

I do not know of any treaty entered into between the government of the United States and any foreign government under which treaty this government would cede to another government extra-territorial rights or did cede such rights. International law recognized extra-territorial rights of the United States in China as well as that of other governments in China. By act of Congress that has been terminated in so far as the United States are concerned.

We no longer claim extra-territorial rights in China, nor do we exercise any such rights. I am not certain as to whether, under the extra-territorial rights which we had in China, marriages could have been or were performed under such extra-territorial rights which were valid in our country or valid in China. Be that as it may, the Japanese government never had extra-territorial rights in the United States, never will have, nor will. I hope, any other government ever have extra-territorial rights in the United States. A marriage performed in the Japanese Consulate in New York by the consul or other person authorized under Japanese law to so do between this man and this woman, presumably pursuant to Japanese law, cannot be regarded as a valid marriage between parties here. Foreign governments cannot establish courts on United States territory to settle disputes between their nationals, nor can they create instrumentalities for the purpose of marrying their nationals on United States territory. At best it might be considered a common-law marriage if the conduct of the parties at the time complied with the laws of this State and if the marriage had been entered into prior to April of 1933.***

The action must be dismissed.

112

The Caroline Incident

DE FORENEDE STATER-STORBRIANNIEN, NOTEVEKSLING, 1842

Se nedenfor sag nr. 166

Territorialhøjhedens begrænsninger: Den kvalificerede fremmedret (eksterritorialitet)

113

Convention on Diplomatic Relations

WIEN, 1961

Art. 2. The establishment of diplomatic relations between States, and of permanent diplomatic missions, takes place by mutual consent.

Art. 3. 1. The functions of a diplomatic mission consist *inter alia* in:

- (a) representing the sending State in the receiving State;
- (b) protecting in the receiving State the interests of the sending State and of its nationals, within the limits permitted by international law;
- (c) negotiating with the Government of the receiving State;
- (d) ascertaining by all lawful means conditions and developments in the receiving State, and reporting thereon to the Government of the sending State;
- (e) promoting friendly relations between the sending State and the receiving State, and developing their economic, cultural and scientific relations.

2. Nothing in the present Convention shall be construed as preventing the performance of consular functions by a diplomatic mission.

Art. 4. 1. The sending State must make certain that the *agrément* of the receiving State has been given for the person it proposes to accredit as head of the mission to that State.

2. The receiving State is not obliged to give reasons to the sending State for a refusal of *agrément*.

Art. 9. 1. The receiving State may at any time and without having to explain its decision, notify the sending State that the head of the mission or any member of the diplomatic staff of the mission is *persona non grata* or that any other member of the staff of the mission is not acceptable. In any such case, the sending State shall, as appropriate, either recall the person concerned or terminate his functions with the mission. A person may be declared *non grata* or not acceptable before arriving in the territory of the receiving State.

2. If the sending State refuses or fails within a reasonable period to carry out its obligations under paragraph 1 of this Article, the receiving State may refuse to recognize the person concerned as a member of the mission.

Art. 14. 1. Heads of mission are divided into three classes, namely:

- (a) that of ambassadors or nuncios accredited to Heads of State, and other heads of mission of equivalent rank;
- (b) that of envoys, ministers and internuncios accredited to Heads of State;

(c) that of chargé d'affaires accredited to Ministers for Foreign Affairs.

2. Except as concerns precedence and etiquette, there shall be no differentiation between heads of mission by reason of their class.

Art. 15. The class to which the heads of their missions are to be assigned shall be agreed between States.

Art. 16. 1. Heads of mission shall take precedence in their respective classes in the order of the date and time of taking up their functions in accordance with Article 13.

2. Alterations in the credentials of a head of mission not involving any change of class shall not affect his precedence.

3. This article is without prejudice to any practice accepted by the receiving State regarding the precedence of the representative of the Holy See.

Art. 22. 1. The premises of the mission shall be inviolable. The agents of the receiving State may not enter them, except with the consent of the head of the mission.

2. The receiving State is under a special duty to take all appropriate steps to protect the premises of the mission against any intrusion or damage and to prevent any disturbance of the peace of the mission or impairment of its dignity.

3. The premises of the mission, their furnishings and other property thereon and the means of transport of the mission shall be immune from search, requisition, attachment or execution.

Art. 29. The person of a diplomatic agent shall be inviolable. He shall not be liable to any form of arrest or detention. The receiving State shall treat him with due respect and shall take all appropriate steps to prevent any attack on his person, freedom or dignity.

Art. 30. 1. The private residence of a diplomatic agent shall enjoy the same inviolability and protection as the premises of the mission.

2. His papers, correspondence and, except as provided in paragraph 3 of Article 31, his property, shall likewise enjoy inviolability.

Art. 31. 1. A diplomatic agent shall enjoy immunity from the criminal jurisdiction of the receiving State. He shall also enjoy immunity from its civil and administrative jurisdiction, except in the case of:

(a) a real action relating to private immovable property situated in the territory of the receiving State, unless he holds it on behalf of the sending State for the purposes of the mission;

(b) an action relating to succession in which the diplomatic agent is involved as executor, administrator, heir or legatee as a private person and not on behalf of the sending State;

(c) an action relating to any professional or commercial activity exercised by the diplomatic agent in the receiving State outside his official functions.

2. A diplomatic agent is not obliged to give evidence as a witness.

3. No measures of execution may be taken in respect of a diplomatic agent except in the cases coming under sub-paragraphs (a), (b) and (c) of paragraph 1 of this Article, and provided that the measures concerned can be taken without infringing the inviolability of his person or of his residence.

4. The immunity of a diplomatic agent from the jurisdiction of the receiving State does not exempt him from the jurisdiction of the sending State.

Art. 32. 1. The immunity from jurisdiction of diplomatic agents and of persons enjoying immunity under Article 37 may be waived by the sending State.

2. Waiver must always be express.

3. The initiation of proceedings by a diplomatic agent or by a person enjoying immunity from jurisdiction under Article 37 shall preclude him from invoking immunity from jurisdiction in respect of any counter-claim directly connected with the principal claim.

4. Waiver of immunity from jurisdiction in respect of civil or administrative proceedings shall not be held to imply waiver of immunity in respect of the execution of the judgment, for which a separate waiver shall be necessary.

Art. 33. 1. Subject to the provisions of paragraph 3 of this Article, a diplomatic agent shall with respect to services rendered for the sending State be exempt from social security provisions which may be in force in the receiving State.

2. The exemption provided for in paragraph 1 of this Article shall also apply to private servants who are in the sole employ of a diplomatic agent, on condition

(a) that they are not nationals of or permanently resident in the receiving State; and

(b) that they are covered by the social security provisions which may be in force in the sending State or a third State.

3. A diplomatic agent who employs persons to whom the exemption provided for in paragraph 2 of this Article does not apply shall observe the obligations which the social security provisions of the receiving State impose upon employers.

4. The exemption provided for in paragraphs 1 and 2 of this Article shall not preclude voluntary participation in the social security system of the receiving State provided that such participation is permitted by that State.

5. The provisions of this Article shall not affect bilateral or multilateral agreements concerning social security concluded previously and shall not prevent the conclusion of such agreements in the future.

Art. 34. A diplomatic agent shall be exempt from all dues and taxes, personal or real, national, regional or municipal, except:

(a) indirect taxes of a kind which are normally incorporated in the price of goods or services;

(b) dues and taxes on private immovable property situated in the territory of the receiving State, unless he holds it on behalf of the sending State for the purposes of the mission;

(c) estate, succession or inheritance duties levied by the receiving State, subject to the provisions of paragraph 4 of Article 39;

(d) dues and taxes on private income having its source in the receiving State and capital taxes on investments made in commercial undertaking in the receiving State;

(e) charges levied for specific services rendered;

(f) registration, court or record fees, mortgage dues and stamp duty, with respect to immovable property, subject to the provisions of Article 23.

Art. 35. The receiving State shall exempt diplomatic agents from all personal services, from all public service of any kind whatsoever, and from military obligations such as those connected with requisitioning, military contributions and billeting.

Art. 36. 1. The receiving State shall, in accordance with such laws and regulations as it may adopt, permit entry of and grant exemption from all customs duties, taxes, and related charges other than charges for storage, cartage and similar services, on:

- (a) articles for the official use of the mission;
- (b) articles for the personal use of a diplomatic agent or members of his family forming part of his household, including articles intended for his establishment.

2. The personal baggage of a diplomatic agent shall be exempt from inspection, unless there are serious grounds for presuming that it contains articles not covered by the exemptions mentioned in paragraph 1 of this Article, or articles the import or export of which is prohibited by the law or controlled by the quarantine regulations of the receiving State. Such inspection shall be conducted only in the presence of the diplomatic agent or of his authorized representative.

Art. 37. 1. The members of the family of a diplomatic agent forming part of his household shall, if they are not nationals of the receiving State, enjoy the privileges and immunities specified in Articles 29 to 36.

2. Members of the administrative and technical staff of the mission, together with members of their families forming part of their respective households, shall, if they are not nationals of or permanently resident in the receiving State, enjoy the privileges and immunities specified in Articles 29 to 35, except that the immunity from civil and administrative jurisdiction of the receiving State specified in paragraph 1 of Article 31 shall not extend to acts performed outside the course of their duties. They shall also enjoy the privileges specified in Article 36, paragraph 1, in respect of articles imported at the time of first installation.

3. Members of the service staff of the mission who are not nationals of or permanently resident in the receiving State shall enjoy immunity in respect of acts performed in the course of their duties, exemption from dues and taxes on the emoluments they receive by reason of their employment and the exemption contained in Article 33.

4. Private servants of members of the mission shall, if they are not nationals of or permanently resident in the receiving State, be exempt from dues and taxes on the emoluments they receive by reason of their employment. In other respects, they may enjoy privileges and immunities only to the extent admitted by the receiving State. However, the receiving State must exercise its jurisdiction over those persons in such a manner as not to interfere unduly with the performance of the functions of the mission.

Art. 39. 1. Every person entitled to privileges and immunities shall enjoy them from the moment he enters the territory of the receiving State on preceeding to take up his post or, if already in its territory, from the moment when his appointment is notified to the Ministry for Foreign Affairs or such other ministry as may be agreed.

2. When the functions of a person enjoying privileges and immunities have come to an end, such privileges and immunities shall normally cease at the moment when he leaves the country, or on expiry of a reasonable period in which to do so, but shall subsist until that time, even in case of armed conflict. However, with respect to acts performed by such a person in the exercise of his functions as a member of the mission, immunity shall continue to subsist.

Art. 42. A diplomatic agent shall not in the receiving State practise for personal profit any professional or commercial activity.

114

Statham v. Statham and Gaekwar of Baroda

STORBRITANNIEN, PROBATE, DIVORCE AND ADMIRALTY DIVISION, 1911

Se ovenfor sag nr. 40

115

Rex v. RoseCANADA, COURT OF KING'S BENCH OF QUEBEC, 1946
(1946) 3 Can. C. R. 277

[Anklagede, der var canadisk statsborger, var tiltalt for at have været medlem af en spionageorganisation i Canada. Anklagemyndigheden ønskede som bevis under sagen at fremlægge nogle dokumenter, der var stjålet fra den sovjetrussiske ambassade i Canada. Anklagede protesterede herimod, idet han gjorde gældende, at dokumenterne, der var fremmed statsejendom og omfattet af den diplomatiske immunitet, ikke kunne fremlægges i nogen ret uden samtykke fra den stat, de hidrørte fra. Sådant samtykke forelå ikke. — Protesten blev afvist, hvorefter anklagede appellerede.]

[*Bissonnette, J.*] ***Is this objection, based on the privilege of immunity, well founded?

A preliminary remark should be made. The accused is not a diplomatic agent, and does not claim to be part of a diplomatic corps; in a word, he does not claim immunity for himself, and does not claim that immunity attaches to his person. He does not say that he is authorized by a foreign State to invoke this privilege for himself or for such State, which, according to the record, does not take advantage of it. He maintains, and I think I have clearly grasped his argument, both in his memorandum and at the hearing, that, immunity being an absolute privilege resulting from the *jus gentium*, any court of justice, from the time that the matter *sub judice* permits of establishing that this privilege is imperilled, is, *erga omnes*, without jurisdiction or competence to hear or receive the deposition of a diplomatic agent and to take cognizance of documents that he offers in evidence, without the assent of the State that he represents.

If the privilege of immunity is absolute, and if the facts contained in this proposition are true, defence counsel is right. If, on the contrary, this privilege is relative, subject to exceptions, his thesis entirely lacks foundation.***

Incumbent on diplomatic agents are two groups of duties, those that they must fulfil with regard to their own sovereign, the others to the head of the State to which they are accredited. These duties can be summed up in two very significant words; in the first case, the diplomatic agent owes fidelity, in the second, loyalty.

All admit, however, that the activities of a diplomatic agent could not be efficaciously exercised and that he could not accomplish the delicate mission with which he is charged, if he did not enjoy, in this foreign State, complete liberty, if he were not free of all subjection to the State in which he provisionally resides. And the sovereignty of the State that he represents would suffer from a certain dependence, if its diplomatic envoys did not remain the subjects of the sovereign whom they are called to represent and serve. It is upon this necessity that the principle of this privilege of diplomatic immunity is founded.

It is indubitable that diplomatic immunity admits necessary and logical restrictions. The prince who sends his representative to another prince, does so through consideration, friendship and regard for such sovereign, and, in return, he consents for the same reasons to receive the envoy of that other State. The foundation of their diplomatic relations is fixed primarily in a principle of honour. Absolute mutual confidence is established; and it is presumed that the sovereign will delegate a person who is ready to respect rigorously the sovereignty of the other State. This diplomatic agent owes, then, to the foreign State absolute loyalty. From this fact it must be deduced that this diplomatic agent must do or attempt nothing against the safety of the State that has consented to receive him.

If the public minister "engages in activities hostile to the high office of the sovereign, to the safety of the State that has received him, and thereby abuses his immunity", can he, nevertheless, claim the privilege of immunity? In theory, the reply must be affirmative.

Quite different, however, are the practical consequences. Indeed, a distinction must be observed. If one understands, in this particular case, that the diplomatic agent would be deprived of his immunity in the sense that he would become subject to the authority and control of the civil and criminal jurisdiction of the State that he has offended, it must be acknowledged that this privilege exists notwithstanding and this agent must escape the authority of the judicial power.

On the other hand, if it is understood that the privilege of immunity becomes illusory because the executive power, in which reposes the exercise of the external sovereignty of the State, has the right and the duty to use all means of prevention against this agent, such as the application of all measures of repression in order to frustrate the reprehensible acts of this diplomatic who violates his mandate, it must be said that this immunity would cease to exist.***

When a public minister offends against the code of honour and imperils

the safety of the State in which he lives, we must see in the culpable activities of such a minister "a sort of tacit renunciation of the privilege of inviolability". (Pradier-Fodéré, *Cours de droit diplomatique*, tome II, 36). It appears to me that it must be so.

The safety of the State that authorizes him to fulfil his functions in its territory, the very dignity of the State has consented to receive him, the respect that it owes itself, as also the obligation incumbent upon it of protecting its own subjects—all that demands that the minister guilty of plotting, conspiracy or espionage shall be expelled and, in accordance with this principle, shall be deprived of the privilege of immunity. However, I repeat, we must retain the exception that, even in such an occurrence, this double-dealing minister cannot be cited before the civil or criminal courts of the foreign State. What are the reasons for this view? Says de Martens, *Causes célèbres*, tome I, 139: "It is because, if the diplomatic violates the law of notions, that does not result in the right of the other State to do likewise"!

For practical purposes, it is recognized in the present state of international law, especially since the war of 1914–18, that if a diplomatic corps conspires against the State to which it is accredited, organizes espionage or sabotage, or makes itself guilty of veritable acts of war against this State, the offended government has the right to take immediately all the repressive measures, all the initiatives that may annihilate and frustrate the acts of disloyalty, of danger to the public, resulting from such an embassy's abuse of office. And these measures of repression and protection will be permissible so far as to expel the ambassador, and put under some kind of seals his residence, his documents and archives. If there is error or abuse of authority on the part of the State that takes such an initiative, the whole matter will have to be regulated or explained through ordinary diplomatic channels.

Such appear to me to be the general principles governing this particular aspect of diplomatic immunity.***

In the present affair, the witness Gouzenko has sworn that the documents of which he took possession were the property of the Embassy and had been stolen from a part of the Embassy's premises, independent of what constitutes the Russian Embassy's residence itself. Within the strict confines of his deposition we must read that he did not say that these documents were of a diplomatic nature. He simply declared that "they were the property of the Embassy". As for himself, he explained at length that he was not attached to the Embassy and that the espionage organization of which he formed a part was independent of the Russian diplomatic service. What is, then, the legal nature of these documents? Are they diplomatic writings? Do they enjoy immunity?

These documents, we recall, through information laid by Gouzenko and in the translation made by the Royal Mounted Police, were transmitted to the Minister of Justice. Whatever may be the meaning that may be attributed to the testimony of Gouzenko, if we look at the facts we must face the following dilemma: either they were the property of the Embassy, or they were not. If they did not belong to the Embassy, the question of immunity does not even present itself. On the other hand, if they belonged to the Embassy, and,

to be entirely logical, that is the position that must be taken in accordance with Gouzenko's evidence, there is room for wondering whether they had the character of "diplomatic documents". International law embodies a legal presumption that documents emanating from an embassy have a diplomatic character and that any court of justice must decline jurisdiction or competence regarding them. But can this presumption be set aside, disputed or annulled? If the acts committed by the diplomatic corps have contravened the legislation of the country to which it is accredited, and if, *a fortiori*, their immediate aim has been to imperil the safety of the State, there is no longer any immunity for the residence or the documents, things, effects or armaments that may be found therein.

A State, before according or conceding a privilege to another State, has the right to grant itself a first privilege, that of its own security. To decide otherwise would be to concede to a rule claimed to be international an authority superior to the precise, rigid, and necessary rule that the State, having its own citizens in mind, must first and above all, independently of its external duties, make sure of its own security and repress the crimes that its own citizens may commit against the King and the safety of the country. The first duty of an envoy is to respect the safety of the State.

The diplomatic agent and his personnel cannot be brought into a court of justice, but measures can be taken to prevent them from doing further damage: that is, such measures as surrounding the embassy, demanding the surrender to the authorities of every guilty person seeking refuge, seizure and arrest of every messenger, and impounding of documents, plans, photographs, reports, etc., from the time when the State becomes certain that its safety is being imperilled. This competence to repress the envoy's abuses—I stress it without giving any demonstration of it—reposes exclusively in the authority of the executive power. If it opposes immunity, all discussion becomes purely academic.

If impounded documents are afterwards delivered to a court of justice for the prosecution of a crime committed *by one of the citizens of the country*, the courts cannot give effect to immunity, cannot thwart the decision of the country's executive, cannot exercise competence in a field, on a matter belonging exclusively to the external sovereignty of the State, that is to say, to its absolute and exclusive power of conditioning and determining its relations with other States. If this were not the case, the conflict between the powers of the executive and those of the judiciary would lead to absurdity and juridical anarchy.

In that case, the State could maintain that documents are not diplomatic, and the judicial power that they are, that the ambassador has no right to immunity and his passports have been handed to him, and the courts, on their side, could decide that an employee of the embassy enjoys the privilege of immunity.***

In conclusion, I am of the opinion, then, that diplomatic immunity is relative; that the courts must verify it and grant the advantage of it to every diplomatic agent who claims it; that the privilege of taking advantage of the

immunity of a foreign State cannot be admitted for a Canadian citizen in a matter of litigation between his government and himself, when he does not form a part of a foreign diplomatic corps; that to *impose* immunity, by a judicial decision, upon a State that does not in any way claim it, would be to attack its dignity, its sovereignty, and, by an action as ungracious as unexpected, to raise a simple litigious matter to a degree of international importance, and give rise, at least in theory, to a diplomatic conflict against the will of the executive power. I have too much respect for public international law to sanction such a theory.

Territorialhøjhedens begrænsninger: Den almindelige fremmedret

A. CIVILISATIONENS MINDSTEKRAV

116

Konvention om beskyttelse af menneskerettigheder og grundlæggende frihedsrettigheder

ROM, 1950

Se ovenfor sag nr. 53

117

Nogle danske lovbestemmelser om udlændinges retsstilling

1. Grundloven af 5. juni 1953.

§ 44, stk. 1. Ingen udlænding kan få indfødsret uden ved lov.

Stk. 2. Om udlændinges adgang til at blive ejere af fast ejendom fastsættes regler ved lov.

§ 71, stk. 1. Den personlige frihed er ukrænkelig. Ingen dansk borger kan på grund af sin politiske eller religiøse overbevisning eller sin afstamning underkastes nogen form for frihedsberøvelse.

Stk. 6. Udenfor strafferetsplejen skal lovligheden af en frihedsberøvelse, der ikke er besluttet af en dømmende myndighed, og som ikke har hjemmel i lovgivningen om udlændinge, på begæring af den, der er berøvet sin frihed, eller den, der handler på hans vegne, forelægges de almindelige domstole eller anden dømmende myndighed til prøvelse. Nærmere regler herom fastsættes ved lov.

2. Lov om udlændinges adgang til landet m. v., lbkg. nr. 20 af 7. februar 1961.

§ 1. Ved kongelig anordning kan det bestemmes, hvorvidt udlændinge ved ankomst til eller udrejse fra landet skal være forsynet med pas eller anden rejselegitimation.

Stk. 2. Der kan af justitsministeren træffes bestemmelse om, hvorvidt passet (legitimationsdokumentet) skal være påtegnet tilladelse (visum) til indrejse til eller udrejse af landet.

Stk. 3. Efter justitsministerens bestemmelse kan der til udlændinge, der ikke er i stand til at skaffe sig pas eller andet legitimationsdokument, udfærdiges særlig rejselegitimation.

§ 2. Politiet bør afvise en udlænding, der vil indrejse til landet:

- 1) når han ikke opfylder de i henhold til § 1 fastsatte bestemmelser med hensyn til rejselegitimation og visering,
- 2) når det må antages, at han ikke har de til opholdet her i landet fornødne midler til sit underhold,
- 3) når det må antages, at han agter at tage arbejde, fast ophold eller ophold af længere, ubestemt varighed her i landet uden i forvejen at have indhentet den dertil fornødne tilladelse,
- 4) når det må antages, at han helt eller delvis vil ernære sig på ulovlig eller uhæderlig måde,
- 5) når han er politiet bekendt som erhvervs- eller vanemæssig forbryder eller efter det foreliggende må antages at ville indrejse for at begå forbrydelser,
- 6) når hans indrejse på grund af begåede borgerlige forbrydelser ikke er ønskelig,
- 7) når han tidligere er udvist og på ny forsøger at indrejse hertil uden at være i besiddelse af den fornødne tilladelse.

Stk. 2. Politiet bør ligeledes afvise en udlænding, der ikke er finsk, norsk eller svensk statsborger, og som må antages at ville rejse videre til Finland, Norge eller Sverige:

- 1) når han ikke opfylder de i vedkommende land gældende bestemmelser med hensyn til rejselegitimation og visering,
- 2) når det må antages, at han ikke har de til sit underhold i det pågældende land og til sin hjemrejse fornødne midler,
- 3) når det må antages, at han agter at tage arbejde, fast ophold eller ophold af længere, ubestemt varighed i det pågældende land uden i forvejen at have indhentet den dertil fornødne tilladelse,
- 4) når det må antages, at han helt eller delvis vil ernære sig på ulovlig eller uhæderlig måde i det pågældende land,
- 5) når han efter det foreliggende må antages at ville indrejse for at begå forbrydelser i det pågældende land,
- 6) når hans indrejse i det pågældende land på grund af begåede borgerlige forbrydelser ikke er ønskelig.

Stk. 3. Politiet bør endvidere afvise en udlænding, der ikke er finsk, norsk eller svensk statsborger, og som er udvist af Finland, Norge eller Sverige med forbud mod at vende tilbage til vedkommende land, når han ikke er i besiddelse

af særlig tilladelse til at indrejse i Danmark og i det eller de af de nævnte lande, hvortil han tillige må antages at ville rejse.

Stk. 4. Såfremt en udlænding påberåber sig, at han har måttet søge tilflugt her som politisk flygtning, og sandsynliggør rigtigheden heraf, må politiet dog ikke afvise ham, men skal snarest forelægge spørgsmålet for justitsministeren til afgørelse.

Stk. 5. Efter justitsministerens beslutning kan en udlænding afvises, når det skønnes, at hans indrejse af hensyn til statens sikkerhed eller opretholdelse af ro og orden eller som følge af deltagelse i foranstaltninger, der har en mod den danske stat eller dens institutioner rettet fjendtlig karakter, ikke er ønskelig, eller når hans forhold i øvrigt måtte give anledning dertil. Såfremt politiet skønner, at en udlændings indrejse til landet bør nægtes af de nævnte grunde, skal spørgsmålet om den pågældendes afvisning snarest forelægges justitsministeren til afgørelse.

§ 3. Udlændinge, der i medfør af bestemmelsen i § 1, stk. 2, skal have tilladelse (visum) til at indrejse her til landet, må ikke uden særlig tilladelse opholde sig her udover den ved indrejsetilladelsen fastsatte tidsfrist.

Stk. 2. Andre udlændinge må ikke uden særlig tilladelse opholde sig her i landet udover et tidsrum af 3 måneder fra og med den dag, da indrejse fandt sted i Danmark, Finland, Norge eller Sverige fra et andet land end disse. I det anførte tidsrum af 3 måneder fradrages det samlede tidsrum, hvor udlændingen har haft ophold i Danmark, Finland, Norge eller Sverige inden for de sidste 6 måneder før hans seneste indrejse i et af disse lande fra et andet land end disse. Overstiger det samlede tidsrum 3 måneder, kan indrejse ikke finde sted uden særlig tilladelse.

Stk. 3. Såfremt en i stk. 2 omhandlet udlænding har opnået opholdstilladelse i Finland, Norge eller Sverige, kan han inden for denne tilladelses gyldighedstid opholde sig i Danmark uden særlig tilladelse i indtil 3 måneder fra og med den dag, da han indrejste her i landet. I det anførte tidsrum af 3 måneder fradrages det samlede tidsrum, hvori udlændingen inden for de sidste 6 måneder før hans seneste indrejse i Danmark har haft ophold her. Overstiger det samlede tidsrum 3 måneder, kan indrejse ikke finde sted uden særlig tilladelse.

§ 4. For så vidt der efter foranstående bestemmelser kræves tilladelse til indrejse eller udrejse eller til ophold her i landet, træffes afgørelse herom af justitsministeren eller af den politimyndighed, han dertil bemyndiger. Der kan endvidere gives danske diplomatiske og konsulære repræsentationer i udlandet bemyndigelse til at meddele tilladelse til ind- og udrejse og til ophold her i landet.

§ 5. En udlænding kan af justitsministeren udvises i følgende tilfælde:

- 1) når afvisning kunne være sket af de i § 2, stk. 1, pkt. 4—6, nævnte grunde, og afvisningsgrunden fremdeles er tilstede,
- 2) når han har forsømt at opfylde de i henhold til § 1 fastsatte bestemmelser med hensyn til rejselegitimation,
- 3) når han forsætligt eller trods politiets advarsel gentagne gange undlader at overholde reglerne om tilmelding til politiet,

- 4) når han overtræder forskrifterne om opholdstilladelse, arbejdstilladelse eller visering eller ikke overholder dertil knyttede betingelser eller har opnået sådanne tilladelser ved bevidst urigtige anbringender eller svigagtige fortielser,
- 5) når hans fortsatte forbliven her i landet af hensyn til statens sikkerhed eller opretholdelse af ro og orden eller som følge af deltagelse i foranstaltninger, der har en mod den danske stat eller dens institutioner rettet fjendtlig karakter, er uønskelig, eller når hans forhold i øvrigt måtte give anledning dertil.

Stk. 2. En udlænding kan endvidere af justitsministeren udvises, når afvisning kunne være sket af de i § 2, stk. 2, punkt 1, 3, 4, 5 eller 6, nævnte grunde og afvisningsgrunden fremdeles er til stede.

Stk. 3. I de tilfælde, hvor en udlænding i medfør af bestemmelserne i stk. 1 og 2 vil kunne udvises, kan justitsministeren, når dette efter omstændighederne findes tilstrækkeligt, meddele ham pålæg om at udrejse inden en af justitsministeren fastsat frist, således at politiet om fornødent drager omsorg for, at udrejse finder sted.

§ 6. En udlænding kan af politiet udvises i følgende tilfælde:

- 1) når han har skaffet sig adgang til landet efter indrejse uden om den danske, finske, norske eller svenske paskontrol,
- 2) når han tidligere er udvist og påny er indrejst hertil uden at være i besiddelse af den fornødne tilladelse,
- 3) når han ikke er i besiddelse af fornødne midler til sit underhold, medmindre vedkommende i henhold til § 17, stk. 2, i lov om offentlig forsorg har opnået adgang til vedvarende forsørgelse her i landet eller der i medfør af samme lovs § 18, stk. 1, er udfærdiget forsørgelsesbevis for ham, eller hjemsendelse på grund af trang i øvrigt ikke kan finde sted enten under hensyn til de til enhver tid gældende traktater eller lignende eller efter bestemmelse truffet af arbejds- og socialministeren.

Stk. 2. En udlænding, der ikke er finsk, norsk eller svensk statsborger, kan af politiet endvidere udvises i følgende tilfælde:

- 1) når han tidligere er udvist af Finland, Norge eller Sverige med forbud mod tilbagevenden og er indrejst i Danmark uden at være i besiddelse af tilladelse til at indrejse i Danmark og i det eller de af de nævnte lande, hvortil han tillige må antages at ville rejse,
- 2) når han må antages at ville rejse til Finland, Norge eller Sverige uden at have de fornødne midler til sit underhold i det eller de pågældende lande samt til sin hjemrejse, medmindre udvisning er udelukket af de i stk. 1, punkt 3, nævnte grunde.

Stk. 3. I de i § 2, stk. 4, omhandlede tilfælde kan politiet dog ikke udvise den pågældende, men skal snarest forelægge justitsministeren spørgsmålet til afgørelse.

§ 9. En udlænding må ikke uden særlig tilladelse tage arbejde, stilling eller beskæftigelse her i landet, hvadenten det sker mod eller uden vederlag. Ej heller må man uden særlig tilladelse drive selvstændig erhvervsvirksomhed her i lan-

det eller herfra virke som repræsentant (handelsrejsende) i udlandet. Afgørelse træffes af justitsministeren eller af den politimyndighed, han dertil bemyndiger.

§ 11. *Stk. 1.* Enhver er, i det omfang justitsministeren bestemmer det og efter nærmere af ham fastsatte regler, pligtig til ved indrejse til og udrejse af landet at melde sig til paskontrollen og forevise sit pas eller anden rejselegitimation.

3. Straffelov, lbkg. nr. 215 af 24. juni 1939.

§ 76. Når en udlænding, der ikke i de sidste 5 år har haft stadigt ophold i den danske stat, dømmes til fængsel i 2 år eller derover, skal det, såfremt ikke særlige omstændigheder taler derimod, i dommen bestemmes, at han efter udstået straf bliver at udbringe af riget. Dømmes en udlænding i øvrigt til fængsel, kan der, hvis hans forhold giver anledning dertil, i dommen træffes sådan bestemmelse.

Stk. 2. Inden udbringelsen skal den pågældende til politiets protokol advares om det med ulovlig tilbagevendende forbundne strafansvar.

4. Lov om offentlig forsorg nr. 169 af 31. maj 1961.

§ 20. Enhver, der har dansk indfødsret, har forsørgelsesret her i landet. Lige med en indfødt anses en herboende kvinde, der ikke selv har dansk indfødsret, men som er eller senest har været i ægteskab med en mand med dansk indfødsret.

§ 21. Der kan ved traktatmæssige bestemmelser — så vidt muligt under forudsætning af gensidighed — indrømmes et fremmed lands statsborgere adgang til vedvarende at forsørges her i landet, så længe de har ophold her.

Stk. 2. En person, der ikke er i besiddelse af dansk indfødsret, kan modtages til forsørgelse her i landet, når socialministeren efter de foreliggende omstændigheder finder, at dette bør ske.

§ 22. Udgifter til hjælp til en udlænding, der ikke i henhold til §§ 20—21 er berettiget til forsørgelse her i landet, vil ikke kunne anmeldes til refusion, medmindre vedkommende kommune uopholdeligt og senest inden 1 måned efter ydelse af hjælp, kautionsafgivelse eller lignende sender indberetning om sagen på et af socialministeriet godkendt skema.

Stk. 2. Efter indberetningens modtagelse meddeler socialministeriet opholdskommunen, om og i hvilken udstrækning hjælpen vil kunne anmeldes til refusion, eller om pågældende eventuelt skal hjemsendes. Amterne kan bemyndiges til at træffe de heromhandlede afgørelser.

5. Lov om udlevering af lovovertrædere til Finland, Island, Norge og Sverige nr. 27 af 3. februar 1960.

§ 1. Den, der i Finland, Island, Norge eller Sverige er sigtet, tiltalt eller dømt for en strafbar handling, og som opholder sig her i landet, kan udleveres i overensstemmelse med denne lov.

§ 2. Udlevering af en dansk statsborger kan kun ske, såfremt han i de sid-

ste 2 år forud for den strafbare handling har haft bopæl i det land, hvortil udlevering ønskes, eller hvis handlingen eller en tilsvarende handling efter dansk ret kan medføre højere straf end fængsel i 4 år.

§ 3. Udlevering til strafforfølgning kan kun finde sted for handlinger, der efter lovgivningen i det land, hvortil udlevering ønskes, kan medføre højere straf end bøde.

Stk. 2. Udlevering til fuldbyrdelse af en dom kan kun ske, hvis dommen lyder på frihedsstraf eller anbringelse i anstalt, eller der med hjemmel i dommen er truffet bestemmelse om sådan anbringelse.

Stk. 3. Udlevering til strafforfølgning eller straffuldbyrdelse for flere strafbare forhold kan finde sted, selv om betingelserne i stk. 1 eller 2 kun er opfyldt med hensyn til et af forholdene.

§ 4. Udlevering for en handling, der udgør en politisk lovovertrædelse, kan kun ske, såfremt en tilsvarende handling er strafbar som politisk lovovertrædelse efter dansk ret og den, der begæres udleveret, ikke er dansk statsborger.

§ 5. Udlevering kan ikke ske, når den, der begæres udleveret, her i landet er dømt eller frifundet for den i begæringen angivne strafbare handling. Er tiltale mod ham frafaldet, kan udlevering kun finde sted, hvis de i retsplejeloven fastsatte betingelser for omgørelse af bestemmelsen om tiltalefrafald er opfyldt.

§ 6. Udlevering kan kun ske på følgende vilkår:

- 1) Den udleverede må ikke drages til ansvar for nogen anden før udleveringen begået strafbar handling end den, han er udleveret for, medmindre
 - a) justitsministeriet tillader det i medfør af § 17,
 - b) han selv i et retsmøde meddeler samtykke dertil,
 - c) han, uanset at han i en måned uhindret har kunnet forlade det land, til hvilket han er udleveret, har undladt dette, eller
 - d) han efter at have forladt landet frivilligt er vendt tilbage.
- 2) Den udleverede må ikke uden justitsministeriets tilladelse udleveres videre til et tredieland for nogen før udleveringen begået strafbar handling.

Stk. 2. I øvrigt kan der til udleveringen knyttes sådanne vilkår, som skønnes hensigtsmæssige.

118

Cutting-sagen

DE FORENEDE STATER-MEXICO, NOTEVEKSLING, 1887
Moore, *International Law Digest*, § 201

En amerikansk statsborger A. K. Cutting havde igennem 1½ år af og til boet i Paso del Norte i staten Chihuahua i Mexiko, hvor han udgav et blad, *El Centinela*. En mexikaner ved navn Emigdio Medina agtede at påbegynde udgivelsen af et konkurrerende blad, *Revista internacional*, hvorfor *El Centinela* den 6. juni 1886 bragte en artikel, der indeholdt et angreb på ham. Blandt andet blev han kaldt for svindler, bedrager, kujon og tyveknægt. Medina ind-

stævnedes Cutting for en lokal domstol for æresfornærmelse. Cutting blev arresteret, men sagen blev afsluttet med, at parterne indgik et forlig, hvorefter sagen mod Cutting blev hævet, og han blev løsladt.

Den 18. juni samme år tog Cutting over på den anden side af grænsen til U.S.A., hvor han i et blad, der udkom i El Paso i Texas, gentog angrebet i forstærket form, skønt forliget tværtimod forpligtede ham til at bringe en berigtigelse. [*El Centinela* bragte ganske vist samtidig en berigtigelse, men ikke på særlig fremtrædende plads og klart i strid med betingelserne i forliget.) Da han d. 22. juni vendte tilbage til mexikansk territorium, blev han påny arresteret og stillet for en domstol, bl. a. med den begrundelse, at han havde uddelt et stort antal eksemplarer af det amerikanske blad i Mexiko. Domstolen besluttede straks at fængsle ham.

Den 6. august 1886 blev Cutting dømt af en lokal domstol i den mexikanske stat Chihuahua til et års straffearbejde og en bøde på 600 dollars. Domstolen begrundede sin jurisdiktionskompetence ved at påberåbe sig artikel 186 i statens straffelov der indeholdt sålydende bestemmelse:

“Forbrydelser begåede i et fremmed land af en mexikaner imod mexikanere eller udlændinge, eller af en udlænding imod mexikanere, kan straffes i republikken og efter dens love under følgende betingelser:

I. at den anklagede befinder sig i republikken, hvadenten han er kommet dertil frivilligt eller er blevet bragt dertil gennem udlevering.

II. . .”

Forøvrigt, gjorde dommen gældende, var bladet blevet distribueret også i Paso del Norte som var mexikansk territorium. Denne afgørelse blev appelleret til Chihuahuas højesteret der den 21. august 1886 stadfæstede den. Cutting blev dog kort efter, antagelig efter henstilling af den mexikanske regering, frigivet.

Denne sag gav anledning til en langvarig noteveksling mellem de to implicerede stater. Fra amerikansk side dels beklagede man sig over den behandling og retspleje Cutting havde været genstand for; dels bestred man at mexikanske domstole var kompetente til at straffe Cutting, idet man gjorde gældende at han ikke havde distribueret det pågældende blad på mexikansk område. På dette grundlag krævede man dels erstatning, dels ophævelse af den omtalte artikel 186 i straffeloven.

I en instruks som den amerikanske udenrigsminister sendte til den amerikanske gesandt i Mexico blev den amerikanske klage i førstnævnte henseende nærmere motiveret således:

“Efter folkeretten kan en suveræn kun pålægge borgere fra andre lande straf i overensstemmelse med de retfærdighedsgarantier, som er fælles for alle civiliserede lande. Blandt disse garantier befinder sig retten til at få de kendsgerninger, på hvilke sigtelsen hviler, undersøgt ved en upartisk domstol, erklæring til den sigtede om disse kendsgerninger, lejlighed for ham til forsvar,

sådan udsættelse, som er nødvendig for at forberede hans sag, tilladelse til at blive løsladt mod kaution indtil domsforhandlingen i alle sager, der ikke drejer sig om kapitalforbrydelser, tilbørlig fremlæggelse under ed af alt bevismateriale til skade for den anklagede, ret for ham til krydsforhør, ret for ham til at fremlægge egne beviser til modbevis af sigtelsen, løsladelse endog fra midlertidig fængsling i alle sager, hvor anklagen udelukkende angår trusel om fredsbrud, og hvor tilbørlig sikkerhed for fredens bevarelse er tilbudt. Alle disse garantier er tilsidesat i den foreliggende sag. Mr. Cutting blev fængslet efter en summarisk behandling ved en domstol, hvis partiskhed og uegnethed i lige grad fremgik af dens optræden. Der blev nægtet ham forsvarer; der blev nægtet ham en tolk, der kunne forklare ham arten af den anklage, der var rejst imod ham; hvis der fandtes beviser imod ham, blev de ihvertfald ikke fremlagt under ed med lejlighed for ham til krydsforhør; kautionsstilling blev nægtet ham; og efter en retsforhandling — hvis den kan kaldes sådan, da den krænkede de fundamentale garantier i en civiliseret retspleje — blev han kastet i en 'afskyelig og snavset' celle, hvor der i henhold til en af de erklæringer, der var vedlagt mr. Brighams rapport, 'er fra seks til otte andre fanger, og når døren er låset, er der ikke andre muligheder for ventilation' — et utilfredsstillende hus, næsten lufttæt, med et 'snavset gulv'; der blev tilstået ham omkring '8½ cents i amerikansk mønt til hans underhold'; han 'fik intet sengetøj, ikke engang et uldtæppe' . . ."

I sidstnævnte henseende gjorde man gældende, at hvorledes det end i det foreliggende tilfælde måtte forholde sig med spørgsmålet, om Cutting virkelig havde udbredt sit smædeskrift på mexikansk område, så måtte det i hvert fald hævdes, at det krav på jurisdiktion den pågældende mexikanske straffelov giver udtryk for er i strid med folkerettens principper og så godt som uden side-tykke i civiliserede staters ret.

Mexico nægtede at efterkomme de amerikanske krav. I en note af 10. februar 1888 sammenfattede den mexikanske udenrigsminister efter en udførlig redegørelse det mexikanske standpunkt således:

"I denne note mener jeg at have vist:

For det første: At Cutting ikke underkastedes nogen dårlig behandling og heller ikke var offer for nogen lovstridig procedure, at selv hans tilsyneladende mangel af forsvar skyldtes hans eget afslag på forsvarer, hans egen forkastelse af løsrivelse imod kaution eller noget andet retsmiddel; han insisterede nemlig hele tiden på, at han udelukkende holdt sig til sin konsul og sin regering.

For det andet: At der derfor inensomhelst grund er til, at Cutting skulle have erstatning.

For det tredje: At heller ikke den indvending kan anerkendes, at der blev anvendt en lov på ham, der var i strid med individers internationale rettigheder —

A. Fordi han ikke udelukkende blev dømt for en forbrydelse begået i et fremmed land, men på grund af fortsættelsen eller gentagelsen heraf på mexikansk territorium, og:

B. Fordi Chihuahuas straffelovs artikel 186 ikke indeholder den mangel, der er tillagt den.

For det fjerde: Det simple faktum, at den nævnte artikel gennemfører tanken om extraterritorial jurisdiktion som anvendt på fremmede udover de grænser, lovgivningen i de fleste andre lande sætter, beviser ikke, at dette er i strid med individers anerkendte rettigheder.

For det femte: Den internationale sædvane indskrænker sig til at opstille almindelige principper, og når der opstår uoverensstemmelser med hensyn til anvendelsen af nogen del af disse principper, er enhver fortolkning, også den, der anlægges af et mindretal af staterne, et retmæssigt udslag af disse staters suverænitæt.

For det sjette: Dette er tilfældet ved den såkaldte objektive eller quasi-territoriale jurisdiktion, d. v. s. den, der er anvendelig på en fremmed, der i udlandet krænker en borger i den stat, der rejser kravet; et spørgsmål, som ifølge alle anerkendte autoriteter langt fra at være afgjort er et af de uafgjorte spørgsmål, der frembyder de største vanskeligheder for lovgiveren og for retsvidenskaben.

For det syvende: Imidlertid kan den jurisdiktion, indrømmet som den er i de fleste anerkendte lovgivninger, over sager i hvilke den fremmede har angrebet en stats sikkerhed eller til skade for mange af dens borgere eller undersåtter har forfalsket rigets mønt eller dens banks sedler, med lige så stor grund omfatte sådanne sager, hvor skaden rammer nogle få eller endog blot én af borgerne i den stat, der rejser kravet.

For det ottende: Den ret, som enhver nation har til at fastsætte passende betingelser for udlændinges adgang til dets territorium, medfører ret til indenfor lovgivningens grænser at gøre sådanne udlændinge ansvarlige for handlinger, som de måtte begå i udlandet imod denne nation eller imod nogen af dens borgere eller undersåtter.

For det niende: De Forenede Stater kan ikke forlange, at Mexiko skal modificere sin lovgivning i denne henseende, selv om der gås ud fra, at den lider af den påståede mangel, thi de Forenede Stater opretholder og følger i virkeligheden selv i én eller flere af deres territoriale enheder den samme lovgivning."

Twisten fandt aldrig nogen formelig løsning, men i den amerikansk-mexikanske udleveringstraktat af 22. februar 1899 bestemtes det i artikel III, 4, at staterne, på bestemte undtagelser nær, skulle afholde sig fra at udøve strafferetlig jurisdiktion over forbrydelser der udelukkende var begået på den anden stats territorium.

119

Neer Claim

DE FORENEDE STATER-MEXICO, GENERAL CLAIMS COMMISSION, 1926
Opinions of Commissioners, 1927, 71

[*C. van Vollenhoven*, President Commissioner, *G. Fernández MacGregor*, Mexican Commissioner.] 1. This claim is presented by the United States against the United Mexican States in behalf of *L. Fay H. Neer*, widow, and *Pauline*

E. Neer, daughter, of Paul Neer, who, at the time of his death, was employed as superintendent of a mine in the vicinity of Guanaceví, State of Durango, Mexico. On November 16, 1924, about eight o'clock in the evening, when he and his wife proceeding on horseback from the village of Guanaceví to their home in the neighborhood, they were stopped by a number of armed men who engaged Neer in a conversation, which Mrs. Neer did not understand, in the midst of which bullets seem to have been exchanged and Neer was killed. It is alleged that, on account of this killing, his wife and daughter, American citizens, sustained damages in the sum of \$100,000.00; that the Mexican authorities showed an unwarrantable lack of diligence or an unwarrantable lack of intelligent investigation in prosecuting the culprits; and that therefore the Mexican Government ought to pay to the claimants the said amount.***

3. As to lack of diligence, or lack of intelligent investigation, on the part of the Mexican authorities, after the killing of Paul Neer had been brought to their notice, it would seem that in the early morning after the tragedy these authorities might have acted in a more vigorous and effective way than they did, and moreover, that both the special agent of the Attorney General of Durango (in his letter of November 24, 1924), and the Governor of that State, who proposed the removal of the Judge of Guanaceví, have shared this opinion. The Commission is mindful that the task of the local Mexican authorities was hampered by the fact that the only eye-witness of the murder was unable to furnish them any helpful information. There might have been reason for the higher authorities or the State to intervene in the matter, as they apparently did. But in the view of the Commission there is a long way between holding that a more active and more efficient course of procedure might have been pursued, on the one hand, and holding that this record presents such lack of diligence and of intelligent investigation as constitutes an international delinquency, on the other hand.

4. The Commission recognizes the difficulty of devising a general formula for determining the boundary between an international delinquency of this type and an unsatisfactory use of power included in national sovereignty. In 1910 John Bassett Moore observed that he did "not consider it to be practicable to lay down in advance precise and unyielding formulas by which the question of a denial of justice may in every instance be determined" (American Journal of International Law, 1910, p. 787), and in 1923 De Lapradelle and Politis stated that the evasive and complex character (*le caractère fuyant et complexe*) of a denial of justice seems to defy any definition (*Recueil des Arbitrages Internationaux*, II, 1923, p. 280). It is immaterial whether the expression "denial of justice" be taken in that broad sense in which it applies to acts of executive and legislative authorities as well as to acts of the courts, or whether it be used in a narrow sense which confines it to acts of judicial authorities only; for in the latter case a reasoning, identical to that which—under the name of "denial of justice"—applies to acts of the judiciary, will apply—be it under a different name—to unwarranted acts of executive and legislative authorities. Without attempting to announce a precise formula, it

is in the opinion of the Commission possible to go a little further than the authors quoted, and to hold (first) that the propriety of governmental acts should be put to the test of international standards, and (second) that the treatment of an alien, in order to constitute an international delinquency, should amount to an outrage, to bad faith, to wilful neglect of duty, or to an insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency. Whether the insufficiency proceeds from deficient execution of an intelligent law or from the fact that the laws of the country do not empower the authorities to measure up to international standards is immaterial.

5. It is not for an international tribunal such as this Commission to decide, whether another course of procedure taken by the local authorities at Guana-cévi might have been more effective. On the contrary, the grounds of liability limit its inquiry to whether there is convincing evidence either (1) that the authorities administering the Mexican law acted in an outrageous way, in bad faith, in wilful neglect of their duties, or in a pronounced degree of improper action, or (2) that Mexican law rendered it impossible for them properly to fulfil their task. No attempt is made to establish the second point. The first point is negated by the full record of police and judicial authorities produced by the Mexican Agent, though the Commission feels bound to state once more that in its opinion better methods might have been used. From this record it appears that the local authorities, on the very night of the tragedy, November 16, went to the spot where the killing took place and examined the corpse; that on November 17 the Judge proceeded to the examination of some witnesses among them Mrs. Neer; that investigations were continued for several days; that arrests were made of persons suspected; and that they were subsequently released for want of evidence. The American Agency in rebuttal offers nothing but affidavits stating individual impressions or suppositions. In the light of the entire record in this case the Commission is not prepared to hold that the Mexican authorities have shown such lack of diligence or such lack of intelligent investigation in apprehending and punishing the culprits as would render Mexico liable before this Commission.

6. The Commission accordingly decides that the claim of the United States is disallowed.

120

Case of Sambiaggio

ITALIEN-VENEZUELA, CLAIMS ARBITRATION, 1903
Ralston, Venezuelan Arbitration of 1903, 679

[*Ralston, Umpire.*] The Commissioners for Italy and Venezuela differing as to right of recovery in the above-mentioned case, the same was duly referred to the umpire for decision under the protocol.

The claimant, Salvatore Sambiaggio, a resident of San Joaquin Parish, State of Carabobo, demands the sum of 5,133.52 bolivars for forced advances

made to, property taken by, and damages suffered from revolutionary forces under command of Colonel Guevara on or about July 27, 1902, with the additional amount of 171.63 bolivars for costs and interest.

The immediate and most important question presented is as to the liability of the existing government for losses and damages suffered at the hands of revolutionists who failed of success.

Let us treat the matter first from the standpoint of abstract right, reserving examination of precedents, the treaties between the two countries, and the question whether there be anything to exempt Venezuela from the operation of such general rule as may be found to exist.

We may premise that the case now under consideration is not one where a State has fallen into anarchy, or the administration of law has been nerveless or inefficient, or the government has failed to grant to a foreigner the protection afforded citizens, or measures within the power of the government have not been taken to protect those under its jurisdiction from the acts of revolutionists; but simply where there exists open, flagrant, bloody, and determined war.

The ordinary rule is that a government, like an individual, is only to be held responsible for the acts of its agents or for acts the responsibility for which is expressly assumed by it. To apply another doctrine, save under certain exceptional circumstances incident to the peculiar position occupied by a government toward those subject to its power, would be unnatural and illogical.

But, speaking broadly, are revolutionists and government so related that as between them a general exception should exist to the foregoing apparently axiomatic principle?

The interest of a government, like that of an individual, lies in its preservation. The presumed interests of revolutionists lie in the destruction of the existing government and the substitution of another of different personnel or controlled by different principles.

To say that a government is (as it naturally must be) responsible for the acts it commits in an attempt (for instance) to maintain its own existence, and to require it at the same moment to pay for the powder and ball expended and the soldiers engaged in an attempt to destroy its life, is a proposition difficult to maintain, and yet it is to this point we arrive in the last analysis if governments are to compensate wrongs done by their would-be slayers when engaged in attempts to destroy them.

A further consideration may be added. Governments are responsible as a general principle, for the acts of those they control. But the very existence of a flagrant revolution presupposes that a certain set of men have gone temporarily or permanently beyond the power of the authorities; and unless it clearly appear that the government has failed to use promptly and with appropriate force its constituted authority, it can not reasonably be said that it should be responsible for a condition of affairs created without its volition. When we bear in mind that for six months previous to the taking complained of in the present case a bloody and determined revolution demanding the

entire resources of the Government to quell it had been raging throughout the larger part of Venezuela, it can not be determined generally that there was such neglect on the part of the Government as to charge it with the offenses of the revolutionists whose acts are now in question.

We find ourselves therefore obliged to conclude, from the standpoint of general principle, that, save under the exceptional circumstances indicated, the Government should not be held responsible for the acts of revolutionists because—

1) Revolutionists are not the agents of government, and a natural responsibility does not exist.

2) Their acts are committed to destroy the government, and no one should be held responsible for the acts of an enemy attempting his life.

3) The revolutionists were beyond governmental control, and the government cannot be held responsible for injuries committed by those who have escaped its restraint.***

[Kendelsen drøfter derefter den konkrete betydning af en mellem Italien og Venezuela indgået traktat og fortsætter:]

The umpire therefore accepts the rule that if in any case of reclamation submitted to him it is alleged and proved that Venezuelan authorities failed to exercise due diligence to prevent damages from being inflicted by revolutionists, that country should be held responsible. In the present instance no such want of diligence is alleged and proved.

It is suggested that a decision holding Venezuela not responsible for the acts of revolutionists would tend to encourage them to seize the property of foreigners. This appeal is of a political character and does not address itself to the umpire.

It is further urged that absolute equity should control the decisions of the Commission and that equitably sufferers from the acts of revolutionists should be recompensed. But this subject may be viewed from two standpoints. It is as inequitable to charge a government for wrongs it never committed as it would be to deny rights to a claimant for a technical reason.***

Governed by what he regards as the clear teachings of international law, the umpire will sign a judgment dismissing the case.

121

Youmans Claim

DE FORENEDE STATER-MEXICO, GENERAL CLAIMS COMMISSION, 1926

[1927] Opinions of Commissioners 150

[Kommissionen; Van Vollenhoven, Nielsen, MacGregor.] 1. Claim for damages in the amount of \$50,000.00 is made in this case by the United States of America against the United Mexican States in behalf of Thomas H. Youmans, the son of Henry Youmans, an American citizen, who, together with two other Americans, John A. Connelly and George Arnold, was killed at the hands of a mob on March 14, 1880, at Angangueo, State of Michoacán,

Mexico. The occurrences giving rise to the claim as stated in the Memorial are substantially as follows:

2. At the time when the killing took place Connelly and Youmans were employed by Justin Arnold and Clinton Stephens, American citizens, who were engaged under a contract with a British corporation in driving a tunnel, known as the San Hilario Tunnel, in the town of Angangueo, a place having a population of approximately 7,000 people. The work was being done by Mexican laborers, resident in the town under the supervision of the Americans. On the day when these men were killed Connelly, who was Managing Engineer in the construction of the tunnel at Angangueo, had a controversy with a laborer, Cayentano Medina by name, over a trifling sum of about twelve cents which the laborer insisted was due to him as wages. Connelly, considering the conduct of the laborer to be offensive, ejected the latter from the house in which Connelly lived and to which Medina had come to discuss the matter. Subsequently Medina, who was joined by several companions, began to throw stones at Connelly while the latter was sitting in front of his house and approached the American with a drawn machete. Connelly, with a view to frightening his assailant, fired shots into the air from a revolver. The American having withdrawn into the house, Medina attempted to enter, and his companions followed. Connelly thereupon fired at Medina with a shotgun and wounded him in the legs. Soon the house was surrounded by a threatening mob, which increased until it numbered about a thousand people. Connelly, Youmans, and Arnold, realizing the seriousness of their situation, prepared to defend themselves against the mob. Connelly's employer, Clinton Stephens, on hearing shots, went to the house and learned from Connelly what had happened. Upon Stephens's advice Connelly undertook to surrender himself to the local authorities, but was driven back into the house by the mob. The attack against Connelly when he endeavored to surrender to police authorities was led by Pedro Mondragón, a person styled the *Jefe de Manzana*, with whom Connelly had been on friendly terms. Stephens, followed by a part of the mob, proceeded to the *Casa Municipal* and requested the Mayor, Don Justo Lopez, to endeavor to protect the Americans in the house. The Mayor promptly went to the house, but was unable to quiet the mob. He then returned to his office and ordered José Maria Mora, *Jefe de la Tropa de la Seguridad Publica*, who held the rank of Lieutenant in the forces of the State of Michoacán, to proceed with troops to quell the riot and put an end to the attack upon the Americans. The troops, on arriving at the scene of the riot, instead of dispersing the mob, opened fire on the house, as a consequence of which Arnold was killed. The mob renewed the attack, and while the Americans defended themselves as best they could, several members of the mob approached the house from the rear, where there were no windows, and set fire to the roof. Connelly and Youmans were forced to leave, and as they did so they were killed by the troops and members of the mob. Their bodies were dragged through the streets and left under a pile of stones by the side of the road so mutilated as scarcely to be recognizable. At night they were buried by employees of the Mining Company in its cemetery at Trojes.

3. On the morning following the murder of the Americans, Federal Troops arrived and established order. On March 17, the Government of the State was directed by the President of Mexico to take all possible measures to discover those who were responsible for the murders. Of the thousand or more who made up the mob, court action was instituted against about twenty-nine. Only eighteen of this number were arrested, but the record discloses that several were released on nominal bail, and were not apprehended after their release. Five were condemned to capital punishment, but their sentences were modified. This action of the court was to no avail; when it was taken one had died, and the remaining four left town before they could be arrested. Seven were acquitted. The cases of six others were discontinued, and the charges against the remaining eleven were left open in the year 1887 for prosecution when they might be apprehended.***

11. The claim made by the United States is predicated on the failure of the Mexican Government to exercise due diligence to protect the father of the claimant from the fury of the mob at whose hands he was killed, and the failure to take proper steps looking to the apprehension and punishment of the persons implicated in the crime. In connection with the contention with respect to the failure of the authorities to protect Youmans from the acts of the mob, particular emphasis is laid on the participation of soldiers which is asserted to be in itself a ground of liability. In behalf of the respondent Government it is contended that the Mexican Government and the Government of the State of Michoacán acted with due diligence in arresting and bringing to justice all persons against whom a reasonable suspicion of guilt existed; that the charge that some State troops participated in the riot is not proved by the evidence; and that, even if it were assumed that the soldiers were guilty of such participation, the Mexican Government should not be held responsible for the wrongful acts of ten soldiers and one officer of the State of Michoacán, who, after having been ordered by the highest official in the locality to protect American citizens, instead of carrying out orders given them acted in violation of them in consequence of which the Americans were killed.

12. We are of the opinion that the contentions advanced by the United States as to liability on the part of the Mexican Government are sustained by the evidence in the record. Without discussing the evidence at length, it may be stated that the Commission is of the opinion that the record shows a lack of diligence in the punishment of the persons implicated in the crime. Annex 3 accompanying the Mexican Answer reveals some interesting information with respect to the prosecution of persons who were arrested. There is not sufficient information before the Commission to warrant us in undertaking to draw any definite conclusions with respect to certain cases in which prisoners were released and other cases in which severe sentences imposed by the court of first instance were mitigated by a higher court. It may be mentioned, however, that this judicial record shows that seventeen prisoners escaped, some of them while they were at liberty on bail. Citations have been made to evidence with respect to participation of soldiers in the killing of the three Americans. We consider that evidence to be ample proof of such conduct on the part of the soldiers,

and touching this point it is pertinent to note that evidence has not been adduced to disprove their guilt. It is also pertinent to note touching this point that some soldiers were arrested but were not sentenced. Evidence before the Commission does not disclose whose weapons killed the Americans, but the participation of the soldiers with members of the mob is established. It can not properly be said that adequate protection is afforded to foreigners in a case in which the proper agencies of the law to afford protection participate in murder. The claim of *Alfred Jeannotat*, under the Convention of July 4, 1868, between the United States and Mexico, was a case very similar to the present one. Speaking of the participation of soldiers in riotous acts, Umpire Thornton said:

It has been alleged that in the above-mentioned instance the sacking was done by the released prisoners, and by a mob belonging to the population of the town; but, if it were so, it was the military force commanded by officers who put it in the power of the convicts and incited the mob to assist them in their acts of violence and plunder. It does not appear that without the arrival of the military force, which ought to have protected the peaceable inhabitants of the town, there would have been any inclination to commit such acts of violence. The umpire is therefore of opinion that compensation is due to the claimant from Mexican Government. (Moore, *International Arbitrations*, IV, 3673, 3674.)

13. With respect to the question of responsibility for the acts of soldiers there are citations in the Mexican Government's brief of extracts from a discussion of a subcommittee of the League of Nations Committee of Experts for the Progressive Codification of International Law. The passage quoted, which deals with the responsibility of a State for illegal acts of officials resulting in damages to foreigners, begins with a statement relative to the acts of an official accomplished "outside the scope of his competency, that is to say, if he has exceeded his powers." An illegal act of this kind, it is stated in the quotation, is one that can not be imputed to the State. Apart from the question whether the acts of officials referred to in this discussion have any relation to the rule of international law with regard to responsibility for acts of soldiers, it seems clear that the passage to which particular attention is called in the Mexican Government's brief is concerned solely with the question of the authority of an officer as defined by domestic law to act for his Government with reference to some particular subject. Clearly it is not intended by the rule asserted to say that no wrongful act of an official acting in the discharge of duties entrusted to him can impose responsibility on a Government under international law because any such wrongful act must be considered to be "outside the scope of his competency." If this were the meaning intended by the rule it would follow that no wrongful acts committed by an official could be considered as acts for which his Government could be held liable. We do not consider that any of these passages from the discussion of the subcommittee quoted in the Mexican brief are at variance with the view which we take that the action of the troops in participating in the murder at Angangueo imposed a direct responsibility on the Government of Mexico.

14. Citation is also made in the Mexican brief to an opinion rendered by Umpire Lieber in which effect is evidently given to the well-recognized rule

of international law that a government is not responsible for malicious acts of soldiers committed in their private capacity. Awards have repeatedly been rendered for wrongful acts of soldiers acting under the command of an officer. (See for example the claim of *Frederick A. Newton v. Mexico*, for the theft of property by Republican troops under Colonel Rijos, and the claim of *A. F. Lanfranco v. Mexico*, for the looting of a store at Tehuantepec by armed men under the command of the *Jefe Politico* of that place—Moore, *International Arbitrations*, III, 2997; also the interesting case of the German sentry who at the frontier near Vexaincourt shot from the German side and killed a person on French territory, mentioned by Oppenheim, *International Law* (3d. ed.), I, 218—219; and the opinion of the Commission in the *Falcón Claim*, Docket No. 278.) Certain cases coming before the international tribunals may have revealed some uncertainty whether the acts of soldiers should properly be regarded as private acts for which there was no liability on the State, or acts for which the State should be held responsible. But we do not consider that the participation of the soldiers in the murder at Angangueo can be regarded as acts of soldiers committed in their private capacity when it is clear that at the time of the commission of these acts the men were on duty under the immediate supervision and in the presence of a commanding officer. Soldiers inflicting personal injuries or committing wanton destruction or looting always act in disobedience of some rules laid down by superior authority. There could be no liability whatever for such misdeeds if the view were taken that any acts committed by soldiers in contravention of instructions must always be considered as personal acts.

15. The respondent Government has not denied that, under the Convention of September 8, 1923, acts of authorities of Michoacán may give rise to claims against the Government of Mexico. The Commission is of the opinion that claims may be predicated on such acts.

16. Claim is made in this case for damages in the amount of \$50,000.00. The Commission is of the opinion that an award may properly be made in the sum of \$20,000.00.

17. The Commission therefore decides that the Government of the United Mexican States must pay to the Government of the United States of America the sum of \$20,000.00 (twenty thousand dollars) without interest on behalf of Thomas H. Youmans.

122

Abbagnato-affæren

DE FORENEDE STATER—ITALIEN, NOTEVEKSLING, 1891

Se ovenfor sag nr. 39

123

De meksikanske landbrugsekspropriationer

DE FORENEDE STATER-MEXICO, NOTEVEKSLING, 1938
Department of State, Inter-American Series 16

[Note fra de Forenede Staters udenrigsminister til ambassadøren for Meksiko:]

Washington, July 21, 1938.

Excellency:

During recent years the Government of the United States has upon repeated occasions made representations to the Government of Mexico with regard to the continuing expropriation by Yours Excellency's Government of agrarian properties owned by American citizens, without adequate, effective and prompt compensation being made therefor.

In extenuation of such action, the Mexican Government both in its official correspondence and in its public pronouncements has adverted to the fact that it is earnestly endeavoring to carry forward a program for the social betterment of the masses of its people.

The purposes of this program, however desirable they may be, are entirely unrelated to and apart from the real issue under discussion between our two Governments. The issue is not whether Mexico should pursue social and economic policies designed to improve the standard of living of its people. The issue is whether in pursuing them the property of American nationals may be taken by the Mexican Government without making prompt payment of just compensation to the owner in accordance with the universally recognized rules of law and equity.***

The taking of property without compensation is not expropriation. It is confiscation. It is no less confiscation because there may be an expressed intent to pay at some time in the future.

If it were permissible for a government to take the private property of the citizens of other countries and pay for it as and when, in the judgment of that government, its economic circumstances and its local legislation may perhaps permit, the safeguards which the constitutions of most countries and established international law have sought to provide would be illusory. Governments would be free to take property far beyond their ability or willingness to pay, and the owners thereof would be without recourse. We cannot question the right of a foreign government to treat its own nationals in this fashion if it so desires. This is a matter of domestic concern. But we cannot admit that a foreign government may take the property of American nationals in disregard of the rule of compensation under international law. Nor can we admit that any government unilaterally and through its municipal legislation can, as in this instant case, nullify this universally accepted principle of international law, based as it is on reason, equity and justice.***

The Government of Mexico has professed its support of this principle of law. It is the considered judgment, however, of the Government of the United

States that the Government of Mexico has not complied therewith in the case of several hundred separate farm or agrarian properties taken from American citizens. This judgment is apparently not admitted by your Government. The Government of the United States therefore proposes that there be submitted to arbitration the question *whether there has been compliance by the Government of Mexico with the rule of compensation as prescribed by international law in the case of the American citizens whose farm and agrarian properties in Mexico have been expropriated by the Mexican Government since August 30, 1927, and if not, the amount of, and terms under which, compensation should be made by the Government of Mexico.* My Government proposes that this arbitration be carried out pursuant to the provisions of the General Treaty of Arbitration signed at Washington January 5, 1929, to which both our countries are parties.

Accept [etc.]

Cordell Hull

[Note fra den meksikanske udenrigsminister til de Forenede Staters ambassadør:]

Mexico, D.F., August 3, 1938.

Mr. Ambassador:

I have the honor to refer to your Government's note delivered on July 21 last, to the Mexican Ambassador to the United States, Dr. Francisco Castillo Nájera.

In the note referred to, your Government *** requires from that of Mexico the immediate payment of adequate compensation for the American landholders affected by the agrarian reform since August 30, 1927, alleging that otherwise my country will violate a universally recognized rule of international law based on reason, equity, and justice.

My Government maintains, on the contrary, that there is in international law no rule universally accepted in theory nor carried out in practice, which makes obligatory the payment of immediate compensation nor even of deferred compensation, for expropriations of a general and impersonal character like those which Mexico has carried out for the purpose of redistribution of the land.

The expropriations made in the course of our agrarian reform, do, in fact, have this double character, which ought to be taken very much into account in order to understand the position of Mexico and rightly appraise her apparent failure to meet her obligations.

Without attempting to refute the point of view of the American Government, I wish to draw your attention very specially to the fact that the agrarian reform is not only one of the aspects of a program of social betterment attempted by a government or a political group for the purpose of trying out new doctrines, but also constitutes the fulfilling of the most important of the demands of the Mexican people, who, in the revolutionary struggle, for the purpose of obtaining it, sacrificed the very lives of their sons. The political, social, and economic stability and the peace of Mexico depend on the land being placed anew in the hands of the country people who work it; therefore,

its distribution, which implies the transformation of the country, that is to say, the future of the nation, could not be halted by the impossibility of paying immediately the value of the properties belonging to a small number of foreigners who seek only a lucrative end.

On the one hand, there are weighed the claims of justice and the improvement of a whole people, and on the other hand, the purely pecuniary interests of some individuals. The position of Mexico in this unequal dilemma could not be other than the one she has assumed, and this is not stated as an excuse for her actions but as a true justification thereof.***

As has been stated above, there does not exist in international law any principle universally accepted by countries, nor by the writers of treaties on this subject, that would render obligatory the giving of adequate compensation for expropriations of a general and impersonal character. Nevertheless Mexico admits, in obedience to her own laws, that she is indeed under obligation to indemnify in an adequate manner; but the doctrine which she maintains on the subject, which is based on the most authoritative opinions of writers of treaties on international law, is that the time and manner of such payment must be determined by her own laws.***

My Government desires to make it plain that when it decided to suspend the payment of its agrarian debt in the year 1930, the measure affected equally Mexicans and foreigners. If Mexico had paid only the former, without doubt it would have violated a rule of equity; if it had paid only the latter, to the exclusion of nationals, it would have committed a similar irregularity.***

The demand for unequal treatment is implicitly included in your Government's note; for, while it is true that it does not so state clearly, it does require the payment to its nationals, independently of what Mexico may decide to do with regard to her citizens; and as your Government is not unaware that our Government finds itself unable immediately to pay the indemnity to all affected by the agrarian reform, by insisting on payment to American landholders, it demands, in reality, a special privileged treatment which no one is receiving in Mexico.***

[I en ny note fastholdt udenrigsminister Hull kravet om erstatning, idet han gjorde gældende, at det er et universelt anerkendt princip såvel i som mellem stater, at fratagelse af ejendom kun kan ske mod erstatning, at en stat ikke kan annullere folkeretten ved at give love, der forhindrer opfyldelsen af folkerettens krav, og at en stat ikke kan frigøre sig fra folkerettens forpligtelser under henvisning til den økonomiske eller finansielle situation i staten.

Efter yderligere noteveksling opnåedes enighed om, at værdien af de eksproprierede amerikanske landbrug skulle fastsættes af en kommission, bestående af repræsentanter for begge regeringer, og at Mexiko foreløbig skulle betale 1 million \$ à conto, indtil erstatningsbeløbet var endeligt fastsat. Begge parter forbeholdt sig iøvrigt deres stilling til de juridiske spørgsmål i sagen og enedes om, at sagens udfald ikke skulle gælde som precedens.]

124

Resolution on Permanent Sovereignty over Natural Resources

DE FORENEDE NATIONERS GENERALFORSAMLING, NR. 1803 (XVII),
14. DECEMBER 1962

The General Assembly *** *declares* that:

1. The right of peoples and nations to permanent sovereignty over their natural wealth and resources must be exercised in the interest of their national development and of the well-being of the people of the State concerned.

2. The exploration, development and disposition of such resources, as well as the import of the foreign capital required for these purposes, should be in conformity with the rules and conditions which the peoples and nations freely consider to be necessary or desirable with regard to the authorization, restriction or prohibition of such activities.

3. In cases where authorization is granted, the capital imported and the earnings on that capital shall be governed by the terms thereof, by the national legislation in force, and by international law. The profits derived must be shared in the proportions freely agreed upon, in each case, between the investors and the recipient State, due care being taken to ensure that there is no impairment, for any reason, of that State's sovereignty over its natural wealth and resources.

4. Nationalization, expropriation or requisitioning shall be based on grounds or reasons of public utility, security or the national interest which are recognized as overriding purely individual or private interests, both domestic and foreign. In such cases the owner shall be paid appropriate compensation, in accordance with the rules in-force in the State taking such measures in the exercise of its sovereignty and in accordance with international law. In any case, where the question of compensation gives rise to a controversy, the national jurisdiction of the State taking such measures shall be exhausted. However, upon agreement by sovereign States and other parties concerned, settlement of the dispute should be made through arbitration or international adjudication.

5. The free and beneficial exercise of the sovereignty of peoples and nations over their natural resources must be furthered by the mutual respect of States based on their sovereign equality.

6. International co-operation for the economic development of developing countries, whether in the form of public or private capital investments, exchange of goods and services, technical assistance, or exchange of scientific information, shall be such as to further their independent national development and shall be based upon respect for their sovereignty over their natural wealth and resources.

7. Violation of the rights of peoples and nations to sovereignty over their natural wealth and resources is contrary to the spirit and principles of the Charter of the United Nations and hinders the development of international co-operation and the maintenance of peace.

8. Foreign investment agreements freely entered into by, or between sovereign

States shall be observed in good faith; States and international organizations shall strictly and conscientiously respect the sovereignty of people and nations over their natural wealth and resources in accordance with the Charter and the principles set forth in the present resolution.

B. MILITÆRTJENESTE

125

Lov om værnepligt nr. 210 af 11. juni 1954

Se ovenfor sag nr. 26

126

**Polites v. The Commonwealth and Another
Kandiliote v. The Commonwealth and Another**

AUSTRALIEN, HIGH COURT OF AUSTRALIA, 1945

Se ovenfor sag nr. 16

C. RESPEKT FOR FREMMED RET OG FREMMEDE RETSAKTER

127

Luther v. James Sagor & Co.

STORBRITANNIEN, COURT OF APPEAL, 1921

Se ovenfor sag nr. 70

128

**Bánská a Hutní Společnost, Prag, mod Dr. Hahn,
Rio de Janeiro, m. fl.**

DANMARK, VESTRE LANDSRET, 1952
U. f. R. 1952, 856

Se nedenfor sag nr. 275

129

Regazzoni v. K. C. Lethia (1944) Ltd.

ENGLAND, HOUSE OF LORDS, 1957
L. R. [1958] A. C. 301

Se ovenfor sag nr. 13.

130

The Case of the S.S. "Lotus"

DEN FASTE DOMSTOL FOR MELLEMFOLKELIG RETSPLEJE, DOM, 1927

Se ovenfor sag nr. 27

131

Cutting-sagen

DE FORENEDE STATER-MEXICO, NOTEVEKSLING, 1887

Se ovenfor sag nr. 118

132

Borgerlig straffelov af 15. april 1930

LOVBEKENDTGØRELSE NR. 215, 24. JUNI 1939

§ 6. Under dansk straffemyndighed hører handlinger, som foretages

- 1) i den danske stat,
 - 2) på dansk fartøj, som befinder sig udenfor nogen stats folkeretlig anerkendt område,
 - 3) på dansk fartøj, som befinder sig på fremmed folkeretlig anerkendt område, af personer, der hører til fartøjet eller som rejsende følger med dette.
- Justitsministeren bestemmer i hvilket omfang handlinger, som på dansk område foretages om bord i fremmed fartøj af og imod nogen, der hører til eller som rejsende følger med dette, skal påtales.

§ 7. Under dansk straffemyndighed hører fremdeles handlinger, som en person, der har dansk indfødsret eller er bosat i den danske stat, har foretaget udenfor denne,

- 1) for så vidt handlingen er foretaget udenfor folkeretlig anerkendt statsområde, hvis handlinger af den pågældende art kan medføre højere straf end hæfte,
- 2) for så vidt handlingen er foretaget indenfor sådant område, hvis den er strafbar også efter den dér gældende lovgivning.

§ 8. Under dansk straffemyndighed hører endvidere handlinger, foretagne udenfor den danske stat, uden hensyn til hvor gerningsmanden hører hjemme,

- 1) når handlingen krænker den danske stats selvstændighed, sikkerhed, forfatning eller offentlige myndigheder, en embedspligt mod staten eller sådanne interesser, hvis retsbeskyttelse i den danske stat forudsætter en særlig tilknytning til denne,
- 2) når handlingen krænker en forpligtelse, som det ifølge lov påhviler gerningsmanden at iagttage i udlandet, eller en ham overfor dansk fartøj påhvilende tjenestepligt,
- 3) når en udenfor folkeretlig anerkendt statsområde foretagen handling krænker nogen, der har dansk indfødsret eller er bosat i den danske stat, og handlinger af den pågældende art kan medføre højere straf end hæfte.

I det under nr. 3 nævnte tilfælde afgør rigsadvokaten, om påtale skal finde sted.

§ 9. I de tilfælde, i hvilke en handling straffbarhed afhænger af eller påvirkes af en indtrædt eller tilsigtet følge, betragtes handlingen tillige som foretaget dér, hvor virkningen er indtrædt eller tilsigtet at skulle indtræde.

§ 10. Når i medfør af foranstående regler påtale skal ske her i landet, skal afgørelsen såvel om straf som om andre retsfølger af handlingen ske efter dansk lovgivning.

Territorialhøjhedens begrænsninger: Særlige regler om skibe

133

Convention on the Territorial Sea and the Contiguous zone,

Genève 1958

Section III.

Right of Innocent Passage

Sub-Section A. Rules applicable to All Ships

Art. 14. 1. Subject to the provisions of these articles, ships of all States, whether coastal or not, shall enjoy the right of innocent passage through the territorial sea.

2. Passage means navigation through the territorial sea for the purpose either of traversing that sea without entering internal waters, or of proceeding to internal waters, or of making for the high seas from internal waters.

3. Passage includes stopping and anchoring, but only in so far as the same are incidental to ordinary navigation or are rendered necessary by force majeure or by distress.

4. Passage is innocent so long as it is not prejudicial to the peace, good order or security of the coastal State. Such passage shall take place in conformity with these articles and with other rules of international law.

5. Passage of foreign fishing vessels shall not be considered innocent if they do not observe such laws and regulations as the coastal State may make and publish in order to prevent vessels from fishing in the territorial sea.

6. Submarines are required to navigate on the surface and to show their flag.

Art. 15. 1. The coastal State must not hamper innocent passage through the territorial sea.

