DUAL NATIONALITY AND ELECTION*

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RECOGNITION BY INTERNATIONAL ARBITRATION COMMISSIONS

In a number of cases international arbitration commissions have recognized the principle of election. In the case of Gautier v. Mexico, which was submitted to arbitration under the Convention of July 4, 1868, an award was made in the claimant's favor. Gautier was born in the United States of French parents and went to Mexico to reside at the age of nineteen. He was said to have made a "valid act of adoption of French nationality," and was recognized by the Arbitration Commission as a French citizen.59

The claims of the de Hammers and de Boissots against Venezuela related to persons who were born in Venezuela of American fathers. Andrade, Commissioner, in rendering his decision said:

"Having attained their majority they have not claimed the paternal citizenship, nor have they fixed their domicil 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 domicil. . . . 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 domicil."

In this case Little, Commissioner, observed that questions of dual nationality must be "resolved from the standpoint of the public law," meaning, presumably, international law.53

The decisions just mentioned do not seem to accord entirely with the decision of the American and British Claims Commission in the case of Alexander v. United States. Alexander was born in Kentucky in 1819, the son of a Scotchman, went to Scotland in early youth, resided there for many years and after reaching his majority held office in Scotland, but subsequently returned to Kentucky, where he died in 1867. It was held that his claim against the United States should be dismissed, as he had never lost his American citizenship. "He was not capable of "divesting himself of his American nationality by mere volition and "residence from time to time in Scotland and holding office there."52

In other words, the Arbitration Commission in this case took the strictly legal view of citizenship, and, finding no statute of the United States under which an American loses his citizenship by making a practical election of a foreign nationality, held that he was still an

* Continued from the April No.

59 3 Moore, International Arbitrations (1898) 2456.
53 Ibid.
52 Ibid. 2529.

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American citizen. Possibly a different decision would have been made, if Alexander had not returned to the United States to reside, but this is not likely.

In most of the cases involving questions of dual nationality decided by international courts of arbitration the claimants were found to be citizens of the countries against which the claims were brought, under their laws, although they were also citizens of other countries under the laws thereof, and in nearly all of these cases it was held that the courts had no jurisdiction, since a person cannot properly sue in such a court a country of which he is a citizen. In the case of Mathison v. Venezuela\(^{29}\) it appeared that the claimant was born in Venezuela September 14, 1858, of a British father and had always resided there. Plumley, the Umpire, said:

> “It is admitted that, if he is also a Venezuelan by the laws of Venezuela, then the law of the domicile prevails and the claimant has no place before this Mixed Commission.”

The Umpire decided that he was in fact a Venezuelan citizen, under Venezuelan law, and therefore disallowed the claim. It seems likely that, if he had been domiciled in Great Britain, the decision would have been the same, for under Venezuelan law, he would still have been a citizen of Venezuela. In this case the Umpire went so far as to say that Mathison was “not a British subject,” but this was merely a dictum, the decision that he was a Venezuelan being a sufficient ground for disallowing the claim. The Umpire’s statement that Mathison was not a British subject seems to have been based upon his theory that \textit{jus soli} is the only true principle of nationality.

The case of \textit{Oscar Chopin v. United States} related to a person who was born in the United States of a native French father. Apparently he had continued to reside in this country. The Commission under the Convention between the United States and France of January 15, 1880, for some unaccountable reason, decided the case in his favor, although he was not only a citizen of the United States under the law of this country, but apparently domiciled in the United States. The report of the case is meagre\(^{24}\) and the grounds for the decision are not given, but it seems to have been contrary to all precedents and cannot be regarded as of much weight.

In a number of cases the Venezuelan Arbitration Commissions decided adversely the claims of Venezuelan women who were widows of aliens and had always been domiciled in their native land.\(^{28}\) Although in these cases the Arbitration Commissions laid some stress upon the fact that the women in question were domiciled in Venezuela, their decisions found sufficient basis in the simple fact that, under Venezuelan

\(^{29}\) Ralston, \textit{Venezuela Arbitrations of 1903} (1904) 439.


\(^{28}\) Stevenson, Miliani, Brignone, and Poggioli Cases, Ralston, \textit{op. cit.}, 438, 754, 710, and 847; Hammer & Brissot Case, Moore, \textit{International Arbitrations}, 2456.
law, they had recovered Venezuelan nationality upon the deaths of their husbands. While these latter cases have been sometimes cited in discussions of dual nationality and election, they would seem to have only an indirect bearing upon the question which we have under consideration.

