JUDICIAL DECISIONS

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Of the Board of Editors

Compulsory jurisdiction—application of Article 36, paragraph 5, of Court's Statute to 1921 Declaration of Bulgaria, non-signatory of the Charter

Case Concerning the Aerial Incident of July 27th, 1955 (Israel v. Bulgaria), Preliminary Objections.* I.C.J. Reports, 1959, p. 127.

International Court of Justice, Judgment of May 26, 1959.

This case turned on the effect of Article 36, paragraph 5, of the Court's Statute, and the Bulgarian Declaration of Acceptance of the compulsory jurisdiction of the Permanent Court of International Justice, ratified August 12, 1921, which reads:

On behalf of the Government of the Kingdom of Bulgaria, I recognize, in relation to any other Member or State which accepts the same obligation, the jurisdiction of the Court as compulsory, *ipso facto* and without any special convention, unconditionally.

Article 36, paragraph 5, of the Statute of the International Court of Justice provides:

Declarations made under Article 36 of the Statute of the Permanent Court of International Justice and which are still in force shall be deemed, as between the parties to the present Statute, to be acceptances of the compulsory jurisdiction of the International Court of Justice for the period which they still have to run and in accordance with their terms.

Bulgaria became a Member of the United Nations in December, 1955. The Court states the facts of the controversy as follows:

It was stated to the Court that on the morning of July 27th, 1955, the civil Constellation aircraft No. 4X-AKC, wearing the Israel colours and belonging to the Israel Company El Al Israel Airlines Ltd., making a scheduled commercial flight between Vienna, Austria, and Lod (Lydda) in Israel, having, without previous authorization, penetrated over Bulgarian territory, was shot down by aircraft of the Bulgarian anti-aircraft defence forces. After catching fire, the Israel aircraft crashed in flames near the town of Petritch, Bulgaria, and all

^{*} Digested by William W. Bishop, Jr., of the Board of Editors.

Composed for this case of President Klaestad, Vice President Zafrulla Khan, Judges Basdevant, Hackworth, Winiarski, Badawi, Armand-Ugon, Kojevnikov, Lauterpacht, Moreno Quintana, Córdova, Wellington Koo, Spiropoulos and Spender, and Judges od hoc Goitein and Zourek.

the crew, consisting of seven members, and also the fifty-one pas-

sengers of various nationalities were killed.

These facts gave rise to negotiations and diplomatic correspondence between the two Governments which attempted in that way to arrive at a friendly solution. As these diplomatic approaches did not lead to a result which was satisfactory to the Parties to the case, the Government of Israel submitted the dispute to the Court by means of an Application instituting proceedings on October 16th, 1957. Against this Application the Government of the People's Republic of Bulgaria advanced five Preliminary Objections.

Invoking the Bulgarian Declaration of 1921 and Article 36, paragraph 5, the application of the Government of Israel asked the Court

to adjudge and declare that the People's Republic of Bulgaria is responsible under international law for the destruction of the Israel aircraft 4X-AKC on 27 July 1955 and for the loss of life and property and all other damage that resulted therefrom;

to determine the amount of compensation due from the People's

Republic of Bulgaria to Israel;

in exercise of the power conferred upon it by Article 64 of the Statute of the Court, to decide that all costs and expenses incurred by the Government of Israel be borne by the Government of the People's Republic of Bulgaria.

The Bulgarian Preliminary Objections were to the effect that (1) the Declaration of August 12, 1921, "ceased to be in force on the dissolution of the Permanent Court, pronounced by the Assembly of the League of Nations on April 18th, 1946," Article 36, paragraph 5, therefore being inapplicable to Bulgaria and the Court lacking jurisdiction. Additional Preliminary Objections were (2) that in any event Bulgaria had not accepted jurisdiction in respect of acts prior to December 14, 1955, when Bulgaria became a Member of the United Nations; (3) that Israel's claim was inadmissible, since the damage was suffered for the most part by non-Israel insurance companies; (4) that the dispute was subject to the exclusive jurisdiction of Bulgaria and fell essentially within Bulgarian domestic jurisdiction; and (5) that local remedies had not been exhausted in Bulgaria.

Israel asked the Court to dismiss the Preliminary Objections and proceed on the merits.

By a vote of 12 to 4 the Court found "that it is without jurisdiction to adjudicate upon the dispute brought before it on October 16th, 1957, by the Application of the Government of Israel." In its opinion the Court stated:

The Court has to determine whether Article 36, paragraph 5, of the Statute is applicable to the Bulgarian Declaration of 1921.

² Bulgaria's Declaration of 1921 was "in relation to any other Member or State which accepts the same obligation." Israel's acceptance of 1950 (ratified in 1951) was limited to "all legal disputes concerning situations or facts which may arise after the date of deposit of the instrument of ratification of this declaration." Israel's Declaration also excepted "any dispute relating to matters which are essentially within the domestic jurisdiction of the State of Israel."

The object of Article 36, paragraph 5, is to introduce a modification in the declarations to which it refers by substituting the International Court of Justice for the Permanent Court of International Justice, the latter alone being mentioned in those declarations, and by thus transferring the legal effect of those declarations from one Court to the other. That Article 36, paragraph 5, should do this in respect of declarations made by States which were represented at the San Francisco Conference and were signatories of the Charter and of the Statute, can easily be understood. This corresponds indeed to the very object of this provision. But is this provision meant also to cover declarations made by other States, including Bulgaria? The text does not say so explicitly.

At the time of the adoption of the Statute a fundamental difference existed between the position of the signatory States and of the other States which might subsequently be admitted to the United Nations. This difference is not expressed in the text of Article 36, paragraph 5, but it derives from the situation which that text was meant to regulate, namely, the transfer to the International Court of Justice of declarations relating to the Permanent Court of International Justice which was on the point of disappearing when the Statute was drawn up. The States represented at San Francisco knew what their own position was under the declarations they had made. They were acting with a full knowledge of the facts when they agreed to transfer the effect of those declarations to the compulsory jurisdiction of the new Court and they had the power to do so. These States were not in the same position with regard to the declarations signed by other States. In the case of some of these there might arise the question of the effect of the war, a question which does not appear then to have been considered. In a more general way, the signatory States could not regard as more or less imminent the admission to the United Nations of any of the other States, their admission being possibly preceded by the lapsing of the declarations of some of them; the question which the signatory States were easily able to resolve as between themselves at that time would arise in a quite different form in the future as regards the other States. The existence of these differences militates against a construction extending the effect of Article 36, paragraph 5, to declarations made by States subsequently admitted to the United Nations, on the mere ground that those declarations were in force at the time of the signing of the Charter or of its entry into force.

Article 36, paragraph 5, considered in its application to States signatories of the Statute, effects a simple operation: it transforms their acceptance of the compulsory jurisdiction of the Permanent Court into an acceptance of the compulsory jurisdiction of the International Court of Justice. This was done in contemplation of the dissolution of the old Court and the institution of a new Court, two events which, while not absolutely coincident, were sufficiently close so far as States signatories of the Charter and of the Statute were concerned. The transformation enacted was in their case contemporaneous with this double event. The position was quite different in respect of declarations by non-signatory States, apart from the possibility, which did not in fact materialize, of a non-signatory State's becoming a party to the Statute before the dissolution of the Permanent Court. Subject to this, the operation of transferring from one Court to the other acceptances of the compulsory jurisdiction by non-signatory States could not constitute a simple operation, capable of being dealt with immediately and completely by Article 36, paragraph 5. Such a transfer

must necessarily involve two distinct operations which might be separated by a considerable interval of time. On the one hand, old declarations would have had to have been preserved with immediate effect as from the entry into force of the Statute, and, on the other hand, they would have had to be transferred to the jurisdiction of the International Court of Justice, a transfer which could only have been operated by the acceptance by the State concerned of the new Statute, in practice, by its admission to the United Nations. Immediate preservation of the declaration was necessary in order to save it from the lapsing by which it was threatened by the imminent dissolution of the Permanent Court which was then in contemplation. If it were not thus maintained in being, a subsequent transfer of the declaration to the jurisdiction of the new Court could not be effected. Thus, the problem of the transfer of former declarations from one Court to the other, which arose in the case of the acceptances of nonsignatory States was quite different from that in the case of acceptances by States signatories of the Charter and of the Statute.

In addition to this fundamental difference in respect of the factors of the problem, there were special difficulties in resolving it in respect of acceptances by non-signatory States. These difficulties, indeed, rendered impossible the solution of the problem by the application of Article 36, paragraph 5, as drafted and adopted. Since this provision was originally subscribed to only by the signatory States, it was without legal force so far as non-signatory States were concerned: it could not preserve their declarations from the lapsing with which they were threatened by the impending dissolution of the Permanent Court. Since it could not maintain them in being, Article 36, paragraph 5, could not transfer their effect to the jurisdiction of the new Court as of the date when a State having made a declaration became a party to the Statute. Since these declarations had not been maintained in being, it would then have been necessary to reinstate lapsed declarations, then to transport their subject-matter to the jurisdiction of the International Court of Justice: nothing of this kind is provided for by Article 36, paragraph 5. Thus, the course it would have been necessary to follow at the time of the adoption of the Statute, in order to secure a transfer of the declarations of non-signatory States to the jurisdiction of the new Court, would have had to be entirely different from the course which was followed to achieve this result in respect of the declarations of signatory States. In the case of signatory States, by an agreement between them having full legal effect, Article 36, paragraph 5, governed the transfer from one Court to the other of still-existing declarations; in so doing, it maintained an existing obligation while modifying its subject-matter. So far as non-signatory States were concerned, something entirely different was involved: the Statute, in the absence of their consent, could neither maintain nor transform their original obligation. Shortly after the entry into force of the Statute, the dissolution of the Permanent Court freed them from that obligation. Accordingly, the question of a transformation of an existing obligation could no longer arise so far as they were concerned: all that could be envisaged in their case was the creation of a new obligation binding upon them. To extend Article 36, paragraph 5, to those States would be to allow that provision to do in their case something quite different from what it did in the case of signatory States.

The question of the transfer from one Court to the other of former acceptances of the compulsory jurisdiction is so different, according to

whether it arises in respect of States signatories of the Statute or in respect of non-signatory States, that the date of the transfer, which it is a simple matter to determine in the case of signatory States, in spite of the silence on the point of Article 36, paragraph 5, can scarcely be determined in any satisfactory way in the case of declarations of non-signatory States. If regard be had to the date upon which a non-signatory State became a party to the Statute by its admission to the United Nations or in accordance with Article 93, paragraph 2, of the Charter, the transfer is then regarded as occurring at a date which might be very distant from the entry into force of the Statute, and this would hardly be in harmony with the spirit of a provision designed to provide for the transition from the old to the new Court by maintaining something of the former regime.

On the point now under consideration, the States represented at San Francisco could have made an offer addressed to other States, for instance, an offer to consider their acceptance of the compulsory jurisdiction of the Permanent Court as an acceptance of the jurisdiction of the International Court of Justice. But, in that case, such an offer would have had to be formulated, and the form of its acceptance and the conditions regarding the period within which it must be accepted would have had to be determined. There is nothing of this kind in Article 36, paragraph 5. When this Article decides that, as between parties to the present Statute, certain declarations are to be deemed to be acceptances of the compulsory jurisdiction of the International Court of Justice, this can be easily understood as meaning that the Article applies to the declarations made by the States which drew it up. Such a form of expression is scarcely appropriate for the making of an offer addressed to other States.

Thus to restrict the application of Article 36, paragraph 5, to the States signatories of the Statute is to take into account the purpose for which this provision was adopted. The Statute in which it appears does not establish the compulsory jurisdiction of the Court. At the time of its adoption, the impending dissolution of the Permanent Court and, in consequence thereof, the lapsing of acceptances of its compulsory jurisdiction, were in contemplation. If nothing had been done there would have been a backward step in relation to what had been achieved in the way of international jurisdiction. Rather than expecting that the States signatories of the new Statute would deposit new declarations of acceptance, it was sought to provide for this transitory situation by a transitional provision and that is the purpose of Article 36, paragraph 5. By its nature and by its purpose, that transitional provision is applicable only to the transitory situation it was intended to deal with, which involved the institution of a new Court just when the old Court was being dissolved. The situation is entirely different when, the old Court and the acceptance of its compulsory jurisdiction having long since disappeared, a State becomes a party to the Statute of the new Court: there is then no transitory situation to be dealt with by Article 36, paragraph 5.

To the extent that the records of San Francisco Conference provide any indication as to the scope of the application of Article 36, paragraph 5, they confirm the fact that this paragraph was intended to deal with the declarations of signatory States. Those of non-signatory States, in respect of which special provisions would have been necessary, were not envisaged.

This point had not been dealt with by the Washington Committee of Jurists. A Sub-Committee, sitting on April 13th, 1945, had merely

drawn attention to the fact that many nations had previously accepted compulsory jurisdiction under the Optional Clause and added "that provision should be made at the San Francisco Conference for a special agreement for continuing these acceptances in force for the purpose of this Statute." This reference to a special agreement clearly indicated that in order to preserve these acceptances under a new system, the consent of States having made such declaration would be necessary: the contemplating of such an agreement indicated that the Conference could not substitute its decision for that of the States not

there represented.