2. The coastal State is required to give appropriate publicity to any dangers to navigation, of which it has knowledge, within its territorial sea.

Art. 16. 1. The coastal State may take the necessary steps in its territorial sea to prevent passage which is not innocent.

2. In the case of ships proceeding to internal waters, the coastal State shall also have the right to take the necessary steps to prevent any breach of the conditions to which admission of those ships to those waters is subject.

3. Subject to the provisions of paragraph 4, the coastal State may, without discrimination amongst foreign ships, suspend temporarily in specified areas of

its territorial sea the innocent passage of foreign ships if such suspension is essential for the protection of its security. Such suspension shall take effect only after having been duly published.

4. There shall be no suspension of the innocent passage of foreign ships through straits which are used for international navigation between one part of the high seas and another part of the high seas or the territorial sea of a foreign State.

Art. 17. Foreign ships exercising the right of innocent passage shall comply with the laws and regulations enacted by the coastal State in conformity with these articles and other rules of international law and, in particular, with such laws and regulations relating to transport and navigation.

Sub-Section B. Rules applicable to Merchant Ships

Art. 18. 1. No charge may be levied upon foreign ships by reason only of their passage through the territorial sea.

2. Charges may be levied upon a foreign ship passing through the territorial sea as payment only for specific services rendered to the ship. These charges shall be levied without discrimination.

Art. 19. 1. The criminal jurisdiction of the coastal State should not be exercised on board a foreign ship passing through the territorial sea to arrest any person or to conduct any investigation in connexion with any crime committed on board the ship during its passage, save only in the following cases:

- (a) If the consequences of the crime extend to the coastal State; or
- (b) If the crime is of a kind to disturb the peace of the country or the good order of the territorial sea; or
- (c) If the assistance of the local authorities has been requested by the captain of the ship or by the consul of the country whose flag the ship flies; or
- (d) If it is necessary for the suppression of illicit traffic in narcotic drugs.

2. The above provisions do not affect the right of the coastal State to take any steps authorized by its laws for the purpose of an arrest or investigation on board a foreign ship passing through the territorial sea after leaving internal waters.

3. In the cases provided for in paragraphs 1 and 2 of this article, the coastal State shall, if the captain so requests, advise the consular authority of the flag State before taking any steps, and shall facilitate contact between such authority and the ship's crew. In cases of emergency this notification may be communicated while the measures are being taken.

4. In considering whether or how an arrest should be made, the local authorities shall pay due regard to the interests of navigation.

5. The coastal State may not take any steps on board a foreign ship passing through the territorial sea to arrest any person or to conduct any investigation in connexion with any crime committed before the ship entered the territorial sea, if the ship, proceeding from a foreign port, is only passing through the territorial sea without entering internal waters.

Art. 20. 1. The coastal State should not stop or divert a foreign ship passing through the territorial sea for the purpose of exercising civil jurisdiction in relation to a person on board the ship.

2. The coastal State may not levy execution against or arrest the ship for the purpose of any civil proceedings, save only in respect of obligations or liabilities assumed or incurred by the ship itself in the course or for the purpose of its voyage through the waters of the coastal State.

3. The provisions of the previous paragraph are without prejudice to the right of the coastal State, in accordance with its laws, to levy execution against or to arrest, for the purpose of any civil proceedings, a foreign ship lying in the territorial sea, or passing through the territorial sea after leaving internal waters.

Sub-Section C. Rules applicable to Government Ships other than Warships

Art. 21. The rules contained in sub-sections A and B shall also apply to government ships operated for commercial purposes.

Art. 22. 1. The rules contained in sub-section A and in article 19 shall apply to government ships operated for non-commercial purposes.

2. With such exceptions as are contained in the provisions referred to in the preceding paragraph, nothing in these articles affects the immunities which such ships enjoy under these articles or other rules of international law.

Sub-Section D. Rule applicable to Warships

Art. 23. If any warship does not comply with the regulations of the coastal State concerning passage through the territorial sea and disregards any request for compliance which is made to it, the coastal State may require the warship to leave the territorial sea.

134

Kgl. anordning nr. 356 af 25. juli 1951 om fremmede krigsskibes og militære luftfartøjers adgang til dansk område under fredsforhold

§ 1. De følgende bestemmelser for fremmede krigsskibe og militære luftfartøjers adgang til dansk område er — medmindre der er truffet anden aftale med fremmed stat — gældende under fredsforhold, hvorved forstås, at såvel Danmark som den fremmede stat, det pågældende fartøj tilhører, kan anses at befinde sig i fredstilstand.

Under andre forhold gælder i denne henseende, hvad der under sådanne forhold nærmere måtte bestemmes.

Bestemmelserne omfatter også sådanne fartøjer, der ejes eller benyttes af en fremmed stat og som anvendes som øvelses- eller lystfartøj uden at føre orlogsflag.

Under fælles forsvarsøvelser fastsætter forsvarsministeriet i hvert enkelt tilfælde, afhængigt af øvelsernes art og formål, bestemmelser for de i øvelserne deltagende fremmede krigsskibes og militære luftfartøjers adgang til dansk område.

§ 2. Ved dansk område forstås i disse bestemmelser dansk landområde og dansk farvand samt luftrummet derover.

Ved dansk farvand forstås i disse bestemmelser dansk søterritoriel farvand, der udgøres af indre og ydre territoriel farvand.

§ 3. Ved dansk indre territoriel farvand forstås i disse bestemmelser danske havne, havneindløb, rede, bugter og fjorde og de dele af dansk territoriel farvand, som er beliggende indenfor og imellem danske øer, holme og rev (stenrøser), som ikke til stadighed overskylls af havet. Dog vil i Storebælt og Sundet kun danske havne, havneindløb, rede, bugter og fjorde samt de i denne paragrafs andet stykke og i § 4 særlige opregnede områder i Storebælt og Sundet være at anse som dansk indre territoriel farvand.

Som indre territoriel farvand kan foruden de i § 4 anførte lukkede farvande særlig nævnes:***

§ 4. Til lukket farvand henregnes følgende indre territoriale farvande:***

§ 5. Det er tilladt fremmede krigsfartøjer at passere eller opholde sig i dansk farvand, dog med de i nedenstående §§ anførte undtagelser og begrænsninger.

§ 6. Såfremt passage af eller ophold i dansk farvand er af længere varighed end 2 døgn, vil forudgående anmeldelse ad diplomatisk vej være nødvendig.

Denne anmeldelse såvel som de i §§ 7 og 8 omhandlede anmeldelser bør foretages mindst 8 dage før ønsket passage eller ophold.

§ 7. Det er kun tilladt fremmede krigsfartøjer at passere eller opholde sig i indre territoriel farvand samt i dansk territoriel farvand i Lillebælt, når anmeldelse derom forud er sket ad diplomatisk vej.

§ 10. De i § 4 nævnte indre territoriale farvande er lukkede for fremmede krigsfartøjer, og tilladelse til at opholde sig i eller passere dem vil i almindelighed kun blive givet for fartøjer, der er i nød.

135

Anordning nr. 290 af 15. november 1932 om påtale af strafbare handlinger begåede om bord i fremmede fartøjer på dansk område

I henhold til § 6, stk. 2 i Borgerlig Straffelov af 15. april 1930 bestemmer justitsministeriet herved, at strafbare handlinger, som på dansk område (havn, søterritorium, luftterritorium) foretages om bord i fremmed fartøj af og imod nogen, der hører til eller som rejsende følger med dette, kun skal påtales, når gerningsmanden har dansk indfødsret eller er bosat i den danske stat, når den offentlige fred er krænket, når de danske myndigheders bistand påkaldes af den forurettede, når handlingen, hvis den var foretagen udenfor den danske stat, i medfør af straffelovens § 8 ville høre under dansk straffemyndighed, eller når rigsadvokaten påbyder det.

136

The Wildenhus' Case

DE FORENEDE STATER, SUPREME COURT, 1887
120 U. S. 1, 7 S. Ct. 385

[*Domstolen.*] Appeal from the Circuit Court of the United States for the District of New Jersey.

This appeal brought up an application made to the Circuit Court of the United States for the District of New Jersey, by Charles Mali, the "consul of His Majesty the King of the Belgians, for the States of New York and New Jersey, in the United States," for himself, as such consul, "and in behalf of one Joseph Wildenhus, one Gionviennie Gobnbosich, and John J. Ostenmeyer," for the release, upon a writ of *habeas corpus*, of Wildenhus, Gobnbosich, and Ostenmeyer from the custody of the keeper of the common jail of Hudson county, New Jersey, and their delivery to the consul, "to be dealt with according to the law of Belgium." The facts on which the application rests are thus stated in the petition for the writ:

"*Second.* That on or about the sixth day of October, 1886, on board the Belgian steamship Noordland, there occurred an affray between the said Joseph Wildenhus and one Fijens, wherein and whereby it is charged that the said Wildenhus stabbed with a knife and inflicted upon the said Fijens a mortal wound, of which he afterwards died.

"*Third.* That the said Wildenhus is a subject of the kingdom of Belgium, and has his domicile therein, and is one of the crew of the said steamship Noordland, and was such when the said affray occurred.

"*Fourth.* That the said Fijens was also a subject of Belgium, and had his domicile and residence therein, and at the time of the said affray, as well as at the time of his subsequent death, was one of the crew of the said steamship.

"*Fifth.* That, at the time said affray occurred, the said steamship Noordland was lying moored at the dock of the port of Jersey City, in said state of New Jersey.

"*Sixth.* That the said affray occurred and ended wholly below the deck of the said steamship, and that the tranquillity of the said port of Jersey City was in no wise disturbed or endangered thereby.

"*Seventh.* That said affray occurred in the presence of several witnesses, all of whom were and still are of the crew of the said vessel, and that no other person or persons except those of the crew of said vessel were present or near by.

"*Eight.* Your petitioner therefore respectfully shows unto this honorable court that the said affray occurred outside of the jurisdiction of the said state of New Jersey.

"*Ninth.* But, notwithstanding the foregoing facts, your petitioner respectfully further shows that the police authorities of Jersey City, in said state of New Jersey, have arrested the said Joseph Wildenhus, and also the said Gionviennie Gobnbosich and John J. Ostenmeyer, of the crew of the said vessel,

(one of whom is a quartermaster thereof), and that said Joseph Wildenhus has been committed by a police magistrate, acting under the authority of the said state, to the common jail of the county of Hudson, on a charge of an indictable offense under the laws of the said state of New Jersey, and is now held in confinement by the keeper of the said jail, and that the others of the said crew, arrested as aforesaid, are also detained in custody and confinement as witnesses to testify in such proceedings as may hereafter be had against the said Wildenhus."

Articles 8, 9, and 10 of the royal decree of the King of the Belgians, made on the eleventh of March, 1857, relating to consuls and consular jurisdiction, are as follows:

Art. 8. Our consuls have the right of discipline on Belgian merchant vessels in all the ports and harbors of their district. In matters of offenses or crimes they are to make the examination conformably to the instructions of the disciplinary and penal code of the merchant service. They are to claim, according to the terms of the conventions and laws in force, the assistance of the local authorities for the arrest and taking on board of deserting seamen.

Art. 9. Except in the case where the peace of the port shall have been compromised by the occurrence, the consul shall protest against every attempt that the local authority may make to take cognizance of crimes or offenses committed on board of a Belgian vessel by one of the ship's company towards one, either of the same company, or of the company of another Belgian vessel. He shall take the proper steps to have the cognizance of the case turned over to him, in order that it be ultimately tried according to Belgian laws.

Art. 10. When men belonging to the company of a Belgian vessel shall be guilty of offenses or crimes out of the ship, or even on board the ship, but against persons not of the company, the consul shall, if the local authority arrests or prosecutes them, take the necessary steps to have the Belgians so arrested treated with humanity, defended, and tried impartially.

The application in this case was made under the authority of these articles.

Article 11 of a Convention between the United States and Belgium "concerning the rights, privileges, and immunities of consular officers," concluded March 9, 1880, and proclaimed by the President of the United States, March 1, 1881 (21 Stat. 776), is as follows:

The respective consuls general, consuls, vice-consuls, and consular agents shall have exclusive charge of the internal order of the merchant vessels of their nation, and shall alone take cognizance of all differences which may rise, either at sea or in port, between the captains, officers, and crews, without exception, particularly with reference to the adjustment of wages and the execution of contracts. The local authorities

shall not interfere, except when the disorder that has arisen is of such a nature as to disturb tranquillity and public order on shore or in the port, or when a person of the country, or not belonging to the crew, shall be concerned therein. In all other cases, the aforesaid authorities shall confine themselves to lending aid to the consuls and vice-consuls or consular agents, if they are requested by them to do so, in causing the arrest and imprisonment of any person whose name is inscribed on the crew list, whenever, for any cause, the said officers shall think proper.

The claim of the consul is that, by the law of nations and the provisions of this treaty the offense with which Wildenhus has been charged is "solely cognizable by the authority of the laws of the Kingdom of Belgium," and that the state of New Jersey is without jurisdiction in the premises. The Circuit Court refused to deliver the prisoners to the consul, and remanded them to the custody of the jailer.***

[*Waite, C. J.*] By sections 751 and 753 of the Revised Statutes (28 U.S.C.A. §§ 451, 453) the courts of the United States have power to issue writs of *habeas corpus* which shall extend to prisoners in jail when they are in "custody in violation of the constitution or a law or treaty of the United States," and the question we have to consider is whether these prisoners are held in violation of the provisions of the existing treaty between the United States and Belgium.

It is part of the law of civilized nations that, when a merchant vessel of one country enters the ports of another for the purposes of trade, it subjects itself to the law of the place to which it goes, unless, by treaty or otherwise, the two countries have come to some different understanding or agreement.***

[Dommeren anfører forskellige fortilfælde og fortsætter:]

From experience, however, it was found long ago that it would be beneficial to commerce if the local government would abstain from interfering with the internal discipline of the ship, and the general regulation of the rights and duties of the officers and crew towards the vessel, or among themselves. And so by comity it came to be generally understood among civilized nations that all matters of discipline, and all things done on board, which affected only the vessel, or those belonging to her, and did not involve the peace or dignity of the country, or the tranquillity of the port, should be left by the local government to be dealt with by the authorities of the nation to which the vessel belonged as the laws of that nation, or the interests of its commerce should require. But, if crimes are committed on board of a character to disturb the peace and tranquillity of the country to which the vessel has been brought, the offenders have never, by comity or usage, been entitled to any exemption from the operation of the local laws for their punishment, if the local tribunals see fit to assert their authority. Such being the general public law on this subject, treaties and conventions have been entered into by nations having commercial intercourse, the purpose of which was to settle and define the

rights and duties of the contracting parties with respect to each other in these particulars, and thus prevent the inconvenience that might arise from attempts to exercise conflicting jurisdictions.***

[Dommeren betragter forskellige typer af amerikanske traktater vedrørende konsularjurisdiktion og fortsætter:]

The treaty is part of the supreme law of the United States, and has the same force and effect in New Jersey that it is entitled to elsewhere. If it gives the consul of Belgium exclusive jurisdiction over the offense which it is alleged has been committed within the territory of New Jersey, we see no reason why he may not enforce his rights under the treaty by writ of *habeas corpus* in any proper court of the United States. This being the case, the only important question left for our determination is whether the thing which has been done—the disorder that has arisen—on board this vessel is of a nature to disturb the public peace, or, as some writers term it, the “public repose,” of the people who look to the state of New Jersey for their protection. If the thing done—“the disorder,” as it is called in the treaty—is of a character to affect those on shore or in the port when it becomes known, the fact that only those on the ship saw it when it was done, is a matter of no moment. Those who are not on the vessel pay no special attention to the mere disputes or quarrels of the seamen while on board, whether they occur under deck or above. Neither do they, as a rule, care for anything done on board which relates only to the discipline of the ship, or to the preservation of order and authority. Not so, however, with crimes which from their gravity awaken a public interest as soon as they become known, and especially those of a character which every civilized nation considers itself bound to provide a severe punishment for when committed within its own jurisdiction. In such cases inquiry is certain to be instituted at once to ascertain how or why the thing was done, and the popular excitement rises or falls as the news spreads, and the facts become known. It is not alone the publicity of the act, or the noise and clamor which attends it, that fixes the nature of the crime, but the act itself. If that is of a character to awaken public interest when it becomes known, it is a “disorder,” the nature of which is to affect the community at large, and consequently to invoke the power of the local government whose people have been disturbed by what was done. The very nature of such an act is to disturb the quiet of a peaceful community, and to create, in the language of the treaty, a “disorder” which will “disturb tranquillity and public order on shore or in the port.” The principle which governs the whole matter is this: Disorders which disturb only the peace of the ship or those on board are to be dealt with exclusively by the sovereignty of the home of the ship, but those which disturb the public peace may be suppressed, and, if need be, the offenders punished, by the proper authorities of the local jurisdiction. It may not be easy at all times to determine to which of the two jurisdictions a particular act of disorder belongs. Much will undoubtedly depend on the attending circumstances of the particular case, but all must concede that felonious homicide is a subject for the local jurisdiction; and, that, if the proper authorities are proceeding with the case in a

regular way, the consul has no right to interfere to prevent it. That, according to the petition for the *habeas corpus*, is this case.***

This is fully in accord with the practice in France, where the government has been quite as liberal towards foreign nations in this particular as any other, and where, as we have seen in the cases of *The Sally* and *The Newton* [(1806) 16 Collection Complète du Conseil d'Etat, p. 65] by a decree of the Council of State, representing the political department of the government, the French courts were prevented from exercising jurisdiction. But afterwards, in 1859, in the Case of *Jally* [(1859) Sirey, I, 183] the mate of an American merchantman, who had killed one of the crew and severely wounded another on board the ship in the port of Havre, the Court of Cassation, the highest judicial tribunal of France, upon full consideration, held, while the convention of 1853 was in force, that the French courts had rightful jurisdiction.***

The judgment of the circuit court is affirmed.

137

Regina v. Anderson

STORBRITANNIEN, COURT OF CRIMINAL APPEAL, 1868

Se ovenfor sag nr. 97

Havets frihed

138

Convention on the High Seas,

Genève 1958

Art. 1. The term "high seas" means all parts of the sea that are not included in the territorial sea or in the internal waters of a State.

Art. 2. The high seas being open to all nations, no State may validly purport to subject any part of them to its sovereignty. Freedom of the high seas is exercised under the conditions laid down by these articles and by the other rules of international law. It comprises, *inter alia*, both for coastal and non-coastal States:

- (1) Freedom of navigation;
- (2) Freedom of fishing;
- (3) Freedom to lay submarine cables and pipelines;
- (4) Freedom to fly over the high seas.

These freedoms, and others which are recognized by the general principles of international law, shall be exercised by all States with reasonable regard to the interests of other States in their exercise of the freedom of the high seas.

Art. 5. 1. Each State shall fix the conditions for the grant of its nationality to ships, for the registration of ships in its territory, and for the right to fly its flag. Ships have the nationality of the State whose flag they are entitled to fly. There must exist a genuine link between the State and the ship; in particular, the State must effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag.

2. Each State shall issue to ships to which it has granted the right to fly its flag documents to that effect.

Art. 11. 1. In the event of a collision or of any other incident of navigation concerning a ship on the high seas, involving the penal or disciplinary responsibility of the master or of any other person in the service of the ship, no penal or disciplinary proceedings may be instituted against such persons except before the judicial or administrative authorities either of the flag State or of the State of which such person is a national.

2. In disciplinary matters, the State which has issued a master's certificate or a certificate of competence or licence shall alone be competent, after due legal process, to pronounce the withdrawal of such certificates, even if the holder is not a national of the State which issued them.

3. No arrest or detention of the ship, even as a measure of investigation, shall be ordered by any authorities other than those of the flag State.

Art. 19. On the high seas, or in any other place outside the jurisdiction of

any State, every State may seize a pirate ship or aircraft, or a ship taken by piracy and under the control of pirates, and arrest the persons and seize the property on board. The courts of the State which carried out the seizure may decide upon the penalties to be imposed, and may also determine the action to be taken with regard to the ships, aircraft or property, subject to the rights of third parties acting in good faith.

Art. 22. 1. Except where acts of interference derive from powers conferred by treaty, a warship which encounters a foreign merchant ship on the high seas is not justified in boarding her unless there is reasonable ground for suspecting:

- (a) That the ship is engaged in piracy; or
- (b) That the ship is engaged in the slave trade; or
- (c) That, though flying a foreign flag or refusing to show its flag, the ship is, in reality, of the same nationality as the warship.

2. In the cases provided for in sub-paragraphs (a), (b) and (c) above, the warship may proceed to verify the ship's right to fly its flag. To this end, it may send a boat under the command of an officer to the suspected ship. If suspicion remains after the documents have been checked, it may proceed to a further examination on board the ship, which must be carried out with all possible consideration.

3. If the suspicions prove to be unfounded, and provided that the ship boarded has not committed any act justifying them, it shall be compensated for any loss or damage that may have been sustained.

139

The Grace and Ruby

DE FORENEDE STATER, DISTRICT COURT OF MASSACHUSETTS, 1922
283 F. 475

[*Morton*, District Judge.] These are libels for the forfeiture of the schooner *Grace and Ruby* for smuggling liquor in violation of Rev.St. §§ 2872, 2874, and the National Prohibition Act (41 Stat. 305, 27 U.S.C.A.). They were heard upon exceptions to the libels, raising solely the question of jurisdiction. The facts are settled by stipulation of the parties. Those essential to a decision may be briefly stated as follows:

The *Grace and Ruby* was a British vessel owned and registered in Yarmouth, Nova Scotia, and commanded by one Ross, a British subject. She sailed from the Bahama Islands, British West Indies, with a St. John, N. B., clearance, on February 10, 1922, having a cargo of liquor, part of which was owned by one Sullivan, of Salem, Mass., who was on board. From the Bahamas she proceeded directly to a point about six miles off Gloucester, Mass., where Sullivan was set on shore and the schooner stood off and on, keeping always more than three miles from land. Two days later Sullivan came out to her in motorboat *Wilkin II*, owned in Gloucester and manned by two men, to bring provisions to the schooner and to take on shore part of her cargo. At the time the schooner was about ten miles from the nearest land. About 8,000 bottles of

whisky and some other liquors were there transferred from the Grace and Ruby into the motorboat and taken to shore at night. Three members of the crew of the schooner, as well as Sullivan, went in the Wilkin II, and a dory belonging to the schooner was towed along, presumably for use in landing the liquor, or to enable the men to return to the schooner after the liquor was landed. The attempt to land the liquor was discovered by revenue officers, and the Wilkin II and her cargo were seized.

The next day the revenue cutter Tampa was ordered to find the Grace and Ruby and bring her into port. Two days later, on February 23d, she discovered the schooner, and after some show of resistance on her part, which was overcome by a display of force by the cutter, the schooner was seized and brought into the port of Boston by the Tampa. At the time of the seizure the Grace and Ruby was about four miles from the nearest land. She had on board the balance of her cargo of liquor. Her master in no way assented to the seizure. After the schooner was brought into Boston the present libels were filed, a warrant for her arrest issued, and she was taken into custody by the United States marshal.

From the agreed facts it is clearly inferable that the master of the Grace and Ruby knew that she was engaged in an enterprise forbidden by the laws of the United States; that he knew her cargo was contraband; that she was lying off the coast beyond the three-mile limit, but within the four-league limit, for the purpose of having her cargo taken ashore in other boats; and that before her seizure part of her cargo had been transferred to the Wilkin II for the purpose, as her master knew, of being smuggled into this country, with the assistance of the schooner's crew and boat. There is nothing to suggest any intent on his part, if that be material, that the Grace and Ruby herself should go within the territorial jurisdiction of this country, and so far as appears she never did. She was hovering on the coast for the purpose of landing contraband goods, and had actually sent, at night, a part of her cargo ashore, with her boat and three of her men to assist in landing it.

While the question is not free from doubt, and no decision upon the point has come to my notice, it seems to me that this action on her part constituted an unlawful unlading by the Grace and Ruby at night within the territorial limits of the United States, in violation of Rev.St. §§ 2872, 2874. See 1 Wheaton, Criminal Law (11th Ed.) §§ 324, 330, 341, for a discussion of the principles involved and a collection of cases. The act of unlading, although beginning beyond the three-mile limit, continued until the liquor was landed, and the schooner was actively assisting in it by means of her small boat and three of her crew, who were on the motorboat for that purpose. It was none the less an unlawful unlading, within the section referred to, because by the transfer to the motorboat an offense was committed under section 2867 which rendered the motorboat and liquor liable to seizure and forfeiture, and the persons who aided and assisted liable to a penalty for so doing. The two classes of offenses are substantially different. I am aware that there has been a difference of judicial opinion about the scope of these sections. See *U. S. v. The Hunter* (1806) Fed.Cas. No. 15428; *The Industry* (1812) Fed.Cas. No. 7028;

The Betsy, Fed.Cas. No. 1365; The Harmony, Fed.Cas. No. 6081; The Active, Fed.Cas. No. 33. I follow the opinion of Mr. Justice Story, both because it is the law of this circuit and because it seems to me to be the sounder view.

The case, then, is that the Grace and Ruby, having violated our law and laid herself liable to forfeiture under it if she could be reached, was forcibly taken four miles off the coast by an executive department of the government and brought within our jurisdiction. The present question is whether on such facts this court has jurisdiction of a libel brought by the government for the forfeiture of the vessel. It is to be noticed that the schooner is held in these proceedings on the arrest made by the marshal under the warrant that was issued on the filing of the libels, and not under the seizure made by the cutter, when the schooner was taken and brought into Boston. Whether she could have been seized beyond the three-mile limit for an offense committed wholly beyond that limit is not the present question.

The high seas are the territory of no nation; no nation can extend its laws over them; they are free to the vessels of all countries. But this has been thought not to mean that a nation is powerless against vessels offending against its laws which remain just outside the three-mile limit.***

These expressions [dommeren refererer til Church v. Hubbard, 2 Cranch, 187, 2 L.Ed. 249] have been questioned by writers on international law, and are perhaps not entirely consistent with views which have been expressed by our State Department. But Church v. Hubbard has never been overruled, and I am bound by it until the law is clearly settled otherwise. Moreover, the principle there stated seems to me such a sensible and practical rule for dealing with cases like the present that it ought to be followed until it is authoritatively repudiated. This is not to assert a right generally of search and seizure on the high seas, but only a limited power, exercised in the waters adjacent to our coasts, over vessels which have broken our laws.

The mere fact, therefore, that the Grace and Ruby was beyond the three-mile limit, does not of itself make the seizure unlawful and establish a lack of jurisdiction.

As to the seizure: The line between territorial waters and the high seas is no like the boundary between us and a foreign Power. There must be, it seems to me, a certain width of debatable waters adjacent to our coasts. How far our authority shall be extended into them for the seizure of foreign vessels which have broken our laws is a matter for the political departments of the government rather than for the courts to determine.

It is a question between governments; reciprocal rights and other matters may be involved. In re Cooper, 143 U.S. 472, 503, 12 S.Ct. 453, 36 L.Ed. 232; The Kodiak (D.C.) 53 F. 126, 130. In the case of The Cagliari, Dr. Twiss advised the Sardinian government that: "In ordinary cases, where a merchant ship has been seized on the high seas, the sovereign whose flag has been violated waives his privilege, considering the offending ship to have acted with *mala fides* towards the other State with which he is in amity, and to have consequently forfeited any just claim to his protection." He considered the revenue regulations of many States authorizing visit and seizure beyond their waters

to be enforceable at the peril of such States, and to rest on the express or tacit permission of the States whose vessels may be seized. 1 Moore's Internat.Law Digest, pp. 729, 730.

It seems to me that this was such a case. The Grace and Ruby had committed an offense against our law, if my view as to the unlading is right, and was lying just outside the three-mile limit for purposes relating to the unlawful act. In directing that she be seized there and brought into the country to answer for her offense, I am not prepared to say that the Treasury Department exceeded its power.

An order may be entered, overruling the exceptions to each libel alleging lack of jurisdiction.

140

Helsingforskonventionen af 19. august 1925

Art. 9. De kontraherende parter forpligter sig til ikke at gøre nogen indvending mod, at enhver af dem i en zone, der strækker sig indtil 12 sømil fra kysten eller de yderste øer, anvender sine love over skibe, der åbenbart giver sig af med at smugle.

Hvis et skib, der er mistænkt for smugleri, træffes i den ovennævnte udvidede zone, og det undslipper ud af denne zone, kan myndighederne i det land, hvortil zonen hører, forfølge skibet også udenfor denne zone i det åbne hav og overfor det anvende de samme rettigheder, som hvis det var pågrebet indenfor zonen.

Disse bestemmelser er vedtaget uden præjudicering af den stilling, som enhver af de kontraherende parter indtager med hensyn til de retslige principper angående de territoriale og toldmæssige zoner.

Territorialhøjhedens begrænsninger: Staternes grundrettigheder

A. INTERVENTION OG ANSLAG MOD STATENS SIKKERHED

141

Monroe-doktrinen

PRÆSIDENT MONROE'S BUDSKAB AF 2. DECEMBER 1823

Efter forslag af den kejserlige russiske regering, fremsat gennem kejserens herværende minister, er der givet de Forenede Staters minister i St. Petersburg fuldmagt til og instruktioner om ved venskabelig forhandling at træffe en ordning vedrørende de to nationers respektive rettigheder og interesser på Amerikas nordvestkyst. Et lignende forslag er af Hans kejserlige Majestæt fremsat overfor Storbritanniens regering, hvilket forslag ligeledes er blevet tiltrådt. Det har været de Forenede Staters regerings ønske på denne venskabelige måde at manifestere den store værdi, som den altid har knyttet til kejserens venskab, og dens dybe interesse for at fremme den bedste forståelse med hans regering.

Ved de drøftelser, som denne interesse har givet anledning til, og ved de ordninger, som de måtte resultere i, har man anset det for en passende lejlighed til at hævde som et princip, i hvilket de Forenede Staters rettigheder og interesser er implicerede, at de amerikanske kontinenter ved den fri og uafhængige stilling, de har indtaget og hævder, herefter ikke skal betragtes som objekter for fremtidig kolonisation fra nogen europæisk magts side.

Det blev ved begyndelsen af den sidste samling fastslået, at der da blev gjort en stor indsats i Spanien og Portugal for at forbedre forholdene for folket i disse lande, og at denne indsats syntes at blive gjort med det største mådehold. Det er næppe nødvendigt at bemærke, at resultatet hidtil har været meget langt fra, hvad man dengang regnede med. Til begivenhederne i den verdensdel, hvormed vi har et så betydeligt samkvem, og fra hvilken vi selv stammer, har vi stedse været spændte og interesserede tilskuere. De Forenede Staters borgere nærer de venskabeligste følelser for deres medmenneskers frihed og lykke på den side af Atlanterhavet. Vi har aldrig taget del i de europæiske magters krige om deres egne problemer, ligesålidt som det stemmer overens med vor politik at gøre dette. Det er kun, når vore rettigheder går for nær eller trues alvorligt, at vi påtaler krænkelse eller træffer forberedelser til at forsvare os.

Vi føler os naturnødvendigt mere umiddelbart knyttet til udviklingen på

denne halvkugle, og det af grunde som må være åbenbare for alle oplyste og upartiske betragtere. Det politiske system i alliancemagterne er væsentligt forskelligt i denne henseende fra Amerikas. Denne forskel har sin kilde i den forskellighed, der indebæres i de respektive regeringer; og hele vor nation er viet forsvaret af vort eget politiske system, som er opnået ved tabet af så meget blod og så store værdier, og som er modnet ved dets mest oplyste borgeres klogskab, og under hvilket vi har nydt en eksempelløs lykke.

Vi skylder derfor oprigtigheden og det mellem de Forenede Stater og disse magter herskende venskabelige forhold at erklære, at vi vil betragte ethvert forsøg fra deres side på at udvide deres politiske system til nogen del af denne halvkugle som farlig for vor fred og sikkerhed. Vi har ikke blandet os i og vil ikke blande os i nogen europæisk magts eksisterende kolonier og bilande. Men enhver indblanding fra en europæisk magts side med hensyn til de regeringer, som har erklæret og hævdet deres selvstændighed, og hvis selvstændighed vi efter nøje overvejelse og i overensstemmelse med retfærdige principper har anerkendt, med det formål at undertrykke dem eller på nogen anden måde at øve indflydelse på deres fremtid, kan vi kun betragte som en manifestation af en uvenskabelig holdning mod de Forenede Stater.

I krigen mellem disse nye regeringer og Spanien erklærede vi vor neutralitet, dengang da de blev anerkendt, og vi har fastholdt og vil fortsat fastholde denne, forudsat at der ikke indtræffer nogen ændring, som efter vor regerings kompetente myndigheders mening vil gøre en tilsvarende ændring fra de Forenede Staters side påkrævet for deres sikkerhed.

Den seneste tids begivenheder i Spanien og Portugal viser, at der stadig ikke er ordnede forhold i Europa. Der kan ikke gives noget stærkere bevis på denne betydningsfulde kendsgerning, end at alliancemagterne ud fra ethvert princip, der er tilfredsstillende for dem selv, ville have anset det for korrekt med magt at blande sig i interne spanske anliggender. I hvilket omfang en sådan indblanding kan foretages ud fra det samme princip, er et spørgsmål, som alle selvstændige magter — selv de fjernest beliggende —, hvis regeringer adskiller sig fra deres, er interesserede i, og dette gælder ikke mindst de Forenede Stater.

Vor politik med hensyn til Europa, som vi slog ind på på et tidligt stadium af de krige, som i så lang tid har holdt denne verdensdel i uro, er ikke destomindre stadig den samme, nemlig ikke at blande os i nogen af dens magters interne anliggender, at betragte de facto regeringen som den lovlige regering for os, at dyrke et venskabeligt forhold til den og at bevare dette forhold ved en ærlig, fast og mandig politik og i alle tilfælde imødekomme enhver magts rimelige krav og ikke tåle krænkelser fra nogen.

Men forholdene for de to verdensdeles vedkommende er uendeligt og iøjnefaldende forskellige. Det er utænkeligt, at alliancemagterne skulle kunne udvide deres politiske system til nogen del af de amerikanske kontinenter uden at bringe vor fred og lykke i fare; ej heller kan nogen tro, at vore brødre mod syd frivilligt ville antage det, såfremt de blev overladt til sig selv. Det er derfor lige så utænkeligt, at vi skulle kunne se på en sådan indblanding under en hvilken som helst form med ligegyldighed. Hvis vi betragter forholdet mellem Spaniens og disse nye regeringers styrke og hjælpekilder og deres indbyrdes

afstand, må det være indlysende, at Spanien aldrig kan betvinge dem. Det er stadig de Forenede Staters sande politik ikke at blande sig i de to parter forhold i håbet om, at andre magter vil følge den samme kurs.

142

De Forenede Nationers pagt

SAN FRANCISCO, 26. JUNI 1945

Art. 2 [4]. Alle medlemmer skal i deres mellemfolkelige forhold afholde sig fra trusel om magtanvendelse eller brug af magt, det være sig mod nogen stats territoriale integritet eller politiske uafhængighed eller på nogen anden måde, der er uforenelig med de Forenede Nationers formål.

Art. 2 (6). Organisationen skal sikre, at stater, der ikke er medlemmer af de Forenede Nationer, handler i overensstemmelse med disse grundsætninger, såvidt det måtte være nødvendigt til opretholdelse af mellemfolkelig fred og sikkerhed.

143

Uddrag af noteveksling mellem de Forenede Stater og Sovjetunionen af 16. november 1933¹

28 A. J. I. L. Supp. 1934, 1-3

Washington, November 16, 1933

My dear Mr. President:

I have the honor to inform you that coincident with the establishment of diplomatic relations between our two governments it will be the fixed policy of the Government of the Union of Soviet Socialist Republics:

1. To respect scrupulously the indisputable right of the United States to order its own life within its own jurisdiction in its own way and to refrain from interfering in any manner in the internal affairs of the United States, its territories or possessions.

2. To refrain, and to restrain all persons in government service and all organizations of the government or under its direct or indirect control, including organizations in receipt of any financial assistance from it, from any act overt or covert liable in any way whatsoever to injure the tranquillity, prosperity, order, or security of the whole or any part of the United States, its territories or possessions, and, in particular, from any act tending to incite or encourage armed intervention, or any agitation or propaganda having as an aim, the violation of the territorial integrity of the United States, its territories or possessions, or the bringing about by force of a change in the political or social order of the whole or any part of the United States, its territories or possessions.

¹ Se endvidere ovenfor sag nr. 55.

3. Not to permit the formation or residence on its territory of any organization or group—and to prevent the activity on its territory of any organization or group, or of representatives or officials of any organization or group—which makes claim to be the government of, or makes attempt upon the territorial integrity of, the United States, its territories or possessions; not to form, subsidize, support or permit on its territory military organizations or groups having in the aim of armed struggle against the United States, its territories or possessions, and to prevent any recruiting on behalf of such organizations and groups.

4. Not to permit the formation or residence on its territory of any organization or group—and to prevent the activity on its territory of any organization or group, or of representatives or officials of any organization or group—which has as an aim the overthrow or the preparation for the overthrow of, or the bringing about by force of a change in, the political or social order of the whole or any part of the United States, its territories or possessions.

I am, etc.,

Maxim Litvinoff

President Roosevelt to Mr. Litvinoff

The White House

Washington, November 16, 1933

My dear Mr. Litvinoff

I am glad to have received the assurance expressed in your note to me of this date that it will be the fixed policy of the Government of the Union of Soviet Socialist Republics:

[En gengivelse af de ovenfor citerede 4 punkter.]

It will be the fixed policy of the Executive of the United States within the limits of the powers conferred by the Constitution and the laws of the United States to adhere reciprocally to the engagements above expressed.

I am, etc.,

Franklin D. Roosevelt

144

Emperor of Austria v. Day and Kossuth

STORBRITANNIEN HIGH COURT OF CHANCERY, 1861

3 De Gex, Fisher & Jones 217

[*Domstolen.*] This was an appeal from the whole of a decree of Vice-Chancellor Stuart, [(1861) 2 Giff. 628], restraining the defendants from making notes purporting to be notes of the Hungarian State, and ordering them to deliver up to the plaintiff the notes already made and the plates used for printing them.

The case made by the bill was in substance as follows:

That the plaintiff was King of Hungary, and as such had the exclusive right of authorizing the issue in Hungary of notes to be circulated in Hungary as

money, and also the exclusive right of authorizing the royal arms of Hungary to be affixed to any document intended to be circulated in that country. That nearly the whole of the circulation of Hungary consisted of notes of the National Bank of Austria, issued under the authority of the plaintiff as Emperor of Austria and King of Hungary, which circulated in Hungary as money, and were for various sums from one florin upwards. That the defendants Day & Sons (the well-known lithographers) had by the direction of the defendant Kossuth prepared plates for printing notes purporting to be notes of the Hungarian nation or state, for various sums of money, and which were intended to be circulated as money in Hungary, and that they were engaged by the direction of Kossuth in printing such notes from the plates.

That the body of each note was in the Hungarian language, and had on the border, in the German and Slavonian and other languages, the amount for which it purported to be a note, and at the bottom a print of the royal arms of Hungary. The body of a one florin note, when translated, was as follows:

One florin. This monetary note will be received in every Hungarian state and public pay office as one florin in silver. Three zwanzigers being one florin, and its whole nominal value is guaranteed by the state.

In the name of the nation,

KOSSUTH, LOUIS.

That the total amount of these notes which was being prepared was upwards of 100,000,000 florins. That Day & Sons had in their possession a large quantity of them entirely or nearly completed, and, unless restrained by the Court, would deliver them to Kossuth. That Kossuth intended, as soon as he received them, to send them to Hungary and endeavour to introduce some of them into circulation there, and use of the remainder for other purposes in Hungary, in violation of the rights and prerogative of the plaintiff asking of that country, and, amongst other purposes, for the promotion of revolution and disorder there. That the plaintiff had never authorized the manufacture of the notes or the use of the royal arms of Hungary thereon; and that the introduction of the notes into Hungary would create a spurious circulation there, and by that and other means cause great detriment to the state and the subjects of the plaintiff. That Day & Sons had notice of the purpose for which the notes were intended, and of Kossuth's want of authority to prepare or issue them.

The bill prayed that Day & Sons might be decreed to give up to the plaintiff the plates, and any documents printed or lithographed therefrom, and any other documents in their possession purporting to be notes of the Hungarian state or nation, or notes with the royal arms of Hungary thereon, and for an injunction restraining Day & Sons from printing or delivering to Kossuth any such notes.***

It appeared that the notes in question were not similar in appearance to any notes circulating in Hungary.

Vice-Chancellor Stuart having made a decree according the prayer of the bill, the defendants Kossuth and Day & Sons severally appealed.***

[*The Lord Chancellor, Lord Campbell.*] ***I will now consider the objec-

tions to the decree appealed against, which appear to me to be chiefly relied upon by the appellant's counsel in the very learned and very able arguments which we have had the advantage of hearing from them.

In the first place, they deny the right of the plaintiff as a sovereign prince to maintain this suit, and if the suit were instituted merely to support his political power and prerogatives, or for any alleged wrong sanctioned by the government of England, I should acquiesce in that position. But the *King of Spain v. Hullet*, (1833) 7 Bligh, N.S. 359, *The King of the Two Sicilies v. Willcox*, (1851) 1 Simons N.S. 301, and various other authorities show that by the law of England a foreign sovereign may sue in our Courts for a wrong done to him by an English subject unauthorized by the English government, in respect of property belonging to the foreign sovereign, either in his individual or in his corporate capacity. Then comes the great question, whether this is a subject over which the Court of Chancery has jurisdiction by injunction?*** I consider that this Court has jurisdiction by injunction to protect property from an act threatened, which if completed would give a right of action. I by no means say that in every such case an injunction may be demanded as of right, but if the party applying is free from blame and promptly applies for relief, and shows that by the threatened wrong his property would be so injured that an action for damages would be no adequate redress, the injunction will be granted.

Although an action arising purely *ex delicto* for an injury to property may not have been brought by a foreign sovereign against an English subject in an English Court, on principle I cannot doubt that such action would be maintainable.***

I rather think that the decree ought to be varied with respect to prohibiting M. Kossuth from the use of the royal arms of Hungary; for it would appear that they may be innocently used by all Hungarians, and, I presume, by all mankind.

With this variation, I am of opinion that the decree appealed against ought to be affirmed, and that the appeal must be dismissed.***

[*Turner, L. J.*] ***This case, as it seems to me, may and ought to be decided upon the third ground on which the case is rested by the bill,—the injury to the subjects of the plaintiff by the introduction of a spurious circulation. I take it to be now well settled, although upon looking into the authorities I have been surprised to find that the point was doubted even in the time of Lord Loughborough, that a foreign sovereign may sue in the Court of this country, and that he may sue in this Court on the behalf of his subjects; and this bill, if it does not require, certainly admits the construction, that it is filed by the plaintiff in his representative character on behalf of the subjects of his kingdom, for it distinctly alleges a case of injury to them. We must consider, then, what is the nature of this injury. I think it is an injury not to the political but to the private rights of the plaintiff's subjects. What is proposed to be done is to introduce into the kingdom of Hungary an enormous number of notes which, on the face of them, purport that they will be received in the public offices of the state and that they are guaranteed by the state, and which pur-

port also to be signed in the name of the nation by the defendant Louis Kossuth. That the effect of this introduction will be to disturb the circulation of the kingdom cannot, in my opinion, be doubted; and what will be the effect of that disturbance? Surely to endanger, to prejudice, and to deteriorate the value of the existing circulating medium, and thus to affect directly all the holders of Austrian bank notes, and indirectly, if not directly, all the holders of property in the state. ***But it is said that the acts proposed to be done are not the subject of equitable jurisdiction, or that, if they are, the jurisdiction ought not to be exercised until a trial at law shall have been had. To neither of these propositions can I give my assent. I agree that the jurisdiction of this Court in a case of this nature rests upon injury to property actual or prospective, and that this Court has no jurisdiction to prevent the commission of acts which are merely criminal or merely illegal, and do not affect any rights of property, but I think there are here rights of property quite sufficient to found jurisdiction in this Court. I do not agree to the proposition, that there is no remedy in this Court if there be no remedy at law, and still less do I agree to the proposition that this Court is bound to send a matter of this description to be tried at law.***

If the property of an individual is affected by an undue and unauthorized use of his name, the law would no doubt give a remedy. I am not satisfied that the law would not give the same remedy in the case of the undue and unauthorized use of the name of a nation or state; but whether it would do so or not, and if not, whether it would be prevented from doing so by the absence of positive law or by formal impediments as to the right to sue, I think the authority to which I have referred, and the instance which I have mentioned of the application of it, warrant me in saying that the case falls within the jurisdiction of this Court. I was said, on the part of the defendants, that the Court has only interfered in cases of this nature where there was a right at law, or where there was trust or confidence; but if the jurisdiction exists, the extent of it cannot be limited by the instances in which it has been applied. It was also attempted to be argued on the part of the defendants, that, assuming the existence of the jurisdiction, there was no sufficient case for the exercise of it. But upon this point I have felt no doubt. The jurisdiction of this Court is preventive as well as remedial, and the affidavit of the defendant Kossuth himself quite satisfies my mind that there is a proper case for the exercise of it. Subject, therefore, to the qualification to which the Lord Chancellor has adverted, I think that this decree must stand.

B. ANSLAG MOD STATENS ÆRE

145

Aksel Larsen sagen

DANMARK, ØSTRE LANDSRET, 1934

U. f. R. 1935, 589

[*Domstolen.*] Under *københavnsk nævningsag* nr. 2/1934 tiltalte en kommunistisk folketingsmand for overtrædelse af straffelov § 108, 1. stk., for offentlig forhånelse af det tyske hagekorsflag ved på et den 7. august 1933 ved havnen i Aabenraa afholdt møde at have omtalt flaget som et "morderflag" samt i alles påsyn at have sønderrevet en skibsvimpel med hagekorsmærket.

Tiltalte erkendte at have optrådt som angivet i tiltalen, men mente ikke at have gjort sig skyldig i noget strafbart.

Forsvaret henviste særlig til, at hagekorsflaget ikke den 7. august 1933 kunne anses for en fremmed stats "flag eller anerkendt nationalmærke", at iturivningen ikke var nogen forhånelse, men kun symbolsk handling for fjernelse, samt til at udtrykket "morderflag" heller ikke var nogen forhånelse, men alene måtte ses på baggrund af, at det nazistiske parti på forskellig måde skulle have billigt, at mord var foretaget i partiets interesse.

I en under sagen fremlagt udtalelse fra udenrigsministeriet angående hagekorsmærkets betydning var oplyst, at dette synes for første gang udtrykkelig betegnet som et nationalt højhedstegn (højhedsflag) i en tysk forordning af 6. juli 1933 om luftskibes flagføring; men først i en note af 22. september 1933 meddelte den tyske gesandt officielt, at en tysk bekendtgørelse af 12. marts 1933, der påbød flagning med hagekorsflag, havde fastsat, at hagekorsflaget var et tysk rigsflag, og herom skete der den 29. september 1933 offentliggørelse i Statstidende.

Udenrigsministeriet udtalte derhos tillige, at det er almindelig international praksis, at ændringer i regler om flag og andre nationalmærker notificeres fremmede magter.

Ved nævningenes kendelse fandtes tiltalte ikke skyldig i det forhold, for hvilket han var anklaget, og han blev *** overensstemmende hermed frifundet.

146

Borgerlig straffelov af 15. april 1930

Lovbekendtgørelse nr. 215, 24. juni 1939

§ 107. Begås nogen af de i kapitlerne 25, 26 og 27 omhandlede forbrydelser mod et fremmed statsoverhoved eller sendebud, kan den dér foreskrevne straf forhøjes med indtil det halve.

§ 108. Med bøde, hæfte eller under skærpende omstændigheder med fængsel

indtil 1 år straffes den, der offentlig forhåner en fremmed nation, en fremmed stat, dens flag eller andet anerkendt nationalmærke.

Påtale finder kun sted, når det forlanges af vedkommende fremmede regering.

C. STATENS IMMUNITET

(1) *Hvem kan gøre krav på immunitet?*

147

Wulfsohn v. Russian Socialist Federated Sovjet Republic

DE FORENEDE STATER, COURT OF APPEALS OF NEW YORK, 1923

Se ovenfor sag nr. 66

148

Ulen & Co. v. Bank Gospodarstwa Krajowego

DE FORENEDE STATER, SUPREME COURT OF NEW YORK, 1940

24, N. Y. S. (2d) 201

[Sagsøgte, en polsk bank oprettet i 1924, var i sine vedtægter betegnet som en "statsinstitution med selvstændig retsevne". 60 % af bankens kapital ejedes af finansdepartementet og af andre statsinstitutioner, banken stod under finansministerens kontrol, ligesom nettooverskudet skulle tilfalde finansdepartementet.

I 1925 udbød banken et lån i de Forenede Stater, og ved et særligt dekret garanterede den polske republik betalingen såvel af lånets hovedstol som renter.

Da banken i januar 1940 ikke betalte renter ved forfaldstid, gjorde sagsøgeren arrest i midler, som sagsøgte havde indestående i forskellige banker i New York. Ved den efterfølgende retssag lod sagsøgte og den polske regering give møde og påstod arresten ophævet, da banken var en statsinstitution og så nær knyttet til den polske regering, at den måtte være berettiget til at nyde godt af den immunitet, der tilkom regeringen. Samtidig foranledigede den polske ambassadør, at det amerikanske udenrigsministerium gav retten meddelelse om den polske regerings synspunkt, uden at ministeriet iøvrigt kommenterede dette.]

[Close, J.] ***It is urged that the action of the State Department amounted to a recognition and allowance of the defendant's claim to immunity by the executive branch of the United States Government. If that were a correct interpretation, the court would have been obliged, without further inquiry, to accept the claim of immunity and decline jurisdiction. It is quite plain, however, that the State Department did not undertake to recognize the claim as valid or to influence the action of the court. It took a position of courteous neutrality. This left the court free to determine the question of jurisdiction, uninstructed by the executive branch of the government. The question is before us on the merits.

It is well recognized as a basic principle of general application that in the

courts of this country both our own government and the governments of friendly foreign nations are immune from suit. The immunity of the domestic sovereign is based on the historic principle that no court has power to command the King. *The Parlement Belge* (1880), 5 L.R.P.D. 197. The immunity of the foreign sovereign rests on a somewhat different theory. It is founded on an implied consent on the part of all sovereigns, as a matter of comity, to a relaxation of the complete jurisdiction which each naturally enjoys within his own territory. *The Schooner Exchange v. M'Faddon*, 7 Cranch 116, 11 U.S. 116, 136, 3 L. Ed. 287. Theoretically, therefore, the immunity of the domestic sovereign is a matter of right, while that of the foreign sovereign is a matter of favor granted voluntarily by the domestic government. But since the favor is reciprocal, the one immunity is, in practice, as obligatory upon the judicial branch as the other. In determining how far the immunity extends beyond the immediate person of the sovereign, authorities dealing with the creatures of the domestic and of foreign governments would seem to be equally applicable.***

There appears to be no decision in either the United States Supreme Court or in the New York Court of Appeals dealing with corporations formed by foreign governments. There are several cases, however, in the lower Federal courts in which the same conclusion has been reached as in the case of domestic governmental corporations. In *Coale v. Société Co-op. Suisse des Charbons, Basle, D.C.*, 21 F. 2d 180, the defendant was a corporation formed by the Swiss government for the importation of coal. The charter and by-laws were subject to governmental approval. The government appointed seven of the seventeen directors, and was entitled to all the net profit above six per cent. The plaintiff sued on a contract of sale which had been signed in the defendant's behalf by the Swiss Minister. The defendant claimed immunity. The District Court held that the defendant was not immune from suit and was liable on the contract. A similar conclusion was reached in *United States v. Deutsches Kalisyndikat Gesellschaft, D.C.*, 31 F. 2d 199, in the case of a corporation formed and controlled by the French government for the purpose of exploiting potash mines in Alsace. It was held that a "suit against a corporation is not a suit against a government merely because it has been incorporated by direction of the government, and is used as a governmental agent, and its stock is owned by the government . . ."

We approve the principle of these latter cases and conclude that a corporation organized by either a domestic or foreign government for commercial objects in which the government is interested, does not share the immunity of the sovereign. There is a dispute in the present case as to whether the defendant is a corporation, but it is of no actual importance whether it be called by that name or not. It has all the characteristics of a corporation. For present purposes the most significant fact is that the Bank is described in its own charter as "a distinct legal person". Since it is a person quite distinct from the Polish government, the reasoning employed in the foregoing authorities with respect to corporations applies with equal force to the defendant. This characteristic also distinguishes the present case from certain authorities

cited by the defendant. Thus in *Oliver American Trading Co. v. Government of United States of Mexico*, 2 Cir., 5 F. 2d 659, 661, where the plaintiff sued on a contract with the National Railways of Mexico, it appeared that there was no corporation or legal person existent under that name. "National Railways of Mexico" was merely a name for a system of railroads directly owned and controlled by the Mexican government. Accordingly it was held that the foreign government was entitled to prevail in its claim to sovereign immunity. The same feature was present in *Dexter & Carpenter v. Kunglig Järnvägsstyrelsen*, 2 Cir., 43 F. 2d 705, which involved the Swedish State Railways.***

The defendant contends that the funds attached by the plaintiff are the property of Poland, and that the bonds represent a part of the public debt of Poland. If either proposition were true, the defendant would be immune from suit. *Lamont v. Travelers Ins. Co.*, *supra*. But this is merely saying in another way that the separate individuality of the defendant should be disregarded, and that the Bank and the Polish government should be considered as one. Because we may not so consider them, we must reject the conclusion suggested. The funds attached are not those of the Polish government but of the defendant. The bonds are not those of the Polish government, for the defendant is the obligor. There can be no clearer illustration of the separate identity of the Bank and the government than the fact that the government guaranteed the Bank's obligations.***

(2) *Immunitetens omfang, betingelser og begrænsninger*

149

Duff Development Co., Ltd. v. Government of Kelantan

STORBRITANNIEN, HOUSE OF LORDS, 1924

Se ovenfor sag nr. 64

150

The Cristina

STORBRITANNIEN, HOUSE OF LORDS, 1938

[1938] A. C. 485

[Appellanterne i denne sag var et spansk rederi, hvis skib *Cristina* var indregistreret i Bilbao. Medens skibet lå i Cardiff, underrettede den stedlige spanske konsul den 9. juli 1937 skibets kaptajn om, at *Cristina* var rekvireret af den republikanske spanske regering i henhold til et dekret, der var offentliggjort i Spanien på et tidspunkt, hvor skibet befandt sig udenfor spansk territorialfarvand. Konsulen beordrede videre kaptajnen til at handle i overensstemmelse med regeringens instruktioner. Da kaptajnen nægtede dette, blev han og mand-

skabet afskediget, og den 14. juli 1937 kom konsulen ombord med ny kaptajn og nyt mandskab, der tog skibet i besiddelse på regeringens vegne.

I overensstemmelse med engelske procedureregler udtog rederiet stævning mod skibet og påstod sig indsat i besiddelse af dette. Konsulen påstod sagen afvist under henvisning til den regeringens tilkommende immunitet.

Såvel retten i 1. instans som appelretten gav konsulen medhold, hvorefter rederiet appellerede sagen påny.]

[*Per Lord Atkin.*] ***The foundation for the application to set aside the writ and arrest of the ship is to be found in two propositions of international law engrafted into our domestic law which seem to me to be well established and to be beyond dispute. The first is that the courts of a country will not implead a foreign sovereign, that is, they will not by their process make him against his will a party to legal proceedings whether the proceedings involve process against his person or seek to recover from him specific property or damages.

The second is that they will not by their process, whether the sovereign is a party to the proceedings or not, seize or detain property which is his or of which he is in possession or control. There has been some difference in the practice of nations as to possible limitations of this second principle as to whether it extends to property only used for the commercial purposes of the sovereign or to personal private property. In this country it is in my opinion well settled that it applies to both.

I draw attention to the fact that there are two distinct immunities appertaining to foreign sovereign: for at times they tend to become confused: and it is not always clear from the decisions whether the judges are dealing with one or the other or both. It seems to me clear that, in a simple case of a writ in rem issued by our Admiralty Court in a claim for collision damage against the owners of a public ship of a sovereign State in which the ship is arrested, both principles are broken. The sovereign is impleaded and his property is seized.

In my opinion the facts of this case establish the same breach of the two principles as in the illustration just given. I entertain no doubt that the effect, and the intended effect, of the action of the Spanish Consul at Cardiff in July, 1937, was to "purge" the officers and crew of the ship of those who were disaffected to the present Spanish Government and to secure that the new master, officers, and crew should hold the ship for the Government: and that from and after July 14 the masters, officers, and crew held the ship not for the owners but for the Government: and that by the master, officers, and crew the Government were in fact in possession of the ship. I cannot pay serious attention to the suggestion that all that the Consul intended to do was to supply a well-affected new master on behalf of the owners.

These being the facts I come to the conclusion that when the plaintiffs issued a writ in which they constituted as defendants the steamship or vessel *Cristina* and all persons claiming an interest therein, in the body of which the same ship and all persons claiming an interest therein were commanded within eight days to cause an appearance to be entered for them in the Probate, Divorce, and Admiralty Division, and on which they endorsed the claim to

have possession adjudged to them of the said steamship or vessel *Cristina*, they were directly impleading the Spanish Government, whom they knew to be the only persons interested in the *Cristina* other than themselves, and from whom they desired that possession should be taken after it was adjusted to them.***

[*Per Lord Wright.*] The respondent Government does not contend that it is the owner of the *Cristina* but says that it is and was at all material times in de facto possession of the *Cristina* and was therefore without its consent impleaded by the writ in rem claiming possession adversely to its actual possession. Such a proceeding, it contends, is inconsistent with its position as an independent sovereign State recognized by His Majesty's Government. It further contends that the action involved a claim to interfere with its right of direction and control coupled with actual possession acquired by reason of the requisition. This, though not ownership, is, it is said, a right in the ship in the nature of property and was, as being the property of an independent sovereign State, immune from the interference of the Court either by the arrest or by an order annulling the requisition and giving possession to the appellants and ousting the respondents from possession. The word "requisition", while not a term of art, is familiar and has been constantly used to describe the compulsory taking by Government, invariably or at least generally, for public purposes of the user, direction and control of the ship with or without possession. In my judgment both contentions are well founded, and the order of the Courts below may be sustained on either ground. But the grounds are separate and call for separate analysis, though both alike are based on the general principles of international law, according to which a sovereign State is held to be immune from the jurisdiction of another sovereign State. This is sometimes said to flow from international comity of courtesy, but may now more properly be regarded as a rule of international law, accepted among the community of nations. It is binding on the municipal Courts of this country in the sense and to the extent that it has been received and enforced by these Courts. It is true that it involves a subtraction from the sovereignty of the State, which renounces pro tanto the competence of its Courts to exercise their jurisdiction even over matters occurring within its territorial limits, though to do so is prima facie an integral part of sovereignty. The rule may be said to be based on the principle "*par in parem non habet imperium*", no State can claim jurisdiction over another sovereign State. Or it may be rested on the circumstance that in general the judgment of a municipal Court could not be enforced against a foreign sovereign State, or that the attempt to enforce might be regarded as an unfriendly act. Or it may be taken to flow from reciprocity, each sovereign State within the community of nations accepting some subtraction from its full sovereignty in return for similar concessions on the side of the others. I need not discuss other possible explanations. The rule is naturally subject to waiver by the consent of the sovereign, who may desire a legal adjudication as to his rights. There may indeed be particular and special exceptions not necessary here to discuss. The principle has been received and applied by the Courts of this country in many decided cases, and in particular many cases dealing with states of fact similar to the facts here in question. But the rule only applies as

between sovereign States recognized as such by His Majesty's Government. For purposes of the present case so far as concerns Spain, the respondent is such a sovereign.

The first of the two rules here relevant, namely, that the independent sovereign may not be directly or indirectly impleaded in the Courts of this country without its consent, has been recognized as a general proposition in many cases.***

To take the present case the writ names as defendants the *Cristina* and all persons claiming an interest therein, and claims possession. The writ commands an appearance to be entered by the defendants (presumably other than the vessel) and gives notice that in default of so doing the plaintiffs may proceed and judgment be given by default, adjudging possession to the plaintiffs. A judgment in rem is a judgment against all the world, and if given in favour of the plaintiffs would conclusively oust the defendants from the possession which on the facts I have stated they beyond question de facto enjoy. The writ by its express terms commands the defendants to appear or let judgment go by default. They are given the clear alternative of either submitting to the jurisdiction or losing possession. In the words of Brett, L. J., the independent sovereign is thus called upon to sacrifice either its property or its independence. It is, I think, clear that no such writ can be upheld against the sovereign State unless it consents. It is therefore given the right, if it desires neither to appear nor to submit to judgment, to appear under protest and apply to set aside the writ or take other appropriate procedure with the same object. It may be said that it is indirectly impleaded, but I incline to think that it is more correct to say that it is directly impleaded. The defendants cited are "all persons claiming an interest in the *Cristina*", a description which precisely covers on the facts of the case the Spanish Government and, to judge by the affidavits filed by the appellants in applying to obtain the warrant to arrest, no one else; under the modern and statutory form of a writ in rem, a defendant who appears becomes subject to liability in personam. Thus the writ in rem becomes in effect also a writ in personam. This emphasizes the view that the writ directly impleads the Spanish Government.

The crucial fact in this connection is simply that de facto possession was enjoyed by the Spanish Government. The position would obviously have been quite different if the respondent were seeking to obtain possession by the process of the Court instead of resisting an attempt by the process of the Court to oust it from actual possession.

In the present case, the fact of possession was proved. It is unnecessary here to consider whether the Court would act conclusively on a bare assertion by the Government that the vessel is in its possession. I should hesitate as at present advised so to hold, but the respondent here has established the necessary facts by evidence.

It is unnecessary to consider by what mode the respondent obtained possession. It is enough to ascertain that it had possession at the time when the claim to immunity was made.***

[Under henvisning til det argument fra appellanternes side, at immuniteten

udelukkende omfatter skibe ejet af en fremmed stat, ikke skibe, der alene er i besiddelse eller under kontrol af en fremmed regering, refererer dommeren til dommen i *The Parlement Belge* og fortsætter:]

In the first place they have relied on the fact that the Spanish Government had no property (in the sense of ownership) in the *Cristina*, whereas in *The Parlement Belge* the Belgian Government was the owner of the mail packet. But the rule is not limited to ownership. It applies to cases where what the government has is a lesser interest, which may be not merely not proprietary but not even possessory. Thus it has been applied to vessels requisitioned by a Government, where in consequence of the requisition the vessel, whether or not it is in the possession of the foreign State, is subject to its direction and employed under its orders.***

[Dommerne var enige om, at *Cristina* var et skib anvendt af en fremmed stat for offentlige formål. Men nogle af dommerne gav i *obiter dicta* udtryk for, at deres afgørelse kunne være faldet anderledes ud, dersom det havde drejet sig om et skib benyttet for private formål.]

[*Per Lord MacMillan.*] ****"It is a trite observation that there is no such thing as a standard of international law extraneous to the domestic law of a kingdom, to which appeal may be made. International law, so far as this Court is concerned, is the body of doctrine regarding the international rights and duties of states which has been adopted and made part of the law of Scotland." These are the well-chosen words of Lord Dunedin, when Lord President of the Court of Session in Scotland, in a case which raised important issues of international law: *Mortensen v. Peters*.

Now, it is a recognized prerequisite of the adoption in our municipal law of a doctrine of public international law that it shall have attained the position of general acceptance by civilized nations as a rule of international conduct, evidenced by international treaties and conventions, authoritative textbooks, practice and judicial decisions. It is manifestly of the highest importance that the Courts of this country before they give the force of law within this realm to any doctrine of international law should be satisfied that it has the hallmarks of general assent and reciprocity.

I confess that I should hesitate to lay down that it is part of the law of England that an ordinary foreign trading vessel is immune from civil process within this realm by reason merely of the fact that it is owned by a foreign State, for such a principle must be an importation from international law and there is no proved consensus of international opinion or practice to this effect. On the contrary the subject is one on which divergent views exist and have been expressed among the nations. When the doctrine of the immunity of the person and property of foreign sovereigns from the jurisdiction of the Courts of this country was first formulated and accepted it was a concession to the dignity, equality and independence of foreign sovereigns which the comity of nations enjoined. It is only in modern times that sovereign States have so far condescended to lay aside their dignity as to enter the competitive markets of commerce, and it is easy to see that different views may be taken as to whether an immunity conceded in one set of circumstances should to the same extent be enjoyed in totally different circumstances.***

[*Per Lord Maugham.*] ***I cannot myself doubt that, if the *Parlment. Belge* had been used solely for trading purposes, the decision would have been the other way. Almost every line of the judgement would have been otiose if the view of the Court had been that all ships belonging to a foreign Government, even if used purely for commerce, were entitled to immunity, and the same is true as regards the judgment of the Supreme Court of the U.S.A. I must admit that some Judges have taken another view; and the decision of the Court of Appeal in *The Porto Alexandre* is a clear decision in a sense opposite to the opinion I have expressed. After much consideration I can only express my own conclusion. The judgments in *The Porto Alexandre* seems to me to have omitted any consideration of what I deem to be a vital point—namely, the fact that other countries while they admit the immunity as regards ships of war and other public ships have not been at all agreed that the same immunity ought to be granted to ships and cargoes engaged in ordinary trading voyages.***

Half a century ago foreign Governments very seldom embarked in trade with ordinary ships, though they not infrequently owned vessels destined for public uses, and in particular hospital vessels, supply ships and surveying or exploring vessels. There were doubtless very strong reasons for extending the privilege long possessed by ships of war to public ships of the nature mentioned; but there has been a very large development of State-owned commercial ships since the Great War, and the question whether the immunity should continue to be given to ordinary trading ships has become acute. Is it consistent with sovereign dignity to acquire a tramp steamer and to compete with ordinary shippers and ship-owners in the markets of the world? Doing so, is it consistent to set up the immunity of a sovereign if, owing to the want of skill of captain and crew, serious damage is caused to the ship of another country? Is it also consistent to refuse to permit proceedings to enforce a right of salvage in respect of services rendered, perhaps at a great risk, by the vessel of another country? Is there justice or equity, or for that matter is international comity being followed, in permitting a foreign Government, while insisting on its own right of indemnity, to bring actions in rem or in personam against our own nationals?***

151

Lov om fremmede statsskibe m. v. nr. 198 af 16. maj 1950

§ 1. At et skib eller dets ladning ejes, eller at skibet benyttes af en fremmed stat, er i andre tilfælde end i §§ 2 og 3 anført ikke til hinder for ved dansk domstol at anlægge sag om en fordring, der grunder sig på benyttelse af skibet eller befordring af ladningen, eller for her i riget at foretage udlæg, udpantning, arrest eller anden retslig tilbageholdelse i skibet eller ladningen for en sådan fordring.

§ 2. Sag mod fremmed stat om en fordring som nævnt i § 1 kan ikke anlægges ved dansk domstol, forsåvidt angår:

1. Krigsskib eller andet skib, som den fremmede stat ejer eller benytter og som på den tid, da fordringen opstod, anvendtes udelukkende i statsøjemed af ikke-forretningsmæssig art;
2. Ladning, der tilhører den fremmede stat, og som befordres med skib som nævnt under 1;
3. Ladning, der tilhører den fremmede stat, og som befordres med handelsskib i statsøjemed af ikke-forretningsmæssig art.

At fordringen grunder sig på befordring af ladning som nævnt under 3, er dog ikke til hinder for at anlægge sag om bjærgeløn, bidrag til almindeligt havari eller fordring ifølge aftale vedrørende ladningen.

§ 3. Udlæg, udpantning, arrest eller anden retslig tilbageholdelse kan her i riget ikke foretages i:

1. Krigsskib eller andet skib, som fremmed stat ejer, benytter eller har helbefragtet for en rejse eller på tid, og som anvendes udelukkende i statsøjemed af ikke-forretningsmæssig art;
2. Ladning, der tilhører fremmed stat, og som befordres med skib som nævnt under 1 eller med handelsskib i statsøjemed af ikke-forretningsmæssig art.

§ 4. Efter overenskomst med fremmed stat kan det, hvis den fremmede stat i krigstid fremsætter begæring derom, ved kgl. anordning bestemmes, at udlæg, udpantning, arrest eller anden retslig tilbageholdelse her i riget heller ikke i andre tilfælde end nævnt i § 3 kan foretages i skib, som den fremmede stat ejer eller benytter, eller i ladning, der tilhører den fremmede stat.

§ 5. Efter overenskomst med fremmed stat kan det ved kgl. anordning bestemmes, at en bevidnelse af den fremmede stats diplomatiske repræsentant her i riget, når udlæg, udpantning, arrest eller anden retslig tilbageholdelse i skib eller ladning som nævnt i § 3 begæres ophævet, skal gælde som bevis for, at skibet anvendes eller ladningen befordres udelukkende i statsøjemed af ikke-forretningsmæssig art.

Traktater

A. TRAKTATERS GYLDIGHED

152

Nogle forfatningsbestemmelser vedrørende traktater

GRUNDLOVEN AF 5. JUNI 1953

§ 19. *Stk. 1.* Kongen handler på rigets vegne i mellemfolkelige anliggender. Uden folketingets samtykke kan han dog ikke foretage nogen handling, der forøger eller indskrænker rigets område, eller indgå nogen forpligtelse, til hvis opfyldelse folketingets medvirken er nødvendig, eller som i øvrigt er af større betydning. Ej heller kan Kongen uden folketingets samtykke opsige nogen mellemfolkelig overenskomst, som er indgået med folketingets samtykke.

Stk. 2. Bortset fra forsvar mod væbnet angreb på riget eller danske styrker kan Kongen ikke uden folketingets samtykke anvende militære magtmidler mod nogen fremmed stat. Foranstaltninger, som Kongen måtte træffe i medfør af denne bestemmelse, skal straks forelægges folketinget. Er folketinget ikke samlet, skal det uopholdeligt sammenkaldes til møde.

Stk. 3. Folketinget vælger af sin midte et udenrigspolitisk nævn, med hvilket regeringen rådfører sig forud for enhver beslutning af større udenrigspolitisk rækkevidde. Nærmere regler om det udenrigspolitiske nævn fastsættes ved lov.

NORSK GRUNDLOV AF 17. MAI 1814

§ 26. Kongen har Ret til at sammenkalde Tropper, begynde Krig til Landets Forsvar og slutte Fred, indgaa og ophæve Forbund, sende og modtage Gesandter.

Traktater angaaende Sager af særlig Vigtighed og i alle Tilfælde Traktater, hvis Iværksættelse efter Konstitutionen nødvendiggør en ny Lov eller Stortingsbeslutning, bliver først bindende, naar Stortinget har givet sit Samtykke hertil.

153

De Forenede Nationers pagt

Art. 110. 1. Nærværende pagt skal ratificeres af signatarmagterne i overensstemmelse med deres respektive forfatningsmæssige fremgangsmåder.

154

Østgrønlands retsstilling

DEN FASTE DOMSTOL FOR MELLEMFOLKELIG RETSPLEJE, DOM, 1933

Se ovenfor sag nr. 101.

155

De Forenede Nationers pagt

Art. 102. 1. Enhver traktat og enhver mellemfolkelig overenskomst, der afsluttes af noget medlem af de Forenede Nationer, efter at nærværende pagt er trådt i kraft, skal så snart som muligt indregistreres i sekretariatet og offentliggøres af dette.

2. Ingen deltager i en sådan traktat eller mellemfolkelig overenskomst, som ikke er blevet indregistreret i overensstemmelse med bestemmelserne i denne artikels pkt. 1, kan påberåbe sig den pågældende traktat eller overenskomst overfor noget af de Forenede Nationers organer.

**B. TRAKTATERS RATIFIKATION OG
IKRAFTTRÆDEN**

156

Nogle fuldmagts- og ratifikationsdokumenter

FRANSK FULDMAGT (PARIS-TRAKTATEN 10. FEBRUAR 1763)

Ludvig, af Guds nåde Konge af Frankrig og Navarra, hilser alle, som ser nærværende brev. Da de i Fontainebleau den 3. november sidste år underskrevne fredspræliminærer har lagt grunden til den fred, som er genoprettet imellem Os og Vor meget kære og elskede gode broder og fætter Kongen af Spanien på den ene side, og Vor meget kære og elskede gode broder Kongen af Storbritannien og Vor meget kære og elskede gode broder og fætter Kongen af Portugal på den anden side, har intet ligget Os mere på sinde, siden denne lykkelige dag, end på den mest varige måde at befæste og styrke et så gavnligt og betydeligt værk ved en højtidelig og endelig traktat mellem Os og de nævnte magter. Af disse grunde og andre gode overvejelser, som bevæger Os hertil, og med fuld tillid til Vor meget kære og højtelskede fætter’s duellighed og erfaring, flid og troskab i Vor tjeneste, har vi udnævnt, beskikket og sendt ham, og udnævner, beskikker og sender ham ved nærværende med Vor hånd underskrevne brev som Vor befuldmægtigede minister, idet Vi giver ham fuld og uindskrænket fuldmagt til at optræde i denne egenskab og at konferere, drøfte, forhandle og komme overens med den befuldmægtigede

minister for Vor meget kære og elskede gode broder og fætter Kongen af Spanien, den befuldmægtigede minister for Vor meget kære og elskede gode broder Kongen af Stor-Britannien og den befuldmægtigede minister for Vor meget kære og elskede gode broder og fætter Kongen af Portugal, som er forsynede med behørig fuldmagter, at oprette, slutte og underskrive sådanne artikler, betingelser, overenskomster, erklæringer, endelig traktat, tiltrædelser og andre akter af enhver art, som han måtte finde formålstjenlige for at sikre og styrke fredens store værk, alt med samme frihed og myndighed, som Vi kunne handle selv, om Vi var personlig der tilstede, endog om der måtte forekomme noget, der ville have krævet en mere speciel ordre, end der indeholdes i nærværende. Idet vi lover at godkende og fast at overholde for bestandig, opfylde og udføre punktligt alt, hvad vor nævnte fætter har stipuleret og underskrevet i henhold til nærværende fuldmagt, og ikke nogensinde overtræde dette, og ej heller tillade, at sådant overtrædes af hvilken grund eller under hvilket påskud, det end måtte være, samt endelig at lade udfærdige Vore ratifikationsbreve herfor i behørig form og at lade dem udlevere, for at udveksling kan ske til den tid, som måtte blive aftalt: Thi således behager det Os. Til bevidnelse heraf***

RATIFIKATION AF EN TRAKTAT UNDERSKREVET DEN 18. NOVEMBER 1738 IMELLEM
FRANKRIG OG DET HELLIGE ROMERSKE RIGE

Ludvig, af Guds nåde Kongen af Frankrig og Navarra, hilser alle, som ser nærværende brev. Da Vor kære og højtelskede Markis af Mirepoix . . . i henhold til den ham af Os givne fuldmagt i sin egenskab af Vor befuldmægtigede minister den 18. november sidste år i Wien i Østrig sammen med . . . har oprettet og underskrevet den fredstraktat og separatartikel, hvis ordlyd følger.***

[Traktatens tekst]

Idet Vi godkender ovennævnte fredstraktat og separatartikel med hensyn til alle og ethvert af de deri indeholdte og anførte punkter og artikler, har Vi nu, såvel på Vore egne vegne som for Vore arvinger, efterkommere, riger, lande, besiddelser, len og undersætter antaget, billiget, ratificeret og stadfæstet disse og antager, billiger, ratificerer og stadfæster dem ved nærværende med Vor hånd underskrevne brev, hvorhos Vi på Vort kongelige æresord lover og hertil forpligter og giver sikkerhed i alle og enhver af Vore ejendele, nuværende og fremtidige, at bevare og ukrænkeligt overholde alt dette uden nogensinde ved noget forhold eller nogen handling at gå derimod, det være sig direkte eller indirekte, på nogen som helst måde. Til bevidnelse heraf***

RUMÆNSK FULDMAGT

Vi Carol II, Konge af Rumænien, giver herved deputeret V. V. Tilea, med fuld tillid til hans tjenstiver og hengivenhed, fuldmagt til sammen med den eller de befuldmægtigede ministre — ligeledes forsynede med fuldmagter i behørig form — for Hans britiske Majestæt at forhandle om, afslutte og

underskrive en handels- og søfartstraktat mellem Rumænien og Stor-Britannien.

Til bekræftelse heraf har Vi udstedt nærværende under Vor kongelige hånd og segl.

Givet i Bukarest, den 28. juli 1930.

BRITISK FULDMAGT TIL FORBEREDELSE AF REGERINGSAFTALE

Whereas for the better treating of and arranging certain matters which are now in discussion or which may come into discussion, between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of ... concerning ... it is expedient that a fit person should be invested with Full Power to conduct the said discussion on the part of the Government of the United Kingdom of Great Britain and Northern Ireland; I ..., His Majesty's Principal Secretary of State for Foreign Affairs, do hereby certify that ... is by these presents named, constituted and appointed as Plenipotentiary and Representative having Full Power and Authority to agree and conclude, with such Plenipotentiary or Representative as may be vested with similar power and Authority on the part of the Government of ..., any Convention or Agreement that may tend to the attainment of the above-mentioned end, and to sign for the Government of the United Kingdom of Great Britain and Northern Ireland everything so agreed upon and concluded. Further I do hereby certify that whatever things shall be transacted and concluded by the said Plenipotentiary, shall, subject if necessary to ratification by the Government of the United Kingdom of Great Britain and Northern Ireland, be agreed to, acknowledged and accepted by the said Government of the United Kingdom of Great Britain and Northern Ireland in the fullest manner. In witness whereof I have signed these Presents and hereunto affixed my seal.

