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WILLIAM L. GRIFFIN *

International Claims of Nationals of Both the Claimant and Respondent States—The Case History of a Myth

The Myth and Its Origin

An international claim is a demand of one government upon another through diplomatic channels or an international tribunal, for redress for acts or omissions for which the respondent government is contended responsible under international law or provisions of a treaty.¹

The modern state practice of espousing private claims against foreign governments began with the treaty of November 19, 1794, between the United States and Great Britain (Jay Treaty). Since then many scores of treaties have provided for the adjudication of private claims against governments by sole arbiters or mixed or joint commissions and their deliberations have brought forth a large mass of judicial precedents.

The nineteenth century accumulation of a huge body of widely scattered case-law materials relating to private claims against foreign governments presents a baffling field for research and it was not until the closing years of the nineteenth century that scholars began to be interested in the subject. The publication of Edwin M. Borchard's treatise, *The Diplomatic Protection of Citizens Abroad*, in 1916 promptly established the subject as a separate and important branch of

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¹ Nielsen, *International Law Applied to Reclamations* (1933), p. 55. Cf. Hyde, *International Law*, 2d ed. (1947), vol. 2, p. 886f.

international law. Borchard's treatise clearly showed the extent of the mass of legal material that had accumulated during the preceding century and its susceptibility to systematic analysis for the distillation of a cohesive body of legal rules. His terminology, classification, and formulation of legal rules received widespread acceptance.

Before the nineteenth century there were no clearly formulated rules of customary international law limiting the category of individuals whose claims a government could espouse, but from the beginning the usual practice of states has been to espouse only claims of their nationals. The usual treaty formula has been to give an international tribunal jurisdiction only over claims of "nationals," "citizens," or "subjects" of the claimant government against the respondent government.

As the nation-states emerged from feudalism there seems to have been general acceptance of the principle that persons born within a state's territory of parents who are nationals of that state are exclusively nationals of that state.

There seems also, during the early post-feudal period, to have been fairly widespread acceptance of the principle that persons born within a state's territory of the nationals of another state are nationals of the state of birth (*jus soli*).² This principle was probably the natural outcome of the intimate connection in feudalism between a person and the soil upon which he lived.³

The passing of feudalism and the emergence of *jus soli* gave rise to the incongruity that children born of a national of one state within the territory of another would not have the nationality of their father. This incongruity was overcome by the revival of the Graeco-Roman principle that membership (nationality) of children in a society follows the membership (nationality) of their parents (*jus sanguinis*). Thus the stage was set for the appearance of a new incongruity, viz., dual or multiple nationality.

At first there seems to have been some attempt at an accommodation between the conflicting principles of *jus soli* and *jus sanguinis*. Thus Pothier wrote that under the *ancien régime* a Frenchman's child born outside France is a French national by *jus sanguinis* if the father has not established his domicile outside France and has the intent to

² Demolombe, Cours de Code Napoleon, liv. i, tit. i., ch. i., No. 146, refers to this principle as "the rule of Europe."

³ Westlake, *International Law*, vol. 1, 2d ed. (1910), p. 220.

return to France;⁴ the French Constitution of 1791 provided that persons born in France of a foreign father are French nationals *jus soli* if they have fixed their residence in France.⁵

However, by the beginning of the nineteenth century, most states in their national legislation had moved toward a largely unbridled and indiscriminating use of *jus soli*, *jus sanguinis*, and naturalization of aliens and international law recognized their competence to do so, thus giving rise to widespread international conflict of national laws on nationality. But no instance is known of an international claims settlement treaty which has expressly covered the matter of the tribunal's jurisdiction regarding the claims of dual nationals, *i.e.*, individual claimants who are nationals of both the claimant and respondent governments under their respective national laws. Thus it has been necessary for each tribunal to interpret its governing treaty in the light of such general principles, customs, and precedents as seemed appropriate to determine whether a given dual national claimant is to be treated as either a national of the claimant government or a national of the respondent government for the purpose of the tribunal's jurisdiction to hear the claim.

According to Borchard,

The principle generally followed [by international tribunals] has been that a person having dual nationality cannot make one of the countries to which he owes allegiance a defendant before an international tribunal.⁶

In support of his formulation of the foregoing rule, Borchard cites the decisions of international tribunals in the cases of *Alexander*, *Boyd*, *Martin*, *Lebret*, *Maninat*, and *Brignone* and also says "see also" the *Drummond* case.⁷

Borchard's above formulation of the rule regarding international claims on behalf of dual nationals has long been widely accepted. However, examination of the cases cited by Borchard, and of the history of the treatment by international tribunals of such claims, shows that Borchard's supposed rule is a myth—or at best an inaccurate oversimplification of the body of precedents existing when he wrote, and subsequently.

⁴ Pothier, *Des Personnes et des Choses* (1778), partie i., tit. ii., sec. i., p. 399.

⁵ Quoted, in II Knapp 308, 13 Eng. Rep. 498.

⁶ *Op. cit.*, p. 588.

⁷ *Id.*, n. 1.

Exploding the Myth

1. *The Privy Council and the British Commission for Claims on France under the treaties of May 30, 1814, November 20, 1815, and April 25, 1818.*⁸

This Commission, and the Privy Council on appeals therefrom, decided the earliest known cases touching upon claims on behalf of dual nationals although none of the claimants were ultimately found to be dual nationals.

In the *Devereux* case (1819) ⁹ the decedent suffering the loss for which claim was made was a British national *jus soli* who, so the Commission found, had taken out letters of French naturalization in 1776 and made his home in France until 1791 when he returned to England and his French property was confiscated. Under the then English law, the foreign naturalization of an English national did not divest him of English nationality so the decedent could have been considered by the Commission to be a dual national. The Commission denied the claim but not on the ground the decedent was a dual national and not on the ground that under English law or policy he had lost the right to the protection of the British government. The Commission denied the claim on the ground the decedent was not a "British subject" within the meaning of the treaties. On appeal the Privy Council considered that the Commission had acted upon a correct principle but reversed the Commission on the ground that the decedent's French naturalization was not proven.