At the San Francisco Conference, the provision which became paragraph 5 of Article 36 was proposed by Sub-Committee D and discussed and adopted by Committee IV/1, on June 1st, 1945. In this Committee, the statements made mainly indicated the preference of many delegations for the Court's compulsory jurisdiction and their regret that it did not appear to be possible to adopt it. As to the meaning to be attributed to the provision which was to become paragraph 5 of Article 36, the Canadian representative said: "In view of the new paragraph . . . as soon as States sign the Charter, the great majority of them would be automatically under the compulsory jurisdiction of the Court because of the existing declarations." The representative of the United Kingdom having for his part said that he thought "that some forty States would thereby become automatically subject to the compulsory jurisdiction of the Court," this optimistic estimate was corrected by the Australian representative in the terms thus recorded in the minutes: "He desired to call attention to the fact that not forty but about twenty States would be automatically bound as a result of the compromise. In this connection he pointed out that of the fiftyone States that have adhered to the optional clause, three had ceased to be independent States, seventeen were not represented at the Conference and about ten of the declarations of other States had expired." The representatives of the United Kingdom and of Australia, referring to the meaning which they attached to the paragraph which subsequently became paragraph 5, were indicating the number of States to which, in their opinion, this provision would be applicable. The Australian representative, whose statement followed that of the representative of the United Kingdom, set out to correct the latter's estimate of the number of declarations which would thus be affected and, for this purpose, he rejected those of the seventeen States which were not "represented at the Conference." This statement clearly shows that in the view of the Australian representative, paragraph 5 was not intended to be applicable to the declarations of States not represented at the Conference. This statement, though it related to a point in the paragraph of cardinal importance, was not disputed by the representative of the United Kingdom or by any other member of the Committee. The conclusion to be drawn is that, in the view of the members of the Committee, the States not represented at the Conference remained outside the scope of the matter being dealt with by paragraph 5 and that that paragraph was intended to be binding only upon those States which, having been represented at the Conference, would sign and ratify the Charter and thus accept the Statute directly and without any probable delay.

This is confirmed by the report of Committee IV/1, approved by the Committee on June 11th, 1945. The report, having stated that the Committee proposed solutions for certain problems to which the creation of the new Court would give rise, sets out under (a) what is

provided in Article 37, under (b) what is provided in paragraph 4 (which was to become paragraph 5) of Article 36, and adds: "(c) Acceptances of the jurisdiction of the old Court over disputes arising between parties to the new Statute and other States, or between other States, should also be covered in some way and it seems desirable that negotiations should be initiated with a view to agreement that such acceptances will apply to the jurisdiction of the new Court. matter cannot be dealt with in the Charter or the Statute, but it may later be possible for the General Assembly to facilitate such negotiations." Thus a clear distinction was drawn between what could be dealt with by Article 36, paragraph 5, and what could only be dealt with otherwise, that is, by agreement, outside the provisions of the Statute, with the States absent from the San Francisco negotiations. If that did not refer exclusively to the declarations of such States, at least there is no doubt that it did refer to them and that they were principally referred to: the use of the word "acceptances" confirms this, if confirmation is necessary, and this word, which appears once only in the French text, appears twice in the English text of which indeed it is the first word.

This confirms the view that Article 36, paragraph 5, was designed to govern the transfer dealt with in that provision only as between the signatories of the Statute, not in the case of a State in the position of Bulgaria.

Finally, if any doubt remained, the Court, in order to interpret Article 36, paragraph 5, should consider it in its context and bearing in mind the general scheme of the Charter and the Statute which founds the jurisdiction of the Court on the consent of States. It should, as it said in the case of the Monetary gold removed from Rome in 1943, be careful not to "run counter to a well-established principle of international law embodied in the Court's Statute, namely, that the Court can only exercise jurisdiction over a State with its consent." (I.C.J. Reports 1954, p. 32.)

Consent to the transfer to the International Court of Justice of a declaration accepting the jurisdiction of the Permanent Court may be regarded as effectively given by a State which, having been represented at the San Francisco Conference, signed and ratified the Charter and thereby accepted the Statute in which Article 36, paragraph 5, appears. But when, as in the present case, a State has for many years remained a stranger to the Statute, to hold that that State has consented to the transfer, by the fact of its admission to the United Nations, would be to regard its request for admission as equivalent to an express declaration by that State as provided for by Article 36, paragraph 2, of the Statute. It would be to disregard both that latter provision and the principle according to which the jurisdiction of the Court is conditional upon the consent of the respondent, and to regard as sufficient a consent which is merely presumed.

* * *

Even if it should be assumed that Article 36, paragraph 5, is not limited to the declarations of signatory States, the terms of that provision make it impossible to apply it to the Bulgarian Declaration of 1921. The Government of Israel, in order to base the jurisdiction of the Court upon the combined effect of the Bulgarian Declaration of 1921 and Article 36, paragraph 5, of the Statute, has construed that provision as covering a declaration made by a State, which had not participated in the San Francisco Conference, which is not a signatory

of the Statute and only became a party thereto much later. The Court will also consider the matter from this angle and accordingly enquire whether the conditions, required by Article 36, paragraph 5, for a transfer from the Permanent Court of International Justice to the International Court of Justice of acceptances of compulsory jurisdiction relating only to the former, are satisfied in the present case and whether the Bulgarian Declaration must therefore "be deemed... to be an acceptance of the compulsory jurisdiction of the International Court of Justice."

The declarations to which Article 36, paragraph 5, refers created for the States which had made them the obligation to recognize the jurisdiction of the Permanent Court of International Justice. At the time when the new Statute was drawn up, it was anticipated—and events confirmed this—that the Permanent Court would shortly disappear and these undertakings consequently lapse. It was sought to provide for this situation, to avoid, as far as it was possible, such a result by substituting for the compulsory jurisdiction of the Permanent Court, which was to come to an end, the compulsory jurisdiction of the International Court of Justice. This was the purpose of Article 36, paragraph 5. This provision effected, as between the States to which it applied, the transfer to the new Court of the compulsory jurisdiction of the old. It thereby laid upon the States to which it applied an obligation, the obligation to recognize, ipso facto and without special agreement, the jurisdiction of the new Court. This constituted a new obligation which was, doubtless, no more onerous than the obligation which was to disappear but it was nevertheless a new obligation.

In the case of a State signatory of the Charter and of the Statute, the date at which this new obligation arises, the date at which this transfer from the jurisdiction of one Court to that of another Court is effected, is not directly determined. It could only be linked to the signing of the Charter by an interpretation somewhat out of keeping with the provisions of Article 110 of the Charter which, for the date of the entry into force of the Charter and, consequently, of the Statute, have regard to the dates of the deposit of ratifications. Neither of these dates can be taken as fixing the birth of the obligation here under consideration in the case of a State not a signatory of the Charter but subsequently admitted to the United Nations. Until its admission, it was a stranger to the Charter and to the Statute. What has been agreed upon between the signatories of these instruments cannot have created any obligation binding upon it, in particular an obligation to recognize the jurisdiction of the Court.

This was the position of Bulgaria. Article 36, paragraph 5, could not in any event be operative as regards that State until the date of its admission to the United Nations, namely, December 14th, 1955.

At that date, however, the Bulgarian Declaration of 1921 was no longer in force in consequence of the dissolution of the Permanent Court of International Justice in 1946. The acceptance set out in that Declaration of the compulsory jurisdiction of the Permanent Court of International Justice was thereafter devoid of object since that Court was no longer in existence. The legal basis for that acceptance of Article 36, paragraph 2, of the Statute of the Permanent Court of International Justice, ceased to exist with the disappearance of that Statute. Thus, the Bulgarian Declaration had lapsed and was no longer in force.

Though the Statute of the present Court could not lay any obligation upon Bulgaria before its admission to the United Nations, and though the Bulgarian Declaration of 1921 had lapsed before that date, can Article 36, paragraph 5, nevertheless have had the effect that that Declaration must be deemed as between Bulgaria and Israel to be an acceptance of the compulsory jurisdiction of the International Court of Justice? That depends upon the date to which Article 36, paragraph 5, refers when it speaks of declarations "which are still in force," "pour une durée qui n'est pas encore expirée." In expressing itself thus, Article 36, paragraph 5, neither states nor implies any reference to a fixed date, that of the signature of the Charter and of the Statute, or that of their original entry into force. These were events to which Bulgaria, which became a party to the Statute only as a result of its admission to the United Nations in 1955, was not privy; it would be permissible to have reference to those dates in respect of the application of Article 36, paragraph 5, only if that provision had referred thereto expressly or by necessary implication; nothing of the kind is stated or implied in the text.

There is nothing in Article 36, paragraph 5, to reveal any intention of preserving all the declarations which were in existence at the time of the signature or entry into force of the Charter, regardless of the moment when a State having made a declaration became a party to the Statute. Such a course would have involved the suspending of a legal obligation, to be revived subsequently: it is scarcely conceivable in respect of a State which was a stranger to the drafting of Article 36, paragraph 5. There is nothing in this provision to show any intention of adopting such an exceptional procedure. If there had been such an intention, it should have been expressed by a direct clause providing for the preservation of the declaration, followed by a provision for its subsequent re-entry into force as from the moment of admission to the United Nations: nothing of the kind is expressed in the Statute.

Article 36, paragraph 5, is expressed in a single sentence the purpose of which is to state that old declarations which are still in force shall be deemed as between the parties to the present Statute to be acceptances of the compulsory jurisdiction of the International Court of Justice. The provision determines, in respect of a State to which it applies, the birth of the compulsory jurisdiction of the new Court. It makes that subject to two conditions: (1) that the State having made the declaration should be a party to the Statute, (2) that the declaration of that State should still be in force.

Since the Bulgarian Declaration had lapsed before Bulgaria was admitted to the United Nations, it cannot be said that, at that time, that declaration was still in force. The second condition stated in Article 36, paragraph 5, is therefore not satisfied in the present case. Thus, even placing itself on the ground upon which the Government of Israel bases its claim, the Court finds that Article 36, paragraph 5, is not applicable to the Bulgarian Declaration of 1921.

This view is confirmed by the following considerations:

On the one hand, the clear intention which inspired Article 36, paragraph 5, was to continue in being something which was in existence, to preserve existing acceptances, to avoid that the creation of a new Court should frustrate progress already achieved; it is not permissible to substitute for this intention to preserve, to secure continuity, an intention to restore legal force to undertakings which have expired: it is one thing to preserve an existing undertaking by changing its subjectmatter; it is quite another to revive an undertaking which has already been extinguished.

On the other hand, Article 36, contrary to the desire of a number of delegations at San Francisco, does not make compulsory jurisdiction an immediate and direct consequence of being a party to the Statute. If Bulgaria, which at the time of its admission to the United Nations was under no obligation of that kind in consequence of the lapse of its Declaration of 1921, were to be regarded as subject to the compulsory jurisdiction as a result of its admission to the United Nations, the Statute of the Court would, in the case of Bulgaria, have a legal consequence, namely, compulsory jurisdiction, which that Statute does not impose upon other States. It is difficult to accept an interpretation which would constitute in the case of Bulgaria such a derogation from the system of the Statute.

In seeking and obtaining admission to the United Nations, Bulgaria accepted all the provisions of the Statute, including Article 36. It agreed to regard as subject to the compulsory jurisdiction of the Court, on the one hand, those States parties to the Statute which had made or would make the declaration provided for by paragraph 2 and, on the other hand, in accordance with paragraph 5, those States which, at the time of their acceptance of the Statute, were bound by their acceptance of the compulsory jurisdiction of the Permanent Court. At the time when Bulgaria sought and obtained admission to the United Nations, its acceptance of the compulsory jurisdiction of the Permanent Court had long since lapsed. There is nothing in Article 36, paragraph 5, to indicate any intention to revive an undertaking which is no longer in force. That provision does not relate to the position of Bulgaria at the time of its entry into the United Nations; Bulgaria's acceptance of the provision does not constitute consent to the compulsory jurisdiction of the International Court of Justice; such consent can validly be given by Bulgaria only in accordance with Article 36, paragraph 2.

Article 36, paragraph 5, cannot therefore lead the Court to find that, by the operation of this provision, the Bulgarian Declaration of 1921 provides a basis for its jurisdiction to deal with the case submitted to it by the Application filed by the Government of Israel on October 16th, 1957.

In the circumstances, it is unnecessary for the Court to proceed to a consideration of the other Preliminary Objections to the Application raised by the Government of the People's Republic of Bulgaria.

Vice President Zafrulla Khan agreed to the judgment, but pointed out that Article 36, paragraph 5, was not limited to original signatories, but included any non-signatory which might have become a party to the Statute of the International Court of Justice before dissolution of the Permanent Court.

Judges Badawi and Armand-Ugon concurred in the result, but gave separate opinions, each to the effect that Article 36, paragraph 5 applied only to states which had accepted the jurisdiction of the Permanent Court for definite periods of time, and did not include those which, like Bulgaria, had accepted without time limit.