Signed and sealed at the Foreign Office, London, the ... day of ..., in the year of our Lord 19...

RATIFIKATIONSdokument fra de Forenede Stater

Calvin Coolidge President of the United States of America.

To all whom these presents shall come, *Greeting*.

Know Ye, That whereas a Treaty between [parternes navne] declaring in the names of their respective peoples that they condemn recourse to war for the solution of international controversies, and renounce it as an instrument of national policy in their relations with one another, was signed by their respective plenipotentiaries at Paris on the twenty seventh day of August, one thousand nine hundred and twenty eight, a true copy of which treaty, in the French and English languages, is hereto annexed:

And Whereas, the Senate of the United States, by their resolution of January 15, 1929 (two-thirds of the Senators present concurring therein), did advise and consent to the ratification of the said Treaty;

Now, Therefore, be it known that I, Calvin Coolidge, President of the United States of America, having seen and considered the said Treaty, do

hereby, in pursuance of the aforesaid advice and consent of the Senate, ratify and confirm the same and every article and clause thereof.

In testimony whereof, I have caused the seal of the United States to be hereunto affixed.

Done at the City of Washington this seventeenth day of January in the (Seal) year of our Lord one thousand nine hundred and twenty nine. . . .

ALBANSK PÅTEGNING PÅ TRAKTATUDKAST

The undersigned Envoy Extraordinary and Minister Plenipotentiary of Albania at Washington, duly empowered thereto has the honour formally to declare, for and in the name of his Government that the Government of Albania, subject to the ratification of its action by the Albanian Parliament, adheres to the treaty for the renunciation of war***

Washington, on the twentieth of October 1928.

DANSK FULDMAGT

Vi Frederik IX.

GØRE VITTERLIGT: Da Vi har besluttet at lade os repræsentere ved den regionale maritime radiokonference som for nærværende er samlet i København, har vi valgt, udnævnt og bemyndiget og vælger, udnævner og bemyndiger ved nærværende som Vore delegerede til nævnte konference . . .

Vi bemyndiger samtidigt formanden for Vor delegation eller i tilfælde af, at han måtte blive forhindret, hans stedfortræder i forbindelse med den eller de af delegationens medlemmer, han dertil måtte udpege, til, under forbehold af Vor ratifikation, at underskrive de internationale aktstykker, som måtte blive resultatet af de på konferencen førte forhandlinger, lovende ved vort kongelige ord at finde behag i og trofast opfylde det, som Vore nævnte repræsentanter i overensstemmelse med denne fuldmagt har aftalt og underskrevet.

Til vished herfor har vi underskrevet denne fuldmagt og ladet samme Vort kongelige segl påtrykke.

Givet i Graasten, den 3. september i året nitten hundrede og otte og fyrrer, Vor regering det andet.

DANSK RATIFIKATIONSdokument

Vi Frederik IX.

GØRE VITTERLIGT, at Vi efter at have læst og overvejet den i København den 15. september 1948 undertegnede europæiske konvention om radiospredning, hvilken konvention ord til andet lyder som følger:***

[Konventionens tekst]

så have Vi denne konvention bifaldet, stadfæstet og ratificeret ligesom Vi også samme herved på bedste og kraftigste måde, som ske kan, for Os og Vore efterfølgere bifalde stadfæste og ratificere lovende ved Vort kongelige ord for Os og dem nøjagtigen at overholde og fuldbyrde denne konvention i alle dens ord og punkter.

Til ydermere vished herfor have vi underskrevet denne ratifikationsakt med Vor egen hånd og ladet samme Vort kongelige segl påtrykke.

Givet på Amalienborg, den 2. februar i året nitten hundrede og ni og fyre, Vor regerings det andet.

157

Kotzias v. Tyser

STORBRITANNIEN, KING'S BENCH DIVISION, 1920

Se ovenfor sag nr. 23.

158

The Eliza Ann

STORBRITANNIEN; HIGH COURT OF ADMIRALTY, 1813

I Dodson 244

[Tre amerikanske fragtskibe blev den 11. august 1812 opbragt i *Hanö-bugten* af engelske krigsskibe. På foranledning af den svenske minister i Storbritannien blev nærværende sag rejst med påstand om, at opbringelsen var folkeretstridig, da skibene var opbragt på svensk territorium.]

[*Sir W. Scott.*] ***These vessels came into Hanoe Bay, for the purpose of taking the benefit of British convoy, and were seized in consequence of the order for the detention of American property. This order has been since followed up by a declaration of war; the ships, therefore, would be liable to condemnation, unless it can be shown that they are entitled to some special protection.

A claim has been given, by the Swedish consul, for these ships and cargoes, as having been taken within the territories of the King of Sweden, and in violation of his territorial rights. This claim could not have been given by the Americans themselves, for it is the privilege, not of the enemy, but of the neutral country, which has a right to see that no act of violence is committed within its jurisdiction.***

Now, in order to support and give effect to this claim, two things are necessary to be established. *First*, it is requisite that Sweden should appear to have been in a state of perfect neutrality at the time when the seizure was made. *Secondly*, it must be shown that the act of violence was committed within the limits of Swedish territory. For, if the scene of hostility did not lie within the territories of the neutral state, then has there been no violation of its neutral rights, and consequently there exists no ground of complaint, and no foundation for the claim.

The first question then is, how far, in August, 1812, Sweden was to be considered as a neutral country.***

This was the state of things originally; British ships were excluded from the ports of Sweden, and the island of Hanoe was occupied by British forces.

After this, a declaration of war was issued by the Government of Sweden.*** This war has, however, been happily terminated by a treaty of peace, which was signed by the plenipotentiaries of the two countries, on the 18th of July, ratified by the Prince Regent of Great Britain on the 4th of August, and by the King of Sweden on the 17th of the same month. From the result of these dates it has been contended, that the war had ceased, and that friendship had been re-established before the time when these vessels were seized. The question, therefore, comes to this, whether a ratification is or is not necessary to give effect and validity to a treaty signed by plenipotentiaries. Upon abstract principle we know that, either in public or private transactions, the acts of those who are vested with a plenary power are binding upon the principal. But, as this rule was in many cases found to be attended with inconvenience, the later usage of States has been to require a ratification, although the treaty may have been signed by plenipotentiaries. According to the practice now prevailing, a subsequent ratification is essentially necessary; and a strong confirmation of the truth of this position is that there is hardly a modern treaty in which it is not expressly so stipulated; and, therefore, it is now to be presumed, that the powers of plenipotentiaries are limited by the condition of a subsequent ratification¹. The ratification may be a form, but it is an essential form; for the instrument, in point of legal efficacy, is imperfect without it. I need not add, that a ratification by one power alone is insufficient; that, if necessary at all, it must be mutual; and that the treaty is incomplete till it has been reciprocally ratified.

It is said, however, that the treaty, when ratified, refers back to the time of its signature by the plenipotentiaries, and that it does so in this case more especially on account of the terms in which it is drawn. The words in one of the articles of the treaty, "*Dès ce moment tout sujet de mésintelligence, qui ait pu subsister sera regardé comme entièrement cessant et détruit,*" have been pointed out, and from these it has been contended, that all hostilities were to cease the moment the treaty was signed. But I take that not to be the case; the positive and enacting part of the articles is, that there shall be a firm and inviolable peace between the two countries; the other part is descriptive only of the pacific intention of the parties, and of their agreement to bury in oblivion all the causes of the war. It does not stand in the same substantive way as the former part of the article, and must be considered as mere explanatory description.*** It would be a stretch beyond the limits to which a fair interpretation of these words could be carried, to say they were intended to convey any other meaning. I am of opinion, therefore, that the ratification is the point from which the treaty must take effect. "*Dès ce moment*" must be referred to the moment at which the treaty received its valid existence by

¹ Traktaten af 18. juli 1812 indeholdt i art. 4 følgende bestemmelse: "The present treaty shall be ratified by the two High Contracting Parties, and the ratifications shall be exchanged within six weeks, or sooner, if possible."

mutual ratification. It is perfectly clear that it was so considered on the part of Sweden. The British officer who was sent to the Swedish coast was still received with the same caution as in the time of war, and was blindfolded before he was permitted to enter Carlsham. Hanoe remained in British possession, and the only communication between that island and the main land of Sweden was by flags of truce. Though it was reasonable to expect that Sweden would return to the relations of amity with this country, yet it is quite clear that she had not at that time confirmed the treaty, and, therefore, could not be entitled to the benefit of a neutral character.

But, in order to give validity to the present claim, another proposition must necessarily be maintained: It must be shown that the place of capture was within the Swedish territories; and I am of opinion that it was not.***

I am of opinion that the claim which has been given fails upon the two essential points, both in respect of the neutrality of Sweden, and of the neutrality of the place of capture, and consequently that these ships and cargoes are liable to condemnation.

159

Case concerning the arbitral award made by the King of Spain

(HONDURAS v. NICARAGUA)
DEN INTERNATIONALE DOMSTOL, DOM, 1960

Der henvises til referatet i Lærebogen i Folkeret § 38 V.

160

Om forbehold ved ratifikation af mangesidede traktater

[Ved ratifikationen af konventionen om folkedrab, vedtaget den 9. december 1949 af de Forenede Nationer, havde nogle stater taget forbehold vedrørende dele af konventionens indhold. Da andre stater protesterede herimod, blev spørgsmålet om de juridiske virkninger af ratifikation med forbehold optaget på de Forenede Nationers generalforsamlings dagsorden i 1950.

Spørgsmålet blev undersøgt af generalforsamlingens 6. komité, der om praksis bl. a. udtalte:]

5. The practice followed by the Secretary-General in the absence of specific provisions in a convention governing reservation procedures was summarized as follows:

“A State may make a reservation when signing, ratifying or acceding to a convention, prior to its entry into force, only with the consent of all States which have ratified or acceded thereto up to the date of entry into force; and may do so after the date of entry into force only with the consent of all States which have theretofore ratified or acceded” (A/1372, par. 46).

6. At the same time, the report of the Secretary-General drew attention to

the system followed by the Pan-American Union as to multilateral conventions concluded among the American States for which it serves as despositary. The essence of this rule has been established as follows:

"The treaty shall be in force, in the form in which it was signed, as between those countries which ratify it without reservations, in the terms in which it was originally drafted and signed. It shall be in force as between the Governments which ratify it with reservations and the signatory States which accept the reservations in the form in which the treaty may be modified by said reservations. It shall not be in force between a Government which may have ratified with reservations and another which may have already ratified, and which does not accept such reservations" (A/1372, par. 26, quoting Resolution of the Governing Board of the Pan American Union, adopted on May 4, 1932).

[På basis af komiteens analyse af spørgsmålets juridiske og politiske problemer vedtog generalforsamlingen den 16. november 1950 følgende resolution:]

*The General Assembly****

1. *Requests* the International Court of Justice to give an advisory opinion on the following questions:

"In so far as concerns the Convention on the Prevention and Punishment of the Crime of Genocide in the event of a State ratifying or acceding to the Convention subject to a reservation made either on ratification or an accession, or on signature followed by ratification:

I. Can the reserving State be regarded as being a party to the Convention while still maintaining its reservation if the reservation is objected to by one or more of the parties to the Convention but not by others?

II. If the answer to question I is in the affirmative, what is the effect of the reservation as between the reserving State and: (a) The parties which object to the reservation? (b) Those which accept it?

III. What would be the legal effect as regards the answer to question I if an objection to a reservation is made: (a) By a signatory which has not yet ratified? (b) By a State entitled to sign or accede but which has not yet done so?"

2. *Invites* the International Law Commission:

(a) In the course of its work on the codification of the law of treaties, to study the question of reservations to multilateral conventions both from the point of view of codification and from that of the progressive development of international law;***

[Den Internationale Domstols responsum forelå den 28. maj 1951 og indeholdt følgende (I.C.J. Reports 1951, 15, 29):]

The Court is of Opinion,

In so far as concerns the Convention on the Prevention and Punishment of the Crime of Genocide, in the event of a State ratifying or acceding to the Convention subject to a reservation made either on ratification or on accession, or on signature followed by ratification.

On Question I, by seven votes to five, that a State which has made and maintained a reservation which has been objected to by one or more of the

parties to the Convention but not by others, can be regarded as being a party to the Convention if the reservation is compatible with object and purpose of the Convention; otherwise, that State cannot be regarded as being a party to the Convention.

On Question II, by seven votes to five, (a) that if a party to the Convention objects to a reservation which it considers to be incompatible with the object and purpose of the Convention, it can in fact consider that the reserving State is not a party to the Convention; (b) that if, on the other hand, a party accepts the reservation as being compatible with the object and purpose of the Convention, it can in fact consider that the reserving State is a party to the Convention.

On Question III, by seven votes to five, (a) that an objection to a reservation made by a signatory State which has not yet ratified the Convention can have legal effect indicated in the reply to Question I only upon ratification. Until that moment it merely serves as a notice to the other State of the eventual attitude of the signatory State; (b) that an objection to a reservation made by a State which is entitled to sign or accede but which has not yet done so, is without legal effect.

[Den internationale folkeretskommission, der behandlede problemet i sin 3. samling (1951), sluttede sig i det væsentlige til den praksis, der var fulgt af de Forenede Nationers generalsekretær. Kommissionen statuerede iøvrigt som sin opfattelse:]

that the criterion of the compatibility of a reservation with the object and purpose of a multilateral convention, applied by the International Court of Justice to the Convention on Genocide, is not suitable for application to multilateral conventions in general.

C. TRAKTATERS RETSVIRKNING I FORHOLD TIL DEN INTERNE RET

Se ovenfor kapitel II.

D. TRAKTATERS RETSVIRKNING I FORHOLD TIL TREDJESTAT

161¹

The Free Zones of Upper Savoy and the District of Gex

DEN FASTE DOMSTOL FOR MELLEMFOLKELIG RETSPLEJE, DOM, 1932

P. C. I. J., Series A/B, no. 46

[Under denne sag var der bl. a. spørgsmål om, hvorvidt der med hensyn til zonen Gex ved visse overenskomster i 1815 var stiftet en ret for Schweiz, hvor-

¹ Jfr. sag nr. 165.

efter denne zone, skønt del af fransk territorium, i forhold til Schweiz skulle udgøre et frit toldområde. Domstolen kom til det resultat, at der var stiftet en sådan ret for Schweiz i kraft af overenskomst mellem Schweiz og stormagterne, herunder Frankrig. Derefter udtales det:]

[*Domstolen.*] ***The Court, having reached this conclusion simply on the basis of an examination of the situation of fact in regard to this case, need not consider the legal nature of the Gex zone from the point of view of whether it constitutes a stipulation in favour of a third party.

But were the matter also to be envisaged from this aspect, the following observations should be made:

It cannot be lightly presumed that stipulations favourable to a third State have been adopted with the object of creating an actual right in its favour. There is, however, nothing to prevent the will of sovereign States from having this object and this effect. The question of the existence of a right acquired under an instrument drawn between other States is therefore one to be decided in each particular case: it must be ascertained whether the States which have stipulated in favour of a third State meant to create for that State an actual right which the latter has accepted as such.***

162

Versaillestraktaten af 28. juni 1919

Art. 110. Til grænselinien kan fastsættes i terrænet, vil den blive fastsat af de allierede og associerede hovedmagter efter en linie, der hviler på resultatet af afstemningen, og som foreslås af den internationale kommission, og som tager hensyn til de pågældende steders særlige geografiske og økonomiske forhold.

Tyskland giver herved, til fordel for de allierede og associerede hovedmagter, afkald på enhver suverænitet over de områder af Slesvig, der ligger nord for den grænselinie, der er fastsat i overensstemmelse med ovenstående bestemmelser. De allierede og associerede hovedmagter vil overdrage Danmark de nævnte områder.

163

Pragerfreden af 23. august 1866

Art. 5. Hans Majestæt Kejseren af Østrig overdrager til Hans Majestæt Kongen af Preussen alle sine ved Wienerfreden af 30. oktober 1864 erhvervede rettigheder til hertugdømmerne Holsten og Slesvig med det forbehold, at befolkningerne i de nordlige distrikter af Slesvig, hvis de ved fri afstemning tilkendegiver ønsket om at blive forenet med Danmark, skal afstås til Danmark.

164

De Forenede Nationers pagt

Art. 2 [6]. Organisationen skal sikre, at stater, der ikke er medlemmer af de Forenede Nationer, handler i overensstemmelse med disse grundsætninger, såvidt det måtte være nødvendigt til opretholdelse af mellemfolkelig fred og sikkerhed.

Art. 103. I tilfælde af konflikt mellem de forpligtelser, der påhviler de Forenede Nationers medlemmer ifølge denne pagt, og deres forpligtelser ifølge enhver anden mellemfolkelig overenskomst går deres forpligtelser ifølge denne pagt forud for de sidstnævnte.

E. TRAKTATERS OPHØR

165¹

The Free Zones of Upper Savoy and the District of Gex

DEN FASTE DOMSTOL FOR MELLEMFOLKELIG RETSPLEJE, DOM, 1932

P. C. I. J., Series A/B, no. 46

[Det blev i denne sag fra fransk side bl. a. gjort gældende, at forholdene siden oprettelsen af frizonerne i 1815 havde ændret sig så væsentligt, at de overenskomster, hvorpå Schweiz begrundede sin ret, måtte anses for bortfaldne. Særligt blev det hævdet, at kantonen Genève i 1815 udgjorde et udpræget frihandelsområde, således at tilbagetrækningen af den franske og sardinske toldlinie forenede zonerne og kantonen til en økonomisk enhed, men at indførelsen af det schweiziske forbundstoldsystem i 1849 tilintetgjorde denne økonomiske enhed. Domstolen afviste denne betragtning, idet den udtalte:]

[*Domstolen.*] ***To establish this position it is necessary, first of all, to prove that it was in consideration of the absence of customs duties at Geneva that the Powers decided, in 1815, in favour of the creation of the zones. There is nothing in the text of the treaties to support this, and the only occasion on which the Swiss representative at the Allied gatherings in 1815 is shown to have relied on the absence of customs at Geneva was when he endeavoured to secure the withdrawal of the French customs along the whole frontier from Basle to Geneva—an effort in which he was not successful. *** Nor can the Court assume that what the Powers had in view in 1815 was a condition of things under which modest customs duties might be imposed, but not substantial duties, with the result that a serious increase would justify a claim that the relevant stipulations had lapsed. The resulting situation would have been much too precarious to constitute the basis of a part of the European settlement after the Napoleonic wars.***

¹ Jfr. sag nr. 161.

Det folkeretlige retsbrud og ansvar

A. DE OBJEKTIVE RETMÆSSIGHEDSGRUNDE

166

The Caroline Incident

DE FORENEDE STATER-STORBRITANNIEN, NOTEVEKSLING, 1842
 Webster's Works, VI, 299

[Under oprøret i Canada i 1837 traf de Forenede Staters regering særlige foranstaltninger for at gennemføre sine forpligtelser som neutral stat. Vanskeligheden hermed forøgedes imidlertid derved, at en del af oprørerne fra Canada søgte tilflugt i de Forenede Stater, hvor de forsøgte at hverve styrker. Den 28. december 1837 rapporterede amerikanske myndigheder således, at mellem 200 og 300 mand havde lejret sig på den amerikanske side af Niagarafloden. Arrestordre blev udstedt, men blev ikke eksekveret. Den 29. december 1837 gik en del af disse oprørsstyrker ombord på dampersen *Caroline*, der førte amerikansk flag. *Caroline* blev, medens skibet befandt sig på amerikansk territorium, beskudt fra den canadiske side af floden, ligesom 70—80 bevæbnede mænd fra de engelske styrker i Canada entrede skibet, jagede de ombordværende på flugt og dræbte herunder nogle amerikanske statsborgere. Skibet blev herefter sat i brand og sendt ned over faldene.

De Forenede Stater protesterede overfor Storbritannien som følge af den skete krænkelse af amerikansk territorium og krævede erstatning for skade på amerikansk liv og ejendom. Storbritannien afviste protesten bl.a. under henvisning til, at de engelske styrker havde handlet i lovligt selvforsvar.

Sagen blev i 1842 afsluttet ved nedenstående noteveksling.]

[*Lord Ashburton*, britisk befuldmægtiget, til de Forenede Staters udenrigsminister Webster:]

Although it is believed that a candid and impartial consideration of the whole history of this unfortunate event will lead to the conclusion that there were grounds of justification as strong as were ever presented in such cases, and, above all, that no slight of the authority of the United States was ever intended, yet it must be admitted that there was, in the hurried execution of this necessary service, a violation of territory; and I am instructed to assure you that her Majesty's government consider this as a most serious fact, and that, far from thinking that an event of this kind should be lightly risked, they would unfeignedly deprecate its recurrence. Looking back to what passed at this distance of time, what is, perhaps, most to be regretted is, that some explana-

tion and apology for this occurrence was not immediately made; this, with a frank explanation of the necessity of the case, might, and probably would, have prevented much of the exasperation, and of the subsequent complaints and recriminations to which it gave rise.

There are possible cases in the relations of nations, as of individuals, where necessity, which control all other laws, may be pleaded; but it is neither easy nor safe to attempt to define the rights or limits properly assignable to such a plea. This must always be a subject of much delicacy, and should be considered by friendly nations with great candor and forbearance. The intentions of the parties must mainly be looked to; and can it for a moment be supposed that Great Britain would intentionally and wantonly provoke a great and powerful neighbor?

[Svarnote fra udenrigsminister Webster:]

The President sees with pleasure that your Lordship fully admits those great principles of public law, applicable to cases of this kind, which this government has expressed; and that on your part, as on ours, respect for the inviolable character of the territory of independent states is the most essential foundation of civilization. And while it is admitted on both sides that there are exceptions to this rule, he is gratified to find that your Lordship admits that such exceptions must come within the limitations stated and the terms used in a former communication from this department to the British plenipotentiary here. Undoubtedly it is just, that, while it is admitted that exceptions growing out of the great law of self-defence do exist, those exceptions should be confined to cases in which the "necessity of that self-defence is instant, overwhelming, and leaving no choice of means, and no moment for deliberation."

Understanding these principles alike, the difference between the two governments is only whether the facts in the case of the *Caroline* make out a case of such necessity for the purpose of self-defence. Seeing that the transaction is not recent, having happened in the time of one of his predecessors, seeing that your Lordship, in the name of your government, solemnly declares that no slight or disrespect was intended to the sovereign authority of the United States; seeing that it is acknowledged that, whether justifiable or not, there was yet a violation of the territory of the United States, and that you are instructed to say that your government consider that as a most serious occurrence; seeing, finally, that it is now admitted that an explanation and apology for this violation was due at the time; the President is content to receive these acknowledgments and assurances in the conciliatory spirit which marks your Lordship's letter, and will make this subject, as a complaint of violation of territory, the topic of no further discussion between the two governments.

167

Naulilaa-affæren

PORTUGAL-TYSKLAND, BLANDET VOLDGIFTSRET, 1928

3 Recueil des Décisions des Tribunaux Arbitraux Mixtes 409¹

[Den 19. oktober 1914 blev en tysk embedsmand og to tyske officerer dræbt af portugisiske grænsevagter ved Naulilaa, som ligger ved grænsen mellem den portugisiske koloni Angola og Tysk Sydvestafrika. To andre tyskere blev sårede. Portugal, som på dette tidspunkt endnu var neutralt, internerede de to sårede tyske militærpersoner. Uden først at rette nogen henvendelse til de portugisiske myndigheder besluttede den tyske guvernør over Sydvestafrika at foretage en repressalie, hvorefter tyske troppeafdelinger angreb og ødelagde en række militære anlæg på den portugisiske side af grænsen. En militærstyrke angreb fortet Naulilaa, hvis besætning gjorde modstand, men til sidst måtte flygte. Portugiserne flygtede et stykke ind i landet, hvorefter de tyske tropper trak sig tilbage. På det af portugiserne rømmede territorium opstod der uroligheder blandt de indfødte, der plyndrede og hærgede området, foruden at der forekom alvorlige kampe mellem de indfødte stammer indbyrdes. Først efter at Portugal havde haft store anstrengelser og betydelige udgifter på udsendelsen af en ekspeditionsstyrke til stedet, lykkedes det at pacificere landet.

I marts 1916 kom Portugal i krig med Tyskland, og Portugal blev derved medunderskriver af Versaillestraktaten af 28. juni 1919 mellem de allierede og associerede magter og Tyskland. I henhold til denne traktats artikler 297 og 298 samt tillægget hertil oprettedes der en række blandede voldgiftsretter til at påkende forskellige spørgsmål mellem de krigsførende magter eller mellem deres borgere. Der oprettedes nu i henhold til tillæggets § 4 en speciel voldgiftsret, der skulle påkende alle sager mellem Tyskland og Portugal vedrørende den tyske regerings eller de tyske myndigheders handlinger i perioden fra 31. juli 1914 til Portugals indtræden i krigen.]

[*Voldgiftsretten.*] ***D.1. The Most recent doctrine, notably the German doctrine, defines reprisals in these terms:

Reprisals are an act of self-help (*propre justice*, *Selbsthilfehandlung*) of the injured state, in retaliation for an unredressed act of the offending state contrary to international law. They have for object to suspend momentarily, in the relations between the two states, the observance of such or such a rule of international law. They are limited by the rules of humanity and good faith applicable in the relations of state to state. They will be illegal unless a previous act in violation of international law has furnished the justification (*motif*). They tend to impose on the offending state reparation for the offence or the return to legality and avoidance of new offences. This definition does not require that the reprisal be proportioned to the offence. On this point authors, unanimous for some years, are now divided in opinion. The majority consider a certain proportion between offence and reprisal a necessary condition of the legitimacy of the latter. Cf. Hershey, *Essentials* (1912), p. 344; Oppenheim,

¹ Oversættelse fra Herbert Briggs, *Law of Nations* (1. ed.), 677.

4th ed., vol. 2, p. 89; Despagnet, *Cours de Droit International Public* (1910), p. 781; Fauchille, I, Part 3, No. 978; Rolin, *Le droit moderne de la guerre* (1920), I, 116, 311; *Institut*, Oxford (1888). Others among the more modern authors no longer demand this condition. Cf. Hatschek, *Völkerrecht* (1923), p. 405; Anzilotti, *Corso*, III, p. 167. International law in process of formation as a result of the experiences of the last war tends certainly to restrain the notion of legitimate reprisals and to prohibit their abuse. Cf. Redslob, *Histoire* (1923), pp. 466 ff.; Waldkirch, *Völkerrecht* (1926), p. 328.

2. The German contentions may be summarized as follows:

(a) The destruction or the capture of the Schultze-Jena mission at Naulilaa constituted an act contrary to international law, an act giving to the Government of South-West Africa a just motive for exercising reprisals.

(b) As soon as informed of the Naulilaa incident, Governor Seitz had broadcast for several nights to all the German radiotelegraphic posts the news of the "assassination" of Dr. Schultze-Jena and his companions. This communication, which was also addressed to the Governor of Angola, was equivalent to a request [*sommation*] to the Portuguese authorities to furnish explanations and to surrender the two prisoners, Jensen and Kimmel. No reply having been made, "one had been reduced, on the German side, to take justice into one's own hands."

(c) Even if reprisals had been excessive, this excusable excess would not engage the responsibility of Germany. In fact there was no excess. The death of Dr. Schultze-Jena and his companions justified the attack on the fort of Cuangar. In spite of this warning not only did the Portuguese authorities not liberate the two prisoners illegally interned, but they had expelled from Lubango the German vice-consul Schoess.

(d) In consequence, the acts committed by the German troops on different points of the frontier of Angola do not engage the responsibility of Germany.

3. The arbitrators cannot admit this thesis for the following reasons:

(a) Conformably to the basic decision given above on the subject of the Naulilaa incident, the death of Dr. Schultze-Jena and the two officers who accompanied him was not the consequence of an act contrary to international law by the Portuguese authorities.

(b) A neutral state has the right to disarm and intern belligerents under arms who penetrate its territory. Cf. Hague Convention V, 1907, Art. 11. The internment of the interpreter Jensen and the soldier Kimmel was then, in principle, authorized by positive international law. *** The German authorities *** could not, on the contrary, see in this internment, or in its maintenance, an act contrary to international law, giving them a proper justification for resorting to reprisals.

(c) The vice-consul Schoess was still *en fonction* at Lubango, November 28, 1914. The attack on the fort of Cuangar, October 31, the destruction of the posts of lower Cubango from November 4 to 15, and the Franck expedition, decided upon October 28, cannot have been motivated by his expulsion. Moreover, the expulsion of a consular agent against whom a state may have complaints, may constitute an unfriendly act, leading to diplomatic repre-

sentations, but it cannot *** [properly be regarded as] an act contrary to international law, justifying, by way of reprisal, an attack accompanied by all the rigors of war.

(d) The first condition—*sine qua non*—of the right of exercising reprisals is a justification furnished by a previous act contrary to international law. This condition, whose necessity the German thesis admits, is lacking; this, in itself, is sufficient to defeat the plea invoked by the German Government.

(e) Even if the arbitrators accepted the accusation that the Portuguese authorities had committed an act contrary to international law, justifying, in principle, reprisals, the German contention would nevertheless be rejected for two other reasons, either of them decisive:

(1) Reprisals are not licit except when they have been preceded by a request for redress (*somation*) which has been unavailing. Employment of force is not justified in effect, except by its character of necessity. Cf. Fauchille, *Traité*, I, Part 3, No. 978. But it is impossible to consider as a demand from state to state the communication by the authorities of the offending state to each other of the news of the pretended offense. *** There was, therefore, on the part of the authorities of South-West Africa, recourse to force without previous attempt to obtain satisfaction by legal means—which constitutes a further reason for denying the legitimacy of the reprisals resorted to.

(2) The necessity of a proportionality between the reprisal and the offense appears to be recognized in the German reply. Even if one admits that international law does not require that reprisals be measured approximately by the offense, one must certainly consider as excessive, and consequently illicit, reprisals out of all proportion to the act which has motivated them. In the present case *** there was an evident disproportion between the incident of Naulilaa and the six acts of reprisal which have followed it.

The arbitrators thus arrive at the conclusion that the German aggressions of October, November, and December, 1914, at the frontier of Angola cannot be considered licit or justified by the incident of Naulilaa or later acts of the Portuguese authorities, there being a lack of sufficient justification, of previous request for redress, and of an admissible proportion between the alleged offense and the reprisals resorted to.***

For these reasons, Germany must make reparation for the damage caused by the aggressions.***

[Med hensyn til fastsættelsen af erstatningsbeløbet erklærede retten, at Tyskland måtte hæfte for den skade, som de tyske myndigheder burde have betragtet som en sandsynlig følge af dets handlinger. Ansvarret måtte derfor også omfatte en del af den skade, der var forvoldt ved oprøret, thi Tyskland måtte kunne forudse uroligheder som en følge af aktionen.]

Retten tog udtrykkelig afstand fra afgørelsen i Alabama-sagen, hvor der kun blev givet erstatning for direkte skade. Det skete bl. a. med den begrundelse, at "det ville være uretfærdigt at pålægge den krænkede at bære tab, som ophavsmanden til den første ulovlige handling forudså og måske endog ønskede indtrådt, blot fordi der fandtes mellemliggende led i den kæde, der forbandt handlingen med det lidte tab.]

168

Le Carthage

FRANKRIG, COURS D'APPEL D'AIX, 1946

1948 Dalloz 155

[I henhold til de franske flådemyndigheders rekvisition blev skibet *Carthage*, der tilhørte Cie Franco-Tunisienne D'Armement, i august 1942 indlemmet i den franske handelsflåde. Ejerne anlagde sag ved civilretten i Marseille og påstod erstatning, da skibet førte fremmed flag. Retten afviste imidlertid sagen under henvisning til, at den manglende kompetence til at tage stilling til dette spørgsmål, da rekvisitionen af skibet var et udslag af angarieretten og således måtte betragtes som en administrativ akt. Herefter blev sagen indbragt for appelretten.]

[*Domstolen.*] ***Skibets ejere påstår, at angarieretten ikke har hjemmel i fransk lov eller i nogen international traktat eller konvention, som Frankrig har tilsluttet sig. Videre, at angarierettens udøvelse er en "fjendtlig handling", rettet mod den person, der må bære det derved opståede tab, omend denne "fjendtlige handling" er af en sådan karakter, at fremmede stater ikke sædvanligvis betragter den som en *casus belli*.

Hertil kan imidlertid anføres, at angarierettens juridiske eksistens ikke med rette kan drages i tvivl. Den er nævnt i *The Digest* ***; i *De Jure Maritimo* af Loccenius og i Stypmanus' fremstilling af Hansestædernes maritime retsregler. Den er altid blevet udøvet, hvilket dommen i 1. instans viser gennem den deri indeholdte historiske oversigt. Den er udøvet såvel af krigsførende overfor neutrale som af neutrale overfor krigsførende. Selv om den ikke har hjemmel i lovbestemmelser eller internationale konventioner, viser de forsøg, der er gjort for at undertrykke eller regulere dens udøvelse (art. 39 i de bestemmelser, der er vedtaget af Institut de Droit International i 1898), at rettens eksistens er anerkendt af alle sømagter. Stater har endog ved særlige traktater søgt at forhindre denne rets misbrug. Den krigsførende stat har således en af den internationale sædvane anerkendt ret til at rekvirere og benytte fremmede skibe for offentligt formål. Denne sædvane, der har udviklet sig af en konstant og generel praksis, må sidestilles med en udtrykkelig aftale. Derfor kan udøvelsen af angarieretten på en fremmed ejendom ikke være en "fjendtlig handling".

Angarieretten må betragtes som en særlig ret, hvis juridiske konsekvenser ikke er underkastet lovgivningens almindelige principper. Rekvisitionen af *Carthage* i henhold til angarieretten er et udslag af suverænitet, hvis udøvelse og virkninger, det ikke ligger indenfor rettens kompetence at bedømme.

Det følger dog af sædvane og international praksis for så vidt angår angarieretten, at den private kan kræve fuld erstatning for det tab, han har lidt. Dette princip indeholdes også i art. 6 i den amerikanske sølov. Fastsættelsen af det lidt tab falder ikke indenfor rettens kompetence, med mindre lovgivningen specielt bestemmer dette; erstatningen må fastsættes af de udøvende myndigheder.***

169

De Forenede Nationers pagt

Se ovenfor sag nr. 142.

B. HVILKE HANDLINGER HENREGNES TIL
STATEN?

170

Gust Adams Claim

DE FORENEDE STATER-PANAMA, GENERAL CLAIMS ARBITRATION, 1933
U. S. Dep. of State, Arbitration Series No. 6, 304

[*D. W. van Heeckeren*, Presiding Commissioner, *Elihu Root, Jr.*, Commissioner.] The amount of \$7,500, with interest, is claimed by Gust Adams, a citizen of the United States, as compensation for injuries inflicted upon him, and money taken from him, by a Panama policeman. There is a substantial agreement on the following facts: On or before May 1, 1921, in the course of a journey from Panamá City to Boquete, Adams stopped at a bar in the town of David. He found two policemen there and asked them where he could get a horse to continue his journey. They promised to help him, he bought them drinks, and they departed. While he was looking over his money for a small bill to make payment, a third policeman, Manuel Iriarte, asked him for a few pesos. Adams refused, and Iriarte struck him on the forehead with a police club, inflicting an ugly wound and making him unconscious.

As to the request for money, the refusal and the delivery of the blow, Adams and Iriarte are in substantial agreement. As to the other details of the episode they differ, Adams in his affidavit of October 27, 1931, says,

another policeman approached me, grabbed my arm and demanded that I give him five dollars. I started to jerk my arm away and remonstrate with him when he dealt me a severe blow on the head with his club and I fell back in my chair unconscious.

Adams' affidavit also says, "When I was able to check up my money I found that the policeman had robbed me of \$12." The statement which the claimant made shortly after the occurrence, and which was on June 1, 1921, forwarded by the American Minister of Panamá City to the Panaman Minister of Foreign Affairs *ad interim*, is not before the Commission, nor has the evidence rendered by Adams in the Panama investigation been produced, but there is an indication in the record that Adams at the time varied in his statements as to the amount of which he was robbed. This evidence of robbery is worthless unless Adams knew with certainty how much money he had when he was attacked. The variation of his own estimates as well as the inherent probabilities cast doubt on this. The Commission dismisses the claim of robbery as unproven.

Iriarte in a statement made to the police authorities, claims that he had been drinking with Adams before the request for money, that he asked for a loan only, that his request was repulsed with insults and an attack by butting, and that his own blow was intended to land on Adams' shoulder but hit his head by accident. The Commission disbelieves the story of butting and the accidental nature of the blow, and finds that there was a request for money, that it was refused, perhaps in offensive terms, and that following the refusal, and perhaps in anger at the words used, Iriarte intentionally struck Adams on the head with his club, wounding him and rendering him unconscious.

Iriarte was tried by a police disciplinary court in Panamá City on the charge of wounding Adams with his stick because of Adams' refusal to lend him money. He was found guilty and was sentenced to dismissal from the police force and 30 days' imprisonment, not for the crime committed, but for the breach of police discipline and regulations. On June 10, 1921, this sentence was ordered to be enforced. On June 23, 1921, Iriarte was sent to David by the police chief, to be held at the disposal of the municipal judge of that district, for criminal proceedings. After some investigation, the exact facts regarding which are in dispute, the criminal proceedings were, on September 27, 1921, discontinued provisionally. They have never been reopened. After being sent to David and during the investigations there, Iriarte was "detained" in and about the police station at the disposal of the judge for a maximum of 10 weeks.

The Commission has taken into account the fact that Iriarte was dismissed from the force, imprisoned in Panamá City for at least 13 days, and detained in David for 10 weeks, and that he may have acted in anger provoked by offensive words. But for a uniformed and armed police officer to demand money of a traveler and fell him with a club when he refuses the demand is a serious matter. The Commission feels that the offender was not adequately punished and that from this arises international liability.

The Commission is not concerned with the formal correctness or incorrectness of the criminal proceedings. As this Commission has said in the case of Denham (Registry No. 6);

liability for failure to punish adequately crimes against aliens is not based upon discrimination in favor of the individual offender or upon any breach of the local laws. The international obligation is clearly established and each country has the power of so arranging its interior jurisprudence as to give that obligation effect.

The Commission finds it unnecessary here to pass upon the question of whether a state is liable for the wrongful act of a police officer irrespective of failure to punish, or of whether the rule regarding liability for the acts of police applies in a case like this where the officer being on duty and in uniform does an act clearly outside of his duty and inconsistent with his duty to protect.

The Commission finds that the Government of Panama is obligated to pay to the Government of the United States, on behalf of Gust Adams \$500, without interest.***

171

G. P. Massey Claim

DE FORENEDE STATER-MEKSIKO, GENERAL CLAIMS COMMISSION, 1927

Opinions of Commissioners, 1927, 228

[Nielsen, Commissioner.] 1. Claim is made in this case by the United States of America against the United Mexican States on behalf of Gertrude Parker Massey, individually, and as guardian of William Patrick and John Kilbane Massey, minor children of herself and William B. Massey, an American citizen, who was killed by a Mexican citizen at Palo Blanco, Vera Cruz, Mexico. The claim is grounded on an assertion of denial of justice growing out of the failure of Mexican authorities to take adequate measures to punish the slayer of Massey.

2. On or about the fourth day of October, 1924, Massey, who was the terminal superintendent of the *Cia Metropolitana de Oleoductos, S.A.*, was killed in a building which is described in the record as a "bodega" (apparently some kind of a store) belonging to the petroleum company, by a Mexican citizen named Joaquín R. Saenz, who was also employed by the company under the direction of Massey. It appears that the slayer fired six shots into Massey's body any one of which was probably sufficient to cause death. After the killing Saenz fled. He was captured and placed in jail at Tamiahua, Vera Cruz. Subsequently he was confined in prison at Tuxpan, Vera Cruz, from which he escaped on December 26, 1924, and he was not apprehended. The record contains copies of correspondence from which it appears that the American Consul at Tampico and the American Ambassador at Mexico City have from time to time urged that steps be taken to apprehend and punish the slayer.***

4. In the Mexican brief the contention is advanced that a State is not responsible for a denial of justice, when a private individual who is under indictment or prosecution for the killing of an alien is allowed to escape by a minor municipal officer in violation of law and of his own duty, if the State immediately disapproves of the act by arresting and punishing the officer, and reasonable measures are taken for the apprehension of the fugitive. It is asserted that an assistant jail-keeper unlawfully permitted Saenz to walk out of jail; that this minor official was arrested and strong action was taken against him; and that therefore no responsibility attaches to the Mexican Government for his misconduct.***

6. An examination of the opinions of international tribunals dealing with the Question of a nation's responsibility for minor officials reveals conflicting views and considerable uncertainty with regard to rules and principles to which application has been given in cases in which the question has arisen. To attempt by some broad classification to make a distinction between some "minor" or petty" officials and other kinds of officials must obviously at times involve practical difficulties. Irrespective of the property of attempting to make any such distinction at all, it would seem that in reaching conclusions in any given case with respect to responsibility for acts of public servants, the most important considerations of which account must be taken are the character of the acts

alleged to have resulted in injury to persons or to property, or the nature of functions performed whenever a question is raised as to their proper discharge. As the Commission has heretofore pointed out, it appears to be a proper construction of provisions in Article I of the Convention of September 8, 1923, that uncertainty with respect to a point of responsibility was largely eliminated by the two Governments when they stipulated that the Commission should pass upon "all claims for losses or damages originating from acts of officials or others acting for either Government and resulting in injustice."

7. The question which has been raised in the instant case, and not infrequently in cases coming before international tribunals, is not one that can be properly determined in the light of generalities such as are frequently found in the opinions of tribunals. That this is true may be shown by a brief reference to citations of cases appearing in the Mexican brief.***

17. In considering the question of a nation's responsibility for acts of persons in its service, whether they be acts of commission or of omission, I think it is pertinent to bear in mind a distinction between wrongful conduct resulting in a direct injury to an alien—to his person or his property—and conduct resulting in the failure of a government to live up to its obligations under international law. The cases which have been cited are concerned with the former; the instant case with the latter.

18. I believe that it is undoubtedly a sound general principle that, whenever misconduct on the part of any such persons, whatever may be their particular status or rank under domestic law, results in the failure of a nation to perform its obligations under international law, the nation must bear the responsibility for the wrongful acts of its servants.

19. In an instruction addressed by Secretary of State Hay to the American Minister to Honduras under date of February 25, 1904, directing the presentation of a claim against the Honduran Government on account of the injuries inflicted on Charles W. Renton, an American citizen, and his family, is a passage that seems to be very apposite to the instant case. In that instruction Secretary Hay said:

The liability of the Government of Honduras is believed to be fully established however, on grounds apart from the fact that a minor official of that Government was directly concerned in the crime. While a State is not ordinarily responsible for injuries done by private individuals to other private individuals in its territory, it is the duty of the State to diligently prosecute and properly punish such offenders, and for its refusal to do so it may be held answerable in pecuniary damages. There was an inexcusable delay in initiating a judicial investigation. The first proceedings were partial and one-sided. The subsequent judicial proceedings, which were the direct result of the naval investigation by the U.S.S. *Montgomery*, terminated in condemning for minor offenses persons who, as the evidence before the Department shows, were guilty of a deliberate and brutal murder. And, finally, soon after the decision of the supreme court all of the murderers, with the single exception of Dawe, were permitted to escape. (Foreign Relations of the United States, 1904, p. 363.)

20. The statement of facts in the above-quoted passage reveals clearly a failure on the part of Honduran authorities to employ adequate measures to

punish wrongdoers. Compensation was made by Honduras in satisfaction of the claim.***

23. I am of the opinion that the record in the instant case clearly reveals gross negligence on the part of the Mexican authorities resulting in a denial of justice. This conclusion I ground on an examination of records throwing light on the actions of authorities which the United States has alleged were improper.

24. Saenz having been arrested, certain proceedings were carried on before a Judge at Palo Blanco, a Municipal Court of Tamiagua, and the Court of First Instance at Tuxpan. The record before the Commission reveals that during the course of these proceedings statements were made by some persons who had some direct information regarding the killing of Massey. Other persons appeared and related stories that they had heard regarding incidents in the life of Massey entirely unrelated to the slaying of the deceased. For example, a Mexican officer, Lieutenant Gabriel Martínez, testified that he had had an altercation with Massey because Massey had discharged a watchman, and that he (Lieutenant Martínez) had had complaints from several persons, whose names he did not remember, that Massey was attempting to make love to their wives. The Lieutenant also mentioned, as several persons appearing as witnesses did, that it was "rumored" that Massey had had intimate relations with a certain woman whose name frequently appears in the record. The record contains statements of several persons to the effect that Massey was a man of despotic character; that he treated employees under his direction harshly; that he had had disgraceful incidents with several women; that it was rumored that he had illicit relations with a certain Mexican woman; that he was disliked by the majority of the men under him. Turning from these proceedings, we find that they were suspended because of the escape of the accused from jail.

25. There is no proper arrest and there can be no prosecution in the case of a man who is permitted by police authorities to leave prison. It is argued in behalf of the Mexican Government that the Mexican Government is relieved from responsibility for the failure to bring Saenz to justice because it arrested of Saenz, and took reasonable measures to apprehend the latter after his escape. Whatever bearing, if any, the arrest of the assistant jail-keeper, Vargas, might be considered to have on the question of Mexico's responsibility in this case, it is not a point of any material importance. With respect to this matter it may be observed, in the first place, that the record does not show that Vargas was prosecuted and punished, although there is evidence that he was arrested and spent some time in jail, and in the second place, that the conditions surrounding the imprisonment of Saenz reveal a situation of something more serious than an unexpected breach of trust on the part of a single minor official. Whether or not the keepers of jails may properly be designated as minor officials, they are assuredly entrusted with highly important duties. The point is more important than the amount or character of their official emoluments or the particular definition or designation of their position under the domestic law of their country. We find Vargas testifying during the course of the proceed-

ings instituted against him that Saenz and three other persons charged with homicide, on one occasion requested Vargas for permission to leave the jail and that, after a conference with the Commandant of the Guard, the jail-keeper permitted the prisoner to depart. Vargas explained that he took such action because he had heretofore seen the warden of the jail do the same thing. The following extract from the testimony of Vargas, irrespective of the question of accuracy in detail, undoubtedly throws some light on conditions in the jail:

It was about 8 o'clock on the night of the 26th of the current month when the warden of the jail left, whose name is Antonio R. Marquez, leaving the care of the jail to the speaker, and from between 10 and 11 of the same night while he was lying down the commandant of the guard, Amador, whose other name he does not know, came to him and stated that at the window which opens on court No. 2 there were parties talking, and he arose and saw that it was Joaquín R. Saenz, who stated to him that they had permission to go out to the street, Joaquín R. Saenz, Teofilo Florencia, Isaac Ovando and Felix Gamundi, the latter returning about one in the morning; that when they asked the speaker for permission to go outside he consulted the commandant of the guard and on agreement with the latter the above mentioned parties left, that the declarant allowed this to be done because prior thereto he had seen the warden do the same thing, and that by verbal order given him by the same warden for allowing to go out the said Joaquín R. Saenz, Teofilo Florencia and Gamundi, and that on the same day the warden had allowed Corporal Francisco Valenzuela to enter in order to converse with Saenz and Gamundi the corporal inviting them to take beer, which Saenz and Gamundi accepted and took in the presence of the warden; that upon the termination of the conversation the speaker shut Saenz and Gamundi up in the presence of the warden.

26. The record shows that Saenz, before the time when he took his final departure from jail by permission, had been allowed to leave the jail on at least one other occasion.

27. With regard to the argument made with respect to the bearing on the question of Mexico's responsibility of the steps taken to apprehend Saenz, it may be concluded that there is no evidence in the record showing that any effective action has been taken by the appropriate authorities to apprehend the accused. On this point counsel for Mexico called attention to a letter written by the Mexican Secretary of the Interior to the Governor of the State of Vera Cruz, requesting that all necessary measures be taken to apprehend Saenz and other fugitives. Citation was also made to a communication written by the Governor of the State of Vera Cruz to the American Consul at Tampico from which it appears that certain prosecuting authorities had requested a Mexican Judge having knowledge of the case to issue the necessary orders and circular asking for the apprehension of Saenz. But there is no specific evidence that police authorities took any steps to apprehend him and no evidence of any difficulties experienced by such authorities to locate this wellknown fugitive. In connection with the citation in the Mexican brief of the claim of Catalina Balderas de Diaz, it is pertinent to note that in that case the record contained evidence that there was no clue whatever to the identity of the guilty person;

that military authorities and civilian police authorities had made diligent efforts to locate the guilty person; and that many persons had been arrested on suspicion.

28. In the light of the reasons which I have stated, I consider that the contentions of the United States that there was a denial of justice in this case growing out of the failure of Mexican authorities to take proper measures to punish the slayer of Massey have been established. I am of the opinion that an award of \$15,000.00 (fifteen thousand dollars) may properly be made on behalf of the claimant.

For the reasons stated above the Commission decides that the Government of the United Mexican States must pay to the Government of the United States of America on behalf of Gertrude Parker Massey the sum of \$15,000.00 (fifteen thousand dollars) without interest.***

172

The Case of the S. S. "Lotus"

DEN FASTE DOMSTOL FOR MELLEMFOLKELIG RETSPLEJE, DOM, 1926

Se ovenfor sag nr. 27.

173

Cutting-sagen

DE FORENEDE STATER-MEXICO, NOTEVEKSLING, 1887

Se ovenfor sag nr. 118.

174

Case of Sambiaggio

ITALIEN-VENEZUELA, CLAIMS ARBITRATION, 1903

Se ovenfor sag nr. 120.

175

Youmans Claim

DE FORENEDE STATER-MEKSIKO, GENERAL CLAIMS COMMISSION, 1926

Se ovenfor sag nr. 121.

C. CULPAREGEL ELLER OBJEKTIVT ANSVAR?

176

Costa Rica Packet Incident

STORBRIANNIEN-HOLLAND, CLAIMS ARBITRATION, 1896
 Moore, International Arbitration V. 4948

[Costa Rica Packet var et britisk hvalfangerskib, der førtes af kaptajn J. B. Carpenter, som var britisk statsborger. Den 24. januar 1888, da skibet befandt sig i nærheden af Hollandsk Ostindien, fik man øje på noget, der lå og flød i vandet et stykke borte. Der blev sat et par både ud, og det viste sig nu, at det drejede sig om en herreløs båd af den slags, som de indfødte malajer benyttede. Båden var fuld af vand, men der befandt sig ti kasser gin, tre kasser cognac og en dunk petroleum i den, hvorfor den blev taget på slæb og varerne bragt ombord på Costa Rica Packet. Skønt spiritusen var beskadiget af havvand, drak søfolkene ubehejst af den, hvorved de blev så berusede, at kaptajnen beordrede den resterende spiritus kastet overbord. Dette skete også, bortset fra en lille smule, som det lykkedes mandskabet at gemme i lasten. Båden blev kastet los, da man anså den for at være fuldstændig værdiløs.

Costa Rica Packet fortsatte nu sin rejse og ankom den 18. februar til Batjan i Hollandsk Ostindien. Her underrettedes myndighederne om det skete, og den 3. marts forlod skibet igen Batjan. Efter adskillige ophold i Hollandsk Indien i de følgende år ankom Costa Rica Packet den 1. november 1891 igen hertil. Da kaptajn Carpenter gik i land i Ternate, blev han anholdt sigtet for tyveri af de nævnte varer fra den ubemandede malajbåd 3—4 år tidligere. Han blev straks sendt til Macassar, 1000 miles borte, hvor han blev holdt fængslet, indtil han den 28. november blev frigivet, efter at den britiske guvernør i Straits Settlements havde gjort indtrængende forestillinger herom.

Den britiske regering forlangte nu erstatning af den hollandske, dels til kaptajnen personlig, dels til skibets ejere og dels til mandskabet, og efter langvarige forhandlinger enedes parterne ved en traktat af 16. maj 1895 om at indbringe sagen for voldgift. Voldgiftsretten skulle bestå af en enkeltperson, og parterne enedes om, at de skulle henvende sig til en tredjestat, der blandt sine borgere skulle udpege en anset jurist til at beklæde voldgiftsretten. Valget faldt på Rusland, der da anmodede en af tidens mest ansete folkeretseksperter, professor F. de Martens i Skt. Petersburg, om at påtage sig hvervet.

For voldgiftsretten gjorde England gældende, at det var folkeretstridigt af de hollandsk-ostindiske myndigheder at indlede strafferetlig undersøgelse imod Carpenter, da de handlinger, han sigtedes for, ikke var foretaget på hollandsk område, men på det åbne hav i en afstand af 15 til 20 sømil fra kysten, og efter folkeretten kunne en stat ikke anvende sin straffelovgivning på handlinger, der var foretagne af udlændinge udenfor territoriet. Handlingen var foretaget "på det åbne hav af britiske borgere, der hørte til et britisk skib, der sejlede under britisk flag og ejedes af britiske borgere", og handlingen selv var foretaget "på

et britisk skib eller på dets både og opererende umiddelbart derudfra". Som følge heraf kunne handlingen kun pådømmes ved britisk domstol og efter britisk ret.

Forøvrigt havde kaptajn Carpenter slet ikke gjort sig skyldig i tyveri, thi når båden og dens indhold blev fundet flydende på havet, prisgivet af den oprindelige ejermænd, måtte tilegnelsen heraf være lovlig efter reglerne om bjergning og bjergeløn, og endelig havde de hollandske myndigheder behandlet Carpenter utilbørligt hårdt i fængselet, hvilket i sig selv alene var folkeretstridigt.

England forlangte derfor £31,594 18s. 10d. i erstatning. Skibet var ved Hollands folkeretstridige handlinger blevet forsinket og gik derved glip af indtægter, ligesom kaptajnen personlig skulle have erstatning for den økonomiske og ikke-økonomiske skade, som han havde lidt ved den ulovlige fængsling.

I sit svar forklarede Holland, at en domstol i Macassar den 26. januar 1891 traf beslutning om Carpenters fængsling, efter at forskellige personers vidneudsagn havde skabt en stærk formodning om, at han havde begået det nævnte tyveri i 1888. Der var indløbet anmeldelse om, at en båd tilhørende M. Frieser var forsvundet, og man gik ud fra, at det drejede sig om den båd, som Costa Rica Packet havde fundet. Da Carpenter efter at være blevet anholdt den 2. november ankom til Macassar den 16. samme måned, indledtes der i overensstemmelse med den i Hollandsk Indien gældende lov en forundersøgelse ved retten til afgørelse af spørgsmålet, om der skulle rejses tiltale imod ham, eller om han skulle frigives. Den 28. november bevægede Macassars magistrat domstolen til at frigive Carpenter og undlade videre retsforfølgning, da nærmere undersøgelser havde vist, at begivenhederne ikke, som først antaget, var foregået indenfor en afstand af tre sømil fra kysten.

Det hele var således efter den hollandske regerings mening foregået i nøje overensstemmelse med hollandsk-indisk ret. Hvis man skulle bebrejde domstolen noget, skulle det være, at den uberettiget havde frigivet Carpenter, thi tyveriet havde fundet sted på et hollandsk-indisk skib, altså på hollandsk-indisk territorium, og forøvrigt havde Carpenter efter ankomsten til hollandsk-indisk havn solgt den tiloversblevne del af det stjalne gods. Endvidere hævdede den hollandske regering, at selv om forbrydelsen var begået udenfor tremilegrænsen, var det ikke dermed givet, at den ikke have fundet sted på hollandsk-indisk søterritorium. Tremilegrænsen gjaldt nemlig kun, hvor den var specielt fastsat, f.eks. ved en international konvention. Iøvrigt gjaldt Bynkershoeks velkendte grundsætning: *Terrae dominium finitur ubi finitur armorum vis*.

Men selv om domstolen havde handlet rigtigt ved at frigive den engelske kaptajn, havde England alligevel intet krav imod Holland. Hverken i Holland eller i England kunne en borger kræve erstatning i anledning af, at de formodninger, der havde ført til en fængsling, senere viste sig at være uholdbare eller under påberåbelse af, at disse formodninger ikke var tilstrækkelige til at begrundede fængslingen, og derfor kunne heller ikke en fremmed borger forlange erstatning i sådanne tilfælde.

Den 25. februar 1897 afsagde professor Martens sin kendelse, der indeholdt følgende:]

In virtue of the high duties of arbitrator conferred by supreme order of my august master, His Majesty the Emperor Nicholas II of All the Russias, F. de Martens, privy councillor, permanent member of the council of the Russian ministry of foreign affairs, and emeritus professor, in accordance with the convention of the 16th May 1895, concluded between the Government of Her Majesty the Queen of Great Britain and Ireland, Empress of India, and the Government of Her Majesty the Queen of the Netherlands, on the subject of the difference which has arisen between the two governments in respect of the detention of Mr. Carpenter, captain of the Australian whaler the *Costa Rica Packet*—

Having duly examined and maturely weighed the documents which have been produced on either side with regard to the indemnity claimed by the Government of Her Britannic Majesty from the Government of the Netherlands on behalf of Captain Carpenter, and the officers, crew, and owners of the vessel *Costa Rica Packet*—

Animated by a sincere desire to justify the great honor which has been conferred on me by an impartial and scrupulous decision, and taking into account the principles of international law applicable to the dispute which has arisen between the two high contending governments, in order to fix the amount of the indemnity due by the Government of the Netherlands on account of the damages suffered personally by Captain Carpenter, of the *Costa Rica Packet*, as well as those that may be proved to have been suffered by the officers, crew, and owners of the aforesaid vessel, as a necessary consequence of the precautionary detention of Mr. Carpenter,

I pronounce the following award of arbitration:

Considering that the right of sovereignty of the state over territorial waters is determined by the range of cannon measured from the low-water mark;

That on the high seas even merchant vessels constitute detached portions of the territory of the state whose flag they bear, and, consequently, are only justiciable by their respective national authorities for acts committed on the high seas;

That the state has not only the right but even the duty of protecting and defending its nationals abroad by every means authorized by international law, when they are subjected to arbitrary proceedings or injuries committed to their prejudice;

That the sovereignty of the state and the independence of the judicial or administrative authorities could not prevail to the extent of arbitrarily suppressing the legal security, which ought to be guaranteed no less to foreigners than to natives in the territory of every civilized country;

Whereas the prauw, floating derelict at sea, and taken possession of in January 1888 by Mr. Carpenter, the captain of the *Costa Rica Packet*, was seized by him incontrovertibly outside the territorial waters of the Dutch Indies;

Whereas the appropriation of the cargo of the aforesaid prauw by Mr. Carpenter having taken place on the high seas was only justiciable by English tribunals, and in nowise by Dutch tribunals;

Whereas even the identity of the above-mentioned derelict with the lost prauw belonging to M. Frieser is in nowise proved;

Whereas the authorities of the Netherlands Indies, who had arrested Mr. Carpenter in November 1891 on the charge of his having committed the act in 1888 outside the territorial waters of the Netherlands Indies, abandoned of their own accord, by the decision of the Macassar council of justice, dated the 28th November 1891, the prosecution of the accused, and irrefutably established by this action the illegality of his detention, as well as of his forced transference from Ternate to Macassar;

Whereas all the papers and deeds produced go to prove the absence of any real cause for arresting Mr. Carpenter, and confirm his right to be indemnified for the losses sustained by him;

Whereas the treatment to which Mr. Carpenter was subjected in prison at Macassar appears to be unjustifiable in view of his being the subject of a civilized state, whose detention was only a precautionary measure, and that, consequently, this treatment entitles him to a fair compensation;

Whereas the unjustifiable detention of Captain Carpenter caused him to miss the best part of the whale-fishing season;

Whereas, on the other hand, Mr. Carpenter, on being set free, was in a position to have returned on board the ship *Costa Rica Packet* in January 1892 at the latest, and whereas no conclusive proof has been produced by him to show that he was obliged to leave his ship until April 1892 in the port of Ternate without a master, or, still less, to sell her at a reduced price;

Whereas the owners or the captain of the ship being under an obligation, as a precaution against the occurrence of some accident to the captain, to make provision for his being replaced, the mate of the *Costa Rica Packet* ought to have been fit to take the command and to carry on the whale-fishing industry,

And whereas, thus, the losses sustained by the proprietors of the vessel *Costa Rica Packet*, the officers, and the crew, in consequence of the detention of Mr. Carpenter, are not entirely the necessary consequence of this precautionary detention;

Whereas, in so far as the indemnity to be paid to Captain Carpenter, the officers, crew, and owners of the vessel *Costa Rica Packet* is concerned, the documents produced, and, in particular, the expert opinion to which recourse has been had at Brussels, do not furnish the necessary elements for fixing the amount, and whereas a sufficient indemnity will have been given them by granting the sum of 3,150*l.* to Captain Carpenter, the sum of 1,600*l.* to the officers and crew, and the sum of 3,800*l.* to the owners of the vessel *Costa Rica Packet*—

For these reasons:

I declare the Government of Her Majesty the Queen of the Netherlands responsible, and I, consequently, fix the indemnity to be paid at—

The sum total of 3,150*l.* to Captain Carpenter.

The sum total of 1,600*l.* to the officers and crew.

The sum total of 3,800*l.* to the owners of the vessel *Costa Rica Packet*—

With interest on all these damages at the rate of 5 per cent per annum,

from the 2nd November 1891, the date of the illegal arrest of Captain Carpenter, and I put the expenses at the total sum of 250*l.*, to be paid by the Government of Her Majesty the Queen of the Netherlands.

177

The Kling Claim

DE FORENEDE STATER-MEKSIKO, GENERAL CLAIMS COMMISSION, 1930
Opinion of Commissioners (1931), 36

[*Nielsen*, Commissioner.] This claim, which is made by the United States of America in behalf of Lillie S. Kling in the sum of \$50,000.00 gold currency of the United States, with interest, is predicated on allegations with respect to the wrongful killing by Mexican soldiers of August Francis Kling, son of the claimant, and with respect to the failure properly to investigate the killing and to punish the wrongdoers. The case was heard in April, 1929, but was reopened for the production of further evidence. The substance of the occurrences on which the claim is based is stated in the Memorial as follows:

At the time this claim arose and for some time prior thereto, August Francis Kling was a resident of Chinampa, State of Vera Cruz, Republic of Mexico, S.A. At about 3:30 *a.m.* on January 23, 1921, Kling in company with M. C. Hancock, J. W. Schmuck, C. M. Maney, T. E. Goolsbee, A. G. Stribling, L. F. Knops and R. C. Knops, all American employees of that company, were returning on foot from Zacamixtle to the company's camp in the vicinity of Zacamixtle. When the party of which Kling was a member had reached the side road which turns into the camp and were standing or proceeding leisurely on the side road on property under lease to the Texas Company of Mexico, S.A., several of the companions of Kling, who had permits to carry arms, in fun fired their revolvers into the air. Immediately thereafter a party of Mexican Federal soldiers, consisting of a captain and several privates, who apparently had been following Kling and his companions, but whose presence was unknown to the Americans, deliberately discharged their firearms at the party of which Kling was a member. Kling received a shot in the back and fell immediately to the ground.

The Mexican soldiers, after firing several shots at the party of Americans, placed the companions of Kling under arrest and compelled them to proceed to Zacamixtle. There after some kind of a hearing heavy fines were imposed upon them and they were compelled under threats of indefinite imprisonment to make false statements to the effect that they were the instigators of the affair, and that they had first fired upon the Mexican Federal soldiers.

August Francis Kling, whose spinal column had been practically severed by the shot fired at him and who was completely paralyzed below the abdomen, was transferred with the greatest possible speed to the United States and placed in a hospital at Dallas, Texas, where he died on March 18, 1921, after lingering and suffering for a period of almost two months.

After the authorities of the Republic of Mexico had obtained the false statements from the companions of Kling as above stated, no further investigation was made by either civil or military authorities. The Mexican Federal soldiers were relieved by the authorities of all responsibility for the death of August Francis Kling, and the soldiers have not been punished for the crime which they committed.

The evidence produced in behalf of the claimant government supports such allegations of the Memorial as are vital to the establishment of the claim.***

Some of the employees of the company who were fired upon by the soldiers were carrying arms. Whether or not such action was a violation of the law in the locality in question may be uncertain. Although account may be taken of that matter in weighing the evidence with respect to the question of fault on the part of the soldiers, the point is not one from which it is proper to infer an excuse for reckless firing by soldiers. The conduct of the Americans of course justified investigation and it might warrant an arrest. The men may have engaged in boyish hilarity; that was probably not a crime, and at most could seemingly be only mildly indiscreet.

The killing of an alien or of a citizen by soldiers is always a serious occurrence calling for prompt investigation. So far as the evidence shows that matter in the present case was ignored—at least for several years—but a great deal of attention was devoted to the conduct of the party fired upon by the soldiers. The unjustifiable use of firearms has frequently been dealt with in diplomatic exchanges between governments and by international tribunals. This Commission has already decided numerous cases concerned with that serious question in various aspects. A few illustrations may be cited.

There have been cases of wanton, deliberate shooting resulting in death or injury.

Thus in the case of *José M. Portuondo*, which came before the Commission under the Convention of February 12, 1871, between the United States and Spain, \$60,000 was awarded for the killing of a naturalized American citizen of Spanish origin, Juan F. Portuondo. It was said in defense that he was shot while trying to escape. Moore, *International Arbitrations*, III, 3007. In the case of *Thomas H. Youmans*, this Commission awarded \$20,000 because soldiers had participated in the murder of Henry Youmans in 1880 in the State of Michoacán. *Opinions of the Commissioners* (1927), 150.

Indemnities have been awarded in cases in which it has been considered that soldiers or police officials acted improperly in attempting to make arrests, when persons have failed to respond to a summons to halt. Domestic laws throughout the world seem none too certain with respect to the action of officers relative to such matters. It seems reasonable to suppose that such is the fact because it is considered to be inadvisable or impracticable to frame legislation tending on the one hand to tie too rigidly the hands of officials, or on the other hand, to give them too great latitude, and that therefore considerable discretion is left to them.

In the *Falcón Case* before this Commission, an award of \$7,000 was made against the United States on account of the firing on Mexican citizens by

American soldiers. *Ibid.*, 140. In the case of *Teodoro Garcia and M. A. Garza*, before this Commission, an indemnity of \$2,000 was awarded against the United States because an American Army lieutenant had shot at a raft in the Rio Grande and one of the shots fired by him killed a Mexican girl. *Ibid.*, 163.

In 1915 Canadian soldiers shot two young Americans thought to be engaged in hunting ducks out of season in Canadian waters. One of them was killed and the other seriously injured. Indemnities were paid by Great Britain *U. S. For. Rel.*, 1915, 415-423.

In cases of this kind it is mistaken action, error in judgment, or reckless conduct of soldiers for which a government in a given case has been held responsible. The international precedents reveal the application of principles as to the very strict accountability for mistaken action.***

It does not appear to have been contended by the United States in the instant case that the killing of Kling was a deliberate and wanton murder. Evidently it cannot properly be considered that the shooting was the result of any attempt to secure the apprehension of a person endeavoring to escape arrest. Whatever excuse might be made for the action of the Mexican soldiers, their conduct must be considered to have been indiscreet, unnecessary and unwarranted. There are also numerous international incidents of this kind, cases not concerned with attempted arrests, in which damages have been assessed for mistaken, unnecessary, indiscreet or reckless action.

Thus in the *Dogger Bank Case*, Great Britain demanded indemnity from the Government of Russia, when during the course of the Russo-Japanese war in 1904, the Russian Baltic fleet fired into the Hull fishing fleet off the Dogger Bank in the North Sea. The British Government demanded an apology, ample damages and severe punishment of the responsible officer. The matter was submitted to an international commission of inquiry. The Russian Government maintained that the firing was caused by the approach of some Japanese torpedo boats. The commission of inquiry reported that no such boats had been present; that the firing was not justifiable; that Admiral Rojdestvensky was responsible for the incident, but that these facts were not of a nature to cast any discredit upon the military qualities or the humanity of Admiral Rojdestvensky or of the personnel of his squadron. Russia paid 65,000 pounds to indemnify the victims and families of two dead fishermen. Oppenheim, *International Law* (3rd ed.), II, 7-8. In the *Stephens Case* decided by this Commission, the sum of \$7,000 was awarded against Mexico for the shooting of Edward C. Stephens, an American citizen, on March 9, 1924, by a member of some Mexican guards or auxiliary forces in the State of Chihuahua. The following extract from the opinion of the Presiding Commissioner indicates the conclusion of the Commission with respect to the facts in that case:

There should be no difficulty for the Commission to hold that Valenzuela when trying to halt the car acted in the line of duty. But holding that these guards were entitled to stop passengers on his road and, if necessary, to use their guns pursuant to Article 176 just mentioned, does not imply that Valenzuela *executed* this authorization of the law in the right way. On the contrary, the use he made of his firearm would seem to have been utterly reckless. *Opinions of the Commissioners* (1927), 397, 399.

On September 26, 1887, a German soldier on sentry duty on the frontier near Vexaincourt, shot from the German side and killed a person on French territory. Germany disowned and apologized for this act and paid the sum of 50,000 francs to the widow of the deceased. The sentry, however, escaped punishment because he proved that he had acted in obedience to orders which he had misunderstood. Oppenheim, *International Law* (3rd ed.), I, 255-256.

The general rule as to the responsibility of a government for errors in judgment of its representatives was given application by M. Henri Fromageot, the distinguished French member of the Permanent Court of International Justice, in an opinion which he rendered in the case of *The Jessie, Thomas F. Bayard and Pescawha*, under the Special Agreement of August 18, 1910, between the United States and Great Britain. The case was concerned with a complaint against American naval authorities. M. Fromageot as arbitrator said:

It is unquestionable that the United States naval authorities acted *bona fide*, but though their *bona fides* might be invoked by the officers in explanation of their conduct to their own Government, its effect is merely to show that their conduct constituted an error in judgment, and any government is responsible to other governments for errors in judgment of its officials purporting to act within the scope of their duties. *American Agent's Report*, 479, 480-481.***

Kling was 22 years old when he was shot. His associates and employers have furnished testimony describing him as a man of fine character, ability and promise. Evidence is furnished by officials of the company that at the time of his death he was receiving \$400 a month. In consideration of these facts and in the light of the principles applied by the Commission in fixing indemnities, the award should be in the amount of \$11,000. However, since my associates are of the opinion that the award should be \$9,000.00, and since I consider that the claimant is entitled to at least that much, I concur in that amount.

The United Mexican States shall pay to the United States of America on behalf of Lillie S. Kling the sum of \$9,000.00 (nine thousand dollars) without interest.***

178

The W. A. Noyes Claim

DE FORENEDE STATER-PANAMA, GENERAL CLAIMS ARBITRATION, 1933
U. S. Dep. of State, Arbitration Series no. 6, 190

[*Kommissionen, van Heeckeren, Elihu Root, Jr., H. F. Alfaro.*] ***In this case a claim is made against the Republic of Panama by the United States of America on behalf of Walter A. Noyes, who was born, and has ever remained, an American citizen. The sum of \$1,683 is claimed as an indemnity for the personal injuries and property losses sustained by Mr. Noyes through the attacks made upon him on June 19, 1927, in, and in the neighborhood of, the village of Juan Diaz, situated not far from Panamá City. The claim is based upon an alleged failure to provide to the claimant adequate police protection,

to exercise due diligence in the maintenance of order and to take adequate measures to apprehend and punish the aggressors.***

The village of Juan Diaz has only a small population, but on June 19, 1927, several hundreds of adherents of the party then in control of the Government had gathered there for a meeting. The police on the spot had not been increased for the occasion; it consisted of the usual three policemen stationed there. In the course of the day the authorities in Panamá City learned that the crowd in Juan Diaz had become unruly under the influence of liquor. The chief of the police, General Pretelt, thereupon drove thither with reinforcements.

After a careful examination of the evidence produced by both Agencies the Commission feels no doubt as to the facts concerning the incidents in which Mr. Noyes became involved on that day. These facts can be concisely stated as follows:

At about 3:00 *p.m.* the claimant passed through the village in his automobile, on his return to Panamá City from a trip to the Tapia River bridge. In the center of the village a crowd blocked the road and Mr. Noyes stopped and sounded his horn, whereupon the crowd slowly opened. Whilst he was progressing very slowly through it, he had to stop again, because somebody lurched against the car and fell upon the running-board. Thereupon members of the crowd smashed the windows of the car and attacked Mr. Noyes, who was stabbed in the wrist and hurt by fragments of glass. A police officer who had been giving orders that gangway should be made for the automobile, but who had not before been able to reach the car, then sprang upon the running-board and remained there, protecting the claimant and urging him to get away as quickly as possible. He remained with Mr. Noyes, until the latter had got clear of the crowd. At some distance from Juan Diaz the claimant was further attacked by members of the same crowd, who pursued him in a bus and who forced him to drive his car off the road and into a ditch. He was then rescued by General Pretelt who, having come from the opposite direction, had, after reaching the plaza of the village, returned upon his way in order to protect Mr. Noyes against his pursuers.

The facts related above show that in both instances the policy most actively protected the claimant against his assailants and that in the second instance the protection was due to the fact, that the authorities sent reinforcements from Panamá City upon learning that the conditions in Juan Diaz rendered assistance necessary. The contention of the American Agent however is, that the Panamanian Government incurred a liability under international law, because its officials had not taken the precaution of increasing for that day the police force at Juan Diaz, although they knew some time in advance that the meeting would assemble there.

The mere fact that an alien has suffered at the hands of private persons an aggression, which could have been averted by the presence of a sufficient police force on the spot, does not make a government liable for damages under international law. There must be shown special circumstances from which the responsibility of the authorities arises: either their behavior in connection with

the particular occurrence, or a general failure to comply with their duty to maintain order, to prevent crimes or to prosecute and punish criminals.

There were no such circumstances in the present case. Accordingly a lack of protection has not been established.

The claim is also based upon the failure of the Panamanian authorities to prosecute the perpetrators of the aggressions upon the claimant. It is a fact that no prosecutions were instituted. Taking into account however the conditions under which the events had taken place, the Commission cannot conclude to a liability of the Panamanian Government in this respect.

The claim is disallowed.

179

The Walwal Incident

ITALIEN-ABESSINIEN, COMMISSION OF CONCILIATION AND ARBITRATION, 1935
29 A. J. I. L. (1935), 690

[I henhold til venskabstraktat af 1928 mellem Italien og Abessinien ned-sattes denne kommission, der fik til opgave at undersøge de faktiske omstændigheder ved en skududveksling, der fandt sted i Walwal den 5. og 6. december 1934 samt placere ansvaret i forbindelse hermed. I henhold til folkeforbunds-rådets resolution af 25. maj 1935 blev de to lande enige om på samme måde at lade kommissionen tage stilling til de episoder, der havde fundet sted på grænsen mellem Italien og Abessinien efter den 5. december 1935.]

[*Kommissionen.*] ***The Commission is inclined to think that this incident was due to an unfortunate chain of circumstances; the first shot might have been accidental, like the numerous and frequent shots that preceded it. It is quite comprehensible that, in the nervous, excited and suspicious state of mind of the opposing troops, who had for two weeks been placed in a dangerous neighbourhood, this shot led to the regrettable results which ensued.

In these circumstances, the Commission, taking into account the limit of its powers under the resolution adopted by the Council of the League of Nations on August 3, finds:

1. That neither the Italian Government nor its agents on the spot can be held responsible in any way for the actual Walwal incident; the allegations brought against them by the Ethiopian Government are disproved in particular by the many precautions taken by them to prevent any incident on the occasion of the assembling at Walwal of Ethiopian regular and irregular troops, and also by the absence of any interest on their part in provoking the engagement of December 5; and

2. That although the Ethiopian Government also had no reasonable interest in provoking that engagement, its local authorities, by their attitude and particularly by the concentration and maintenance, after the departure of the Anglo-Ethiopian Commission, of numerous troops in the proximity of the Italian line at Walwal, may have given the impression that they had aggressive intentions—which would seem to render the Italian version plausible—but

that nevertheless it had not been shown that they can be held responsible for the actual incident of December 5.

From December 6, 1934, to May 5, 1935, various incidents occurred between the Italian and Ethiopian forces, some following upon the Walwal incident, and others unconnected with it.

A careful examination of the facts alleged on both sides shows that, of these incidents, the first-named, which followed upon the Walwal incident, were of an accidental character, while the others were for the most part not serious and of very ordinary occurrence in the region in which they took place.

In these circumstances, the Commission is of opinion that in respect of these minor incidents no international responsibility need be involved.

D. MIDDELBAR HÆFTELSE

180

Abbagnato-affæren

DE FORENEDE STATER-ITALIEN, NOTEVEKSLING, 1891

Se ovenfor sag nr. 39.