The *Devereux* case, standing alone, can be said to be insignificant as laying down an international test of "nationality" for international claims purposes because the claimant (decedent) was a national of the claimant state (Britain) but was not found to be a national of the respondent state (France). However, in the *Drummond* case ¹⁰

⁸ This was a "domestic" claims commission. By treaties of May 30, 1814, and November 20, 1815, it was provided that the British and French Governments would name Commissioners to examine and settle claims of "British subjects" against the French Government for the confiscation of their property in France. But the Commissioners could not agree among themselves and by a convention of April 25, 1818, France made a lump sum settlement to be distributed by British Commissioners. This was done pursuant to a statute (59 Geo. 3, c. 91) which provided that claimants could appeal the Commissioners' awards to the King in Council. See 2 Knapp 10-12, 298; 12 Eng. Rep. 383-384, 494; 2 Russ. 608, 38 Eng. Rep. 464.

⁹ Described in *Hill v. Reardon*, 2 Russ. 608, 38 Eng. Rep. 464, and in the *Drummond* case, below, n. 10.

¹⁰ 2 Knapp. 295, 12 Eng. Rep. 492.

(1834) the claimant (decedent) was a national of the claimant state (Britain) and was not a national of the respondent state (France) but both the Commission and the Privy Council clearly denied the claim on the ground the decedent was not a British national for the purpose of the claims treaties.

In the *Drummond* case the decedent suffering the loss for which claim was made a third generation British national *jus sanguinis* through his grandfather who was a British national *jus soli*. The decedent made his home in France until 1792 when he took up residence in England and thereafter his property in France was confiscated. The Commission denied the claim on the ground the decedent was not a British national for the purpose of the claims conventions; appeal was taken to the Privy Council which affirmed the denial.

Before the Privy Council it was argued against the claim that the decedent was a French national *jus soli* and,

Admitting that . . . [the decedent] . . . technically speaking . . . was, according to the statutes of this country, a British subject, still treaties must be interpreted according to the law of nations, which requires words to be taken in their ordinary meaning, not in the artificial sense which may have been imposed upon them by the particular statutes of a particular nation. When, therefore a treaty speaks of the subjects of any nation it must mean those who are *actually and effectually under its rule and government*, not those, who although living out of its dominions, and never having been subject to its government, it may choose to designate its subjects in its own municipal laws and statutes. It never could have been the intention of the framers of this treaty that the expression, 'British subjects,' should include persons who were also French subjects. How could, indeed, a French negotiator be acquainted with the technical rule of English law, by which a man, whose father and himself were born in France, is to be considered a British subject? [*Italics added.*]

It was argued for the claim that

The simple question is, whether the expression 'British subjects,' occurring in a treaty entered into on behalf of the British nation, is to be interpreted to mean that class of individuals who are designated as such by the laws and statutes of Great Britain, or whether a restricted and confined sense is to be attributed to it, according to some new and undefined rule of international law, as has been contended for on the other side. . . .

The Vice-Chancellor, in delivering the "advice" of the Privy

Council affirming the denial of the claim, accepted the former argument:

. . . But though formally and literally, by the law of Great Britain, he [the decedent] was a British subject, the question is, whether he was a British subject within the meaning of the treaty. . . . Their Lordships are therefore of opinion that although [the decedent] was technically a British subject [at the time of confiscation], yet he was also, at the same time, in form *and in substance, a French subject, domiciled in France, with all the marks and attributes of French character.* He and his family had resided in France for more than a century; and the act of violence that was done towards him was done by the French Government in the exercise of its municipal authority over its own subjects. [Italics added.]

Throughout the argument of the case before the Privy Council it was assumed that the decedent had been born in French territory. It was subsequently brought to the attention of the Council that he had been born in Avignon while that city was Vatican territory and that he was therefore only a British subject and not a French subject, and a rehearing was requested. This request was denied by the Privy Council on the ground that it was:

. . . satisfied *upon the facts* that [the decedent and his father], *did sufficiently indicate by their conduct their intention to accept the character of French subjects;* so that their estates could not be considered as “indument confisqués,” within the meaning of the treaty of 1814; and their Lordships think that the fact of the birth of [the decedent] at Avignon (now for the first time brought before them) does not vary the case. [Italics added.]

Before the petition for rehearing, the holding of the Privy Council may fairly be said to be that it lacked jurisdiction to hear the claim on the ground that the parties to the treaty could not have intended the phrase “British subjects” to include such who were also French nationals *and* who in their daily lives were in fact more closely connected with France. And the petition for rehearing was denied on the ground that the treaty was not intended to include “British subjects” who, although not French nationals, had indicated by their conduct their intention to regard themselves as French nationals.

In the cases of *Countess Conway* (1834), *Andre* (1821), and *Wellesley* (no date given)¹¹ the claimants were French nationals (*jus soli*) and wives or widows of British nationals but did not acquire

¹¹ 2 Knapp. 364, 12 Eng. Rep. 522.

British nationality nor apparently lose French nationality by such marriage. Mrs. Andre and Mrs. Wellesley were held entitled to claim against France on the ground that, although aliens, they had British character for the purpose of the claims treaties because actually residing in England. Countess Conway's claim was denied for lack of evidence of actual residence in England.