Altogether, while arbitration courts have to some extent recognized the principle of election, they can hardly be said by their decisions to have established it as a definite rule of international law.

Perhaps the most notable decision of a court of arbitration, in which the question of dual nationality has been involved, was the decision of the Hague court, May 3, 1917, in the Canevaro arbitration. The claim against Peru of Raffaele Canevaro, who was born in Peru of an Italian father, and had resided and carried on business there during the greater part of his life, was disallowed because he had the status of a Peruvian citizen under Peruvian law. The decision of the court was based upon the following postulates, among others:

"And whereas, according to Peruvian legislation (Art. 34 of the Constitution), Raphael Canevaro is a Peruvian by birth because born on Peruvian territory,

"And, on the other hand, the Italian legislation (Art. 4 of the Civil Code) assigns to him Italian nationality because he was born of an Italian father);

"And whereas, as a matter of fact, Raphael Canevaro has on several occasions acted as a Peruvian citizen, both by running as a candidate for the Senate, where none are admitted except Peruvian citizens and where he went to defend his election, and also especially by accepting the office of Consul General of the Netherlands, after soliciting the authorization of the Peruvian Government and then of the Peruvian Congress;

"And whereas, under these circumstances, whatever Raphael Canevaro's status may be in Italy with respect to his nationality, the Government of Peru has a right to consider him as a Peruvian citizen and to deny his status as an Italian claimant."[n]

Charles de Boeck speaks in high praise of this decision. "In our opinion," he says, "one cannot but approve this manner, at once elegant and practical (réalistes) of resolving a question which, theoretically, would seem insoluble. The 'élegance du droit' is satisfied, for neither of the two sovereignties, equally to be respected, which are found in conflict is sacrificed. From the point of view of concrete reality, how can we be surprised to see preferred the active nationality, that which is of law and of fact, and for which the manifest and constant will of the person in interest has been pronounced."

While this important decision seems to have a decided slant toward recognition of the principle of election, it is to be noted that the court did not go so far as to hold that Raffaele Canevaro had ceased to be an Italian subject. The decision went no further than to decide that he had

[n] (1913) 20 Revue Générale de droit international public, 349.
continued to be a citizen of Peru, and, therefore, according to the generally recognized rule, could not recover from Peru as a subject of Italy.

VIEWS OF WRITERS ON INTERNATIONAL LAW

Having considered the recognition of the principle of election of nationality by Secretaries of State and by Arbitration Commissions, let us now consider to what extent, if at all, it has been recognized as a part of international law by authorities on that subject, and as a part of the municipal law of the United States by the courts of this country.

It is a well recognized principle that each country must decide for itself what persons are to have its nationality. "It is not for International but for Municipal Law," says Oppenheim, "to determine who is "and who is not to be considered a subject."56 "Each individual State," says Bar, "will always, in the first place, have to decide whether, in "accordance with its own legal system, any particular person is to be "recognized as belonging to it or not."59 He qualifies the rule somewhat by the words, "in the first place." Wharton's statement is somewhat more explicit. "Questions as to citizenship," he says, "are deter "mined by municipal law in subordination to the law of nations."60

It remained for Hall to explain how, and to what extent, municipal law is subordinated to international law in the decision of questions of nationality. He says that international law "declares that the quality of a subject must not be imposed upon certain persons with regard to whose position as members of another sovereign community it is considered that there is no room for the existence of doubt, the imposition of that quality upon an acknowledged foreigner being evidently inconsistent with a due recognition of the independence of the state to which he belongs; but where a difference of legal theory can exist international law has made no choice, and it is left open to states to act as they like."

He adds:

"The persons as to whose nationality no room for difference of opinion exists are in the main those who have been born within a state territory of parents belonging to the community, and whose connexion with their state has not been severed through any act done by it or by themselves. . .