E. HVEM KAN GØRE ANSVARET GÆLDENDE?

181

Administrative Decision No. 5

DE FORENEDE STATER-TYSKLAND, MIXED CLAIMS COMMISSION, 1924
Consolidated Edition of Decisions, 1925, 145, 175

[*Parker*, Umpire.] No government-owned claims are dealt with in this opinion, but only those put forward by the United States on behalf of private owners. It is in this sense that the term "claim" or "claims" is used, unless it otherwise appears from the context.

The answer to the basic question presented by the Certificate of Disagreement of the Two National Commissioners calls for a definition of the jurisdiction of this Commission as determined by the nationality of claims. But the rule invoked by the German Agent and the application sought to be made of it, when analyzed, strike deeper than a mere question of jurisdiction. The jurisdictional form of presentation but serves to obscure the real issue, which is, Shall the property rights which have vested under the Treaty of Berlin be preserved, or shall they be destroyed through a change in their nationality? It is in this latter aspect that the question assumes its true importance.

It is contended by the German Agent that it is an established rule of international law that no nation will assert a claim of a private nature against another nation unless such claim possesses the nationality of the nation asserting it continuously from its origin to the time of its presentation and even of

its final adjudication by the authorized tribunal. This is but another way of saying that a change in the nationality of a right, through its voluntary or involuntary transfer, deprives it of the remedy of enforcement through diplomatic intervention. He further contends that this rule must be read into and constitutes a part of the Treaty of Berlin, so that a right once vested in an American national under that Treaty will be destroyed, and Germany released from her obligation thereunder, upon the transfer of that right, by succession, assignment, or otherwise, to alien ownership. That the reasons underlying the Umpire's decision on the points of difference certified by the National Commissioners may be clearly understood, it is necessary to examine these contentions put forward by the German Agent to ascertain whether or not such an established rule of international practice as he invokes exists, and if it exists, its applicability, if any, to the Treaty of Berlin.

Statements will be found in some decisions of international tribunals and in some treatises dealing with international law and international arbitral procedure supporting the contention of the German Agent with respect to the existence of the rule as stated. But it may well be doubted whether the alleged rule has received such universal recognition as to justify the broad statement that it is an established rule of international law. It is no doubt the general practice of nations not to espouse a private claim against another nation unless in point of origin it possesses the nationality of the claimant nation. The reason of the rule is that the nation is injured through injury to its national and it alone may demand reparation as no other nation is injured. As between nations the one inflicting the injury will ordinarily listen to the complaint only of the nation injured. A third nation is not injured through the assignment of the claim to one of its nationals or through the claimant becoming its national by naturalization. While naturalization transfers allegiance, it does not carry with it existing state obligations. Only the injured nation will be heard to assert a claim against another nation. Any other rule would open wide the door for abuses and might result in converting a strong nation into a claim agency in behalf of those who after suffering injuries should assign their claims to its nationals or avail themselves of its naturalization laws for the purpose of procuring its espousal of their claims.

But even this practice of nations may be changed by mutual agreement between the two governments parties to a particular protocol creating a tribunal for the adjudication of claims and defining its jurisdiction. The National Commissioners are in agreement on this point. Such jurisdiction is purely a matter of agreement between the interested nations. It is not one of general concern to all members of the family of nations. It does not declare any international *principle* but is only a rule of *practice*, to be followed or not as may be stipulated between the interested nations. It pertains to the course and form of the procedure agreed upon between the two nations to enforce rights but not to the rights themselves. In other words, it pertains to the *remedy*, not to the *right*. It affects only the question of the jurisdiction of an international arbitral tribunal, which in turn is fixed and defined by the particular agreement creating it. Where the meaning of such an agreement is obscure, custom and esta-

blished practice may be looked to in arriving at the intention of the parties. But where the agreement creating the tribunal and defining its jurisdiction is clear it is not competent to look beyond the terms of the agreement in determining its jurisdiction. Such an agreement creating the forum to adjudicate claims and defining its jurisdiction in no wise affects the existing rights and obligations which are to be adjudicated by it.

The general practice of nations not to espouse a private claim against another nation that does not in point of origin possess the nationality of the claimant nation has not always been followed. And that phase of the alleged rule invoked by the German Agent which requires the claim to possess continuously the nationality of the nation asserting it, from its origin to the time of its presentation or even to the time of its final adjudication by the authorized tribunal, is by no means so clearly established as that which deals with its original nationality. Some tribunals have declined to follow it. Others, while following it, have challenged its soundness. The application in all of its parts of the rule invoked by the German Agent to a privately-owned claim in which the nationality has changed by voluntary or involuntary transfer since the right accrued would deprive the claimant of all remedy for its enforcement through diplomatic intervention. The practical effect would frequently be to deprive the owner of his property. As the rule in its application necessarily works injustice, it may well be doubted whether it has or should have a place among the established rules of international law. Those decisions which have adopted it as a whole have recognized it as a mere rule of practice.***

But even if the rule invoked by the German Agent be conceded to exist as a rule of international practice, it remains to consider what, if any, application it has to the questions presented by the certificate of disagreement of the National Commissioners.***

[Efter en undersøgelse af jurisdiktionsaftalen, Berlinertraktaten af 10. august 1922, kommer opmanden til følgende resultat:]

II. Such claims, or a fixed and definite interest therein, as are asserted by the United States before this Commission and with were impressed with American nationality both (a) on the date when the loss, damage, or injury occurred and (b) on November 11, 1921, when the Treaty of Berlin became effective, are, so far as concerns the nationality of such claims or the fixed and definite American interest therein, within the terms of the Treaty of Berlin and within the jurisdiction of this Commission.***

182

Interhandel Case

(SWITZERLAND v. UNITED STATES OF AMERICA) (PRELIMINARY OBJECTIONS)
DEN INTERNATIONALE DOMSTOL, DOM, 1959

[I 1942 beslaglagde den amerikanske regering med hjemmel i *Trading with the Enemy Act* næsten alle aktierne i det amerikansk registrerede selskab *General Aniline and Film Corporation* (kort omtalt som GAF) med den begrundelse

at aktierne i virkeligheden tilhørte det tyske selskab *I. G. Farbenindustrie*; eller at GAF i hvert fald på den ene eller anden måde blev kontrolleret af dette fjendtlige selskab. Efter krigen bestred Schweiz på vegne det schweiziske selskab *Société internationale pour participations industrielles et commerciales S.A.* (kort omtalt som *Interhandel*) berettigelsen af dette skridt. Det blev fra schweizisk side oplyst at de i Amerika beslaglagte aktier tilhørte *Interhandel* og gjort gældende at dette selskab ikke stod under kontrol af *I. G. Farbenindustrie*. Det blev indrømmet at *I. G. Farben* indtil 1940 havde kontrolleret GAF via det schweiziske selskab *Société internationale pour entreprises chimiques S.A.* der bortset fra navnet var identisk med *Interhandel*. Men samtidig med navneforandringen skete der i 1940 også en reel afbrydelse af de bånd der bandt det schweiziske selskab til det tyske. Da man fra amerikansk side ikke kunne godkende disse synspunkter indbragte Schweiz spørgsmålet for den Internationale Domstol med påstand om, at de Forenede Stater kendtes pligtig at tilbagegive *Interhandel* de i Amerika beslaglagte aktiver. De Forenede Stater fremsatte forskellige præliminære indsigelser mod domstolens jurisdiktionskompetence af hvilke den tredje skal omtales her.]

Third Preliminary Objection

The Third Preliminary Objection seeks a finding that "there is no jurisdiction in this Court to hear or determine the matters raised by the Swiss Application and Memorial, for the reason that *Interhandel*, whose case Switzerland is espousing, has not exhausted the local remedies available to it in the United States courts".

Although framed as an objection to the jurisdiction of the Court, this Objection must be regarded as directed against the admissibility of the Application of the Swiss Government. Indeed, by its nature it is to be regarded as a plea which would become devoid of object if the requirement of the prior exhaustion of local remedies were fulfilled.

The Court has indicated in what conditions the Swiss Government, basing itself on the idea that *Interhandel's* suit had been finally rejected in the United States courts, considered itself entitled to institute proceedings by its Application of October 2nd, 1957. However, the decision given by the Supreme Court of the United States on October 14th, 1957, on the application of *Interhandel* made on August 6th, 1957, granted a writ of *certiorari* and readmitted *Interhandel* into the suit. The judgment of that Court on June 16th, 1958, reversed the judgment of the Court of Appeals dismissing *Interhandel's* suit and remanded the case to the District Court. It was thenceforth open to *Interhandel* to avail itself again of the remedies available to it under the Trading with the Enemy Act, and to seek the restitution of its shares by proceedings in the United States courts. Its suit is still pending in the United States courts. The Court must have regard to the situation thus created.

The rule that local remedies must be exhausted before international proceedings may be instituted is a well-established rule of customary international law; the rule has been generally observed in cases in which a State has adopted the cause of its national whose rights are claimed to have been dis-

regarded in another State in violation of international law. Before resort may be had to an international court in such a situation, it has been considered necessary that the State where the violation occurred should have an opportunity to redress it by its own means, within the framework of its own domestic legal system. *A fortiori* the rule must be observed when domestic proceedings are pending, as in the case of Interhandel, and when the two actions, that of the Swiss company in the United States courts and that of the Swiss Government in this Court, in its principal Submission, are designed to obtain the same result: the restitution of the assets of Interhandel vested in the United States.

The Swiss Government does not challenge the rule which requires that international judicial proceedings may only be instituted following the exhaustion of local remedies, but contends that the present case is one in which an exception to this rule is authorized by the rule itself.***

In the first place, it is contended that the rule is not applicable for the reason that the measure taken against Interhandel and regarded as contrary to international law is a measure which was taken, not by a subordinate authority but by the Government of the United States. However, the Court must attach decisive importance to the fact that the laws of the United States make available to interested persons who consider that they have been deprived of their rights by measures taken in pursuance of the Trading with the Enemy Act, adequate remedies for the defence of their rights against the Executive.

It has also been contended on behalf of the Swiss Government that in the proceedings based upon the Trading with the Enemy Act, the United States courts are not in a position to adjudicate in accordance with the rules of international law and that the Supreme Court, in its decision of June 16th, 1958, made no reference to the many questions of international law which, in the opinion of the Swiss Government, constitute the subject of the present dispute. But the decisions of the United States courts bear witness to the fact that United States courts are competent to apply international law in their decisions when necessary. In the present case, when the dispute was brought to this Court, the proceedings in the United States courts had not reached the merits, in which considerations of international law could have been profitably relied upon.

The Parties have argued the question of the binding force before the courts of the United States of international instruments which, according to the practice of the United States, fall within the category of Executive Agreements; the Washington Accord is said to belong to that category. At the present stage of the proceedings it is not necessary for the Court to express an opinion on the matter. Neither is it practicable, before the final decision of the domestic courts, to anticipate what basis they may adopt for their judgment.

Finally, the Swiss Government laid special stress on the argument that the character of the principal Submission of Switzerland is that of a claim for the implementation of the decision given on January 5th, 1948, by the Swiss Authority of Review and based on the Washington Accord, a decision which the Swiss Government regards as an international judicial decision. "When an international decision has not been executed, there are no local remedies to ex-

haust, for the injury has been caused directly to the injured State." It has therefore contended that the failure by the United States to implement the decision constitutes a direct breach of international law, causing immediate injury to the rights of Switzerland as the Applicant State. The Court notes in the first place that to implement a decision is to apply its operative part. In the operative part of its decision, however, the Swiss Authority of Review "Decrees: (1) that the Appeal is sustained and the decision subjecting the appellant to the blocking of German property in Switzerland is annulled . . ." The decision of the Swiss Authority of Review relates to the unblocking of the assets of Interhandel in Switzerland; the Swiss claim is designed to secure the restitution of the assets of Interhandel in the United States. Without prejudging the validity of any arguments which the Swiss Government seeks or may seek to base upon that decision, the Court would confine itself to observing that such arguments do not deprive the dispute which has been referred to it of the character of a dispute in which the Swiss Government appears as having adopted the cause of its national, Interhandel, for the purpose of securing the restitution to that company of assets vested by the Government of the United States. This is one of the very cases which give rise to the application of the rule of the exhaustion of local remedies.

For all these reasons, the Court upholds the Third Preliminary Objection so far as the principal Submission of Switzerland is concerned.

183

The Tinoco Concessions

STORBRITANNIEN-COSTA RICA, CLAIMS ARBITRATION, 1923

Se ovenfor sag nr. 63.

F. HVORI BESTAR ANSVARET?

184

Abbagnato-affæren

DE FORENEDE STATER-ITALIEN, NOTEVEKSLING, 1891

Se ovenfor sag nr. 39.

185

Laura M. B. Janes Claim

DE FORENEDE STATER-MEKSIKO; GENERAL CLAIMS COMMISSION, 1926
Opinion of Commissioners, 1927, 108

[Kommissionen.] 1. Claim is made by the United States of America in this case for losses and damages amounting to \$25,000.00, which it is alleged in the Memorial were "suffered on account of the murder, on or about July 10,

1918, at a mine near El Tigre, Sonora, Mexico, of Byron Everett Janes," an American citizen. The claim is presented, as stated in the Memorial, "on behalf of Laura May Buffington Janes, individually and as guardian of her two minor children, Byron Everett Janes, Jr., and Addison M. Janes; and Elizabeth Janes and Catherine Janes."

2. Briefly summarized, the allegations in the Memorial upon which the claim is based are as follows:

3. Byron Everett Janes, for some time prior to and until the time of his death on July 10, 1918, was Superintendent of Mines for the El Tigre Mining Company at El Tigre. On or about July 10, 1918, he was deliberately shot and killed at this place by Pedro Carbajal, a former employee of the Mining Company who had been discharged. The killing took place in the view of many persons resident in the vicinity of the company's office. The local police Comisario was informed of Janes' death within five minutes of the commission of the crime and arrived soon thereafter at the place where the shooting occurred. He delayed for half an hour in assembling his policemen and insisted that they should be mounted. The El Tigre Mining Company furnished the necessary animals and the posse, after the lapse of more than an hour from the time of the shooting, started in pursuit of Carbajal who had departed on foot. The posse failed to apprehend the fugitive. Carbajal remained at a ranch six miles south of El Tigre for a week following the shooting, and it was rumored at El Tigre that he came to that place on two occasions during his stay at the ranch. Subsequently information was received that Carbajal was at a mescal plant near Carrizal, about seventy-five miles south of El Tigre. This information was communicated to Mexican civil and military authorities, who failed to take any steps to apprehend Carbajal, until the El Tigre Mining Company offered a reward, whereupon a local military commander was induced to send a small detachment to Carrizal, which, upon its return, reported that Carbajal had been in this locality, but had left before the arrival of the detachment, and that it was therefore impossible to apprehend him.

4. It is alleged in the Memorial that the Mexican authorities took no proper steps to apprehend and punish Carbajal; that such efforts as were made were lax and inadequate; that if prompt and immediate action had been taken on one occasion there is reason to believe that the authorities would have been successful; that it was only after a money reward for the capture of Carbajal had been offered that some dilatory steps were taken to apprehend him in a nearby town where he was staying.***

19. The liability of the Mexican Government being stated there remains to be determined for what they are liable and to what amount. At times international awards have held that, if a State shows serious lack of diligence in apprehending and/or punishing culprits, its liability is a derivative liability, assuming the character of some kind of complicity with the perpetrator himself in rendering the State responsible for the very consequences of the individual's misdemeanor. Opinions to this effect are to be found in the international awards in the Ruden & Company case (Moore 1655; under the Convention of December 4, 1868), in the Cotesworth & Powell case (Moore, 2053,

2082, 2085; under the Convention of December 14, 1872) and in the Bovallins and Hedlund cases (Ralston, *Venezuelan Arbitrations* of 1903, p. 953), separate opinions of seemingly the same tendency being expressed in the cases of *De Brissot et al.* (Moore, 2968, 2969; under the Convention of December 5, 1885). The reasons upon which such finding of complicity is usually based in cases in which a Government could not possibly have prevented the crime, is that the nonpunishment must be deemed to disclose some kind of approval of what has occurred, especially so if the Government has permitted the guilty parties to escape or has remitted the punishment by granting either pardon or amnesty.

20. A reasoning based on presumed complicity may have some sound foundation in cases of nonprevention where a Government knows of an *intended* injurious crime, might have averted it, but for some reason constituting its liability did not do so. The present case is different; it is one of nonrepression. Nobody contend either that the Mexican Government might have prevented the murder of Janes, or that it acted in any other form of connivance with the murderer. The international delinquency in this case is one of its own specific type, separate from the private delinquency of the culprit. The culprit is liable for having killed or murdered an American national; the Government is liable for not having measured up to its duty of diligently prosecuting and properly punishing the offender. The culprit has transgressed the penal code of his country; the State, so far from having transgressed its own penal code (which perhaps not even is applicable to it), has transgressed a provision of international law as to State duties. The culprit can not be sentenced in criminal or civil procedure unless his guilt or intention in causing the victim's death is proven; the Government can be sentenced once the nonperformance of its judicial duty is proven to amount to an international delinquency, the theories on guilt or intention in criminal and civil law not being applicable here. The damage caused by the culprit is the damage caused to Janes' relatives by Janes' death; the damage caused by the Government's negligence is the damage resulting from the nonpunishment of the murderer. If the murderer had not committed his delinquency—if he had not slain Janes—Janes (but for other occurrences) would still be alive and earning the livelihood for his family; if the Government had not committed its delinquency—if it had apprehended and punished Carbajal—Janes' family would have seen spared indignant neglect and would have had an opportunity of subjecting the murderer to a civil suit. Even if the nonpunishment were conceived as some kind of approval—which in the Commission's view is doubtful—still approving of a crime has never been deemed identical with being an accomplice to that crime; and even if nonpunishment of a murderer really amounted to complicity in the murder, still it is not permissible to treat this derivative and remote liability not as an attenuate form of responsibility, but as just as serious as if the Government had perpetrated the killing with its own hands. The results of the old conception are unsatisfactory in two directions. If the murdered man had been poor, or if, in a material sense, his death had meant little to his relatives, the satisfaction given these relatives should be confined

to a small sum, though the grief and the indignity suffered may have been great. On the other hand; if the old theory is sustained and adhered to, it would, in cases like the present one, be to the pecuniary benefit of a widow and her children if a Government did *not* measure up to its international duty of providing justice, because in such a case the Government would repair the pecuniary damage caused by the killing, whereas she practically never would have obtained such reparation if the State had succeeded in apprehending and punishing the culprit.

21. It can not surprise, therefore, that both international tribunals and Governments more than once took a different view, or at least abstained from sustaining the first view. The Commission is not aware of an international award in which the distinction has been set forth with clearness. But the Commission is aware of more than one award and governmental interposition which, in allowing or claiming damages in connecting with nonpunishment of a wrongdoer, abstained from linking up the amount of these damages with the loss caused by the act of the individual.***

22. The answer to the question, which of the two views should be accepted as consistent with international law in its present status, would seem to be suggested by the fact that here we have before us a case of denial of justice, which, but for some convincingly logical reason, should be judged in the same manner as any other case of the same category. Denial of justice, in its broader sense, may cover even acts of the executive and the legislative; in cases of improper governmental action of this type, a nation is never held to be liable for anything else than the damage caused by what the executive or the legislative committed or omitted itself. In cases of denial of justice in its narrower sense, Governments again are held responsible exclusively for what they commit or omit themselves. Only in the event of one type of denial of justice, the present one, a State would be liable not for what it committed or omitted itself, but for what an individual did. Such an exception to the general rule is not admissible but for convincing reasons. These reasons, as far as the Commission knows, never were given. One reason doubtless lies in the well-known tendency of Governments (Hyde, I, p. 515; Ralston, 1926, p. 267) to claim exaggerated reparations for nonpunishment of wrongdoers, a tendency which found its most promising help in a theory advocating that the negligent State had to make good all of the damage caused by the crime itself. But since international delinquencies have been recognized next to individual delinquencies, since damages for denial of justice have been assessed by international tribunals in many other forms, and since exaggerated claims from one Government as against another have been repeatedly softened down as a consequence of arbitral methods, it would seem time to throw off the doctrine dating from the end of the eighteenth century, and return to reality.

23. Once this old theory, however, is thrown off, we should take care not to go to the opposite extreme. It would seem a fallacy to sustain that, if in case of nonpunishment by the Government it is not liable for the crime itself, then it can only be responsible, in a punitive way, to a sister Government, not to a claimant. There again, the solution in other cases of improper governmental

action shows the way out. It shows that, apart from reparation or compensation for material losses, claimants always have been given substantial satisfaction for serious dereliction of duty on the part of a Government; and this world-wide international practice was before the Governments of the United States and Mexico when they framed the Convention concluded September 8, 1923. In the *Davy* case—a case, not of unpunished crime, but of inhuman treatment of a foreigner under the color of administration of justice—the award rightly stated (Ralston, *Venezuelan Arbitrations* of 1903, p. 412) that “there is left to the respondent Government only one way to signify . . . its desire to remove the stain which rests upon its department of criminal jurisprudence.” In the *Maal* case—a case of attack on a foreigner’s personal dignity by officials—the award rightly stated (Ralston, *Venezuelan Arbitrations* of 1903, p. 916): “The only way in which there can be an expression of regret on the part of the Government and a discharge of its duty toward the subject of a sovereign and a friendly State is by making an indemnity therefore in the way of money compensation.” The indignity done the relatives of Janes by nonpunishment in the present case is, as that in other cases of improper governmental action, a damage directly caused to an individual by a Government. If this damage is different from the damage caused by the killing, it is quite as different from the wounding of the national honor and national feeling of the State of which the victim was a national.

24. The Commission holds that the wording of Article I of the Convention, concluded September 8, 1923, mentioning claims for losses or damages suffered by persons or by their properties, is sufficiently broad to cover not only reparation (compensation) for material losses in the narrow sense, but also satisfaction for damages of the stamp of indignity, grief, and other similar wrongs. The *Davy* and *Maal* cases quoted are just two among numerous international cases in which arbitrators held this view. The Commission does not think lightly of the additional suffering caused by the fact that a Government apparently neglects its duty in cases of so outstanding an importance for the near relatives of a victim.

25. As to the measure of such a damage caused by the delinquency of a Government, the nonpunishment, it may be readily granted that its computation is more difficult and uncertain than that of the damage caused by the killing itself. The two delinquencies being different in their origin, character, and effect, the measure of damages for which the Government should be liable can not be computed by merely stating the damages caused by the private delinquency of Carbajal. But a computation of this character is not more difficult than computations in other cases of denial of justice such as illegal encroachment on one’s liberty, harsh treatment in jail, insults and menaces of prisoners, or even nonpunishment of the perpetrator of a crime which is not an attack on one’s property or one’s earning capacity, for instance a dangerous assault or an attack on one’s reputation and honor. Not only the individual grief of the claimants should be taken into account, but a reasonable and substantial redress should be made for the mistrust and lack of safety, resulting from the Government’s attitude. If the nonprosecution and non-

punishment of crimes (or of specific crimes) in a certain period and place accrues with regularity, such nonrepression may even assume the character of a nonprevention and be treated as such. One among the advantages of severing the Government's dereliction of duty from the individual's crime is in that it grants an opportunity to take into account several shades of denial of justice, more serious ones and lighter ones (no prosecution at all; prosecution and release; prosecution and light punishment; prosecution, punishment, and pardon), whereas the old system operates automatically and allows for the numerous forms of such a denial one amount only, that of full and total reparation.

26. Giving careful consideration to all elements involved, the Commission holds that an amount of \$12,000, without interest, is not excessive as satisfaction for the personal damage caused the claimants by the nonapprehension and nonpunishment of the murderer of Janes.

27. On the above grounds, the Commission decides that the Government of the United Mexican States is obligated to pay to the Government of the United States of America \$12,000.00 (twelve thousand dollars), without interest, on behalf of Laura May Buffington Janes, widow of Byron Everett Janes, and Elizabeth Janes, Catherine Janes, Byron E. Janes, Jr., and Addison M. Janes, their children.

Bilæggelse af tvister mellem stater

186

Lehigh Valley Railroad Company & Others v. Germany

DE FORENEDE STATER-TYSKLAND, MIXED CLAIMS COMMISSION, 1933
34 A. J. I. L. (1940) 154,

[Ved overenskomst af 10. august 1922 mellem de Forenede Stater og Tyskland forpligtede Tyskland sig til at betale erstatning for sabotage forøvet af bemyndigede tyske agenter mod amerikansk ejendom i U.S.A. En blandet voldgiftsret blev samtidig oprettet til at undersøge de fra amerikansk side rejste krav samt fastsætte størrelsen af erstatningen.

Den 30. oktober 1930 afsagde voldgiftsretten kendelse i nogle af disse sager, hvorved Tyskland blev frifundet, idet retten fastslog, at den tyske regerings bemyndigelse til de pågældende sabotagehandling ikke havde foreligget.

Efter i 1931 at have fået afslag på anmodning om sagernes genoptagelse som følge af fremkomsten af nye oplysninger, anmodede den amerikanske agent i maj 1933 påny herom, idet han gjorde gældende, at Tyskland havde forelagt voldgiftsretten "falske, ufuldstændige og svigagtige beviser, der havde vildledt retten og præjudiceret sagen", og at der desuden nu var fremskaffet bevis for indbyrdes aftaler mellem visse tyske og amerikanske vidner.

Da det tyske og amerikanske medlem af voldgiftsretten ikke kunne blive enige om sagens genoptagelse, blev dette spørgsmål afgjort af rettens opmand.]

[*Owen J. Roberts*, Umpire.] ***May the Commission pass upon its own jurisdiction?

The agreement of the two Governments created the Commission to deal with three classes of claims specified in Article I arising by reason of obligations undertaken by Germany under the Treaty of Berlin of August 25, 1921. While at the date of the execution of the agreement, August 10, 1922, it was known that such claims would be numerous and amount in the total to a huge sum, the nature and the validity of the separate claims which might be submitted were unknown. It was for the purpose of passing upon these claims, both as to validity and amount, that the Commission was created. At the very threshold the tribunal might encounter in each case the question whether the claim presented fell within the categories of those to be adjudicated or was outside the scope of the treaty and the agreement. In this aspect the Commission was bound to determine its own jurisdiction, and for that purpose to interpret and apply the terms of the agreement which created it.

A decision that it had jurisdiction of a claim was by the very terms of the agreement to be accepted by both Governments as final and binding upon them (Article VI). The agreement submits the questions for decision as be-

tween the two Governments to the Commission. What those questions are must be determined within the four corners of the instrument. It is not within the competency of either Government to retract the authority which it conferred upon the Commission. If that body may not from the terms of the agreement ascertain what power was conferred, it would be wholly incompetent to act except in an advisory capacity, and none of its decisions could in the nature of the case be accepted as final and binding by the Governments, as the agreement states they shall be.***

The agreement is to be read in the light of its language and its purpose; and where it is silent, the powers and duties of the Commission are to be determined according to the nature of the functions entrusted to it. I have no doubt that the Commission is competent to determine its own jurisdiction by the interpretation of the agreement creating it. Any other view would lead to the most absurd results—results which obviously the two Governments did not intend.

This brings me to the second question of substance:

Has the Commission the power to reopen a case upon the showing made by the pending petition?

The answer to this question must also be found in the terms of the agreement creating the Commission.***

My view is that the Commission is a tribunal sitting continuously with all the attributes and functions of a continuing tribunal until its work shall have been closed; and that as such tribunal it is engaged in the trial and adjudication of a large number of separate and individual cases.

The German Government would have me draw from these premises the ultimate conclusion that the Commission is without power to reopen any case in which it has made a decision, and in support of this view refers to the last paragraph of Article VI, which provides "The decisions of the commission and those of the umpire (in case there may be any) *shall be accepted as final and binding upon the two Governments*". This paragraph, in my judgment, furnishes no aid to the German argument. It is a covenant as between the two nations binding each of them with respect to any decisions which may be made. But it is to be observed that neither this paragraph nor any other provision of the agreement purports to define what is or what shall be considered a "decision of the commission". It is left to the Commission to determine when its decision upon any claim is final. It has no concern with the action taken in consequence of its awards. It is a matter for the two sovereigns to carry out their agreement that they shall accept the decisions as final and binding. If a decision should be revised by the Commission as a result of a rehearing and a new decision reached in a particular case, the Commission would have no concern with the adjustment of the settlement consequent upon its action. A court may often render a judgment which, by reason of what has occurred, it is possible to execute in accordance with its terms, but the mere fact that the judgment may be incapable of execution in part or in whole in no way alters the jurisdiction of the tribunal or indeed its duty to render judgment as to justice and right may appertain.

With this preliminary general statement as to the jurisdiction of the Com-

mission, I address myself to a determination of its power to reopen a case in which it has rendered a decision.

1. I think it clear that where the Commission has misinterpreted the evidence, or made a mistake in calculation, or where its decision does not follow its fact findings, or where in any other respect the decision does not comport with the record as made, or where the decision involves a material error of law, the Commission not only has the power, but is under the duty, upon a proper showing, to reopen and correct a decision to accord with the facts and the applicable legal rules. My understanding is that the Commission has repeatedly done so where there was palpable error in its decisions. It is said on behalf of Germany that this has never been done except where the two agents agreed that such course under the circumstances was proper. And the argument is drawn from this fact that the Commission is without power to take such action of its own motion or in the face of opposition by either agent. I cannot follow this argument.

If the Commission's decisions once made are final and the body wholly without power to reopen them, then a case once decided can only be reopened by a formal agreement of the two Governments amending the agreement under which the Commission sits, for no additional power can be conferred upon the tribunal except by the parties who called it into being and gave whatever jurisdiction it originally possessed. If, therefore, a case may be reopened by consent, the same action may be taken without consent. The first petition for reopening and rehearing filed in these cases by the American Agent was based on grounds such as are above described. I have no doubt that the Commission had power to consider that petition and to deal with the case in the light of the matters it brought forward.

2. I come now to the question of jurisdiction to reopen for the presentation of what is usually known in judicial procedure as after-discovered evidence. I am of opinion that the Commission has no such power.

In cases where a retrial is granted or a reopening and rehearing indulged for the submission of so-called after-discovered evidence, this is usually by a court. It is to the interest of the public that litigation be terminated, and municipal tribunals have the power to set a case for trial and to compel the parties to proceed. While they will not compel a litigant to proceed without hearing his reasons for delay, neither party has a right to hold the case open until he feels that he has exhausted all possible means of obtaining evidence. If such right existed, courts would be unable to function. By analogy, if this Commission had the power to make an order to close the proofs in any case and compel the parties to proceed, either party who was not then ready, because it had not exhausted its sources of information and evidence, might well have an equity to ask a reopening that it might be permitted to offer evidence theretofore unavailable.

But the situation here is quite otherwise. Article VI, second paragraph, provides: "The commission shall receive and consider all written statements or documents which may be presented to it by or on behalf of the respective Governments in support of or in answer to any claim". All must admit the

parties intended the Commission should not sit indefinitely but should expeditiously complete its work. The agreement provides that all claims to be considered must be brought to the Commission's attention within six months of its first session. But, on the other hand, no time limit whatever was set in the original agreement for the closing of proofs. In contradistinction, such a mandatory provision for closing proofs was embodied in the supplementary agreement of December 31, 1928, as to claims embraced within the scope of that instrument.***

It is suggested in the petition for reopening that the United States was unable to obtain the evidence from certain witnesses without the power to compel their testimony. This fact was as obvious in the autumn of 1930 as it is to-day. The German Government availed itself of its ordinance of June 28, 1923, which permitted the summoning of witnesses, placing them under oath, examining them before a court, and rendering them liable to penalty for false-swearing. No reason is apparent why a similar statute could not at any time have been adopted in the United States. The best evidence that it could is that when the American Agent and the Department of State requested the passage of such a law it was promptly enacted and has been availed of in obtaining evidence now proffered (Act of June 7, 1933). The lack of an instrument which would have been ready to hand if requested cannot excuse the failure to obtain the testimony thereby obtainable.***

3. The petition now under consideration presents, in the main, a situation different from either of those above discussed. Its allegations are that certain witnesses proffered by Germany furnished the Commission fraudulent, incomplete, collusive and false evidence which misled the Commission and unfairly prejudiced the claimants' cases; that certain witnesses, including some who previously testified, who are now within the United States, have knowledge and can give evidence which will convince the Commission that its decision is erroneous; that evidence has come to light showing collusion between certain German and American witnesses to defeat the claims. These are serious allegations, and I express no opinion of the adequacy of the evidence tendered by the American Agent to sustain them. I have refrained from examining the evidence because I thought it the proper course at this stage to decide the question of power on the assumption that the allegations of the petition may be supported by proof, postponing for the consideration of the Commission the probative value of the evidence tendered.

The petition, in short, avers the Commission has been misled by fraud and collusion on the part of witnesses and suppression of evidence on the part of some of them. The Commission is not *functus officio*. It still sits as a court. To it in that capacity are brought charges that it has been defrauded and misled by perjury, collusion, and suppression. No tribunal worthy its name or of any respect may allow its decision to stand if such allegations are well founded. Every tribunal has inherent power to reopen and to revise a decision induced by fraud. If it may correct its own errors and mistakes, *a fortiori* it may, while it still has jurisdiction of a cause, correct errors into which it has been led by fraud and collusion.

I am of opinion, therefore, that the Commission has power to reopen these cases, and should do so, in order that it may consider the further evidence tendered by the American Agent and, dependent upon its findings from that evidence and any that may be offered in reply on behalf of Germany, either confirm the decisions heretofore made or alter them as justice and right may demand.

187

**Case concerning right of passage over Indian territory
(Portugal v. India)**

DEN INTERNATIONALE DOMSTOL, DOM, 1960

[I 1955 rejste Portugal for den Internationale Domstol sag mod Indien med påstand om at Indien blev kendt pligtig at anerkende og respektere Portugals ret til passage mellem kystbesiddelsen Daman og to enklaver omgivet af indisk territorium. Indien rejste forskellige præliminære indsigelser mod domstolens jurisdiktionskompetence. Her omtales den femte af disse.]

[*Domstolen.*] In its Fifth Preliminary Objection the Government of India relied upon the reservation which forms part of its Declaration of 28 February 1940 accepting the jurisdiction of the Court and which excludes from that jurisdiction disputes with regard to questions which by international law fall exclusively within the jurisdiction of India. The Government of India argues that on that score the present dispute is outside the jurisdiction of the Court.

In support of its challenge of the jurisdiction the Government of India contended, in the grounds in support of its Submissions of 21 October 1959, that:

“if its examination of the merits should lead the Court to a finding that Portugal has not established the existence of the titles which she has invoked, and that these titles must accordingly be regarded as non-existent, it must follow that the question of the grant or refusal of the passage claimed over Indian territory falls exclusively within the domestic jurisdiction of India . . .”.

That statement admits of no dispute, but it cannot be inferred therefrom, as the Indian Government does, that the Court has no jurisdiction, since the statement proceeds from a finding by the Court that the titles invoked by Portugal are invalid. The Court can only arrive at that finding after first establishing its competence to examine the validity of these titles.

In the present case Portugal is claiming a right of passage over Indian territory. It asserts the existence of a correlative obligation upon India. It asks for a finding that India has failed to fulfil that obligation. In support of the first two claims it invokes a Treaty of 1779, of which India contests both the existence and the interpretation. Portugal relies upon a practice of which India contests not only the substance, but also the binding character as between the two States which Portugal seeks to attach to it. Portugal further invokes international custom and the principles of international law as it interprets them. To contend that such a right of passage is one which can be relied upon as

against India, to claim that such an obligation is binding upon India, to invoke, whether rightly or wrongly, such principles is to place oneself on the plane of international law. Indeed, in the course of the proceedings both Parties took their stand upon that ground and on occasion expressly said so. To decide upon the validity of those principles, upon the existence of such a right of Portugal as against India, upon such obligation of India towards Portugal, and upon the alleged failure to fulfil that obligation, does not fall exclusively within the jurisdiction of India.

The Fifth Objection cannot therefore be upheld.

188

Case of certain Norwegian loans (France v. Norway)

DEN INTERNATIONALE DOMSTOL, DOM, 1957

[To norske banker udbød i årene mellem 1885 og 1909 obligationslån på det franske lånemarked. Obligationerne indeholdt klausuler der efter fransk opfattelse garanterede kreditorerne betaling efter guldværdi. En norsk lov af 15. december 1923 fritog debitorer der havde stipuleret betaling efter guldværdi for denne forpligtelse. Frankrig protesterede på franske kreditorers vegne herimod.]

Da langvarige forhandlinger om spørgsmålet ikke førte til nogen løsning af tvisten indbragte Frankrig i 1955 sagen for den Internationale Domstol. Norge rejste forskellige præliminære indsigelser mod domstolens jurisdiktionskompetence. Her omhandles den første af disse.]

[Domstolen.] The Court will at the outset direct its attention to the Preliminary Objections of the Norwegian Government. The first of these Objections relates directly to the jurisdiction of the Court to adjudicate upon the dispute submitted to it by the French Application. It is this Objection that the Court will examine first.

As previously stated, this Objection, as presented by the Norwegian Government, has two aspects. In the first place, it is contended that the Court, whose function is to decide in accordance with international law such disputes as are submitted to it, can be seised, by means of a unilateral Application, only of legal disputes falling within one of the four categories enumerated in paragraph 2 of Article 36 of the Statute and relating to international law. It is urged that the Application of the French Government asks the Court to interpret loan contracts which, in the view of the Norwegian Government, are governed by municipal law and not by international law.

After presenting the first ground of its first Preliminary Objection on the basis that the loan contracts are governed by municipal law, the Norwegian Government continues in its Preliminary Objections:

“There can be no possible doubt on this point. If, however, there should still be some doubt, the Norwegian Government would rely upon the reservations made by the French Government in its Declaration of March 1st,

1949. By virtue of the principle of reciprocity, which is embodied in Article 36, paragraph 2, of the Statute of the Court and which has been clearly expressed in the Norwegian Declaration of November 16th, 1946, the Norwegian Government cannot be bound, *vis-à-vis* the French Government, by undertakings which are either broader or stricter than those given by the latter Government."

It is this second ground of the first Preliminary Objection which the Court will proceed to consider.

It will be recalled that the French Declaration accepting the compulsory jurisdiction of the Court contains the following reservation:

"This declaration does not apply to differences relating to matters which are essentially within the national jurisdiction as understood by the Government of the French Republic."

In the Preliminary Objections filed by the Norwegian Government it is stated:

"The Norwegian Government did not insert any such reservation in its own Declaration. But it has the right to rely upon the restrictions placed by France upon her own undertakings.

Convinced that the dispute which has been brought before the Court by the Application of July 6th, 1955, is within the domestic jurisdiction, the Norwegian Government considers itself fully entitled to rely on this right. Accordingly, it requests the Court to decline, on grounds that it lacks jurisdiction, the function which the French Government would have it assume."

In considering this ground of the Objection the Court notes in the first place that the present case has been brought before it on the basis of Article 36, paragraph 2, of the Statute and of the corresponding Declarations of acceptance of compulsory jurisdiction; that in the present case the jurisdiction of the Court depends upon the Declarations made by the Parties in accordance with Article 36, paragraph 2, of the Statute on condition of reciprocity; and that, since two unilateral declarations are involved such jurisdiction is conferred upon the Court only to the extent to which the Declarations coincide in conferring it. A comparison between the two Declarations shows that the French Declaration accepts the Court's jurisdiction within narrower limits than the Norwegian Declaration; consequently, the common will of the Parties, which is the basis of the Court's jurisdiction, exists within these narrower limits indicated by the French reservation. Following in this connection the jurisprudence of the Permanent Court of International Justice (Phosphates in Morocco case, Judgment of June 14th, 1938, P.C.I.J., Series A/B, No. 74, p. 22; Electricity Company of Sofia and Bulgaria case, Judgment of April 4th, 1939, P.C.I.J., Series A/B, No. 77, p. 81) the Court has reaffirmed this method of defining the limits of its jurisdiction. Thus the judgment of the Court in the *Anglo-Iranian Oil Company* case states:

"As the Iranian Declaration is more limited in scope than the United Kingdom Declaration, it is the Iranian Declaration on which the Court must base itself." (*I.C.J. Reports* 1952, p. 103).

France has limited her acceptance of the compulsory jurisdiction of the Court by excluding beforehand disputes "relating to matters which are essentially within the national jurisdiction as understood by the Government of the French Republic". In accordance with the condition of reciprocity to which acceptance of the compulsory jurisdiction is made subject in both Declarations and which is provided for in Article 36, paragraph 3, of the Statute, Norway, equally with France, is entitled to except from the compulsory jurisdiction of the Court disputes understood by Norway to be essentially within its national jurisdiction.***

The Court does not consider that it should examine whether the French reservation is consistent with the undertaking of a legal obligation and is compatible with Article 36, paragraph 6, of the Statute which provides:

"In the event of a dispute as to whether the Court has jurisdiction, the matter shall be settled by the decision of the Court."

The validity of the reservation has not been questioned by the Parties. It is clear that France fully maintains its Declaration, including the reservation, and that Norway relies upon the reservation.

In consequence the Court has before it a provision which both Parties to the dispute regard as constituting an expression of their common will relating to the competence of the Court. The Court does not therefore consider that it is called upon to enter into an examination of the reservation in the light of considerations which are not presented by the issues in the proceedings. The Court, without prejudging the question, gives effect to the reservation as it stands and as the Parties recognize it.

The Court considers that the Norwegian Government is entitled, by virtue of the condition of reciprocity, to invoke the reservation contained in the French Declaration of March 1st, 1949; that this reservation excludes from the jurisdiction of the Court the dispute which has been referred to it by the Application of the French Government; that consequently the Court is without jurisdiction to entertain the Application.

189

Case concerning right of passage over Indian territory (Portugal v. India). Preliminary objections

DEN INTERNATIONALE DOMSTOL, DOM, 1957

[Om sagens genstand henvises til referatet ovenfor under nr. 187. Her omhandles Indiens første præliminære indsigelse.]

[Domstolen.] *First Preliminary Objection.*

The First Preliminary Objection of the Government of India is to the effect that the Court is without jurisdiction to entertain the Application of Portugal on the ground that the Portuguese Declaration of Acceptance of the jurisdiction of the Court of December 19th, 1955, is invalid for the reason that the Third

Condition of the Declaration is incompatible with the object and purpose of the Optional Clause. There are, in the view of the Government of India, three main reasons for such incompatibility.

The Third Condition of the Declaration of Portugal provides as follows:

- "3) The Portuguese Government reserves the right to exclude from the scope of the present declaration, at any time during its validity, any given category or categories of disputes, by notifying the Secretary-General of the United Nations and with effect from the moment of such notification."

In the first instance, the Government of India maintains that that Condition gives Portugal the right, by making at any time a notification to that effect, to withdraw from the jurisdiction of the Court a dispute which has been submitted to it prior to such a notification. This is what in the course of the proceedings was described as the retroactive effect attaching to that notification. India asserts that such retroactive effect is incompatible with the principle and notion of the compulsory jurisdiction of the Court as established in Article 36 of the Statute and that the Third Condition is invalid inasmuch as it contemplates an effect which is contrary to the Statute.

The Government of Portugal has contested that interpretation and has affirmed that the Third Condition does not have such retroactive effect and that, in consequence, it is not incompatible with Article 36 of the Statute.

In order to decide whether, as maintained by the Government of India, the Third Condition appended by Portugal is invalid, and whether such invalidity entails the invalidity of the Declaration in which it is contained, the Court must determine the meaning and the effect of the Third Condition by reference to its actual wording and applicable principles of law.

The words "with effect from the moment of such notification" cannot be construed as meaning that such a notification would have retroactive effect so as to cover cases already pending before the Court. Construed in their ordinary sense, these words mean simply that a notification under the Third Condition applies only to disputes brought before the Court after the date of the notification. Such an interpretation leads to the conclusion that no retroactive effect can properly be imputed to notifications made under the Third Condition. It is a rule of law generally accepted, as well as one acted upon in the past by the Court, that, once the Court has been validly seised of a dispute, unilateral action by the respondent State in terminating its Declaration, in whole or in part, cannot divest the Court of jurisdiction. In the *Nottebohm* case the Court gave expression to that principle in the following words:

"An extrinsic fact such as the subsequent lapse of the Declaration, by reason of the expiry of the period or by denunciation, cannot deprive the Court of the jurisdiction already established." (*I.C.J. Reports 1953*, p. 123.)

That statement by the Court must be deemed to apply both to total denunciation, and to partial denunciation as contemplated in the Third Portuguese Condition. It is a rule of interpretation that a text emanating from a Govern-

ment must, in principle, be interpreted as producing and as intended to produce effects in accordance with existing law and not in violation of it.

The second reason, contended for by the Government of India, for the incompatibility of the Third Portuguese Condition with the object and purpose of the Optional Clause, is that it has introduced into the Declaration a degree of uncertainty as to reciprocal rights and obligations which deprives the acceptance of the compulsory jurisdiction of the Court of all practical value. In particular, it was contended that, in consequence of the Third Condition, the other Signatories are in a continuous state of uncertainty as to their reciprocal rights and obligations which may change from day to day.

While it must be admitted that clauses such as the Third Condition bring about a degree of uncertainty as to the future action of the accepting government, that uncertainty does not attach to the position actually established by the Declaration of Acceptance or as it might be established in consequence of recourse to the Third Condition.

As Declarations, and their alterations, made under Article 36 must be deposited with the Secretary-General, it follows that, when a case is submitted to the Court, it is always possible to ascertain what are, at that moment, the reciprocal obligations of the Parties in accordance with their respective Declarations. Under the existing system, Governments can rely upon being informed of any changes in the Declarations in the same manner as they are informed of total denunciations of the Declarations. It is true that during the interval between the date of a notification to the Secretary-General and its receipt by the Parties to the Statute, there may exist some element of uncertainty. However, such uncertainty is inherent in the operation of the system of the Optional Clause and does not affect the validity of the Third Condition contained in the Portuguese Declaration.

It must also be noted that, with regard to any degree of uncertainty resulting from the right of Portugal to avail itself at any time of its Third Condition of Acceptance, the position is substantially the same as that created by the right claimed by many Signatories of the Optional Clause, including India, to terminate their Declarations of Acceptance by simple notification without any obligatory period of notice. India did so on January 7th, 1956, when it notified the Secretary-General of the denunciation of its previous Declaration of Acceptance, for which it simultaneously substituted a new Declaration incorporating reservations which were absent from its previous Declaration. By substituting, on January 7th, 1956, a new Declaration for its earlier Declaration, India achieved, in substance, the object of Portugal's Third Condition.

It has been argued that there is a substantial difference, in the matter of the certainty of the legal situation, between the Third Portuguese Condition and the right of denunciation without notice. In the view of the Court there is no essential difference, with regard to the degree of certainty between a situation resulting from the right of total denunciation and that resulting from the Third Portuguese Condition which leaves open the possibility of a partial denunciation of the otherwise subsisting original Declaration.

Neither can it be admitted, as a relevant differentiating factor, that while in

the case of total denunciation the denouncing State can no longer invoke any rights accruing under its Declaration, in the case of a partial denunciation under the terms of the Third Condition Portugal can otherwise continue to claim the benefits of its Acceptance. For, as the result of the operation of reciprocity, any jurisdictional rights which it may thus continue to claim for itself can be invoked against it by the other Signatories, including India.

Finally, as the third reason for the invalidity of the Third Condition, it has been contended that that Condition offends against the basic principle of reciprocity underlying the Optional Clause inasmuch as it claims for Portugal a right which in effect is denied to other Signatories who have made a Declaration without appending any such condition. The Court is unable to accept that contention. It is clear that any reservation notified by Portugal in pursuance of its Third Condition becomes automatically operative against it in relation to other Signatories of the Optional Clause. If the position of the Parties as regards the exercise of their rights is in any way affected by the unavoidable interval between the receipt by the Secretary-General of the appropriate notification and its receipt by the other Signatories, that delay operates equally in favour of or against all Signatories and is a consequence of the system established by the Optional Clause.

Neither can the Court accept the view that the Third Condition is inconsistent with the principle of reciprocity inasmuch as it renders inoperative that part of paragraph 2 of Article 36, which refers to Declarations of Acceptance of the Optional Clause in relation to States accepting the "same obligation". It is not necessary that the "same obligation" should be irrevocably defined at the time of the deposit of the Declaration of Acceptance for the entire period of its duration. That expression means no more than that, as between States adhering to the Optional Clause, each and all of them are bound by such identical obligations as may exist at any time during which the Acceptance is mutually binding.

As the Court finds that the Third Portuguese Condition is not inconsistent with the Statute, it is not necessary for it to consider the question whether, if it were invalid, its invalidity would affect the Declaration as a whole.

For these reasons, the First Preliminary Objection of the Government of India must be dismissed.

2. AFDELING
INTERNATIONAL PRIVATRET

Den internationale privatrets funktion

A. KOLLISIONSNORMER

190

Lov om ægteskabets retsvirkninger § 53

NR. 56 AF 18. MARTS 1925

Se Juristens Lovsamling.

191

Veksellov §§ 79-86

NR. 68 AF 23. MARTS 1932

Se Juristens Lovsamling.

192

Nordisk konvention om arv og dødsboskifte art. 1, stk. 1

Se nedenfor nr. 270.

193

Einführungsgesetz zum Bürgerlichen Gesetzbuche

Art. 15: Das eheliche Güterrecht wird nach den deutschen Gesetzen beurteilt, wenn der Ehemann zur Zeit der Eheschliessung ein Deutscher war.

Erwirbt der Ehemann nach der Eingehung der Ehe die Reichsangehörigkeit oder haben ausländischen Ehegatten ihren Wohnsitz im Inlande so sind für das eheliche Güterrecht die Gesetze des Staates massgebend, dem der Mann zur Zeit der Eingehung der Ehe angehörte; die Ehegatten können jedoch einen Ehevertrag schliessen, auch wenn er nach diesen Gesetzen unzulässig sein würde.

B. METODEN

194

Irma-Mignon sagen

NORGES HØJESTERET
Norsk Rettsvidende 1923, II, 58

[To norske skibe, Irma og Mignon, kolliderede på den engelske flod Tyne. Irma førtes af en engelsk tvangslods. Dommeren:]

***Jeg er kommet til et andet resultat end sjøretten. Hvad spørgsmaalet om selve erstatningsplikten angaar, er det paa det rene, at det i saken omhandlede sammenstøt alene skyldtes feil fra "Irmas"s side, og at det var "Irma"s tvangslos E. C. Burn som hadde det direkte ansvar for denne feil.

Derimot *** er det omtvistet, hvorvidt spørgsmaalet om "Irma"s rederis ansvar for den ved sammenstøtet voldte skade skal bedømmes efter engelsk eller efter norsk ret.***

Ved avgjørelsen av, hvilken stats regler der skal anvendes er man da, saavidt jeg skjønner, i det væsentlige henvist til at bygge paa almindelige retsgrundsætninger og arten av det forhold det her gjælder. Hvilke principer man i det hele bør opstille for løsningen av international-privatretslige spørsmål har jo været gjenstand for megen meningsforskjel. For mit vedkommende synes jeg imidlertid det er naturligt at ta utgangspunkt i den betragtning, at et forhold fortrinsvis bør bedømmes efter loven i det land, hvortil det har sin sterkeste tilknytning, eller hvor det nærmest hører hjemme. Det er selvfølgelig ikke mulig uten videre at løse alle international-privatretslige spørsmål ut fra denne almindelige betragtning, men det forekommer mig dog, at den er tilstrækkelig til at gi en løsning for det tilfælde, som her foreligger. Det, som der her spørres om, er jo, om en norsk skibseiers ansvar overfor en anden norsk skibseier for skade voldt ved, at den førstes skib har paaseilet den andens skib. Og dette forhold synes jeg maa siges at ha sin sterkeste tilknytning til Norge, uanset at paaseilingen har fundet sted paa en anden stats sjøterritorium. Efter min mening er det naturligt at opfatte den norske sjøfartslov saa, at dens bestemmelser om rederi og da ogsaa om reders ansvar fortrinsvis er git med sigte paa norske skibe, og at det forsaavidt maa ansees stemmende med lovens tanke, at disse regler saavidt mulig kommer til anvendelse ved bedømmelsen av forhold, som knytter sig til norske skibe. Regelmæssig vil det jo ogsaa være disse regler, som de norske redere kjender bedst og i almindelighet indretter sig efter. Det er vistnok saa, at sjøfartsloven maa antages at bygge paa den forutsætning, at rækkevidden av dens bestemmelser begrænses av almindelige international-privatretslige regler, og at internationale hensyn kan lede til en innskærnkning av bestemmelseernes anvendelse overfor forhold, som knytter sig til norske skibe. I nærværende tilfælde, hvor begge skibe er norske og likesaa alle de personer, hvis interesser direkte berøres av sammenstøtet, synes jeg imidlertid ikke der med føie kan anføres noget internationalt hensyn mot at la norsk ret faa anvendelse. Til støtte for denne opfatning mener jeg ogsaa at kunne paabe rope den foran om-

handlede art. 12, 2 ledd, nr. 2, i den internationale konvention om sammenstøt. Jeg antar nemlig, at denne bestemmelse i hvert fald maa tillægges den betydning, at der ut fra internationale hensyn intet er at indvende mot, at en stat lar sine domstoler anvende indenlandsk ret paa en sak angaaende sammenstøt, naar alle interesserte tilhører denne stat, uanset hvor sammenstøtet har fundet sted.***

195

A mod B

Se nedenfor nr. 255.

196

Eos-sagen

SØ- OG HANDELSRETTE

U. f. R. 1956. 912

[Den 2. september 1953 fandt der på Odense fjord en kollision sted mellem m/s Mars af Aalborg og m/s Eos af Amsterdam. Mars var for indgående og Eos for udgående. Kollisionen ansås forvoldt ved fejl fra begge sider, og retten skønnede, at tabet burde fordeles med to trediedele på Eos og en trediedel på Mars. Der blev gjort ansvarsbegrænsning gældende for Eos' vedkommende. Retten udtalte:]

***Med hensyn til spørgsmålet om, hvorvidt ved fastsættelsen af ansvarsbegrænsningen for "Eos" dansk ret — *lex loci* — eller hollandsk ret — flagets ret — skal lægges til grund, bemærkes følgende:

I det foreliggende tilfælde fører den hollandske ansvarsbegrænsningsregel til en større erstatning end den danske ansvarsbegrænsningsregel, og begrundelsen for at anvende hollandsk ret, altså flagets ret, er da den, at det synes unaturligt, at rederens ansvar skal være mindre, fordi skibet befinder sig udenfor hollandsk søterritorium i stedet for indenfor dette. Der bortses herved fra, at hollandsk praksis og teori efter det oplyste begrænser ansvaret efter *lex loci* — endog i tilfælde af kollision mellem to hollandske skibe i fremmed farvand. Den omstændighed, at hollandsk ret i det foreliggende tilfælde giver en større erstatning end dansk ret, bør efter rettens opfattelse ikke influere på afgørelsen, idet den modsatte situation, at anvendelsen af flagets retsregel giver mindre krav end kollisionsstedets retsregler, vel kan tænkes, og der rejser sig da det spørgsmål, om det er reelt begrundet at lade den fremmede lovgivnings ringe beskyttelse reducere skadelidtes retsstilling. En anvendelse af ordre public ville ikke kunne bøde på denne svingende retsstilling, idet ordre public reglen kun kan anvendes på de grove ydertilfælde. En anvendelse af *lex loci* reglen vil vel for skadelidte gøre hans retsstilling afhængig af kollisionsstedets ret, men *lex loci* reglen er en almindelig anerkendt retsregel.

For anvendelse af lex loci reglen taler efter rettens opfattelse, dels at det under hensyn til ansvarsbegrænsningsreglernes nære sammenhæng med reglerne om ansvars opståen vil være naturligt, at samme retssystem anvendes ved bedømmelsen af ansvarsgrundlaget og fastsættelsen af ansvarsbegrænsningen, dels at skadelidte herved undergives den gennemsnitlig fastere retsregel uden variation efter det skadevoldende skibs nationale retsregler, som bør være skadelidte uvedkommende. Af vægt synes det også at være, at skadelidte, når ansvaret ved kollisioner på dansk søterritorium begrænses efter dansk ret, opnår en retsbeskyttelse, som er i overensstemmelse med internationalt vedtagne regler, og mere synes skadelidte ikke at have naturligt krav på. Sagsøgtes ansvar findes herefter at burde begrænses efter dansk ret.***

197

Kaj Hansen mod A/S Columbosemballage

Se nedenfor nr. 282.

198

Kurt Persson mod fa. Brdr. Jørgensen

Se nedenfor nr. 285.

C. ANVENDELSESPROBLEMER (Kvalifikation)

199

Brewitt & Dieckmeyer mod R. B. Jespersen

SØ- OG HANDELSRETTE

U. f. R. 1870, 276

Sagsøgerne, Handelshuset Brewitt & Dieckmeyer i Hamborg, paastaa under nærværende Sag Indstævnte, Kjøbmand R. B. Jespersen, tidligere Associé af det nu ophævede Firma Jespersen & Kleinert i Hamborg, kjendt pligtig til at indfri en af J. C. Præsent Wittwe den 12 Decbr. 1866 til Sagsøgernes Ordre paa bemeldte Firma trukken og af samme accepteret 3 Md. prima Vexel, oprindelig stor 8,235 Bcomk. 6½ Sk., ved at betale dens Restbeløb 4,235 Bcomk. 6½ Sk. med Vexelrenter deraf, Protestomkostninger 4 Bcomk., ½ pCt. Provision og Courtage samt Sagens Omkostninger skadesløst.***

Imod dette Søgmaal har Indstævnte imidlertid først fremsat den Hovedindsigelse, at der efter hamborgsk Ret — der formentlig her maa tages i Betragtning — ikke paahviler ham nogen Forpligtelse til nu at betale det paastævnte Beløb eller nogen Del af samme. Han har blandt Andet i denne Henseende anført, hvad der under Sagen er indrømmet af Sagsøgerne, at Firmaet Jespersen &

Kleinert i Hamborg, saavelsom Indstævnte selv, den 16 Novbr. 1867 have overgivet deres Bo til Fallitbehandling, som endnu ikke er sluttet, at Restbeløbet, Bcomk. 4,235, 6½ Sk. af den paagjældende, til et hamborgsk Firmas Ordre paa et andet hamborgsk Firma trukne, Vexel, er anmeldt i Fallitboet af Sagsøgerne, og at en Fallent efter hamborgsk Ret — ialtfald forsaavidt han ikke er domfældt som svigagtig Fallent — ikke personlig kan søges til Betaling af de i Boet anmeldte Fordringer, saalænge Boet staar under Behandling, og fremdeles heller ikke efter dets Slutning, saafremt han hvert 5te Aar med sin Ed bekræfter, at han ikke ejer Andet eller Mere end Tilstrækkeligt til sit og sin Families Underhold. Sagsøgerne have nu vel dertil erindret, at Indstævnte, der er dansk af Fødsel og nu igjen har taget fast Bopæl her i Riget, ikke kan beskyttes af de hamborgske Fallitlove eller nyde nogen Begunstigelse, som ikke vilde have tilkommet ham efter de danske Love, idet det formentlig er afgjort, at det er de paa det Sted, hvor Sagen forfølges, gjældende Rettergangslove, som blive at anvende, og der ikke efter dansk Ret er Noget til Hinder for at søge en Fallent personlig, medens hans Bo er under Skiftebehandling. Men det skjønnes ikke rettere, end at der maa gives Indstævnte Medhold i, at de ovenanførte Bestemmelser i den hamborgske Fallitlovgivning ikke kunne anses som processuelle eller Rettergangslovbestemmelser, men maa erkjendes at afficere selve Gyldigheden eller Retskraften af de i et Fallitbo anmeldte Fordringer, og Consequentsen heraf maa da formentlig blive den, at Sagsøgerne, der have undergivet deres Fordring de i Hamborg om en Fallents og hans Creditorers gjensidige Rettigheder og Forpligtelser gjældende Retsregler, ikke kunne benytte sig af den Omstændighed, at Fallenten — hvis Herkomst i denne Henseende maa være ligegyldig — er flyttet til Danmark, til at gjøre en anden og større Ret gjældende imod ham end den, som de have ifølge den Lovgivning, under hvis Herredømme Retsforholdet mellem dem og Indstævnte er stiftet og videre udviklet.***

200

C. Carlstein mod Ingeborg Carlstein

SVERIGES HÖJESTERET
Nytt Juridisk Arkiv 1930. 692

C. Carlstein och Ingeborg Köpper ingingo år 1896 äktenskap i Boston, Massachusetts. Båda makarna hade invandrat från Sverige men voro vid äktenskapets ingående medborgare i Nordamerikas förenta stater. Mannen var poliskonstapel i Boston och åtnjöt i denna egenskap en årlig avlöning av 1,200 dollars.

Under år 1902 beslöto makarna att utan äktenskapsskillnad leva åtskilda och ingingo i samband därmed ett d. 22 nov. 1902 dagtecknat avtal rörande hustruns rätt till underhåll. Med hänsyn därtill att ett dylikt under äktenskapets bestånd slutet avtal enligt lagen i Massachusetts icke är giltigt med mindre även en tredje person inträtt såsom kontrahent i avtalet, medverkade vid avtalets slutande jämväl en amerikansk advokat, Arthur P. Gay, vilken hustrun utsett till god man (trustee) för sig.

Avtalet innehöll bl. a. följande: Mannen skulle i underhåll till hustrun ut-

giva 300 dollars om året under den tid hon levde skild från honom och utom staten Massachusetts gränser. Underhållet skulle betalas i förskott med 25 dollars d. 8 i varje mån. Betalningen skulle erläggas till Gay eller till hans efterträdare såsom god man.***

Hustrun överflyttade sedermera till Sverige. Hon är numera bosatt i Stockholm och har blivit svensk medborgare.

Avtalet fullgjordes t. o. m. maj 1911. Mannen drabbades vid denna tid under tjänstutövning av ett olycksfall, som gjorde honom tjänstoduglig för återstoden av hans livstid. Med anledning härav blev han av staden pensionerad med en årlig pension av 600 dollars. Kort därefter avvek han till okänd ort.

Efter åtskilliga försök från Gays sida att av staden utfå de underhållsbidrag, som enligt avtalet tillkommo hustrun, blev Gay d. 28 febr. 1916 av domstol (Probate Court i Boston) förordnad till förvaltare av den på okänd ort vistande mannens fasta och lösa egendom. Andra tillgångar än rätten till pension synas icke hava funnits. Såsom förvaltare uppbar Gay förfallna pensionsbelopp. Efter ansökan av Gay d. 18 juli 1916 beslöt domstolen i nov. s. å. bemyndiga Gay att av medel, som han uppburit eller komme att uppbära för mannens räkning, till sig själv i egenskap av god man för hustrun utbetala dels vad som redan vore upplupet av hennes underhållsbidrag och dels månatligen tillsvidare vad hon hade att fordra för framtiden enligt avtalet. I enlighet med detta bemyndigande utbetalte Gay d. 2 jan. 1917 till sig själv ett belopp av 1,200 dollars.

Från nov. 1916 vägrade emellertid staden att till Gay utbetala den mannen tillkommande pensionen, emedan bevis saknades om att denne fortfarande vore i livet.

I maj 1925 återvände mannen till Massachusetts. Frågan om uppbärandet av hans pension ordnades då interimistiskt på det sätt, att Gay fick från staden uppbära allt vad mannen hade att fordra med skyldighet att till denne utbetala vissa belopp och att innehålla återstoden intilldess frågan blivit slutligt avgjord. I mars 1927 blev Gay entledigad från förvaltarskapet för mannen och förpliktad att avgiva redovisning. I sin redovisning tillgodoförde Gay sig själv såsom hustruns gode man vissa belopp. I detta avseende klandrades emellertid redovisningen; och domstolen förklarade, att Gay icke ägde för hustruns räkning tillgodoföra sig mer än ett belopp av 350 dollars. Med de belopp å 1,200 dollars och 350 dollars, som Gay sålunda fått uppbära, hade hustrun utfått de underhållsbidrag, som förfallit till betalning t. o. m. d. 8 juli 1916.

Mannen överflyttade häfester till Sverige och bosatte sig i Partille utanför Göteborg, där han efter sin år 1923 avlidna moder ärvt del i en fastighet. Han har uppgivits fortfarande vara amerikansk medborgare.

Efter att förgäves have försökt att lagsökningsvägen *** utfå sin fordran yrkade hustrun efter särskilda stämningar, som delgavos mannen d. 25 juni och d. 9 aug. 1928, vid *Askims, västra och östra Hisinges samt Sävedals H.R.* åläggande för mannen att till hustrun utgiva avtalet men icke guldett underhållsbidrag, förfallet under tiden fr. o. m. d. 8 aug. 1916 t. o. m. d. 8 aug. 1928, jämte ränta.

Mot kravet framställde mannen åtskilliga invändningar.

Mannen invände ytterligare, att varje fordringsrätt på grund av avtalet vore

preskriberad. Beträffande denna fråga synas båda parterna hava utgått från att svensk rätt vore tillämplig; men hustrun hävdade, att preskriptionsavbrott ägt rum genom de åtgärder, som i Amerika vidtagits mot mannen.***

*H.R.:*n yttrade i dom d. 30 okt. 1928: *** då mannen vitsordat, att han icke under tiden efter d. 8 juli 1916 till Gay eller hans efterträdare i godmanskapet utbetalt det uti ifrågakommande avtal stadgade underhållet, men hustrun icke visat, att hon förr än d. 28 april 1928 hos mannen krävt betalning för sin å ifrågakommande avtal grundade fordran för tiden efter d. 8 juli 1916, och hustrun förty jämlikt 2 § i K. F. d. 4 mars 1862 om tioårig preskription och om årsstämning förlorat sin talan mot mannen beträffande den å tiden fr. o. m. d. 9 juli 1916 t. o. m. d. 27 april 1918 belöpande andelen av fordrade beloppet, prövade *H.R.:*n rättvist på det sätt bifalla hustruns i målet förda talan, att mannen förpliktades att genast mot kvitto till hustrun utgiva vad av omstämda fordran belöpte på tiden fr. o. m. d. 28 april 1918 t. o. m. d. 27 aug. 1928 eller 3,100 dollars eller däremot svarande belopp i svenskt mynt enligt den vid betalningstiden gällande högsta kurs jämte 5 % ränta därå från stämningssdagen, d. 25 juni 1928, till dess full betalning skedde.***

Makarna sökte å ömse sidor revision.***

Målet avgjordes efter cirkulation d. 17 dec. i *H. D.*, vars flesta ledamöter (*Just.R.:*n frih. *Leijonhufvud*, *Molin*, *Lindhagen* och *Bagge*) förenade sig om följande, av den sistnämnde avgivna yttrande: "Vid tiden för upprättandet av ifrågakomna avtal, som avser underhåll till hustrun under tid, då makarna på grund av söndring levde åtskilda, voro båda makarna medborgare i Nordamerikas förenta stater med hemvist i staten Massachusetts. På grund härav finner jag, att frågan om avtalets giltighet och verkan skall bedömas enligt den i Massachusetts gällande lag.

Jämlikt nämnda lag är avtalet giltigt.***

Med hänsyn till det nära sambandet mellan frågan om avtalets giltighet och verkan samt frågan efter vilken tid rättighet enligt avtalet på grund av preskription icke längre kan göras gällande finner jag, att lagen i Massachusetts skall äga tillämpning jämväl vid bedömande av sistnämnda fråga, oavsett att bestämmelserna om preskription i nämnda lag äro att hänföra till reglerna om rättegångsförfarandet.

Enligt lagen i Massachusetts kan fordran på grund av sådant avtal, varom här är fråga, utkrävas intilldess 20 år förflutit från det fordringen förföll till betalning. Vid sådant förhållande är hustrun fortfarande bevarad vid rätt att göra avtalet gällande i fråga om underhåll för de år, som avses med hennes yrkanden.***

På grund av vad sålunda anförts prövar jag rättvist på det sätt ändra *HovR.:*ns dom, att mannen förpliktas att till hustrun genast mot kvitto utgiva 3,625 dollars, avseende belopp som förfallit till betalning fr. o. m. d. 8 aug. 1916 t. o. m. d. 8 aug. 1928, jämte 6 % ränta å de månatliga beloppen om 25 dollars från resp. förfallodagar d. 8 i varje mån. tills betalning sker; och skall, därest utdömda beloppen erläggas i svenskt mynt, betalning ske efter den vid betalningstiden gällande högsta kurs å dollars.***

201

M/S Ostmarks rederi mod A/S Lorentz Nilssen

NORGES HØJESTERET
Norsk Rettsidende 1956, 1172

Lagmannsrettens dom:

Ved certeparti av 26. januar 1951 ble det tyske tankskip "Ostmark" befraktet av A/S Johan C. Martens & Co. for en reise med fiskeolje fra Bergen til Hamburg, Brake eller Rotterdam. Certepartiet, som er utferdiget på Tank Vessel Voyage Charterparty — formular 1950, inneholder i p. 13 følgende trykte klausul: "This contract shall be governed by the laws of the Flag of the Vessel — — —". P. 18 bestemmer: "Any dispute arising during execution of this Charter party shall be settled in Hamburg, Owners and Charterers each appointing an arbitrator — — —".

Ved addendum av 27. januar 1951 fikk befrakteren opsjon på ytterligere 2 "consecutive" reiser.

Et addendum nr. 2 av 13. februar 1951 bestemmer at skipet skal laste en del olje i Ålesund og resten i Bergen.

Endelig lyder et addendum nr. 3 av 19. februar 1951 i oversettelse: "Refere-rende til addendum nr. 2 er det idag blitt overenskommet mellom rederiet og befrakterne å la skipet foreta en mellomreise ("Intermediate trip") fra maksimum 2 plasser Haugesund med en full ladning sildolje for lossing i Bergen, før skipet går til Ålesund for å laste. Fraktraten er 25 norske kr. pr. 1000 kg."

I henhold til addendum nr. 3 tok skipet den 26.—27. februar 1951 inn en last olje som ble levert ved Haugesund av A/S Lorentz Nilssen. Under inn-lastingen gikk en del olje tapt derved at en tank i skipet ble overfylt og olje fløt i sjøen.

Ved stevning mot rederiet ved skipsføreren reiste A/S Lorentz Nilssen sak ved Karmsund herredsrett til inntale av erstatning av den tapte olje med den be-grunnelse at tapet skyldtes mangelfullt tilsyn ombord under innlastingen. Det er på det rene mellom partene at A/S Lorentz Nilssen hadde solgt oljen levert Bergen. — — —

Rederiet bestrider ikke for lagmannsretten at oljespillet skyldes feil eller for-sømmelse av mannskapet og at rederiet derved ble pådratt erstatningsansvar. Men det hevder at ansvaret er begrenset til kr. 145 pr. tonn av skipets drek-tighet i henhold til sjøfartslovens § 255. Dette var ikke gjort gjeldende for her-redsretten.

Under forberedelsen av ankesaken har rederiet betalt et beløp som partene er enige om at dets ansvar utgjør, hvis det er begrenset. Dets påstand er at det frifinnes og tilkjennes saksomkostninger for lagmannsretten.

Motparten, A/S Lorentz Nilssen, bestrider ikke at kravet etter sin art er av dem som er omhandlet i sjøfartslovens § 255, 2. p. Men motparten hevder at spørsmålet om ansvarets art og begrensning må avgjøres etter tysk lov, hvoretter rederiet hefter med sjøformuen for kravet. Det er på det rene mellom partene

at det under den forutsetning blir full dekning for kravet, og at motparten da har kr. 44 556,37 av dette til gode. — — —

Lagmannsretten er, riktignok under tvil, kommet til at den oppfatning som er hevdet av motparten er den riktige.

Retten antar at ansvaret må bedømmes som et ansvar i kontraktsforhold. Fra skipets side sett dreier det seg om ansvar oppstått som følge av mannskapets forhold under tjeneste som hørte med til oppfyllelsen av en fraktkontrakt. Avskiperen leverte på sin side lasten etter avtale med befrakteren. I og med at skipet meldte seg for å ta inn lasten og at det ved samarbeid mellom avskiperens og skipets folk ble etablert rørforbindelse mellom avskiperens og skipets tanker, ble etter rettens syn rederiet ved skipsføreren også overfor motparten kontraktmessig forpliktet til å passe på og til å stenge av eller koble over til en annen når en skipstank var fylt. Det er en forsømmelse av å oppfylle denne forpliktelse som har voldt tapet. Til støtte for denne oppfatning vises til uttalelser av Jantzen i "Godsbefordring til sjøs" side 61 (2. utg.) og i Nordiske Domme i Sjøfartsanliggender 1931 side 83. Så vidt forstås har også begge parter i prosedyren gått ut fra at motpartens krav er begrunnet i sjøfartsloven § 118 jfr. § 122, altså at det er et bortfrakteransvar for mottatt fraktgods.

Retten er videre enig med motparten i at addendum nr. 2 og addendum nr. 3 etter sammenhengen slutter seg til certepartiet slik at dettes bestemmelser gjelder også for "mellomreisen" Haugesund—Bergen.***

Når det så gjelder spørsmålet om hvilket lands lov som etter alminnelige grunnsetninger i norsk internasjonal privatrett er bestemmende for mulig begrensning av ansvaret, slutter retten seg til de foran nevnte uttalelser av norske forfattere. Disse går ut på at spørsmålet om ansvars art og eventuelle begrensning skal avgjøres etter flaggets lov, selv når ansvarsbetingelsene skal bedømmes etter en annen lov.***

Noen norsk rettsavgjørelse om spørsmålet vites ikke å foreligge. I høyesterettsdommene i Rt. for 1923 II side 58, 1931 side 1185 og 1937 side 888 er det lagt avgjørende vekt på hvor forholdet "har sin sterkeste tilknytning" eller "nærmest hører hjemme". De uttalelser som det er vist til i det foregående ligger til dels forut for disse dommer. Det antas imidlertid ikke at dommene gir grunn til i dette tilfelle å fravike den oppfatning som er den herskende i teorien. Skipet er tysk. Om motparten ikke ble direkte part i befraktningskontrakten så ble ansvaret pådratt under innlasting som var ledd i oppfyllelse av en fraktavtale hvori flaggets lov var vedtatt, jfr. foran. Det er så vidt vites sedvanlig at flaggets lov er vedtatt i tankskips reisecertepartier — jfr. Jantzen 1. c. side 45 note b. Reisen Haugesund—Bergen var norsk kystfart, men ble avtalt nærmest som et appendiks til en reise fra norsk til utenlandsk havn. Under disse omstendigheter finner retten at spørsmålet om ansvarsbegrensning har fullt så stor tilknytning til tysk lov som til norsk.***

Høyesteretsdom:

Dommer Kruse-Jensen:

Jeg er kommet til samme resultat som lagmannsretten og kan i vesentlige deler tiltre dens begrunnelse.

Når det gjelder firmaet Nilssens forhold til certepartiet og spesielt den refererte klausul om flaggets rett, er det visstnok så at Nilssen ikke har undertegnet certepartiet. Men jeg finner ikke dette avgjørende i denne forbindelse. Alle forhold tatt i betraktning er den tilknytning som avskiperen — som er den direkte skadelidende ved det brudd på fraktavtalen (certepartiet) som skipet har gjort seg skyldig i — har til certepartiet, allikevel slik at det må antas at firmaet under forhold som de foreliggende må kunne påberope seg den omtvistede bestemmelse. Jeg peker i den forbindelse på at firmaet Nilssen, da "Ostmark" kom for å innta oljen for "mellomreisen", måtte være klar over at skipet var et tysk tankskip, chartret av Martens. — I den dokumenterte skipningsordre, datert 26. februar 1951, er så vel fartøyet som mottageren Martens' navn angitt, liksom den også inneholder opplysning om at leveransen skulle skje etter de vanlige instruksjoner. Jeg viser i denne forbindelse til Jantzen: Godsbehandling til sjøs, 2. utg. side 61, hvor det mellom annet heter: "I forholdet mellom befrakter og bortfrakter er avlasteren *forsåvidt* å opfatte som *befrakterens medhjelper* eller fullmektig som han oppfyller reisebefrakterens første og viktigste forpliktelse, nemlig levering av last."***

Dommer Heiberg: Jeg er kommet til et annet resultat enn førstvoterende.

I motsetning til førstvoterende antar jeg at man ikke av den omstendighet at certepartiet mellom "Ostmarks"s rederi og befrakteren, Martens, inneholder en henvisning til "flaggets rett", kan trekke noen slutning med hensyn til hvilket lands rett skal bestemme ansvaret overfor avskiperen, Nilssen. Jeg er enig i at Nilssen ved innlastingen er trådt i rettsforhold til skipet og dets reder. Men dette rettsforhold er ikke begrunnet i certepartiet, og jeg kan ikke se at Nilssen ved det som er skjedd, har vedtatt eller er blitt bundet av fraktavtalens klausul om flaggets rett. At han har kjent til fraktavtalens innhold har ikke vært hevdet. Spørsmålet om hvilket lands rett skal komme til anvendelse i det foreliggende tilfelle, må derfor etter mitt syn løses uavhengig av klausulen i certepartiets punkt 13.***

Etter stemmegivningen avsa Høyesterett dom overensstemmende med førstvoterendes konklusjon.

202

Venstres Ungdoms Rejseklub m. fl. mod chauffør Ejnar Larsen m. fl.

Se nedenfor nr. 295.

203

Harnischknyttter Adolf Zimmerbeutel mod I/S Alfred Berg

Se nedenfor nr. 279.