2. The American-British Commission under the Convention of February 8, 1853.

Although apparently no case before this Commission involved a claim of a dual national, this topic was very instructively discussed by counsel and Commissioners for both Governments in the *Laurent* case.¹²

In *Laurent* the inquiry was whether the Laurents had standing to claim as "British subjects" (*jus soli*) against the United States for their losses caused by United States military forces in Mexico where the Laurents had resided as merchants for twenty years, or whether the latter fact gave them Mexican character, *i.e.*, rendered them not British for the purpose of the claims convention. Counsel for both sides agreed that this was a question of interpretation of the convention in the light of international law. The British counsel argued that *Drummond* did not apply because the Laurents had not become Mexican nationals. Counsel for the United States argued that *Drummond* required only that they be resident in Mexico and hence were not British subjects within the meaning of the claims convention. The claim was allowed.

The opinion of the American Commissioner includes the following:

The international definition of 'subject' is also recognized and adjudged in *Drummond's* case . . . , where it was holden that though an individual might be formally and literally by the law of Great Britain a British subject, still there was a question beyond that, and that was whether he was a British subject within the meaning of the treaty then under consideration; and it was there contended that all treaties must be interpreted according to the law of nations, and that where a treaty speaks of the subjects of any nation it means those who are actually and effectually under its rule and government, and not those who for certain purposes under the mere municipal obligations of a country may be held to maintain that character. . . . Suppose, for instance, that an

¹² III Moore, *History & Digest of Int. Arb.* 2671 ff.

American citizen whose grandfather was born in England should come before this commission . . . to enforce his claim here against his own country, will it answer for this commission to say that by the law of England he is a British *subject*, and as such we must hear him? Surely not. . . .

In similar vein the opinion of the British Commissioner included the following:

Drummond's case . . . has been especially relied on. The reasons, however, which are expressly given for the decision in that case, show it was not determined on the mere fact of the claimant being domiciled in France, but *that from* special circumstances—such as accepting military employment under the French crown—he had voluntarily taken upon himself the character of a French subject, and having done so, the new French Government had a right to treat him as such, and consequently that he was not entitled to indemnity.

If there had been analagous circumstances in the present case, I might have felt bound to hold that the Messrs. Laurent were not entitled to resume at pleasure, for their advantage, the character of British subjects. . . . I can not find any force in the argument, that if the Messrs. Laurent are admitted under this convention as British subjects, thousands of American citizens by birth having claims against the American Government, might also have presented them before the Commissioners as British subjects by descent. If I am right in the rule of interpretation which I have adopted, it is clear that they could not. . . .

3. *The American-Mexican Commission under the Convention of July 4, 1868.*

This tribunal decided the *Martin* case (1871)¹³ which is the earliest of cases cited by Borchard in support of the supposed rule that a dual national *ipso facto* may not claim against either government of which he is a national. Martin was a United States national (*jus soli*) who had taken employment as an officer of a Mexican Government vessel. Under United States law such employment had no effect on his United States nationality but under Mexican law such employment clothed him with Mexican nationality. The Commission denied his claim against Mexico for unpaid salary on the ground that

It can already be said that all enlightened governments agree that it is an international duty to recognize the naturalization of their subjects in other countries. That duty, it is certain, has not been recognized in all legislations, because, perhaps, it is

¹³ *Id.*, 2467.

not in harmony with the national, political, and judicial institutions; but it has been accepted explicitly or implicitly in international transactions. Thus it has become a part of the law of nations, and now constitutes a rule to decide questions pending between sovereign nations. Consequently, it ought to be accepted as a guide in the decisions given by this commission, whenever it may be deemed applicable, as it is, according to our opinion in the present case. John T. Martin, a native of North Carolina, acquired the Mexican citizenship according to the laws of that country; by that same fact he was deprived of the American citizenship; and, this being his condition at the time of acquiring the right alleged by him, it is evident that he had no legitimate personality to prefer a claim against the Republic of Mexico.

The foregoing rationale has never been regarded as a generally accepted rule of international law. Nevertheless, in the light of such rationale it is obvious that *Martin* does not support Borchard's supposed rule regarding dual nationals, even though there exists in the case the juxtaposition of the facts that Martin was a Mexican national under Mexican law and that the claim was denied.

In several cases ¹⁴ not involving dual nationals in which the Commission held that foreign residence did not in itself divest the claimant of his nationality, counsel for the United States observed that only in the case of dual nationals is it generally held that residence or actual domicile "might properly determine for practical purposes" their national character as between the two countries.

In other cases ¹⁵ not involving dual nationals the Commission held that a real and actual residence in the United States plus a declaration of intent to become a citizen would confer American nationality for the purpose of the convention. In many cases where such a claimant had not maintained his actual residence in the United States he was denied claimant status.¹⁶ The logic of the foregoing holdings would apply even if the claimant was technically a national of the respondent state.

In the *Schreck* case (1874)¹⁷ the claimants were American nationals *jus sanguinis* but were born in Mexico. The umpire held that since Mexico was entitled to regard them as Mexican nationals by birth, "the umpire is therefore of the opinion that [they] . . . have no standing before the mixed commission and cannot claim, as citizens of the United States, against the country of their birth." In assessing

¹⁴ *Id.*, 2695 ff.

¹⁵ *Id.*, 2713 ff.

¹⁶ *Id.*, 2718 ff.

¹⁷ *Id.*, 2450. The decision was vacated and the claim allowed upon new evidence that the claimants never acquired Mexican nationality.

the weight of this opinion as declaratory of international law, it should be noted that: (1) it is given solely as the umpire's opinion without citation of authority of state practice, judicial precedent, or publicists; (2) it is a fair factual inference that the claimants had always resided in Mexico.

4. *The American-British Commission under the Treaty of May 8, 1871.*

The opinion of this tribunal in the *Alexander* case (1872)¹⁸ is the only one cited by Borchard which supports—superficially—his formulation of the supposed general rule regarding dual nationals.

Great Britain made claim on behalf of the estate of Alexander, owner of certain real property in Kentucky which was damaged by United States forces in the Civil War. Alexander was a United States national *jus soli* and a British national *jus sanguinis*. In his early youth he returned to his father's home in Scotland where he grew up and for many years held public office. During the Civil War his residence was partly in Scotland and partly in Kentucky, where he died in 1867.