Judges Lauterpacht, Wellington Koo, and Spender gave a long joint dissenting opinion.³ They said:

3 Judge ad hoc Goitein gave a separate dissenting opinion. He pointed out that Art. 36, par. 5, was specifically designed to preserve the declarations of acceptance of

According to paragraph 5 of Article 36, as cited above, the following two conditions must be fulfilled for the transfer to the International Court of Justice of the declarations of acceptance made with respect to the Permanent Court: (1) the declarant State must become a party to the Statute of the International Court of Justice; (2) its declaration must be "still in force," that is to say, the period for which it has been made must not have expired. By virtue of these conditions the obligations of the Declaration made by Bulgaria on 29th July, 1921, were transferred to the International Court of Justice on 14th December, 1955, when she became a party to the Statute of the International Court of Justice. On that day, paragraph 5 became applicable to Bulgaria. We are of the view that, so far as that provision is concerned, the Court, contrary to the conclusions of the First Preliminary Objection of the Government of Bulgaria, is competent to adjudicate upon the application of the Government of Israel brought before the Court in reliance upon its declaration of acceptance of 17th October, 1956.

To the express conditions, as stated, of paragraph 5 of Article 36 of the Statute, the present Judgment of the Court adds two further conditions: (1) the declarant State must have participated in the Conference of San Francisco; (2) the declarant State must have become a party to the Statute of this Court prior to the date of the dissolution of the Permanent Court, namely, prior to 18th April, 1946....

Upon that text of paragraph 5 of Article 36 the principal contention of the Government of Bulgaria engrafted a new text. The Government of Bulgaria contended, in effect, that the Court must omit from the text of Article 36, paragraph 5, the words "which are still in force" and replace them by other words. It was contended that the Court must read the relevant part of Article 36, paragraph 5, as follows: "Declarations made under Article 36 of the Statute of the Permanent Court shall be deemed as between the parties to the present Statute who have become parties thereto prior to the dissolution of that Court to be acceptances of the compulsory jurisdiction of the International Court of Justice. . . ." We are unable to accept that emendation of a clear provision of the Statute. We are unable to do so for two reasons: The first is that the interpretation thus advanced is contrary to the clear terms of paragraph 5; the second is that the interpretation is contrary to the manifest purpose of that provision.

Tracing the drafting of the Statute, they stated that "It was specifically contemplated that the continuity of the two Courts should be given expression by recognizing the continuity of the compulsory jurisdiction at

compulsory jurisdiction despite the termination of the Permanent Court, saying: "The Permanent Court would be dissolved: the declarations would survive. That is why Article 36 (5) was enacted, and there is nothing in the paragraph that even hints that the declarations in question should survive only until the dissolution of the Permanent Court. . . .

"Before December 1955, when Bulgaria was admitted as a Member of the United Nations, she had two clear courses open to her: to refuse to become a Member of the United Nations, or to denounce her Declaration of 1921. She chose to become a Member: she did not renounce her Declaration. Whether the States at San Francisco had authority or not to enact Article 36 (5), Bulgaria ratified what had been done there when she became a Member of the United Nations without denouncing her Declaration."

that time existing." From the records of the San Francisco Conference of 1945 they concluded:

It is thus clear that the purpose of paragraph 5 was to provide "for the continuing validity of the existing adherences" to the Optional Clause. Far from contemplating that any of the then existing declarations of acceptance should disappear with the dissolution of the Permanent Court, the authors of paragraph 5 had in mind the maintenance of the entire group of declarations of acceptance which were still in force and in accordance with their terms, irrespective of the dissolution of the Permanent Court. That purpose was expressed in the widest possible terms intended to eliminate any real or apparent legal difficulties.

As for the "still in force" language, they said:

We consider that the words "which are still in force," when read in the context of the whole paragraph, can only mean, and are intended to mean, the exclusion of some fourteen declarations of acceptance of the compulsory jurisdiction of the Permanent Court which had already expired and the inclusion, irrespective of the continuance or dissolution of the Permanent Court, of all the declarations the duration of which has not expired. At the Conference of San Francisco there were present a number of States that had in the past made Declarations of Acceptance which, not having been renewed, had lapsed and were therefore no longer in force. This applied, for instance, to the Declarations of China, Egypt, Ethiopia, France, Greece, Peru, Turkey and Yugoslavia. It was clearly necessary, by inserting the expression "which are still in force," to exclude those States from the operation of paragraph 5. That interpretation is supported by the French text which is as authoritative as the English text and which is even more clear and indisputable than the latter. The words "pour une durée qui n'est pas encore expirée" (for a duration which has not yet expired) must be regarded as determining the true meaning of the English text in question. The fact that the Chinese, Russian and Spanish texts of that paragraph approximate to the English text does not invalidate or weaken the obvious meaning of the French text. Those three texts were translated from the English version, whereas the French text was that of one of the two official working languages adopted at the San Francisco Conference. However, while the French text removes any doubt whatsoever as to the meaning of these words, there is in effect no reasonable doubt about them also so far as the English text is concerned. There is no question here of giving preference to the French text. Both texts have the same meaning. The French text is no more than an accurate translation of the English text as generally understood. Or, rather, in so far as it appears that the final versions was first formulated in the French language, the English text is no more than an accurate translation from the French.

The Joint Dissent continued:

We do not attach decisive importance to the question, with regard to which the parties were sharply divided, of the date to which the expression "which are still in force" must be attached. That may be either the date on which the Charter entered into force, namely, 24th October, 1945, or the date on which the declarant State has become a party to the Statute of the International Court of Justice. It may be said, in support of the first alternative, as urged by the Government of Israel, that normally a legal instrument speaks as of the date on which it enters into force. However, there is also substance in the view that that expression ought, more properly, to be attached to the date on which the particular State becomes bound by the obligations of the Statute. Retroactive operation of a provision ought not to be assumed without good cause; normally, it is the date of the State becoming a party to the instrument which determines, in relation to that State, the date of the commencement of the operation of its various provisions.

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We do not consider that any practical consequences, detrimental to the contentions of either party, follow from the adoption of one of these alternative dates in preference to another. In our view, the validity of paragraph 5 did not lapse on the dissolution of the Permanent Court; its purpose was to render that dissolution irrelevant in the matter of the transfer of declaration; the intention was that it should become operative as soon as a declarant State becomes a party to the Statute—unless its declaration was not longer in force by reason of having expired in conformity with the concluding passage of paragraph 5. Accordingly, the main contention of the Government of Israel is not defeated if the expression "which are still in force" is attached to the date on which Bulgaria became a party to the Statute. On that date—or from that date—her Declaration of 1921, saved from extinction by virtue of paragraph 5 of Article 36, became fully operative.

Accordingly, we reach the conclusion that, having regard both to the ordinary meaning of their language and their context, the words "which are still in force" refer to the declaration themselves, namely, to a period of time, limited or unlimited, which has not expired, regardless of any prospective or actual date of the dissolution of the Permanent Court. So long as the period of time of declarations made under Article 36 of the Statute of the Permanent Court still has to run at the time when the declarant State concerned becomes a party to the Statute of the International Court of Justice, those declarations fall within the purview of Article 36, paragraph 5, of the new Statute and "shall be deemed to be acceptances of the compulsory jurisdiction of the International Court for the period which they still have to run and in accordance with their terms."

Arguing that the San Francisco documents show "that the provisions of Article 36, paragraph 5, of the new Statute operate independently of the Permanent Court and that such operation is not affected by its dissolution," they stated:

There is a further consideration of a practical nature which precludes the interpretation of the words "which are still in force" as being directed to the contingency of the dissolution of the Permanent Court. If that were the true interpretation of these words, there would have existed a distinct possibility of the object of paragraph 5 being frustrated. The States participating in the Conference of San Francisco, having decided upon the creation of a new Court, were anxious to see the old Court terminated. Of the fifty-one States attending the San Francisco Conference, thirty-one were parties to the old Statute and, with a few exceptions, were Members of the League of Nations. There existed the possibility of the League of Nations

meeting and dissolving itself and the Permanent Court before the coming into force of the Charter of the United Nations and the Statute of the new Court. Moreover, the attainment of twenty-nine ratifications of the Charter on October 24th, 1945, including the ratifications of five permanent members of the Security Council, could not have been foreseen with any degree of certainty. It might have been achieved at a later date, possibly after the dissolution of the League and of the old Court. In either eventuality, Article 36, paragraph 5, would have become a dead letter. For in that case, according to the contention of Bulgaria, all the declarations would have lapsed with the dissolution of the Permanent Court and the extinction of the old Statute, and would no longer be in force.

The intention of paragraph 5 of Article 36 was to eliminate the difficulties connected with the impending dissolution of the Permanent Court and likely to interfere with the continued validity of the declarations. The Bulgarian contention, accepted by the Court, introduced these considerations as an integral part of Article 36. The unqualified language of paragraph 5 suggests that any real or apparent legal difficulty ensuing from the fact that the declarations were annexed to the Statute of the Permanent Court and any other legal difficulties, real or apparent, which did or did not occur to the authors of paragraph 5 were met by the comprehensive provision laying down that these declarations shall be deemed, as between the parties to the present Statute, to be acceptances of the compulsory jurisdiction of the new Court. It is exactly some such obstacles which the authors of Article 36 wished to neutralize. This was the purpose of paragraph 5. They said in effect: Whatever legal obstacles there may be, these declarations, provided that their period of validity has not expiredthat is provided that they are still in force on the day of the entry of the Charter into force or on the day on which the declarant State becomes a party to the Statute—shall continue in respect of the International Court of Justice. . . .

There is a deceptive element of simplification in some such notion as that the Conference of San Francisco decreed certain measures or that it had no power to decree them-for instance, to deprive the declarations of acceptance of their consensual character or to attach them to something which had ceased to exist. The only step which the Conference did take and could take in this connection was to establish a text. That text did not bind any State. Any signatory of the Charter was free to refuse to ratify it. Any State subsequently contemplating membership of the United Nations was free to treat it as an offer which it was at liberty to accept or to reject. The validity and binding force of the Charter and any of its provisions are due not to the decision of the Conference of San Francisco but to the very will of the States which subscribed voluntarily to its obligations in 1945 and in subsequent years. Like any other Member of the United Nations, Bulgaria, in adhering to the Charter, of her own free will, accepted its obligations, including those of paragraph 5 of Article 36 of the Statute. In doing so, she supplied that very consensual link which, it is asserted, is essential to the declarations of the Optional Clause. She also supplied the consensual link necessary for the modification—however slight in the present case—of her Declaration of

The second main ground by reference to which the First Preliminary Objection is upheld is that paragraph 5 of Article 36 applies only to original Members of the United Nations. . . .

There is nothing in paragraph 5, or in the preparatory work of the Conference of San Francisco, or in general principles of international law, or in the various provisions of the Charter to substantiate the view that that paragraph applies only to original Members of the United Nations in the sense of Article 3 of the Charter. Unless otherwise expressly provided, the provisions of the Charter apply in equal measure to every State which becomes a Member of the United Nations. In relation to Members of the United Nations, whatever may be the date of their adherence, no provision of the Charter can be res inter alios acta so as to bind some some but not other Members. The proposition that the rights and obligations of the Charter vary in this respect as between the various Members of the United Nations is contrary to the entire structure of the Charter and the relevant principles, generally accepted, of international law on the subject. In practice, any such proposition, if accepted, would lead to serious consequences.

Neither can the suggestion be accepted that paragraph 5 does no more than to give expression to an agreement reached *inter se* between the States which participated in the Conference of San Francisco. The Charter nowhere embodies particular agreements between particular Members. Any such method would be wholly alien to its purpose and character. The provisions of the Charter are of general application. The same applies to the Statute, which is part of the Charter...

There was no question at the Conference of San Francisco of the participant States imposing upon future Members of the United Nations any obligations against their will. What the authors of the Charter were entitled to do, and what in fact they did, was to provide that it should be a condition of membership—whether on the part of the original Members or of States subsequently adhering to the Charter—that the existing declarations in the matter of the Optional Clause should continue in accordance with their terms. All Members of the United Nations, whatever the date of their membership, were to be placed in this respect on an equal footing.⁴

Interpretation of Netherlands-Belgian Boundary Convention—status quo—proof of mistake—acquisition of sovereignty in derogation of treaty

CASE CONCERNING SOVEREIGHTY OVER CERTAIN FRONTIER LANDS (BELGIUM/NETHERLANDS).* I.C.J. Reports, 1959, p. 209. International Court of Justice, Judgment of June 20, 1959.

An Agreement of March 7, 1957, between Belgium and The Netherlands provided:

Article I. The Court is requested to determine whether 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 or the Kingdom of the Netherlands.

- ⁴ The Joint Dissent alluded to views expressed by Judge Manley Hudson, in 41 A.J.I.L. 10 (1947), and 40 *ibid*. 34 (1946), concerning the effect of Art. 36, par. 5.
 - * Digested by William W. Bishop, Jr., of the Board of Editors.
- ¹ Composed for this case of President Klaestad, Vice President Zafrulla Khan, and Judges Basdevant, Hackworth, Winiarski, Badawi, Armand-Ugon, Kojevnikov, Lauterpacht, Moreno Quintana, Córdova, Wellington Koo, Spiropoulos and Spender.

These plots 2 lie near the frontier north of the Belgian town of Turnhout, where the Belgian commune of Baerle-Duc is made up of a series of isolated plots enclaved within the Netherlands commune of Baarle-Nassau, which is in turn non-continuous.