204

**Haagerkonventionen 1960 vedrørende lovkonflikter med hensyn
til testamentariske dispositioners form, art. 5**

Se nedenfor nr. 266.

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Domstolenes anvendelse af fremmed ret

205

Bagermester H. P. Sørensen som tilsynsværge for Ana Luisa Pedersen Kielmann mod Frederiksberg Birks Skifteret m. fl.

HØJESTERET
U. L. R. 1918. 212 jfr. 1916. 1011

Landsover- samt Hof- og Stadsrettens dom:

I Boet efter den i Brasilien den 2 Marts 1899 afdøde Frederik Daniel Løwener, hvilket Bo behandlede af Frederiksberg Birks Skifteret, forsaavidt angik Afdødes her i Landet værende Ejendele, paastod Appellanten, Bagermester H. P. H. Sørensen som Tilsynsværge for Ana Luisa Pedersen Kielmann, sin nævnte Myndling kendt arveberettiget i Boet som ægtefødt Datter af Afdøde. Herimod protesterede Appelindstævnte Carl Holger Visby Løwener, der er Broder til Afdøde, idet han gjorde gældende, at Ana Luisa Pedersen Kielmann, efter hvad der var oplyst, ikke kunde være Afdødes Barn, og ved Skifterettens Decision af 11 November 1915 statueredes dette at være rigtigt, hvorfor det decideredes, at Ana Luisa Pedersen Kielmann ikke kunde anses arveberettiget i det heromhandlede Bo.

Denne Decision har Appellanten indanket her for Retten.***

Under Skiftedisputen er det uomtvistet, at Afdøde og hans Hustru Marie Dorteia Kielmann umiddelbart efter den 5 Juni 1895 at være ægteviet i København rejste til Sydamerika, hvor de bosatte sig i Byen Iquique, beliggende i Provinsen Tarapaca i den nordlige Del af Fristaten Chile, at Ægteskabet bestod, indtil Manden efter nogle Aars Omflakken i Sydamerika den 2 Marts 1899 døde i Brasilien, og at Hustruen, der hele Tiden var forblevet boende i Provinsen Tarapaca i Nærheden af Iquique eller i denne By i Mellemtiden — nemlig den 4 Oktober 1898 — havde født Barnet Ana Luisa Pedersen Kielmann, der altsaa maa være avlet omkring Nytaar 1898.

At Sidstnævnte ikke er Datter af Afdøde støttes hovedsagelig paa følgende Oplysninger og ikke særlig bestridte Anbringender:

at Afdøde kun et Aars Tid samlevede med sin Hustru og derefter — senest noget ind i Aaret 1897 — forlod hende, uden at det er oplyst, at han, der beskyldte hende for ægteskabelig Utroskab, siden har genoptaget Samlivet med hende, at det derimod er oplyst, at han i 1897 har opholdt sig i den fra hans oprindelige Bosted i Iquique fjernliggende sydchilensiske Provins Valparaiso og senere i Buenos Aires og sidst i Rio Janeiro, hvor han døde som foran ommeldt den 2 Marts 1899, at det fremdeles er oplyst, at hans Hustru efter at være ladt alene en Tid ernærede sig som Selskabsdame i Nærheden af Iquique, men i 1898

vendte tilbage til denne By, hvor hun blev Husholderske for en dansk født Mand ved Navn Jørgen (Jørge, Jorge) Petersen, hvis Bekendtskab hun havde gjort under sit første Ophold i Iquique, *at* hun fødte Barnet Ana Luisa Pedersen Kielmann i Jørgen Petersens Hus, *at* hun i Aaret 1900 indgik Ægteskab med Jørgen Petersen, *at* nævnte Ægtepar til et offentligt oprettet Dokument i April 1903 lod gøre Tilførsel om, at Ana Luisa Pedersen Kielmann, hvis Fødsel af dem som Forældre de allerede den 6 Oktober 1898 havde anmeldt til Civilregistret i Iquique, anerkendtes som deres naturlige Barn, samt *at* der om denne Anerkendelse er sket særlig Tilføjelse til det ommeldte Register.

Marie Dortehea Kielmann afgik ved Døden i Aaret 1905, og hendes anden, foran omtalte Mand, der for Tiden er bosat her i Danmark, har til Brug under nærværende Retstvist afgivet den Erklæring, at han anser sig for at være Fader til Ana Luisa Pedersen Kielmann.

Der maa nu vel gives Appellanten Medhold i, at det ikke ved samtlige foran anførte Omstændigheder er bevist, at den omstridte Paternitet ikke kan henføres til Afdøde Frederik Daniel Løwener, idet den Mulighed fremdeles er tilstede, at han under et kortere Samliv eller Samvær med sin Hustru omkring Nytaar 1898, om hvilket Eftertiden ikke har nogen Efterretning, kan have avlet Barnet Ana Luisa Pedersen Kielmann. Om der skal tillægges en saadan Mulighed retlig Betydning derhen, at Barnet, indtil absolut Bevis er ført for det Modsatte, anses for at være født som Ægtebarn, maa imidlertid afgøres efter, hvad der paa Avlingstiden i saa Henseende var gældende Ret paa Forældrenes Hjemsted — altsaa i det foreliggende Tilfælde efter udenlandsk (chilensk, eventuelt anden sydamerikansk) Ret. Til Bedømmelse af dennes Standpunkt til det berørte Retsspørgsmaal foreligger der imidlertid ikke tilstrækkeligt Materiale under Sagen, og Tvisten om Ana Luisa Pedersen Kielmanns Egenskab som ægte Barn af Afdøde og hendes heraf flydende Arveberettigelse maa derfor løses, uden at den nys berørte Retsregel kan komme i Betragtning. Derimod maa det blive afgørende, at Jørgen Petersen og Marie Dortehea Kielmann til det paagældende offentlige Register umiddelbart efter Ana Luisa Pedersen Kielmanns Fødsel har anmeldt, at hun er *deres* Datter, samt har forlangt, at deres Navne skulde anføres i Registret, *at* den nævnte Anmeldelse er blevet modtaget og det nævnte Forlangende efterkommet, *at* det i samme Register findes bemærket, at det af et for notarius publicus oprettet Dokument fremgaar, at de angivne Forældre efter at være blevet gift har anerkendt Ana Luisa Pedersen Kielmann som deres naturlige Barn, og *at* denne Anerkendelse er modtaget af Barnets beskikkede Formynder "i Overensstemmelse med Loven". Naar henses hertil og det iøvrigt Oplyste kan det ikke antages, at Ana Luisa Pedersen Kielmann er Datter af Afdøde, og den indankede Skifteretsdecision vil derfor være at stadfæste.***

Højesterets dom:

Med bemærkning, at der ikke bliver spørgsmål om anvendelse af fremmed ret, allerede fordi ingen af parterne har nedlagt påstand herom, og iøvrigt i henhold til de i den indankede dom anførte grunde kendes for ret: Landsover-samt Hof- og Stadsrettens dom bør ved magt at stande.

206

Skibscapitain Bartlett mod F. Tutein & Co.

LANDSOVER- SAMT HOF- OG STADSRETTE

JU 8 1846-47. 76

Citanten, Skibscapitain Bartlett, der med sit i England hjemmehørende Skib, Thorp kaldet, var bestemt fra Hull til Stettin, men formedelst Haveri har maattet ende sin Reise her i Staden, søger under nærværende Sag de Indstevnte, Handelshuset F. Tutein & Comp. til som Distancefragt og Omkostninger at betale i alt 83 Pund 9 sh. Sterling efter den ved Betalingstiden gjældende Cours.

De Indstevnte paastaae *principaliter* Sagen afviist, da den paastevnte Fragtfordring formeentlig ikke kan indfordres her, men paa Bestemmelsesstedet, og i alt Fald ikke skal paakjendes efter de danske, men efter de preussiske eller engelske Love.

Betræffende denne Paastand, da kan samme ikke tages til Følge, siden en Fragtfordring altid maa paakjendes der, hvor Skib og Ladning skilles ad, og der, hvis fremmede Love skulde kunne have nogen Indflydelse, gjerne her ved Retten kan tages Hensyn til samme, forsaavidt deres Indhold oplyses.

Hvad dernæst angaaer Sagens Realitet, saa paastaae de Indstevnte sig frifundne for Citantens Tiltale. Forsaavidt denne Paastand skulde grundes paa, at de paaberaabte fremmede Love vilde lede til et saadant Resultat, kan den ikke, endog om disse Loves Anvendelighed *in casu* forudsættes, komme i Betragtning, da meerberørte Loves Indhold ei fra de Indstevntes Side er beviist, og Beviisbyrden paaligger den, der vil have en anden Lovgivning anvendt, end den her gjældende. Sagen bliver følgelig at paakjende efter de danske Love.***

207

Skibscapitain A. J. Bakker mod N. Ammitzböll

LANDSOVER- SAMT HOF- OG STADSRETTE

JU 8. 1846-47. 126

Indstevnte Viinhandler I. N. Ammitzböll, der, efter at Citanten Skibscapitain A. I. Bakker var med sit Skib Theodor indkommen hertil under Haveri, har modtaget den til Antwerpen eller Brüssel bestemte Ladning Byg og ladet den bedærvede Deel af samme bortsælge, søges under nærværende Sag til af denne Deel, i Overensstemmelse med Lovens 4—3—22, at betale fuld Fragt m. v., da Citanten nu med Resten af Ladningen skal gaee til Bestemmelsesstedet.

Indstevnte paastaaer derimod enten Sagen afviist eller sig frifunden for Citantens Tiltale i det Hele eller i al Fald imod at betale Fragt efter den sigtede Distance, nemlig fra Helsingør til Kjøbenhavn.***

Betræffende dernæst Paastanden om aldeles Frifindelse, da har Indstevnte til Styrke for samme anført, deels *** og deels, at her ikke kan blive Tale om Anvendelse af vore Love, da Skibet farer under hamburgsk Flag og Certepartiet er sluttet i Hamborg med et hamburgsk Handelshus.***

Heller ikke kan den anden Grund have nogen Indflydelse paa Sagens Udfald; thi om det end ikke antages, at den almindelige Forskrift i 4—8—1 hjemlede vor Lovs Anvendelse, maatte der dog være Beviis for, at de fremmede Love, som skulde komme i Betragtning, medførte et andet Resultat end vor Lov, hvilket Beviis ikke *in casu* fra Indstevntes Side er præsteret.***

208

Retsplejeloven § 293 stk. 2

Se særudgave af retsplejeloven.

209

F mod M

Se nedenfor nr. 252.

210

Veksellov § 87

NR. 68 AF 23. MARTS 1932

Se Juristens Lovsamling.

211

**A/S Det Sibiriske Kompagni mod A/S Københavns Handelsbank
og Ahlmann & Boysen**

SØ- OG HANDELSRET TEN

U. f. R. 1912. 690

I Februar f. A. solgte det herværende Aktieselskab Det Sibiriske Kompagni til Firmaet Ahlmann & Boysen, Hamborg, et Parti sibirisk Smør dels friskt Smør til en Pris af Mrk. 106, dels Efteraarssmør til en Pris af Mrk. 94 pr. 100 Pund fob Windau. Partiet (96 Foustager friskt Smør og 127 Foustager Efteraarssmør) afskibedes den 18 Februar fra Windau, og for det omtrentlige Fakturabeløb, 24,000 Mrk., akcepterede Køberne en den 27 Februar forfalden Veksel, der er indfriet paa Forfaldsdag. Smørret ankom den 23 Februar til Hamborg. Køberne disponerede over 19 Foustager af det friske Smør, men refuserede Resten som ukontraktmæssigt. Da Sælgerne, der havde ladet en Mægler i Hamborg undersøge en Del af Sendingen, protesterede mod Reklamationen som ubeføjet, meddelte Køberne dem under 27 Februar, at de agtede at lade Smørret bedømme af Sagkyndige ved Handelskamret. Den 28 Februar henvendte Køberne sig til Handelskamret i Hamborg med Anmodning om at ud-

nævne 2 Mænd til at besigte Smørret. Besigtigelsen fandt Sted den 4 Marts, saavidt ses, uden at Køberne havde faaet nogen Meddelelse om Tidspunktet. Skønsmændene udtalte som deres Skøn, at de 77 Foustager, som var tilbage af det Smør, som var solgt som friskt Smør, ikke mere var friskt, og at det kun havde en Værdi af Mrk. 95—97 ufortoldet, samt at de 127 Foustager ikke var Efteraarssmør, men Sommersmør fra 1910, delvis af meget ringe Kvalitet, og at de havde en Værdi af Mrk. 80—83 ufortoldet. Umiddelbart efter Afholdelsen af Skønnet sendte Køberne Smørret til København og underrettede i Skrivelse af 4 Marts Det Sibiriske Kompagni herom, idet de forlangte godtgjort Trattens Beløb med Tillæg af Omkostninger og med Fradrag af Købesummen for de 19 Foustager. Det Sibiriske Kompagni protesterede, idet Kompagniet ikke kunde anerkende Skønnets Resultat som rigtigt, og Kompagniet, som ved Varernes Forsendelse til København var afskaaret fra at benytte de Retsmidler, den hamborgske Ret mulig maatte hjemle til at faa Skønnets Resultat paany prøvet og omstødt, telegraferede til Ahlmann & Boysen, at de paa en nærmere bestemt Dag agtede at lade optage nyt Skøn her i Byen over Partiet.***

Firmaet Ahlmann & Boysen *** har gjort gældende, at Forholdet mellem dem og Citanterne maa afgøres efter gældende Hamborg Ret, at der herefter ved det i Hamborg foretagne Skøn er ført et fuldt tilstrækkeligt Bevis for Varens Ukontraktmæssighed, og at de have været berettigede til at sende det ukontraktmæssige Parti til Citanterne.

Citanterne gøre derimod gældende, dels at Forholdet maa bedømmes efter dansk Ret.***

Firmaet Ahlmann & Boysen har begæret Rettens Medvirken til gennem Hanseatisches Ober-Landesgericht at skaffe Oplysninger om Indholdet af den i Hamborg gældende Ret med Hensyn til de omtvistede Punkter.

Da nu Retten maa give Ahlmann & Boysen Medhold i, at det maa bedømmes efter den i Hamborg gældende Ret, om det i Hamborg afholdte Skøn afgiver tilstrækkeligt Bevis for Varernes Ukontraktmæssighed, og om Ahlmann & Boysen have været berettigede til straks efter Skønnet at sende Varen til København uden at indhente Instruktioner fra Citanterne, vil det have Interesse for Sagen at faa oplyst,

- 1) Om Skønnet i Hamborg har været behørig foretaget, uanset at Citanterne ikke have faaet nogen Meddelelse om Tidspunktet for Afholdelsen,
- 2) Om der efter Hamborg Ret eksisterer en Adgang for en Sælger til at faa et af en Køber optaget Skøn omstødt ved et Overskøn eller paa anden Maade,
- 3) Om en Køber efter Hamborg Ret er berettiget til straks efter Afholdelsen af et Skøn, der giver ham Medhold, at sende Varen til Sælgeren uden at afvente dennes nærmere Instruktioner, og uden Hensyn til, at den var solgt fob et andet Sted end det, hvor Sælgeren opholder sig.

T h i e r a g t e s :

Firmaet Ahlmann & Boysens Paastand om Rettens Medvirken til gennem Henvendelse til den nævnte Ret i Hamborg at faa de omtalte Spørgsmaal besvarede vil være at tage til Følge.

212

M/S Hika mod m/s Merita

SØ- OG HANDELSRET TEN
U. I. R. 1959. 419

[Den 11. november 1955 skete der et sammenstød i farvandet mellem Stettin og Swinemünde mellem dansk m/s Hika og finsk m/s Merita. Retten pålagde Merita hele ansvaret for den ved kollisionen indtrufne skade. Med hensyn til ansvarsbegrænsningen hedder det i dommen:]

***Med hensyn til spørgsmålet om ansvarsbegrænsning hævdede sagsøgeren, at polsk ret eller *lex loci* burde lægges til grund, da kollisionen var sket i polsk farvand, og at derfor reglerne i Brysselkonventionen af 25. august 1924, som er tiltrådt af både Polen, Finland og Danmark, skulle anvendes, d. v. s. ansvaret begrænses til 8 £ pr. ton.

Sagsøgeren angav at have søgt nærmere oplysning om polsk ret ved henvendelse til det polske gesandtskab i Danmark, men havde ikke modtaget svar. Det danske udenrigsministerium har i skrivelse af 10. marts 1958 oplyst, at Polen har ratificeret den i Bruxelles den 25. august 1924 undertegnede konvention angående begrænsning af rederes ansvar — konventionsteksten er offentliggjort i *Journal Officiel* i 1937 — og at det polske udenrigsministerium senest i 1955 har bekræftet, at nævnte konvention faktisk er gældende for Polen, men at særlige bestemmelser til dens gennemførelse ikke er blevet truffet. Sagsøgeren ville herefter ikke kræve ansvarsbegrænsningen fastsat i guld £, idet Finland efter konventionens artikel 15 havde fastsat begrænsningen i sin nationale mønt, men krævede £ beregnet som i forbindelse med påstanden nævnt.

Selv om begrænsningen skulle fastsættes efter finsk ret, krævede sagsøgeren de finske mark omregnet til danske kroner efter den kurs, som gjaldt ved skibets ankomst til første havn efter kollisionen, hvorved sagsøgeren henviste til konventionens artikel 15, jfr. artikel 3, og fremhævede, at erstatningskravet var opstået ved kollisionen, at sagsøgeren var uden skyld i, at sagen var trukket så længe ud, at tabet var lidt i danske kroner, og at garantien var stillet i denne mønt.

Såfremt sagsøgeren ikke skulle få medhold i nogen af sine påstande, gjorde sagsøgeren gældende, at beregning af ansvaret burde ske efter dansk ret, *lex fori*, som efter reglen om 145 kr. pr. ton ville udgøre 69.337 d. kr.

Sagsøgte gjorde gældende, at der ikke på grundlag af *lex loci* var tilstrækkelig hjemmel for at anvende reglerne i Brysselkonventionen af 25. august 1924 i den af sagsøgeren hævdede udformning — omsætning af ansvarsbegrænsningen til 8 £ efter dansk mønt til kurs 19,34 —, idet der ikke forelå fornødent bevis for, at dette stemte med polsk ret, — der måtte således efter det oplyste gås ud fra, at ansvarsbegrænsningen omsat til national mønt ikke er incorporeret i polsk lovgivning. Sagsøgte afviste endvidere en afgørelse efter *lex fori* og hævdede, at afgørelsen under hensyn til den foreliggende usikkerhed om stedets ret burde træffes efter det skadevoldende skibs ret — flagets ret — hvortil retsforholdet herefter havde den nærmeste tilknytning. Sagsøgte fremhævede herved, at finsk

ret ved behandlingen af det foreliggende retsforhold ligger på linie med dansk ret, idet Finland ligeledes har tiltrådt Brysselkonventionen, og ligesom for Danmarks vedkommende i henhold til artikel 15 forladt guldmøntfoden og anvender landets eget møntsystem. Ved finsk lov af 30. juli 1950 er ansvarsbegrænsningen således fastsat til 5000 finmark pr. ton.***

Hvad angår ansvarsbegrænsningen, er retten enig med sagsøgte i, at *lex loci* ikke vil kunne anvendes under hensyn til den rådende usikkerhed om, hvad der er gældende polsk ret, og at derfor det skadevoldende skibs ret, eller flagets ret bør anvendes.***

Ordre public

213

Eos-sagen

Se ovenfor nr. 196.

214

Retsplejeloven § 223 a

Se særudgave af retsplejeloven.

215

Nordisk domskonvention art. 12

Bkg. nr. 177 af 10. maj 1933

Se Juristens Lovsamling.

216

Bànskà a Hutni Spolecnost mod dr. Georg Heinrich Hahn

Se nedenfor nr. 275.

217

**Vereeniging voor den Effectenhandel te Amsterdam mod
Finansministeriet**

Se nedenfor nr. 284.

218

**Stefan Eismann mod A/S Københavns Bryggerier og Malterier
Hafnia, Hovedintervenient: Dresdner Bank, litis denunciatus:
Firma Ludwig Eismann, Nürnberg**

ØSTRE LANDSRET
U. f. R. 1939. 919

Den 8. Februar 1938 fakturerede Firmaet Ludwig Eismann, Nürnberg, af hvilket Købmand Stefan Eismann, nu boende: rue de la Loi 155, Bruxelles, var eneste Indehaver, til Aktieselskabet Københavns Bryggerier og Malterier Hafnia et Parti Humle. Købesummen androg 6192 Kr. 38 Øre at betale i czek. Kroner rentefri i 3 Maaneder og derefter at forrente med 5 pCt. p. a. Den 22. s. M. faktureredes paa tilsvarende Maade et andet Parti Humle til Hafnia til en Købesum af Kr. 1112,40.

Ved Skrivelse af 28. Marts 1938 meddelte Stefan Eismann, Hafnia, at der forestod en Nyorganisation af Firmaet Ludwig Eismann, at samtlige meddelte Prokuraer under denne Dag var tilbagekaldt, at gyldig Underskrift for Firmaet herefter alene kunde meddeles af dettes eneste Indehaver Stefan Eismann, og at Betalingen af Firmaets Tilgodehavende hos Hafnia skulde ske til en Konto i Banque Belge & Coloniale, Bruxelles, med mindre anden Instruktion senere maatte følge. Ved Skrivelse af 8. April s. A., skrevet paa Firmaet Ludwig Eismanns Brevpapir og som Underskrift forsynet med Firmastempel og tvende ulæselige Underskrifter, meddeltes det Hafnia, at Firmaets Tilgodehavende udelukkende maatte betales til Firmaets Adresse i Nürnberg, og at anden Disposition fra Hr. Stefan Eismann ikke maatte udføres. Som Motivering herfor anførtes "Anweisung hiesiger Amtsstellen". Hafnia, der først den 30. April 1938 havde modtaget Skrivelsen af 8. April, modtog senere en Skrivelse af 17. Maj, bilagt Udskrift af Handelsregisteret i Nürnberg, hvorved en Købmand Friedrich Högner som "Treuhänder" for Firmaet Ludwig Eismann meddelte, at Stefan Eismann og Hustru "durch Anordnung der Devisenstelle von 13. April 1938 das Verfügungsrecht entzogen und dieselben sind daher nicht berechtigt meine Forderung von d. Kr. 7304,78 zu kassieren. Einzig und allein inkassoberechtigt ist der amtlich bestellte Treuhänder, Herr Diplom-Kaufmann Friedrich Högner." Af Udskriften af Handelsregistret fremgik, at det ifølge nævnte Bestemmelse, der kaldes "Sicherungsanordnung der Devisenstelle", var Indehaveren af Firmaet Ludwig Eismann, Herr Stefan Eismann, forbudt at disponere over hans i Ind- eller Udlandet værende Formue og at Retten til Firmaets Forretningsførelse var ham unddraget. Under disse Omstændigheder har Hafnia, der erkender at være de paaklagede Beløb med Renter skyldig, ment at maatte fordre en retslig Afgørelse af, om Beløbet skal udbetales Stefan Eismann som eneste Indehaver af Firmaet Ludwig Eismann eller den af "Devisenstelle" indsatte "Treuhänder".

Købmand Stefan Eismann har derfor anlagt nærværende Sag mod Aktieselskabet Københavns Bryggerier og Malterier Hafnia som Sagsøgte og paastaet Sagsøgte tilpligtet at betale Sagsøgeren Modværdien i fri Valuta af Kr. 7304,78

med Renter 5 pCt. p. a. af Kr. 6192,38 fra 8. Maj 1938 og af yderligere Kr. 1112,40 fra 22. Maj 1938, til Betaling sker.

Sagsøgte har paastaet sig frifundet mod Betaling af det paastaaede Beløb til den, der ifølge Rettens Afgørelse er rette Fordringshaver, dog uden Sagsomkostninger.

Sagsøgte har denuncieret lis for Firmaet Ludwig Eismann, Nürnberg, hvorefter Dresdner Bank, Filiale Nürnberg, er indtraaet som Hovedintervenient i Sagen og har paastaet sig — subsidiært Firmaet Ludwig Eismann, Nürnberg, ved dets Treuhänder Diplom-Købmand Friedrich Högner — kendt berettiget til Modværdien i fri Valuta af det af Sagsøgte som skyldigt anerkendte Beløb.

Saa vel Sagsøgeren som Hovedintervenienten har erklæret sig enig i, at Sagsøgte ikke bør betale Sagsomkostninger.

Hovedintervenienten har til Begrundelse af sin Paastand bl. a. anført følgende:

I Januar 1938 begav Sagsøgeren sig til Udlandet, og da de paagældende tyske Devisemyndigheder — særlig efter at Sagsøgeren uden Tilladelse fra disse i Amsterdam havde indkasseret et Tilgodehavende paa £ 1159—5—10, fik den Opfattelse, at det var Sagsøgerens Hensigt at tage fast Ophold i Udlandet og i Strid med de tyske Valutabestemmelser indkassere sit Firmas meget betydelige Tilgodehavender i forskellige Lande udenfor Tyskland, udfærdigede Præsidenten for "Devisenstelle" i Nürnberg den omtalte saakaldte Sicherungsanordnung. "Der Treuhänder" Købmand Högner beskikkedes derhos den 16. August s. A. til "Abwesenheitspflger" for Sagsøgeren, og under 26. s. M. overdrog Högner i denne sin Egenskab til delvis Dækning af Hovedintervenientens forfaldne Tilgodehavende hos Firmaet Ludwig Eismann, stort 25.720,30 Rm. med Renter og Provision, den i nærværende Sag omhandlede Fordring paa Sagsøgte til Hovedintervenienten, der saaledes er berettiget til at erholde Fordringen tilkendt.

I denne Forbindelse har Hovedintervenienten vel erkendt, at Sagsøgeren havde stillet i og for sig fyldestgørende Sikkerhed for Hovedintervenientens Tilgodehavende hos hans Firma, bestaaende af Værdipapirer og Panteret i en fast Ejendom i Nürnberg, men dels anført, at visse Formaliteter savnedes, forsaavidt angik sidstnævnte, dels oplyst, at de paagældende tyske Myndigheder, hvis Samtykke paa Grund af Sagsøgerens Overtrædelse af de tyske Deviseforskrifter udkrævedes, forinden Fyldestgørelse kunde søges i de til Sikkerhed stillede Værdier, ikke trods Hovedintervenientens Begæring havde meddelt en saadan Tilladelse.

Sagsøgeren har bestridt, at Dresdner Banks Fordring er forfalden, og gjort gældende, at selv om den af Hovedintervenienten paaberaabte "Sicherungsanordnung" maatte være lovlig efter tysk Ret, vilde denne Bestemmelse, der er af politimæssig og politisk Natur kun kunne have Gyldighed indenfor Tysklands Grænser, ligesom det er i Strid med danske Retsgrundsætninger at berøve Sagsøgeren Raadigheden over dennes hele Formue i Ind- og Udland som Følge af en Valutaforsøelse som den i Anordningen beskrevne.

Endelig har Sagsøgeren hævdet, at Overdragelse af Sagsøgerens heromhandlede Tilgodehavende til Hovedintervenienten, foretaget uden Sagsøgerens Sam-

tykke ved en for denne beskikket Værge, ligeledes vilde være i Strid med danske Retsgrundsætninger, idet Overdragelsen er sket til Varetagelse af tyske Deviserinteresser og til Skade for Sagsøgeren; en saadan Overdragelse vilde aldrig kunne falde inden for en dansk Værges Virksomhed, idet en Værge ifølge Lov Nr. 277 af 30. Juni 1922 § 53 skal varetage dens Interesser, for hvem han er beskikket, "med Omhu og efter bedste Evne."

Efter det oplyste maa det antages, at Sagsøgeren har haft bekendt Adresse udenfor Tyskland, saaledes at Værgen til enhver Tid har kunnet sætte sig i Forbindelse med ham.

Idet der findes at maatte gives Sagsøgeren Medhold i, at en Værges Beføjelse efter dansk Retsopfattelse ikke kan omfatte Dispositioner, der ifølge deres Natur aabenbart er i Strid med dens Interesser, for hvem Værgemaalet er oprettet, og da den til Hovedintervenienten skete Overdragelse af den omprocederede Fordring skønnes at være en saadan Disposition, findes Sagsøgeren allerede af disse Grunde i sin Egenskab af Eneindehaver af Firmaet Ludwig Eismann berettiget til Udbetaling af det omprocederede Beløb Kr. 7304,78 med Renter som paastaet; derimod kan Retten ikke paa det foreliggende Grundlag tage Stilling til Paastanden om, at Modværdien af Beløbet stilles til Raadighed i fri Valuta.***

219

S. Bondy mod Edv. Poulsen

HØJESTERET

U. f. R. 1917. 429, jfr. 1915. 1003

Landslover- samt Hof- og Stadsrettens dom:

Ved Skrivelse af 26 Juni f. A. stadfæstede Indstævnte, Direktør Edv. Poulsen af Aarhus, at han af Citanten, Købmand S. Bondy af Hamborg, havde købt 10,000 kilo Kobber til Levering i Hamborg pr. Maj Termin 1915 til en Pris af Mk. 123½ pr. 100 kg foruden 2 % og Telegram- samt Stempelafgift. Ifølge Skrivelsen skulde Forretningens Afvikling ske gennem Sælgeren senest den 25 April 1915, men Køberen havde Ret til ogsaa forinden at forlange Afvikling. Yderligere var det i Skrivelsen udtalt, at hvis der indtraadte Prisnedgang inden Forretningens Afvikling, forpligtede Indstævnte sig til paa Anfordring at indbetale Forskellen mellem den noterede lavere Pris og ovennævnte Købepris.

Da den europæiske Krig udbrød omkring den 1 August f. A., maatte de fleste Børser lukke, og da det herved blev umuliggjort at afvikle Børsterminsforretninger, blev det ved tysk Rigslov af 4 August f. A. bl. a. fastsat, at Forbundsraadet kunne anordne, at visse Børsterminsforretninger ved Anordningens Ikrafttræden skulde anses, som om en Kontrahent ifølge en ham tilkommende Ret var traadt tilbage, hvorefter der skulde finde en Likvidation Sted til en af vedkommende Statscentralmyndighed fastsat Pris. I Henhold til denne Lov blev det af Forbundsraadet under 24 August f. A. anordnet, at denne Regel skulle gælde bl. a. for Børsterminsforretninger i Kobber, der var afsluttede før den 1 August f. A.,

og som først skulde opfyldes efter den 4 s. M., hvorhos Forfaldstiden for de ved Likvidationen opstaaede Fordringer for de Kontrakter, ved hvilke det var aftalt, at Levering skulde finde Sted senere end den 31 Oktober f. A., fastsattes til den 30 November s. A., idet der da skulde fradrages en Mellemrente af 6 % p. a. fra sidstnævnte Dag i den aftalte Leveringsmaaned. Endelig blev det under 26 August f. A. af Senatsforsamlingen i Hamborg fastsat, at Likvidationsprisen for Børsforretninger i Kobber pr. 1915 skulde andrage 119½ Mark for 100 kg.

I Overensstemmelse med disse Bestemmelser har Citanten derefter opgjort sit Mellemværende med Indstævnte, og da Opgørelsen udviser en Saldo i Citantens Favør af 660 Mk. 20 Pf., har han under denne ved nærværende Ret som vedtaget Værneting behandlede Sag paastaet Indstævnte tilpligtet at betale ham bemeldte Beløb tilligemed Renter deraf 5 % p. a. fra Forligsklagens Dato, den 2 December f. A., indtil Betaling sker, og Sagens Omkostninger skadesløst.

Indstævnte har paastaet sig frifundet med Tillæg af Sagens Omkostninger.

Forsaavidt Indstævnte til Støtte herfor har henvist til, at den mellem Parterne afsluttede Kontrakt om Købet af det ovennævnte Parti Kobber ikke indeholder nogen Henviisning til Reglerne paa Hamborgs Børs, maa der efter det Foreliggende gaas ud fra, at Indstævnte med Hensyn til den afsluttede Handel er indgaaet paa at tage den paa bemeldte Børs officielt noterede Salgspris for Kobber til Rettesnor saavel med Hensyn til den i Kontrakten omtalte, inden Forretningens Afvikling indtrædende Prisnedgang som med Hensyn til den Pris, som paa Tidspunktet for Forretningens endelige Afvikling vilde være at lægge til Grund ved Opgørelsen af Parternes Mellemværende i Tilfælde af, at Levering in natura ikke maatte finde Sted.

Mod Indstævntes Benægtelse har Citanten derimod ikke godtgjort, at Indstævnte iøvrigt er indgaaet paa at underkaste sig de for Hamborger Børsforretninger gældende Bestemmelser, og idet Indstævnte herefter navnlig ikke findes at have været forpligtet til at afvikle tidligere eller anderledes end i Kontrakten, der maa anses at hjemle ham Ret til Levering in natura, stipuleret, vil der ikke kunne gives Citanten Medhold i, at der paahviler Indstævnte Forpligtelse til at betale ham det indbetalte Beløb. Indstævntes Paastand vil herefter være at tage til Følge, saaledes at Sagens Omkostninger bestemmes til 60 Kr. — —

Højesterets dom:

Selv om der gås ud fra, at indstævnte med Hensyn til den i den indankede dom omtalte kontrakt er underkastet de for Hamborger Børsforretninger gældende bestemmelser, og selv om de i dommen omtalte, af de tyske myndigheder givne forskrifter overhovedet omfatter en kontrakt af sådan art som den foreliggende, kan i hvert fald indstævnte ikke være pligtig at betale noget beløb efter en afregning, der er bygget på en af den tyske lovgivning af krigshensyn hjemlet vilkårlig indgriben i et af kontraktens væsentlige vilkår. Som følge heraf vil dommen efter indstævntes påstand være at stadfæste.***

220

M mod H

KØBENHAVNS BYRET
Juristens Domsamling 1945. 271

Under denne Sag har Sagsøgeren M, der den 3. Januar 1940 for Københavns Magistrat har indgaaet Ægteskab med Sagsøgte Fru H, principalt nedlagt Paastand paa, at den af Retten i Juarez i Mexico den 5. Juni 1941 afsagte Dom, hvorefter det mellem Parterne bestaaende Ægteskab opløses, anerkendes som havende Gyldighed her i Landet.***

Sagsøgeren har forklaret, at han og Sagsøgte i Slutningen af Januar 1940 som Turister rejste til Argentina, hvortil de havde faaet Indrejsetilladelse. Ved Danmarks Besættelse den 9. April 1940 blev Parterne afskaaret fra at vende tilbage til Danmark, og de erhvervede nu Opholdstilladelse i Argentina, hvor Sagsøgeren ernærede sig som Huslærer. Allerede i Februar 1940 var Sagsøgte Sagsøgeren utro med en Argentiner, som Parterne kendte fra Legationen i København, hvor Sagsøgeren havde været ansat. Sagsøgte forlod i Slutningen af 1940 eller Begyndelsen af 1941 Sagsøgeren, og Parterne blev da enige om at søge Skilsmisse, da Sagsøgte tænkte paa at gifte sig med en Argentiner. Da det ikke var muligt at opnaa Skilsmisse efter argentinsk Ret, afgav Parterne efter deres argentinske Sagførers Raad en pro forma Erklæring overfor en Notar i Buenos Aires om, at de havde taget Bopæl i Mexico og indgav gennem dertil bemyndigede meksikanske Sagførere et fælles Andragende om Dom til Skilsmisse, hvilket ogsaa opnaaedes ved en den 5. Juni 1941 i Mexico afsagt Dom. Sagsøgeren har ikke efter Dommens Afsigelse haft nogen Forbindelse med Sagsøgte, og han forlod i Slutningen af 1941 Argentina og rejste til England, hvor han siden har opholdt sig, indtil han efter Danmarks Befrielse er vendt tilbage hertil.

Det er oplyst, at en herboende Slægtning af Sagsøgte i 1943 har modtaget et Brev fra hende, der da endnu opholdt sig i Argentina, og som meddelte, at hun agtede at gifte sig igen. En anden af Sagsøgte's Slægtninge har haft Brev fra hende i 1944, i hvilket hun oplyste, at hun nu havde til Hensigt at indgaa Ægteskab med en Person fra Uruguay.***

Det maa efter det foreliggende antages, at Sagens Parter aldrig har boet eller opholdt sig i Mexico, og at de ikke har været meksikanske Statsborgere eller haft nogensomhelst anden Tilknytning til Forbundsstaten Mexico.

Som Sagen foreligger oplyst, maa det antages, at den meksikanske Domstol efter dansk Rets Principper har savnet den fornødne Kompetence til at antage sig Sagen, og at Dommen ogsaa iøvrigt hviler paa et Grundlag, der i saa høj Grad afviger fra dansk Lovgivnings Grundsætninger, at der ikke vil kunne tillægges den Gyldighed i Danmark, og Sagsøgerens principale Paastand vil derfor ikke kunne tages til Følge.***

221

Haagerkonvention 1951 til regulering af konflikter mellem den nationale lov og domicilloven. Art. 6

Se nedenfor nr. 227.

222

Haagerkonvention 1956 angående den på underholdsforpligtelser overfor børn anvendelige lov. Art. 4

Se nedenfor nr. 256.

223

Srini Vasan v. Srini Vasan

Se nedenfor nr. 245.

Renvoi

224

Dina Soldath mod Emilie Topp m. fl.

Se nedenfor nr. 265.

225

Eos-sagen

Se ovenfor nr. 196.

226

Veksellov § 79 stk. 1, 2. pkt.

Nr. 68 af 23. marts 1932

Se Juristens Lovsamling.

227

Haagerkonvention 1951 til regulering af konflikter mellem den nationale lov og domicilloven

Art. 1. Lorsque l'Etat, où la personne intéressée est domiciliée, prescrit l'application de la loi nationale, mais que l'Etat, dont cette personne est ressortissante, prescrit l'application de la loi du domicile, tout Etat contractant appliquera les dispositions du droit interne de la loi du domicile.

Art. 2. Lorsque l'Etat, où la personne intéressée est domiciliée, et l'Etat, dont cette personne est ressortissante, prescrivent tout les deux l'application de la loi du domicile, tout Etat contractant appliquera les dispositions du droit interne de la loi du domicile.

Art. 3. Lorsque l'Etat, où la personne intéressée est domiciliée, et l'Etat, dont cette personne est ressortissante, prescrivent tous les deux l'application de la loi nationale, tout Etat contractant appliquera les dispositions du droit interne de la loi nationale.

Art. 4. Aucun Etat contractant ne s'oblige à appliquer les règles édictées aux articles précédents, lorsque ses règles de droit international privé ne prescrivent l'application, au cas donné, ni de la loi du domicile, ni de la loi nationale.

Art. 5. Le domicile, au sens de la présente Convention, est le lieu où une personne réside habituellement, à moins qu'il ne dépende de celui d'une autre personne ou du siège d'une autorité.

Art. 6. Dans chacun des Etats contractants, l'application de la loi, déterminée par la présente Convention, peut être écartée pour un motif d'ordre public.

Domicil

228

Poul Erik Bentzen mod Emmy Karla Bentzen

KØBENHAVNS BYRET

U. f. R. 1959. 255

***Forud for ægteskabet, der blev indgået i Rom, boede sagsøgeren i New York, medens sagsøgte boede i den hende tilhørende lejlighed Kastelsvej 28, København. Efter vielsen i Rom rejste sagsøgte tilbage til København, hvor hun forblev, indtil hun omkring nytår 1948 sluttede sig til sagsøgeren i Arabien, hvor han efter vielsen i juni 1947 havde tiltrådt en stilling som læge. Fra eftersommeren 1948 til omkring nytår 1949 opholdt sagsøgte sig påny i København, heraf ca. 3 uger i efteråret 1948 sammen med sagsøgeren, der var kommet hertil på ferie. Omkring nytår 1949 rejste sagsøgte tilbage til sagsøgeren i Arabien, hvor parterne herefter opholdt sig, indtil sagsøgeren i oktober—november 1949 fratrådte sin derværende stilling. Fra Arabien rejste begge parter til København, hvor de boede sammen indtil februar—marts 1950, da sagsøgeren tog videre til New York. Sagsøgte forblev i København og sluttede sig først til sagsøgeren i juni 1950 i New York, hvor han da havde fået en stilling som hospitalslæge. I tiden fra januar 1951, da sagsøgeren fratrådte sin stilling i New York, til august samme år opholdt begge parter sig herefter påny i København. I august—september 1951 tiltrådte sagsøgeren en ny hospitalslægestilling i New York, som han havde indtil efteråret 1952. I denne periode boede parterne sammen i New York bortset fra 3—4 måneder i begyndelsen af 1952, hvor sagsøgte påny opholdt sig i København. I september 1952 overtog sagsøgeren en stilling som læge i Thule, Grønland, medens sagsøgte forblev i New York. Da sagsøgeren i maj 1953 fratrådte stillingen i Thule, fulgtes han med sagsøgte fra New York til København, hvor de herefter opholdt sig sammen indtil august 1953. I perioden fra september 1953 til omkring september 1955 opholdt parterne sig sammen i Afrika (Guldkysten), hvor sagsøgeren var chefkirurg på et hospital. Sagsøgte var dog på ferie i København i formentlig ca. 3 måneder i efteråret 1954. Efter at sagsøgeren i september 1955 var fratrådt stillingen i Afrika, rejste parterne til Danmark, men gjorde undervejs ophold i Spanien. Fra november 1955 til april 1956 boede de herefter påny sammen i København. I april 1956 tog parterne til New York, hvor sagsøgeren ville søge sig en lægestilling. Afbrudt af et kortere ophold på De vestindiske Øer opholdt parterne sig herefter i New York indtil august 1956, da sagsøgeren tiltrådte en lægestilling ved en amerikansk base i Keflavik, Island. En måneds tid senere kom sagsøgte fra New York til Island, hvor de herefter boede sammen indtil foråret 1957, da sagsøgeren fratrådte stil-

lingen i Island. I maj 1957 tog parterne til København, hvor de agtede at opholde sig en kortere tid, idet det var meningen at rejse videre til Libanon, hvor sagsøgeren muligvis ville søge en lægestilling, og derfra eventuelt til New York.

Under parternes fælles ophold i København, der må antages at have været ca. 1 måned, bestemte sagsøgeren sig til at søge at opnå separation fra sagsøgte på grund af de uoverensstemmelser, der efter hans opfattelse var opstået mellem dem i de senere år. De forhandlinger, der i den anledning blev optaget mellem parterne og deres sagførere, førte imidlertid ikke til noget resultat. Samlivet blev derefter ophævet og har ikke senere været genoptaget.

I tiden fra samlivsophævelsen til dato har sagsøgeren opholdt sig her i landet med det formål at søge nærværende ægteskabssag gennemført. Det er hans tanke at vende tilbage til U. S. A., hvor han har sin formue anbragt, og hvor han er skatteansat, så snart sagen er afgjort.

Sagsøgte har efter det oplyste i tiden efter samlivsophævelsen opholdt sig periodevis i Danmark, Sverige, Tyskland og U. S. A. Hun bor nu i New York, hvor hun har en lejlighed på 1 værelse med badeværelse og køkken. Det er uoplyst, hvornår hun har erhvervet denne lejlighed, men hendes fuldmægtig under nærværende sag har udtalt, at han først i slutningen af maj 1958 har fået meddelelse om adressen på lejligheden. Indtil dette tidspunkt skrev han til hende under en "kontaktadresse".

Af parternes forklaringer fremgår endvidere, at lejemålet vedrørende sagsøgtes lejlighed på Kastelsvej i København har været opretholdt under hele ægteskabet, og at den pågældende lejlighed er den eneste, som de konstant har haft til disposition. Under deres ophold i U. S. A. har de boet på hotel eller på det hospital, hvor sagsøgeren havde ansættelse, og en enkelt gang nogle måneder i 1952 i en fremlejet lejlighed i New York. Indtil 1953 var lejligheden på Kastelsvej ikke fremlejet. Fra september 1953 var den fremlejet i en periode svarende til sagsøgerens ansættelse i Afrika. Siden april 1956 har den været fremlejet med et opsigelsesvarsel på 6 måneder til en 1. april eller 1. oktober. Under lejemålet, hvori er indbefattet parternes møbler, har det ene af lejlighedens 3 værelser konstant været til parternes disposition og har blandt andet været benyttet til opbevaring af den del af deres klæder og personlige ejendele, som de ikke kunne medbringe under deres ophold andetsteds. Under de ophold, som parterne under deres ægteskab har haft i Danmark hver for sig eller sammen, har de boet i lejligheden på Kastelsvej med undtagelse af den sidste periode i maj—juni 1957, hvor de først boede hos noget familie til sagsøgte i København og derefter på hotel.

Af sagsøgtes forklaring fremgår yderligere, at det er hendes hensigt at forblive i U. S. A., hvor hun betragter sig som hjemmehørende. Hun har på grundlag af et immigrationsvisum af 18. november 1946 været "permanent resident" i U. S. A. og skattepligtig hertil siden 1946. Hun har i løbet af årene siden ægteskabets indgåelse to gange søgt om amerikansk statsborgerret, men har endnu ikke opnået det, fordi hun hver gang er fulgt med sagsøgeren ud af landet, inden de fornødne afhøringer havde fundet sted.

Specielt med hensyn til spørgsmålet om sagsøgtes bopæl og opholdssted i tiden fra samlivets ophævelse i juni 1957 til sagens anlæg den 1. februar 1958 har

sagsøgeren forklaret, at han med sikkerhed kan huske, at han har set sagsøgte på gaden i København to gange i efteråret 1957. Han har endvidere hørt, at hun har besøgt nogle fælles venner i Asserbo i juni 1957. Endelig har han set hende på gaden uden for Sølvgade 20, København, hvor nogle andre fælles venner bor, den 10. eller 12. februar 1958; han underrettede straks sin sagfører herom.

Det fremgår af en under sagen fremlagt attest fra Københavns folkeregister, at sagsøgte den 3. juni 1957 har meldt sig til U. S. A., men påny tilmeldt sig den 24. juni 1957. Den 4. august 1957 har hun meldt sig til Sverige (U. S. A.) og har ikke påny tilmeldt sig.

Sagsøgeren har *** anført, at sagsøgte efter de i sagen foreliggende oplysninger om hendes og parternes bopæls- og opholdsforhold til stadighed under ægteskabet har bevaret domicil i Danmark. Han har herved særlig henvist til, at parternes eneste faste tilholdssted i de forløbne år har været sagsøgte lejlighed på Kastelsvej i København. Dette forhold var ikke ændret ved sagens anlæg den 1. februar 1958, idet sagsøgte også på dette tidspunkt var indehaver af den pågældende lejlighed og fortsat opholdt sig her i landet uden at have taget bopæl andetsteds.***

Sagsøgte har *** anført, at hun definitivt opgav sin bopæl her i landet, da hun omkring nytår 1948 rejste til Arabien for at slutte sig til sagsøgeren og skabe et fælles hjem sammen med ham. Alle senere ophold i Danmark har kun været midlertidige ophold, der ikke kan begrunde domicilforandring tilbage til Danmark for hende, og det må iøvrigt følge af de almindelige regler, at hun siden januar 1948 har haft samme domicil som sagsøgeren, der aldrig har haft bopæl i Danmark. Hendes domicil ved sagens anlæg den 1. februar 1958 var derfor i U. S. A., hvor hun nu bor og har status som "permanent resident", og hvortil hun har været skattepligtig siden 1946. Hertil kommer, at lejligheden på Kastelsvej reelt ikke har været til disposition for parterne og ikke har været benyttet af dem siden april 1956.***

Retten må *** efter de om sagsøgte forhold efter ægteskabets indgåelse foreliggende oplysninger anse det for godtgjort, at hun ikke på noget tidspunkt under samlivets beståen har erhvervet domicil i noget andet land end Danmark, og at hun i denne periode konstant har bevaret bopæl her i landet. Retten har herved lagt vægt på, at sagsøgte forblev i Danmark i ca. $\frac{1}{2}$ år efter ægteskabets indgåelse, at intet af de ophold, som hun og sagsøgeren derefter har haft uden for Danmark, efter deres tidsbestemte karakter i sig selv efter de almindelige regler er tilstrækkeligt til at begrunde domicilforandring for sagsøgte fra hendes hjemland til et fremmed land, at sagsøgte under hele ægteskabet har bevaret den i sagen omhandlede lejlighed i København, at hun har opholdt sig her i landet og boet i lejligheden i ikke helt kortvarige perioder inden for hvert enkelt kalenderår siden ægteskabets indgåelse og sammenlagt i en ikke uvæsentlig del af parternes samlivsperiode, at parterne intet andet sted, heller ikke i sagsøgerens hjemland U. S. A., konstant har haft en lejlighed til deres disposition, og at sagsøgte stadig har bevaret sin danske statsborgerret. Overfor disse omstændigheder kan det efter rettens skøn ikke tillægges afgørende betydning, at sagsøgte nu forklarer, at opholdene i Danmark kun var af midlertidig karakter, og

at hun føler sig som hjemmehørende i U. S. A., hvor hun siden 1946 har været anerkendt som "permanent resident".

Retten må endvidere anse det for godtgjort, at sagsøgte heller ikke i perioden fra samlivets ophævelse i juni 1957 til sagens anlæg den 1. februar 1958 har opgivet sin bopæl i Danmark. Retten har ved afgørelsen af dette spørgsmål lagt til grund, at sagsøgte, der stadig er dansk statsborger og stadig er indehaver af lejligheden i København, i den pågældende periode har opholdt sig skiftevis i Danmark, Sverige, Tyskland og U. S. A., at hun i alt fald opholdt sig her i landet ved juletid 1957 (det vil sige ca. 1 måned før sagens anlæg) og omkring den 10. februar 1958 (det vil sige ca. 10 dage efter sagens anlæg), og at hendes nuværende lejlighed i New York først er erhvervet og taget i brug af hende efter den 1. februar 1958.

For så vidt angår *** sagsøgeren *** skal retten bemærke, at det efter den stedfundne bevisførelse må antages, at også sagsøgeren har haft bopæl i København i perioden umiddelbart forud for samlivsophævelsen i juni 1957, idet han på det pågældende tidspunkt ikke havde bopælstilknytning til noget andet land end Danmark, hvor han i de foregående år havde haft ophold i ikke helt korte perioder.***

229

Emmy Karla Bentzen mod Poul Erik Bentzens dødsbo m. fl.

Se nedenfor nr. 259.

230

**Ellen Elisabeth Kirsten Wittrup Fischer mod
Erik Fritz Emil Fischer**

HOJESTERET
U. E. R. 1948. 1120

Københavns Byrets Skifteafdeling

Vicekonsul Erik Frits Emil Fischer, der som Tjenestemand i Udenrigstjenesten fra den 1. Marts 1936 at regne blev beordret til at forrette Tjeneste som Sekretær ved det kongelige danske Generalkonsulat — senere Konsulat — i Sydney, New South Wales, Australien, med Titel af Vicekonsul, indgik den 10. Februar 1938 i den engelske St. Mark's Church i Sydney Ægteskab med Frøken Ellen Elisabeth Kirsten Wittrup Hansen, der da opholdt sig som Balletdanserinde i Australien, hvor hun havde lært Fischer at kende under en Tourmé i 1936. Dagen før Brylluppet — den 9. Februar 1938 — underskrev Ægtefællerne en Ægtepagt, hvori bestemmes, at der ikke skal finde Formuefællesskab Sted imellem dem, men at alt, hvad enhver af dem indbringer ved Ægteskabet og fremtidigt under Ægteskabet erhverver, det være sig ved Selverhverv, Arv, Gave

eller paa hvilkensomhelst anden Maade, skal være dens særlige Ejendom, som har indbragt eller erhvervet dette.

Ægtefællernes Samliv blev hævet paa Grund af Uoverensstemmelser i April 1943 og er ikke senere blevet genoptaget. Hustruen har nu taget Ophold her i Landet, medens Manden stadig er ansat ved Konsulatet i Sydney, og ved Københavns Byrets Dom af 16. Oktober 1947 er Ægteskabet blevet opløst i Medfør af § 55 i Lov Nr. 276 af 30. Juni 1922.

I en Skrivelse af 12. November 1947 har Hustruens Sagfører overfor nærværende Skifteret fremsat Begæring om Skifte af Ægtefællernes Bo, idet det gøres gældende, at den indgaaede Ægtepagt er ugyldig efter dansk Ret, og at der følgelig bestaar almindeligt Formuefællesskab mellem Ægtefællerne.

Til Støtte for Begæringen er fra Hustruens Side nærmere anført, at Formueforholdet mellem Ægtefællerne maa bedømmes efter dansk Ret, da Ægtemanden, uanset at Ægtepagt er oprettet, og Ægteskab er indgaaet i Australien, ved Ægteskabets Indgaaelse maa antages at have haft Domicil her i Landet, idet han udelukkende i Embeds Medfør har opholdt sig i Australien, til hvilken Stat han ikke har nogensomhelst anden Tilknytning end den, der følger af hans diplomatiske Hverv. Ifølge § 53, 1. Stk., i Lov Nr. 56 af 18. Marts 1925 kommer nævnte Lov derfor til Anvendelse paa den mellem Ægtefællerne oprettede Ægtepagt. Da Lovens § 37 stiller den Betingelse for Ægtepagts Gyldighed — ogsaa mellem Parterne indbyrdes — at den bliver tinglyst — ifølge samme Lovs § 49 enten ved Mandens personlige Værneting her i Riget, eller, hvis Manden intet personligt Værneting har her i Riget, ved Københavns Byret —, og da den mellem de heromhandlede Ægtefæller oprettede Ægtepagt ingensinde er tinglyst, er den ugyldig, hvorfor der efter dansk Rets almindelige Regler maa bestaa Formuefællesskab mellem Ægtefællerne.

Den for Ægtemanden mødende Sagfører har nedlagt Paastand paa, at Hustruens Begæring om Indledning af Skifte afvises, da der ifølge den oftnævnte Ægtepagt har været fuldstændigt Særeje mellem Ægtefællerne, og der saaledes intet Fællesbo er at skifte.

Det anføres fra Ægtemandens Side, at han, da han i 1936 blev Sekretær ved Generalkonsulatet i Sydney, opgav sin Bopæl i Danmark og tog Bopæl i Sydney. Der tilkommer ifølge § 57, 1. Stk., i den for Statens lønnede Tjenestemænd i Udenrigstjenesten gældende Instruks — Nr. 335 af 1. Juni 1921 — ikke konsulære Tjenestemænd Eksterritorialitetsret, og Udenrigsministeriet har i en Skrivelse af 27. Oktober 1947 udtalt, at der ikke i de gældende folkeretlige Regler findes nogen Hjemmel for, at Ægtemanden ikke var underkastet australsk Dommermyndighed, men at Afgørelsen heraf maa afhænge af de i Australien gældende nationale Regler. Da Ægtemanden altsaa ikke var eksteritorial, maa Spørgsmalet om Ægtepagts Gyldighed afgøres efter hans australske Domicils Love.***

Den Omstændighed, at Ægtemanden ikke har Eksterritorialitetsret i Australien, kan efter Rettens Mening ikke uden videre medføre, at hans Forhold vil være at bestemme efter australsk Ret. Afgørende maa være, om det efter den internationale Privatrets almindelige Regler maa siges, at han i 1938, da Ægteskabet blev indgaaet, havde opgivet sit danske Domicil og erhvervet Do-

micil i Australien. Da Ægtemandens Ophold i Australien, omend det bl. a. paa Grund af Krigsforholdene er blevet af lang Varighed, dog efter det oplyste maa antages udelukkende at være foranlediget ved hans Udsendelse i den danske Stats Tjeneste og saaledes af ren midlertidig Karakter, tør det ikke antages, at en saadan Domicilforandring har fundet Sted. At Ægtemanden selv i 1938 har ment, at hans Ægteskab vilde være at bedømme efter dansk Ret, fremgaar da ogsaa deraf, at han i det hele taget lod oprette Ægtepagt, skønt ægteskabeligt Formuefællesskab og Ægtepagt efter det foreliggende er ukendt i australsk Ret.

Da Retsforholdet mellem Ægtefællerne saaledes maa antages at skulle bedømmes efter dansk Ret, da Ægtepagten for at være gyldig, skulde være tinglyst ved Københavns Byret, jfr. Lov Nr. 56 af 18. Marts 1925 § 51, 1. Stk., og § 49, og da Tinglysning ikke har fundet sted, maa Ægtepagten anses for ugyldig saaledes at Lovens almindelige Regler om Formuefællesskab mellem Ægtefæller maa komme til Anvendelse.

Den af Ægtemanden nedlagte Paastand om Afvisning af Hustruens Begæring om offentlig Skifte af Ægtefællernes Fællesbo kan herefter ikke tages til Følge. — — —

Østre Landsrets Kendelse

***Under Hensyn til, at den Kærende, der ikke har eller har haft Eksterritorialitetsret, opgav sin Bopæl her i Landet, da han i 1936 rejste til Sydney for at overtage en Stilling som Sekretær ved det derværende danske Generalkonsulat, og til at han siden har boet der, maa det antages, at hans Ophold der har en saa fast Karakter, at han maa anses som havende Bopæl i Sydney.

Herefter, og indtil Indkærede atter maatte tage Bopæl i Danmark, er den den 9. Februar 1938 mellem Parterne oprettede Ægtepagt gyldig baade efter australsk og dansk Ret uden Tinglysning, og da der efter Ægtepagten intet Formuefællesskab er mellem Parterne, vil Begæringen om Skifte af Fællesboet være at afvise.***

Højesterets Kæremaalsudvalgs Kendelse.

Efter de foreliggende Oplysninger maa det antages, at Indkærede, der ikke har eller har haft Eksterritorialitetsret, den 9. Februar 1938 ikke længere havde Bopæl her i Landet, men havde Hjemsted i Sydney. Herefter, og idet Ægtepagten maa antages at være gyldig efter australsk Ret, har der ikke i Ægteskabet mellem Parterne været noget Formuefællesskab, og Landsrettens Kendelse vil derfor være at stadfæste.

232**Nordisk konvention om arv og dødsboskifte art. 1, stk. 1**

Se nedenfor nr. 270.

233**Statsskattelov**

Nr. 149 af 10. april 1922

§ 2. Skattepligten påhviler:

1. Enhver person, der er bosat her i landet . . .
2. enhver person, som, uden at opgive sin bopæl her i landet, tager midlertidigt ophold i udlandet . . .

234**Haagerkonvention 1951 til regulering af konflikter mellem den nationale lov og domicilloven. Art. 5**

Se ovenfor nr. 227.

235**Konvention af 28. september 1954 om statsløse personers retsstilling**

Bekg. nr. 54 af 7. juli 1960 L T C

Art. 12 nr. 1. En statsløs persons personalstatut skal bestemmes ved lovgivningen i det land, hvor han har sit hjemsted, eller, hvis han intet hjemsted har, ved lovgivningen i det land, hvor han er bosat.

236**Restatement of the Law of Conflict of Laws. 1934**

U. S. A.

§ 9. Domicil is the place with which a person has a settled connection for certain legal purposes, either because his home is there, or because that place is assigned to him by the law.

§ 13. A home is a dwelling place of a person, distinguished from other dwelling places of that person by the intimacy of the relation between the person and the place.

§ 14, (1) The domicile of origin is the domicile assigned to every child at its birth.

§ 15, (1) A domicile of choice is a domicile acquired, through the exercise of his own will, by a person who is legally capable of changing his domicile.

(2) To acquire a domicile of choice, a person must establish a dwelling place with the intention of making it his home.

(3) The fact of physical presence at a dwelling place and the intention to make it a home must concur; if they do so, even for a moment, the change of domicile takes place.

(4) A person can acquire a domicile of choice only in one of three ways:

(a) having no home, he acquires a home in a place other than his former domicile;

(b) having a home in one place, he gives it up as such and acquires a new home in another place;

(c) having two homes, he comes to regard the one of them not previously his domicile as his principal home.

§ 19. The intention required for the acquisition of a domicile of choice is an intention to make a home in fact, and not an intention to acquire a domicile.

§ 20. For the acquisition of a domicile of choice the intention to make a home must be an intention to make a home at the moment, not to make a home in the future.

Personretten

237

Gebrüder Wiener, Hamborg, mod J. J. Kappen

SØ- OG HANDELSRETTE

U. f. R. 1871. 734

Handelsfirmaet Gebrüder Wiener i Hamborg søger under nærværende Sag Indstævnte, Manufacturhandler J. J. Kappen, tilpligtet at betale for til Indstævnte til Brug i dennes Næringsvej solgte og leverede Varer i følge 2 af ham accepterede, af Sagsøgerne den 6 April 1866 trasserede, henholdsvis den 6 August og 6 October s. A. forfaldne Vexler, lydende hver paa Bcmk. 267, tilsammen i Rigsmønt 356 Rdl.

1/2 p. c. Provision og Courtage	1	—	4	Mk.	12	Sk.
Protetomkostninger	5	—	1	—	14	—
Portoudgifter	"	—	2	—	"	—

i Alt 363 Rdl. 2 Mk. 10 Sk.

med Vexlrenter heraf 1 p. c. maanedlig af Vexlernes Paalydende fra den 6 August og 6 October 1866 i de første 6 Maaneder og derefter 1/2 p. c. maanedlig, indtil Betaling sker, og Sagens Omkostninger skadesløst. Indstævnte har derimod paastaaet sig frifunden, fordi han, da Handelen blev indgaaet og Vexlerne accepterede, var mindreaarig, idet han efter en fremlagt Daabsattest er født den 21 Juli 1842.

Sagsøgerne have herimod indvendt, at Indstævnte efter de hamborgske Love, som formentlig maa komme til Anvendelse, da Handelen er indgaaet i Hamborg og da Betalingen er præsteret dels strax contant, dels ved Vexlernes Acceptering i Hamborg, var fuldmyndig. Men da en Persons Myndighed og hans deraf følgende Ret til at indgaa Retshandeler maa efter Forholdets Natur, jfr. ogsaa D. L. 1—23—12, bedømmes efter hans Hjemsteds Love, og det er in confesso, at Indstævntes Hjemsted, da han afsluttede Contracten i Hamborg, var Kjøbenhavn, og da det ikke skjønnes at kunne gjøre nogen Forandring heri, om endog Vexlerne, hvad Indstævnte iøvrigt har benægtet, ere accepterede i Hamborg, vil Indstævntes Frifindelsespaastand være at tage tilfølge, hvorimod Sagens Omkostninger efter Omstændighederne findes at burde ophæves.***

238

Sophus Mortensen mod Leif Bloch Schrøder

ØSTRE LANDSRET

U. f. R. 1923. 455

I Juni 1920 rejste den da 22aarige Ingeniør Leif Bloch Schrøder, der var forlovet med en Datter af Godsejer Sophus Mortensen, til Nordamerika for dér at søge at skabe sig en Stilling. I August s A rejste hans Forlovede over til ham, og straks efter hendes Ankomst indgik de Ægteskab. Ingeniør Schrøder havde Vanskelighed ved at skaffe Udkommet til sig og sin Hustru, og i Sommeren 1921 anmodede han sin Svigerfar, der allerede i det forløbne Aar flere Gange havde ydet Ægteparret pekuniær Bistand, om at forstrække ham med 1000 Dollars. Godsejer Mortensen sendte ogsaa Beløbet, og Ingeniør Schrøder udstedte i den Anledning saalydende Kvittering dateret Reading U S A, Juli 1921:

“Kære Svigerfader.

Jeg erklærer herved — at have laant 1000 Dollars af Dem og som skal tilbagebetales — August 1922.”

I August s A forlod Fru Schrøder sin Mand og rejste tilbage til Danmark. En Maanedstid senere kom Ingeniør Schrøder ogsaa til Danmark for at søge at bevæge sin Hustru til at vende tilbage til ham. Herpaa vilde hun imidlertid ikke indlade sig, og i November s A rejste Ingeniør Schrøder tilbage til Amerika, hvor han siden har opholdt sig. Ægteskabet er senere blevet opløst. Inden Ingeniør Schrøder igen forlod Landet, henstillede hans Svigerfader til ham at bringe deres Mellemværende angaaende det fornævnte Laan i Orden, hvilket han imidlertid vægrede sig ved under Henvisning til, at Laanet først var forfaldent til Udbetaling til August 1922.

Da Ingeniør Schrøder ikke senere lod høre fra sig, anlagde Godsejer Mortensen ved Stævning af 24 August 1922 nærværende Sag, hvorunder han paastaar sig tilkendt de 1000 Dollars à 6,20 eller 6200 Kr med Renter 5 pCt aarlig fra Stævningens Dato.***

Sagsøgte paastaar sig frifundet for Sagsøgerens Tiltale.***

Sagsøgte har imidlertid villet gøre gældende, at han, da Laanet blev stiftet, endnu ikke var fuldmyndig, idet han er født den 31 Juli 1897, og at han derfor, da hans Kurator*** hverken har givet Samtykke til Laanets Optagelse eller senere godkendt dette, ikke er pligtig at tilbagebetale det og saaledes maa frifindes.

Sagsøgte tidligere Hustru har som Vidne forklaret, at hun og hendes Mand i den første Tid efter Ægteskabets Indgaaelse opholdt sig forskellige Steder i Nordamerika, idet hendes Mand havde vanskeligt ved at faa noget at bestille, men at de fra Jul 1920 tog fast Bopæl i Reading i en lejet Lejlighed, hvor de boede indtil den 20 August 1921. Efter hendes Forklaring har det hele Tiden været hendes Mands Hensigt at forblive i Amerika — hvor han som nævnt ogsaa, bortset fra det kortvarige Ophold i Danmark i Efteraaret 1921, stadig har boet siden Juni 1920 — og han har ogsaa til hende udtalt, at han havde

foretaget Skridt til at blive amerikansk Statsborger. Med Hensyn til Laanet har hun derhos forklaret, at Sagsøgte rettede Henvendelse til hendes Fader desangaaende for at faa Kapital til Startning af en Forretning, og at han ved den Lejlighed udtalte, at han var myndig efter amerikansk Ret og derfor egentlig kunde forlange sin Formue udbetalt fra sin Kurator.

Efter det Oplyste findes Sagsøgte Ophold i Amerika at have haft en saa varig Karakter, at Spørgsmaalet om hans Myndighed til at paadrage sig den her omhandlede Forpligtelse maa afgøres efter de paa hans daværende Opholdssted gældende Regler. Og da han nu, efter hvad der er uomtvistet under Sagen, ifølge amerikansk Ret paa det paagældende Tidspunkt var fuldmyndig, vil han være at dømme til at betale det paastævnte Beløb med Renter som paastaaet.***

239

M. Hansen mod W. Sørensen

GJÆLDSKOMMISSIONEN

U. f. R. 1886. 49

[Sagsøgeren sagsøgte til betaling af et beløb for husleje. Dommen af 28. august 1885 udtaler:] Det er under sagen in confesso, at indstævnte er født den 31. maj 1860, og den af citanten påberåbte omstændighed, at indstævnte, der er født og tidligere har været bosat i Sverige, hvor han havde opnået fuldmyndighed, inden han bosatte sig her i landet, kan ikke medføre, at han også her i landet skulde anses for fuldmyndig, forinden han blev 25 år gammel, og da han nu er stævnet uden kurator, og der derfor også er mæglet forlig med ham alene, og da forligsmæglingen, som fandt sted den 17. april d. å., således ikke kan anses behørig, vil sagen ex officio være at afvise.

240

Veksellov § 79

Nr. 68 af 23. marts 1932

Se Juristens Lovsamling.

241

Lov om ægteskabets retsvirkninger § 53, stk. 1

Nr. 56 af 18. marts 1925

Se Juristens Lovsamling.

242

Myndighedsloven § 67

Nr. 277 af 30. juni 1922

Se Juristens Lovsamling.

243

**Nordisk konvention om ægteskab, adoption og værgemål,
art. 14-21**

Bekg. nr. 121 af 10. april 1954

Se Juristens Lovsamling.

Ægteskabs indgåelse og opløsning

244

Ingeborg Hussein-Zade Ibragimouff, født Pedersen, mod Sally Hussein-Zade Ibragimouff

Utrykt dom afsagt af Frederiksberg Birks 3. afd. i sag 182/1932 den 5. august 1932

Under denne Sag paastaar Sagsøgerinden, Fru Ingeborg Hussein-Zade Ibragimouff, født Pedersen, H. C. Ørstedsvej 46, principalt Sagsøgte, Dr. med. Sally Hussein-Zade Ibragimouff, Smallegade 10—12 dømt til at anerkende, at der ikke bestaar lovligt Ægteskab mellem hende og ham samt tilpligtet at udrede Underholdsbidrag til de af Parterne avlede 2 Børn, Leila Hussein-Zade Ibragimouff, født 21 Juli 1928, og Andrey Hussein-Zade Ibragimouff, født 9 September 1929.***

Sagsøgte paastaar Frifindelse, idet han protesterer mod, at der gives Dom som af Sagsøgerinden foran principalt paastaet. Han har til Retsbogen erkendt, at han er Fader til de 2 ovennævnte af Sagsøgerinden fødte Børn.

Det er dokumenteret for Retten, at Parterne under 29 December 1927 i Kirkesognet Torre S. Maria Provins Sondrio, Kommune Torre S. Maria under Como i Italien har indgaaet Ægteskab for Sognepræsten i Torre S. Maria, og der er Enighed mellem Parterne om, at de hverken før eller efter foranomtalte kirkelige Vielse har foretaget nogen borgerlig Ægteforening eller nogen Anmeldelse til de paagældende borgerlige Myndigheder i Italien. Sagsøgte er, efter hvad han har oplyst, persisk Statsborger, og Parterne har fra 1929 levet sammen her i Danmark.

Sagsøgerindens Sagfører rettede efter Dommerens Begæring under 25 Maj d. A. Henvendelse til Udenrigsministeriet om at foranledige oplyst fra kompetent italiensk Myndighed, hvilke Krav der efter den paa Vielsens Tidspunkt gældende italienske Lovgivning stillede med Hensyn til Indgaaelse af et ogsaa i borgerlig Henseende gyldigt Ægteskab, navnlig om den foreliggende kirkelige Vielse i Italien den 29 December 1927 har været fyldestgørende i saa Henseende eller ved en senere Lovgivning har faaet borgerlig Retskraft, uden at Parterne har foretaget yderligere dertil sigtende Skridt. Udenrigsministeriet svarede under 27^e Juni d. A. og fremsendte en Indberetning med 1 Bilag fra det kgl. Gesandtskab i Rom.*** Den med Gesandtskabets Skrivelse fulgte Erklæring fra Advokat Dr. A. Boschi-Hüber i Rom lyder i dansk Oversættelse saaledes:

“I Besvarelse af det kgl. Gesandtskabs Note af 4 ds. tillader jeg mig at meddele, at et Ægteskab, indgaaet i Italien af to Udlændinge i December 1927 udelukkende efter *den religiøse katolske Ritus ikke* — i Henhold til den *da*

gældende Lovgivning — kunde medføre nogen civilretlig Virkning: faktisk var, før de bekendte Overenskomster mellem Den Hellige Stol og den kgl. italienske Regering af 11 Februar 1929, kun den Form for Ægteskab, som blev indgaaet for Embedsmanden for "Stato civile italiano" (Det italienske Civilstands-kontor) anerkendt i Italien med juridisk Virkning. Til denne civile Ritus kunde vel tilsluttes Højtideligholdelse af Ægteskabet i Nærværelse af det paagældende Trossamfunds Præst, saaledes som det i Virkeligheden blev gjort af langt den største Del af de italienske katholske Statsborgere; men den religiøse Ritus var og forblev, ogsaa naar den fulgte efter den civile, i Virkeligheden ganske uafhængig af den anden, og i hvert Tilfælde kunde den alene ikke medføre nogen Virkning i Henseende til den civile Lovgivning.

Altsaa er det udelukket, efter de foran anførte Betragtninger, at det Ægteskab, hvorom Sagen drejer sig, og som blev indgaaet i Italien af udenlandske Statsborgere den 29 December 1927 udelukkende efter den religiøse Ritus, kan betragtes som medførende juridiske Virkninger, saaledes at det kan være gyldigt efter den italienske Civillovgivning.

Tilbage staar altsaa at undersøge, for at besvare det af Gesandtskabet mig forelagte Spørgsmaal, om det Ægteskab, der er indgaaet under de ovenfor anførte Forhold, senere har kunnet opnaa Gyldighed i Henhold til de nye Love, som er vedtaget efter de indgaaede Overenskomster mellem Den Hellige Stol og den italienske Regering. Som det vil være bekendt, er de Ægteskaber, som er indgaaet efter den katholske Ritus, efter denne nye Lovgivning blevet erklæret fuldt gyldige i enhver Henseende, forudsat at de bliver indført i Civilstandskontorets Registre. Og forsaavidt angaar de religiøse Ægteskaber, som er indgaaet før den nye Lovs Ikrafttræden, har den italienske Lovgiver ved Art. 2 i Overgangsbestemmelserne, som indeholdes i Loven af 27 Maj 1929 Nr. 847, fastslaaet, at Appelretten ved Sempel Beslutning, som tages af dens "Camera di Consiglio", kan *bestemme*, at en Overførsel ogsaa af saadanne Ægteskaber finder Sted, naar begge de to Parter i deres derom indgivne Ansøgning begærer det, og naar de to Parter paa det Tidspunkt, da Ægteskabet blev indgaaet, opfyldte Betingelserne for Ægteskabs Indgaaelse efter den italienske Civilkodeks. Naar saadan Overførsel er sket, træder de civile Virkninger af Ægteskabet i Kraft fra den Dag, paa hvilken Overførselen er sket.

Af Indholdet af den ovenfor omtalte Overgangsbestemmelse fremgaar altsaa klart, at de Ægteskaber, som er indgaaet efter den katholske Ritus forinden den nye Lovgivnings Ikrafttræden, ikke *ipso jure* i Kraft af denne nye Lovgivning har nogen civilretlig Virkning, *men at de kan opnaa dette*, saafremt Ægtefællerne anmoder den kompetente Appelret om Overførsel til Civilstandsregistrene af denne Vielsesakt, og saafremt Appelretten — efter at have forvirket sig om, at de Betingelser var til Stede paa det Tidspunkt Ægteskabet blev indgaaet, som da krævedes efter den civile Lovgivning for at foretage en saadan Akt — fælder en Afgørelse i Overensstemmelse med deres Anmodning.

Hvis det, i det Tilfælde, som interesserer det ærede Gesandtskab, ikke konstateres, at der er forelagt den kompetente Appelret nogen Anmodning i Overensstemmelse med de Regler, som ovenfor er fremstillet, *maa man følgende*

slutte, at det religiøse Ægteskab som i 1927 er afsluttet af de to Udlændinge, hvorom Talen er, *heller ikke i Dag* har nogen juridisk Gyldighed i Italien.”

Paa Rettens Foranledning er der endvidere tilvejebragt Genparter af Justitsministeriets Skrivelser af 25 Oktober 1913 til Udenrigsministeriet og 14 April 1923 til Overretssagfører Rudolf Sand, hvori Ministeriet som sin Anskuelse udtaler, at Ægteskab indgaaet i Italien under Forhold svarende til de foran beskrevne ikke efter dansk Ret kan anses for et gyldigt Ægteskab, da der ikke foreligger et efter italiensk Ret gyldigt Ægteskab.

Efter alt saaledes foreliggende finder Retten, at der fra Sagsøgerindens Side er ført fyldestgørende Bevis for, at der ikke kan antages at foreligge lovgyldigt Ægteskab mellem hende og Sagsøgte, og Retten vil derefter give Dom efter Sagsøgerindens principale Paastand, hvorved dog bemærkes, at Retten efter alt foreliggende finder det ufornuddent at paakende Spørgsmaalet om Sagsøgtes Pligt til at yde Underholdsbidrag til hans 2 ovennævnte Børn.***

245

Srini Vasan v. Srini Vasan

ENGLAND, HIGH COURT OF JUSTICE, PROBATE DIVISION
Law Reports [1946] P 67

On December 26, 1936, the petitioner, who was then a spinster domiciled in England, went through a form of marriage with the respondent at the Blackburn registry office. The respondent was a Hindu domiciled in India but temporarily resident in this country. The parties lived together in England until June, 1937. The respondent then returned to India without the petitioner, and ceased to communicate with her after January, 1938. At the time of the English ceremony the respondent was already married, having in March, 1933, been through a Hindu ceremony of marriage with a Hindu woman unknown to the petitioner, at Trivandrum, Travancore State, South India, and the Hindu marriage was still subsisting.***

Barnard J., after stating the facts, continued: I am satisfied, by the evidence of Dr. Nissim, an expert on the law of British India, that the Hindu marriage was a valid marriage and would be recognized as such by the courts of British India, and that, both parties to it being Hindus, their marriage is regulated by Hindu Law. That law permits polygamy. The respondent's Hindu marriage was therefore a potentially polygamous marriage. The question which I have to decide is whether this Hindu marriage, notwithstanding its polygamous character, is recognized by this court when exercising its matrimonial jurisdiction, invoked in this case. It would be strange if English law were to afford no recognition of polygamous marriages when one realizes that England is the centre of a great Empire, whose Mohammedan and Hindu subjects number many millions; and, as Mr. Beckett points out, in his admirable article on Polygamous Marriages in 48 Law Quarterly Review, at p. 345, "polygamous marriages are, of course, recognized as lawful and regulated by the law of many countries forming a part of His Majesty's Dominions, and which are governed

under laws depending ultimately upon statutes of the Parliament of the United Kingdom, and the Privy Council, exercising its appellate jurisdiction over the courts of these countries, has frequently recognized the legal validity of such marriages." None the less, the standard text books suggest that the only kind of marriage which English law recognizes is one which is essentially the voluntary union, for life, of one man with one woman, to the exclusion of all others. The Divorce Court, for obvious reasons, would not entertain a matrimonial cause for the purpose of granting relief or enforcing rights, in respect of a marriage which lacks the characteristics of monogamy; this was the decision of Lord Penzance in *Hyde v. Hyde* (1); but he was most careful to conclude his judgment with the following words: "All that is intended to be here decided is that as between each other they are not entitled to the remedies, the adjudication, or the relief of the matrimonial law of England."