Counsel for the United States admitted by demurrer that Alexander had always held himself a British national and had been so regarded by all others, but counsel contended that as a dual national he was not a "British subject" within the meaning of the treaty, citing *Drummond*.

Counsel for Great Britain argued that Alexander's position was not like that of Drummond because Drummond was held to have sufficiently indicated by his conduct his intention to accept the character of French national whereas Alexander had never indicated his intention to accept the character of American national. On the contrary, he had always claimed to be a British national and was recognized as such by special legislation of Kentucky empowering him to hold property there notwithstanding his alienage and residence in Scotland.

The Commission by a 2 to 1 vote held that it had no jurisdiction over the claim. The American commissioner, Frazer, rendered an opinion in which the presiding neutral commissioner concurred, concluding as follows:

Being, then, a subject of both governments, was he a British subject within the meaning of the treaty? The practice of nations in such cases is believed to be for their sovereign to leave the

¹⁸ *Id.*, 2529; *Hale's Rep., For. Rels. 1873*, vol. III, p. 15.

person who has embarrassed himself by assuming a double allegiance to the protection which he may find provided for him by the municipal laws of that other sovereign to whom he thus also owes allegiance. To treat his grievances against that other sovereign as subjects of international concern would be to claim a jurisdiction paramount to that of the other nation of which he is also a subject. Complications would inevitably result, for no government would recognize the right of another to interfere thus in behalf of one whom it regarded as a subject of its own. It has certainly not been the practice of the British Government to interfere in such cases, and it is not easy to believe that either government meant to provide for them by this treaty. In Drummond's case the terms of the treaty were quite as comprehensive as those of this treaty, and yet it was there held that the claimant was not within the treaty, not being within its intention. This was held even after it was ascertained that he was not a French subject, he having merely evinced his intention to regard himself as a French subject.

There are several reasons for believing that the actual rationale of Frazer's opinion is that, for claims purposes as between the two governments of which he is a national, a dual national is deemed to be a national of the government with which he has the most significant contact (usually residence) at the time of loss or injury. In this case it was the respondent, United States, because at the time of loss, Alexander had resumed residence in the United States, the country of his birth, where he died without ever returning to Scotland.

Frazer's opinion, above, refers to "the person who has embarrassed himself by assuming a double allegiance" and says that "It has certainly not been the practice of the British Government to interfere in such cases. . . ." No evidence has been found that at this time (1872) the British Government, other governments, or international tribunals allowed the claim of a dual national *per se* to be brought as a matter of law against a government of which he is a national. The cases discussed above are evidence to the contrary. Frazer's reference is to the British practice regarding persons who (unlike Alexander—a dual national at birth) *by their own act* became dual nationals, *i.e.*, persons who acquired a second nationality by naturalization. From the beginning of the nineteenth century until 1870, an Englishman naturalized abroad remained an Englishman in the eyes of English law. If he returned to British territory he was held to be unentitled to the protection of his adopted government. However, when residing in his adopted country, he was held to be bound by his own act of renuncia-

tion of his English character and so he was refused the protection of the British Government to which he acknowledged no duties. But this refusal of protection was not considered to be based upon any rule of international law; it was a discretionary attitude of the British Government toward its own national.¹⁹

Analysis of Frazer's reliance on *Drummond* also indicates that Frazer's actual rationale in *Alexander* was the characterization of Alexander as being resident or domiciled in the respondent state at the time of loss. In *Alexander* counsel for Britain argued, and counsel for the United States admitted by demurrer, that Alexander had evinced his intent to regard himself as a British national; but counsel for the United States argued that the mere fact of Alexander's American nationality per se meant the claim could not be entertained. However, Frazer did not base his opinion upon the latter's argument but relied on the holding in *Drummond* that the decedent was not within the treaty phrase "British subjects" even after it was ascertained he had "merely evinced his intention to regard himself" as a national of the respondent, France. This would be a sound and consistent ground for a similar interpretation of "British subject" in *Alexander* only if Frazer considered that Alexander by resuming residence in the United States had evinced his intention to regard himself as a national of the respondent, United States.

Finally, Frazer's dissent in the *Ferris* case (1872)²⁰ in which he further expounded upon his opinion in *Alexander* clearly shows his actual rationale in the latter to be that a dual national for claims purposes is deemed a national of the government in whose territory he resides.

In *Ferris* a decedent who was exclusively a British national had sustained a property loss in the United States for which the United States was allegedly responsible but the heir and beneficial claimant was a minor son who was a British national *jus sanguinis* and an American national *jus soli* who apparently resided in the United States. Counsel for the United States argued that the claim was barred because of the beneficial claimant's American nationality. Counsel for Britain argued that the United States could not impress upon the infant heir of a British national the character of American citizen for the sole purpose of denying him the benefit of the claims treaty. By a vote of 2 to

¹⁹ Report of the Royal Commission on the Laws of Naturalization and Allegiance, Appendix, pp. 31-48 (1869).

²⁰ III Moore, *op. cit.*, 2239-2242.

1 the Commission allowed the claim in an opinion which said only that where the decedent "was exclusively a British subject, and the beneficiaries are British subjects as well as American citizens, the claim may be prosecuted for their benefit." Frazer's dissent included the following:

By the very words of the treaty . . . the claim must be, first, for an act done to . . . a British subject. . . . The treaty is the language of both governments, and must be construed to effectuate not the intent of *one* only, but of *both*. [Emphasis in original.] If any of its terms have one sense in Great Britain and another in the United States by reason of their respective laws, neither of these senses can fairly be taken; another, though limited, sense must be sought, common to both countries. There is such a restricted sense of the language employed here. In Alexander's case I expressed myself on this branch of the present question. One born in the United States of British parents *residing here* [in the United States] would be protected by the United States as fully as any American against wrongs from other countries, Great Britain probably not excepted. And Great Britain would not, as against the United States, intervene in his behalf, though she would claim him as her subject, and hold him to accountability as such if found bearing arms against her. And if born here [in the United States] of British parents during a temporary sojourn, but afterwards domiciled in England and *never residing here*, the United States would practically treat him as not an American, refusing to intervene in his behalf against any other government, though she, too, would hold him to accountability as a citizen if found in arms against her. And so of persons born in Great Britain of American parents. . . . (Emphasis added.)