Before the separation of Belgium from The Netherlands, unsuccessful attempts were made to fix the boundary between these communes so as to eliminate enclaves. In 1836 the burgomasters of the two communes tried to determine exact boundaries between them for tax purposes, establishing the "Communal Minute" dated November 29, 1836, but not actually signed until March 22, 1841, which was done in two originals to be deposited in the respective communal archives. The Netherlands produced what purported to be one of the originals, which reads (in translation) that "Plot Numbers 78 to 111 inclusive belong to the commune of Baarle-Nassau." The Baerle-Duc (Belgian) original could not be produced. The Treaty of London of April 19, 1839, provided for a Mixed Boundary Commission to fix the boundary between Belgium and The Netherlands. On November 5, 1842, the two governments signed a boundary treaty (effective February 5, 1843), Article 14 of which provided:

The status quo shall be maintained both with regard to the villages of Baarle-Nassau (Netherlands) and Baerle-Duc (Belgium) and with regard to the ways crossing them.

Article 70 stipulated that the Mixed Boundary Commission should "draft the convention . . . in accordance with the foregoing provisions."

The work of this Commission resulted in a Boundary Convention dated August 8, 1843, ratifications of which were exchanged October 3, 1843. This provided that the frontier "is defined in an exact and invariable way by a Descriptive Minute," which together with detailed maps "shall remain annexed to the present Convention and shall have the same force and effect as though they were inserted in their entirety." The convention further provided that with regard to the communes of Baarle-Nassau (Netherlands) and Baerle-Duc (Belgium) "the status quo is maintained in virtue of Article 14 of the Treaty of 5 November 1842." The Descriptive Minute first refers to this Article 14, and then says of the Communal Minute signed March 22, 1841, that "The above-mentioned Minute, noting the plots composing the communes of Baerle-Duc and Baarle-Nassau, is transcribed word for word in the present Article." But the Descriptive Minute actually made a part of the Boundary Convention departed from the text of the copy of the Communal Minute produced by The Netherlands, and instead read (in translation):

Plots numbers 78 to 90 inclusive belong to the commune of Baarle-Nassau.

Plots numbers 91 and 92 belong to Baerle-Duc.

Plots numbers 93 to 111 inclusive belong to Baarle-Nassau.

The Belgian Government relied on this to show that plots 91 and 92 were Belgian. The Netherlands contended that the Boundary Convention of

² About 14.378 hectares or 35 acres in area.

1843 did not determine what the status quo was, but left this to the Communal Minute under which sovereignty was recognized and vested in The Netherlands. It added that if the Boundary Convention purported to determine sovereignty over the disputed plots, it was vitiated by mistake and did not carry out the intention of the parties. The Netherlands further submitted that even if the convention determined sovereignty over the disputed plots and was not vitiated for mistake, yet acts of sovereignty exercised by The Netherlands since 1843 displaced the legal title flowing from the convention and established Dutch sovereignty over the plots.

By a vote of 10 to 4 the Court found that sovereignty over the two plots belonged to Belgium.

Looking at the history of the work of the Mixed Boundary Commission and the task assigned to the Commission, the majority opinion concluded that the Commission had intended to make definite allocation of these two plots to Belgium. From the language in the preamble of the Boundary Convention to the effect that the two parties, "wishing to fix and regulate all that relates to the demarcation of the frontier," appointed their commissioners, et cetera, the Court reasoned that:

This statement represents the common intention of the two States. Any interpretation under which the Boundary Convention is regarded as leaving in suspense and abandoning for a subsequent appreciation of the *status quo* the determination of the right of one State or the other to the disputed plots would be incompatible with that common intention.

The Court reaches the conclusion that the Boundary Convention was intended to determine, and did determine, as between the two States, to which State the various plots in each commune belonged. Under its terms, the disputed plots were determined to belong to Belgium.

The Court said that the Descriptive Minute of the Boundary Convention stated that the Communal Minute signed March 22, 1841, "is transcribed word for word in the present article." In fact it was not so transcribed, but differed in attributing the plots to Belgium. The Court stated:

The Court does not consider that a mere comparison of these two documents establishes any such mistake. Under the terms of the Boundary Convention, sovereignty over the disputed plots is vested in Belgium. The only question is whether a mistake, such as would vitiate the Convention, has been established by convincing evidence.

To succeed on the basis of the alleged mistake, the Netherlands must establish that the intention of the Mixed Boundary Commission was that the Descriptive Minute attached to and forming part of the Convention of 1843 should set out the text of the Communal Minute contained in the copy produced by the Netherlands, and that this intention was defeated by the transcription in the Descriptive Minute of a different text, which, contrary to the text of that copy and the intention of the Mixed Boundary Commission, attributed the disputed plots to Baerle-Duc instead of to Baarle-Nassau.

The duty of the Mixed Boundary Commission was to determine and fix the limits of the possessions of the two States. So far as the two communes were concerned, the essence of its task was to determine the status quo. In order to discharge its duty, the Commission, directly

and through sub-commissions, made examinations on the spot, had recourse to researches, records and surveys, verified the findings of the sub-commissions and carefully checked its own labours.

Examining the records of the Boundary Commission, the Court added:

The Court draws the conclusion from these documents that the two copies of the Communal Minute held by the Netherlands and Belgian Commissions were at variance on the attribution of the disputed plots to the two communes. There is no satisfactory explanation how a text—which according to the copy of the Communal Minute produced by the Netherlands consists of one paragraph reading "plots numbers 78 to 111 inclusive belong to the commune of Baarle-Nassau"—could have by mistake been broken up into three separate paragraphs giving a different attribution to the disputed plots.

As to the mistake, the Court concluded:

In the view of the Court, apart from a mere comparison of the text of the Descriptive Minute with the copy of the Communal Minute produced by the Netherlands, all attempts to establish and to explain the alleged mistake are based upon hypotheses which are not plausible

and which are not accompanied by adequate proof.

The Boundary Convention of 1843 was the result of several years of labour, with members of the Mixed Boundary Commission not only in contact with the respective communal administrations but also with the Governments of the respective States. According to information furnished to the Court, copies of the text of the Communal Minute to be incorporated in the Descriptive Minute, and which was in fact incorporated therein, were signed by the secretaries of each commune. The actual text transcribed was accordingly known to both communes and both States. The Convention was confirmed by the Parliament of each State and ratified in accordance with their constitutional processes. Its terms have been published in each State. For almost a century the Netherlands made no challenge to the attribution of the disputed plots to Belgium.

The Court is satisfied that no case of mistake has been made out and that the validity and binding force of the provisions of the Convention of 1843 in respect to the disputed plots are not affected on

that account.

The Court continued:

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 Belgium 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.

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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

istry.

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 a 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 of the 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.

Judges Lauterpacht and Spiropoulos agave brief statements of their

3 Judge Lauterpacht said: "The circumstances of the adoption, in 1843, of the Descriptive Minute must, to some extent, be in the nature of conjecture. In particular, it has not been proved possible to state a direct conclusion as to the authenticity or otherwise of the cardinal piece of evidence, namely, of the only existing copy of the

reasons for believing that the land belonged to The Netherlands. Judges Armand-Ugon 5 and Moreno Quintana 6 gave dissenting opinions.

Communal Minute produced by the Netherlands. Moreover, while the Commissioners who drafted the Descriptive Minute enjoyed wide powers, they had no power to endow with legal efficacy a document in which they purported to transcribe word for word the Communal Minute and to observe the status quo but in which they actually modified the Communal Minute and departed from the status quo. The law knows of no such power. For these reasons, I am of the opinion that the relevant provisions of the Convention must be considered as void and inapplicable on account of uncertainty and unresolved discrepancy.

"... it seems proper that a decision be rendered by reference to the fact, which is not disputed, that at least during the fifty years following the adoption of the Convention there had been no challenge to the exercise, by the Government of the Netherlands and its officials, of normal administrative authority with regard to the plots in question. In my opinion, there is no room here for applying the exacting rules of prescription in relation to a title acquired by a clear and unequivocal treaty; there is no such treaty. It has been contended that the uninterrupted administrative activity of the Netherlands was due not to any recognition of Netherlands sovereignty on the part of Belgium but to the fact that the plots in question are an enclave within Netherlands territory and that, therefore, it was natural that Netherlands administrative acts should have been performed there in the ordinary course of affairs. However, the fact that local conditions have necessitated the normal and unchallenged exercise of Netherlands administrative activity provides an additional reason why, in the absence of clear provisions of a treaty, there is no necessity to disturb the existing state of affairs and to perpetuate a geographical anomaly."

⁴ Judge Spiropoulos found the status of the plots "extremely doubtful" and preferred the Dutch hypothesis, which he thought "the less speculative."

5 Judge Armand-Ugon pointed to the Communal Minute as "of cardinal importance," and said that Belgium could not explain the absence of its original, but did not challenge the authenticity of the Dutch original. He thought the records of the Mixed Boundary Commission showed the clear intention to adopt the Communal Minute without alteration on the relevant point, particularly as there was no evidence in the records of any intention to make this change and deliberately award the plots to Belgium. He added that: "For almost one hundred years the Convention of 1843 was applied in a manner which does not conform with the text of the Communal Minute included in Article 90 of the Descriptive Minute; although that article regards the plots as Belgian, these same plots have actually been submitted to Netherlands sovereignty." Only in 1890 was the divergence apparently raised by Belgium. He further stated that "the Netherlands Government has exercised preponderant governmental functions in respect of the disputed plots, without these having given rise on the part of the Belgium theorement to any protest or any opposition. This prolonged tolerance of the Belgian Government in this respect has created an indisputable right of sovereignty in favour of the Netherlands Government. There is no evidence that Belgium claimed restitution of the parcels before 1921, or that any Belgian activities occurred thereon."

6 Judge Moreno Quintana regarded the question as one of interpretation of the Boundary Convention, since the real intention of the parties should control. Finding a mistake in the "transcription" of the Communal Minute in Article 90 of the Descriptive Minute of the Boundary Convention, he said: "A mistake of fact—as the most qualified writers in international law teach us—vitiates the consent of the Parties to a legal instrument such as a treaty. This defect in consent involves the total or partial nullity of the instrument in question." This nullity was confined to the provision concerning these two plots in question.

Nationality of claimant—interpretation of Italian Peace Treaty and Bancroft Nationality Treaty, U. S.-Württemberg

U.S.A. EX REL. FLEGENHEIMER v. ITALY.*
Italian—U. S. Conciliation Commission.¹ September 20, 1958.

Albert Flegenheimer sought cancellation of his sale of stock in an Italian company to another Italian company March 18, 1941, for the sum of \$277,860.60, at a time when the actual value of the shares was from four to five million dollars, claiming that as a Jewish person he had feared application to him of the 1938 Italian anti-Semitic legislation. This claim was based on Article 78, paragraph 3, of the Italian Peace Treaty,² and Article III, section 16 (b) of the Lombardo-Lovett Agreement.³ The Italian Government answered that Flegenheimer was not a "United Nations national" within the definition of Article 78, paragraph 9(a), of the Peace Treaty.⁴ On August 6, 1954, the representatives of the United States and Italy on the Conciliation Commission found themselves unable to agree on the case, and resorted to the third member as provided for by Article 83 of the Treaty of Peace.

Albert Flegenheimer was born in Württemberg, Germany, in 1890, the son of Samuel Flegenheimer. Samuel had been born in 1848 in Baden, Germany; moved to the United States in 1864 or 1866; was naturalized as an American citizen November 7, 1873; returned to Germany in 1874 to live in Württemberg; and was naturalized in Württemberg August 23, 1894. He lived there until his death in 1929. Albert and his two older brothers were included in the father's 1894 naturalization in Württemberg. Albert lived in Germany until 1937, apparently unaware of his father's one-time American citizenship until after the Nazis took power in 1933. Between 1933 and 1939 Albert and his brother Eugene contacted several American Consulates in Europe, and the American Embassy in Paris, seeking to find out whether they might have preserved American citizenship through their father, but received negative or ambiguous information.

- * Digested by William W. Bishop, Jr., of the Board of Editors.
- 1 Established under Art. 83 of the Treaty of Peace with Italy, 61 Stat. 1245; T.I.A.S., No. 1648; 42 A.J.I.L. Supp. 47 (1948). In this case the members were A. J. Matturri, Antonio Sorrentino, and G. Sauser Hall ("Third Member"). For earlier decisions of this Commission, see 50 A.J.I.L. 150 (1956), and 51 ibid. 436 (1957).
- ² The paragraph reads: "The Italian Government shall invalidate transfers involving property, rights and interests of any description belonging to United Nations nationals, where such transfers resulted from force or duress exerted by Axis Governments or their agencies during the war."
 - 3 T.I.A.S., No. 1757; 42 A.J.I.L. Supp. 146, 150 (1948).
 - 4 Art. 78, par. 9(a): "As used in this Article:
- "(a) United Nations nationals means individuals who are nationals of any of the United Nations, or corporations or associations organized under the laws of any of the United Nations, at the coming into force of the present Treaty, provided that the said individuals, corporations or associations also had this status on September 3, 1943, the date of the Armistice with Italy.
- "The term 'United Nations nationals' also includes all individuals, corporations or associations which, under the laws in force in Italy during the war, have been treated as enemy."

