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Dual Nationality in Practice— Some Bizarre Results

Americans encounter the dual nationality problem in grade school while studying the War of 1812. We are taught that the proximate cause of the war was the unpleasant habit of the British of impressing (“Shanghai-ing” in modern naval parlance) into the British navy, American citizens who formerly had been British subjects, but had become naturalized here. Although American citizens under American law, they remained British subjects under British law.

To the protests of our State Department, the British Foreign Office replied loftily, “*Nemo potest patriam exudere*,” evidencing thereby the occasional value, in public service in those days, of a sound classical education. “No one can shed his nationality” is a fair equivalent, and “Once an Englishman, always an Englishman” expresses the idea in non-legal terms.

There was thus an irreconcilable conflict between the “doctrine of indelible allegiance” of the British, and the American policy of liberal naturalization. Great Britain did not abandon its views on expatriation until 1870, two years after our Fourteenth Amendment conferred American nationality (“citizenship”) upon all persons born in the United States, if subject to our jurisdiction.

“Naturalization,” to the American layman, suggests a court proceeding, resulting in an immigrant surrendering his former allegiance and nationality, and becoming an American citizen. Technically, it is defined as “the conferring of nationality of a state upon a person after birth, by any means whatsoever.”¹ Text-writers call this “Derivative Acquisition of Na-

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¹8 U.S.C. 1101 (a)(23).

tionality," as distinguished from "Original Acquisition of Nationality," that is, through the circumstance of one's birth.

One method of derivative acquisition of nationality is by marriage, when the parties are of different nationalities. Generally, the wife takes the nationality of the husband. The United States, however, by the Cable Act of September 22, 1922, provides, in respect of its own nationals, that no change of nationality takes place upon marriage.² A few countries, including Great Britain since 1949, have followed our lead.³

Many nations claim the right to prohibit the naturalization of their subjects, by judicial or administrative proceedings, in other countries. They take the position that unless prior consent has been given to expatriation by naturalization in the other country, the naturalization will not be recognized by the country of origin. The United States, with its large flow of immigration from early times, stands for freedom of naturalization.

Since some states look chiefly to the place of birth (*jus soli*) in determining who are their nationals, others to nationality by descent (*jus sanguinis*), and most states to both in varying degrees, dual nationality at birth is not uncommon. Many immigrants remained nationals of their homelands after coming to the United States. Their children, under the principle of *jus sanguinis*, were considered nationals of their father's native country. Conflicts arising from dual nationality have occurred when the dual national returned to his country of origin; for example, he has been held liable for military service. Demands for payment of local estate or inheritance taxes have been made in respect of decedents who were both citizens of, and domiciled in, the United States.

The purpose of this article is to invite attention to some unusual situations arising out of dual nationality. There are involved: marriage; naturalization in America without the consent of the country of origin; and claims by the treasury officials of foreign countries in respect of decedents' estates of natural-born American citizens and domiciliaries, whose property at death was situated wholly in the United States.

Some situations described herein have been corrected in whole or in part. Others may be mitigated by treaties still to be negotiated. In one case, the only advice which can be given to the client is to stay out of the

²Married Women, United States, September 22, 1922 c.411, 42 Stat.1021.

³The British Nationality Act of 1948, which came into effect on the 1st January 1949, accepted for the first time, the status of dual citizenship by naturalization. From then on a British woman did not lose her British citizenship on marriage unless she chose formally to renounce it, nor, on the other hand, did an alien woman who married a United Kingdom citizen automatically acquire his citizenship. See *British Nationality*, by J. Meryn Jones (1956).

particular country, and to avoid use of its air lines and steamship lines, until our State Department can assure our citizens that they will not be molested, should they visit the land of their ancestors.

Marriage Cases

1. As stated above, the United States Cable Act of 1922 changed the general rule that a wife takes the nationality of the husband. An American girl marries a Frenchman after September 22, 1922; in American law, she remains American; but in French law she becomes French. Conversely, her brother (an American citizen) marries a French girl. Under French law, she becomes an American; under American law, she remains French. In respect of nationality, the Cable Act has achieved the intriguing paradox of "double or nothing."

Interesting possibilities could arise if the French wife of a post-Cable marriage should suddenly find herself in need of diplomatic or consular assistance in a third country; the Americans would refer her to the French, who, in turn, would refer her back to the Americans. This situation resembles the *renvoi* problem, which so fascinates students of conflict of laws. This back-and-forth shuttling has been called "lawn tennis applied to law."⁴

2. New York newspapers had a field day soon after the Cable Act went into effect, thanks to an assist from the quota system of the immigration law. An American man went abroad to marry an alien bride. They returned to New York from their honeymoon about December 29th. The sympathetic, but unrelenting, immigration authorities told the wife that she could not be admitted because she was not an American citizen, and the quota for her country for that year had already been filled. In this particular case, no great harm was done. The pair went to Canada for a few days, returned to New York and were promptly admitted.