"The persons as to whose nationality a difference of legal theory is possible are children born of the subjects of one power within the territory of another."64

In other words, according to Hall, it is left to each state to act as it likes with regard to persons born in its territory of alien parents or

56 1 International Law (2d ed. 1912) sec. 293.
59 Bar, Private International Law (2d ed. 1892).
60 Wharton, International Law Digest (1886) 324.
64 Hall, International Law (5th ed. 1904) 224-225. The principle that municipal laws of nationality are limited by international law is found in the generally recognized rule that no country can claim as its nationals children born in its territories of foreign diplomatic officers. See United States v. Wong Kim Ark (1898) 169 U. S. 649, 674, 16 Sup. Ct. 456, 466.
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Hall might well have qualified his statement that it is left to each state to act as it likes by adding the words, "provided it is in a position to do so," although he was doubtless referring to the bare legal claim to allegiance rather than the actual enforcement thereof. Hall fails to suggest that claims to the nationality of persons, arising out of the conflicting theories of jus soli and jus sanguinis, may be settled by election. In fact he does not seem to recognize election as a rule of international law. The same may be said of Westlake, although, in the tenth chapter of his admirable book on International Law he discusses questions of nationality with particular care. The only solution which he suggests is that

"no state shall extend its protection to its nationals residing in the territory of another state which claims them as its own nationals by any title known in the civilized world, whether jus soli, jus sanguinis or naturalization."

In other words, the claim of the state which has the person within its jurisdiction prevails. If works of well known authors upon the subject are the principal guide for determining what is international law, there seems to be some doubt as to the accuracy of the statement of Secretary Bayard in the case of Victor Labroue that "the law of nations," as well as the French law, required him, upon reaching his majority "to make his election" of the nationality which he wished to preserve.

HAS ELECTION BEEN RECOGNIZED BY COURTS OF THE UNITED STATES?

In several cases the courts of this country have made mention of the principle of election in cases of dual nationality, but whether their pronouncements in regard thereto amounted to legal decisions or merely to dicta is another question.

The principle of election was mentioned by Justice Thompson in rendering the opinion of the Supreme Court of the United States in the year 1830 in the case of Inglis v. Trustees of Sailor's Snug Harbor. It appeared that Inglis was born in New York, probably less than a year before September 15, 1776, of a native Irish father, and that he was taken by the latter to England in the year 1783 and two or three years later to Nova Scotia, where they continued to reside. Justice Thompson said that, if Inglis was born before July 4, 1776, when the United States became independent, or after September 15, 1776, when the British military forces took possession of New York, he was a British subject by birth and not an American citizen, but if he was born after July 4, 1776, and before September 15, 1776, he was born with dual nationality, and that

"his infancy incapacitated him from making any election for himself, and his election and character followed that of his father, subject to the right of disaffirmance in a reasonable time after the termination of his minority; which never having been done, he remains a British subject, and disabled from inheriting the land in question" (p. 126).

"3 Moore, 546.  
(1830, U. S.) 3 Pet. 99."
In *Lynch v. Clarke*6 Assistant Vice Chancellor Sandford alluded to the rule of election. He observed that application in the United States of the principle of law that the political condition of the child follows that of the father would lead to "the perpetuation of a race of aliens." "Accordingly," he added,

"the difficulty is sought to be obviated by giving to the child born of alien parents, the election, on arriving at maturity, to become a citizen either of the state where he was born, or of the state of which his father was a member" (p. 673).

However, the learned judge proceeded to argue that recognition of the right of election involved a general recognition of the right to change one's nationality at will, that is, the right of expatriation, and this right he seemed unwilling to concede.

The decision in *Ludlam v. Ludlam*6 has been cited as upholding the doctrine of election. Maximo Ludlam was born in Lima, Peru, in 1831 and came to the United States in 1836, with his father, a native American who had gone to Peru in 1822. Although born before the passage of the Act of 1855, and although the Act of 1802 had been held to be not prospective, the court held that Maximo Ludlam was born a citizen of the United States under the common law and had done nothing to divest himself of his American citizenship. The court seems to have considered the Act of 25 Edward III as merely declaratory of the common law. After mentioning possible difficulties arising under dual nationality, Judge Selden said:

"No such difficulty would be likely to arise during his minority, and on his arriving at maturity he would have the right to elect one allegiance and repudiate the other, and such election would be conclusive upon him, and would doubtless be respected by the governments" (p. 377).

Although this statement seems clear and unequivocal it can hardly be deemed a decision of the court.