In November, 1937, Albert Flegenheimer was notified that as a Jewish person he must dispose of his property under penalty of total confiscation, sold his property at a nominal price, and was told to leave Germany. Traveling on a German passport, he went to Italy, and, after the 1938 Italian anti-Semitic laws, went to Switzerland and then in 1939 to Canada. still using a German passport. At the American Consulate in Winnipeg, Canada, he filed on November 3, 1939, his first formal claim to American citizenship. The Board of Special Inquiry of the Immigration and Naturalization Service of the United States, after hearing him, decided on November 22, 1939, that he was not an American citizen. While he was in America, the German Government decreed forfeiture of his German citizenship, April 29, 1940. After he was admitted to the United States for temporary sojourn, and after the United States had entered the war, the Immigration and Naturalization Service on February 24, 1942, ordered that Flegenheimer be given the status of an American national. The Department of State refused him a passport to travel to Europe on May 14, 1946; but granted him an American passport October 24, 1946.

After the present proceedings were brought before the Conciliation Commission, Flegenheimer asked issuance of a certificate of United States nationality. Despite a negative finding by the examining officer, the Acting Assistant Commissioner, Inspection and Examinations Division, found him to be an American citizen, and caused the certificate of nationality to be issued to him July 10, 1952.

The Conciliation Commission found unanimously 5 in favor of the Italian Government, concluding that, although claimant Albert Flegenheimer "acquired by filiation the nationality of the United States, at birth, in Wurttemberg," he "acquired German and Wurttemberg nationality as the result of his naturalization in Wurttemberg on August 23, 1894, and thereby lost, after five years' residence in his new 6 home country, his American nationality, under the Bancroft Treaty concluded on July 2, 1868, between the United States of America and Wurttemberg." The Commission found that "he never re-acquired his American nationality after reaching majority"; and that, although stateless after the forfeiture of his German nationality, "he did not prove that he was treated as enemy by the Italian authorities during his stay in the countries at war with Italy, Canada first and later the United States." The Commission regarded itself as not bound by the certificate of nationality, and held that Flegenheimer was not a United Nations national within the meaning of the Peace Treaty and the Lombardo-Lovett Agreement. The petition filed on his behalf was rejected as inadmissible.

The first question of law was whether the Commission had power to disregard the certificate of American nationality. It stated:

⁵ The Commission stated that "The dispositions of this decision are adopted by unanimous vote, although on some points of law the Representative of the United States of America is not in agreement."

o Sic. It was "new" in the sense of being newly his country of allegiance, but he had been born there and had until then always lived there.

24. It is clear that the afore-mentioned provision of the Treaty of Peace, in explaining the meaning of "United Nations nationals" refers to an unquestionable principle of international law according to which every State is sovereign in establishing the legal conditions which must be fulfilled by an individual in order that he may be considered to be vested with its nationality.

... the Commission will have to admit or reject, at the international level, a nationality, the existence or inexistence of which shall be established, in its opinion in full compliance with the law, at the national level.

25. Nevertheless, the Commission recalls that, according to a well established international jurisprudence, where international law and the international bodies who must apply that law are concerned "national laws are simple facts, an indication of the will and the activity of States, just like judicial decisions or administrative measures" (P.C.I.J. Decision of May 25, 1926, case relating to certain German interests in Upper Silesia, series A, No. 7, p. 19).

The result is that, in an international dispute, official declarations, testimonials or certificates do not have the same effect as in municipal law. They are statements made by one of the Parties to the dispute which, when denied, must be proved like every other allegation. It is the duty of this Commission to establish Albert Flegenheimer's true nationality, at the relevant dates specified in Article 78, paragraph 9 of the Treaty of Peace, and it has a right to go into all the elements of fact or of law which would establish whether the claimant actually was, on the aforementioned dates, vested with the nationality of the United States; these investigations are necessary in order to decide whether the international action, instituted in his behalf, fulfills the conditions required by the Treaty of Peace from which the Commission cannot deviate. It must therefore freely examine whether an administrative decision, such as that taken in favor of Albert Flegenheimer in the United States, was of such a nature as to be convincing.

The profound reason for these broad powers of appreciation which are guaranteed to an international court for resolving questions of nationality, even though coming within the reserved domain of States, is based on the principle, undenied in matters of arbitration, that complete equality must be enjoyed by both Parties to an international dispute. If it were to be ignored, one of the Parties would be placed placed in a state of inferiority vis-a-vis the other, because it would then suffice for the Plaintiff State to affirm that any given person is vested with its nationality for the Defendant State to be powerless to prevent an abusive practice of diplomatic protection by its Opponent.

The right of challenge of the international court authorizing it to determine whether, behind the nationality certificate or the acts of naturalization produced, the right to citizenship was regularly acquired, is in conformity with the very broad rule of effectivity which dominates the Law of Nations entirely and allows the court to fulfill its legal function and remove the inconveniences specified.

Arguing that the certificate "constitutes legally valid proof of his nationality," the United States Agent cited the cases of Rau, Meyer Wilder-

7 Decided Jan. 14, 1930, by the German-Mexican Claims Commission, 1931-1932 Annual Digest, Case 124.

mann,⁸ and Pablo Najera,⁹ and instructions by Secretary of State Blaine to the United States Commissioner on the Spanish American Commission of 1871 in connection with the Buzzi case.¹⁰ In contrast, the Italian Agent cited other instructions of American Secretaries of State concerning the same commission.¹¹ The decision stated:

- 29. In fulfilling its duties, the Commission can draw its authority from a long series of arbitral precedents, as well as from important qualified legal writings distinctly affirming the power of investigation by the international court in matters of nationality.¹²
- . . . The majority of international tribunals has thus accepted this concept. . . .
- 30. The foregoing point of view is, in any event, that which has been upheld on many occasions by the Agents of the Government of the United States during international proceedings. . . . ¹³
- 31. Abundant doctrine in international law confirms the power of an international court to investigate the existence of the nationality of the claimant, even when this is established *prima facie* by the documents issued by the State to which he owes allegiance and in conformity with the legislation of said State. This opinion is supported, in particular, by distinguished American authors of international law, such as the late professors Borchard and Hyde. 12

34. The Commission, in conformity with the case law of international tribunals, holds that it is not bound by the provisions of the national law in question, either as regards the manner or as regards the form in which proof of nationality must be submitted. . . . 15

35. The Commission, on the basis of the research made in jurisprudence and authoritative doctrine, holds that its powers of investigation as to whether Albert Flegenheimer validly acquired United States nationality are all the less disputable in that no American judgment of naturalization has been introduced during these proceedings but a mere administrative statement which, according to the international practice commonly followed, is subjected to the valuation of every court, whether national or international, to which the question of the validity of a nationality is submitted.

- Nildermann v. Heritiers Stinnes, German-Rumanian Mixed Arbitral Tribunal, June 8, 1926, 6 Recueil des Décisions des Tribunaux Arbitraux Mixtes 485, 493.
- ⁹ Decided Oct. 19, 1928, by French-Mexican Claims Commission, 1927-1928 Annual Digest 301.
 - 10 3 Moore's Arbitrations 2592, 2618.
 - 11 Ibid. 2599, 2620.

12 Discussing the Medina case before the U. S.-Costa Rican Claims Commission, decided Dec. 31, 1862, 3 Moore's Arbitrations 2587; the Salem case between the United States and Egypt, June 8, 1932, 2 Int. Arb. Awards 1184; the Hatton case, Sept. 26, 1928, before the U. S.-Mexican General Claims Commission, 4 ibid. 329, Opinions (1928-29), p. 6; Nielsen's opinion in the Naomi Russell case before the Special Claims Commission (U. S.-Mexico), April 24, 1931, 4 Int. Arb. Awards 805; and the Flutic cases decided by the American-Venezuelan Commission of 1903, Ralston, Venezuelan Arbitrations of 1903, p. 38. The Commission cited several further cases.

13 Citing Hunt's Report of the American and Panamanian General Claims Arbitration under Conventions of 1926 and 1932, pp. 663 and 723; and 3 Moore's Arbitrations 2600.

14 Citing Borchard in 1931 Annuaire de l'Institut de Droit International 277 (I);

and 2 Hyde, International Law 1130-1131 (2nd ed., 1945).

¹⁵ Here the Commission found its conclusion in harmony with that of the Franco-Mexican Commission in the George Pinson case, 5 Int. Arb. Awards 327, 371.

The Commission nevertheless considers that the observations made by the commentators of the Medina case cannot be ignored, and that international jurisdictions must act with the greatest caution and exercise their powers of investigation only if the criticism directed by one Party against the allegations of the other, not only are not manifestly groundless, but are of such gravity as to cause serious doubts in the minds of their Members with regard to the reality and truth of the nationality invoked.

36. In the instant case, the grounds for doubt in connection with Albert Flegenheimer's nationality are so numerous and so patent, that the Commission could allow him to benefit by Article 78 of the Treaty of Peace with Italy only if all the doubts, raised in its mind over the facts on the basis of which the certificate of United States nationality

was issued, were dispelled.

These facts are first of all connected with the validity of Samuel Flegenheimer's naturalization in the United States from which flows the acquisition jure sanguinis, of his son Albert's American nationality; subsequently with the loss by the latter of his American nationality as a result of his naturalization together with his father in Wurttemberg in 1894, when he was still a minor; with the long sojourn of the interested party, as a German national, in Germany from 1904 to 1937, with his entry into Canada on February 10, 1939 before the outbreak of World War II, on a German passport which was renewed to him a few days later by the German Consulate at Winnipeg, and then in 1941 by the Swiss Consul in that city, who had taken over the protection of German interests.

The Commission's grounds for doubt are further increased when acquiring knowledge, from the documents in the record, of the fact that all inquiries for information made by Albert Flegenheimer at consular offices and even at an Embassy of the United States in Europe in connection with his American nationality only resulted in negative or dubious answers; that, if he succeeded in obtaining an authorization of making, at the outset, only temporary sojourns in the United States, his case gave rise to conflicting decisions by the State Department and by the Immigration Service of the Department of Justice of the United States; that at the time of the inquests to which he was subjected by American officials, he made statements which are not entirely consistent; that the authorization which was accorded to him to enter the United States as a German national was only modified by a decision of the Immigration and Naturalization Service of February 24, 1942, in the sense that he was thereafter qualified as a citizen of the United States, but that the subsequent inquests which resulted in this amendment of the record of his entry, are defined as irregular by the American counsel for the Italian Government in these pro-

37. This Commission owes it to itself, as it owes it to the two States who have placed their confidence in it so as to assure a correct application of Article 78 of the Treaty of Peace with Italy, to make an objective search for the truth and to clarify the legal position which, as far as the Commission, in its capacity as an international organ, is concerned is Albert Flegenheimer's factual position. . . .

From the standpoint of form, international jurisprudence has admitted, without any divergence of views, that consular certificates as well as certificates issued by administrative bodies which, according to the national legislation of the subject State do not have absolute probative value, are not sufficient to establish nationality before in-

ternational bodies, but that the latter are nevertheless entitled to take them into consideration if they have no special reasons for denying their correctness.

From the standpoint of merit, even certificates of nationality the content of which is proof under the municipal law of the issuing State, can be examined and, if the case warrants, rejected by international bodies rendering judgment under the Law of Nations, when these certificates are the result of fraud, or have been issued by favor in order to assure a person a diplomatic protection to which he would not be otherwise entitled, or when they are impaired by serious errors, or when they are inconsistent with the provisions of international treaties governing questions of nationality in matters of relationship with the alleged national State, or, finally, when they are contrary to the general principles of the Law of Nations on nationality which forbid, for instance, the compulsory naturalization of aliens. It is thus not sufficient that a certificate of nationality be plausible for it to be recognized by international jurisdictions; the latter have the power of investigating the probative value thereof, even if its prima facie content does not appear to be incorrect. This is particularly true before international arbitral or conciliation commissions who are called upon to adjudicate numerous disputes following troubled international situations, that are the outcome of war, internal strife or revolutions.

The Commission next found that Albert Flegenheimer did acquire United States nationality jure sanguinis, despite Italian contentions that the father, Samuel, had no intention to reside permanently in the United States at the time of naturalization, that Samuel's motives were to escape German military service and thus the naturalization was fraudulent, and that by his return to Germany soon after naturalization Samuel lost his American citizenship, even if it had been acquired in good faith. Refusing to apply retroactively later American naturalization statutes, the Commission found that at the crucial time any lack of intent to reside permanently in the Unied States would not impair naturalization, nor did the motives for which the candidate sought naturalization. During the period between 1874 and 1890, and indeed prior to 1907, United States law did not provide for loss of citizenship (or presumption of loss) on the ground of residence abroad. Since Samuel was an American citizen at the date of his son's birth in 1890, the son Albert became a citizen under the Act of February 10, 1855.

The Commission then discussed whether Albert lost United States nationality through naturalization with his father in Württemberg, and found that he did. To reach this result the Commission applied the "Bancroft Treaty" of 1868 between the United States and Württemberg. Concerning these treaties, the Commission said:

45. The so-called Bancroft Treaties constitute a pattern of agreements concluded by the United States with a large number of European and American States with a view to settling certain nationality conflicts, and, in fact, to put a stop to the malpraetices committed by European emigrants who acquired American nationality for the sole purpose of avoiding their military duties in the respective countries, and later returned thereto when in possession of United States citizenship papers, without any intention of returning to this latter country.

Treaties, even though they were not all negotiated by this diplomat, because they have certain common features. But they do not contain provisions that are wholly alike; there are two types of Bancroft Treaties and even those concluded with the five afore-mentioned German States do not belong to the same category. They can therefore be interpreted one for the other only with caution because many of them have certain peculiarities which are not to be found in the treaties concluded with other States.