This tribunal also decided the *Boyd* case (1873),²¹ cited by Borchard in support of his formulation of the general rule regarding claims of dual nationals. Boyd had American nationality *jus soli*, took a job in Scotland in 1862, and there received British naturalization in 1864. He immediately returned to the United States on a British passport to take his wife back to Scotland and shortly after arrival in the United States suffered the injury upon which he based his claim against the United States. But thereafter he sought and obtained employment in the United States in his profession and never returned to British territory. The United States contended Boyd lost his British nationality and was solely a United States national. The Commission dismissed the claim without rendering a written opinion. It is just as

²¹ *Id.*, 2465.

possible that the Commission believed Boyd had lost his British nationality, as it believed that he possessed both nationalities. In the latter event it is also possible the Commission could have regarded his factual ties with the United States as being closer. In the absence of any reasoned opinion by the Commission, Borchard was not justified in citing *Boyd* in support of his formulation of the general rule merely because of the coincidence of circumstances that Boyd could be considered a dual national and his claim was not entertained.

5. *The American-French Commission under the Convention of January 15, 1880.*

This tribunal decided the *Lebret* case (1884)²² cited by Borchard in support of his formulation of the general rule. The claim was presented on behalf of Elise Lebret, a French national *jus soli*, and allegedly arose out of the destruction by Federal forces in the Civil War of the joint property of Mrs. Lebret and her deceased husband, an American national.

Counsel for the United States demurred to the claim on the ground that Mrs. Lebret had lost her French nationality and acquired by marriage the United States nationality of her husband. The Commission unanimously sustained the demurrer without giving any reasons *qua* Commission.

The French Commissioner in a separate opinion held that since Mrs. Lebret had lived in the United States for more than forty years without ever returning to France or contributing to the interests of France her attachment to France was too platonic to justify France in demanding compensation for her losses.

The United States Commissioner in a separate opinion held that Mrs. Lebret had either lost her French nationality, or "If we admit that there is a conflict of laws in this case, that she is American by American law and French by French law, then the rule of decision is, that she is deemed to be a citizen of the country in which she has her domicile, that is, the United States." In support of this rule he cited publicists²³ and the *Alexander* case.

It seems clear the *Lebret* does not support Borchard's supposed general rule. The separate opinions of the two national commissioners in essence are in accord with the *Drummond* case, above.

²² *Id.*, 2488.

²³ Bluntschli, *Int. Law*, sec 394; Morse, *Citizenship*, p. 160; and Twiss, *Law of Nations*, pp. 231-232.

This tribunal also decided two other cases involving dual nationals in a manner contrary to Borchard's general rule.

In the *Chopin* case (1884)²⁴ claim against the United States was made on behalf of the children and heirs of Jean Chopin, a French national who had died in 1870. These children were American nationals *jus soli* and had visited and resided in France for brief periods. During the pendency of the claim one of these children, Oscar, died leaving as his heirs a widow and five children, American nationals *jus soli*. The United States objected that the Commission had no jurisdiction because of the American nationality of the children of Jean, and of Oscar.

The American Agent, Boutwell, in his report of the case concludes with the following:

An award was made by the united action of the Commission. . . . There was, however, no order as to the distribution of the sum so awarded, nor any indication of opinion on the part of the Commission as to the citizenship of the children of Oscar Chopin. It may, however, be assumed fairly that the Commission were of opinion that the children of Jean Baptiste Chopin, although born in this country, were citizens of France, and that, inasmuch as the death of Oscar Chopin occurred after the ratification of the Treaty and after the presentation of the memorial, his right to reclamation had become so vested that it descended to his children independently of the question of their citizenship in France.

Borchard²⁵ states that the decision appears "contrary to the general rule" and that "the decision is not well reasoned." But no written opinion was rendered. Borchard also echoes Boutwell's explanation that Oscar Chopin had died after the ratification of the convention. But this explanation fails because Oscar Chopin, himself, was a national of both France and the United States. Therefore it can only be assumed that the Commission felt that the fact that Jean Chopin, the decedent sustaining the loss, had been exclusively a French national was sufficient to justify overruling the United States objection that his heir, Oscar, was also an American national.

In the *Petit* case (1884)²⁶ special counsel for the claimant against the United States summarized the facts and his argument as follows:

The evidence in the case shows that Petit was born in Bordeaux, France, in 1818; that he remained a citizen of France

²⁴ III Moore, *op. cit.*, 2506; Boutwell, *Rep.*, p. 88.

²⁵ *Op. cit.*, p. 589, n. 2.

²⁶ Boutwell, *Rep.*, p. 86.

until October, 1868, when he was naturalized as a citizen of the United States; that in 1870 he returned to France with his family and all his means, resumed his native nationality by his declaration and acts, and that he and his family have resided there continuously since, claiming to have resumed his native citizenship, and that he has been recognized as a French citizen. The certificate of reintegration as a French citizen (issued by the French authorities in 1881, five months after his claim was filed) was only the completion of all evidence on that point to meet any technical question that might be raised.

Counsel for the United States argued that the claimant did not resume French nationality until September 1881, and that, therefore the Commission had no jurisdiction (*i.e.*, that Petit was solely an American national at the relevant times).