Again the principle of election was recognized in the case of *State v. Jackson*,6 decided in 1907 by the Supreme Court of Vermont. It appeared that Samuel Nelson Jackson was born in Canada, his father, Horatio Nelson Jackson, having been born in the United States. The court said:

"The citizenship acquired by Samuel Nelson Jackson at birth was a qualified one, and of that peculiar character under the law which required an election on his part upon attaining his majority or within a reasonable time thereafter whether he would conserve the citizenship of the United States or that of Canada. This election when once made is binding upon him and the country of his choice. *Ludlam v. Ludlam*, 26 N. Y. at p. 371, 84 Am. Dec. 193; Van Dyne on Cit. 38. Such an election Samuel Nelson seasonably made, for he came to this country a minor, completed his education here, resided here several years after attaining his majority, took the freeman's oath, engaged in business,

6 (1844, N. Y. Ch.) r Sandf. 583.
6 (1863) 26 N. Y. 336.
6 (1907) 79 Vt. 504, 65 Atl. 657.
paid taxes, and intended to become and thereby did become an Ameri-
can citizen in the full and unqualified sense of the term."

The court went on to say:

"His son, S. Holister, the respondent, was born in Canada in 1875, born
into that same kind of American citizenship which required an election
on his part as it had of his father. He came to Vermont permanently
to reside in 1895, a minor, and upon arriving at full age made a complete
election of American citizenship by taking the oaths required by law,
securing his enrollment as a voter in Barre, and by exercising and
enjoying all the rights and performing all the duties of citizenship from
that time until his election as state's attorney for Washington County,
an office which he was, by law, duly qualified to accept and fill."

This is the most unequivocal pronouncement in favor of election of
citizenship that I have been able to find in any court decision except,
perhaps, the statement of Justice Thompson in Inglis v. Trustees of
Sailor's Snug Harbor, but it is not clear what the judge meant by "the
"oaths required by law." He could not have referred to the oaths
required by the sixth section of the Citizenship Act of March 2, 1907,
because the decision was rendered more than a month prior to the
passage of that Act.

In Ex parte Chin King," decided in 1888, it appeared that Chin
King and Chin San Hea were born in this country October 10, 1868,
and March 15, 1878, respectively, and were sent by their father to
China in 1881. It was argued that their father had sent them to China
for permanent residence, and that they had thereby lost their claim to
American citizenship which they had acquired by birth in the United
States. The court said:

"But it seems that the citizenship of the petitioners would not be
affected by the fact, if they had never come back, unless it also appears
that they had in some formal and affirmative way renounced the same.

"However, in my judgment, a father cannot deprive his minor child
of the status of American citizenship, impressed upon it by the circum-
stances of its birth under the constitution and within the jurisdiction
of the United States. This status, once acquired, can only be lost or
changed by the act of the party when arrived at majority, and the
consent of the government" (p. 356).

The decision just mentioned has no very important bearing upon the
question of election, since the persons concerned had not reached the
age of election. So far as the judge's opinion referred to the principle
of election it was a mere dictum.

The cases of Trimbles v. Harrison" and Calais v. Marshfield" cited
in the Report of the Citizenship Board of 1906," have a very indirect
bearing, if any, upon the subject under discussion, since they both relate
to persons who were born in what is now the United States, before the
Declaration of Independence, were residing in this country at the time

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" (1888, C. C. D. Ore.) 35 Fed. 354. 60 (1840, Ky.) 1 B. Mon. 140.
" (1849) 30 Me. 511. 61 (H. R. Doc. No. 326, 59th Cong., 2d sess.) 74, 75.
of the Declaration, but afterwards removed to British territory to reside. It is unnecessary to discuss these cases in detail, but the question was whether their citizenship had been transferred to the United States by the transfer of sovereignty over the territory. There is a clear distinction between such cases and cases of persons born with dual nationality.

The decision in the case of *State v. Adams*\(^7\) mentioned in the Citizenship Board Report as containing "one of the clearest statements of recognition"\(^7\) of the principle of election, was evidently misconstrued. In this case the defendant's grandfather was born in Connecticut in 1764 and emigrated to Canada in 1790, his father was born in Canada in 1795 and he himself was born there in 1834. In the year of his birth the defendant was brought by his father to the United States to reside. His father had served in the Canadian militia involuntarily in the War of 1812 and in the year 1875 had received from the Canadian Government a bounty of $20 for his services. The court held that defendant's father was born a citizen of the United States under the Act of 1802, and that he himself was also born a citizen of this country, although it was not stated under what law he claimed citizenship.\(^7\)