There are, however, certain passages in the authorities, though only obiter dicta, which go far beyond this and support the text book view. I do not propose to refer to these passages, because I have little doubt that they are the dicta referred to by Lord Maugham L.C., in the course of his speech before the Committee of Privileges in the House of Lords in the *Sinha Peerage Claim* (1) on July 25, 1939. There Lord Maugham says: "On the other hand, it cannot, I think, be doubted now (notwithstanding some earlier dicta by eminent judges) that a Hindu marriage between persons domiciled in India is recognized in our courts, that the issue are regarded as legitimate, and that such issue can succeed to property in this country with a possible exception which will be referred to later"; and further in his speech he says: "Having regard to the domicile of the parties to the marriage at the date when it was solemnized, the marriage would properly be treated as valid in this country for all purposes, except it may be the inheritance of real estate before the Law of Property Act, 1925, or the devolution of entailed interests as equitable interests before or since that date, and some other exceptional cases." The parties referred to by Lord Maugham were the petitioner's parents, who were at all times domiciled in the Presidency of Bengal, British India, and whose marriage took place in Bengal according to the formalities prescribed by Hindu law and usages, and was therefore polygamous; and it was six years later, but before the birth of the petitioner and long before the date of the patent, that the petitioner's parents joined a religious sect, one of whose main tenets was monogamy, and thus, the petitioner's father not having married a second wife in the interval, converted a polygamous marriage into a monogamous one.

I have come to the conclusion that the text book view is wrong and, relying as I do on the above passages from Lord Maugham's speech, I ought to recognize this Hindu marriage as a valid marriage. To refuse recognition would mean that the respondent would be lawfully married to his Hindu wife in India, and to his English wife in England, but if he brought his Hindu wife to this country and lived with her here, he would be living in adultery with her. It would mean that if the respondent were to live with his Hindu wife in India for a part of the year and for the remainder of the year live with his English wife in England, he would be living with his lawful wife in each coun-

try. It would therefore mean that English law would be encouraging polygamy and not frowning on it. Again, a Hindu marriage is indissoluble; but, according to Mulla on Hindu Law, 9th ed., p. 513, a Hindu wife, deserted by her husband, can sue him for restitution of conjugal rights in the civil courts of British India. If, therefore, the respondent deserted both his Hindu wife and his English wife, he could be sued for restitution of conjugal rights by both wives, in the courts of their respective countries, and he might be ordered by those courts to return to two different wives in two different parts of the world. To deny recognition of a Hindu marriage for the purpose in hand would, in my opinion, be to fly in the face of common sense, good manners and the ordered system of tolerance on which the Empire is based; and, as I decide, to deny such recognition would be bad law. I, therefore, recognize as a fact the respondent's Hindu marriage, which was subsisting at the time he went through the ceremony of marriage with the petitioner, and I hold that this ceremony is a nullity and the petitioner is entitled to a decree nisi, with costs.

246

**Nordisk konvention om ægteskab, adoption og værgemål,
art. 1-2 og 7-10**

Bekg. nr. 121 af 10. april 1954

Se Juristens Lovsamling.

Ægteskabs retsvirkninger

247

Lov om ægteskabets retsvirkninger, § 53

Nr. 56 af 18. marts 1925

Se Juristens Lovsamling.

248

Gerhard Christoffersen mod Sonja Christoffersen

FREDERIKSBERG BIRK. (STADFÆSTET AF ØSTRE LANDSRET)
U. f. R. 1935. 1143

Tankejer Gerhard Christoffersen, Schneeklothsvej 11, Frederiksberg, har indgivet Begæring om Deling af Fællesboet mellem ham og hans Ægtefælle Fru Sonja Christoffersen, født Gnat, Maglekildevej 4, Frederiksberg, i Henhold til Lov om Ægteskabets Retsvirkninger § 38 Nr 3, idet han gør gældende, at Hustruen ulovlig er bortgaaet fra deres fælles Hjem.

Hustruen paastaar Sagen afvist, da der ikke mellem Ægtefællerne bestaar noget Fælleseje, men derimod fuldstændig Særeje.

Efter Parternes for Skifteretten afgivne Forklaring er der Enighed om, at de i 1923 rejste til Amerika, Manden i Maj og Hustruen i November, at de i 1927 indgik Ægteskab med hinanden og derefter tog Ophold i Illinois, hvor de først boede i en møbleret Lejlighed, men senere fik eget Hjem og Indbo, at Hustruen i 1926 og Manden i 1930 gjorde indledende Skridt til at blive amerikanske Stasborgere ved at indgive Ansøgning derom, men uden at forfølge Sagen, og endelig at de i 1933 tog tilbage til Danmark, hvor de boede sammen til Maj 1935, da Samlivet ophørte. Tillige er der Enighed om, at Boets Formue, hvoriblandt ikke findes fast Ejendom, er indført i Ægteskabet af Hustruen som Arv fra dennes Forældre.

Til Støtte for sin Paastand hævder Hustruen, at Forholdet mellem Parterne bør bedømmes efter den i Staten Illinois ved deres Ægteskabs Indgaaelse gældende Ret, idet Parterne maa anses for at have haft fast Ophold i denne Stat, og at der i Illinois bestaar legalt Særeje mellem Ægtefæller.

Manden gør gældende, at dansk Rets Regler om Formueforholdet mellem Ægtefællerne maa lægges til Grund ved Sagens Afgørelse, idet begge Parter er danske Statsborgere. Han bestrider, at de har haft til Hensigt at tage endeligt Ophold i Amerika, og hævder, at Indgivelsen af Ansøgningen om Statsborgerforholdet ikke kan anføres herimod, da en saadan Ansøgnings Indgivelse var nødvendig for og kun blev indgivet for at opnaa Arbejde i Amerika.

Under Sagens Behandling er fremskaffet Afskrifter af Parternes Andragende

om amerikansk Statsborgerforhold. I Hustruens Andragende indeholdes følgende Løfter:

"It is my bona fide intention to renounce forever all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty, and particularly to Christian X King of Denmark, of whom I am now a subject; — — — it is my intention in good faith to become a citizen of the United States of America and to permanently reside therein: So help me God. Sonja Gnatt."

og i Mandens: "my lawful entry for permanent residence in the United States was at "New York N Y under the name of Gerhardt Kristoffersen, on June 1, 1923" on the vessel S/S Majestic. I will, before being admitted to citizenship, renounce forever all allegiance and fidelity to any foreign prince, potentate, State, or sovereignty and particularly, by name, to the prince, potentate, state, or sovereignty of which I may be at the time of admission a citizen or subject; I am not an anarchist; I am not a polygamist nor a believer in the practice of polygamy; and it is my intention in good faith to become a citizen of the United States of America and to reside permanently therein; and I certify that the photograph affixed to the duplicate and triplicate hereof is a likeness of me: So help me God. Gerhardt Christoffersen."

Endvidere er indhentet Erklæringer fra det kgl danske Gesandtskab i Washington, hvoraf fremgaar, at der i Staten Illinois hersker legalt Særeje, forsaavidt angaar Løsøre i Modsætning til fast Ejendom.

Efter det fremkomne derunder navnlig Ægtefællernes Partsforklaringer og Indholdet af deres under Ed afgivne Erklæringer vedrørende deres eventuelle amerikanske Statsborgerforhold skønnes deres Ophold i Amerika at have været af en saadan Art, at de kan siges at have haft Domicil der, og amerikansk Rets Regler om Formueforholdet findes herefter at maatte lægges til Grund, idet den Omstændighed, at Ægtefællerne senere har taget Ophold i Danmark ikke kan bevirke, at dansk Rets Regler kommer til Anvendelse.

Da der i Staten Illinois hersker legalt Særeje mellem Ægtefæller, vil der være at give Hustruen Medhold i, at Bosondringsbegæringen afvises. — — —***

249

Ellen Elisabeth Kirsten Wittrup Fischer mod Erik Fritz Emil Fischer

Se ovenfor nr. 230.

250

Nordisk konvention om ægteskab, adoption og værgemål, art. 3-5

Bekg. nr. 121 af 10. april 1954

Se Juristens Lovsamling.

Børns retlige stilling

A. ÆGTE BØRN

251

Bagermester H. P. Sørensen som tilsynsværge for Ana Louisa Pedersen Kielmann mod Frederiksberg Birks skifteret m. fl.

Se ovenfor nr. 205.

252

F. mod M.

ØSTRE LANDSRET
U. f. R. 1949. 1049

Under nærværende sag har sagsøgeren F påstået sagsøgte, fru M, født M, dels på egne vegne, dels som moder og værge for — — — dømt til at anerkende, at det af sagsøgte den 17. august 1932 fødte barn, nævnte — — — ikke skal anses som sagsøgerens ægtefødte barn, og at sagsøgeren ikke er forpligtet til at betale underholdsbidrag til barnet.

Sagsøgte har påstået frifindelse.

Det fremgår af sagens oplysninger, at parterne, der begge fra fødslen var tyske statsborgere, og som indgik ægteskab i Tyskland i 1928, under en af sagsøgeren ved Preussische Landgericht, Berlin, anlagt sag opnåede skilsmisse ved dom af 23. november 1931, hvilken dom blev retskraftig den 10. januar 1932. Ved dommen blev det fastslået, at der indtil den seneste tid havde bestået et kærlighedsforhold mellem sagsøgte og en tredje person. Parterne, der havde levet adskilt siden sommeren 1931, genoptog dog samlivet, efter sagsøgerens påstand formentlig i slutningen af december 1931, ifølge sagsøgtes påstand dog allerede fra 17. oktober 1931. Den 17. august 1932 fødte sagsøgte det i sagen omhandlede barn, som ved den påbudte anmeldelse til vedkommende tyske myndighed af sagsøgeren personlig blev anmeldt, uden at der af ham blev taget forbehold.

I den følgende tid boede parterne sammen, indtil samlivet blev ophævet i 1933. Efter dette tidspunkt har sagsøgeren alene ydet sagsøgte et beløb af 150 kr., hvoraf 100 kr. til tøj til barnet, og sagsøgte, der indgik nyt ægteskab i 1936 med en dansk statsborger, og som ikke tidligere havde krævet bidrag fra sagsøgeren til barnet, indgav i 1946 andragende til de danske myndigheder om, at det måtte blive pålagt sagsøgeren at svare bidrag til barnets underhold.

Ved Sjællands stiftamts resolution af 12. august 1947 blev forældremyndigheden over barnet tillagt sagsøgte, og der blev pålagt sagsøgeren bidragspligt overfor barnet.

Herefter har sagsøgeren anlagt nærværende sag, idet han til støtte for påstanden har anført, at parterne ikke har stået i forhold til hinanden i tiden fra april 1931 til slutningen af december s. å., hvorfor han ikke kan være fader til barnet, samt at dette under ingen omstændigheder kan være avlet i ægteskabet, idet parterne ikke indenfor avlingstiden har haft samleje med hinanden forinden skilsmisdommen, hvorfor der ikke kan pålægges ham bidragspligt.

Sagsøgte har begrundet sin påstand med, at hun indenfor avlingstiden alene har stået i forhold til sagsøgeren, og at barnet må være avlet inden nytår 1932, samt at sagsøgeren overhovedet ikke forinden fornævnte resolution fra stiftamtet har fragået faderskabet. Når hun først i 1946 rejste krav om bidrag, skyldtes det, at det først da blev nødvendigt på grund af en forringelse af hendes økonomiske kår.

Da der i 1940 var spørgsmål om at barnet skulle adopteres af hendes daværende mand, afgav sagsøgeren en erklæring, hvori han betegnede barnet som "sin datter af tidligere ægteskab".

Af en af universitetets retsmedicinsk institut foretaget blodtypebestemmelse fremgår, at der intet er til hinder for, at sagsøgeren kan være fader til barnet.

Foreløbig bemærkes, at da begge parter på tidspunktet for barnets fødsel var tyske statsborgere og bosat i Tyskland, hvor barnet blev født, må tysk rets regler lægges til grund ved sagens afgørelse. Da barnet er født 267 dage efter skilsmisdommens afsigelse, må den i B. G. B. § 1593 fastsatte formodningsregel være gældende.

Da sagsøgeren ikke i overensstemmelse med bestemmelserne i B. G. B. §§ 1594—96 har anfægtet barnets stilling som ægtefødt indenfor den i § 1594 fastsatte frist af 1 år fra fødslen, men tværtimod gennem en lang årrække har anerkendt barnet som sit, samt da betingelserne for indtrædelse af den i B. G. B. § 203 omhandlede suspension af forældelsesfristen ikke skønnes at foreligge, vil sagsøgeren ifølge B. G. B. §§ 1593, jfr. 1594 og 1598, nu være afskåret fra at gøre gældende, at barnet ikke er ægtefødt.

Herefter vil sagsøgtes påstand være at tage til følge. — — —***

B. BØRN UDENFOR ÆGTESKAB

253

Harry Alfred Emil Svendsen mod Johan Martin Theodor Schultz som formynder for Karl Heinz Brehme

VESTRE LANDSRET
U. f. R. 1929. 114

[Svendsen var sagsøgt til at betale alimentationsbidrag til et i Altona avlet og der i 1923 af en tysk barnemoder udenfor ægteskab født barn, som senere sammen med moderen stadig har boet i Altona. Svendsen, som er sømand og nu

bor i Esbjerg, havde på avlingstiden bopæl ombord på S/S Phønix, der går i rutefart mellem Esbjerg og Hamborg. Han påstod sig frifundet efter tysk rets regler, da forskellige mandspersoner på avlingstiden havde haft samleje med barnemoderen. Underretten havde begrundet anvendelse af dansk rets regler på, at appellanten både nu og på avlingstiden var dansker. I Vestre Landsrets dom udtales det:] S/S Phønix har siden året 1911 været registreret i Danmark og sejlet under dansk flag. Herefter har appellanten på avlingstiden haft hjemsted her i landet, og dommen vil således i henhold til de i den iøvrigt anførte grunde være at stadfæste.

254

M mod F

RETTEEN FOR ÆRØSKØBING M. V.
Juristens domssamling 1953. 199

I begyndelsen af maj måned 1949 traf sagsøgerinden, fabriksarbejderske M, da af Kolding, sagsøgte F, der var belgisk statsborger, ved en koncert i Kolding. De begyndte derefter at komme sammen og havde første gang samleje med hinanden i begyndelsen af juni måned 1949 på højskolehjemmet i Kolding, hvor sagsøgte boede. Den 9. juli 1949 blev de ringforlovet, og i den ring, sagsøgte forærede sagsøgerinden, blev indgraveret F's fornavn og datoen 9/7. I tiden fra begyndelsen af juni måned 1949 indtil slutningen af oktober måned samme år, da sagsøgte rejste her fra landet, havde de regelmæssigt samleje med hinanden. Juleaftensdag 1949 kom sagsøgte påny her til landet og besøgte sagsøgerinden, der da fortalte sagsøgte, at hun skulle have et barn. I slutningen af januar måned 1950 rejste sagsøgte tilbage til Belgien. Den 19. marts 1950 rejste sagsøgerinden til Belgien for at føde sit barn der, og den 27. marts 1950 fødte hun på en klinik i Vervieres et drengebarn, der er døbt N.M. Den 11. marts 1951 tog sagsøgerinden atter ophold i Kolding tilligemed fornævnte barn, der siden da har opholdt sig her i landet. Den 27. september 1951 afgik sagsøgte ved døden i Durban.

Under nærværende sag har sagsøgerinden derefter påstået sagsøgte anset som fader til det af hende den 27. marts 1950 udenfor ægteskab fødte drengebarn N.M., under anbringende af, at sagsøgte har haft samleje med sagsøgerinden i avlingstiden.***

Den for sagsøgte beskikkede sagfører, landsretssagfører Bruun Andersen, Marstal, har påstået sagsøgte frifunden, da sagen efter dansk international privatrets regler må bedømmes efter belgisk ret, efter hvis retssystem sagsøgte må frifindes. For så vidt retten måtte statuere, at dansk ret bør lægges til grund ved pådømmelsen af nærværende sag, påstår han F frifunden som fader til fornævnte barn.

Sagsøgerinden har forklaret, at hun fra begyndelsen af maj måned 1949 og indtil slutningen af oktober s. å. ikke har haft samleje med andre mænd end sagsøgte. Først da hun var rejst til Belgien for at føde sit barn, fortalte sagsøgte hende, at han var gift.***

Det fremgår af en under sagen fremlagt gennem udenrigsministeriet indhentet erklæring, at der ikke ifølge belgisk ret, da sagsøgte ved sin død var gift, er adgang til formel anerkendelse af faderskabet til det udenfor ægteskab fødte barn ("en droit belge cette reconnaissance n'est pas admise"), og en eventuel kendelse af en fremmed domstol i sagen vil ikke kunne eksekveres i Belgien, da den anses for stridende mod "ordre public".

Da sagsøgte havde ophold her i landet på barnets avlingstid, har faderskabs-sag i henhold til de i retsplejelovens § 456 b indeholdte regler kunnet anlægges ved en dansk domstol. Da derhos barnet er bosat her i landet, findes dansk rets regler at måtte lægges til grund ved sagens pådømmelse, idet den omstændighed alene, at barnet er født i Belgien, fordi sagsøgerinden ønskede at føde sit barn i nævnte land, ikke findes at kunne medføre, at sagsøgtes fremmede domicillov skal anvendes.***

255

A mod B

NORGES HØJESTERET
Norsk Rettstidende 1953 II 1132

[En tysk kvinde fødte i Tyskland et barn og opgav som fader en nordmand, bosat i Norge, som havde gjort tjeneste i den norske Tysklandsbrigade og af denne grund på avlingstiden havde opholdt sig i Tyskland. Der blev rejst faderskabssag i Norge.]

Dommer Heiberg:

***Under disse omstændigheter står det for meg som det naturlige også her å ta utgangspunkt i den alminnelige betraktning som er gjort gjeldende av først-voterende i den sak som er refereret i Rt. 1923 II, s. 58 flg., "at et forhold for-trinsvis bør bedømmes etter loven i det land hvortil det har sin nærmeste til-knytning, eller hvor det nærmest hører hjemme" (s. 60). Jfr. også Knoph: Rettslige standarder s. 11. Godtar man dette utgangspunkt, kan det i og for seg neppe være tvilsomt at forholdet har sin sterkeste tilknytning til Tysk-land. Moren er tysk borger, bosatt i Tyskland, barnet er konsipert og født i Tyskland, er ved fødselen blitt tysk borger og har hele tiden vært bosatt der. Den omstendighet at den oppgitte far eller bidragspliktige er norsk og har sitt hjem i Norge, er ikke i seg selv tilstrekkelig til å berøve forholdet også mellom den mulige far og barnet dets karakter av et forhold som har sin naturlige til-knytning først og fremst til Tyskland som barnets hjemland. Når det gjelder å bestemme barnets rettsstilling, synes det meg naturlig å se som et primært mål å stille det i samme stilling som andre barn som fødes utenfor ekteskap i Tysk-land, uten hensyn til den mer tilfældige omstendighet om faren i det enkelte tilfelle hører hjemme i Tyskland, i Norge eller i et tredje land. Barnet tilhører det tyske rettsamfunn, og det er da mest nærliggende her å la tysk rett være bestemmende, med mindre det foreligger særlige grunner for å velge en annen løsning.

Som utgangspunkt mener jeg således at man bør legge till grunn at barnets

hjemlandslov er avgjørende. Mer enn et utgangspunkt er dette ikke. Selv om man som hovedregel vil legge barnets lov til grunn, er det nemlig på det rene at denne regel må tåle vesentlige unntak ut fra "ordre-public"-artede synspunkter, jfr. den foran nevnte dom av 1933, nemlig for så vidt en anvendelse av barnets hjemlandslov ville føre til resultater som må ansees stridende mot fundamentale etiske eller sosiale prinsipper, slik som de er kommet til uttrykk i norsk lovgivning.

Det som for meg blir spørsmålet, er da nettopp om de hensyn som ligger bak våre regler, er av den art og styrke at norsk lov her må slå gjennom overfor tysk lovs avvikende regler, hvor disse fører til en ugunstigere stilling for barnet enn det ville ha etter norsk lov.

Når det gjelder underholdsbidrag til barn født utenfor ekteskap, har den norske lov av 1915 i § 13, 2. ledd latt et *mulig* farskap være tilstrekkelig til å etablere underholdsplikt. Denne bidragsplikt har ikke sitt grunnlag i noe slektskapsbånd mellom barnet og den bidragspliktige, men kan bare sees som en positiv løsning av et sosialpolitisk problem hvor tysk rett, som jeg senere skal komme tilbake til, har valgt en annen løsning.

Men jeg kan ikke se at det bak den norske regel ligger noen etisk vurdering som skulle tilsi å gjøre den gjeldende også i forhold til barn som er bosatt i utlandet, alene av den grunn at vedkommende mann er bosatt i Norge. Det forekommer meg derfor ikke naturlig å gi denne ordning anvendelse på andre barn enn dem som hører det norske rettssamfund til ved at de er bosatt i Norge.

I en noe annen stilling står spørsmålet når det gjelder dom for farskap etter norsk rett. Vår lov har så vidt mulig søkt å gi barn utenfor ekteskap samme rettstilling som andre barn. Av den grunn er det også nødvendig å søke det virkelige (biologiske) farskap fastslått. Man kan si at når vår lov slik har valgt å bygge på hensynet til barnet, beror dette på en bevisst etisk vurdering som er uavhengig av hvor barnet hører hjemme.

Imidlertid mener jeg at barnets hjemlandslov også i denne forbindelse bør være utslagsgivende. Tysk lov — som i likhet med de fleste utenlandske lover som hovedregel nekter adgang til å få det biologiske farskap fastslått — bygger også på en etisk vurdering, om enn en annen enn norsk lov, nemlig at hensynet til ekteskapet og familien bør gå foran hensynet til barnet. Når det da som her gjelder et tysk barn som etter all sannsynlighet vil vokse opp under tysk lov som ikke godkjenner vår lovs prinsipp, forekommer det meg å være liten grunn til å bringe dette til anvendelse her.***

Dommer Bahr:

***Jeg behandler først spørsmålet om hvilket lands lov som skal legges til grunn ved avgjørelsen av spørsmålet om *farskap*.

Jeg er blitt stående ved at spørsmålet om farskap i det foreliggende tilfelle må bli å avgjøre etter norsk rett.***

Jeg presiserer først at det som her skal avgjøres, bare er hvorvidt A i biologisk forstand er å anse som far til B, og — i tilfelle — om han på dette grunnlag skal kjennes underholdspliktig til barnet.***

Spørsmålet om rettsvirkningene av dommen — bortsett fra underholdsplikten — foreligger ikke til avgjørelse i denne sak. Disse må avgjøres særskilt for

hver enkelt rettsvirkning etter rettsreglene på det sted hvor spørsmålet i sin tid måtte komme opp, jfr. de betraktninger som er anført av Gaarder i den tidligere nevnte artikkel s. 97 nederst — 98 og i Philips Hults artikkel i T.f.R. 1939 s. 376 flg., særlig s. 383—384. Noe annet er at hvis spørsmålet om farskap består eller ikke består, skulle komme opp i en senere sak for norsk domstol, f. eks. i forbindelse med navne- eller arvekrav, vil man — så vidt jeg forstår — måtte bygge på at selve farskapsspørsmålet er bindende avgjort, jfr. tvistemålslovens § 432 første ledd. Det er etter min mening nettopp dette som begrunner den rettslige interesse i å få spørsmålet avgjort.

Med hensyn til det internasjonal-privatretslige spørsmål (lovvalget) er det for meg naturlig å ta utgangspunkt i en betraktning som er fremholdt av Hult i den siterte artikkel s. 384, nemlig at kollisjonsnormene bør innrettes slik at de avgjørelser som skal treffes med støtte i dem, så vidt mulig tilgodeser de særlige formål domslandets "indre" rettsregler på området søker å fremme. Hvilke formål de norske rettsregler om barn utenfor ekteskap tar sikte på å fremme, kommer jeg senere tilbake til. Hva jeg her finner grunn til å fremheve, er at norske domstoler ved avgjørelsen av saker av denne art etter min mening må bygge på at de formål som vår lovgivning her forfølger, i alminnelighet ikke vil kunne realiseres på noen bedre måte gjennom anvendelse av fremmed rett. Jeg tilføyer at det også av retts tekniske grunner er fordelaktig at norske domstoler i størst mulig utstrekning kan anvende landets egen, "indre" rett, et moment som jeg for øvrig senere kommer tilbake til.

Den store hovedregel er at norske domstoler dømmer etter norsk lov, dvs. etter "indre" norske rettsregler fordi det i de fleste tilfelle ikke vil foreligge noen særlig tilknytning til fremmed rett. Når vår internasjonale privatrett i visse situasjoner gir anvisning på å anvende fremmed rett, fordi det foreligger en slik tilknytning som nevnt, må begrunnelsen for slike kollisjonsnormer etter min mening søkes i at det — i situasjoner av den art som normen tar sikte på — må antas stort sett å være naturligere og mer hensiktsmessig at forholdet bedømmes etter vedkommende fremmede lands rett og ikke etter vår egen.

Hva den foreliggende sak angår, bygger førstvoterende på at forholdet faller inn under en kollisjonsnorm som i dette tilfelle fører til anvendelse av fremmed rett, nemlig barnets hjemlandslov. Jeg har i og for seg ikke noe å innvende mot den betraktning som førstvoterende her — med støtte bl. a. i høyesterettsdom i Rt. 1923 II s. 58 — tar som utgangspunkt: at et forhold fortrinnsvis bør bedømmes etter loven i det land hvortil det har sin sterkeste tilknytning eller hvor det nærmest hører hjemme. Men spørsmålet om lovvalget er etter min mening ikke uttømt med dette: hvilket land forholdet nærmest har tilknytning til. Det må — som jeg alt har antydnet — også tas hensyn til den rettsoppfatning våre "indre" rettsregler på området er utslag av, eller — for å bruke min tidligere uttrykksmåte — til de formål som disse rettsregler søker å fremme. Jeg er oppmerksom på at førstvoterende drøfter hvorvidt det ut fra "ordrepublic"-artede synspunkter — hensynet til fundamentale etiske eller sosiale prinsipper hos oss — er grunn til i nærværende tilfelle å gjøre unntak fra den regel som førstvoterende går ut fra, nemlig at barnets hjemlandslov er bestemmende. Men hva jeg vil fremheve er at hensynet til de grunnleggende prinsip-

per som våre rettsregler om dette emne bygger på, må komme inn allerede ved opptrekningen av selve kollisjonsnormene, eller med andre ord: når man skal søke frem til de prinsipielle linjer for lovvalget. Hvis man da her kommer til at det grunnsyn som vedkommende norske rettsregler gir uttrykk for, ikke vil bli tilstrekkelig tilgodesett med mindre forholdet bedømmes etter norsk rett, må valget falle ut til fordel for denne, uansett den tilknytning som forholdet ellers måtte ha til en fremmed stat. Det er dette resultat jeg er kommet til i den foreliggende sak.

Våre lovregler om barn utenfor ekteskap bygger på et markert etisk og sosialt syn, hvor hensynet til barnet og dets interesser er dominerende, mens farens interesser og de hensyn til ekteskapet og den legitime familie som har preget mange andre lands lovgivning på dette område, er skjøvet i bakgrunnen. (Jfr. Gaarder s. 97.) Som nevnt av førstvoterende gir vår lov i motsetning til de fleste fremmede lover — adgang til å få fastslått det virkelige farskap, og gjennom de rettsvirkninger den knytter til farskapet — navnerett, arverett osv. — søker den så vidt mulig også i forhold til faren å gi barnet samme rettsstilling som et ekte barn. Det er sannsynlig at det — bortsett fra Danmark (etter loven "om børn udenfor ægteskab" av 7. mai 1937) — ikke er noe land som i sin lovgivning går så langt når det gjelder å trygge slike barns stilling som Norge.***

Som tidligere nevnt er spørsmålet om rettsvirkningene av avgjørelsen ikke aktuelt i denne sak, bortsett fra underholdsplikten, som i denne forbindelse er av mindre interesse, fordi bidragsplikt etter loven av 1915 § 13 annet ledd kan idømmes selv om betingelserne for farskap ikke er til stede. Det som det her spørres om, er således først og fremst hvilket lands lov som skal være bestemmende når det gjelder adgangen til og vilkårene for å fastslå farskap. Adgangen til å få fastslått virkelig (biologisk) farskap må betraktes som et kjernepunkt i vår ordning, og ut fra mitt syn på det internasjonalt-privatretslige spørsmål — som jeg alt har gjort rede for — mener jeg at denne adgang bør stå åpen også i tilfelle som det foreliggende, hvor et barn som er bosatt i utlandet, søker farskapsspørsmålet prøvd ved søksmål mot den utlagte far her i landet. — Dermed blir norsk lov bestemmende også når det gjelder vilkårene for å fastslå farskap, og det er da den eneste naturlige — og så vidt skjønnes den eneste mulige — løsning at man her anvender de materielle regler i loven av 1915.

Jeg er ikke enig i den betraktning som under prosedyren for Høyesterett har vært fremholdt av den ankende part — med støtte i uttalelser av Gaarder, s. 97 og 98 — nemlig at det ikke er noen oppgave for det norske rettssamfunn å skaffe de barn det her gjelder, en "nedstammingsposisjon" svarende til den som vi gir barn her i landet. Det fremgår av det jeg har sagt, at det beskyttelseshensyn som er det bærende prinsipp i vår lovgivning om barn utenfor ekteskap, etter min mening må strekke seg så langt at det også kommer utenlandske barn til gode for så vidt de søker sin status overfor en formodet far her i landet fastslått ved norsk domstol.***

Før jeg forlater de internasjonalt-privatretslige spørsmål, nevner jeg at det etter min mening må være klart at det ikke vil innebære noen urimelighet

overfor saksøkte, at forholdet i det foreliggende tilfelle bedømmes etter norsk lov — saksøktes egen hjemlandslov. Dette gjelder så vel for farskaps- som for bidragsspørsmålets vedkommende. Videre finner jeg det riktig å presisere mitt syn på avgjørelsens rekkevidde i internasjonal-privatretslig henseende. Om dette skal jeg bemerke:

Norsk lov er i det foreliggende tilfelle både den utlagte fars hjemlandslov og *lex fori*. I min argumentasjon i det foregående har jeg bygd på begge tilknytningsmomenter i fellesskap: både saksøktes norske domisil og det forhold at saken er reist ved norsk domstol. Det er mulig at det sistnevnte moment — norsk forum — i og for seg ville være tilstrekkelig til å begrunne valget av norsk lov. Det er imidlertid ikke nødvendig for resultatet i nærværende sak å løse dette spørsmål, eller med andre ord: å ta standpunkt til hvorledes lovvalget ville stille seg dersom også den utlagte far hadde hatt domisil i utlandet. Avgjørelsen vil med andre ord ikke være noe prejudikat i en sak hvor både barnet og den utlagte far har fremmed rett til hjemlandslov.***

256

Haagerkonventionen 1956 angående den på underholdsforpligtelser overfor børn anvendelige lov

Art. 1. La loi de la résidence habituelle de l'enfant détermine si, dans quelle mesure et à qui l'enfant peut réclamer des aliments.

En cas de changement de la résidence habituelle de l'enfant, la loi de la nouvelle résidence habituelle est applicable à partir du moment où le changement s'est effectué.

Ladite loi régit également la question de savoir qui est admis à intenter l'action alimentaire et quels sont les délais pour l'intenter.

Par le terme "enfant", on entend, aux fins de la présente Convention, tout enfant légitime, non légitime ou adoptif, non marié et âgé de moins de 21 ans accomplis.

Art. 2. Par dérogation aux dispositions de l'article premier chacun des Etats contractants peut déclarer applicable sa propre loi, si

- a. la demande est portée devant une autorité de cet Etat,
- b. la personne à qui les aliments sont réclamés ainsi que l'enfant ont la nationalité de cet Etat, et
- c. la personne à qui les aliments sont réclamés a sa résidence habituelle dans cet Etat.

Art. 3. Contrairement aux dispositions qui précèdent, est appliquée la loi désignée par les règles nationales de conflit de l'autorité saisie, au cas où la loi de la résidence habituelle de l'enfant lui refuse tout droit aux aliments.

Art. 4. La loi déclarée applicable par la présente Convention ne peut être écartée que si son application est manifestement incompatible avec l'ordre public de l'Etat dont relève l'autorité saisie.

C. ADOPTION

257

Boet efter fhv. oversergent Einar Søren Christoffer Knudsen

HORSSENS BYS SKIFTERET

U. f. R. 1963. 619

Den 1. marts 1962 afgik den amerikanske statsborger, fhv. oversergent Einar Søren Christoffer Knudsen, Horsens, ved døden. Afdøde, som siden 1951 havde haft bopæl her i landet, havde ikke efterladt sig børn eller efterkommere af sådanne, men havde den 23. juli 1938 ved dekret, afsagt af the Circuit Court of the First Judicial Circuit Territory of Hawaii, Division of Domestic Relations, sammen med sin daværende hustru, Annie Knudsen, adopteret barnet Richard Mitchell Eli, som ved adoptionen fik afdødes navn, Einar Søren Christoffer Knudsen. Afdøde levede ved sin død i ægteskab med fru Edith Hollbaum Knudsen, født Andersen, og der bestod mellem ægtefællerne fuldstændigt formuefællesskab. Afdøde og dennes hustru, fornævnte fru Edith Hollbaum Knudsen, havde den 3. april 1954 oprettet testamente for notaren i Horsens købstad. Ved testamentet, hvori ægtefællerne tilbagekaldte et af dem den 30. maj 1952 oprettet testamente, indsatte afdøde sin hustru som sin universalarving og traf samtidigt bestemmelse om, at hans adoptivsøn, sergent Einar Søren Christoffer Knudsen jr. — — — Hawaii, U. S. A., skulle arve 100 \$ eller modværdien heraf i danske penge efter ham.

Efter afdødes død er der mellem afdødes enke og adoptivsøn opstået strid om, hvorvidt afdøde har været berettiget til at disponere som tilsigtet ved testamentet. Da denne strid ikke har kunnet finde en forligsmæssig afgørelse, er boet taget under behandling af skifteretten, over for hvilken enken har nedlagt påstand om, at afdødes bo deles mellem hende og afdødes adoptivsøn som foreskrevet i afdødes testamente.

Adoptivsonnen har heroverfor nedlagt påstand om, at han i medfør af dansk rets regler anses som arving til halvdelen af afdødes efterladenskaber eller en fjerdedel af hele fællesboet, som er på omkring 60.000 kr. — — —

Ifølge en af skifteretten gennem Udenrigsministeriet indhentet udtalelse af 7. september 1962 fra staten Hawaii's justitsminister, har et adoptivbarn efter denne stats retsregler ingen tvangsarveret efter dets adoptant ligeså lidt som et naturligt barn efter sine forældre. Derimod har adoptivbarnet i delvis modsætning til, hvad der gælder efter dansk ret, legal arveret efter såvel adoptanten som dennes slægt, ligesom adoptanten fuldtud arver adoptivbarnet som et naturligt barn.

Afdødes enke, som ikke har bestridt gyldigheden af den på Hawaii skete adoption, har til støtte for sin påstand om, at afdødes testamente skulle lægges til grund for delingen af afdødes bo, i første række anført, at retsvirkningerne, herunder også de arveretlige virkninger af adoptionen efter dansk rets regler om anvendelsen af fremmed ret ved danske domstole må bestemmes på grundlag af selve den retsstiftende kendsgerning for adoptionen, bevillingen eller

-dekretet, og den til grund derfor liggende lovgivning i det land, hvor adoptionen er sket. Adoptionens retsvirkninger kan hverken være videregående eller mere begrænsede end disse fremmede retsregler hjemler det. Havde der i den foreliggende sag været spørgsmål om, hvorvidt afdødes adoptivsøn var legal arving efter afdødes slægt, måtte dette spørgsmål på grundlag af de Hawaiiske regler have været besvaret bekræftende uden hensyn til dansk rets regler derom. Da der efter de i staten Hawaii gældende regler ikke tilkommer et adoptivbarn nogen tvangsarveret efter den, der adopterer det, må det på tilsvarende måde antages, at der i det foreliggende tilfælde ikke ved adoptionen er sket nogen indskrænkning i afdødes testationskompetence. Efter enkens opfattelse følger det allerede heraf, at afdøde har været berettiget til at begunstige hende, sådan som det er sket ved testamentet.

For det tilfælde, at det dog antages, at spørgsmålet om omfanget af afdødes testationskompetence skal afgøres på grundlag af dansk ret, har enken videre anført, at dette ikke vil kunne medføre, at afdødes adoptivsøn anses som tvangsarving efter ham. De retsregler, som i dette tilfælde skulle finde anvendelse på forholdet, måtte efter tidspunktet for adoptionen være § 13 i lov nr. 87 af 26. marts 1923 om adoption med de ændringer, der følger af § 27 i lov nr. 140 af 25. maj 1956 om adoption. Ifølge denne bestemmelse arver adoptivbarnet adoptanten som ægtebarn, medmindre der på adoptantens begæring er optaget et forbehold i bevillingen om, at der ikke ved adoptionen sker nogen indskrænkning i adoptantens testationsret. I så fald er adoptivbarnet ikke tvangsarving efter adoptanten. I det dekret, hvorved adoptionen i det foreliggende tilfælde er sket, siges det om forholdet mellem afdøde og adoptiv sønnen, at de "herefter over for hinanden skal bevare det gensidige forhold forældre og børn imellem med fuld arveret fra og gennem hinanden i samme omfang, som hvis adoptiv sønnen var adoptantens eget og naturlige barn". Da der efter staten Hawaii's ret ikke tilkommer naturlige børn tvangsarveret efter deres forældre, har der for afdøde ikke været anledning til ved adoptionen at tage noget testationsforbehold. Efter at afdøde havde taget ophold her i landet, har der selv sagt ikke været nogen juridisk mulighed for at få optaget et sådant forbehold i adoptionsdekretet. Hvis afdøde derfor ikke skal stilles ringere end personer, hvem der her i landet er meddelt bevilling til adoption, må man tillægge den kendsgerning, at adoptionen er meddelt under et retssystem, som ikke anerkender nogen tvangsarveret for adoptivbarnet, samme betydning som et ved en her i landet meddelt adoption udtrykkeligt udtalt testationsforbehold. Enken har herved henvist til bestemmelsen i den nordiske dødsbokonventions § 12, som udtrykkeligt opretholder virkningen af et i en dansk adoptionsbevilling indeholdt testationsforbehold, selv om adoptionsforholdets arveretlige virkninger i øvrigt skal bedømmes efter et af de andre nordiske landes arveretlige love, efter hvilken adoptivbarnet ville være at anse som tvangsarving. Enken har endelig anført, at der, da de i medfør af adoptionsloven af 1923 meddelte adoptionsbevillinger faktisk i det helt overvejende flertal af tilfælde indeholder testationsforbehold for adoptanten, for dansk retsfølelse intet stødende er i, om adoptiv sønnen ikke i det foreliggende tilfælde anses som tvangsarving efter afdøde. For enhver pris at ville sidestille afdødes adoptivsøn med et naturligt barn

indeholder en underkendelse af adoptionsforholdets særlige karakter, som netop er kommet til udtryk i lovgivningens særregler om adoptivbørns arveret.

Afdødes adoptivsøn, som ikke i øvrigt har bestridt testamentets gyldighed, og som har erklæret sig enig i, at der ikke efter staten Hawaii's ret tilkommer ham tvangsarveret efter afdøde, har til støtte for sin påstand om, at han er tvangsarving efter afdøde, anført, at det er et ganske almindeligt anerkendt princip i den internationale privatret, at spørgsmålet om en arveladers kompetence til ved testamente at råde over sine efterladenskaber, må bestemmes på grundlag af lovgivningen i det land, hvor arveladeren bor ved sin død. I det foreliggende tilfælde vil det sige, at hans arveret må bestemmes på grundlag af den danske adoptionslov af 1923. Efter denne lovs hovedregel arver et adoptivbarn adoptanten som ægtebarn, og er altså ikke blot legal arving, men også tvangsarving efter denne. Da det dekret, hvorved han er adopteret, ikke indeholder noget forbehold om, at der ved adoptionen ikke sker nogen indskrænkning i adoptantens testationskompetence, men tværtimod ligesom den danske lov udtrykkeligt udtaler, at hans arveret efter adoptanten skal være den samme som et naturligt barns, må det være den danske lovs hovedregel, som her finder anvendelse. Afdøde har ved adoptionen akcepteret denne ligestilling mellem den søn, han adopterede, og et naturligt barn, og det er derfor en ren fiktion at tale om, at han ved adoptionen skulle have taget noget testationsforbehold. Under alle omstændigheder vil der ligeså lidt, som hvis afdøde havde avlet naturlige børn i tillid til, at der ikke derved skete nogen indskrænkning i hans testationsret, kunne tages nogetsomhelst hensyn til et sådant forbehold. Den ligestilling med et naturligt barn, som adoptiv sønnen søger at opnå, er derfor efter hans opfattelse i den bedste overensstemmelse både med den i Danmark og den i staten Hawaii gældende ret.

Adoptiv sønnen har endelig bestridt, at dødsbokonventionens § 12 skulle kunne anvendes analogt på forholdet til andre end de nordiske lande og dermed få betydning for afgørelsen af nærværende sag.

Afdødes enke har under domsforhandlingen forklaret, at baggrunden for afdødes testamente til fordel for hende bl. a. var, at forholdet mellem afdøde og dennes adoptivsøn i årenes løb var kølnet, og at afdøde havde en formodning om, at adoptiv sønnen i et økonomisk forhold havde misbrugt navneligheden mellem ham og afdøde.

Retten finder ikke at kunne give afdødes enke ret i, at spørgsmålet om afdødes adoptiv søns arveret skal afgøres på grundlag af de i staten Hawaii gældende arveretlige regler, ligeså lidt som der, når dansk ret skal anvendes, kan tillægges disse fremmede retsregler en lignende betydning som et i en dansk adoptionsbevilling indeholdt testationsforbehold. Herefter findes det at følge af arvelovgivningens regler, at afdødes adoptivsøn må anses som tvangsarving efter ham, hvorfor der vil være at give adoptiv sønnen medhold i den af ham nedlagte påstand.

258

**Nordisk konvention om ægteskab, adoption og værgemål,
art. 11-13**

Bekg. nr. 121 af 10. april 1954

Se Juristens Lovsamling.

Arveret og dødsboskifte

A. SKIFTERETTENS KOMPETENCE

259

Emmy Karla Bentzen mod Poul Erik Bentzens dødsbo m fl.ØSTRE LANDSRET
U. f. R. 1960. 286

Den i Østre Landsrets kendelse af 11. november 1958, gengivet i U 1959.255, nævnte læge Poul Erik Bentzen omkom ved m/s "Hans Hedtoft"'s forlis den 30. januar 1959 uden at separationssagen mellem ham og fru Bentzen var afgjort. Afdøde gjorde tjeneste som skibslæge uden løn. Hans herboende moder og søster begærede derefter skiftebehandling ved Københavns Byret.

Københavns Byrets skifteafdeling

***— — — højesteretssagfører Bierfreund har nedlagt påstand om, at hele læge Poul Erik Bentzens bo tages under behandling ved nærværende skifteret som værende rette dødsboværmæting.

Højesteretssagfører Stefan Nielsen har på fru Emma Karla Bentzens vegne principalt påstået sagen afvist, således at den her i landet efterladte del af boet gøres til genstand for subsidiært (akcessorisk) skifte.

Subsidiært påstås afvisning, således at de herværende midler skiftes efter foretagen henvisning i medfør af skiftelovens § 87.

Mere subsidiært påstås alene afvisning for så vidt angår de uden for Danmark beroende midler.

Højesteretssagfører Bierfreund har — — — anført følgende:

I ovennævnte af Østre Landsret stadfæstede kendelse er det blandt andet statueret, at læge Poul Erik Bentzen har haft bopæl i København i perioden umiddelbart forud for ægtefællernes samlivsophævelse i juni 1957, idet han på det pågældende tidspunkt ikke havde bopælstilknytning til noget andet land end Danmark. Den omstændighed, at han ikke var tilmeldt det herværende folkeregister, men havde anmeldt adresse i Malmø, skyldtes hensynet til hans amerikanske statsborgerskab ifølge naturalisation. Statsborgerforholdet er imidlertid uden betydning for domicilspørgsmålet, og det kan heller ikke være afgørende, at læge Bentzen utvivlsomt havde til hensigt at vende tilbage til U. S. A., eller at boets hovedaktiver beror uden for Danmark.

Til yderligere støtte for sin påstand har højesteretssagfører Bierfreund henvist til, at læge Bentzen efterlod sig moder og søster, der begge er danske, her i landet, at han omkom i rigsdansk farvand ombord på et dansk statsfartøj, og at hans enke, ligesom han selv oprindelig, stadig er dansk statsborger, omend hun nu må anses havende bopæl i U. S. A.

For det tilfælde, at det måtte blive statueret, at boet ikke umiddelbart henhører under dansk skiftemyndighed er det højesteretssagfører Bierfreunds agt at indgive begæring til Justitsministeriet om dets henvisning hertil for så vidt angår de herværende efterladenskaber i medfør af skiftelovens § 87 eller dennes analogi.

Højesteretssagfører Stefan Nielsen har — — — anført følgende:

I virkeligheden må læge Bentzen antages at have haft amerikansk domicil og personalstatut, hvorefter ægteskabet må bedømmes efter amerikansk ret. Herefter skulle der ikke blive spørgsmål om aktuel arveret for højesteretssagfører Bierfreunds mandanter, som derfor heller ikke har nogen retlig interesse i at få boet behandlet ved danske skiftemyndigheder. Den ovennævnte kendelse kan ikke være afgørende i så henseende, da domicilbegrebet er flertydet. Efter højesteretssagfører Stefan Nielsens opfattelse var læge Bentzens ophold hos moderen kun af midlertidig karakter, hans arbejde ombord på m/s "Hans Hedtoft" var ulønnet, og han betalte skat i U. S. A., idet han havde arbejde dér eller i henhold til kontrakter, som var indgået i U. S. A. Han var derimod ikke skatteansat her i landet. Det erkendes, at læge Bentzen ikke havde bopæl i U. S. A., men dette må være uden betydning, da han heller ikke var tilmeldt i Danmark, men derimod, som oplyst, i Sverige.

Højesteretssagfører Bierfreund har sluttelig bemærket, at det er ham bekendt, at læge Bentzen inden afrejsen med "Hans Hedtoft" også havde haft beskæftigelse på et herværende hospital. Højesteretssagfører Bierfreund har iøvrigt procederet på, at det foreliggende spørgsmål alene afgøres ud fra almindelige processuelle regler om afdødes værneting, uden at spørgsmålet om de materielle regler om ægteskabelig formueordning eller arveret indblandes i afgørelsen. — —

Da ægteskabet blev indgået i Rom den 23. juni 1947, var læge Poul Erik Bentzen, som allerede dengang var amerikansk statsborger, på vej til Arabien, hvor han skulle tiltræde en stilling. Fru Emmy Karla Bentzen sluttede sig et halvt år senere til læge Bentzen i Arabien, hvor de boede sammen til efteråret 1949. I begyndelsen af 1950 rejste læge Bentzen til U. S. A., hvor han fra april 1950 var ansat som hospitalslæge i New York. Senere havde han lægestillinger i Thule i Grønland, i Liberia, i U. S. A. og de vestindiske øer samt i Keflavik i Island.***

Det er bekræftet, at læge Bentzen, medens ægteskabssagen verserede, og medens han opholdt sig i København inden afrejsen med m/s "Hans Hedtoft", har gjort tjeneste på et herværende hospital, idet der den 21. april 1959 pr. postgiro fra Ortopædisk Hospital blev tilstillet Københavns Byrets skiftekontor et under sagen omtalt beløb, stort 346 kr. 75 øre, der ifølge anvisningstalonon angår regulering af løn for tiden fra den 27. juni til den 31. august 1958 samt feriepenge.

Herefter, og efter det iøvrigt under sagen oplyste må det antages, at læge Erik Bentzens sidste bopæl inden m/s "Hans Hedtoft"s forlis har været hos moderen fru Bertha Bentzen i København, og at han ikke havde sådan bopæls-tilknytning til noget andet land, at dette kan begrunde skifteværneting andetsteds.

Som følge heraf findes Københavns Byrets skifteret at være rette værneting til behandling af boet.***

Østre Landsret:

Den — — — afsagte kendelse er påkæret af fru Emmy Karla Bentzen, født Langbjerg, hvis endelige påstand går ud på, principalt at de indkærede fru Bertha Bentzens og fru Merete Jørgensens begæring om skifte af læge Poul Erik Bentzens dødsbo afvises fra skifteretten, således at den i Danmark efterladte del af boet alene gøres til genstand for subsidiært (akcessorisk) skifte, subsidiært at der sker afvisning for så vidt angår den uden for Danmark beroende del af boet.

De indkærede arvinger har påstået kendelsen stadfæstet.***

Kærende har også for landsretten støttet sin principale påstand dels på, at de indkærede arvinger ikke har nogen retlig interesse i, at boet tages under skiftebehandling, idet afdøde, måske bortset fra et ubetydeligt resthonorar for en midlertidig hospitalstjeneste, ikke har efterladt sig midler, dels at afdødes sidste domicil i henseende til skifteværneting var New York.***

Med hensyn til værnetingsspørgsmålet har den kærende fastholdt, at den i ægteskabssagen afsagte kendelse må være uden betydning i nærværende sag, da dens grundlag er de særlig udvidede værnetingsregler i retsplejelovens § 448 d, der i vidt omfang fraviger de i den internationale privatret anerkendte principper med hensyn til domicil.

Som omstændigheder, der peger hen på, at afdødes domicil var New York og ikke København, har kærende henvist til, at afdøde ikke havde nogen bolig i København, og end ikke var tilmeldt her, ikke betalte skat i Danmark og havde tilkendegivet sin hensigt til at vende tilbage til New York, når ægteskabssagen var afsluttet, medens han på den anden side havde lejet et værelse i New York, der tjente ham som postadresse, betalte skat i New York, havde hele sin formue dér, og var amerikansk statsborger. Hertil kommer imidlertid, at det fremgår af de nu fremkomne dokumenter, at der ved vedkommende amerikanske skifteret har været indledet skiftebehandling, idet afdøde er blevet anset for "resident" i New York, og at behandlingen kun er standset, fordi det oplystes, at "all property is in joint names". Det ville derfor stride mod det internationalt anerkendte princip om bobehandlingens enhed, om en skiftebehandling herefter blev indledet ved en dansk skifteret.***

Med hensyn til værnetingsspørgsmålet har de indkærede arvinger i det væsentlige anført samme betragtninger som for skifteretten. De har derhos bestridt, at det for skifteretten i New York passerende kan opfattes som indledning af en skiftebehandling.***

Idet det efter det oplyste må lægges til grund, at afdøde har boet i København hos sin moder, indkærede fru Bertha Bentzen, siden juni 1957, og idet det ikke er godtgjort, at han har bevaret bopæl noget andet sted, findes afdøde ved sin død at have haft værneting i København.

Skifterettens kendelse vil herefter, så vidt den er påkæret, være at stadfæste. — — —***

260

Skifteloven § 87

Nr. 155 af 30. november 1874

Se Juristens Lovsamling.

261

Boet efter Simon Christensen

VESTRE LANDSRET

U. f. R. 1955. 883

Boet efter den den 3. december 1953 afdøde kanadiske statsborger Simon Christensen, Marcillieborg ved Mariager, var blevet taget under offentlig skiftebehandling som gældsfragåelsesbo af skifteretten for Mariager købstad m. v., idet afdøde havde fast ejendom og anden formue i Danmark. Ifølge et i Kanada i 1949 oprettet testamente var arvingerne afdødes søskende og søskendebørn, som var bosat dels i Danmark, dels i Kanada og andetsteds. En af arvingerne i Kanada var umyndig. Ifølge testamentet skulle boet behandles af kærende, Crown Trust Company, Calgary, Alberta, Kanada, som eksekutor. Kærende havde protesteret mod skifterettens behandling af dødsboet, forstået som afdødes her i landet beroende efterladenskaber, men protesten var forkastet ved skifterettens dom. På en i april 1955 afholdt skiftesamling påstod kærende herefter, at skifteretten var uberettiget til at behandle boet yderligere, og henviste til, at kærendes her boende sagfører hele tiden havde tilkendegivet, at kærende ikke ville kræve boet udleveret, før samtlige krav samt skifte- og arveafgifter var betalt. Ved skifterettens kendelse af 7. maj 1955 blev påstanden ikke taget til følge. Den 2. s. m. var der udsendt proklama til boets fordringshavere.

For landsretten har de kærende gentaget den af dem for skifteretten nedlagte påstand. De har til støtte herfor navnlig anført, at afdødes bo må behandles i Kanada, og at skifteretten for Mariager købstad m. v. kun kan påse, at afgifter, gebyrer og lignende bliver erlagt, og at herværende kreditorer bliver betalt. Skifteretten må efter de kærendes videre anbringende herefter navnlig være uberettiget til at bortsælge den boet tilhørende her i landet værende faste ejendom, hvortil der er truffet forberedelser.***

Ved sagens afgørelse findes det at måtte lægges til grund, at farmer Simon Christensen ved sin død havde hjemsted i Kanada, og at hans bo følgelig ikke vil kunne tages under egentlig skiftebehandling her i landet. Da skifteretten imidlertid findes at have ret og pligt til at drage omsorg for, at boets herværende aktiver ikke udleveres de kanadiske skiftemyndigheder, forinden skatter, gebyrer, afgifter m. v. og de for skifteretten anmeldte gældsposter er betalt eller behørig sikkerhed stillet for, at betaling vil finde sted, og da sådan betaling eller sikkerhedstilse efter det oplyste ikke er sket, vil skifterettens kendelse kunne stadfæstes.***

262

Nordisk konvention om arv og dødsboskifte

Bekg. nr. 274 af 4. oktober 1935

Art. 19. Behandlingen af et dødsbo og et skifte mellem den afdødes arvinger og den efterlevende ægtefælle skal, når den afdøde var statsborger i en af staterne og var bosat i en af dem, foregå efter loven i den stat, hvor han ved sin død var bosat, og skal høre under retterne i denne stat, forsåvidt loven henlægger behandlingen til retten.

Har en efterlevende ægtefælle, som er statsborger i en af staterne, hensiddet i uskiftet bo, og skal boet skiftes, foregår behandlingen efter loven i den af staterne, hvor den efterlevende ægtefælle er eller ved sin død var bosat, og i den udstrækning, hvori loven foreskriver det, under medvirkning af denne stats retter.

Behandlingen af boet skal også omfatte formue, som findes i de andre stater.

Art. 20. En efterlevende ægtefælles ret til på skifte at udtage visse ejendele mod eller uden vederlag bedømmes efter den lov, som ifølge artikel 19 er bestemmende for behandlingen af boet. Det samme gælder ægtefællens adgang til på skifte at opnå udsættelse med udbetalingen af en arvelod, mod at arvingen får panteret for sin fordring, dog således at panteret i ejendele, som findes i de andre stater, kun kan stiftes efter de der gældende regler.

Art. 21. Tvistigheder om retten til arv eller legat efter nogen, som var statsborger i en af staterne og var bosat i en af dem, om en efterlevende ægtefælles rettigheder og om fordringer, som gøres gældende mod dødsboet og ikke mod arvingerne eller ægtefællen personlig, hører under retterne i den stat, hvis lov efter artikel 19 er bestemmende for behandlingen af boet.

Er parterne enige, kan sagen dog anlægges i en anden af staterne, medmindre boet er under behandling af skifteretten, testamentseksekutor eller en af retten beskikket *boutredningsman* eller *skiftesman*, eller sagen angår det i et sådant bo foretagne skifte. Sag om gyldigheden af et testamente, oprettet af nogen, som var bosat i Finland eller Sverige (*testamentskländer*), kan ikke anlægges i de andre stater. Det samme gælder sag, hvorved et skifte efter nogen, som var bosat i Finland, søges omstødt (*kländer*).

Art. 22. Er der i en anden af staterne end den, hvis lov er bestemmende for bobehandlingen, ejendele, som tilhører boet, skal retterne i den stat, hvor ejendelene findes, på begæring sørge for disses registrering og midlertidige bevaring samt for salg af ejendele, som ikke hensigtsmæssig lader sig opbevare. Iøvrigt skal myndighederne i sidstnævnte stat på begæring yde bistand ved bobehandlingen i den udstrækning, hvori det er hjemlet ved loven i denne stat.

Begæringen kan rettes umiddelbart til vedkommende myndighed. Omkostningerne kan, om fornødent, forlanges udredede forskudsvis. Skriftstykker, som er affattet på finsk eller islandsk, skal være ledsaget af bekræftet oversættelse til dansk, norsk eller svensk.

Har dødsfaldet fundet sted i en anden stat end den, hvor den afdøde var bosat, skal de efterladte ejendele også uden begæring tages i forvaring efter de på stedet gældende forskrifter.

B. LEGAL ARVERET

263

Boet efter Hans Jensen Hansen

ESBJERG KØBSTADS M. FL. SKIFTERET (STADFÆSTET AF VESTRE LANDSRET)
U. f. R. 1922. 446

I boet efter den under 28. september 1918 i New Jersey, U. S. A., afdøde Hans Jensen Hansen, hvis heri landet værende ejendele i henhold til Justitsministeriets skrivelse af 28. februar 1920 skiftes af nærværende skifteret, har afdødes enke Annie Louise Hansen . . . anmeldt sig som enearving, medens afdødes søskende, . . . , der efter dansk ret er medarvinger, har påstået sig anerkendt som sådanne og kendt berettiget til den del af boet, der efter dansk ret ville kunne tilkomme dem.

Afdøde havde ved sin død fast bopæl i New Jersey, U. S. A., men havde ikke opnået amerikansk statsborgerret.

Da arveforholdene i boet vil være at afgøre efter reglerne på afdødes hjemsted, og da disse efter det oplyste i dette tilfælde — da ægteskabet er barnløst — vil føre til, at enken som enearving overtager boet, vil den af afdødes søskende fremsatte påstand ikke kunne tages til følge.

264

Nordisk konvention om arv og dødsboskifte, art. 1-7

Bekg. nr. 274 af 4. oktober 1935

Se nedenfor nr. 270.

C. TESTAMENTS ARVERET

265

Dina Soldath mod Emilie Topp m. fl.

ØSTRE LANDSRET
U. f. R. 1940. 857

Københavns Byrets Skifteafdeling

Den 16. Januar 1939 afgik Frøken Anna Camilla Adelaide Soldath, Esromgade 7 B, I, ved Døden i en Alder af 80 Aar, og den 7. Februar s. A. blev Boet efter Afdøde taget under Behandling af nærværende Skifteret.

Blandt Afdødes efterladte Papirer forefandes et i det franske Sprog affattet Testamente, der betegner sig som oprettet i Paris den 19. Maj 1929, og som er underskrevet med Afdødes Navn uden at Underskriften er bekræftet af Vitterlighedsvidner eller ved Notarialattest.

Testamentets Ordlyd er saalydende:

Ceci est mon testament

Je donne tout ce que je possède à Mademoiselle Emelie Topp actuellement demurant en Amerique 280 Park Avenue (chez Madame Chandler) New York City. Au cas de décès de Mademoiselle Topp, mes deux Nièces seront mes heritières, soit Madame Karen-Margrethe Perbøll née Soldath et sa sœur Mademoiselle Ellen Soldath, demurant la dernière à Hellerup Sigridsvej 1³, Copenhague, Danemark, et Madame Perbøll demurant à Frederikssund, Danemark.

Fait à Paris le 19 Mai 1929

dix Neuf Mai dix neuf cent vingt neuf

Anna Camilla Adelaide Soldath.

Nævnte Frøken Emilie Topp, der er bosat i New York, er under Boets Behandling repræsenteret af Overretssagfører Carl Jepsen, der paa hendes Vegne har paastaet Testamentet lagt til Grund ved Boets Opgørelse, saaledes at Frøken Topp anerkendes som Universalarving.

Afdødes legale Arvinger er efter det for Skifteretten oplyste Ove Perbøll, Einar Soldath, Ellen Soldath, Ingeborg Kelland, Ruth Marienhof og Dina Soldath, dog ikke med lige store Anparter.

Af disse Arvinger har Ellen Soldath, Ingeborg Kelland og Ruth Marienhof anerkendt Testamentet, medens Ove Perbøll ikke har givet Møde og ikke har udtalt sig i Sagen. Einar Soldath og Dina Soldath, der er Arving til en større Anpart end de øvrige Arvinger, har derimod protesteret mod, at Testamentet lægges til Grund ved Boets Opgørelse, idet de anfører, at Testamentet ikke er Udtryk for Afdødes sidste og endelige Vilje og ikke i den foreliggende Form er gyldigt efter dansk Ret.

Under Boets Behandling har Medhjælperen, Overretssagfører Steinthal, gennem Justitsministeriet indhentet en Udtalelse fra det danske Gesandtskabs Advokat i Paris, André Morin, hvoraf blandt andet fremgaar, at et holografisk Testamente som det foreliggende fra Formens Side maa siges at være absolut i Orden efter fransk Ret og i Frankrig i Stand til at medføre alle de normale Retsvirkninger for Dispositioner mortis causa.

Under Sagen er det endvidere oplyst, at Afdøde, der til sin Død var dansk Statsborger, i ca. 42 Aar havde opholdt sig i Frankrig og var bosat i Paris paa det Tidspunkt, Testamentet blev oprettet, at den indsatte Arving, Frøken Emilie Topp, har kendt Afdøde, fra hun som 14 Aars Pige kom til Paris, og af Afdøde har været betragtet som hendes Plejedatter, saaledes at det var naturligt, at hun ogsaa skulde være hendes Arving, saa meget mere som Størstedelen af de Penge, Afdøde har efterladt, hidrører fra Gaver fra nævnte Plejedatter.

Efter det oplyste var Afdøde ved Testamentets Oprettelse ca. 70 Aar og havde paa det Tidspunkt været i Frankrig i ca. 37 Aar, og der er intet oplyst

om, at hun dengang tænkte paa at forlade Frankrig for at tage Ophold i Danmark. Efter de afgivne Forklaringer synes det ogsaa naturligt for afdøde at indsætte Emilie Topp som sin Universalarving, og der er intet oplyst, der kan støtte den Paastand, at hun havde forandret Mening og ikke længere ønskede Testamentet opretholdt, men ønskede, at Familien skulde indtræde som hendes Arvinger. Tværtimod synes den Omstændighed, at hun har opbevaret Testamentet sammen med sine andre vigtige Papirer at tyde paa det modsatte.

Med Hensyn til Advokat Morins Udtalelser i Skrivelsen af 25. Maj 1939 vedrørende Gyldigheden i Frankrig af et i Frankrig af en Udlænding oprettet Testamente, kan der ses bort fra disse som værende uden Betydning for nærværende Sag, da de kun omhandler fransk international Privatret, og kun anfører de Vanskeligheder en fransk Domstol muligvis vilde komme ud for, idet fransk international Privatret tilbageviser Kompetence til dansk (eller tysk eller engelsk) Ret.

Uanset at Testamentet ikke opfylder den danske Arvelovgivnings Forskrifter om Testamentsformen, vil det derfor, da der ikke ses at være ført noget Bevis for, at det ikke er Udtryk for Afdødes sidste og endelige Vilje, være at lægge til Grund ved Boets Opgørelse som et fuldgyldigt Testamente, da det i den foreliggende Form er oprettet i Overensstemmelse med den franske Lovgivnings Forskrifter om Testamentsformer. — — —

Østre Landsrets Dom.

— — — Til den i Dommen givne Fremstilling føjes, at Frøken Topp, der nu er nogle og halvtreds Aar gammel, i Løbet af 1920'erne rejste fra Paris til New York, og at Afdøde, der i Aaret 1932 fra Paris rejste her til Landet, har opbevaret Testamentet, der er oprettet paa fransk Stempelpapir til Takst 3 francs 60 centimes, blandt sine personlige og vigtige Papirer, Pas, Forsikringspolicer m.v.***

Det er*** for Landsretten uomtvistet, at det af Afdøde den 19. Maj 1929 i Paris oprettede Testamente er oprettet i den der lovgyldige Form.

Herefter findes Testamentet som udtalt i den indankede Dom at maatte lægges til Grund ved Opgørelsen af Afdødes Bo, uden at det, som af Appellantinden paastaet, kan have nogen Betydning, om Skiftemyndighederne i Frankrig, dersom Afdøde var afgaaet ved Døden under sit Ophold i Frankrig, saaledes at hendes Bo skulde behandles dér, og dersom Afdøde af Skiftemyndighederne ikke var befundet at være hjemmehørende eller bosiddende i Frankrig uden at have Hjemsted eller Bopæl her i Landet, efter fransk Ret vilde have at tage et vist Hensyn til de her i landet gældende Arveforskrifter.

Dommen vil herefter kunne stadfæstes.***

266

Haagerkonvention 1960 angående lovkonflikter i spørgsmål om testamentariske dispositioners form

Art. 1. Une disposition testamentaire est valable quant à la forme si celle-ci répond à la loi interne :

- a) du lieu où le testateur a disposé, ou
- b) d'une nationalité possédée par le testateur, soit au moment où il a disposé, soit au moment de son décès, ou
- c) d'un lieu dans lequel le testateur avait son domicile, soit au moment où il a disposé, soit au moment de son décès, ou
- d) du lieu dans lequel le testateur avait sa résidence habituelle, soit au moment où il a disposé, soit au moment de son décès, ou
- e) pour les immeubles, du lieu de leur situation.

Aux fins de la présente Convention, si la loi nationale consiste en un système non unifié, la loi applicable est déterminé par les règles en vigueur dans ce système et, à défaut de telles règles, par le lien le plus effectif qu'avait le testateur avec l'une des législations composant ce système.

La question de savoir si le testateur avait un domicile dans un lieu déterminé est régie par la loi de ce même lieu.

Art. 2. L'article premier s'applique aux dispositions testamentaires révoquant une disposition testamentaire antérieure.

La révocation est également valable quant à la forme si elle répond à l'une des lois aux termes de laquelle, conformément à l'article premier, la disposition testamentaire révoquée était valable.

Art. 3. La présente Convention ne porte pas atteinte aux règles actuelles ou futures des Etats contractants reconnaissant des dispositions testamentaires faites en la forme d'une loi non prévue aux articles précédents.

Art. 4. La présente Convention s'applique également aux formes des dispositions testamentaires faites dans un même acte par deux ou plusieurs personnes.

Art. 5. Aux fins de la présente Convention, les prescriptions limitant les formes de dispositions testamentaires admises et se rattachant à l'âge, à la nationalité ou à d'autres qualités personnelles du testateur, sont considérées comme appartenant au domaine de la forme. Il en est de même des qualités que doivent posséder les témoins requis pour la validité d'une disposition testamentaire.

Art. 6. L'application des règles de conflits établies par la présente Convention est indépendante de toute condition de réciprocité. La Convention s'applique même si la nationalité des intéressés ou la loi applicable en vertu des articles précédents ne sont pas celles d'un Etat contractant.

Art. 7. L'application d'une des lois déclarées compétentes par la présente Convention ne peut être écartés que si elle est manifestement incompatible avec l'ordre public.

267

Veksellov §§ 80 og 85

Nr. 68 af 23. marts 1932

Se Juristens Lovsamling.

268

Jens Foss Christian Steenbergs dødsbo

LANDSOVER- SAMT HOF- OG STADSRETTENS SKIFTEKOMMISSION
U. L. R. 1904. A 259

***Jens Foss Chr. Steenberg, som i en ung Alder var udvandret til britisk Indien, hvor han gjorde Tjeneste, først i det ost-indiske Kompagnis Flaade og senere i den engelske Hær, men som sluttelig havde bosat sig i London, hvor han i sine ældre Aar levede som Arbejdsmand, afgik ved Døden i London den 19 Februar 1900, efterladende sig et af ham under et midlertidigt Ophold her for Notarius publicus her i Staden under 5 Juli 1886 oprettet Testamente, saalydende:

T e s t a m e n t e .

Jeg underskrevne Jens Fos Christian Steenberg, engelsk Undersaat, men for Tiden opholdende mig i Danmark, bestemmer herved som min sidste Villie:

Af min efterladte Formue, der væsentlig bestaar af den mig tilhørende i Kjøbenhavns Overformynderi til Rentenydelse for mig i min Livstid indestaaende Kapital stor ca. 20,000 Kr., skal ved min Død, efter at alle Udgifter til min Begravelse, Skiftet og Betaling af min Gæld ere afholdte, udredes som Arv til nedennævnte Personer følgende Beløb:

- a) til min Son Edmund C. Steenberg 5400 Kr., idet jeg bemærker, at min nævnte Son, der er født under mit Ægteskab i Ostindien, efter engelsk Ret har forbrudt sin Arveret efter mig paa Grund af mod mig øvet Vold, og jeg saaledes er berettiget til fuldstændig at udelukke ham fra Arv,
- b) til Frøken Alvilda Gandil, Datter af afdøde Fyrinspektør Fritz Gandil, 2700 Kr.,
- c) til Hr. Sekretær Emil Meyer 2700 Kr.,
- d) til Hr. Carl Møller 2700 Kr.,
- e) til Frøken Helen Browning Ely 1800 Kr.,
- f) til Hr. Frank Ely og Hr. Newport Ely 900 Kr. til hver,
- g) til den engelske Kirke i Kjøbenhavn 1800 Kr.,
- h) til Overretssagfører Harald Carlsen i Kjøbenhavn 900 Kr.,
- i) hvad der herefter maatte være tilbage af mit Bos Midler skal tilfalde en efter Eksekutors Skøn værdig velgørende Stiftelse eller Forening i Kjøbenhavn, der navnlig virker til Forbedring af Enkers og Forældreløses Kaar — — — — —

3.

For det Tilfælde, at de danske Arveretsregler maatte anses alene anvendelige paa den mig tilhørende, i Danmark værende Formue, og min ovennævnte Søn Edmund saaledes for det Tilfælde, han maatte overleve mig eller hans mulige Descendenter maatte anses som Tvangsarvinger efter mig, da skal der dog ingensinde tilfalde min Søn eller hans mulige Descendenter en større Lod end $\frac{2}{3}$ af min efterladte Formue.***

7.

Ved nærværende Testamente ere samtlige tidligere, være sig i Danmark eller andetsteds, oprettede testamentariske Dispositioner tilbagekaldte. Til Bekræftelse har jeg underskrevet dette Testamente i Overværelse af Notarius publicus. p. t. Kjøbenhavn, den 5 Juli 1886.

Jens Fos Christian Steenberg.

***Ved Justitsministeriets Skrivelse af 15 Maj 1900 blev Testators Bo, hvis Ejendele her i Landet bestaar af fornævnte Overformynderi-Kapital med Renter af samme fra 11 December 1899 samt et Restbeløb af den ovennævnte Livrente og, muligvis, Bonus af samme, i Henhold til Skiftelovens § 87 henvist til Behandling af nærværende Skiftekommission, men blev derpaa af denne under 7 Juni s. A., i Henhold til Kgl. Bevilling af 29 Maj s. A., udleveret Overretssagfører Harald Carlsen til Behandling af denne som executor testamenti.

Medens Arveladerens i Testamentet nævnte Søn ikke har ladet give Møde paa Skiftet, har den af Kjøbenhavns Magistrat for ham under 29 Juli 1901 beskikkede Tilsynsværge, Sagfører I. C. M. Hansen her af Staden, givet Møde i Boet og for bemeldte Christopher Edmund Steenberg, som er født i Bombay den 21 November 1852 og — efter Tilsynsværgens Anbringende — er eneste, Testator overlevende Barn af dennes eneste Ægteskab med den i Aaret 1873 i Indien afdøde Charlotte Christine Nock, principalt nedlagt Paastand om, at det ovennævnte af Jens Foss Chr. Steenberg under 5 Juli 1886 oprettede Testamente tilsidesættes, for saa vidt det maatte stride mod danske Formue- og Arveretsregler, og dette saaledes:***

at Testators Formue — med Fradrag af Skifte- og Arveafgifter — udlægges som Arv til C. E. Steenberg, alene med Afkortning heri af en saa stor Part af nævnte Formue, som Faderen ifølge den danske Arvelovgivning var berettiget til at disponere over. Til Støtte for disse Paastande har Værgen anført, at han ikke kan erkende, at afdøde Jens F. C. Steenberg har været eller ved sin Død var engelsk Undersaat, at hans Myndling efter engelsk Ret har forbrudt sin Arveret efter sin Fader af nogensomhelst Grund og Faderen derfor været berettiget til fuldstændig at udelukke Sønnen fra Arv, eller at engelsk Ret, selv om noget af det her Benægtede skulde kunne bevises, derfor vil være at anvende eller vil kunne anvendes paa den Formue, som under det foreliggende Skifte vil være at dele.***

Overfor de af Tilsynsværgen fremsatte Paastande er der rejst Indsigelse af Frk. Gandil, Arvingerne efter Sekretær Emil Meyer, Frank Ely, den engelske Kirke i Kjøbenhavn og Overretssagfører Carlsen, idet disse*** have paastaaet Boet delt overensstemmende med de i Testamentets Post 1 og 2 givne Forskrifter.***

Idet der*** maa gives de under Disputen overfor Tilsynsværgens Paastande optraadte Legatarer Medhold i, at det, da det er uomtvistet, at Testator ved sin Død havde og i en meget lang Aarrække uafbrudt havde haft Hjemsted paa britisk Territorium, ikke kan være den danske Arvelovgivning, som bør være bestemmende for Omfanget af Afdødes Testationsret, hvorimod denne maa bedømmes efter den Ret, som er gældende paa det Sted, hvor Afdøde havde fast Bopæl, ikke alene ved Testamentets Oprettelse men også ved sin Død, samt da Tilsynsværgen end ikke har forsøgt at svække Troværdigheden af de af Modparten fra engelske Jurister erhvervede Udtalelser om den i England gældende Testationsret, ifølge hvilken selv en fuldstændig Exheredation af Testators Søn, endog uden Angivelse af Bevæggrunden hertil, samt Indsættelse af Arvinger i hans Sted vilde have været lovlig, vil Indholdet af Posterne 1 og 2 i det foreliggende Testamente, om hvis, ogsaa efter engelsk Lov, retsgyldige Form ingen Tvist er rejst, være at lægge til Grund ved Boets Opgørelse.***

269

Boet efter fhv. oversergent Einar Søren Christoffer Knudsen

Se ovenfor nr. 257.

270

Nordisk konvention om arv og dødsboskifte

Dekg. nr. 274 af 4. oktober 1935

Art. 1. Når en statsborger i en af de kontraherende stater ved sin død var bosat i en af de andre stater, skal retten til arv ifølge loven bestemmes efter loven i den stat, hvor han havde bopæl. Havde den afdøde ikke de sidste fem år været bosat i denne stat, skal dog loven i den stat, hvor han var statsborger, komme til anvendelse, såfremt nogen arving eller legatar, for hvem det har retlig betydning, begærer det. Skulle arven efter statsborgerlandets lov tilfalde staten, kan sådan begæring ikke fremsættes.

Begæring om anvendelse af statsborgerlandets lov skal være fremsat inden seks måneder fra dødsfaldet. Er skifte ikke sluttet ved udløbet af denne frist, kan begæring dog fremsættes indtil skiftets slutning. Efter at et skifte er sluttet, kan den, der har deltaget i skiftet, ikke fremsætte begæring.

Bestemmelserne i denne artikel om retten til arv finder også anvendelse på en efterlevende ægtefælles lovbestemte ret til at beholde boet udelt i tilfælde, hvor den afdøde ikke efterlod sig livsarvinger, samt på sådan ret til underholdsbidrag af et dødsbos midler, som efter loven i den stat, hvor den afdøde var statsborger, tilkommer en arving udover hans arvelod.

Art. 2. Var den afdøde bosat i en stat, hvor loven giver en efterlevende ægtefælle ret til hensiddende i uskiftet bo med livsarvinger, kommer denne lov til anvendelse, også når den afdøde var statsborger i en af de andre stater. Havde

han ikke været bosat i førstnævnte stat de sidste fem år, kan dog en livsarving straks eller senere kræve skifte, hvis dette er hjemlet ved loven i den stat, hvor den afdøde var statsborger. Denne ret tilkommer ikke en livsarving, hvis den efterlevende ægtefælle, da ægteskabet blev indgået, var statsborger i den stat, hvor den afdøde var bosat.