This situation does not arise today, because of a system of preferences, non-quota immigrants, etc. The large number of marriages of American service men to foreign girls required a change. Consider, too, the amusing complications, based on fact, set forth in *I Was a Male War-Bride*, in which a French army lieutenant married an American WAC officer in France, and wanted to accompany his wife to New York on an American army transport, and to be admitted for permanent residence on arrival. Certainly, no aspiration could be more modest, more reasonable or more orthodox than to bring one's own spouse into one's own home in one's own country for permanent residence therein.

⁴See *Matter of Talmadge*, 109 Misc. (N.Y.) 696, 181 N.Y. Supp. 336 (1919).

3. At the time of the passage of the Cable Act in 1922, the present writer, along with many others, thought that serious complications would arise out of the position taken by the United States; i.e., that no change in nationality occurs when a marriage takes place between parties of different nationalities. As of 1922, the American position was, in effect, "We are right, and the rest of the world is wrong."

A different point of view became apparent very vividly to the American Army of Occupation in Austria in 1945. A severe food shortage caused the Austrian Government to propose deporting aliens in order to feed its own nationals adequately. Austria followed the old rule that a wife took her husband's nationality. Many Austrian girls had married Germans, and many were war widows with young children. Hitler had abolished Austrian nationality by the 1938 *Anschluss*, and the restoration of a separate Austrian citizenship was a primary goal for the Austrians in late 1945. Many such women had never been in Germany, and had no connections there—in many cases not even relatives of their husbands. The widows were allowed to stay in Austria, notwithstanding legalistic arguments that they were Germans and hence aliens.⁵

4. Another marriage situation of a different nature arose out of the application of a rule of Greek law that a marriage between two members of the Greek Orthodox Church must be celebrated by a priest of that Church in order to be valid. The question arose in connection with a demand by the Greek Treasury that a beneficiary on intestacy of a decedent, whose estate was being administered in New York, pay a tax on the inheritance which she had received.

Practically all of the property owned by the decedent was located in New York, except for shares of stock in a Central American corporation, the certificates of which were located in the Central American country. The beneficiary had been married to the decedent in the United States by a civil ceremony, which was valid in all American states. Both were Greek Orthodox communicants.

The attitude of the Greek Government was that since the marriage was not valid under Greek law, the status of lawful wife (or widow) was denied her. The importance of being demoted from the position of a wife-widow to that of a complete stranger assumed financial significance, because Greece,

⁵By Section 2 Paragraph 1 of Public Law #59, dated July 10, 1945, regarding transfer to Austrian Nationality (*Staatsbuergerschaftsueberleitungsgesetz*), persons who had been continually domiciled in Austria since January 1st, 1915, could acquire Austrian citizenship by declaration. For a discussion of the effect of the 1938 *Anschluss* on an Austrian citizen, and also the necessity of considering "the accepted rules and practices under international law" in determining who are "citizens" of a foreign nation, see *U.S. ex rel Schwartzkopf v. Uhl*, 137 F.2d 898 (C.A. 2-1943).

like other jurisdictions, has various classes or categories of beneficiaries, taxed in proportion to their relationship to the decedent. A stranger is taxed much more heavily than a widow.

The grounds upon which Greece claimed jurisdiction over the estate involved another question—the necessity, in Greek law, of the consent of the Greek Government to renounce Greek nationality when an immigrant applies for naturalization. Decedent was a native-born Greek who had emigrated to America. No such consent was given by Greece, and, in Greek eyes, the decedent remained a Greek national, whose estate was liable for Greek death duties.

5. In the autumn of 1963, New York City newspapers had another field day on a Greek-American dual nationality problem, arising out of the refusal of the Greek Government to release from his prior Greek nationality, a Greek who had emigrated to the United States, where he became naturalized in 1919, after service in the American army in World War I. He died in 1955, unmarried, domiciled in Kings County, New York, leaving movable property (bank accounts in New York banks, securities of New York corporations) all located in New York City, none in Greece. He left a will, which was admitted to probate; all debts and taxes paid, and distribution made. One of his beneficiaries was his niece, Maria, who was a native-born American citizen. She was married to a native-born Greek, who had been naturalized in the United States before his marriage. He too had not obtained the consent of the Greek Government to naturalization proceedings in America. Maria's share, after deduction for her proportion of taxes, amounted to about \$4,500 which she received in 1957.