The gist of the decision was that the father had not, by his prolonged residence in Canada after attaining his majority and service in the Canadian army, lost his American citizenship. The only reference in the decision to the right of election related to the defendant's grandfather, who was said to have had a right to elect British or United States citizenship during the period between 1776 and 1783, the date of the Treaty of Peace with Great Britain. The statement of the judge quoted in the Citizenship Board Report that "the plaintiff, at the time of his election, was a citizen of the United States" was misunderstood. The judge was referring, not to election of citizenship, but to the defendant's election as mayor of a town in Iowa, the legality of which had been questioned upon the ground that he was an alien.\(^7\) Although the court did not enter into a discussion of election in cases of dual nationality, it decided in effect that, in the case of a person born in a foreign country of an American father, election of the nationality of the country of birth and loss of American nationality are not to be inferred from continued residence in the country of birth. A similar decision was made in the case of *Ware v. Wisner*\(^7\) which also related to persons born in Canada of American parents. In this case both father and sons had engaged in business in Canada and voted in local elections, but it was held that they had not thereby lost their American citizenship.

\(^7\) (1876) 45 Iowa, 99.  
\(^7\) Supra, at p. 79.  
\(^7\) The court apparently overlooked the fact that the Act of 1802 was not prospective.  
\(^7\) This was a slip; he meant the defendant.  
\(^7\) This is one of the few errors in this carefully prepared and most valuable report.  
\(^7\) (1883, C. C. D. Iowa) 50 Fed. 310.
It is obvious from the above discussion, that the right of election in cases of dual nationality cannot be said to have been established as a part of the municipal law by the decisions of the courts of this country. The nearest approach to an actual decision in support of the right of election is the decision in *Inglis v. Trustees of Sailor’s Snug Harbor*, but, as in that case it was not clear that Inglis had been born a citizen of the United States, the decision cannot be said to have established the right of election as a part of the citizenship law of the United States. When judges have in their opinions expressly mentioned the principle of election, their observations have for the most part been in the nature of dicta. Thus, in *State v. Jackson* it was not essential to the decision reached to introduce the discussion of the principle of election, for, if there had been no such thing as election, the decision would no doubt have been the same. On the other hand, if the court had held that Jackson had made an effective election of Canadian citizenship and had thereby lost his American citizenship, the decision could clearly be cited as upholding the principle of election. It is difficult to see how any decision of a court of this country can be deemed to support the theory of election as a part of the law unless it is held that the person concerned has by electing a foreign nationality lost American citizenship. It remains true that the observations of judges in which they recognize the principle are worthy of respect, although they have not the effect of legal decisions.\(^7\)

**THE ACT OF MARCH 2, 1907**

We have seen above that many foreign countries have made statutory provisions of one kind or another for election in cases of dual nationality. In this respect our own country has been one of the most back-

\(^7\) Since writing the above, I have had my attention called to the case of *Ex Parte Gilroy* (February 29, 1919, S. D. N. Y.) 257 Fed. 110. The question presented was whether one Walter Alexander came within the category of “natives, citizens, subjects or denizens” of an enemy country, under sec. 4067 U. S. Rev. St., as amended by an Act of April 16, 1918. It appeared that Alexander was born in Germany, October 23, 1893, of a naturalized American father, and resided in Germany until November, 1915, when he came to the United States, with a passport issued by the American Embassy at Berlin. From September, 1914, until about January 1, 1915, he had served voluntarily in the “Imperial Volunteer Motor Corps,” but there was no evidence that he had ever taken an oath of allegiance to the German Emperor. When he left Germany, the German authorities recognized his American passport as valid. Judge Mayer, in delivering the opinion of the court, said that, among other questions, it was necessary to determine “whether, because of the doctrine of so-called double allegiance, relator so acted, after attaining majority, as to select Germany, instead of the United States, as the country of his allegiance.” After quoting Professor Moore’s statement in *3 International Law Digest*, 518, concerning “double allegiance,” Judge Mayer said:

“When Alexander became 21 years of age, he lived in Germany, and therefore, if Moore is right, his allegiance to Germany, because of his German birth, would be determined by the German law. It is entirely plain that the German authorities did not regard him as a German citizen, but, if anything, as a man without nationality. It is by no means clear that a person must affirmatively select his
ward. The only attempt on the part of the United States to provide a statutory solution is found in the Act of Congress of March 2, 1907, commonly known as the Citizenship Act. The first paragraph of section 2 of the Act provides:

"That any American citizen shall be deemed to have expatriated himself when he has been naturalized in any foreign state in conformity with its laws, or when he has taken an oath of allegiance to any foreign state."