Når der efter begæring som nævnt i første stykke skal foretages skifte efter en svensk statsborger, har den efterlevende ægtefælle den ret til ved skiftet at udtage midler til en vis værdi, som er fastsat i svensk lov.

Art. 3. Var den afdøde bosat i en stat, hvor loven ikke giver en efterlevende ægtefælle ret til hensidden i uskiftet bo med livsarvinger, skal ægtefællen dog have den ret til at hensidde i uskiftet bo, som måtte være hjemlet ved loven i den stat, hvor den afdøde var statsborger, såfremt den afdøde ikke havde været bosat i førstnævnte stat de sidste fem år. De forretninger, som statsborgerlandets lov henlægger til skifteretten eller anden offentlig myndighed, udføres i så fald af den almindelige underret i den stat, hvor den afdøde var bosat. Er også den efterlevende ægtefælle bosat der, og foreskriver statsborgerlandets lov tilsyn med forvaltningen af boet, udøves tilsynet af en dertil af retten beskikket tilsynsførende (*god man*). Foreligger der en af retten registreret opgørelse over boets ejendele og gæld (*bouppteckning*), kommer bestemmelser i statsborgerlandets lov om udfærdigelse af sådanne opgørelser ikke til anvendelse.

Art. 4. Er der i medfør af dansk lov truffet bestemmelse om, at der skal beskikkes tilsynsværge for enke, som vil hensidde i uskiftet bo, får bestemmelsen kun virkning, såfremt enken ved mandens død var bosat i Danmark. Bosætter hun sig senere i en af de andre stater, bortfalder tilsynsværgemålet.

Art. 5. Bestemmelserne i artiklerne 2, 3 og 4 om adgangen til at hensidde i uskiftet bo med livsarvinger finder tilsvarende anvendelse på adgangen til at hensidde i uskiftet bo med adoptivbarn eller dets livsarvinger.

Art. 6. Den, som i henhold til artiklerne 1, 2 eller 3 begærer statsborgerlandets lov anvendt, skal om fornødent godtgøre, at de nævnte betingelser foreligger, og fremlægge oplysninger om indholdet af statsborgerlandets lov.

Art. 7. Ved deling af ægtefællers bo efter den enes eller begges død forholdes der, for så vidt ikke andet følger af artikel 2, 2. stykke, efter de regler, som i artiklerne 3 og 6 i konvention af 6. februar 1931 er givet om ægtefællers formueforhold.

Art. 8. Testamente, der er oprettet af en arvelader, som ved sin død var statsborger i en af staterne og bosat i en af dem, skal i henseende til formen anses for gyldigt, såfremt der ved oprettelsen er gået frem efter loven i den af staterne, hvor testamentet er oprettet, eller hvor testator ved oprettelsen var bosat eller var statsborger. Tilbagekaldelse af et testamente skal anses for gyldig, når testator er gået frem efter loven i den af staterne, hvor han ved tilbagekaldelsen var bosat eller var statsborger.

Art. 9. Den alder og myndighed, som kræves til oprettelse eller tilbagekaldelse af testamentet, bedømmes efter loven i den af staterne, hvor testator ved oprettelsen eller tilbagekaldelsen var bosat. Havde han da ikke de sidste fem år været bosat i denne stat, er testamentet eller tilbagekaldelsen også gyldig, hvis betingelserne ifølge statsborgerlandets lov var til stede.

Art. 10. Spørgsmål om testamentets eller tilbagekaldelsens ugyldighed på grund af testators sindstilstand eller på grund af svig, vildfarelse, tvang eller anden utilbørlig påvirkning bedømmes efter loven i den af staterne, hvor testator var bosat, da testamentet blev oprettet eller tilbagekaldt.

Art. 11. Bestemmelser i finsk eller svensk lov om, at et testamente efter Testators død skal indleveres til retten inden en vis tid (*testamentsbevakning*), får også anvendelse på et testamente efter en statsborger i en anden af staterne, såfremt han ved dødsfaldet var bosat i Finland eller Sverige. Det samme gælder bestemmelser i finsk eller svensk lov om, at en arving, som vil angribe et testaments gyldighed, skal rejse sag inden en vis tid, efter at testamentet er forkyndt for ham (*testamentskländer*).

Art. 12. Spørgsmålet om den bindende virkning af dødsgaver, arvepagter og arveafkald overfor arveladeren skal, når denne ved sin død var statsborger i en af staterne, afgøres efter loven i den af staterne, hvor han var bosat, da aftalen blev truffet.

Det samme gælder spørgsmål om, hvorvidt midler, som en arving har modtaget af arveladeren, medens denne levede, skal anses som forskud på arv.

Art. 13. De særlige regler, som i nogle af staterne gælder om en arvinges ret til fast ejendom med tilbehør eller om en arveladers adgang til ved testamente at råde over sådan ejendom til fordel for enkelte arvinger, finder anvendelse på ejendom i denne stat.

Retten til ved testamente at træffe fideikommissariske bestemmelser vedrørende fast ejendom eller andre bestemmelser over sådan ejendom til fordel for ufødte bedømmes ligeledes efter loven i den stat, hvor ejendommen ligger. På retten til at træffe sådanne bestemmelser angående andet end fast ejendom kommer denne konvention ikke til anvendelse.

Art. 14. Efterlader en statsborger i en af staterne sig adoptivbarn, og er adoptionsbevillingen i en af disse stater meddelt med forbehold om ret for adoptanten til uafhængig af adoptionen at råde over sine efterladenskaber, skal dette forbehold have gyldighed også i de andre stater.

Art. 15. Spørgsmålet om forbrydelse af retten til arv eller legat og om adgang til at gøre en arving arveløs bedømmes, når arveladeren var statsborger i en af staterne, efter loven i den af staterne, hvor han ved sin død var bosat.

Art. 16. Om forældelse af retten til arv eller legat efter en statsborger i en af staterne gælder loven i den af staterne, hvor arveladeren ved sin død var bosat.

Art. 17. Arvingers ansvar for gæld efter en statsborger i en af staterne eller for opfyldelse af legat eller testamentarisk pålæg bedømmes efter loven i den af staterne, hvor arveladeren ved sin død var bosat. Det samme gælder ansvaret for opfyldelse af underholdspligt, som påhvilede den afdøde overfor barn udenfor ægteskab eller et sådant barns moder.

Art. 18. Præklusivt proklama, som er udstedt i boet efter en statsborger i en af staterne, får ikke virkning med hensyn til kendte fordringer, når fordringshaveren er bosat i en af de andre stater og ikke i tide har fået særskilt meddelelse om proklamaet og dets virkning eller på anden måde er blevet bekendt dermed.

Tingsretten

271

Nordisk konkurskonvention

Bekg. nr. 249 af 1. september 1934

Art. 4. Spørgsmålet om, hvorvidt tinglysning eller indførelse i grundbog er en betingelse for, at retshandler, som skyldneren før konkursen har indgået om fast ejendom med tilbehør, skal have gyldighed overfor konkursboet, og spørgsmål om afkræftelse af sådanne retshandler afgøres efter loven i den stat, hvor ejendommen er beliggende. Det samme gælder spørgsmål om, hvorvidt tinglysning af konkursen er nødvendig for at hindre, at retshandler, som skyldneren under konkursen foretager vedrørende sådan ejendom, skal få virkning for boet. De tilsvarende spørgsmål vedrørende registreret skib eller luftfartøj eller part i sådanne afgøres efter loven i skibets eller luftfartøjets hjemland.

Er efter loven i en af staterne tinglysning, registrering eller anden kundgørelse betingelse for, at overdragelse eller underpantsettning af andet løsøre end det i første stykke omhandlede skal have gyldighed overfor konkursboet, skal loven i denne stat anvendes på spørgsmålet om en sådan retshandels ugyldighed eller afkræftelse, såfremt genstanden findes der ved konkursens indtræden.

Spørgsmålet om konkursens indvirkning på en ret, som er erhvervet ved udlæg eller udpankning, afgøres efter loven i den stat, hvor forretningen er foretaget.

272

Nordisk konvention om arv og dødsboskifte

Bekg. nr. 274 af 4. oktober 1935

Art. 25. Lovbestemmelser i en af staterne om, at tinglysning er nødvendig, for at rettigheder, som er erhvervet ved retshandel eller ved udlæg eller udpankning, skal have gyldighed overfor et dødsbo, kommer ikke til anvendelse på ejendele, som ved dødsfaldet findes i de andre stater.

Art. 26. Forsåvidt anvendelsen af foranstående bestemmelser afhænger af, hvor en formuegenstand befinder sig, skal en fordring, som tilhørte arveladeren, anses for at være i den stat, hvis lov efter art. 19 er bestemmende for behandlingen af boet. Er fordringen knyttet til gældsbevis eller andet dokument,

hvis forevisning er nødvendig for at gøre den gældende, anses den dog for at være i den stat, hvor dokumentet findes.

Registreret skib eller luftfartøj anses for at befinde sig i den stat, hvor det har hjemsted.

273

Reno Press v/fru Anna Larsen mod Joachim Scheinhuber

KØBENHAVNS DYRET (STADFÆSTET AF ØSTRE LANDSRET)
U. f. R. 1963. 704

Ved en låne- og sikkerhedsoverdragelseskontrakt af 2. december 1960 lånte Kaj Elgaard Madsen, dengang bosat i Lübeck, 1508 DM hos Bank für Teilzahlungskredit Heinrich Köhler KG i Kiel til køb af en brugt motorvogn Opel Caravan Kombi årgang 1954 og overdrog ejendomsretten til motorvognen til banken til sikkerhed for lånets tilbagebetaling, dog således at der i stedet for motorvognens overgivelse til banken blev aftalt, at låntageren vederlagsfrit skulle opbevare motorvognen på bankens vegne med ret til at bruge den. Lånet skulle tilbagebetales i 12 rater fra 1. januar til 1. december 1961. Ifølge kontraktens almindelige lånebetingelser måtte låntageren ikke disponere retligt over motorvognen og måtte ikke, selv forbigående, føre den ud af tysk toldområde.

Kaj Elgaard Madsen har den 3. oktober 1961 fået motorvognen indregistreret her i landet som KC 61.008 og har den 28. februar 1962 solgt motorvognen til firmaet Reno Press ved fru Anna Larsen, Nørrebrogade 211, København.

Under denne sag, — — — har Joachim Scheinhuber af Lübeck, der ved transport af 27. juli 1962 har overtaget bankens lånekontrakt af 2. december 1960, påstået sagsøgte, firma Reno Press ved fru Anna Larsen, dømt til at udlevere motorvognen.

Sagsøgte har påstået sig frifundet.

Sagsøgeren har anført, at der ved kontrakten af 2. december 1960 efter tysk ret er stiftet en gyldig ejendomsret for banken, jfr. BGB § 930, og at låntageren har gjort sig skyldig i berigelsesforbrydelse ved at sælge motorvognen uden at fyldestgøre banken. Sagsøgeren må derfor kunne vindicere motorvognen fra sagsøgte, som har erhvervet den fra en person, som ikke har haft ret til at overdrage den. Låntageren skylder 8 afdrag à 125 DM eller 1000 DM, hvortil kommer renter og omkostninger.

Sagsøgte har anført, at hun i god tro har købt motorvognen som ubehæftet her i landet af Elgaard Madsen, på hvis navn de danske motorpapirer lød. Hun har købt motorvognen for 3750 kr. med en udbetaling på 1000 kr., medens restkøbesummen + rentetillæg 690 kr. skal afdrages over 24 måneder. Hun har intet kendskab haft til långiveren og mener herefter, at sagsøgeren ikke kan kræve vognen udleveret, da sagen skal afgøres efter dansk ret, og sagsøgerens ret kun er en utinglyst sikkerhedsret i løsøre, som en godtroende erhverver af tingene ikke skal respektere.

Til det anførte bemærkes, at spørgsmålet om vindikation vil være at afgøre

efter dansk ret. Retten må imidlertid lægge til grund, at der efter tysk ret gyldigt er stiftet en som ejendomsret beskyttet sikkerhedsret for långiveren, jfr. BGB § 930, og at låntageren efter dansk ret har gjort sig skyldig i underslæb eller skyldnersvig over for långiveren ved at sælge vognen uden at fyldestgøre långiveren. Herefter, og idet der ikke i långiverens og sagsøgerens forhold er oplyst omstændigheder, som kan begrunde andet resultat, findes sagsøgeren at have krav på udlevering af motorvognen fra sagsøgte. — — —***

274

Luther v. James Sagor & Co.

Se ovenfor nr. 70.

275

Bánská a Hutní Společnost, národní podnik, Prag, mod dr. Georg Heinrich Hahn m. fl.

VESTRE LANDSRET
U. f. R. 1952. 856

Randers købstads ret

Med faktura af 1. juli 1939 fik S. C. Sørensen a/s, Randers, fra firmaet Albert Hahn Röhrenwalzwerk, Bohumin, Czekoslovakiet, leveret varer for en købesum af sv. kr. 1878,45. På grund af de daværende urolige internationale forhold blev købesummen ikke betalt forinden verdenskrigens udbrud i september s. å., og først efter krigens ophør blev spørgsmålet om betalingen påny aktuelt, idet der over for køberfirmaet S. C. Sørensen a/s blev gjort krav gældende på købesummen såvel af de tidligere indehavere af sælgerfirmaet som af et i Czekoslovakiet nyoprettet nationalt selskab, hvortil samtlige dette firmas ejendele og formueværdier var overført i henhold til en der gennemført nationalisering. Da S. C. Sørensen a/s herefter var i tvivl om, hvem købesummen rettelig tilkom, har aktieselskabet under 14. juni 1949 deponeret denne i Randers Diskonto- og Lånebank a/s i medfør af bestemmelserne i lov nr. 29 af 16. december 1932.

Idet sagsøgerne, det fornævnte czekiske nationale selskab, hvis czekiske navn er Bánská a Hutní Společnost, národní podnik, med hjemsted i Prag, nu har anbragt, at de tidligere indehavere af det pågældende firma var dr. Georg Heinrich Hahn og dr. Rudolf Eisner, begge af Berlin, ingeniør Eisner, Wien, og købmand Hans Hahn, Prag, har selskabet under denne sag*** nedlagt påstand på, at de tilpligtes at anerkende, at det ovennævnte deponerede beløb tilkommer sagsøgeren.***

De 3 sagsøgte*** har påstået sig frifunden for sagsøgernes påstand, idet de bestrider, at der kan tillægges den nationalisering af virksomheden og dens formue, som påberåbes som grundlag for sagsøgernes krav, retsgyldighed her i landet.***

Sagsøgerne har under sagen fremlagt eksemplarer af den officielle czekiske lovtidende med vedhæftet translatøversættelse til engelsk af de deri indeholdte bestemmelser vedrørende den skete nationalisering af det heromhandlede firma. Det fremgår heraf, at nationalisering er sket i henhold til et af Tsekoslovakiets præsident den 27. oktober 1945 udstedt dekret, der i almindelighed bestemmer, hvilke virksomheder der er genstand for nationalisering, og fastsætter dennes omfang, i hvilken henseende udtrykkelig nævnes de virksomhederne tilhørende fordringer. Ved en bekendtgørelse af 27. december 1945 fra den czekiske industriminister erklæres udtrykkelig "Albert Hahn, rourovna (Overberger Eisen- und Stahlwerke, G. m. b. H.)" med hjemsted i Novy Bohumin som værende nationaliseret fra den 27. oktober s. å. at regne "through transformation in to State's property (state- impropriation)", hvorhos der opregnes, hvilke aktiver nationaliseringen omfatter, derunder også fordringer (claims). Endelig er der ved dekret af 7. marts 1946 fra industriministeren truffet bestemmelse om oprettelse af det nu som sagsøger optrædende nationale selskab og om overførelse til dette bl. a. af de det nævnte foretagende tilhørende værdier.

Endvidere har sagsøgerne fremlagt en ligeledes af translatøversættelse til engelsk ledsaget erklæring af 10. juli 1950 fra det czekiske industriministerium, hvori det bekræftes, at det omhandlede foretagende er nationaliseret og overdraget til det nævnte nationale selskab (národní podnik) ved de foran nævnte dekreter og bekendtgørelser og at efter omfanget af den skete nationalisering og overdragelse også den heromhandlede fordring på S. C. Sørensen a/s indbefattes derunder, således at det sagsøgende nationale selskab er blevet rette kreditor ifølge denne.

Sagsøgerne har erkendt, at der ikke foreligger en efter danske retsregler gyldig overførelse af fordringen til sagsøgerne, men gør gældende, at overdragelsens gyldighed i det foreliggende tilfælde alene vil være at afgøre efter czekisk lov, hvorefter der ikke kan være tvivl om sagsøgernes adkomst til det omstridte beløb. De har herved bestridt, at den skete nationalisering skulle være i den grad stridende mod dansk retsopfattelse eller retsorden, at dens gyldighed af denne grund skulle kunne anfægtes ved dansk domstol.

De sagsøgte har på den anden side erkendt, at anvendelsen af den czekiske lov måtte føre til godkendelse af sagsøgernes krav. De har imidlertid gjort gældende, at den skete nationalisering af virksomheden, for hvilken der ikke er dokumenteret at være ydet nogen erstatning, må anses som værende i så åbenbar strid med dansk retsopfattelse og ufravigelige retsgrundsætninger, at den ikke kan gøre krav på at blive anerkendt som gyldig her i landet, og at konsekvenserne heraf må blive, at fordringen rettelig tilkommer virksomhedens tidligere indehavere. — — —

Hvad angår sagsøgernes krav på den heromhandlede fordring finder retten efter de om den foregående nationalisering foreliggende oplysninger, at denne

må anses som værende uforenelig med gældende danske retsgrundsætninger, og at der derfor ikke vil kunne tillægges den retsgyldighed med hensyn til her i landet værende formueværdier. Herefter vil sagsøgerens påstand om at anerkendes berettiget til det deponerede beløb ikke kunne tages til følge.***

Vestre Landsrets dom.

***For landsretten har appellerterne påstået de indstævnte tilpligtede at anerkende, at det af a/s S. C. Sørensen, Randers, den 14. juni 1949 i a/s Randers Disconto- og Lånebank deponerede beløb, der rettelig udgør i svensk mønt 1873 kr. 43 øre, tilkommer appellerterne, medens de indstævnte har nedlagt påstand om frifindelse og påstået appellerterne dømt til at anerkende, at de indstævnte er ejere af det anførte beløb. — — —

I en — — — for landsretten fremlagt skrivelse af 28. juni 1951 udtaler appellerterne, «dass die ausländischen Inhaber des nationalisierten Eigentums grösstenteils entschädigt wurden und zwar im Wege zwischenstaatlicher Vereinbarungen. Mit den Inhabern der Firma Hahn wurde jedoch keine Vereinbarung getroffen, umsomehr als nach hiesigen Gesetzen und nach dem Benehmen derselben diese Firma bis zum Jahre 1939 als eine deutsche Firma galt. Bis zum Jahre 1939 also waren alle Inhaber, bezw. Gesellschafter der Firma Hahn deutsche Staatsbürger.» Af en attestation af 17. januar 1952 fra distrikts-civilretten i Prag fremgår det derhos, at Hans Hahn i overensstemmelse med nationaliseringslovgivningens bestemmelser har fremsat begæring om tilkendelse af erstatning for den skete nationalisering af firmaet, men at dette krav ikke har ført til noget resultat, fordi han ikke inden en af retten fastsat frist på 2 måneder tilvejebragte de for retten fornødne oplysninger til sagens fremme, herunder «navnlig sådanne, som kunne bevise, at han besidder ret til at optræde som part i den anførte procedure», samt fordi han havde undladt behørigt at udpege en inden for Tjcekoslovakiet bosat procesfuldmægtig.

Appellerterne har for landsretten støttet deres påstand på, at de efter de tjcekske bestemmelser har overtaget den af de indstævnte i Tjcekoslovakiet drevne virksomhed i sin helhed med samtlige dens aktiver og passiver, og at det ved en sådan overtagelse af et samlet formuekompleks må være den for dette gældende lov, der er bestemmende for samtlige de til dette hørende ejendele, uanset hvor de befinder sig. De har dernæst henvist til, at de bestemmelser, efter hvilke de har overtaget den nævnte virksomhed, principielt forudsatte, at der blev ydet erstatning til de tidligere ejere, selv om der findes væsentlige undtagelser herfra, navnlig refererende sig til ejernes forhold til den tjcekske stat. Når de indstævnte ikke har opnået erstatning, skyldes det deres egne forhold, idet de ikke på den i nationaliseringsbestemmelserne fastsatte måde har dokumenteret deres ret hertil.

I henhold til det i underretsdommen nævnte dekret — af 24. oktober 1945 — må der nu vel antages at være sket en overførsel til appellerterne af de aktiver, herunder fordringer, der tilhørte firmaet Albert Hahn, men der findes ikke at kunne tillægges det nævnte nationaliseringsdekret retsvirkning med hensyn til den her i sagen omhandlede fordring på det herværende selskab eller — efter at dette har frigjort sig ved deponering — med hensyn til retten til det i a/s

Randers Disconto- og Lånebank deponerede beløb, og de indstævnte vil således — som ved dommen sket — være at frifinde.

Da der under denne forudsætning for landsretten er enighed mellem parterne om, at de indstævnte har dokumenteret deres ret til beløbet, vil appellerne være at dømme til at anerkende, at de indstævnte er ejere af det i sagen omhandlede beløb i svensk mønt 1873 kr. 43 øre.***

276

USSR's Handelsrepræsentation i Danmark og Narva Flachs Manufactur vormals Flachs-Spinnerei Baron A. L. Stieglitz A.G. m. fl. mod Narva Flachs Manufaktur A/S og Peter Peltzer

ØSTRE LANDSRET
U. f. R. 1955. 1070

Blandt de virksomheder i Estland, der ved begivenhederne i sommeren 1940 blev nationaliserede af det nye estniske styre, var det sagsøgende selskab, Narva Flachs Manufactur vormals Flachs-Spinnerei Baron A. L. Stieglitz A/G. Dette selskab, der videreførte et af Stieglitz siden 1851 drevet hørspinderi, som siden 1880 havde vært drevet som aktieselskab, var efter den første verdenskrig, da Estland var blevet selvstændig, blevet omdannet til et estnisk selskab med en aktiekapital på ialt 2.160.000 estniske kroner. Sagsøgte, direktør Peter Peltzer, hvis fader havde været i kompagni med baron Stieglitz, har siden 1907 været administrerende direktør for selskabet, og aktiekapitalen har i det væsentlige tilhørt ham, hans slægt og nære venner, i 1940 ejede han således aktier af pålydende 604.400 estniske kroner, hvortil kom 92.000 estniske kroner, udlånt af ham til estniske bestyrelsesmedlemmer. Siden 1919 har direktør Peltzer, der er hollandsk statsborger, haft bopæl i København, hvorfra han har ledet selskabet, herunder afsætning af selskabets produkter. Bestyrelsen, hvoraf direktør Peltzer også var medlem, havde iøvrigt sæde i Tallin (Reval), hvor hovedkontoret fandtes.

For at have et eksportorgan, oprettedes i 1925 aktieselskabet Narva Flachs Manufactur A/S, København, med en aktiekapital på 75.000 kr., hvoraf selskabet i Tallin ejede de 72.000 kr. Bestyrelsen bestod af direktør Peltzer og to danske bestyrelsesmedlemmer.

Direktør Peltzer var bemyndiget til i vidt omfang at forpligte selskabet, og der var den 10. maj 1938 meddelt ham en generalfuldmagt, hvis ordlyd er følgende:***

Da direktør Peltzer, der i 1917 havde oplevet en nationalisering af selskabet i Rusland beroende værdier, nærede ængstelse ved den politiske udvikling, tog han initiativet til, at der den 15. juni 1940 oprettedes overenskomst mellem Narva Flachs, Tallin og Narva Flachs, København, hvorefter samtlige de her i landet værende aktiver tilhørende det estniske selskab og omfattende bankbeholdninger, udestående fordringer samt samtlige varelagre i Danmark blev overdraget til det danske aktieselskab Narva Flachs, København. Disse værdier ansattes til 1.761.000 danske kroner. Som vederlag for overdragelsen af disse

aktiver skulle det estniske selskab modtage nye aktier i det danske Narva Flachs-Manufactur, København, for et tilsvarende beløb. For at sikre det estniske selskabs kreditorer blev det derhos bestemt, at samtlige disse nye aktier tilligemed de gamle aktier i det danske aktieselskab af pålydende 75.000 kr. skulle deponeres i en bankboks i København som et samlet håndpant og sikkerhed for det estniske selskabs udenlandske kreditorer, således at de deponerede aktier først kunne frigøres, når disse kreditorer var blevet fyldestgjort eller havde samtykket heri.

På en generalforsamling i det københavnske aktieselskab den 26. juli 1940 godkendtes denne overenskomst.***

Den 3. august 1940 afholdtes i Berlin på foranledning af den hidtidige formand for bestyrelsen i det estniske aktieselskab A. Schwartz et møde vedrørende dette selskab, betegnet generalforsamling. Det besluttedes her at godkende den lige nævnte overdragelse af aktiverne til det københavnske aktieselskab, samt at de nye aktier, som skulle ydes til vederlag herfor, skulle udstedes til de gamle aktionærer i det estniske selskab forholdsvis efter deres aktieandel i moderselskabet. Endelig besluttedes det, for så vidt muligt at være i overensstemmelse med aktieselskabets vedtægter, at indkalde en ny generalforsamling 14 dage senere i Berlin til godkendelse af de trufne dispositioner, da der ikke var repræsenteret kvalificeret flertal af aktionærerne som efter vedtægterne krævedes til så vidtgående beslutninger.

På en ny generalforsamling i Berlin den 17. august godkendte de samme aktionærer de trufne beslutninger.

I det københavnske aktieselskab afholdtes ekstraordinær generalforsamling og bestyrelsesmøde den 5. august 1940, hvor man godkendte Berlin-generalforsamlingens beslutninger og vedtog at udstede de nye aktier direkte til de enkelte aktionærer i forhold til deres aktieandele i moderselskabet og på samme måde at udlodde aktiekapitalen på 75.000 kr. i det danske aktieselskab.

I den i Estland af underhuset vedtagne deklaration, offentliggjort i den estniske statstidende den 23. juli 1940 udtales det bl. a.: "— — — proklamerer underhuset for hele Estlands territorium nationaliseringen af bankerne og storindustrien". Den 26. juli offentliggjordes endvidere et dekret, hvoraf fremgik, at Narva Flachs-Manufactur A/S, Narva, omfattedes af nationaliseringen. En estnisk lov af 1. august 1940 gav nærmere regler om nationaliserings gennemførelse.

Det bestemtes i § 1, at Erhvervsministeriet fremtidig overtager administreringen af de nationaliserede foretagender, i § 5, at indehaverne af sådanne foretagender er pligtige ufortøvet at overgive til den befuldmægtige kommissær alle selskabets aktiver og passiver, i § 6, at indehaverne har pligt til at fungere videre og i § 11, at alle fordringer over for personer, institutioner og andre foretagender overtages i forbindelse med nationaliseringen. Ifølge § 12 bliver også aktierne i nationaliserede aktieselskaber statsejendom; de skal ifølge § 12, stk. 2, præsenteres i Erhvervsministeriet inden for en vis frist med den virkning, at aktieretten ellers bortfalder. På dette tidspunkt befandt sig i Estland 79,2 pct. af aktiebrevene i det estniske selskab; disse aktiebrev er nu deponerede i U. S. S. R.s statsbank.

Den 6. august 1940 afholdtes bestyrelsesmøde i det nationaliserede estniske

aktieselskab, hvori foruden 3 estniske bestyrelsesmedlemmer Krug, Reinok og Simsivart tillige deltog den af regeringen indsatte kommissær Tambi og dennes stedfortræder Kerem. Det blev på dette møde besluttet at annullere den til direktør Peltzer udstedte fuldmagt, hvilket samme dag telegrafisk meddeltes ham.

Den 12. august 1940 sendtes sålydende telegram til sagsøgte, direktør Peltzer: "Ifølge en vedtagelse i bestyrelsen i Narva Flachs-Manufactur, Tallin, er besiddelse og varer, der befinder sig på konsignationslager i København, blevet solgt til folkekommissariatet for udenrigshandel i U. S. S. R. Vi foreslår at overgive besiddelser og varer i henhold til opgørelse pr. 1. juli til U. S. S. R.'s handelsrepræsentation i Danmark", underskrevet bestyrelsen for Narva Flachs-Manufactur. Den 13. august 1940 indføjedes ligeledes telegrafisk efter ordene "Varer": "med alle rettigheder og fordringer".

Den 14. august 1940 bekræftede erhvervsministeren i Narva telegrafisk den skete overdragelse.

Efter et henholdende svar fra direktør Peltzer af 14. august 1940, afsendtes den 15. august 1940 sålydende telegram til ham: "Vi — — — beder Dem øjeblikkelig overdrage lageret med alle fordringer og rettigheder til U. S. S. R.'s repræsentant i Danmark for kommissariatet for udenrigshandel uden at afvente modtagelsen af skriftlig bekræftelse. Vi gør Dem ansvarlig for alle tab, der måtte opstå ved forhaling af overdragelsen", underskrevet bestyrelsen for Narva Flachs-Manufactur Krug, Simsivart, F.-D.-kommissær Kerem, erhvervsminister Narma.

Den 16. august 1940 afholdtes i Berlin af den samme, uden for Estland værende aktionærgruppe, som havde afholdt generalforsamling den 3. august 1940, en ny generalforsamling, hvor det besluttedes at afskedige bestyrelsen i Estland og i stedet indsætte en ny bestyrelse af personer uden for Estland, ligesom det i anledning af den foretagne annulation af direktør Peltzer's fuldmagt besluttedes at godkende hans fuldmagt som fortsat bestående. De trufne beslutninger godkendtes på en ny generalforsamling, afholdt den 30. august 1940 i Berlin, og er senere skriftlig tiltrådt af en række aktionærer, der ikke kunne komme til stede i Berlin.

I overensstemmelse med den trufne overenskomst med det danske aktieselskab blev der udstedt aktiebrev direkte til de tidligere aktionærer i moderselskabet. Samtlige aktier blev deponeret i Nationalbanken, hvor de siden har henligget.***

Efter afslutningen af krigen blev sagen anlagt ved stævning af 12. juni 1946. Sagsøgerne har herunder nedlagt følgende endelige påstand:

Principal:

At de sagsøgte, direktør Peter Peltzer, Nørrevoldgade 88, København, og Narva Flachs-Manufactur A/S, sammesteds, in solidum tilpligtes

I. til U. S. S. R.'s handelsrepræsentation på det estniske erhvervsministeriums vegne og Narva Flachs-Manufactur A/G., Tallinn, at udlevere

1. en aktiepost til pålydende 72.000 kr. i Narva Flachs-Manufactur A/S, København, i sin tid tegnet af og udstedt til Narva Flachs-Manufactur A/G., Tallinn,

2. provenuet af to livsforsikringspolicer for Albert C. Hay, London, henholdsvis med forsikringsselskabet "Royal" til pålydende £ 1000 og med forsikringsselskabet "Prudential" til pålydende £ 1500, udbetalt med £ 2500,
 3. en obligation i nævnte Albert C. Hay's hus i London til pålydende £ 600, alternativt at betale £ 600,
- II. 1. til U. S. S. R.'s handelsrepræsentation på vegne Ministeriet for Udenrigshandel at betale 1.292.694 kr. 86 øre,
2. og anerkende, at tilgodehavende hos A/S Sækkeleje-Kompagniet, København, A/S Fyens Sækkekompagni, Odense, og Skandinavisk Jute Kompagni, store henholdsvis U. S. A. \$ 46.915,83, U. S. A. \$ 32.955,69 og U. S. A. \$ 10.597,38, nu deponeret i Nationalbanken med ialt 468.305 kr. 14 øre, tilkommer U. S. S. R.'s handelsrepræsentation på Ministeriet for udenrigshandels vegne,

forsåvidt angår værdierne under II subsidiært til sagsøgerne, U. S. S. R.'s handelsrepræsentation på det estniske erhvervsministeriums vegne og Narva Flachs-Manufactur A/G., Tallinn, at udlevere aktier til pålydende 1.761.000 kr. i Narva Flachs-Manufactur A/S, København, alternativt at betale som erstatning herfor 1.761.000 kr. og mere subsidiært til sagsøgerne U. S. S. R.'s handelsrepræsentation på det estniske erhvervsministeriums vegne at udlevere aktier til pålydende 1.382.690 kr. i Narva Flachs-Manufactur A/S, København, alternativt at betale som erstatning herfor 1.382.690 kr.

De sagsøgte har påstået sig frifundet og har nedlagt selvstændig påstand på, at Narva Flachs-Manufactur A/S, København, kendes berettiget til fra Danmarks Nationalbank at få udbetalt de i denne bank i henhold til deponeringslov nr. 29 af 16. december 1932 deponerede beløb.***

Sagsøgerne har påstået frifindelse over for denne de sagsøgte selvstændige påstand*** sagsøgerne har til begrundelse for de rejste krav nærmere anført, at det er det oprindelige aktieselskab i Tallinn som sådant, der blev nationaliseret; det er ikke blevet opløst ved nationaliseringen, men består fremdeles og er også efter nationaliseringen ejer af de her i landet beroende værdier, som hele tiden har tilhørt det estniske selskab; aktiverne ejes af selskabet som sådant, ikke af aktionærerne, og dette gælder uanset nationaliseringen; selskabet kan følgelig nårsomhelst og hvorsomhelst efter almindelige retsregler gøre sin ejendomsret gældende. Ved nationaliseringen, en retsakt, foretaget af myndighederne i en anerkendt stat, er staten blevet ejer af det estniske aktieselskab, men det fremsatte krav må netop, fordi aktieselskabet fortsat består som selvstændig juridisk person, anses som privatretligt (staten som fiscus), ikke som udsprunget af statens højhedsret. Heraf følger at spørgsmålet om, hvorvidt den foretagne nationalisering efter international retsopfattelse og domspraksis kan tillægges retsvirkning uden for det statsterritorium, hvor den er foretaget, ikke får direkte betydning i den foreliggende sag. Men iøvrigt bestrider sagsøgeren, at der skulle gælde noget almindelig anerkendt territorialitetsprincip, som frakender en nationalisering (statskonfiskation) ekstraterritorial retsvirkning.

Sagsøgerne har videre gjort gældende, at de af sagsøgte foretagne transaktioner må anses for ugyldige. Den til direktør Peltzer udstedte fuldmagt må

ifølge sagens natur anses som bortfaldet ved nationaliseringen eller i alt fald senest ved den lovligt af bestyrelsen for det nationaliserede estniske selskab foretagne annulation; men hertil kommer, at fuldmagten ved de foretagne transaktioners vidtgående karakter er klart overskredet, og disse dispositioner er iøvrigt i strid med allerede før nationaliseringen gældende estnisk lov og selskabets egne statutter.

Sagsøgeren har endvidere gjort gældende, at overenskomsten om de her-værende værdiers overdragelse til det københavnske aktieselskab først er sket efter nationaliseringen, nemlig tidligst ved den den 26. juli 1940 daterede overenskomst, som benyttedes ved anmeldelsen til aktieselskabsregistret. I denne forbindelse har sagsøgerne henvist til et i sagen fremlagt referat af generalforsamling i det københavnske aktieselskab, dateret 3. august 1940, som urigtigt omtaler, at der var afholdt 2 generalforsamlinger i Berlin, hvilket i forbindelse med de 2 forskelligt daterede overenskomster af henholdsvis 15. juni og 26. juni 1940 viser, at de sagsøgte har dateret urigtigt, formentlig for at få overdragelsen til at ligge før nationaliseringen. Generalforsamlingerne i Berlin, der kun kan opfattes som møder af nogle aktionærer eller rettere forhenværende aktionærer, må ligeledes være betydningsløse, dels fordi disse aktionærers aktiebrev eller i alt fald den alt overvejende del af disse som anført lå i Estland og omfattedes af nationaliseringen, dels som følge af, at vedtægternes regler for generalforsamlingernes indkaldelse m. v. ikke var overholdt.

Til godtgørelse af, at det nationaliserede estniske aktieselskab stadig består, har sagsøgerne, foruden til at selskabet fortsat benytter samme brevpapir og har valgt ny bestyrelse, henvist til, at der som nævnt afholdtes bestyrelsesmøder, der, som det fremgår af protokollen for det den 6. august 1940 afholdte møde, f. eks. beskæftiger sig med spørgsmålet om selskabets finansieringsproblemer, samt til at aktieselskabet er indregistreret, jfr. en i sagen fremlagt erklæring herom af 17. april 1954 fra det estniske finansministerium, hvori det yderligere udtrykkelig anføres, at selskabet efter sin nationalisering i 1940 har fortsat sin virksomhed som selvstændig juridisk person. Iøvrigt har sagsøgerne henvist til et af dem fremlagt responsum af 28. februar 1955 fra det estniske justitsministerium, hvorefter de af de sagsøgte foretagne transaktioner anses stridende mod såvel ældre som nyere estnisk lovgivning, ligesom fuldmagten for direktør Peltzer efter estnisk ret er lovligt annulleret.***

For det tilfælde, at overdragelsen til det danske aktieselskab anses for gyldig, har sagsøgerne subsidiært gjort gældende, at denne overdragelse er sket mod et vederlag i aktier tilkommende det estniske moderselskab, som derfor må have krav på samtlige disse aktier eller et til deres pålydende, 1.761.000 kr., svarende beløb.

Mere subsidiært, nemlig for det tilfælde, at den skete udlodning af de nye aktier også anses lovlig, påstås udlevering af andel heri, svarende til de 79,2 pct. af aktierne i moderselskabet, som nationaliseredes ved, at aktiebrevene lå i Tallinn, eller ialt 1.382.690 kr., alternativt med en erstatning af samme størrelse, alt foruden de 72.000 kr., som udgjorde aktiekapitalen i det københavnske aktieselskab.

De sagsøgte har til støtte for deres frifindelsespåstand gjort gældende, at

de af nærværende sag omhandlede aktiver var uden for Estland på nationaliseringstidspunktet og derfor ikke kan anses for omfattet af denne. Dette er en følge af det almindelige anerkendte territorialitetsprincip, hvorefter en nationalisering vel må anerkendes inden for det pågældende territorium (statens magt-område), men ikke kan tillægges retsvirkning for værdier, der på nationaliserings-tidspunktet befandt sig uden for dette. At det drejer sig om en juridisk person, et aktieselskab, kan ikke gøre nogen ændring heri. Forholdet må behandles ganske på samme måde som ved enkeltmandsfirmaer. Den eneste følge af, at det drejer sig om et aktieselskab, er, at der kan opstå vanskeligheder med hensyn til, hvem der kan disponere over værdierne uden for konfiskations-landet, men sådanne vanskeligheder foreligger ikke her. Heller ikke det forhold, at aktieselskabet måtte have fortsat sin virksomhed efter at være blevet stats-ejendom, kan ændre dette. De sagsøgte har iøvrigt betvivlet, at der har været tale om andet og mere end den ved den fornævnte estniske lov af 1. august 1940 forudsatte overgangstid, og har herved henvist til, at det af en i sagen fremlagt fuldmagt af 15. februar 1947 til de sagsøgte henværende sagfører, landsretssagfører Lannung, fremgår, at den er udstedt af Krenholm Manufactur, der følgelig må have overtaget det gamle selskab.

Som støtte for at frakende nationaliseringen virkning over for de her-værende værdier har de sagsøgte også peget på, at den skete nationalisering efter deres opfattelse har været ulovlig efter estnisk ret, hvilket støttes af et fremlagt responsum af 2. august 1941 fra de estniske sagførere Herman Koch og Victor Johannson, samt på, at nationaliseringen må anses for uforenelig med gældende danske retsgrundsætninger (ordre public).

De uden for Estland trufne dispositioner med overdragelsen af værdierne til det danske aktieselskab støtter efter de sagsøgte opfattelse også deres fri-findelsespåstand, idet det fastholdes, at overdragelsen har fundet sted forud for nationaliseringen; men iøvrigt erkendes det, at formerne for generalforsamlin-gernes indkaldelse og afholdelse ikke ganske har været iagttaget, men dette skyldtes alene, at det var umuligt; det erkendes, at den direktør Peltzer med-delte fuldmagt må anses for bortfaldet ved nationaliseringen, men kun for så vidt angår de i Estland værende værdier.

Over for det af sagsøgerne om de urigtige dateringer anførte, har de sag-søgte fastholdt, at begge de nævnte overenskomster er originale, og at den første af 15. juni 1940 er udfærdiget, før der forelå specifikation over værdierne, hvorfor de angives med ca. tal, medens det ved anmeldelsen til aktieselskabs-registret var nødvendigt at have specifikation. Referatet af bestyrelsesmødet i det københavnske aktieselskab den 3. august er et udkast uden betydning. Mødet er, som anført, først afholdt den 5. august 1940. De sagsøgte har for retten forevist det københavnske selskabs bestyrelsesprotokol, ifølge hvilken der alene har været afholdt møde sidstnævnte dato.

Efter de sagsøgte opfattelse er det estniske aktieselskab blevet opløst ved nationaliseringen, og de ikke nationaliserede værdier må derfor tilkomme kredi-torerne og, når de er dækket, aktionærerne.

Den omstændighed, at de fysiske aktiebreve i betydeligt omfang lå i Tallinn og derfor nu er taget i besiddelse af staten, har ingen betydning, da disse aktie-

breve kun er legitimationspapirer, ikke bærere af den reelle ejendomsret. Om virksomheden i Estland videreføres af staten eller af et statsejet aktieselskab, må være uden betydning, et sådant aktieselskab er i hvert fald ikke identisk med det gamle, da alle aktieejerne jo er andre.

Vedrørende deres selvstændige påstand har de sagsøgte anført følgende: Når det fastslås, at sagsøgerne ikke kan disponere over de i sagen omhandlede værdier, opstår der i det store og hele ingen legitimationsvanskeligheder for de sagsøgte, da de faktisk siden 1940 uden vanskeligheder har videreført virksomheden i Danmark med tilslutning af aktionærer, bosat uden for Estland, repræsenterende 85,69 pct. af aktiekapitalen i det oprindelige estniske selskab; det bemærkes i denne forbindelse, at ingen aktionær har modsat sig de trufne dispositioner, og at det må formodes, at ejerne af de ikke repræsenterede aktier enten er forsvundne eller bosatte i Estland. De sagsøgte har set det som deres hovedopgave at fyldestgøre kreditorerne uden for Estland, og ved at udnytte den eksisterende organisation og good-will at arbejde for aktionærernes interesser. — Kun for så vidt angår de i Nationalbanken deponerede beløb er det nødvendigt at få en domsafgørelse for de sagsøgte ret til at disponere. I tilfælde, hvor et selskabs normale organer er sat ud af den formelt korrekte funktion, må det være domstolens opgave i hvert enkelt tilfælde at afgøre, om den i den pågældende sag optrædende part rent faktisk har tilvejebragt tilstrækkelig klart bevis for, at den repræsenterer aktieejernes interesser. I denne henseende har de sagsøgte navnlig henvist til, at selv om man ikke kan tillægge overdragelsen i juni 1940, baseret på direktør Peltzers fuldmagt og generalforsamlingerne i august 1940, selvstændig juridisk gyldighed, må man dog tage disse dispositioner og den senere videreførelse af selskabet under direktør Peltzers fortsatte ledelse som et fuldgyldigt udtryk for, at det er aktionærernes ønske, at der er forholdt af de sagsøgte som sket, og at det sagsøgte selskab skal kunne disponere over de deponerede beløb; de få ikke repræsenterede aktionærers rettigheder er og vil blive varetaget på samme måde som de repræsenteredes, og da der kun er og vil blive disponeret efter aktionærernes tarv, derunder dækning af kreditorer, må det være klart, at dette også er i de ikke repræsenterede aktionærers interesse.

Der findes nu ved rettens afgørelse af sagen at burde gives de sagsøgte medhold i, at der må gælde samme retsregler, hvad enten en nationalisering omfatter en enkelt persons ejendele eller et aktieselskab, og i sidste fald, hvad enten den gennemføres i form af en fortsættelse af selskabet og dets organisation, eller om der dannes et nyt selskab, eller om foretagendet videreføres direkte af staten. Da aktiebrevene kun er en legitimation for aktionærerne, må det i dette tilfælde, hvor det ikke bestrides, hvem disse er, og hvor det er klart, hvorledes overtagelsen af de i Estland beroende aktiebrev skete, være uden betydning, om disse i 1940 fandtes i eller uden for landet, og at de nu er i sagsøgernes besiddelse.

Allerede fordi overgangen af ejendomsretten efter et nationaliseringsdekret alene er en følge af et statsindgreb, ikke af tidligere gældende almindelige retsregler, omtrent ensartede i de implicerede lande, kan dekretet umiddelbart kun have virkning i det land, inden for hvis magtområde de pågældende goder

befinder sig. Herefter findes der ikke at kunne gives sagsøgerne medhold i de principale påstande.

Da den i 1940 foretagne overdragelse af de uden for Estland værende aktiver til det danske aktieselskab ikke vil kunne tillægges selvstændig betydning ved afgørelsen af ejendomsretten til disse værdier, er der ikke anledning til at indgå nærmere på de subsidiære påstande.

Med hensyn til de sagsøgte påstand om udlevering af de deponerede beløb bemærkes, at deponeringen alene fandt sted, fordi der var tvivl om, hvorvidt beløbene skulle udbetales til selskabet i Danmark eller til sagsøgerne på det nationaliserede selskabs vegne. Da sidstnævnte efter det ovenfor anførte ikke er berettiget til at få beløbene udbetalt, og da de sagsøgte efter de foreliggende omstændigheder findes tilstrækkeligt at have godtgjort deres ret til at repræsentere aktionærerne i såvel det oprindelige estniske selskab som det danske selskab, vil deres påstand være at tage til følge. — — —***

Kontraksstatuttet

277

Thordur Einarsson, Island, mod Jacob Dahl

SO- OG HANDELSRETTE
U. f. R. 1948. 1220

M/S "Grønland", som da var hjemmehørende i Vestmanna paa Færøerne, ejedes og førtes af Skibsfører Joen (eller Jøgvan) Christiansen, Vestmanna, og for hvilket Sagsøgte, Grosserer Jacob Dahl, var korresponderende Reder, drev i Sommeren 1946 Fiskeri ved Island. Under Fiskeriet har Joen Christiansen i Tiden 11. Juli—20. August hos Sagsøgeren, Thordur Einarsson, Nordfjærdur, Island, taget Varer paa Kredit og modtaget Laan ifølge Sagsøgtes Regning af 20. August 1946 for ialt islandske Kr. 5292,37. Skibet er senere solgt, og Sagsøgte har overfor Køberne indestaaet for Betaling af Fordringer med Søpanteret.

Under denne Sag paastaar Sagsøgeren principalt Sagsøgte dømt til at anerkende, at Sagsøgeren for islandske Kr. 5292,37 med Renter 5 pCt. p. a. fra Stævningens Dato den 5. Juli 1947, til Betaling sker, har Søpanteret i Fartøjet M/S "Grønland".***

Sagsøgte paastaar Frifindelse for den principale Paastand.***

Under Sagens Forberedelse har Skibsfører Joen Christiansen forklaret ved Retten for Færøernes Retskreds, at Skibet, da de lige havde faaet begyndt at fiske, mistede et ældre Kullervod og næsten alt Tov. For at fortsætte Fiskeriet var det nødvendigt at faa Grejerne suppleret, og de gik ind til Nordfjord i dette Øjemed. Posterne 13 Kr. 20 Øre og 90 Kr. i Regningen er nødvendige Havneudgifter. Posten 1055 Kr. vedrører Anskaffelse af et Rødspættevod, hvilket var nødvendigt, da de skulde til at fiske Rødspætter. De havde ikke tidligere haft Rødspættevod, men naar der nu skulde nyanskaffes, var det naturligt at købe et saadant. De havde længe ønsket at anskaffe et saadant Vod, men havde ikke kunnet finde et saadant noget Sted før her. De havde 3 Kullervod med paa Rejsen. Efter Uheldet med Grejerne havde de kun to ældre Kullervod og praktisk talt intet Tov. Posten 42 Kr. 75 Øre paa Regningen vedrører en nødvendig Færdiggørelse af Rødspættevodet, som, til Trods for at det var helt nyt, havde en Mangel. Posten 3436 Kr. vedrører, bortset fra en Smæklaas til 16 Kr., Nyanskaffelse af Snurrevodstov. Da Skibet startede paa den forudgaende Rejse, havde det kun gammelt Tov ombord. Det var ikke muligt at faa nyt Tov paa Færøerne, men i England fik de 3 Ruller, hvilket var altfor lidt, og de mistede som sagt næsten det hele ved Ankomsten til Island. Tilbage havde de kun ca. 300 Favne gammelt Tov. Posten 347 Kr. 40

Øre paa Regningen vedrører Gummistøvler til Kaptajn og Styrmand. De 50 Kr. er anvendt til Indkøb af Stearinlys og andre nødvendige Ting til Skibet.

Vidnet tilføjer, at naar han nødvendigvis skulde gaa ind for at købe nyt Tov, fandt han det paakrævet ogssaa at købe et nyt Vod, idet de to forhaandenværende var gamle og skrøbelige.

Sagsøgeren gør gældende, at islandsk Ret bør lægges til Grund ved Sagens Bedømmelse, idet Gælden er paadraget, og Fordringshaveren bor i Island. Sagsøgeren hævder herefter, at Paastanden har Hjemmel i Søløv for Island, Nr. 42 af 30. November 1914; hvis Paragraf 236, Punkt 4, er mere omfattende end den tilsvarende Bestemmelse i den danske Sølovs § 267, Stk. 5, idet nævnte Bestemmelse i Almindelighed hjemler Søpanteret for "Fordringer, der grunder sig paa Forpligtelser, som Skipperen i denne sin Egenskab har indgaaet."

Sagsøgeren fremhæver endvidere, at Forældelsesfristen for Krav, som det her omhandlede, ifølge den islandske Lovs § 251, Punkt 6, er 1 Aar fra Forfaldsdagen, medens Forældelsesfristen efter den danske Sølovs § 283, Stk. 4, er 6 Maaneder.

Sagsøgte hævder derimod, at dansk Ret bør lægges til Grund ved Sagens Paadømmelse, da Skibet var hjemmehørende paa Færøerne og dermed undergivet den danske Sølovs Regler. Herefter er den paastaaede Søpanteret forældet. Iøvrigt bestrider Sagsøgte, at den væsentligste Del af Fordringerne i Medfør af Sølovens § 267, Stk. 5, nogen Sinde har været forsynet med Søpanteret, idet de ikke grunder sig paa Indkøb, der var nødvendige til Bevaring af Skibet eller Fortsættelse af Rejsen.

Retten er enig med Sagsøgeren i, at i det foreliggende Tilfælde, hvor begge Parter Debitor — Skibsfører Joen Christiansen, der baade var Ejer og Fører af "Grønland" — og Kreditor — Sagsøgeren, Thordur Einarsson, Nordfjærdur, Island, — var til Stede paa Kreditors Forretningssted, maa Kontraktsstedets Lovgivning være afgørende for Spørgsmaalet om, hvorvidt der er stiftet Søpanteret for Sagsøgerne for de skete Kreditydelser.

Idet herefter Søløv for Island skal lægges til Grund ved Forholdets Bedømmelse, kan Søpanteretten ikke anses for forældet. Heraf følger dog ikke, at hele det paastaaede Krav kan anses for udrustet med Søpanteret. Bestemmelsen i nævnte Søløv § 236, Punkt 4, om Søpanteret for Fordringer, der grunder sig paa Forpligtelser, som Skipperen i denne sin Egenskab har indgaaet, maa efter Rettens Formening forstaas saaledes, at den indgaaede Forpligtelse skal falde indenfor den Skipperen ved Lov for Island § 53 udenfor Hjemstedet givne Legitimation, altsaa "sigter til Rejsens Udførelse".

Efter Rettens Opfattelse maa det have staaet klart for Sagsøgeren, at nogle af de af Skibsfører Christiansen foretagne Indkøb er sket i Henhold til hans Stilling som Ejer af Skibet. Dette gælder Indkøb af Rødspætte-Snurrevod, fordi Christiansen vilde optage denne Fangst, Køb af Søstøvler og kontant Laan. Sagsøgeren vil herefter kun være at anerkende som Søpanthaver for Havneafgift og Klarering 103 Kr. 20 Øre, og Anskaffelse af Tovværk m. v. til Kullervod til Erstatning for det under Rejsen mistede 3436 Kr. samt 5 pCt. Agentprovision heraf 176 Kr. 96 Øre eller ialt 3716 Kr. 16 Øre.***

278

Checklov, § 61

N. 69 af 23. marts 1932

Se Juristens Lovsamling.

279

**Harnischknytter Adolf Zimmerbeutel, Wuppertal-Barmen, mod
I/S Alfred Berg**

ØSTRE LANDSRET

U. f. R. 1954. 891

I juli 1951 leverede harnischknytter Adolf Zimmerbeutel, der har fast bopæl og forretningssted i Wuppertal-Barmen, Tyskland, i overensstemmelse med tilbud af 7. marts 1951, 4 stk. harnischer til i/s Alfred Berg, Søborg, til brug i dets væveri. Prisen var i danske penge 6817 kr. 85 øre, heri indbefattet omkostninger ved monteringen. Zimmerbeutel foretog i løbet af 2 à 3 uger i juli 1951 sammen med to andre specialuddannede personer fra hans virksomhed monteringen.

Da de leverede harnischer viste sig at virke mangelfuldt, reklamerede i/s Alfred Berg ved skrivelse af 2. august 1951 over for Zimmerbeutel og forsøgte derefter forgæves efter dennes skriftlige anvisning at udbedre manglen. Kort før jul 1951 kom Zimmerbeutel atter til Danmark og udskiftede de tidligere leverede harnischer med 4 nye, som han monterede med hjælp af 5 af fabrikkens folk. Interessentskabet stillede herefter over for Zimmerbeutel krav om erstatning for de udgifter, interessentskabet havde haft på grund af manglerne, men Zimmerbeutel afviste kravet.

Den 14. juli 1953 lod i/s Alfred Berg foretage arrest hos Zimmerbeutel under dennes midlertidige ophold her i landet i en ham tilkommende fordring hos "Dansk Etikvæveri a/s" for 2280 kr. 72 øre.

Den 20. juli 1953 anlagde i/s Alfred Berg ved retten for Frederiksberg birks 3. afdeling sag mod Zimmerbeutel, der ved stævningens forkyndelse havde ophold i retskredsen, og påstod ham tilpligtet at anerkende arrestforretningen som lovlig gjort og forfulgt samt at betale det nævnte beløb med sædvanlig procesrente og arrestsagens omkostninger, 66 kr.

Sagsøgte påstod sig frifundet.

Sagens parter var enige om særskilt at søge rettens afgørelse af, hvorvidt danske eller tyske retsregler skulle bringes til anvendelse.

Ved foreløbig dom af 23. oktober 1953 fastslog retten, at retssagen burde afgøres efter de materielle og processuelle retsregler, som indeholdes i den danske lovgivning.

Da Zimmerbeutel senere under sagens behandling udeblev den 15. marts 1954, afsagde retten den 19. s. m. udeblivelsesdom, hvorved han blev dømt til at betale sagsøgeren 2346 kr. 72 øre med renter 5 pct. årlig fra den 14. juli

1953 og 750 kr. i sagsomkostninger, hvorhos arrestforretningen stadfæstede.

Denne dom er påanket af Zimmerbeutel.

I medfør af retsplejelovens § 286, stk. 3, har spørgsmålet om anvendelse af dansk eller tysk ret, henset til forskellen mellem de to retssystemers forældelsesregler, været gjort til genstand for særskilt procedure. Zimmerbeutel har anerkendt, at spørgsmålet om arrestens lovlighed, forsåvidt angår de processuelle betingelser for dens foretagelse, må afgøres efter dansk ret.

Under særligt hensyn til, at arbejdet med monteringen af de solgte harnischer i interessentskabets virksomhed her i landet efter det oplyste udgjorde en ikke uvæsentlig bestanddel af de Zimmerbeutel i henhold til parternes overenskomst påhvilende forpligtelser, og idet bemærkes, at det er usikkert, om mangleerne skyldtes det leverede materiale eller monteringen af dette eller begge dele, findes retsforholdet mellem parterne at have en sådan tilknytning til leveringsstedet, at også dansk rets materielretlige regler bør finde anvendelse ved sagens afgørelse. — — —***

280

Colcombet F.s. & Cie., St. Etienne, mod Hugo Brammer

SØ- OG HANDELSRETTE
U. f. R. 1915. 9

Ved Hovedstævning af 7 Januar d. A. har Citanterne, Handelsfirmaet Colcombet F.s & Cie, St. Etienne, paastaaet Indstævnte, Handlende Hugo Brammer, dømt til Betaling af 806 Kr. 47 Øre for en Sending (96 Stk.) Silkebaand, sendt Indstævnte med Faktura af 4 November 1913, og ved Kontinuationstævning af 25 April 1914 har Citanterne paastaaet Indstævnte dømt til Betaling af 311 Kr. 65 Øre for 3 andre Sendinger Silkebånd.

Der er Enighed om, at Indstævnte, der har modtaget de 3 sidstnævnte Sendinger, skylder de 311 Kr. 65 øre.

Derimod har Indstævnte, som i sin Tid nægtede at modtage de med Fakturaen af 4 November 1913 sendte Baand, idet han gjorde gældende, at de var for sent leverede, paastaaet sig frifunden for at betale det i Hovedstævningen nævnte Beløb, hvorhos han efter udtaget Kontrastævning har paastaaet sig tilkendt en Erstatning for Misligholdelse af den fastsatte Leveringstid, stor 527 Kr. 46 Øre.

Sagens Omstændigheder er paa de omtvistede Punkter følgende.

I Juli Maaned 1913 gav Indstævnte, Handlende Hugo Brammer, til en tysk Repræsentant for Citanterne, som rejste her i Landet, Ordre paa et Parti Silkebaand af forskellige Farver. En Del skulde leveres den 15—20 September, Resten den 15 Oktober s. A. Under Fabrikationen indtraadte der Forsinkelse, og Indstævnte modtog først med Faktura af 30 September 16 Stk. Baand til en Pris af 134 Kr. 37 Øre. Trods den for sene Levering tog Indstævnte uden Indvending mod disse Baand, hvis Betaling indtales sammen med nogle andre Summer under Kontinuationssagen. Resten kom som forannævnt først med Faktura af 4 November og afvist af Indstævnte.

Indstævnte gør gældende, at han har været berettiget til at hæve Købet. Han hævder, at det drejer sig om en Modeartikel, hvis "Sæson" er afsluttet senest med Udgangen af Oktober Maaned, efter hvilket Tidspunkt Varens Salgsværdi — saafremt Salg overhovedet er muligt — bliver betydeligt forringet.

Han hævder, at der er paaført ham Tab ved den foreliggende Forsinkelse, idet han havde solgt en Del af de i Sagen omhandlede Varer til Kunder, som paa Grund af Forsinkelsen har annulleret Ordreerne, og idet han let vilde have kunnet sælge Resten, hvis Varen var kommet i Sæsonen.

Han opgør den Avance, han kunde have haft paa Partiet, til det i Kontrastævningen nævnte Beløb af 527 Kr. 46 Øre.

Citanterne hævder, at Indstævnte ikke har været berettiget til paa den anførte Maade uden forudgaaende Varsel at refusere Hovedsendingen, efter at den var ankommet hertil. De hævder, at dette strider mod gældende Sædvaner.

Til Oplysning om den i St. Etienne gældende Sædvane har de fremlagt en Attest fra Formanden for Handelskamret i St. Etienne. Denne Attest gaar ud paa, at det i Baandindustrien i St. Etienne, en Industri, der er udsat for mange Fabrikationstilfældigheder, er Coutume, at man er pligtig at tilstille Fabrikanten en bestemt Opfordring til at levere netop paa den Dag, der er fastsat i den givne Ordre, samt at indrømme ham en Tillægsfrist af 8 à 14 Dage, forinden der kan være Spørgsmaal om en Annulation. En Køber kan altsaa ikke uden denne forudgaaende Formalitet simpelthen refusere Varen.

For at oplyse her gældende Sædvaner har Citanterne henvendt sig til Grosserersocietetets Komité, til Manufaktur-Sektionen under Foreningen af Repræsentanter for udenlandske Huse og til Manufakturhandlerforeningen.***

Citanterne har herefter gjort gældende, at der ogsaa her i Landet eksisterer en Sædvane, hvorefter Indstævnte har været uberettiget til at refusere Sendingen. De hævder, at der i hvert Fald hersker saadan Sædvane i St. Etienne, og at det maa være den i St. Etienne raadende Sædvane, der behersker Forholdet, *da* Varerne skulde fabrikeres der, *da* Afsendelsen derfra skulde ske paa Afsenderens Regning og Risiko, og *da* Varerne skulde betales dér. Citanterne hævder, at Indstævnte ikke kan være ukendt med den paagældende Sædvane.

Indstævnte nægter at kende Sædvanen i St. Etienne, nægter, at denne Sædvane kan have nogen Betydning for Sagen, og nægter, at der her i Landet eksisterer nogen Sædvane af den anførte Art.***

Efter det Foreliggende synes det at maatte antages, at det i hvert Fald er højst ualmindeligt, at Manufakturhandlere bærer sig ad som Indstævnte i nærværende Tilfælde, lader Varen fabrikere færdig og først rejser Indsigelse efter dens Ankomst. Men Retten tør dog, som Sagen foreligger oplyst, og navnlig under Hensyn til, at Grosserersocietetets Komité Intet kender dertil, og at Manufakturhandlerforeningens Erklæring kun skriver sig fra dens Bestyrelses Formand alene, ikke gaa ud fra som givet, at der her i Landet har dannet sig nogen saa fast Regel paa dette Omraade, at den kan betragtes som en alle forbindende Sædvane. Retten tør saaledes ikke dømme Indstævnte til at betale det i Hovedstævningen omtalte Beløb.

Paa den anden Side kan der ikke være Tale om at tilkende Kontracitanten den af ham paastævnte Erstatning. Dette maa allerede blive en Følge af, at

Hovedcitanterne ikke kan antages at kende danske Sædvaner eller Lovregler, og at de dem paahvilende Pligter findes at maatte bestemmes efter deres Hjemstavn's Sædvaner.***

Kontracitanten vil saaledes være at dømme efter Kontinuationsstævningen, medens Parterne iøvrigt vil være at frifinde for hinandens Tiltale.***

281

Assurance-Compagniet Baltica A/S mod M. J. Vermaas Scheepvart Bedrijf, Rotterdam

SØ- OG HANDELSRETTE

U. f. R. 1957. 807

***indladedes i Rotterdam i det sagsøgte tilhørende m/s "Jokurme" et parti blikplader, der var forsikret hos sagsøgeren. Indladningen foretoges af tidsbefragterens stevedore. "Jokurme" afsejlede fra Rotterdam den 5. maj 1954, men da ladningen forskubbede sig, måtte skibet efter 9 timers sejlads ændre kurs mod Ymuiden, hvortil det ankom den 6. maj. Ladningen blev den 7. maj omstuvet i Amsterdam og "Jokurme" afsejlede derefter påny.

Under sagen krævede sagsøgeren erstatning for den af sagsøgeren dækkede ladningsskade. Sagsøgte påstod frifindelse.

Sagsøgeren gjorde til støtte for sin påstand gældende, at skibet havde været usødygtigt, og henviste herved til, at det, trods moderat vindstyrke, fik så stærk slagside, at der var fare for kæntring, hvorfor kaptajnen besluttede at søge nødhavn. Sagsøgte har i overordentlig vidt omfang villet fraskrive sig ansvaret, men ansvar for usødygtighed kan ikke gyldigt fraskrives. Skulle skibet ikke kunne betragtes som usødygtigt, hævdede sagsøgeren, at sagsøgte måtte hæfte for følgerne af uforsvarlig stuvning, da kaptajnen allerede ved afsejlingen havde indset, at der kunne opstå fare for skib og ladning, men alligevel havde forholdt sig passiv. Sagsøgeren henviste herved til, at dansk ret burde anvendes ved sagens afgørelse, og iøvrigt bestred sagsøgeren, at sagsøgte på fuld tilstrækkelig måde har dokumenteret, at ansvarsfraskrivelse er gyldig efter hollandsk ret i et så ekstraordinært omfang, som sagsøgte hævder. Der var derfor grund til at fortolke sådanne usædvanlige klausuler indskrænkende, eller endog anvende ordre-public reglen.

Sagsøgte fremhævede, at hverken den stillede bankgaranti eller den heri indeholdte værnetingsaftale kunne begrunde anvendelsen af dansk ret på et forhold, der gennem skib, bortfragter og befragter samt positiv henvisning i konnossementet til hollandsk lov var tilknyttet Holland.

Sagsøgte hævdede, at sagsøgte på fuldt tilstrækkelig måde havde fraskrevet sig ansvar for stuvningen, hvilket var reelt begrundet i, at denne foretoges for befragternes regning. Det var sandsynligt, at befragterne havde villet spare udgifter til gaffeltrucks eller stuvetræ, men kaptajnen var ubemyndiget til at rekvirere sådant og kunne ikke overfor den erfarne stevedore hævde nødven-

digheden heraf. I hvert fald var ansvaret for kaptajnens fejlskøn såvel med hensyn til stuvningens forsvarlighed som til kæntringsfare på gyldig måde fraskrevet, og sagsøgte, der bestred, at skibet havde været usødygtigt, idet stuvningen ikke havde haft indflydelse på selve skibets sikkerhed, mente iøvrigt, at også et sådant ansvar var gyldigt fraskrevet.***

Retten er enig med sagsøgte i, at hollandsk ret bør anvendes ved sagens afgørelse, jfr. herved henvisningen i konnossementets punkt 9 til artikel 470 i "Wetboek van Koophandel". Retten finder ikke, at den i Gencon certepartiets punkt 2 indeholdte ansvarsfritagelse for rederen for forsømmelse ved stuvningen, når denne er foretaget af afskiberne eller deres stavedore, kan fritage sagsøgte for ansvar, idet spørgsmålet vil være at afgøre efter den i konnossementet nævnte artikel 470 i The Netherlandish Commercial Code, og efter denne bestemmelse er der et ufravigeligt ansvar for rederen for skibets sødygtighed.***

282

Kaj Hansen mod Columbus-emballage A/S

SØ- OG HANDELSRETTE

U. f. R. 1955. 727

Værkfører Kaj Hansen, der havde fået at vide, at direktør J. Baungaard i det sagsøgte selskab skulle bruge en mand til en emballagefabrik i Mombasa, henvendte sig i februar 1951 på sagsøgte, A/S Columbasemballages kontor i Holmbladsgade og talte der med Baungaard, som ville tænke over det og give besked 14 dage senere. Sagsøgeren kom herefter igen, og Baungaard sagde, at det var i orden, men at sagsøgeren selv måtte betale rejsen for kone og børn. Sagsøgeren skulle få en god lejlighed med iskab og derfor også betale sin egen rejse. Lønnen skulle i begyndelsen være 15—1600 kr. om måneden og senere, når fabrikken var opført, stige til, hvad en mand i hans stilling ellers fik, Baungaard fortalte også, at direktør Haugaard fra sagsøgte var dernede.

Sagsøgeren arbejdede herefter ca. 5 uger hos sagsøgte for at sætte sig ind i maskineriet, han blev også i en halv snes dage sendt til fabrikken i Randers for at demontere maskiner, der skulle sendes til Mombasa. Han fik i denne tid 5 kr. i timen, beløbet udbetaltes i to gange; sagsøgeren skrev selv kvitteringerne, der påtegnedes af den hos sagsøgte ansatte kontorassistent Sindesen, som udskrev fakturaer, og med hvem sagsøgeren drøftede afsendelsen af maskinerne, efter at Baungaard kort efter sagsøgerens ansættelse var rejst til Indien. Sagsøgeren husker ikke kvitteringens tekst.

Kort tid før sin afrejse, der fandt sted den 7. april s. a., bad sagsøgeren om en skrivelse om, at han var antaget af sagsøgte. Han modtog følgende erklæring af 29. marts 1951 skrevet på sagsøgtes papir og underskrevet af fornævnte Sindesen:

"TO WHOM IT MAY CONCERN.

We the undersigned A/S COLUMBUSEMBALLAGE do hereby declare that Mr. Kaj Hansen has been engaged by us as a fitter for our factory in

Mombasa and further that all the necessary deposits for landing in Kenya will be paid by the Manager of our factory in Mombasa Mr. Haugaard, P. O. Box 1413, adress "Kenya Box FACTORY, Mombasa".

Efter at sagsøgeren den 3. april 1954 var blevet opsagt, rejste han krav på løn efter opsigelsen, overtidsbetaling m. v., men afvistes. Under sagen har parterne foreløbig begæret rettens afgørelse af spørgsmålene om rette sagsøgte og dansk rets anvendelse.***

Retten lægger afgørende vægt på, at der ikke af fabrikant Baungaard er sørgt for oprettelse af skriftlig kontrakt, hvorved ansættelsesforholdet er præciseret. Sagsøgeren, der ikke var klar over den juridiske adskillelse, der er mellem sagsøgte og virksomheden i Kenya, men kun kendte sagsøgtes virksomhed her i landet og mente, at fabrikken i Kenya var en videre udvikling af denne virksomhed, måtte i mangel af præcisering af det modsatte, naturlig få den opfattelse, at han blev ansat i det sagsøgte selskab. Den nære sammenhæng mellem de to selskaber i henseende til ejerforhold, der gav sig udtryk i produktionen, maskinernes og personalets identitet, har måttet bestyrke ham heri. Det må gå ud over sagsøgte, at dettes leder fabrikant Baungaard har optaget kontakten med sagsøgeren på sagsøgtes kontor, instrueret ham gennem den sagsøgtes virksomhed og vederlagt ham for hans foreløbige arbejde her i landet uden at præcisere, at der fra hans side lagdes vægt på, at sagsøgeren tilknyttedes Kenyavirksomheden og ikke den sagsøgte virksomhed. Heller ikke det senere i Kenya passerede kan antages at have gjort sagsøgeren klar over denne indstilling fra fabrikant Baungaards side, og sagsøgte findes herefter at være sagsøgt som rette vedkommende.

Hvad angår spørgsmålet, om forholdet skal bedømmes efter dansk ret, lægger retten vægt på, at aftale må anses indgået her i landet ved de mundtlige forhandlinger mellem sagsøgeren og fabrikant Baungaard. Når hertil føjes, at sagsøgeren med føje har antaget sig for engageret af et dansk selskab, og det ikke er præciseret overfor ham, at det var hensigten at undergive arbejdsforholdet den i Kenya gældende lovgivning, som sagsøgeren ikke kendte, og således ikke havde anledning til at sikre et aftalt opsigelsesvarsel, findes spørgsmålet om sagsøgerens retsstilling i anledning af forholdets ophævelse, naturlig at burde afgøres efter dansk ret.***

283

August Søderberg mod Københavns Telefon-Aktieselskab

HØJESTERET
U. f. R. 1935. 82

Østre Landsret:

Under 29 Januar 1929 blev der mellem Københavns Telefon-Aktieselskab og Guaranty Trust Company of New York oprettet en Kontrakt, hvorefter førstnævnte Selskab gennem Guaranty Trust Company optog et Laan, stort 7 Millioner Dollars (\$ 7.000.000). For Laanet skulde Debitor udstede "sine

udenlandske guldindløselige Obligationer", rentebærende med 5 pCt p a. Renterne skulde betales halvårligt den 15 Februar og 15 August hvert Aar. Det hedder endvidere i den fornævnte Kontrakts § 1 bl a: "Hovedstol og Renter er betalbare i de Forenede Stater i Amerikas Guldmonet med den Standardvægt og Finhed, der var gældende den 15 Februar 1929 ved Guaranty Trust Company of New Yorks Hovedsæde, som herved udnævnes til Betalingsagent for Laanet i Byen New York, — — —"

Obligationerne skal være Obligationer med Kuponer, betalbare til Ihænde-haveren og udstedes med et Paalydende af \$ 1.000."****

De for Laanet udstedte Obligationer betegner sig som udenlandske Guldobligationer. I Obligationerne hedder det bl a:

"Københavns Telefon-Aktieselskab (i det efterfølgende kaldet Laantageren) forpligter sig herved til for Valuta modtaget (for value received) at betale til Ihænde-haveren den 15 Februar 1954 eller eventuelt paa et tidligere Tidspunkt, hvortil Obligationen maatte blive opsagt til Indfrielse, nærværende Obligations Hovedstol Eet Tusinde Dollars, samt til at betale Rente 5 pCt p a af Hovedstolen fra 15 Februar 1929, indtil nævnte Hovedstol indfries; Renten erlægges halvårlig hvert Aars 15 Februar og 15 August, men for saa vidt Hovedstolen angaar, kun mod Aflevering af nærværende Obligation og forsaavidt Renten angaar, kun mod Aflevering af vedføjede Kuponer, efterhaanden som disse forfalder til Udbetaling. Hovedstol og Rente betales paa Guaranty Trust Company of New Yorks Hovedkontor — idet dette Selskab er Betalingsagent for Laanet i Manhattan Kommune, Byen og Staten New York, Amerikas forenede Stater, i De forenede Stater af Amerikas Guldmonet af, eller svarende til, disses Vægt og Finhed, den 15 Februar 1929. ("in gold coin of the United States of America of or equal to the standard of weight and fineness existing February 15 1929") — — — Nærværende Obligation henhører til et af Laantageren op-taget 25-Aars amortisabelt 5 pCt udenlandsk Guldlaan, idet Laanets samlede Hovedstol ikke maa overstige Syv Millioner Dollars (\$ 7.000.000)."

I de til Obligationerne hørende Rentekuponer hedder det bl a:

"Københavns Telefon-Aktieselskab — — — \$ 25. betaler til Ihænde-haveren paa Betalingsagentens Guaranty Trust Company of New York Hovedkontor i Manhattan Kommune, Byen og Staten New York, De forenede Stater i Amerika, mod Aflevering af nærværende Kupon Fem og Tyve Dollars i Amerikas Forenede Staters Guldmonet — — — hvilket Beløb repræsenterer seks Maaneders Renter forfaldne paa Københavns Telefon-Aktieselskabs 25-aarlige amortisabelt 5 pCt udenlandske Guldobligationer medmindre nærværende Obligation forinden maatte være opsagt til Indfrielse og er blevet behørig indfriet."****

Kontrakten og Obligationerne med Rentekuponer,*** er affattede i det engelske Sprog.***

Da 10 Rentekuponer paa tilsammen 250 Guld Dollars, forfaldne den 15 August 1933 og tilhørende Grosserer August Søderberg her af Staden som Ihænde-haver af de respektive Obligationer, præsenteredes for Københavns Telefon-Aktieselskabs Betalingsagent i New York, nægtede denne i Overensstemmelse med den fra nævnte Aktieselskab indhentede Instruks at betale i Guld Dollars eller efter Guld-Dollars Værdi i Papir Dollars.

Under nærværende Sag har nu Sagsøgeren, Grosserer August Söderberg, overfor de Sagsøgte, Københavns Telefon-Aktieselskab, nedlagt Paastand paa, at disse dømmes til mod Aflevering af de ovennævnte Rentekuponer at betale ham 250 Guld Dollars efter Vægt og Finhed pr 15 Februar 1929 eller den tilsvarende Værdi i Papir Dollars eller i danske Kroner beregnet efter Guld-Dollars Vægt og Finhed pr. 15 Februar 1929 tilgigemed Renter af Beløbet 5 pCt p a fra den 15 August 1933 til Betaling sker.***

De Sagsøgte har*** paastaaet sig frifundne.