Six years later, in 1963, Maria took a trip to Greece. After a two-month sojourn in the land of her forebears, she arrived at Athens to board her plane for New York. Her name was called out, and she was escorted to an office, where she was informed that the Greek Government had a claim against her for about \$3,300 for a Greek inheritance tax on the \$4,500 she had received from the New York estate of her uncle. She was told that she could not leave Greece until she either paid the tax demanded, or posted a bond to do so. The plane left without her. She was not imprisoned, because Greek law does not permit a woman to be put in jail for debt.

A telegram to our State Department elicited the response (which, under the circumstances, might be characterized, not uncharitably, as "Delphic") that the Department was "already informed of the matter" and was "reviewing appropriate action." Ultimately, over a month later, she was permitted to leave Greece without paying the tax demanded.

A Greek-United States Double Taxation Treaty regarding Estates of Deceased Persons entered into force December 30, 1953. It provides for

certain abatements, exemptions, deductions and credits (except the Marital Deduction provided by the United States Revenue Act of 1948) in order to prevent double taxation.⁶ The words used in the treaty are "citizen or subject" of the contracting parties (Art. V).⁷

The claim of Greece was based on the two admitted facts that decedent had not obtained permission of Greece to become an American naturalized citizen, and a similar claim that Maria's husband likewise had not received similar Greek permission for naturalization, and hence remained Greek. Therefore his wife, Maria, was also Greek. Therefore, the Greek tax bureau contended, Greece had jurisdiction over both the decedent's estate and over the beneficiary.⁸

See *Rogers, Secretary of State v. Bellei*, Supreme Court of the United States, October Term, 1969, No. 179, argued January 15, 1970. The issue is the constitutionality of Section 301(b) of the Immigration and Nationality Act of 1952, providing that a person born abroad of one American and one foreign parent loses his citizenship, unless he resides in the United States for five continuous years between the ages of fourteen and twenty-eight. On his twenty-third birthday, the plaintiff was informed that he had lost his United States citizenship by virtue of Section 301(b). He had been born of an American mother and an Italian father in Italy, and so acquired American citizenship by virtue of Section 1993 of the Revised Statutes, as amended by Section 1 of the Act of May 24, 1934, 48 Stat. 797. He also acquired Italian citizenship at time of birth. He had lived most of his life in Italy. He claims that Section 301(b), by providing for involuntary expatriation, violates the Fifth and Fourteenth Amendments, by the reasoning in *Schneider v. Rusk*, 337 U.S. 163 (1963) and *Afroyim v. Rusk*, 387 U.S. 253 (1967), and likewise violates the procedural safeguards of the Fifth and Sixth Amendments by stripping citizenship automatically without prior judicial or administrative safeguards, on the analogy of *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963). It was also urged that Section 301(b) violates the due-process clause of the Fifth Amendment, because it is unreasonable, imposes a serious deprivation of liberty, and serves no rational public policy in the changed circumstances of today. A three-judge District Court granted a motion for declaratory and injunctive relief against the government, which appealed. The Association of American Wives of Europeans, and the American Bar Association (through its Section of International and Comparative Law) filed briefs as *amici curiae*.

⁶Treaties and Other International Acts Series 2901.

⁷*Ibid.* Art. V, pp. 10-11.

⁸For further details, see a most interesting article in the *BROOKLYN BARRISTER* Vol. 15 No. 2, November 1963, pp. 55-60, entitled *The Greeks Had a Tax For It*, by Gladys M. Dorman, the attorney for the beneficiary.

The Supreme Court had not handed down its decision at the time this issue went to press.

Conclusion

Nationality is a legal concept both of municipal law and of international law. The Hague Convention on Conflict of Nationality Laws, April 12, 1930, provides: "Art. 1. It is for each state to determine under its own law who are nationals. This law shall be recognized by other states in so far as it is consistent with international conventions, international custom, and the principles of law generally recognized with regard to nationality. Art. 2. Any question as to whether a person possesses the nationality of a particular state shall be determined in accordance with the law of that state."⁹

The reply of the United States on March 16, 1929, to the inquiries of the Preparatory Committee for the Hague Codification Conference, stated: "There are certain grounds generally recognized by civilized States upon which a State may properly clothe individuals with its nationality at or after birth but . . . no State is free to extend the application of its laws of nationality in such a way as to reach out and claim the allegiance of whomsoever it pleases. The scope of municipal laws governing nationality must be regarded as limited by consideration of the rights and obligations of individuals and of other States . . . The Government of the United States has taken the position that, as a general rule, no person should have the nationality of a foreign country forced upon him after birth without his consent, express or implied."¹⁰

In *Nationality Decrees Issued in Tunis and Morocco*,¹¹ Great Britain objected to the application to British subjects of decrees issued by French, Tunisian and Moroccan authorities regarding the nationality of certain persons born in Tunis and in Morocco (French Zone), both French protectorates. Great Britain brought the ensuing controversy with France before the Council of the League of Nations. There, France contended that the League lacked jurisdiction, since nationality was a matter which by international law was solely within domestic jurisdiction. The Council requested The Permanent Court of International Justice to give it an advisory opinion on the question whether nationality is, by international law, solely a matter of domestic jurisdiction, within Art. 15, par. 8 of the Covenant. The French text used "exclusive" for "solely."