The Commission made an award to Petit without written opinion, which was commented upon by the American Agent as follows:

As the Commission entertained jurisdiction notwithstanding the naturalization of Petit in the United States in the year 1868, it is to be assumed that the views of the special counsel were accepted. It is not to be inferred, however that the Commission reached the conclusion that the reinstatement of Petit as a French citizen in the year 1881 was accepted as justifying jurisdiction, but that the jurisdiction was found in the fact that he returned to France in 1870, and had acted as a French citizen and had been accepted as a French citizen for the period of ten years and more previous to his formal reinstatement in citizenship by the duly-constituted authorities.

6. The American-Venezuelan Commission under the Convention of December 5, 1885.

In the *Hammer* and *de Brissot* cases ²⁷ the claims were against Venezuela on behalf of widows and their adult children who had both Venezuelan and American nationality. They were all born in and had always resided in Venezuela. The widows acquired American nationality by marriage and the children by *jus sanguinis*. The Commission unanimously held that the claimants were not American nationals within the meaning of the treaty.

The Venezuelan commissioner said that in the national courts of the United States or Venezuela the claimants would be considered American or Venezuelan, respectively, but that before an interna-

²⁷ III Moore, *op. cit.*, 2456 ff., date not given.

tional tribunal the question of their nationality is governed by international law. He then said:

[The widows] were born in Venezuela and both married there to citizens of the United States in 1853, before the law of 1855 had made them also citizens of the United States. So the citizenship which they afterwards acquired by operation of law cannot be said to have been acquired consciously and voluntarily; while, on the other hand, they have, after becoming widows, continued to reside in Venezuela without having ever made any declaration whatever as to their desire of preserving such citizenship or without having ever come to the United States, which seems to show not only by the fact of their birth but also by their own free will that they prefer the Venezuelan citizenship. To declare them citizens of the United States against their express or presumptive good will would be contrary to the general principle of right and to those of international law now prevailing. . . . 'Supposing, finally, that an individual united in his person several nationalities, it would be necessary to apply the law *best agreeing with his actual position*, otherwise the question would be insoluble.' (Heffter) . . .

As to the children . . . they were also born in Venezuela where they have been residing since the death of their fathers. Having attained their majority they have not claimed the paternal citizenship nor have they fixed their domicile in the United States. This conjuncture of circumstances seems to clearly indicate that they, too, have renounced the citizenship of their filiation and chosen that of their birthplace and permanent domicile. According to the principles already invoked, . . . that in case of conflict between several citizenships that is to be preferred which is more in accordance with the actual position of the person, namely, that of the place of his actual residence and domicile, the said children as well as their mothers must be held to be Venezuelans and to have no standing before this Commission.

The American and neutral commissioners each filed an opinion in substantial agreement with the Venezuelan commissioner on the question of the claimants' nationality.

7. The Italian-Peruvian Arbitral Tribunal under the Protocol of November 25, 1899.

In the *Arata* case (1900)²⁸ the claimants against Peru were children born in Peru of an Italian father. The Peruvian Government argued against the claim on the ground the claimants were

²⁸ Descamps et Renault, *Recueil Int. des Traités du XXe Siècle* (1901), vol. 1, p. 709.

Peruvian nationals *jus soli*. The arbitrator said that in cases of dual nationality tribunals solve the conflict in accord with rules of international law without calling into question the validity of either nationality and allowed the claim on the ground of what he considered to be the "universally admitted principle" that internationally the conflict is resolved by giving preference to the nationality of the children's father when he is not domiciled in the country of the children's birth.

8. The Venezuelan Arbitrations under the Protocols of 1902 & 1903.

The summer of 1903 saw assembled at Caracas eleven international arbitral tribunals appointed to adjudicate claims of as many governments against Venezuela. Three of these tribunals rendered written opinions in seven cases involving dual nationals, the rationale in all being contrary to Borchard's supposed rule although he cites two of them (*Brignone & Maninat*) in support thereof.

Plumly, umpire of the British-Venezuelan tribunal, decided the *Mathison* and *Stevenson* cases.

In *Mathison*²⁹ claim was made on behalf of a British national *jus sanguinis* who was born in Venezuela and who had always resided in Venezuela. The umpire found that the claimant was also a Venezuelan national *jus soli* and held that internationally the claimant must be deemed to be only Venezuelan when *jus soli* links allegiance to the *de facto* nationality of a country in which a man resides and rears his children.

In *Stevenson*³⁰ claim was made on behalf of the estate of Stevenson, a British national residing in Venezuela at the time of his death. One of the principal parties in interest to the claim was Stevenson's widow, a Venezuelan national by birth who had always resided in Venezuela. The umpire dismissed the claim as to the widow "consistently with his holding, and for the reasons and upon the authorities given in the *Mathison* case," and also saying that:

. . . In the opinion of the umpire, where, as in this case, there appears to be a conflict of laws constituting Mrs. Stevenson a British subject under British law and a Venezuelan under Venezuelan law the prevailing rule of public law, to which appeal must then be taken, is that she is deemed to be a citizen of the country in which she has her domicile; that is, Venezuela.

²⁹ Ralston, *Venezuelan Arbs. of 1903* (1904), p. 429.

³⁰ *Id.*, p. 438.

The umpire also referred to the conditions under which Mrs. Stevenson's British nationality might be held as predominant:

Had Mr. Stevenson taken his wife within the dominions of Great Britain to reside, and had he there remained and died, leaving her domiciled there, and were she asserting a claim before this tribunal as one still domiciled in Great Britain or its dependencies, in the opinion of the umpire the law of Great Britain might well be taken as the controlling law and she be held to be a citizen of Great Britain as against Venezuela, notwithstanding the law of Venezuela reestablishing her citizenship in that country after the death of her husband.³¹

Ralston, umpire of the Italian-Venezuelan tribunal, decided the *Brignone*, *Miliani*, and *Poggioli* cases.