Finding that the Bancroft Treaties of the United States with Baden and with Württemberg remained in force after the formation of the German Empire in 1871, the Commission stated:

46. The right of the Italian Government to find support in the Bancroft Treaties was denied by the Government of the United States for two reasons: in the first place because the Treaties are no longer in force; and in the second place because as far as Italy is concerned they are a res inter alios acta in view of the fact that she was not a party thereto.

Neither of these two objections is founded.

It cannot be denied that the Bancroft Treaties between the United States and the German States expired on April 6, 1917 as the result of the fact that the United States entered World War I, by virtue of the rules of the Law of Nations which provide that treaties between States are cancelled by the outbreak of war between the signatory States, with the exception of treaties concluded in contemplation of war and of collective treaties which are merely interrupted between the belligerent States, but continue to deploy their effects between neutral and belligerent States. They [the Bancroft Treaties] were not subsequently resumed.

The Bancroft Treaties nevertheless fully deployed their effects until April 6, 1917 (Hackworth, Digest of International Law, III, p. 334 and V, p. 386), that is, during the whole of the critical period during which Samuel Flegenheimer changed rationality for the first time in the United States, and a second time in Wurttemberg, hence from 1874 to 1894. Their provisions may have exercised influence, first on the loss of Samuel Flegenheimer's Baden nationality as the result of his naturalization in Pittsburgh, the validity of which is admitted by the Commission, and, subsequently, on his own American nationality and on the American nationality of his son Albert Flegenheimer, whose jure sanguinis acquisition of United States nationality is likewise admitted by this Commission. . . .

The objection raised that Italy has no title to invoke the Bancroft Treaties because she was not a party thereto is also unfounded. It is a foregone conclusion that Italy is obligated to bear the heavy burdens of reparation and restitution which she accepted under the Treaties of Peace of 1947, only if the persons involved are nationals of one of the "United Nations."... She has a right to require that the "United Nations" nationality be established in each case, and to oppose all rebuttal evidence against the allegations of the opponent Parties. That if this rebuttal evidence flows from conventional provisions concluded with a third State, there is no reason why Italy should not invoke them, preliminarily, insofar as they create objective conditions which can be forced not only upon her but on every other State as well. In other words, the treaty is as legitimate a source of nationality vis-a-vis third States as the provision of municipal law of a State which

is not a party to an international dispute and which is invoked by one of the States engaged in this controversy. No distinction should be made according to whether a rule establishing the nationality of a person is contained in the municipal law of a State or in a treaty concluded by the State with another State....

48. The Parties to this dispute are in complete disagreement on the meaning of the Bancroft Treaties. The Agent of the United States and his Counsel consider them as agreements whose essential purpose is to eliminate disputes between States in connection with the diplomatic protection of persons naturalized in a State and returning subsequently to their country of origin, while the Agent of the Italian Republic and his Counsel consider them mainly as conventions governing the nationality of the subjects of one of the contracting States residing in the other, and containing therefore provisions on the acquisition and the loss of title to citizenship of persons whose legal position the signatory States have agreed to settle.

In order to determine their exact scope, it is indispensable to go back to the origin of these Treaties; their conclusion was due to the initiative of the Government of the United States.

As the United States owed its prosperity to a constant flow of European immigrants, beginning with the XIXth century, it was concerned with attaching legally and in a final manner all this new population to the territory wherein it resided. It forcefully affirmed the right of every individual to change his nationality and to expatriate. In this policy of assimilation of aliens the United States clashed with the law of numerous European States which were desirous of preserving, often for military reasons, their emigrated nationals, either because these States constantly followed the principle of perpetual allegiance, or because they subjected the loss of the nationality of origin to governmental authorization (acts of manumission) which was frequently refused to individuals who were still liable to military service in their home country, or, further, because they did not admit that naturalization abroad entailed, by operation of law, the loss of the nationality of origin of their nationals and required the fulfillment of formalities (application for expatriation, specific renunciation) in order to liberate the naturalized individuals from all ties and bonds with the State of origin.

The United States set out with the idea that the naturalization of all aliens established in its territory was to entail immediately the loss of their previous nationality; it inversely admitted that naturalization of its nationals abroad directly caused the loss of American nationality.

Contrasting the language of treaties like that with Baden,¹⁶ providing for renunciation of the acquired nationality by mere action by the individual without any specified period of residence in his old country, the Commission said that in treaties like that with Württemberg,¹⁷

The result is that these treaties have a direct bearing on nationality, that they do away with dual nationality, as the citizenship of origin is

16 1 Malloy 53; Art. IV of this treaty provided: "The emigrant from the one State who, according to the first article, is to be held as a citizen of the other State, shall not on his return to his original country be constrained to resume his former citizenship; yet if he shall of his own accord reacquire it and renounce the citizenship obtained by naturalization, such a renunciation is allowed, and no fixed period of residence shall be required for the recognition of his recovery of citizenship in his original country." If 2 Malloy 1895.

undeniably lost by a naturalization abroad accompanied by a five-year residence, because in case of return to the former country, the person concerned must become naturalized in order to re-acquire it. . . .

After a careful analysis of these conventional texts, the Commission is convinced that the Bancroft Treaties with the Grand Duchy of Baden and Wurttemberg, in the relationship with the United States, not only had the purpose of regulating the diplomatic protection of naturalized persons but of determining their nationality as well.

Finding that Samuel Flegenheimer lost his American citizenship by reason of the United States treaty with Württemberg, rather than that with Baden, the Commission stated:

He thus took up permanent residence in Wurttemberg as an American national, and it is likewise in this quality, and not as a former Baden national, that he applied for and obtained Wurttemberg naturalization in 1894, following an uninterrupted residence of twenty years. As the result of this naturalization he directly and finally lost his United States nationality by virtue of Article 1, para. 2 of the Bancroft Treaty of July 27, 1868 concluded between the United States and Wurttemberg, wherein it is provided that:

Reciprocally: citizens of the United States of America who have become or shall become naturalized citizens of Wurttemberg and shall have resided uninterruptedly five years within Wurttemberg shall be held by the United States to be citizens of Wurttemberg and shall be treated as such.

In the foregoing text, like in the corresponding text of the Treaty with the Grand Duchy of Baden of July 19, 1868, the expressions "shall be held" and "shall be treated" do not have the meaning of a mere interruption of the American nationality and of the loss of title to the diplomatic protection of the United States, but of a complete annulment of the title to the nationality of that State, by virtue of the Treaty itself. The Commission must reach this conclusion when faced with the Protocol signed at Stuttgart, on the same date as the Treaty, July 27, 1868, which, although making specific reference to Article 4 of the Treaty, explains very clearly that naturalized persons, in application of Article 1, lose, as a result of their naturalization, their preceding naturalization; Part III of this Protocol reads as follows:

It is agreed that the fourth article shall not receive the interpretation, that the naturalized citizen of the one State, who returns to the other State, his original country, and there takes up his residence, does by that alone recover his former citizenship; nor can it be assumed, that the State, to which the emigrant originally belonged, is bound to restore him at once to his original relation. On the contrary it is only intended, to be declared, that the emigrant so returning, is authorized to acquire the citizenship of his former country, in the same manner as other aliens in conformity to the laws and regulations which are there established. Yet it is left to his own choice, whether he will adopt that course, or will preserve the citizenship of the country of his adoption. With regard to this choice, after a two years residence in his original country, he is bound, if so requested by the proper authorities, to make a distinct declaration, upon which these authorities can come to a decision as the case may be, with regard to his being received again into citizenship or his further residence, in the manner prescribed by law.

The Commission could interpret this document established by common agreement of the High Contracting Parties, in no other way than as a recognition of the principle constantly defended by the American authorities in their relationship with foreign States, namely that the nationality of origin is lost *ipso jure*, by virtue of the Bancroft Treaty concluded with Wurttemberg; it draws the conclusion therefrom that even a Wurttemberg national, if naturalized in the United States, when returning to reside in his country of origin, can re-acquire the nationality of this latter country only like any other alien, this means without the slightest doubt that he had lost that nationality as a result of his naturalization in the United States, by virtue of Article I of the aforesaid Treaty, and that, in application of the principle of reciprocity which is at the basis of the Bancroft Treaties, this is all the more so in the case of an American who secures naturalization in Wurttemberg.

The Commission is of the opinion that Article 4 of the Bancroft Treaty with Wurttemberg of July 27, 1868, is not applicable to the instant case; it reads as follows:

If a Wurttemberger naturalized in America renews his residence in Wurttemberg without the intention to return to America he shall be held to have renounced his naturalization in the United States. . . . The intent not to return may be held to exist when the person naturalized in the one country resides more than two years in the other.

Samuel Flegenheimer never fell under the provisions of this Article, because he was not a Wurttemberg national naturalized in the United States, but an individual of Baden origin. On the other hand, the Bancroft Treaty of July 19, 1868 with the Grand Duchy of Baden (Art. 4) fails to recognize this loss of American naturalization as the result of the return to reside in the country of origin without animus revertendi to the United States; it only provides for a new naturalization in the country of origin accompanied by a voluntary renunciation of the naturalization secured in the United States; but this provision also was inapplicable to Samuel Flegenheimer who could not be qualified as a Baden national returning to his country of origin. The two treaties are not complementary and the provisions of one cannot be invoked in order to make good the inapplicability of the provisions of the other. It is therefore by virtue of Article I, para. 2 of the Treaty between Wurttemberg and the United States that Samuel Flegenheimer and the members of his family, under his control and guardianship as a husband and a father, lost their American nationality.

52. Samuel Flegenheimer's naturalization in Wurttemberg was formally extended, by the very act under which he secured said naturalization, to his wife and to his minor children, namely, Joseph who was then 18 years old, Eugen who was 6 and Albert who was 4. The three of them, through their father, lost, under the Bancroft Treaty concluded between the United States and Wurttemberg, the American nationality they had acquired jure sanguinis. The collective effects of Samuel Flegenheimer's naturalization on the members of his family, under his control and guardianship as a husband and as a father, are explicitly confirmed by the excerpt from the Register of families of the Schwäbisch-Hall district, as well as by a statement, introduced in the record, of the Government of the district of his domicile in Wurttemberg (Königliche Kreisregierung) of August 23, 1894. They fulfilled the conditions of domicile required by the Treaty of July 27,

1868; although Albert was only four years old on the date of the naturalization of his father, he too falls under the provisions of this Treaty. The Protocol annexed thereto explicitly provides in Part I (1):

It is of course understood, that not the naturalization alone, but a five years uninterrupted residence is also required, before a person can be regarded as coming within the treaty; but it is by no means requisite, that the five years residence should take place after the naturalization.

It is therefore immaterial whether the five-year uninterrupted residence is placed before or after the grant of naturalization; it is in any event established that Albert Flegenheimer resided uninterruptedly for more than five years in Wurttemberg, since birth and immediately after his naturalization. One could admit that he lost title to United States nationality only in 1895, a chronological verification that is devoid of all pertinence for the purpose of settling this dispute.

53. Moreover, the Bancroft Treaty of July 27, 1868, like the others, does not specifically decide the question of the extension, to the minor children of an American national, of the loss of United States nationality by the head of the family who secured naturalization in Wurttemberg. As the collective effects assigned to a naturalization under the laws of a State do not have as a necessary corollary an expatriation with collective effects in the State of origin, the laws of which may have adopted, by way of hypothesis, the principle of individual expatriation, the question must be settled by an interpretation of the Treaty that is binding on the two Parties.

A literal interpretation of Article 1, para. 2 of the Treaty between Wurttemberg and the United States of July 27, 1868, leads to the recognition that all of Samuel Flegenheimer's minor children, who were naturalized with him, lost by this fact, like him, their American nationality.

The starting point of the *processus* of all interpretation of an international treaty is the text on which the two Parties have agreed; it is evident that the main point of an international agreement lies in the concordant intent of such Parties and that, without this concordance, there are no rights or obligations which arise therefrom....

International jurisprudence has made an extensive application of this rule of interpretation....

The Treaty of July 27, 1868 does not afford any exception to the rule of the loss of American nationality following the naturalization in Wurttemberg of minor children included in their father's change of nationality. There is therefore no ground for inserting it in the text of the Treaty and taking it for granted; "ubi lex non distinguit, nec nos distinguere debemus." Such is the wisdom of centuries.

A teleological interpretation of the aforesaid Treaty does not lead to a different result. As the genesis of the Bancroft Treaties discloses, the main concern of the United States in concluding these treaties was to put a stop to the evil usage and inconveniences of dual nationality, by adopting the rule that every naturalization in the United States accompanied by a permanent residence, entailed as a consequence, automatically, the loss of the former allegiance; and the United States succeeded in obtaining this result only by admitting, in its turn, by way of reciprocity, that American nationality would not continue to exist following naturalization, accompanied by permanent residence, of an American national abroad. Therefore, the principal purpose of these

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treaties is to link every naturalization in a State, the seriousness and sincere character of which is proved by a durable residence, with expatriation in the other State.

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A search for the agreed intent of the contracting Parties, at the time the Bancroft Treaties were concluded, does not lead to another result.

As for an alleged right of the naturalized child to elect American nationality upon reaching majority, provided he returns to the United States, the Commission declared:

Although this right of election was not included in any positive law, at that time, it was considered as a legal rule constantly admitted and sanctioned by the Supreme Court in the Perkins v. Elg case in 1939, subject to the provisions contained in international treaties.