De Sagsøgte har*** til Støtte for deres Frifindelsespaastand anført følgende:

I de for Laanet udstedte Obligationer indeholdes en Bemærkning om, at de er udstedte i Henhold til den under 29 Januar 1929 mellem Laantageren og Guaranty Trust Company of New York oprettede Kontrakt, og der henvises derhos paa forskellige Steder i Obligationernes Tekst til den nævnte Kontrakt, der saaledes er af afgørende Betydning ved Bedømmelsen af det mellem Parterne bestaaende Retsforhold. Det paagældende Laan er alene udbudt til offentlig Tegning i Amerika og fremtræder i det hele som et amerikansk Laan. Obligationernes Tekst er — ligesom Kontraktens — affattet i det engelske Sprog, og de lyder alene paa amerikansk Mønt (§ 1000). Obligationerne er vel her i Landet underskrevne af Formanden for Telefonselskabets Bestyrelse og dets administrerende Direktør, men de er ifølge Kontraktens § 17 og selve Obligationernes Indhold ikke gyldige eller bindende i nogen Henseende, forinden de er medunderskrevne af Guaranty Trust Company i New York, og de maa derfor anses for at være definitivt udstedte i Amerika. De Sagsøgte har i denne Forbindelse gjort opmærksom paa, at medens der ingen Stedbetegnelse findes angivet for Debitor, findes der overalt i Obligationerne og Rentekuponerne en detailleret Angivelse af Guaranty Trust Company's Hjemsted. Med Hensyn til Betalingsstedet er det saavel i Obligationerne som i Rentekuponerne angivet, at Betalingen af Hovedstol og Renter, henholdsvis Renter skal finde Sted paa Betalingsagentens Guaranty Trust Company of New York's Hovedkontor i Manhattan Kommune, Byen og Staten New York, Amerikas forenede Stater. At Betalingsstedet er New York fremgaar ogsaa af forskellige Bestemmelser i Kontrakten, saaledes § 1 (ordinær Indfrielse) og § 6 (ekstraordinær Indfrielse), og § 9 (Udtrækning) og § 23 (Misligholdelse). Endelig er ifølge § 14 ved Indsættelsen af en Betalingsagent i Almindelighed fastslaaet, at alt, hvad der vedrører Opfyldelsen af Debtors Forpligtelser, skal ske i New York. De Sagsøgte har særlig henvist til, at de ifølge*** § 15 i Kontrakten er forpligtede til mindst 5 Dage før hver Rentetermin at erlægge de nødvendige Midler til Betaling af alle halvaarlige Renter til Guaranty Trust Company i New York. Dette er ogsaa sket med Hensyn til Ydelsen pr 15 August 1933, og Sagsøgeren har saaledes kunnet erholde sine den nævnte Dato forfaldne Rentekuponer indfrie i New York.*** De Sagsøgte har endelig henvist til, at det saavel i Kontraktens §§ 6 og 9 som i Obligationerne er bestemt, at Meddelelser til Obligationsejerne om ekstraordinær Indfrielse og om Udtrækning af Obligationer skal ske i et Dagblad paa det engelske Sprog, der udgives i og er almindeligt læst i Manhattan Kommune, Byen New York. Under Hensyn til de foran nævnte Bestemmelser i Kontrakten og Obligationerne har de Sagsøgte gjort

gældende, at det er Reglerne i den i De forenede Stater i Amerika gældende Lovgivning, der maa komme til Anvendelse i det foreliggende Tilfælde, uanset at Kontrakten og Obligationerne ikke indeholder en udtrykkelig Bestemmelse herom. Dette maa i ethvert Fald antages, saafremt man lægger Vægten paa, hvad Parterne stiltiende kan antages at have tænkt i saa Henseende. Laanets Emission har alene fundet Sted i Amerika, og det fremtræder som ovenfor nærmere paavist som et rent amerikansk Laan. At det betegner sig som et udenlandsk Laan kan der ikke — som af Sagsøgeren hævdet — tillægges nogen praktisk eller retlig Betydning. Man maatte efter det nysanførte regne med, at Laanet for den langt overvejende Dels Vedkommende blev tegnet af amerikanske Borgere, men disse er utvivlsomt gaaet ud fra som en Selvfølge, at amerikansk Ret i paakommende Tilfælde vilde komme til Anvendelse, saa meget mere som den Klausul, om hvis Fortolkning nærværende Sag drejer sig, stammer fra Amerika, og det i og for sig synes naturligt, naar man kontraherer i Dollars, at det maa afgøres efter den amerikanske Lovgivning, hvad der skal forstaaes ved Dollars. Herefter maa imidlertid ogsaa de Sagsøgte anses for at have regnet med Anvendelsen af amerikansk Ret. Saafremt man ikke finder at kunne lægge Vægt paa Parternes formodede Vilje, maa Resultatet dog blive det samme, idet det maa anses for naturligt at lægge Loven paa det Sted, hvor de af Debitor ved Laanet paatagne Forpligtelser skal opfyldes, til Grund, og at dette Land i det foreliggende Tilfælde er De forenede Stater i Amerika, kan der jo efter det ovenfor udviklede ikke være nogen Tvivl om. Der maa ogsaa lægges Vægt paa, at Laanet forretningsmæssigt har nøje Tilknytning til Amerika. Den, som sætter sig i Forbindelse med en udenlandsk Bank for at opnaa et Laan, maa med Hensyn til Opfyldelsen af sine Forpligtelser underkaste sig Lovgivningen paa det Sted, hvor Banken har Domicil, idet Banken har Interesse i at kunne stille sig paa samme Maade overfor alle sine Kunder. Det her anførte udelukker selvfølgelig ikke, at visse Forhold, der ikke vedrører Opfyldelsen af Debtors Forpligtelser, saaledes navnlig Forhold, der vedrører Spørgsmaalet om Obligationers gyldige Udstedelse, maa bedømmes efter Lovgivningen i det Land, hvor Debitor har Domicil. Kontrakten indeholder da ogsaa bl a i §§ 2 og 20 dertil sigtende Bestemmelser, men disse fremtræder som Undtagelser. De Sagsøgte har i denne Forbindelse fremhævet, at det i den internationale Privatret nu maa anses for at være den fremherskende Anskuelse, at Opfyldelsesstedets Lovgivning er bestemmende for Tiden, Stedet, Maaden og den tilstrækkelige Karakter af Opfyldelsen af Forpligtelsen, om den af Kontrakten foreskrevne Opfyldelse er lovlig eller ulovlig og om Forpligtelsens Ophør. Den danske Lovgivning indeholder ikke almindelige Bestemmelser om, hvilket Lands Lov der i de forskellige Relationer skal komme til Anvendelse i det internationale Samkvem, men de Sagsøgte har til Støtte for den af dem hævdede Opfattelse, at det med Hensyn til Forhold, der vedrører Opfyldelsen af Forpligtelser, er Opfyldelsesstedets Love, der maa komme i Betragtning, henvist til de specielle Regler i Vekselloven Nr 65 af 23 Marts 1932 § 81, 1 Stk: hvorefter Retsvirkningen af en trukken Veksels Akcept eller af Udstedelsen af en egen Veksels bedømmes efter Loven i det Land, hvor Vekslen skal betales, og i Checkloven Nr 69 af samme Dato § 63, hvorefter Loven i det Land, hvor Checken er betal-

bar, i forskellige Henseender skal bringes til Anvendelse. Med Hensyn til amerikansk Ret har de Sagsøgte gjort gældende, at det ifølge samme er Opfyldesstedets Lov, der er bestemmende for Tiden, Stedet, Maaden og den tilstrækkelige Karakter af Opfyldelsen.

Med Hensyn til den herhen hørende amerikanske Lovgivning har de Sagsøgte oplyst følgende:

Under 5 April 1933 udstedte Præsidenten for De forenede Stater i Kraft af den Myndighed, som tilkom ham i Henhold til § 5 i Lov af 6 Oktober 1917, ændret ved § 2 i Lov af 9 Marts 1933 om Afhjælpning af den nuværende nationale Krisetilstand indenfor Bankvæsenet m m en Forordning ("Executive order"), hvorved det paalagdes alle Personer senest den 1 Maj 1933 til en "Federal Reserve" Bank eller til en saadan Banks Filial eller Afdeling eller til en Bank, der er Medlem af "Federal Reserve" Systemet, at aflevere al Guldmonet og alle Guldbarrer eller Guldcertifikater, som de da var i Besiddelse af, eller som de kom i Besiddelse af senest den 25 April 1933, dog med visse stærkt begrænsede Undtagelser, og en lignende Bestemmelse om Aflevering indeholdtes i Forordningen med Hensyn til Guldmonet, Guldbarrer eller Guldcertifikater, som en Person efter den 25 April 1933 kom i Besiddelse af, saaledes at Fristen for Afleveringen fastsattes til 3 Dage efter Modtagelsen. Den Enkeltperson, som med Overlæg overtraadte de foranførte Bestemmelser, kunde idømmes en Bøde paa indtil \$ 10 000 eller Fængselsstraf paa indtil ti Aar eller saavel Bøde- som Fængselsstraf.

Under 5 Juni 1933 stadfæstede Præsidenten for De forenede Stater en af Senatet og Repræsentanternes Hus vedtaget Resolution, hvori det bl a hedder:

"Alle Bestemmelser, som indeholdes i eller træffes vedrørende enhver Obligation, og som gaar ud paa at give Kreditor Ret til at kræve Betaling i Guld eller i en af De forenede Staters særlige Møntsorter eller Papirpenge eller i et Beløb af De forenede Staters Valuta, som maales efter samme Maalestok, erklæres for at være stridende mod det almene Vel; og ingen saadan Bestemmelse skal indeholdes i eller træffes med Hensyn til nogen Gældsforpligtelse, der herefter indgaas. Enhver Gældsforpligtelse, der hidtil er og fremtidig vil blive indgaaet skal, enten den indeholder en saadan Bestemmelse, eller der er truffet Aftale i saa Henseende eller ej, opfyldes ved Betaling Dollar for Dollar i enhver Møntsort eller enhver Art Papirpenge som paa Betalings tidspunktet er lovligt Betalingsmiddel for offentlig og privat Gæld.

— — — — —
Saaledes som Udtrykket "Obligation" benyttes i denne Lov, betyder det en Gældsforpligtelse (derunder enhver Gældsforpligtelse udstedt af eller til De forenede Stater med Undtagelse af Pengesedler), som er betalbar i De Forenede Staters Valuta; og Betegnelsen "Møntsort eller Papirpenge" betyder De Forenede Staters Mønter eller Papirpenge, derunder "Federal Reserve" Pengesedler og "Federal Reserve Bankernes" og "National-Bank" Selskabers i Omløb værende Sedler — — —

Samtlige De Forenede Staters Møntsorter og Papirpenge, (derunder "Federal-Reserve" Pengesedler og "Federal-Reserve Bankernes" og "National-Bank"-Selskabers i Omløb værende Sedler) der hidtil er og fremtidig vil blive udmøn-

tet eller udstedt, skal være lovligt Betalingsmiddel for alle offentlige og private Gældsforpligtelser, offentlige Gebyrer, Skatter, Told- og Forbrugsafgifter — ”

Resolutionen angiver sig udtrykkelig at være vedtaget for at sikre en ensartet Værdi af De Forenede Staters Møntsorter og Papirpenge, og i Indledningen til Resolutionen er der givet saalydende nærmere Motivering af Resolutionen:

“Da Besiddelsen af eller Handelen med Guld berører almene Interesser, og derfor underkastes behørige Reguleringer og Restriktioner, og da den øjeblikkelige Krisetilstand har vist, at Bestemmelser i Obligationer gaende ud paa, at Kreditor har Ret til at kræve Betaling i Guld eller i en af De forenede Staters særlige Møntsorter eller Papirpenge, eller i et Beløb af De Forenede Staters Valuta, som maales efter samme Maalestok, lægger Hindringer i Vejen for Kongressens Bemyndigelse til at regulere Værdien af De Forenede Staters Valuta og er uforenelig med Kongressens een Gang vedtagne Politik, der gaar ud paa til enhver Tid paa Forretningsmarkederne og ved Afgørelsen af Gældsforpligtelser at opretholde den samme Købekraft for hver enkelt Dollar, der udmøntes eller udsendes af De forenede Stater.”

Ved den citerede Lov er det saaledes bleven bestemt, at offentlige eller private Gældsforpligtelser, uanset om det maatte være vedtaget, at de skal betales i Guld, skal afgøres ved Betaling Dollar for Dollar i enhver Møntsort eller enhver Art Papirpenge, som paa Betalingstidspunktet er lovligt Betalingsmiddel for offentlig og privat Gæld, og samtidigt er det som ovenfor anført fastsat, at samtlige De Forenede Staters Møntsorter og Papirpenge skal være lovligt Betalingsmiddel. Allerede forinden Lov af 5 Juni 1933 var det iøvrigt af en amerikansk Domstol i en under 24 Maj 1933 afsagt Dom statueret, at der efter Forordning af 5 April 1933, i Henhold til hvilken al Guldmønt og alle Guldcertifikater var bleve inddragne, kun var eet lovligt Byttemiddel, og at det havde samme Møntværdi som et tilsvarende Beløb i Guld.

De Sagsøgte har iøvrigt overfor Sagsøgerens Paastand henvist til,*** at Sagsøgeren, der som ovenfor hævdet ikke har Ret til at forlange Guld Dollars, ifølge Loven af 5 Juni 1933 heller ikke har Ret til at forlange den tilsvarende Værdi i Papir Dollars, idet Forpligtelsen skal opfyldes som der staar i Loven “Dollar for Dollar”.***

Med Hensyn til Sagens Realitet skal Retten for det første bemærke, at der særlig under Hensyn til, at det paagældende Laan alene er udbudt til offentlig Tegning i De forenede Stater i Amerika, at Betaling saavel af Hovedstol som af Renter kun skal ske paa Betalingsagentens Guaranty Trust Companys Hovedkontor i New York, og at Obligationerne lyder paa Betaling alene i Betalingsstedets Mønt, findes at maatte gives de Sagsøgte Medhold i, at den i De forenede Stater gældende Lovgivning maa komme til Anvendelse ved Afgørelsen af nærværende Sag.

Naar Sagsøgeren har gjort gældende, at den amerikanske Lovgivning ikke vil kunne paaberaabes med Hensyn til Betalinger til Personer, der ikke har Domicil i Amerika, vil der ikke kunne gives ham Medhold deri. Den nævnte Lovgivning maa komme til Anvendelse paa alle Betalinger, der skal finde Sted i Amerika, af Forpligtelser, der skal betales i Dollars. Ved at købe en saadan Dollars Obligation har den paagældende sikret sig den Fordel, der maatte være forbunden med, at den lyder paa Dollars til Betaling i Amerika, men han har

paa den anden Side ogsaa undergivet sig den dermed eventuelt forbundne Risiko.

Efter at det ved den af Præsidenten for De Forenede Stater under 5 April 1933 udstedte Forordning var foreskrevet, at al Guldmønt og alle Guldbarrer eller Guldcertifikater med de særlig nævnte Undtagelser, der ikke har Betydning her, skal afleveres inden en kort Frist til de sammesteds nævnte Banker, maa det anses at have været umuligt for de Sagsøgte den 15 August 1933 at indfri de forfaldne Rentekuponer hørende til det af dem hos Guaranty Trust Company of New York optagne Laan i Guld Dollars paa Betalingsstedet i New York, og de Sagsøgte Forpligtelse hertil maa derfor anses som bortfalden.*** Sagsøgerens Paastand for saa vidt den gaar ud paa Betaling i Guld Dollars, vil derfor ikke kunne tages til Følge. Det samme maa imidlertid gælde Sagsøgerens Paastand, for saa vidt den gaar ud paa Betaling af den tilsvarende Værdi i Papir Dollars. Det er ved Loven af 5 Juni 1933 udtrykkelig foreskrevet, at enhver Gældsforpligtelse, der hidtil er og fremtidig vil blive indgaaet, skal, uanset om der maatte foreligge en Klausul om Betaling i Guld, opfyldes ved Betaling Dollar for Dollar i enhver Møntsort eller enhver Art Papirpenge, som paa Betalingstidspunktet er lovligt Betalingsmiddel for offentlig og privat Gæld. De Sagsøgte vilde derfor have handlet i Strid med Loven, hvis de havde betalt Sagsøgeren de 250 Guld Dollars med den tilsvarende Værdi i Papir Dollars.***

De sagsøgte frifindelsespaastand vil herefter være at tage til følge.***

Højesteret:

Af de i Dommen anførte Grunde tiltrædes det, at den i de forenede Stater gældende Ret maa komme til Anvendelse ved Sagens Afgørelse, og da nu den af Appellanten fordrede Betaling efter Guldværdi er i Strid med de i Dommen omtalte amerikanske Lovbestemmelser, vil Indstævntes Frifindelsespaastand være at tage til Følge, og Dommen vil saaledes i det hele kunne stadfæstes.

284

Vereeniging voor den Effectenhandel te Amsterdam mod Finansministeriet

HØJESTERET

U. f. R. 1939. 296

[I en lignende sag som nr. 283 hedder det i højesterets dom:]

***Efter indholdet af de i overensstemmelse med de to lånekontrakter udstedte obligationer, navnlig bestemmelserne om betalbarhed alene på betalingsagentens hovedkontor i New York og alene i De Forenede Staters guldmønt, må det antages, at den danske stats forpligtelser efter obligationerne blev undergivet den i De Forenede Stater gældende lovgivning, og at således også bestemmelserne i Joint Resolution af 5. juni 1933 kom til anvendelse på obligationerne.

Herefter og idet hensynet til såkaldet ordre public ikke findes at kunne påberåbes til udelukkelse af resolutionens bestemmelser i nærværende tilfælde.***

285

Kurt Persson, Malmø, mod Brdr. Jørgensen

SØ- OG HANDELSRETTE

U. f. R. 1959. 410

Efter et møde mellem sagsøgeren, afdelingschef Kurt Lennart Persson, Malmø, og direktør Alfred Jørgensen hos sagsøgte, firmaet Brdr. Jørgensen, på sagsøgtes kontor i København den 9. juli 1956, tilskrev sagsøgte samme dag sagsøgeren således:

“— — Firmaet har truffet følgende aftale med Dem:

“Firmaet ansætter Dem her på kontoret i København pr. 15. juli 1956 i afdelingen for distribution af “Wurlitzer Musikautomater”. Prøvetid er 3 måneder med en gage på sv. kr. 1.000,00 pr. mdr. + betaling for 2 rejser Malmø-København + udgifter for værelse i København. Så snart firmaet er klar, både med hensyn til organisation og varelager, er formålet, at De selvstændig be- arbejder de svenske kunder i Skåne og Blekinge incl. Malmø, som sælger, samt at De for firmaet skal opbygge Filialvirksomhed i Malmø. Deres bopæl vil stadig være Malmø, men De må regne med ca. 2 dages ophold pr. uge i København, for at administrere. Efter prøvetiden aftales nærmere ansættelsesforhold.”

— — —
I tiden fra 15. juli til 15. august 1956 oplærtes sagsøgeren i København i brugen af de nævnte Wurlitzer musikautomater, og derefter arbejdede han i Sverige, hvor han blev bestyrer af sagsøgtes datterselskab i Malmø Brödr. Jørgensens Svenska Försäljnings A. B.

Den 7. November 1956 tilskrev sagsøgte sagsøgeren således:

“Vi bekræfter hermed Deres samtale med hr. direktør Jørgensen og hr. Dütz om, at De er fast ansat og at Deres gage fra den 31. oktober er svenske kroner 1.100,—”

Sagsøgeren modtog løn fra firmaet i København indtil den 31. oktober 1956 og derefter gennem selskabet i Malmø.

I tiden fra 19. september til 12. december 1956 var sagsøgeren bestyrelsesmedlem i Brödr. Jørgensens Svenska Försäljnings A. B.

Ved skrivelse af 28. marts 1957 opsigte Brödr. Jørgensens Svenske Försäljnings A. B. sagsøgeren til fratræden den 1. maj 1957. Sagsøgeren blev kaldt til København og fik overrakt opsigelsen i det sagsøgte firma. Han har senest fået udbetalt løn for marts måned 1957, men det svenske selskab har til de svenske skattemyndigheder indbetalt 1716,— sv. kr. til delvis dækning af sagsøgerens skattetilsvær.

Af en anbefalingsskrivelse af 31. marts 1957 fra sagsøgte til sagsøgeren fremgår indledningsvis følgende:

“Hr. Kurt Persson har været filialbestyrer i vort datterselskab i Malmö, Bröderna Jørgensens Svenska Försäljnings AB, der beskæftiger sig med salg og udlejning af musikautomater, fra 15. juli 1956, indtil hr. Persson nu efter eget ønske fratræder sin stilling. — — —”

Sagsøgeren gør gældende, at han hele tiden har været ansat i det sagsøgte

firma, og at han også under sit arbejde for sagsøgte i Sverige har været omfattet af dansk funktionær- og ferielovgivning, og har under denne ved stævning af 12. januar 1958 anlagte sag påstået sagsøgte tilpligtet at betale sagsøgeren 3102 kr. 51 øre med renter 5 pct. p. a. fra stævningens dato, til betaling sker. — —

Sagsøgte påstår frifindelse og gør til støtte herfor gældende, at ansættelsesforholdet var med Brødr. Jørgensens Svenska Försäljnings A. B., således at sagsøgte ikke er rette sagsøgte. Brødr. Jørgensens Svenska Försäljnings A. B. er et i Sverige indregistreret aktieselskab med en aktiekapital på oprindelig 5.000,— sv. kr., nu 50.000,— sv. kr. Af disse aktier tilhører 45.000,— sv. kr. direktør Alfred Jørgensen, medens kun 5.000 sv. kr. tilhører sagsøgte. Sagsøgerens indledende arbejde i København var kun en kort oplæring af få ugers varighed, og sagsøgeren var klar over, at han derefter udelukkende skulle fungere i det svenske selskab. Sagsøgeren, der er svensk statsborger, blev efter oplærings- og prøvetiden bestyrelsesmedlem i det svenske selskab. Det bemærkes herved, at sagsøgeren var det eneste bestyrelsesmedlem, hvad der er fuldt lovligt i Sverige og havde den følge, at han havde såvel bestyrelsesformandens som den administrerende direktørs funktioner. Sagsøgeren har hele tiden fået gage udbetalt i svenske kroner, og som leder af det svenske firma udskrev han på dette selskabs vegne og for dets regning gagechecks såvel til det øvrige personale som til sig selv. Skattekravet opstod ved, at sagsøgeren, når han udbetalte gage til sig selv, glemte at tilbageholde den svenske kildeskat. Også efter at sagsøgeren var udtrådt af det svenske selskabs bestyrelse, fungerede han som det svenske selskabs disponent og arbejdede alene i dette selskab. Når anbefalingsskrivelsen er udfærdiget på sagsøgtes papir, er det udelukkende, fordi det sagsøgte firma er betydelig mere kendt end det svenske datterselskab, og man mente derfor, at det kunne være af betydning for sagsøgeren, at anbefalingen fremtrådte som udstedt af det danske firma.

Sagsøgte gør endvidere gældende, at sagsøgerens ansættelsesvilkår, hvad enten søgsmålet rettes mod sagsøgte eller det svenske selskab, må bedømmes efter svensk ret, der ikke hjemler de i påstanden indeholdte krav. Sagsøgeren blev således antaget til arbejde i Sverige og har, som det fremgår af det foran anførte, efter oplæring udelukkende fungeret i det svenske selskab. Når hertil kommer, at sagsøgeren er svensk statsborger og stedse har været bosat i Sverige, har ansættelsesforholdet haft en sådan tilknytning til Sverige, at den internationale privatrets regler fører til, at sagen må afgøres efter svensk ret.

Sagsøgeren har til støtte for sin påstand anført, at ansættelsesforholdet, som det fremgår af sagsøgtes skrivelse af 9. juli 1956, er oprettet med det sagsøgte firma, og at der ikke på noget tidspunkt har været tale om, at sagsøgeren skulle ansættes i eller overgå til det svenske selskab. Tanken var, at sagsøgeren skulle opbygge en filialvirksomhed for sagsøgte i Malmø. Sagsøgte ville imidlertid ikke opfylde de af de svenske myndigheder stillede krav ved en filials oprettelse, men flyttede i stedet for det i Stockholm hvilende aktieselskab Brødr. Jørgensens Svenska Försäljnings A. B. til Malmø. Der blev ikke i den anledning fastsat nye ansættelsesvilkår for sagsøgeren, og sagsøgeren havde ingen grund til at tro, at han ikke længere skulle være ansat i det sagsøgte firma. Det bemærkes

herved, at der ingen reel adskillelse var mellem de to firmaer, som begge blev dirigeret af direktør Alfred Jørgensen. Sagsøgeren modtog alle ordrer fra København og måtte daglig aflægge rapport til kontoret i København, hvor alle regnskaber også bogførtes. Sagsøgerens gage blev i begyndelsen udbetalt og bogført i København, og når udbetalingen senere skete i Malmø, skyldtes det alene det sagsøgte firmas vanskeligheder ved her i landet at få svenske penge til løn-udbetalingerne. Ikke blot ansættelsesbrevet, men også anbefalingsskrivelsen af 31. marts 1957 er udfærdiget på det danske firmas papir. Sagsøgeren bestrider, at han skulle have udøvet funktion som administrerende direktør i det svenske selskab, og gør gældende, at den omstændighed, at han i tiden 19. september til 12. december 1956 har været medlem af nævnte selskabs bestyrelse, ikke har medført nogen ændring i hans ansættelsesforhold til det danske firma.

Med hensyn til spørgsmålet, om sagen skal afgøres efter dansk eller svensk ret, gør sagsøgeren gældende, at ansættelsesforholdets tyngdepunkt har ligget i København, og at sagen derfor må afgøres efter dansk ret. Sagsøgeren bemærker herved, at aftalen er indgået i København under begge parter nærværelse, at arbejdsforholdet startede i København, at sagsøgeren ikke er blevet gjort bekendt med, at han under sit arbejde i Sverige måtte betragte sig som ansat efter svensk lovgivning, og at sagsøgeren også under dette arbejde har været undergivet det sagsøgte selskabs instruktioner. — — —

Retten lægger ved sagens afgørelse vægt på, at det drejer sig om en svensk statsborger, hvis virksomhed efter en kortere prøvetid i København skulle udføres i Sverige. Når hertil føjes, at sagsøgeren var fuldt klar over, at virksomheden udøvedes gennem det lovligt eksisterende svenske aktiebolag, i hvilket han var bestyrelsesmedlem, og at udtalelsen i sagsøgtets skrivelse af 9. juli 1956, hvor der tales om ansættelse i sagsøgtets filialvirksomhed i Malmø, er afløst af den nævnte aktiebolagsordning, findes sagsøgeren ikke med føje at kunne have regnet med, at han havde en sådan tilknytning til sagsøgte, at hans forhold skulle omfattes af den danske funktionærlovgivning. Sagsøgte vil herefter være at frifinde.***

286

Egil Blix m. fl. mod kaptajn Millward som fører af S/S Arctic Queen

BERGENS BYRETT (STADFÆSTET AF HØJESTERET)
Norsk Rettstidende 1936. 900

*** — — De 199 saksøkere har været forhyret som fiskere og dorybaser med Hellyer Bros. Limited's fiskeekspedisjon med dampskibene "Arctic Queen" og "Arctic Prince" paa Grønlandsfiske i sesongen i 1934.*** Deres godtgjørelse var fastsatt som lott av fangsten. I kontrakter, som oprettedes ved forhyringen, var lotten fastsatt til 5 procent for fiskerne og 7 procent for dorybaserne at utregnes av en i kontraktene fastsatt verdi av fangsten. Den 11 juli 1934 blev der ute paa fiskefeltet opsatt en overenskomst mellem fiskerne og dorybasene og ekspedisjonslederen kaptein Engvald Baldersheim om en forhøielse av lottsatsene til

henholdsvis 7 procent for fiskerne og 8 procent for dorybasene, som skulde gjelde fra fiskets begynnelse til sesongens slutt. Rederiet mener at denne overenskomst av forskjellige grunner er uforbindende, og at saksøkerne ved sin opptreden har forspilt retten til lott og paadratt sig et erstatningsansvar, som overstiger den lott, de ellers vilde ha hatt tilgode.***

— — Angaaende saksforholdet bemerkes: Rederiet Hellyer Bros. Limited er engelsk, hjemmehørende i Hull, og fiskeekspedisjonens skiber seiler under engelsk flagg. Det er de to moderskiber "Arctic Queen" og "Arctic Prince" og 4 traalere. Skibenes faste besetning av sjøfolk er engelske, men fiskerne, dorybasene og fiskearbeiderne har været norske. Der var saaledes paa "Arctic Queen" paamønstrert 200 norske fiskere og dorybaser og 150 norske fiskearbeidere. Ogsaa de 3 doryformenn, fiskeribasen Halfdan Wilhelmsen og ekspedisjonslederen kaptein Baldersheim er norske. Sammen med skibets faste engelske besetning blev det ialt 460 à 470 mann. Fiskerne og dorybasene blev forhyret her i landet gjennom kaptein Baldersheim ved kontrakter avfattet i det norske sprog og vedtatt av Baldersheim paa vegne av Hellyer Bros. Limited. Kontrakt-skjemaene var paa forhaand blitt tilstillet fiskerne og dorybasene og vedtatt av dem. De aller fleste av dem kjente dessuten kontraktbestemmelsene fra tidligere sesonger, da de hadde vært forhyret med Hellyer Bros.' ekspedisjonen. De blev paamønstrert paa "Arctic Queen" paa Aalesund havn ved den engelske konsul paa stedet og den norske mønstringsmann. Der blev da samtidig av fiskerne og dorybasene og skibets fører undertegnet en i det engelske sprog og i overensstemmelse med den engelske Merchant Shipping Act avfattet hyrekontrakt og mannskapsliste. Men denne skulde ikke avløse de paa forhaand oprettede enkeltmannskontrakter. Det var fremdeles disse som var grunnlaget for rettsforholdet mellem partene forsaavidt angaar detaljbestemmelsene om tjenesteforholdet og partenes gjensidige rettigheter og plikter.***

Om morgenen den 6 juli blev der overlevert kaptein Baldersheim et brev undertegnet av paa det nærmeste alle fiskere og dorybaser, inneholdende en ansøknings om et tillegg paa 3 procent til de tidligere fastsatte lottsatser at regnes fra fiskesesongens begynnelse til dens slutt. Ansøkningsen begrunnedes med, at fisket artet sig saa daarlig, at de ikke efter de oprinnelige satser vilde faa et rimelig vederlag for sitt arbeide. De utbad sig "bestemt svar" innen den 9 juli, og sa, at de "vil ta under overveielse at slutte at fiske", hvis ansøkningsen ikke blev innvilget. Det er oplyst at denne skrivelse er fremkommet som resultatet av en drøftelse paa et møte av dorybaser den foregaaende aften, og at der tidligere hadde vært snakket mann og mann imellem om at søke om en forhøielse. Eftersom dorylagene kom tilbake fra fisket den dag, innkalte Baldersheim dorybasene til konferanse enkeltvis og gruppevis. Efter hvad kaptein Millward som part og kaptein Baldersheim og fiskeribas Wilhelmsen som vidner har forklart, sa da Baldersheim til dem, at rederiet ikke vilde gaa med paa nogen forhøielse, og foreholdt dem det kontraktstridige i deres opptreden, og at de vilde bli holdt ansvarlig ved hjemkomsten. — — Samme aften mottok kaptein Baldersheim en ny skrivelse hvori det stod: "Da nu Deres svar paa vaar skrivelse om forhøielse av procenten er forelagt fiskerne, blir De herved underrettet om at vi ser oss nødsaget til at slutte at fiske mandag den 9. juli kl. 24." — —

Den 10 juli tørnet folkene ut som vanlig. Hvert dorylag hadde da 2 stubber med liner staaende i vannet siden 7 og 8 juli, og disse blev trukket. Men der blev ikke agnet liner til ny utsetning, og ingen liner blev satt. — — — Om aftenen sammenkalte kaptein Baldersheim et basmøte. Han bød da et tillegg i betalingen paa 1 procent til saavel dorybaser som fiskere. Dorybasene svarte, at de for sitt vedkommende kunde godta et saadant tillegg, men at fiskerne fikk svare for sig selv. Der blev saa tilkalt nogen fiskere. Men disse fastholdt sitt forlangende om et høiere tillegg, idet de dog uttalte at de trodde fiskerne vilde gaa med paa at de fikk det samme som basene hadde hatt før — altsaa 7 procent. Baldersheim avbrøt da den videre forhandling, men tilkaldte allikevel noget senere paa natten — han sier selv at det var i 1—2-tiden om morgenen til den 11 juli — nogen dorybaser og sa, at han vilde legge paa henholdsvis 1 og 2 procent til dorybaser og fiskerne, saa at fiskerne vilde faa de forlangte 7 procent. — — —

Baldersheim har forklaret, at han ved angivelsen av tilsagnet om en forhøiet betaling handlet under den tvang, at folkene truet med streik.***

Saksøkerne mener — som nevnt — prinsipalt at kunne kreve oppgjør efter den overenskomst, som blev inngaatt den 11 juli 1934.***

Der er uenighet mellom partene, om hvorvidt forholdet skal bedømmes efter norsk rett — som saksøkerne paastaar — eller efter engelsk rett — som det hevdes fra saksøktes side.***

— — — Efter avtalelovens § 29 vil det fremtvungne tilsagn være ugyldig likeoverfor baade dem, som selv har været med paa at utøve tvangen, som dem som kjente til eller burde ha kjent til, at tilsagnet var rettsstridig fremkaldt ved tvang. — — —

Nu synes imidlertid saksøkte at maatte gis medhold i, at det ikke er norsk rett, men engelsk rett, som her kommer til anvendelse, fordi et hyreforhold maa bedømmes efter flaggets lov. Og de i engelsk rett gjeldende regler om ugyldighet paa grunn av tvang gaar — saavidt forstaaes — ikke saa langt, at en overenskomst som den her omhandlede vilde bli ugyldig efter disse.*** Men der er — som i en av saksøkte fremlagt skriftlig redegjørelse paapekt — i engelsk rett en annen rettsdannelse, som vilde medføre at overenskomsten av 11 juli 1934 maa ansees for at være ugyldig. Engelsk rett krever, at en kontrakt for at bli rettsgyldig enten maa være opprettet under segl eller inngaat mot vederlag — “made for valuable consideration”. Som en “consideration”, der skal kunne gjøre en kontrakt rettsgyldig, godtar ikke engelsk rett en ydelse, hvortil vedkommende part allerede paa forhaand ifølge en eldre kontrakt er forpligtet overfor medkontrahenten.***

288

Haagerkonvention 1951 om den på internationale køb af løsøre anvendelige lov

Foreløbig oversættelse

Art. 1. Denne konvention gælder for internationale køb af løsøregenstande.

Konventionens regler kommer dog ikke til anvendelse på køb af værdipapirer, på køb af indregistrerede skibe eller luftfartøjer, eller på køb fra judicielle myndigheder eller på grundlag af udlæg. Konventionen gælder for køb på grundlag af dokumenter.

Ved konventionens anvendelse ligestilles med køb levering af løsøregenstande, som skal fabrikeres eller fremstilles, når den part, som skal levere genstandene, selv skal fremskaffe de til fabrikationen eller fremstillingen nødvendige råmaterialer.

Parternes aftale om anvendelse af en bestemt lovgivning eller om en domstols eller voldgiftsrets kompetence i tvistigheder vedrørende købet gør ikke i sig selv købet til et internationalt løsekøb i den i stk. 1 omhandlede betydning.

Art. 2. Har parterne aftalt anvendelse af et bestemt lands lovgivning i tvistigheder vedrørende købet, finder den pågældende lovgivning anvendelse.

Aftalen skal fremtræde som en udtrykkelig bestemmelse i kontrakten eller på utvivlsom måde fremgå af kontraktens bestemmelser.

Gyldigheden af parternes aftale om anvendelse af et bestemt lands lovgivning skal bedømmes efter den pågældende lovgivning.

Art. 3. Har parterne ikke truffet aftale om anvendelse af et bestemt lands lovgivning, gælder lovgivningen i det land, hvor sælgeren havde hjemsted, da han modtog bestillingen. Er bestillingen modtaget af et af sælgeren oprettet forretningssted, gælder lovgivningen i det land, hvori dette er beliggende.

Købet er dog underkastet lovgivningen i det land, hvor køberen eller dennes forretningssted har sit hjemsted, såfremt bestillingen er modtaget i dette land af sælgeren eller hans repræsentant, agent eller handelsrejsende.

Køb på børs eller på auktion er undergivet lovgivningen i det land, hvori børsen er beliggende, eller hvori auktionen finder sted.

Art. 4. Hvis ikke andet er udtrykkelig aftalt, kommer lovgivningen i det land, hvor undersøgelsen af de købte løsøregenstande skal finde sted, til anvendelse for så vidt angår formen for denne undersøgelse og for fristerne for undersøgelsens foretagelse og for meddelelser om undersøgelsen samt for de forholdsregler, der skal træffes, hvis modtagelse af løsøregenstandene afvises.

Art. 5. Konventionens regler gælder ikke 1) ved bedømmelsen af parternes habilitet, 2) ved bedømmelsen af kontraktens form, 3) ved afgørelse af spørgsmål om ejendomsrettens overgang, dog således, at parternes forpligtelser herunder særlig deres forpligtelser i tilfælde af løsøregenstandenes ødelæggelse eller beskadigelse bedømmes efter den ved konventionen fastsatte lovgivning, 4) ved bedømmelse af køkets retsvirkninger for andre personer end parterne.

Art. 6. I enhver af de kontraherende stater kan man undlade at benytte den lovgivning, som efter konventionens regler skulle finde anvendelse, såfremt anvendelsen ville stride mod statens grundlæggende retsprincipper (ordre public).

Fuldmagt

289

**Aktiebolaget Landéns hissar i Stockholm mod
Hj. Hein & Møller-Holst**LANDSOVER- SAMT HOF- OG STADSRETTE (STADFÆSTET AF HØJESTERET)
U. f. R. 1903 A. 570. U. f. R. 1904 B. 277

Under denne Sag have Citanterne, Aktiebolaget Landéns hissar i Stockholm, paastaaet de Indstævnte, Ingeniørfirmaet Hj. Hein & Møller-Holst her af Staden, og dette Firmas eneste ansvarlige Deltagere: Cand. polyt. Ingeniør Hjalmar Hein og Ingeniør Kristen Møller-Holst, disse en for begge og begge for en, dømte til at betale 22,500 Kr., som Firmaet skal være Citanterne skyldigt til Rest for Levering af 6 Elevatorer — dog saaledes, at heri eventuelt afgaar nedennævnte Beløb af 3000 Kr. — med Renter af det indtalte Beløb 5 pCt. aarlig fra Forligsklagens Dato, den 24 September 1901.

De Indstævnte have paastaaet sig frifundne for Citanternes Tiltale.***

Til Støtte for deres*** Paastand have de Indstævnte paaberaabt sig en dem den 8 Juli 1901 i Citanternes Navn af disses administrerende Direktør, Ingeniør Rudolph Landén, meddelt Kvittering for det indtalte Beløb 22,500 Kr., som sluttede sig til en samme Dag mellem ham i Citanternes Navn og de Indstævnte indgaaet Overenskomst, ifølge hvilken disse bl. a. mod at faa Kvittering for bemeldte Beløb til Citanterne transporterede en dem for Levering af de ommeldte 6 Elevatorer til et Byggeforetagende her i Staden tilkommende Fordring paa vedkommende Bygherre, stor til Rest 24,000 Kr. I denne Overenskomst hed det sluttelig, at nævnte Ingeniør Landén meddelte "sin personlige Indestaaelse for, at han er berettiget til at signere Aktiebolagets Landéns hissar." Medens det nu er uomtvistet, at der ifølge Citanternes Anmeldelse til Handelsregistret i Stockholm udkræves to Bestyrelsesmedlemmers Underskrift til at forbinde Citanterne, have de Indstævnte anbragt, at Ingeniør Landén har været særlig bemyndiget til med bindende Virkning for Citanterne at afslutte bemeldte Overenskomst. Ligesom de imidlertid ikke overfor Citanternes Benægtelse have godtgjort Rigtigheden af dette Anbringende, kan der heller ikke gives dem Medhold i, at den Omstændighed, at forskellige tidligere Henvendelser til dem fra Citanterne alene ere underskrevne af Ingeniør Landén, skulde bevirke, at dennes Underskrift paa fornævnte Overenskomst blev bindende for Citanterne.***

290

International Law Association. Udkast 1952 til konvention om internationale privatrettlige regler om fuldmagt ved internationale køb af løsøre

Art. 1. This Convention shall regulate the conflict of Laws regarding Agency in matters of sale of goods when the Convention on the law applicable in matters of international sales of goods is applicable to the sale.

Art. 2. In the present Convention the following terms shall be used with the meaning indicated below:

The Agent is he who carries out acts for the account of another, whether he acts in his own name or in the name of the principal.

To carry out acts shall mean making a contract, or receiving a declaration capable of producing legal effects, receiving payment or delivery or generally to take part in a legal act by any means whatsoever.

The Principal is he for whose account the Agent carries out such acts.

The third Party is he with whom the Agent carries out acts for the account of the Principal.

The Authorization is the act by which the Principal has conferred on or recognized in another the capacity of an Agent. The Authorization may result either from a contract of Agency or another contract (contract of work or services) to which the contract of Agency is accessory or be conferred by a unilateral act of the Principal.

The Law shall be the internal law of a country or a place, to exclusion of any rule of the conflict of laws.

Art. 3. When the authorization results from a contract the rights and obligations as between principal and agent shall be regulated by the law indicated by the contracting parties.

This designation must either result from an express term in or follow plainly from the provisions of the contract.

The provisions relating to the consent of the parties as to the law applicable, shall be settled by that law.

Art. 4. If no law be declared applicable by the parties within the terms laid down by the preceding article, the rights and obligations between principal and agent shall be regulated by the law of the place where the principal has his habitual residence or in which he conducts that branch through the intermediary of which the authorization is given.

Notwithstanding the provisions of the preceding paragraph the relations between principal and agent shall be regulated by the law of the place where the agent has his habitual residence or in which he conducts that branch through the intermediary of which he has received the authorization, provided that the business of the agent consists in his habitually carrying out acts of agency and that he is not a servant of the principal.

Art. 5. When the authorization results from a contract of agency which is

accessory to another contract, the relations between principal and agent shall be regulated by the law which governs the last mentioned contract.

Art. 6. The manner of fulfilling the obligations of the agent and of the principal shall be settled by the law of the place where any such obligation is to be executed, whenever the application of some other law has not been laid down by the express terms of the authorization or the contract of agency, or does not clearly arise therefrom by implication.

Art. 7. Whenever the agent has been authorised to substitute someone else in his place, the relations between the principal and the substitute shall be regulated by the same law as that which governs the relations between the principal and the person who has made the substitution.

Art. 8. The agency, including the case when the agent has gone beyond the powers conferred on him by the authorization, shall be governed, as between the principal and the third party, by the law of the place where the act of agency has been carried out.

Art. 9. When the agent in carrying out an act in the name of the principal has gone beyond the powers conferred on him by the authorization, his liability to the third party shall be regulated by the law of the place where the act has been carried out.

Art. 10. The place from which an agent has carried out an act by telephone, by correspondence, or by telegraph shall, for the purpose of Articles 8 and 9, be the place from which the agent has telephoned, or from which he has sent the letter or telegram.

Art. 11. The present Convention shall not apply to the conflict of laws relating to:

- (1) the capacity of the parties,
- (2) the formalities of legal acts.

Art. 12. In any contracting State the law settled by the present Convention may be overridden for a reason of public policy.

Erstatningsretten

291

S/S Willies ejer O. Lundquist mod A/S Dampskibsselskabet Vesterhavet

SØ- OG HANDELSRETTE
U. I. R. 1906. 111

[Sagen angik et sammenstød mellem en svensk og en dansk damper i Kejser Wilhelm Kanalen, hvor der herskede lodstvang. Retten udtalte:] Da nu derhos sammenstødet skete i ubetinget tysk territorialfarvand, og da som følge deraf den tyske rets bestemmelser for et sådant tilfælde findes at måtte komme til anvendelse ved pådømmelsen, og ikke den danske rets, som af sagsøgeren hævdede, hvorved det tillige bemærkes, at reglerne i Sverige, hvor Willie hørte hjemme, netop må antages i et tilfælde som det foreliggende ikke at stemme med de her gældende regler, samt da den tyske søhandelsret, se § 738 i den i så henseende gældende lov af 10. maj 1897, som Willie underkastede sig ved at gå ind i kanalen, udtrykkelig foreskriver, at, når et skib har været under førelse af tvangslods, er skibets reder fri for ansvaret for den skade, som er opstået ved det af lodsens forskyldte sammenstød, ville de indstævnte som følge deraf blive at frifinde, uanset hvad der iøvrigt måtte antages om skylden for sammenstødet ...

292

Eos-sagen

Se ovenfor nr. 196.

293

Irma-Mignon-sagen

Se ovenfor nr. 194.

294

Harnischknytter Adolf Zimmerbeutel mod I/S Alfred Berg

Se ovenfor nr. 279.

295

**Venstres Ungdoms Rejseklub m. fl. mod Ejnar Larsen,
A. J. Thomsen m. fl.**

ØSTRE LANDSRET

U. f. R. 1953. 945

Sagsøgte, vognmand A. J. Thomsen, der i 1951 var ejer af en turistomnibus, med hvilken han foretog selskabsrejser til udlandet, traf i foråret 1951 aftale med sagsøgerne, Venstres Ungdoms Rejseklub og Dansk Ungdoms Rejseforening, om en selskabsrejse til Paris, der skulle vare fra den 13. til den 23. maj 1951. I rejsen til Paris deltog 16 danske statsborgere, blandt andre de tre sagsøgerinder, frøken Tove Ipsen, frøken Joan Post og frøken Maren Rasmussen, en fransk statsborger Claude Lliberia, rejseleder Erik Sørensen, sagsøgte Thomsen og sagsøgte chauffør Ejner Larsen, der skulle skiftes med Thomsen til at køre omnibussen. I hjemturen fra Paris deltog foruden de ovennævnte personer 2 tunesiske studenter, inviteret af Venstres Ungdoms Rejseklub, samt en dansk journalist og dennes hustru, der var vognmand Thomsens gæster.

Da rejseselskabet den 21. maj 1951 ca. kl. 11 kom kørende ved byen Nordhorn i Tyskland, skete der et sammenstød mellem omnibussen, der på dette tidspunkt førtes af chauffør Larsen, og et jernbanetog. Omnibussen blev totalt ødelagt, og flere af passagererne, deriblandt de tre sagsøgerinder, kom alvorligt til skade. En af de tunesiske studenter, Charley Habib, blev så hårdt kvæstet, at han døde kort efter ulykken.

Chauffør Larsen blev fængslet af de tyske myndigheder, og ved dom afsagt den 29. maj 1951 af retten i Neunhaus blev han i overensstemmelse med sin tilståelse kendt skyldig i uagtsomt manddrab og uagtsomt legemsbeskadigelse samt i uagtsomt at have udsat trafikken for fare og i overtrædelse af visse bestemmelser i den tyske færdselslov. Han idømtes en bøde på 600 DM.***

Som følge af ulykken måtte de sagsøgende foreninger afholde udgifter til sygehusophold, kiste til den dræbte tunesiske student, til sygetransporter m. m., ligesom der påførtes sagsøgerinderne, der alle kom alvorligt til skade, ekstra udgifter. Sagsøgerne ønskede alle at få erstatning for disse udgifter, hvorhos sagsøgerinderne ønskede erstatning for svie, smerte og varigt mén.***

Sagsøgerne*** har derfor anlagt nærværende sag, hvorunder de har påstået de sagsøgte, vognmand Thomsen og chauffør Larsen, tilpligtet een for begge og begge for een, at betale 32.648 kr. 63 øre med renter 5 pct. årlig fra sagens anlæg den 27. september 1952.***

De sagsøgte, chauffør Larsen og vognmand Thomsen, har nedlagt påstand principalt på frifindelse, subsidiært på frifindelse mod betaling af et af retten fastsat beløb, der er mindre end det påståede.***

Til støtte for påstanden overfor chauffør Larsen har sagsøgerne henvist til den tyske straffedom, der har fastslået, at Larsen uagtsomt har forvoldt ulykken. Sagsøgerne, der er enige med Larsen i, at hans erstatningsansvar skal bedømmes efter tysk ret, har påberåbt sig § 823, jfr. § 276 i Bürgerliches Gesetzbuch,

og parterne er enige om, at disse lovbestemmelser svarer til dansk rets almindelige erstatningsregel, culpareglen.

Forsåvidt angår påstanden over for vognmand Thomsen har sagsøgerne principalt gjort gældende, at hans erstatningsansvar må bedømmes efter danske retsregler, in casu Danske Lovs 3—19—2. De har til støtte herfor gjort gældende, at Thomsens ansvar hviler på de kontrakter, der er indgået dels mellem ham og chauffør Larsen, dels mellem ham og de sagsøgende foreninger. Da de herhenhørende aftaler er indgået i Danmark mellem danske parter og vedrører en rejse i en dansk omnibus med danske passagerer, bortset fra Claude Lliberia, er kontrakterne i så høj grad knyttet til danske forhold, at de på grundlag deraf opståede retstvister bør bedømmes efter dansk ret. Sagsøgerne har i denne forbindelse specielt anført, at forholdet mellem Thomsen og Larsen, uanset at Larsens personlige erstatningsansvar i det foreliggende tilfælde skal bedømmes efter tysk ret, bør bedømmes efter danske retsregler, idet det er urimeligt, at de af arbejdskontrakten mellem disse sagsøgte opståede tvistigheder skal underkastes forskellige retsregler, hver gang omnibussen passerer en landegrænse.

For det tilfælde, at det måtte blive statueret, at også Thomsens ansvar skal afgøres efter tysk ret, har sagsøgerne påberåbt sig § 831 i Bürgerliches Gesetzbuch, der i det væsentligste svarer til Dansk Lovs 3—19—2, dog at hverviverens ansvar efter den tyske bestemmelse er betinget af, at han har vist forsømmelighed ved valget af tjeneren. Sagsøgerne har her gjort gældende, at Thomsen netop har udvist en sådan forsømmelighed ved at lade chauffør Larsen, der ikke tidligere har kørt i udlandet, og som ikke var fortrolig med de tyske færdselsforhold, føre omnibussen.***

Sagsøgte Thomsen, hvem der er meddelt fri proces, har for sit vedkomende påstået tysk ret lagt til grund ved sagens afgørelse, idet han har gjort gældende, at hans ansvar alene kan afledes af chauffør Larsens skadevoldende handling i Tyskland og ikke støttes på de i Danmark mellem ham og chauffør Larsen og de sagsøgende foreninger indgåede aftaler. Han har derfor påstået sit erstatningsansvar afgjort efter § 831 i Bürgerliches Gesetzbuch og har bestridt, at han har vist forsømmelighed ved at lade chauffør Larsen køre omnibussen. Larsen har været chauffør i mange år og har tidligere ført omnibusser, uden at der er sket uheld. Larsen var kompetent til at køre, idet han var udhvilet og ikke havde nydt spiritus. Han havde først overtaget føringen af omnibussen, kort før ulykken skete.

Thomsen har videre forklaret, at han havde bedt sin forsikringsagent om at sætte forsikringen for kørsel i udlandet i kraft, men at dette ikke var sket. Han har bestridt, at dette forhold kan pådrage ham erstatningspligt.***

Til det anførte skal bemærkes: ***

Hvad angår sagsøgte Thomsen må spørgsmålet om hans ansvar for sagsøgte Larsens retsbrud bedømmes efter gerningsstedets, altså tysk ret, d. v. s. Bürgerliches Gesetzbuch § 831. Da det er ubestridt, at denne bestemmelse principielt pålægger en vognmand ansvar for den skade, hans chauffør anretter ved kørsel i hans tjeneste, og da det ikke er godtgjort, at der foreligger sådanne omstændigheder, som efter tysk rets regler, jfr. særlig bestemmelsens 2. pkt., i det foreliggende tilfælde kan fritage ham for sådant ansvar, må han anses erstatnings-

pligtig for den sagsøgerne ved ulykkestilfældet påførte skade. Herefter bliver det for nærværende sag uden betydning at undersøge, om Thomsen, såfremt han ikke ifølge tysk ret kunne være gjort direkte ansvarlig for Larsens retsbrud i sin egenskab af dennes arbejdsgiver og foresatte, dog kunne ifalde ansvar over for sagsøgerne på grund af sin forsømmelse af at tegne en ansvarsforsikring, som ville have dækket også den ved Larsens forseelse forvoldte skade.***

296

Singergas A/S mod N. Th. Andersen

VESTRE LANDSRET

U. f. R. 1949. 1122

[Sagsøgte havde for sagsøgeren transporteret flaskegas med sin lastvogn fra Holland til Danmark. Der var ved et kørselsuheld i Tyskland sket skade på det transporterede. Retten udtalte:] Da begge parter såvel ved aftalens indgåelse, som da transporterne fandt sted, var hjemmehørende her i landet, og da transporterne vedrørte varer, for hvilke sagsøgeren havde risikoen, findes dansk rets regler at være anvendelige både med hensyn til spørgsmålet om sagsøgtes eventuelle erstatningspligt og med hensyn til spørgsmålet om sagsøgerens krav på delvis tilbagebetaling af det forud erlagte transportvederlag.

Værneting

297

Soldatens og orlogsgastens fond mod Vagn Egeriis

ØSTRE LANDSRET
U. f. R. 1961. 454

[Indstævnte havde fået forkyndt stævning til at møde for Københavns byret under et ophold i Chicago som påmønstret et norsk skib. Retten udtalte:]

Efter det oplyste må det lægges til grund, at indstævnte inden sagens berømmelse senest havde haft fast bopæl hos W. Larsen, Gullfossgade 1, 4. sal, og at indstævnte ved sagens berømmelse hverken havde fast bopæl eller opholdssted her i landet eller havde opnået fast bopæl i udlandet.

Da indstævnte derhos ikke, som forhyret med et nærmere angivet fartøj i udenrigs fart, ved skibets anløb af Chicago som nævnt i (underrets)dommen kan anses at have haft opholdssted i lovens forstand i denne by, findes sagen i medfør af retsplejelovens § 236 stk. 2 med rette at have kunnet indbringes af appellanterne for Københavns byret som indstævntes rette værneting.

298

B.M.C. Ltd. A/S mod Aktiebolaget Örebro Skjortfabrik

SØ- OG HANDELSRETEN
U. f. R. 1954. 1056

Med faktura af 10. juni 1953 leverede de sagsøgte, A/B Örebro Skjortfabrik, Örebro, til sagsøgerne, B.M.C., Ltd., A/S, 155 skjorter til en pris af sv. kr. 5967,50 ÷ 2 pct. kasserabat 119,35 eller sv. kr. 5848,15 at betale med speditørfærdkrav. Skjorterne sendtes af de sagsøgte til Adam's Transport Co. A/S, hvor sagsøgerne indløste 15 skjorter, for hvilke de indbetalte d. kr. 841,66 til Adam's Transport Co. A/S. De 155 skjorter havde sagsøgerne videresolgt til firma Brønderslew & Lohse, København, til en pris af dr. kr. 66 pr. stk. Kort efter, at de indtagne 15 skjorter var kommet i handelen, indløb der reklamationer, idet stoffet skred i sømmene. Sagsøgerne reklamerede til de sagsøgte, som erkendte, at skjorterne skred i sømmene, og i skrivelse af 11. august 1953 meddelte de sagsøgte sagsøgerne, at de ikke ønskede, at skjorterne blev solgt til nogen kunder, og at de havde anmodet Adam's Transport Co. A/S om at returnere de i behold værende ufortoldede skjorter, hvorhos de tilbød sagsøgerne en mindre erstatning, som sagsøgerne imidlertid afviste. Sagsøgerne har derefter under nær-

værende i medfør af retsplejelovens § 248, stk. 2, ved Sø- og Handelsretten i København anlagte sag påstået de sagsøgte dømt til at betale en erstatning på 3275,40 d. kr.***

Sagsøgerne har anført, at sag kan anlægges her i riget, idet de sagsøgte ved sagens anlæg havde gods her i landet, nemlig de hos Adam's Transport Co. A/S beroende 140 skjorter og det sammesteds indestående kontante beløb 841 kr. 66 øre.

De sagsøgte har under særskilt procedure af formaliteten påstået sagen afvist, idet de gør gældende, at sag ikke kan anlægges her i riget i medfør af retsplejelovens § 248, stk. 2, men at de sagsøgte må sagsøges ved deres hjemting i Sverige. De gør gældende, at det er uden betydning, at det på fakturaerne er anført, at delleverancer er tilladt. De gør videre gældende, at det vel er rigtigt, at skjorterne skred i sømmene, og at de derfor ex gratia har tilbudt sagsøgerne en erstatning, hvilket tilbud imidlertid er bortfaldet, da det blev afvist af sagsøgerne. De i behold værende skjorter hos Adam's Transport Co. A/S måtte vel, indtil de var indløst, betragtes som tilhørende de sagsøgte, men da skjorterne var prøvesvarende, var sagsøgerne forpligtet til at indløse dem, og de sagsøgte har ikke haft og har ikke nogen pligt til at betale erstatning. Sagsøgerne kan ikke under påberåbelse af påståede mangler afvise varen og derved skabe værneting for de sagsøgte her i landet. Med hensyn til de til Adam's Transport Co. A/S af sagsøgerne indbetalte 841 kr. 66 øre har de sagsøgte anført, at det skyldes en henvendelse fra sagsøgerne til Adam's Transport Co., at beløbet ikke inden sagens anlæg var blevet overført til de sagsøgte; derfor må sagsøgerne være afskåret fra at anlægge sagen her i landet under henvisning til, at de sagsøgte ved sagens anlæg havde en fordring på Adam's Transport Co. A/S.

Efter det anførte skal retten bemærke, at de hos Adam's Transport Co. A/S beroende skjorter vel formentlig har været de sagsøgtes ejendom, indtil de blev indløst af sagsøgerne. Da det imidlertid efter det for retten oplyste er tvivlsomt, om sagsøgerne ikke inden sagsanlægget havde haft pligt til at indløse skjorterne, og det for så vidt beror på udfaldet af nærværende sag, om de sagsøgte kan siges at have haft gods her i landet på det pågældende tidspunkt, findes sagsøgerne ikke at kunne anlægge sag mod de sagsøgte her i riget, fordi skjorterne ved sagsanlægget beroede her i landet. Med hensyn til de 841 kr. 66 øre bemærkes, at sagsøgerne har bestridt at have forhindret, at beløbet blev overført til de sagsøgte. Dette punkt er imidlertid ikke nærmere oplyst, og da det beror på nærværende sags udfald og altså er tvivlsomt, om ikke sagsøgerne hos de sagsøgte havde et tilgodehavende, som oversteg det nævnte beløb, findes sagsøgerne ej heller på grund af beløbets tilstedeværelse hos Adam's Transport Co. A/S ved sagens anlæg at kunne anlægge sag mod de sagsøgte her i riget. De sagsøgtes påstand om sagens afvisning vil herefter være at tage til følge. — —

299

A/S Ferrosan mod Carl Detlef Feddersen

HØJESTERET
U. f. R. 1956. 692*Østre Landsret:*

Den 6. september 1951 skete der en eksplosion i en kuglemølle på den sagsøgeren, A/S Ferrosan, tilhørende kemisk-tekniske fabrik i Ølseagle ved Køge. Møllen benyttes til formaling og blanding af potaske og metaaminofenol, og ved den efter eksplosionen foretagne undersøgelse viste det sig, at en af de fustager, hvis indhold var benyttet til den formalede blanding, ikke indeholdt potaske, men kaliumklorat, der, når det blandes med et organisk stof, hvad metaaminofenol er, frembringer en eksplosiv blanding. Fustagen var leveret af sagsøgte, grosserer Carl Detlef Feddersen, Hamborg, hos hvem Ferrosan havde bestilt et parti potaske, og var, formentlig ved en fejltagelse, afsendt sammen med potasken.***

Ferrosan*** har derefter i medfør af retsplejelovens § 248, stk. 2, under 11. september 1954 anlagt nærværende sag mod sagsøgte som eneste ansvarlige indehaver af firmaet K. D. Feddersen & Co., Hamborg, og nedlagt påstand på, at sagsøgte dømmes til at betale dem de ovennævnte beløb med nærmere angivne renter.

Sagsøgte har påstået sagen afvist, idet Hamborg i henhold til sagsøgtes ordrebekræftelse er vedtaget som værneting.

Ordrebekræftelsen er fremlagt i fotokopi. Den angår køb af 15.000 kg potaske og indledes ifølge fremlagt translatøversættelse således:

“Vi har modtaget Deres ordre gennem Fa. K. D. Feddersen & Co. A/S, København, som vi på grundlag af vore Dem bekendte salgsbetingelser har noteret som følger: — — —”

På dens bagside er sagsøgtes salgsbetingelser trykt. De er opført i 26 forskellige punkter og punkt 3 i translatøversættelsen lyder således:

“Opfyldelsessted for leveringen er den søhavn, som i det enkelte tilfælde kommer på tale, henh. ved forsendelse med jernbane afsendelsesstationen, for betaling og værneting derimod Hamburg. Der indrømmes dog køberen efter anmodning ret til før indladningen at lade varen besigtige henh. undersøge ved en neutral sagkyndig; derved må dog ikke forvoldes nogen forsinkelse af den påtænkte afskibning henh. indlevering. Gøres der ikke brug af denne ret, anses varen for at være leveret som betinget ved indladningen.”

Sagsøgerne hævder, at den nævnte værnetingsbestemmelse ikke kan være bindende for dem. De har i så henseende anført, at der ikke foreligger nogen værnetingsvedtagelse, men kun en ensidig erklæring fra sagsøgte i salgsbetingelserne, som Ferrosan ikke er blevet gjort opmærksom på, og ikke kendte, og som ikke er særlig fremhævet. En værnetingsvedtagelse bør efter sagsøgernes formening være klar og utvetydig, og kravene i så henseende må være endnu større, når man vil unddrage danske procesparter deres lovhjemlede ret til at anlægge sag ved danske domstole.***

Skulle man imidlertid antage, at værnetsbestemmelsen er bindende, kan den dog ikke komme til anvendelse i det foreliggende tilfælde, hvor det ikke af den med tilstrækkelig tydelighed fremgår, at den også omfatter dette, idet det ikke drejer sig om opfyldelse af kontrakten i egentlig forstand, men om erstatning for en mangel ved det leverede.

Til støtte for afvisningspåstanden har sagsøgte, der erkender, at betingelserne for anvendelse af værnetsbestemmelsen i retsplejelovens § 248, stk. 2, er til stede, anført følgende:

Ferrosan købte i april 1951 2 tons potaske af sagsøgte på ganske tilsvarende betingelser som ved det heromhandlede køb, der fandt sted i maj 1951, hvor der iøvrigt to gange leveredes 15 tons potaske. Det er i handelsforhold ganske almindeligt, at sælgeren tilstiller køberen sine handelsbetingelser, hvori ofte er indbefattet værnetsregler. Det må herefter være køberens, i det foreliggende tilfælde Ferrosans, pligt at gøre sig bekendt med disse, inden endelig handel afsluttes. Ferrosan er et stort firma med internationale forbindelser og kan ikke være ukendt med, at værnetsvedtagelser er almindelige i salgsbetingelser. Det kan derfor ikke for Ferrosan have været usædvanligt, at der også i sagsøgtes salgsbetingelser kunne findes værnetsregler, og der er iøvrigt i det foreliggende tilfælde intet urimeligt i betingelsen, idet den jo blot medfører at sagsøgte må sagsøges ved sit sædvanlige værneting.***

Værnetsreglen i sagsøgtes ordrebekræftelse er vel ikke fremhævet, men retten må dog finde at den må være bindende for sagsøgerne, idet det ikke for Ferrosan kan have stillet sig som usædvanligt, at der i sagsøgtes salgsbetingelser har været indbefattet værnetsregler, og sagsøgerne ikke findes at kunne påberåbe sig, at de ikke har gjort sig bekendt med disse. At købet er bragt i stand gennem sagsøgtes herværende repræsentant, tillægger retten ikke afgørende betydning, allerede som følge af, at der, som også af sagsøgte anført, på aktieselskabet K. D. Feddersens brevpapir findes en trykt klausul, hvorefter "alle tilbud er fritblivende og først bindende, når skriftlig ordrebekræftelse fra leverandøren foreligger".***

Højesteret:

Den i indstævntes ordrebekræftelse indeholdte værnetsregel er vel noget uklart formuleret, men den findes dog med tilstrækkelig tydelighed at fastsætte, at værnetinget ved sagsanlæg mod indstævnte er Hamburg. Med denne bemærkning vil dommen i henhold til de i den iøvrigt anførte grunde være at stadfæste.

300

Retsplejeloven. §§ 236 stk. 2, 248, 448 d, 456 a og b

Lovbekg. nr. 286 af 1. juli 1963

Se særudgave af retsplejeloven.

Anerkendelse og fuldbyrkelse af domme

301

Peter Nicolaysen mod August Weiss

ØSTRE LANDSRET (STADFÆSTET AF HØJESTERET)

U. f. R. 1940. 652

Ved Erklæring af 8. November 1913 paatog Sagsøgte, Grosserer Peter Nicolaysen, sig Selvskyldnerkaution for Sagsøgeren, fhv. Købmand, nu Rentier August Weis's prioritetssikrede Fordring paa Gæstgiver Georg Christoph Meyer, stor 10.000 Rm., der var indført i Grundbogen for Lokstedt, Bind 13, Folio 612, Afdeling III, Nr. 5. Sagsøgeren opsigde denne Prioritet den 28. Februar 1915 og opnaaede den 14. December s. A. ved Landsretten i Altona Dom over Hoveddebitor Meyer og Sagsøgte til Betaling af 10.000 M. in solidum. Ejendommen, paa hvilken Sagsøgerens Prioritet med Hoveddebitor Meyer var indført, blev i Aaret 1916 solgt ved Tvangsauktion, uden at Sagsøgeren blev fyldestgjort, og ogsaa Eksekution hos Hoveddebitor forblev resultatløs; da denne senere døde, fik Sagsøgeren, bortset fra en Del af Renterne, ingen Betalinger paa sin Fordring. Sagsøgte, der er dansk Statsborger, havde, da han paatog sig Kautionen, fast Bopæl i Tyskland; i 1916, eller i Begyndelsen af 1917 opgav han denne og flyttede her til Landet, hvor han siden har boet.

I 1937 anlagde Sagsøgeren Sag mod Sagsøgte ved Landsretten i Hamborg til Betaling af den ovennævnte Fordring; under Henviſning til, at Anerkendelsesdommen af 14. December 1915 lød paa Fredsmark og saaledes ikke var eksigibel ved en Eksekution i Reichsmark, gjorde Sagsøgeren nu Fordringen gældende som Værdiopskrivnings-Fordring. Ved Landsrettens Dom af 18. Februar 1938 blev imidlertid Sagsøgte, der havde ladet give Møde under Sagen, frifundet.***

Denne Dom blev af Sagsøgeren indanket for den Hanseatiske Overlandsret i Hamborg, og ved denne Rets Dom af 15. Juni 1938 blev Sagsøgte, der ligeledes havde ladet møde her, dømt til at betale Sagsøgeren det indtalte Beløb, 2500 Rm. med Renter 6 pCt. aarlig fra den 1. Januar 1933 samt Sagens Omkostninger.***

Under Henviſning til, at det ikke har været muligt at formaa Sagsøgte til godvilligt at opfylde denne Dom, har Sagsøgeren, der har erholdt Bevilling til fri Proces, dog uden Beskikkelse af Sagfører, under nærværende Sag paastaet Sagsøgte dømt til at betale ham de ovennævnte 2500 Rm. med Renter heraf 5 pCt. aarlig fra Stævningens Dato, den 22. Marts 1939.

Sagsøgte har paastaet sig frifundet.

Her for Retten er Parterne enige om, at den Hanseatiske Overlandsrets Dom af 15. Juni 1938 ikke har bindende Virkning for nærværende Sag.

Til Støtte for sin Paastand gør Sagsøgte gældende, dels*** dels at Sagsøgere ns paastaaede Ret til Opskrivning ikke kan anerkendes, hverken efter dansk Rets Regler eller efter tyske Retsregler, disse rigtigt anvendt.

Fra Sagsøgte s Side er det ubestridt, at Sagsøgeren har haft fornøden Hjemmel til at anlægge Sagen ved de tyske Domstole, saaledes som sket; da der derhos maa gives Sagsøgeren Medhold i, at de tyske Domstole med Føje har bedømt Retsforholdet efter tysk Ret, idet Sagsøgte — som foran nævnt — har paa taget sig den heromhandlede Forpligtelse paa et Tidspunkt, hvor han havde fast bopæl i Tyskland, og idet forpligtelsen efter sit Indhold i det hele ogsaa var bestemt til Opfyldelse i Tyskland, og da de af de tyske Domstole i den foreliggende Sag anvendte Retsregler ikke kan siges at stride mod ufravigelige danske Retsgrundsætninger, findes Sagsøgte, der ikke har godtgjort Rigtigheden af sin Paastand om, at den Hanseatiske Overlandsrets Doms Resultat skulde hvile paa urigtig Anvendelse af tysk Ret, i det hele at burde dømmes i Overensstemmelse med den af Sagsøgeren nedlagte Paastand.***

302

Clarice Una Tønnesen, Johannesburg, mod Rasmus Modeweg Tønnesen

ØSTRE LANDSRET

U. f. R. 1952. 631

Københavns amts nordre birks civilret:

Under nærværende sag har sagsøgeren, civilingeniør Rasmus Modeweg Tønnesen, der den 1. maj 1947 i Transvaal i Sydafrika indgik ægteskab med sagsøgte, Clarice Una Tønnesen, født Smeal, påstået dom til separation fra sin nævnte ægtefælle på vilkår, at spørgsmålet om sagsøgerens pligt til at svare underholdsbidrag til sagsøgte afgøres af retten.

Der er ingen børn i ægteskabet.

Til støtte for sin påstand om dom til separation på det nævnte vilkår har sagsøgeren anført, at forholdet mellem parterne er ødelagt på grund af dyb og varig uoverensstemmelse.

Sagsøgte, der er bosiddende i Johannesburg i Sydafrika, har ikke personlig givet møde under sagen.

Den for sagsøgte beskikkede forsvarer, landsretssagfører Edel Saunte, har påstået sagsøgte frifundet, idet der allerede den 19. april 1951 af "The supreme Court of South Africa" er givet dom til separation mellem parterne på grund af uoverensstemmelser, ved hvilken dom der er pålagt sagsøgeren at betale sagsøgte et underholdsbidrag på £ 30 pr. måned samt at betale sagens omkostninger efter rettens nærmere opgørelse. Omkostningerne er den 22. maj 1951 af rettens "Taxing Master" opgjort til £ 162-19-3.

Det bemærkes, at denne dom er afsagt på grundlag af en af sagsøgte udtagen stævning, og at sagsøgeren, der er dansk statsborger, men som dengang havde fast bopæl i Sydafrika, ved sagfører gav møde under sagen.

Landsretssagfører Edel Saunte har endvidere nedlagt påstand om, at den af "The supreme Court of South Africa" afsagte dom gøres eksegibel her i landet, herunder at der gives dom for det i henhold til nævnte dom forfaldne underholdsbidrag for tiden 19. april til 18. oktober 1951 £ 180 eller 3484 kr.

Sagsøgeren har intet haft at erindre imod, at dommen gøres eksegibel her i landet, når bortses fra dommens bestemmelse om underholdsbidrag og sagsomkostninger.

Justitsministeriet, hvem dommen har været forelagt, har i skrivelse af 31. juli 1951, udtalt, at der ikke på grundlag af denne dom kan udfærdiges skilsmissebevilling her i landet, men at spørgsmålet om dommens gyldighed iøvrigt hører under domstolene.

Under domsforhandlingen har sagsøgeren afgivet partsforklaring.

Det er under domsforhandlingen oplyst, at den i Sydafrika afsagte dom ikke i dette land hjemler ret til skilsmisse efter udløbet af en bestemt frist, ligesom det heller ikke der er muligt at få et ægteskab opløst blot på grund af uoverensstemmelser mellem ægtefællerne.

Da dommen efter det således foreliggende ikke her i landet har nogen værdi som grundlag for en eventuel senere skilsmisse, og da det retsinstitut, som dommen efter det oplyste synes at være udslag af, er uden hjemmel her i landet, findes der, uanset at sagsøgeren som nævnt har givet møde under den af sagsøgte i Sydafrika anlagte sag, ikke at kunne tillægges dommen nogen retskraft (exegibilitet) her i landet forsåvidt angår dommens hovedindhold, og da dommens bestemmelser om underholdsbidrag og omkostninger må anses som accessorier til hovedindholdet, findes der, når hovedindholdet forkastes, heller ikke at burde tillægges disse accessorier selvstændig eksegibilitet her i landet.

Sagsøgeren vil herefter være at frifinde for de af sagsøgte nedlagte påstande.

Med hensyn til den af sagsøgeren nedlagte påstand om separationsdom bemærkes herefter følgende:

Da det gennem den af sagsøgeren afgivne forklaring og det iøvrigt under sagen fremkomne findes bevist, at forholdet mellem parterne er ødelagt på grund af dyb og varig uoverensstemmelse, der ikke hovedsagelig skyldes sagsøgeren, vil der i medfør af § 53, stk. 2, i lov nr. 276 af 30. juni 1922 om ægteskabs indgåelse og opløsning være at meddele dom til separation.

Under hensyn til det om parternes økonomiske forhold oplyste og når især henses til ægtefællernes alder og ægteskabets korte varighed, findes sagsøgeren ikke at burde svare bidrag til sagsøgtes underhold. — —

Østre Landsret:

Den indankede dom er — — — påanket af fru Clarice Una Tønnesen, født Smeal, med endelig påstand om, at dommen stadfæstes med den ændring, at indstævnte, civilingeniør Rasmus Modeweg Tønnesen, tilpligtes at betale bidrag til appellantindens underhold efter overøvrighedens bestemmelse fra og med den 19. april 1951.

Indstævnte har sluttet sig til denne påstand.

For landsretten er afgivet forklaring af indstævnte.

I henhold til de i dommen anførte grunde, og idet landsretten har taget

hensyn til den af "The supreme Court of Sout Africa" den 19. april 1951 afsagte dom som værende af bevismæssig betydning, vil dommen være at stadfæste, dog at indstævnte fra og med den 19. april 1951 og i separationstiden vil have til appellantinden at betale underholdsbidrag, hvis størrelse fastsættes af overøvrigheden.***

303

M mod H

Se ovenfor nr. 220.

304

Retsplejelov. §§ 223 a og 479

Lovbekg. nr. 286 af 1. juli 1963

Se særudgave af retsplejeloven.

305

Kgl. anordning nr. 148 af 13. april 1938

§ 1. Retskraftige tyske Domme om formueretlige Krav, som er afsagt i borgerlige Sager, derunder sø- og handelsretlige Sager, har bindende Virkning i Danmark.

Lige med retskraftige Domme stilles de for en Ret eller et "Gutestelle" indgaaede Forlig samt retskraftige Afgørelse, som i borgerlige Sager, derunder sø- og handelsretlige Sager, enten i Dommen eller særskilt er truffet om Erstatning for Sagsomkostninger.

§ 2. Bindende Virkning her i Riget tilkommer dog kun de i § 1 nævnte Domme og Forlig under Forudsætning af, at Anerkendelsen af Dommen eller Forliget ikke vilde stride mod ufravigelige danske Retsgrundsætninger.

§ 3. De i § 1 nævnte Domme har derhos kun bindende Virkning her i Riget under Forudsætning af, at de tyske Domstole efter danske Love har været kompetente.

Bindende Virkning her i Riget tilkommer dog ikke tyske Domme, hvis Kompetencer alene begrundes i det i tysk Zivilprozessordnung § 23 hjemlede Værneting, eller hvis Sagen er behandlet ved en i Henhold til tysk Zivilprozessordnung § 26 eller § 34 kompetent Ret.

§ 4. Udeblivelsesdom, som i Tyskland er afsagt over en sagsøgt, som er dansk Statsborger, har kun bindende Virkning her i Riget, naar Stævningen rettidig er forkyndt enten for den paagældende personlig eller efter de mellem Danmark og Tyskland gældende Regler om Retshjælp.

§ 5. Bestemmelserne i denne Anordning finder ikke Anvendelse paa Domme og Forlig vedrørende person- eller familieretlige Krav.

Udenfor Bestemmelserne falder ogsaa Afgørelser, der er truffet af de særlige Domstole for Arbejdsvistigheder.***

306

Nordisk konvention om anerkendelse og fuldbyrdelse af domme

Bekg. nr. 177 af 10. maj 1933

Se Juristens Lovsamling.

307

Nordisk konvention om ægteskab, adoption og værgemål, art. 22

Bekg. nr. 121 af 10. april 1954

Se Juristens Lovsamling.

308

Nordisk konvention om arv og dødsboskifte

Bekg. nr. 274 af 4. oktober 1935

Art. 27. Har en ret i en af staterne truffet afgørelse om, at et bo, som omhandles i artikel 19, skal behandles af skifteretten, testamentseksekutor eller *boutredningsman* eller skiftes under medvirkning af *skiftesman*, eller at det skal udleveres til privat skifte, er afgørelsen bindende også i de andre stater.

Det samme gælder afgørelser om en efterlevende ægtefælles ret til at hensidde i uskiftet bo.

Art. 28. Bestemmelserne om anerkendelse og fuldbyrdelse af domme og forlig i konvention af 16. marts 1932 skal også finde anvendelse på domme og forlig om ret til arv eller legat, om en efterlevende ægtefælles rettigheder og om ansvar for en arveladers gæld, såfremt den afdøde var statsborger i en af staterne og var bosat i en af dem.

De i artikel 3 og artikel 6 nr. 3 i den nævnte konvention givne særlige bestemmelser vedrørende domme over en udebleven sagsøgt kommer kun til anvendelse, forsåvidt dommen angår den efterlevende ægtefælles eller de enkelte arvingers ansvar for den afdødes gæld.

STUDIEBOG I

International Ret

EN SAMLING AF RETSAFGØRELSE
OG ANDET MATERIALE
TIL BRUG FOR UNDERVISNINGEN I FOLKERET
OG INTERNATIONAL PRIVATRET

2. udgave – 2. oplag

UDGIVET AF
ALF ROSS · ISI FOIGHEL · ALLAN PHILIP



NYT NORDISK FORLAG · ARNOLD BUSCK

København 1967