In *Brignone*³² the claim was against Venezuela on behalf of the widow of an Italian national, the widow being born and always residing in Venezuela. The umpire first quoted the respective civil codes of Italy and Venezuela each to the effect that a native-born woman marrying a foreigner and becoming a widow having resided all the time at her original home reassumes her original nationality. The umpire then said that in his opinion "there is not a true conflict of laws, if we read the foregoing extracts with due regard to their spirit," thus implying that at the death of her Italian husband the claimant lost her Italian nationality. The umpire also said that if the claimant is considered to be a dual national the rule is that the law which governs her status is the law of her domicile, citing in support thereof of Frazer's opinion in *Alexander*.

Both these conflicting reasons can hardly be considered the rationale of the umpire's decision to reject the claim but it is impossible definitely to state which is the ground from a reading of the decision. However, Ralston's own text³³ states that the holding in this case is the same as in *Stevenson* and *Mathison*.

The headnote written by Ralston to his opinion in *Miliani*³⁴ states that "in cases of double citizenship neither country can claim the person having the same as against the other nation although it may as against all other countries." However, the opinion of the umpire accepts residence or domicile as "furnishing the rule in case of conflict" and refers for authority to "the decisions cited in the *Brignone*

³¹ *Id.*, p. 445.

³² *Id.*, p. 710.

³³ Ralston, *The Law & Procedure of Int. Tribunals* (1926), p. 171, n. 4.

³⁴ Ralston, *Venezuelan Arbs. of 1903* (1904), p. 754.

case." The headnote is therefore inconsistent with the written opinion and the latter is, of course, controlling.

In *Poggioli*⁸⁵ there is no discussion of the point in Ralston's opinion but the headnote by him states that "the widow and children of an aggrieved Italian, who were all born in Venezuela and have always lived in that country, cannot claim as Italian subjects before this Commission (affirming Brignone and Miliani cases)."

Plumly, who was also umpire of the French-Venezuelan tribunal, decided the *Maninat & Massiani* cases.

In *Maninat*⁸⁶ the claim was against Venezuela on behalf of the heirs of a French national. It appeared that some of the heirs were nationals of both France and Venezuela. The umpire in deciding against the claim of the heirs who were dual nationals pointed out that they were born and reared in Venezuela and held that "In a conflict of laws as to nationalities the law of the place of domicile should prevail." He then referred to his opinion in *Mathison* and *Stevenson* pointing out that they were similar holdings by him and invited attention to his reasons and the authorities supporting them discussed in those cases.

In *Massiani*⁸⁷ the claim was against Venezuela on behalf of the widow and children of a French national. In his opinion discussing the claim the umpire said:

The widow was born in Venezuela, achieved French nationality by the laws of both countries when she married Thomas Massiani, but by the laws of Venezuela was restored to her quality as a Venezuela citizen at his death. During their married life they remained in Venezuela; they were there domiciled when he died. It has always been her domicile. It is therefore her nationality, since such is the law of her domicile, which law prevails when there is a conflict as held by the umpire in the claim of *Maninat* heirs before this same tribunal. The children of this marriage were all born in Venezuela. By the voluntary action of their father this was their birthplace. It has always been their domicile, first through the paternal selection and later through their own choice. Hence, governed by the laws of their domicile, they are Venezuelans. . . .

This case is on all fours with that of the estate of *Stevenson*, decided by the umpire in the British-Venezuelan Mixed Com-

⁸⁵ *Id.*, p. 847.

⁸⁶ Ralston & Doyle, French-Venezuelan Mixed Claims Commission of 1902 (1906), p. 44.

⁸⁷ *Id.*, p. 211.

mission of 1903. . . . The reasons there given and the authorities there accumulated are directly in point in this case. . . .

9. *The Canevaro case (Italy v. Peru)*, *Permanent Court of Arbitration under the Agreement of April 25, 1910*.⁸⁸

In this case one of the claimants, Rafael Canevaro, was Italian *jus sanguinis* and Peruvian *jus soli*. The tribunal held (1912) that "Peru has a right . . . to deny his status as an Italian claimant" because "as a matter of fact, Rafael Canevaro has on several occasions acted as a Peruvian citizen" by running as a candidate for the Peruvian Senate and defending his election thereto and by securing the authorization of the Peruvian Government and Congress for his acceptance of the office of Consul General of The Netherlands.

10. *The Mixed Arbitral Tribunals after World War I*.

The various peace treaties after World War I entitled the nationals of the victor states to file certain claims against the defeated states before a series of Mixed Arbitral Tribunals, who ignored Borchard's supposed rule.

In the *Hein* case⁸⁹ before the British-German tribunal the claimant did not lose his original German nationality when he became a naturalized British subject. Moreover, his British naturalization certificate contained an express reservation to the effect that within the limits of his country of origin he was not to be deemed a British subject. Nevertheless the tribunal held that because the claimant was a British national he had the right to file a claim.

In the *Grigoriou* case⁴⁰ before the Bulgarian-Greek tribunal Bulgaria objected to the claim against it on the ground the claimant was a Bulgarian national but the tribunal held that the claimant had a right to file the claim simply because he was a Greek national.

The French-German tribunal decided the *Blumenthal*⁴¹ and *de Montfort*⁴² cases each involving a claim against Germany on behalf of a claimant who possessed French and German nationality. In *Blumenthal* the tribunal simply rejected the German defense based upon the claimant's German nationality and held he was entitled to claim. In *de Montfort* the tribunal held the claimant was entitled to

⁸⁸ Scott, Hague Ct. Rep. 284 (1916).

⁸⁹ II Recueil des Decisions des Tribunaux Arbitraux Mixtes (1920-1925), p. 71.

⁴⁰ III *Id.*, p. 977.