This right of option was never analyzed very thoroughly by American jurists, so that it was not possible to establish whether for the minor children involved, it is a question of loss of American nationality under a resolving condition of option and of return to the United States, or of redintegration in their American nationality suspensively conditioned upon option and return to the United States. In the first case, these minors would lose their American nationality as a result of the naturalization of their father abroad, and would only be vested with the nationality of their father during the whole of their minority, but could re-acquire their American nationality by an option entailing the cancellation of the loss which had previously occurred; in the second case these minor children would maintain their nationality during their minority, they would thus have simultaneously the quality of American nationals and of nationals of the country of naturalization of their father, but would still be required to elect in favor of American nationality and to return to the country of their birth; failing the option, they would lose this latter citizenship and would remain vested only with the nationality acquired by their naturalized father.

The Commission must note that the Treaty of 1868 with Wurttemberg contains no reservation in favor of this right of option. If it had been the intent of the contracting parties to admit it, they would have introduced certain provisions in their agreement which the Commission cannot presume. It is in fact the custom of introducing in international conventions, directed at combating or preventing dual nationality, special rules if the right of option is reserved to minor children naturalized with their parents in one of the contracting countries, as is particularly the case in the Franco-Swiss Convention of July 23, 1879, and of establishing, very accurately, this right of option which must be made use of within certain time limits and before certain designated authorities.

The gap of the Treaty in this connection leads the Commission to note that Wurttemberg has always applied, in its municipal law, the principle of naturalization and expatriation with collective effects, and that the same principle was generally followed by the United States until 1939.

The Commission distinguished the decision in *Elg* v. *Perkins* ¹⁸ in favor of the minor's right to elect American citizenship upon coming of age, saying:

18 307 U. S. 325 (1939); 33 A.J.I.L. 773 (1939).

This Commission believes that this precedent, the importance of which it does not deny, is applicable, in the interpretation of an international treaty to the specific case of election of American nationality by a minor child born in the United States territory, of parents who were naturalized in the United States, and later taken by them to their country of origin where the latter re-acquired, by virtue of a special applicable authorization of the Bancroft Treaty, their nationality of origin, under conditions established at the discretion of the Government of that country, hence without a naturalization procedure; election of nationality must be accompanied by a return to the United States shortly after the minor child reaches majority.

None of these particular circumstances have occurred in the instant case. Albert Flegenheimer's position in fact differs from that which appeared in the Perkins v. Elg case, on essential and numerous points.

Albert Flegenheimer had been born abroad, not in the United States: he had lived in Germany until he was 47 instead of coming to the United States within a year after majority; in contrast to Miss Elg, he apparently did not make any election of American citizenship until he was 49, and then "under the pressure of political events and in the furtherance of his business"; and the Bancroft Treaty with Sweden conferred a discretionary power for "establishing the conditions of redintegration of a naturalized person in her nationality of origin, whereas the Bancroft Treaty with Wurttemberg contains very clear and precise provisions to the contrary, namely, the naturalized person who returns to his country of origin can recover the nationality thereof only 'in the same manner as other aliens in conformity to the laws and regulations which are there established.'" The Commission added that, unlike the Elg case, Albert Flegenheimer was not vested with dual nationality, and concluded that "the Perkins v. Elg case is not applicable to his case by reasons of fact and of law." 10

The Commission summarized its decision on the crucial nationality point as follows:

The Commission, taking as a basis the Bancroft Treaty concluded on July 27th, 1868, between the United States and Wurttemberg, is of the opinion that Albert Flegenheimer lost his American nationality through the naturalization of his father in Wurttemberg, in 1894, and that he never subsequently recovered it, either because he did not have a legal possibility to do so by virtue of laws which were applicable at the time of his naturalization in Germany, or, in the hypothesis most favorable to him, because it must be admitted that the right of election he claims he had in favor of American nationality was exercised too late by him.

The Commission can therefore dispense with entering upon the remedy of law based on expatriation, resulting from an absence of animus redeundi, of persons naturalized in the United States, as the result of prolonged residence in their country of origin or in another foreign State.

 19 The Commssion discussed Rueff v. Brownell, 116 F. Supp. 298 (D.N.J. 1953), and rejected its applicability to the instant case.

Going on to examine other Italian defenses, the Commission refused to apply here any theory that "effective nationality" was required in order to have a claim under the Peace Treaty; and said that if in fact he were an American citizen, Albert's rights would not be diminished under any theory of "apparent nationality" because of his use of a German passport.²⁰

The Commission also rejected the theory that Flegenheimer was a "United Nations national" under the second paragraph of Article 78, paragraph 9(a), as a person "treated as enemy," since no actual treatment as an enemy by Italian authorities could be shown. The United States argued that this term mean not necessarily "treatment" as enemies, but that it was enough if they were considered as such under the legislation in force in Italy during the war. This American contention was based on the fact that, although in the English and French texts the words used were "treated" and "traités," in the equally authentic Russian the word was "rassmatrivat," which could only mean "considered" since there was another Russian expression for "treated." In the Italian translation (not authentic under Article 90 of the Treaty), the word used, "considerate," was said to be an exact translation of the Russian rather than of the French and English. Rejecting this argument, the Commission found that it would not be proper to "take the Italian translation to corroborate one of the three authenticated originals, nor to contend that the Italian Government is bound by the Italian text" (at least in the absence of something amounting to estoppel). It said:

It cannot be denied that the interpretation of the text of a treaty can be made only by using the versions that have been declared to be authenticated originals by the Treaty itself.

When the texts of an international treaty prepared in different languages cannot be exactly reconciled with one another, the Commission, according to the teachings of international law, believes that

20 Seeking to restrict the theory of the International Court of Justice in the Notte-bohm Case, [1955] I.C.J. Rep. 4, 49 A.J.I.L. 396 (1955), the Commission limited the theory of "effective or active nationality" to cases of dual nationality, saying: "There does not in fact exist any criterion of proven effectiveness for disclosing the effectiveness of a bond with a political collectivity, and the persons by the thousands who, because of the facility of travel in the modern world, possess the positive legal nationality of a State, but live in foreign States where they are domiciled and where their family and business center is located, would be exposed to non-recognition, at the international level, of the nationality with which they are undeniably vested by virtue of the laws of their national State, if this doctrine were to be generalized."

As for "apparent nationality," the Commission said it "cannot be considered as accepted by the Law of Nations." Instead, "Barring cases of fraud, negligence or serious errors which are not proved in the instant case, the Commission holds that there is no rule of the Law of Nations, universally recognized in the practice of States, permitting it to recognize a nationality in a person against the provisions of law or treaty stipulations, because nationality is a legal notion which must be based on a state law in order to exist and be productive of effects in international law; a mere appearance cannot replace provisions of positive law governing the conditions under which a nationality is granted or lost, because international law admits that every State has a right, subject to treaty stipulations concluded with other States, to sovereignly decide who are its nationals."

adjustment should be made on the basis of all the texts stated to be authenticated originals by the Parties.

"Considered" in the Russian included "treated" in the French and English. "The true and proper meaning of all international treaties should always be found in the purpose aimed at by the Parties." The Russian text did not seem to answer the intent as well as the narrower term "treated," since paragraphs 1 through 4 of Article 78 were drawn up "for the purpose of assuring restoration to persons injured by exceptional war measures introduced in Italian legislation":

A restoration of property, rights and interests is not conceivable unless these were previously injured in such a manner as to engage the responsibility of the Italian State, subject only to material and direct war damages caused by military operations.

Particularly with reference to paragraph 3,

The meaning to be given to the Article in question is hence one of concrete, effective treatment, meted out to a person by reason of his enemy status, and not by abstract considerations envisaging the mere possibility of subjecting him to a course of action by the State of such a nature as to cause injury on the grounds that such a person would fulfill the conditions for being considered, under the terms of a legal provision of municipal law, as an enemy person.

Reviewing the facts concerning the transfer of stock now sought to be set aside, the Commission was not satisfied that the claimant had actually been "treated as an enemy" by the Italian authorities.

Notes

Admiralty—Carriage of Goods by Sea Act—bills of lading—liability of carrier's agent for negligence

A shipper sued the stevedore for negligence in handling cargo. The stevedore, agent of the carrier, claimed limitation of liability under Section 4(5) ¹ of the Carriage of Goods by Sea Act and under the terms of the bill of lading, although neither included specifically agents of the carrier. The Supreme Court held unanimously that the stevedore was not protected by the limitations. Robert C. Herd & Company v. Krawill Machinery Corp., 359 U. S. 297 (U. S. Sup. Ct., April 20, 1959, Whittaker, J.).

Treaties—desertion—within American port

Spanish Navy seamen on shore leave in San Diego crossed into Mexico before their leave expired. American naval authorities, after facilitating the return of the seamen to the United States, proposed to turn them over to the Spanish Navy under Article XXIV of the Treaty of 1902.² The seamen brought habeas corpus proceedings. The District Court refused a writ. On appeal, the decision was reversed on the ground that the treaty was inapplicable, since the desertion did not occur in an American port.

146 U.S.C. § 1304 (5). 233 Stat. 2117.

Medina v. Hartman, 260 F. 2d 569 (U. S. Ct. A., 9th Cir., July 17, 1958, Chambers, Ct. J.).

Tax treaties-permanent establishment

In C.I.R. v. Consolidated Premium Iron Ores, Limited, 265 F. 2d 320 (U. S. Ct. A., 6th Cir., April 10, 1959, Cecil, D.J.), a Canadian corporation was held not to have a permanent establishment in the United States within the meaning of the Tax Convention and Protocol between the United States and Canada.³

Diplomatic immunity—perjury—witnesses

In *Diehl* v. U. S., 265 F. 2d 344 (U. S. Ct. A., Dist. of Col., Jan. 15, 1959, *Per Curiam*), witnesses having diplomatic immunity were held competent to testify in a criminal trial.

Tariffs—effect of proclamation terminating trade agreement on earlier proclamation under Tariff Act

In Barclay & Company v. United States, 167 F. Supp. 264 (U. S. Customs Court, 1st. Div., Oct. 9, 1958, Wilson, J.), a Presidential Proclamation terminating the Trade Agreement with Mexico was held to have merely suspended and not superseded a prior proclamation under the Tariff Act, and that Section 350(a)(2) of the Tariff Act of 1930, as amended, was not applicable to terminating proclamations.

Extradition—offenses within treaty—sufficiency of complaint

A complaint for extradition charged the defendant with a "crime of fraud." The court held the complaint insufficient to notify defendant and that the offense charged was not an offense included within Article 2(19) of the 1899 Treaty with Mexico.⁵ In Re Wise, 168 F. Supp. 366 (U. S. Dist. Ct., S.D., Texas, Oct. 31, 1957, Allred, D.J.).

Admiralty-Jones Act-joinder with maritime claims

In Bartholomew v. Universe Tankships, Inc., 263 F. 2d 437 (U. S. Ct. A., 2d Cir., Jan. 9, 1959, Medina, Ct.J.), the test of "substantial" contacts was said to govern the applicability of the Jones Act, and the doctrine of pendent jurisdiction to justify the sending of a seaworthiness count to the jury along with the Jones Act count in a case without diversity on the civil side of the district court. Lunbard, Ct.J., concurring, took the position that the Jones Act itself authorized a seaworthiness count as an action for damages for personal injury. See also Bobolakis v. Compania Panamena Maritima San Gerassimo, 168 F. Supp. 236 (U. S. Dist.

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3 56 Stat. 1399.
5 31 Stat. 1818.
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^{4 19} U.S.C.A. § 1351. 6 46 U.S.C. § 688.

Ct., S.D.N.Y., Nov. 18, 1958, Irving R. Kaufman, D.J.), in accord on pendent jurisdiction, and holding that American ownership and control of a foreign corporate owner of a foreign flag vessel is, by itself, sufficient for jurisdiction under the Jones Act. On the latter point, semble accord, Rodriquez v. Solar Shipping, Ltd., 169 F. Supp. 79 (U. S. Dist. Ct., S.D.N.Y., Aug. 13, 1958, Cashin, D.J.).

Warsaw Convention—limitation of liability—governmental set-off not compliance with statute of limitations

In a suit for air freight charges, the U. S. Government counterclaimed for loss on an earlier shipment, which was made on a government form without a statement subjecting the shipment to the limitations of liability of the Warsaw Convention. The court held the carrier was not entitled to the limitations of liability. The carrier claimed that Government rights were lost by its failure to sue within two years as required by Articles 28 and 29 of the Convention. The court held that governmental set-off within two years was not effective to toll the statute of limitations. Flying Tiger Line, Inc. v. United States, 170 F. Supp. 422 (U. S. Ct. of Claims, Feb. 11, 1959, Madden, J.).

Requisition of ship contracts and shippards—convention with Norway

A convention of March 28, 1940, between Norway and the United States ⁸ provided for the disposition of Norwegian claims on behalf of Hannevig for requisitions during and after World War I by the Court of Claims with the consent of Congress. The Court of Claims held, unanimously, that there was no adequate proof of alleged oral contracts; that rights under actual contracts were effectively released; and that the requisition orders did not include actual shipbuilding facilities. In Re Government of Norway, 172 F. Supp. 651 (U. S. Ct. of Claims, April 14, 1959, Jones, C.J.).