The Court answered in the negative, saying ". . . In a matter which, like

⁹5 Hudson, *International Legislation* 359 (1936).

¹⁰League of Nations Doc. 1929. V.I. at 145-146. See Bishop, *International Law-Cases and Materials* (1962) p. 410.

¹¹Per. Ct. of Int'l Jus., *Advisory Opinions*, Feb. 7, 1923 Ser. B No. 4.

that of nationality, is not, in principle, regulated by international law, the right of a State to use its discretion is nevertheless restricted by obligations which it may have undertaken towards other States. In such a case, jurisdiction which, in principle, belongs solely to the State, is limited by rules of international law." Compare the language in *United States ex. rel Schwartzkopf v. Uhl*¹² where the issue was whether relator was an "alien enemy" within the statutory definition, i.e., whether he was a "native, citizen, denizen or subject" of Germany, because he was an Austrian citizen on March 13, 1938, the date of the *Anschluss*: "In determining who are 'citizens' of a foreign nation, our courts must consider not only the municipal law of the foreign nation but also the accepted rules and practices under international law."

Dual nationality will be with us as long as some states look chiefly to the place of birth (*jus soli*), and others to descent (*jus sanguinis*). Also, we shall have it as long as some states do, and some do not, require their permission for their nationals to become naturalized elsewhere; and as long as some states do, and some do not, permit an automatic change of nationality by marriage.

For decades American states have sought to tax decedents' estates on various theories of domicile, situs of property, situs of the corporation whose securities are involved, etc. Reciprocal tax legislation has eased possibilities of double taxation. Our government has many treaties in force with many nations, designed to prevent double taxation of incomes and inheritances.¹³

Perhaps the doctrine of "dominant nationality" can be developed, if one nationality cannot be eliminated.¹⁴ An obvious analogy is the development in the field of private international law¹⁵ of applying to the solution of the problem of the foreign tort, the law of the place with which the plaintiff has the most contacts, instead of a double test of the act complained of being actionable by the law of the place where committed.¹⁶

An interesting argument has been made to the effect that Art. 15 of the

¹²See *Uhl* case, Note 5, supra.

¹³See current tax services for details of state statutes.

¹⁴For the doctrine of "dominant nationality", see *Claim of James Lewis Drummond*, 12 Knapp P.C. Reports, 295, 12 Eng. Rep. 492; also *U.S. ex rel Florence Strunsky Merge v. Italian Republic*, Italian Conciliation Commission, 1955; Bishop, op. cit. 418, 423-424.

¹⁵Professor Dicey, the author of what is probably the best-known text-book on Conflict of Laws, used to tell his students (including the present writer) that he personally preferred "Private International Law" to "Conflict of Laws", but he was overruled by his publishers.

¹⁶For a recent article on conflict of laws, with special reference to torts, see *Judge Keating and the Conflict of Laws*, 36 Brooklyn Law Review 10 (Fall, 1969), by Professor Hans W. Baade, of Duke University. See also *The Foreign Torts Act: Look Before You Leap*, 20 Toronto L.J. 81 (1970), by Professor J. A. Clarence Smith, Faculty of Law, University of Manitoba.

Universal Declaration of Human Rights¹⁷ contemplates that a person should have only one nationality at any given time; if a person who is at birth subject to the nationality claims of two or more countries, the right to a single nationality asserted in Par. 1 of Art. 15 seems clearly to imply an obligation on all but one of the states to give up their claims.

Perhaps we may put some hope in the Commission of Human Rights of the Council of Europe. It is regrettable that Greece ceased to be a member last December. Perhaps Greece will someday again become a member. It has been suggested by Professor Fawcett of Oxford that the Court of Human Rights may create a new body of jurisprudence in this field.¹⁸

We can encourage our State Department to negotiate the necessary treaties to avoid most, or some, of the difficulties mentioned above. Meantime, while searching for solutions, we might profitably, for a guideline, follow the famous, historic formula, enunciated by the late Mayor Fiorello La Guardia, for living in what has euphemistically been dubbed "Fun City" by his current successor: — Patience and Fortitude.

¹⁷W.L. Griffin, *The Right to a Single Nationality*, 40 Temple L. Rev. 57, Fall 1966.

¹⁸*Application of the European Convention on Human Rights*, by J.G.S. Fawcett, Clarendon Press, Oxford, 1969.