⁴¹ *Id.*, p. 616.

⁴² VI *Id.*, p. 806.

claim on the ground of effective French nationality because the claimant had never ceased to live in France and there exercise the duties of citizenship.

The French-Turkish tribunal decided the *Apostolidis* case ⁴³ in which Turkey defended on the ground that the claimants retained Turkish nationality even though naturalized as French, and that under Turkish law the French naturalization was void. The tribunal recognized the standing of the claimants as French nationalists saying that under international law the naturalization must be recognized by "all other judicial authorities, including the Mixed Arbitral Tribunal. . . ."

The Tripartite Claims Commission, United States, Austria, and Hungary, decided the *Tellech* ⁴⁴ (1928) and *Fox* ⁴⁵ (1929) cases involving dual nationals of the United States and Austria. The basis of the claims was the claimants' enforced military service by the Austrian authorities. The claims were denied on the ground that the claimants' continued residence in Austrian territory after adulthood was a voluntary subjection by them to the duties of their Austrian nationality.

11. The Inter-War Period

Borchard's formulation of the rule regarding dual nationals reached a limited zenith before three tribunals in the period between the two world wars, either by way of dictum or summary treatment of the problem, based upon deference to the authority of Borchard without any independent examination of past arbitral opinions. Moreover, viewing these three tribunals' decisions in historical perspective it seems significant that in every case the claimants were born in the territory of the respondent government and resided there at the time of loss or injury for which claim was made.

In the *Pinson* case (1928) ⁴⁶ before the French-Mexican tribunal under the convention of September 24, 1924, the claim against Mexico was entertained on the finding that the claimant possessed only French nationality. But in dictum, if the claimant had been also a Mexican national, the tribunal seemed to imply that it might have considered the claim to be barred but for the fact that the Mexican authorities

⁴³ VIII *Id.*, p. 373.

⁴⁴ *Decisions & Opinions*, p. 71.

⁴⁵ *Id.*, p. 73.

⁴⁶ *Annual Digest of Public Int. Law Cases 1927-28*, Case No. 195.

had never treated the claimant as Mexican in all the years of his residence there.

The British-Mexican tribunal under the convention of November 18, 1926, considered three claims against Mexico by dual British-Mexican nationals born and residing in Mexico: *Oldenbourg* (1929),⁴⁷ *Adams and Blackmore* (1931),⁴⁸ and *Honey* (1931).⁴⁹ Mexican counsel in defense relied solely on the treatises of Borchard⁵⁰ and Ralston.⁵¹ British counsel agreed, instead of briefing the issue, and so the tribunal rejected the claims.

The American-Egyptian tribunal under the protocol of January 20, 1931, created to decide the claim of Salem (1932),⁵² a naturalized American born in Egypt, found that the claimant was not an Egyptian national but in dictum cited Borchard⁵³ approvingly.

*12. The American-Italian Conciliation Commission*⁵⁴ *under the Treaty of Peace with Italy of February 10, 1947.*

This tribunal's leading case is *Mergé* (1955)⁵⁵ in which the United States espoused a claim on behalf of a dual American-Italian national. The issue of the legal effect of the claimant's Italian nationality was exhaustively briefed by counsel. The tribunal unanimously held the claim was barred on the ground the claimant's conduct manifested an intent to be effectively an Italian national, but adopted as a rule of decision for future cases the criterion of the claimant's closer and more effective bond with either the claimant or respondent state:

The principle, based on the sovereign equality of States, which excludes diplomatic protection in the case of dual nationality, must yield before the principle of effective nationality whenever such nationality is that of the claiming State. But it must not yield when such predominance is not proved, because the first of these two principles is generally recognized and may constitute

⁴⁷ *Decisions & Opinions*, p. 97.

⁴⁸ *Further Dec. & Ops.*, p. 199.

⁴⁹ *Id.*, p. 13.

⁵⁰ *Op. cit.*, p. 588.

⁵¹ *Op. cit.*, n. 33 above.

⁵² III Hackworth, *Digest of Int. Law* 166-167.

⁵³ *Op. cit.*, p. 588.

⁵⁴ The Commission was created to deal with disputes over treaty provisions concerning the property in Italy of Allied nationals and operated as an arbitral tribunal whenever it was necessary to add a "third member" due to disagreement of the two national commissioners.

⁵⁵ [1955] I.L.R. 443.

a criterion of practical application for the elimination of any possible uncertainty. . . .

In order to establish the prevalence of the United States nationality in individual cases, habitual residence can be one of the criteria of evaluation, but not the only one. The conduct of the individual in his economic, social, political, civil and family life, as well as the closer and more effective bond with one of the two States must be considered.⁵⁶

Conclusion

In the following dictum of the *Nottebohm* case before the International Court of Justice the true rationale of the foregoing century and a half history of the treatment by international tribunals of the claims of dual nationals against one of the governments of the claimant's nationality has been captured in its essence and with such succinct perspicacity: ⁵⁷

International arbitrators have decided in the same way numerous cases of dual nationality, where the question arose with regard to the exercise of protection. They have given their preference to the real and effective nationality, that which accorded with the facts, that based on stronger factual ties between the person concerned and one of the States whose nationality is involved. Different factors are taken into consideration, and their importance will vary from one case to the next: the habitual residence of the individual concerned is an important factor, but there are other factors such as the centre of his interests, his family ties, his participation in public life, attachment shown by him for a given country and inculcated in his children, etc.

⁵⁶ The tribunal's subsequent application of this rule of decision in fifty-two cases is summarized by its President in Messia, "La protection diplomatique en cas de double nationalite," published in *Hommage d'une generation de juristes au President Basdevant* (1960), pp. 547-558. The Anglo-Italian Commission under the same treaty also followed the same rule of decision in numerous cases.

⁵⁷ I.C.J. Reps., 1955, p. 4.