Treaties of friendship—workmen's compensation laws discriminating against aliens

The claimant, a British subject about to become non-resident, was awarded one-half of a scheduled award under Section 17 of New York's Workmen's Compensation law. The claimant appealed on the basis of Article X of the Jay Treaty and Articles II and V of the Convention of 1899. The claim was rejected on the ground that these treaties did not apply to workmen's compensation laws. Heaton v. Delco Appliance Div., General Motors Corp., 180 N.Y.S. 2d 173 (Sup. Ct., App. Div., 3d Dept., Dec. 2, 1958, Herlihy, J.).

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7 49 Stat. (2) 3000 et seq. 8 62 Stat. 1798.
9 8 Stat. 116. 10 31 Stat. 1939.
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BRITISH AND COMMONWEALTH DECISIONS *

Taxation—United Kingdom income tax—checks drawn on American account sold to authorized dealer not income

Thomson (Inspector of Taxes) v. Moyes, noted in 53 A.J.I.L. 189 (1959), affirmed by the Court of Appeal, [1959] 2 W.L.R. 577, 1 All E.R. 660 (Jenkins and Romer, L.JJ., Pearce, L.J., dissenting, March 9, 1959).

Conflict of laws—foreign legislation—effect of foreign legislation on contract of guarantee governed by English law—liquidation of guarantor corporation—new entity exempt from guarantor's liability—retroactive legislation—debt due after exemption granted

The Court of Appeal reversed the decision previously digested in 53 A.J.I.L. 187 (1959), on the ground that the action had been based on rights which arose after Decree 3504 of the Greek Government had come into effect. Thus when the cause of action arose the guarantor of the bonds was no longer in existence so as to be held liable thereon, nor could the National Bank of Greece and Athens, S.A., be deemed its successor, for Decree 3504 expressly stated that it was not. The Court of Appeal distinguished National Bank of Greece and Athens, S.A. v. Metliss, [1958] A.C. 509, on the ground that when that action had been brought. Decree 3504 had not been issued and the National Bank was deemed the successor to the guarantor bank. The plaintiffs were relying on Greek law as creating the new entity as successor to the guarantor bank. They must thus also accept Greek law as determining the liabilities of such new entity. There were no contractual ties between the plaintiffs and the National Bank, on which the plaintiffs could rely. Adams & Others v. National Bank of Greece and Athens, S.A., [1959] 2 W.L.R. 800, 2 All E.R. 362 (Court of Appeal, Lord Jenkins, Morris and Ormerod, L.JJ., April 29, 1959).

Taxation—evasion of foreign revenue laws—presumption of advancement—equitable relief

A British subject and his American wife had a joint account in an American bank into which the husband made all deposits. Securities had been bought in the wife's name so as to evade the withholding tax to which the alien husband would have been liable. When the parties became estranged, the wife sold the securities. In an action to recover the proceeds thereof, Wynn-Parry, J., held that the purchase of the securities in the name of the wife raised the presumption of an advancement in her favor which could ony be rebutted by proving the attempt to evade U. S. taxes. Had this been a U.K. tax, the husband would not have been able to raise this point when claiming equitable relief. Although it is a foreign tax which

*These decisions and the American Enemy Property and Nationality Cases were prepared by Egon Guttmann, Esq., LL.B., LL.M. (London), Ford Graduate Fellow, Northwestern University School of Law.

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the husband tried to evade, a court of equity will not assist him in the breach of the law of a friendly country when he is seeking equitable relief. Re Emery's Investments Trust. Emery v. Emery, [1959] 2 W.L.R. 461, 1 All E.R. 577 (Ch. D., Wynn-Parry, J., Feb. 27, 1959).

Taxation—double taxation—estate duty—part of estate outside New Zealand

Part of the estate consisted of shares in a trading company and were situated in New South Wales, Australia. In assessing the exemption from double taxation granted by the New Zealand Estate and Gift Duties Act, 1955, Section 35(1), N.Z. Act 105, 1955, the amount of estate duty to be deducted from payments in New Zealand is the amount payable in New Zealand in respect of foreign property, and not the amount of duty payable in Australia. In view of the initial tax-free exemptions, this amount is to be ascertained by taking the total value of the estate and assessing the rate of duty payable in relation thereto, deducting at such rate from the duty payable in respect of foreign assets. *Pollock* v. *Commissioner of Inland Revenue*, [1959] N.Z.L.R. 559 (Sup. Ct., McGregor, J., Feb. 18, 1959).

AMERICAN CASES ON ENEMY PROPERTY

Enemy Property. Legerlotz v. Rogers, 266 F. 2d 457 (D. C., April 16, 1959), the Attorney General's order revoking the return of enemy property after the signing of the Blum-Byrnes Agreement between the U.S. and France [63 Stat. 2507 (1949)] cannot be reviewed by the court; Bosh v. Rogers, 169 F. Supp. 877 (D. C. Feb. 2, 1959), a naturalized Haitian of German extraction, who voluntarily resided in Germany during war, is an "enemy" under the Act and not entitled to return of his property; G.M.O. Niehaus & Co. v. U. S., 170 F. Supp. 419 (Ct. Cl., Feb. 11, 1959), property acquired by a German after Dec. 31, 1946, is not subject to vesting order; Kimiko Arita v. Rogers, 173 F. Supp. 17 (D. Hawaii, Feb. 26, 1959), Japanese resident in Hawaii who only visited the U. S. mainland when husband was interned there, and visited Japan for a short while after the war, was a permanent resident of Hawaii and not of Japan or any territory of an enemy of U. S., including occupied territories between Dec. 7, 1941, and May 4, 1954, and is thus entitled to the return of seized property; Rogers v. Hertlein, 172 F. Supp. 610 (E.D.N.Y., April 21, 1959), a debt of an American agent of an enemy alien to his principal can be the subject matter of a vesting order.

AMERICAN CASES ON NATIONALITY

Citizenship. Eng v. Dulles, 263 F. 2d 834 (2d Cir., Feb. 16, 1959), evidence is insufficient to show applicants to be natural children of citizen father, who neither supported nor acknowledged them until after application; Gonzales-Jasso v. Rogers, 264 F. 2d 584 (D. C., March 5, 1959), admission of having voted in foreign election, though made on oath, can be retracted, and burden remains on U. S. to prove expatriation; Tugade

v. Hoy, 265 F. 2d 63 (9th Cir., March 30, 1959), Philippine Independence Act, 1934, 48 Stat. 456, and Presidential Proclamation No. 2696, U.S.C.A. § 1281a, made thereunder, are not unconstitutional, though resulting in plaintiff becoming an alien; Wong Kwai Sing v. Dulles, 265 F. 2d 131 (9th Cir., April 6, 1959), testimony containing improbabilities and discrepancies was properly rejected; Reyes v. Neelly, 264 F. 2d 673 (5th Cir., April 22, 1959), burden of proving citizenship is on claimant, so that where the basis of citizenship is birth in U. S. and this is destroyed by contrary evidence, the certificate of citizenship fails (note strong dissenting judgment); Eng Wee Lem v. Dulles, 266 F. 2d 550 (2d Cir., May 1, 1959), testimony of alleged parents was false in material respect, and conduct of alleged parents was not demonstrative of a parental relationship, thus the claim was rejected; Lee Hon Lung v. Dulles, 171 F. Supp. 830 (D. Hawaii, April 10, 1959), decision of a Board of Special Inquiry is not res judicata but requires clear, unequivocal and convincing evidence to rebut it.

Deportation. De Souza v. Barber, 263 F. 2d 470 (9th Cir., Jan. 30, 1959), deportation 26 years prior to last unlawful entry cannot be attacked collaterally in deportation proceedings based on present unlawful entry; Wong Hing Goon v. Brownell, 264 F. 2d 52 (9th Cir., Feb. 18, 1959), appellant who failed to prove blood relationship to U. S. citizen, when seeking admission to U.S., could be deported and there is no discretion in Attorney General, for he was not an alien "within the United States" under § 243(h); Cavallaro v. Lehmann, 264 F. 2d 237 (6th Cir., Feb. 18, 1959), alien is deportable if, at date of entry, he is within the class of excludable aliens; suspension of deportation order is a matter of grace, not of right; Kimm v. Hoy, 263 F. 2d 773 (9th Cir., Feb. 19, 1959), refusal to answer whether alien was or had been a member of the Communist Party amounted to failure to prove affirmatively "good moral character"; U. S. v. Murff, 264 F. 2d 926 (2d Cir., March 3, 1959), deportable Chinese seaman refused admission to Formosa could only be deported to Chinese mainland if Communist Government would accept him; Cakmar v. Hoy, 265 F. 2d 59 (9th Cir., March 23, 1959), the exercise of the Attorney General's discretion is only reviewable to see whether procedural due process was followed; Tugade v. Hoy, 265 F. 2d 63 (9th Cir., March 30, 1959), though the Philippines at the date of entry was not a foreign country, alien is deportable; a statute making drug addicts or persons unlawfully possessing or trafficking in drugs deportable has retroactive effect; Exarchou v. Murff, 265 F. 2d 504 (2d Cir., April 15, 1959), a right of voluntary departure is in discretion of Attorney General and denial of such right is not to be arbitrary or capricious; it is the good character of the alien which is relevant and not his reputation of good character; Niukkanen v. McAlexander, 265 F. 2d 825 (9th Cir., May 19, 1959), a dues-paying, card-carrying, actively participating member of the Communist Party had "meaningful association" so as to be deportable; Tahir v. Lehmann, 171 F. Supp. 589 (N.D. Ohio, Jan. 2, 1959), injustice of deportation of longresident alien is an argument for Congress; the court must enforce a

statutory enactment and has no discretion; Kazanos v. Murff, 170 F. Supp. 182 (S.D.N.Y., Feb. 11, 1959), alien need only prove time, place and manner of entry, the burden of proving deportability being on the immigration authority; Mesina v. Hoy, 170 F. Supp. 502 (S.D. Calif., Feb. 19, 1959), the Attorney General has discretion whether to institute deportation proceedings on latest illegal entry or to reinstate previous deportation order; Rizzi v. Murff, 171 F. Supp. 362 (S.D.N.Y., March 16, 1959), an alien is entitled to a fair hearing before denial of voluntary departure, but not to a right of appeal against such denial; Chong Chak v. Murff, 172 F. Supp. 151 (S.D.N.Y., April 17, 1959), a country only needs to show willingness to accept an alien, not to guarantee that he will never be deported from such country.

Naturalization. Tak Shan Fong v. U. S., 259 U. S. 102 (March 23, 1959), naturalization of alien Korean War veteran requires lawful entry into U. S. followed by one-year residence prior to service, though such residence need not continue to remain lawful; Gilligan v. Barton, 265 F. 2d 904 (8th Cir., April 23, 1959), a finding of fact that petitioner knew that application for exemption from military service disbars him from citizenship was left to the trial judge; Petition for Naturalization of Rabanal, 169 F. Supp. 918 (D. Md., Jan. 15, 1959), a Philippine national, admitted to permanent residence in Hawaii, where he filed petition, can be naturalized on U.S. mainland which he entered as a non-immigrant; Petition for Naturalization of Rosenbaum, 171 F. Supp. 141 (S.D.N.Y., March 2, 1959), filing an intention to become naturalized gave "a right in process of acquisition" which was preserved by the Immigration and Nationality Act, 1952, so that there was no need for two and one-half years' continuous residence, nor did a delay of seven years after filing involve a forfeiture of such right; Petition for Naturalization of Meng Chung Yang, 171 F. Supp. 898 (D. C., April 13, 1959), a plea of lack of comprehension of effect of application for exemption from military service was accepted; petitioner should have been originally classified as a student so as not to have had to make such application; Petition for Naturalization of Louis Bronkovitch, 172 F. Supp. 319 (D.Md., April 20, 1959), an illiterate enemy alien, inducted into the Army during World War II, who orally answered that he did not want to fight and was discharged, made no intelligent choice between exemption and citizenship, for none existed at that time, nor was his oral answer an application for exemption on ground of alienage; Petition of Kauffmann, 148 A. 2d 925 (Sup. Ct. Pa., March 16, 1959), since the draft board can reclassify and the Service accept a person who made application for exemption, such application cannot make a person "permanently ineligible" without giving him the right to reconsider.

Denaturalization. U. S. v. Frank Costello, 171 F. Supp. 10 (S.D.N.Y., Feb. 20, 1959), admissions before a Grand Jury warrant revocation of naturalization obtained by means of fraudulent, false and misleading statements, though activities concealed were no longer offenses; U. S. v. Galato, 171 F. Supp. 169 (M.D. Pa., Feb. 25, 1959), deliberate misrepresentation and falsehood in naturalization proceedings warrant denaturalization,

though the truth, if told, might not have resulted in a refusal of citizenship; $U.\ S.\ v.\ Rossi$, 171 F. Supp. 451 (N.D. Calif., March 16, 1959), assumption of identity of brother prior to admission to U. S. with no intention to deceive does not warrant denaturalization.

Miscellaneous. Madox v. U.S., 264 F. 2d 243 (6th Cir., Feb. 18, 1959), where no administrative steps have been taken to revise national service classification, a renunciation of citizenship and claimed allegiance to a foreign flag does not make such classification incorrect.