The 6th section of the Act provides as follows:

"That all children born outside the limits of the United States who are citizens thereof in accordance with the provisions of section nineteen hundred and ninety-three of the Revised Statutes of the United States and who continue to reside outside the United States, shall, in order to receive the protection of this Government, be required upon reaching the age of eighteen years to record at an American consulate their intention to become residents and remain citizens of the United States and shall be further required to take the oath of allegiance to the United States upon attaining their majority."

If a person born a citizen of the United States under the law of this country and, at the same time, a citizen of another country under its law, upon reaching majority takes an oath of allegiance to the other country, it is clear that he thereby loses his American citizenship, but, to reach this conclusion it is not necessary to rely upon the principle of election. Moreover, it is not believed that the law of any foreign country except Greece requires the taking of the oath of allegiance as a part of the formality of signifying election.

It has been suggested that the formal election of foreign nationality is equivalent to naturalization in the foreign country, so that the person making the election thereby loses his American citizenship under section 2 of the Act. However, this is not believed to be the case, since naturalization involves the acquisition of a new nationality not previously enjoyed, whereas election of foreign nationality merely confirms an existing status so far as the foreign country is concerned.

Section 6 of the Act is a step in the direction of a real provision for election of nationality, but only a step. It falls far short of a satisfactory provision. In the first place, it relates only to persons who are born abroad to American citizens and who continue to reside abroad; allegiance when he becomes of age. In questions which might arise as to property, the inquiry would doubtless be as to the conduct of a person after he became of age, and that inquiry might cover a considerable period. So, in the case at bar, where the question might arise as to which country could claim him as a subject, unless Alexander did something which indicated allegiance to Germany, between October 23, 1914, and November 8, 1915, when he swore to his application for a passport, and took the oath of allegiance to the United States, he neither lost his American citizenship nor elected German citizenship. During that period there is only one act which Alexander might have done which would have amounted to a renunciation of American citizenship and allegiance to the Imperial German government, and that was, if an oath of allegiance, contrary to his testimony, was required of him in connection with his service in the volunteer motor corps."

As Alexander was not considered a German subject under German law, Judge Mayer's observations concerning election were in the nature of a dictum.
in the second place, it says nothing about renunciation of the foreign allegiance; and in the third place its express object is merely to enable the person concerned "to receive the protection of this Government."

Furthermore, it is unfortunately vague as to the period within which the preliminary declaration of intention must be made, as well as the period within which the oath of allegiance must be taken. It has been held by the Department of State that the words, "upon reaching the "age of eighteen years," mean within a reasonable time, not necessarily within one year, after reaching the age named. The same rule would seem to be applicable to the provision in regard to taking the oath of allegiance. The reason for requiring the declaration in question to be made, by a person born abroad of American parents, "upon reaching "the age of eighteen years" seems to have been that liability for military service in most foreign countries accrues at about that age, and it was thought desirable to require those who should seek to avoid such service because of their American parentage to make an express declaration of intention to retain their American citizenship. Because of its vagueness and the fact that comparatively few Americans of foreign birth take advantage of it, the provision in question has not been as effective as might be desired.

**THE LAW OF THE COUNTRY HAVING JURISDICTION PREVAILS**

No discussion of this subject can be complete without a reference to the generally recognized rule that where two countries claim the allegiance of an individual the law of the country within whose jurisdiction he is to be found at a given time must necessarily prevail. In an opinion of June 12, 1869, which has been often quoted, Attorney General Hoar said:

> "If therefore by the laws of the country of their birth children of American citizens, born in that country, are subjects of its government, I do not think that it is competent to the United States by any legislation to interfere with that relation, or, by undertaking to extend to them the rights of citizens of this country, to interfere with the allegiance which they may owe to the country of their birth while they continue within its territory, or to change the relation to other foreign nations which, by reason of their place of birth, may at any time exist."

In 1873 President Grant called upon the members of his cabinet for opinions upon several difficult problems of citizenship, and the reply of Secretary of State Fish contained a statement very similar to the opinion of Attorney General Hoar just quoted. The opinion was quoted almost verbatim in the Consular Regulations of 1870, and a special qualified form of passport was provided for the use of persons born abroad of American fathers. This form contained a statement

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7 Failure to register or to take the oath of allegiance, or both, does not result in a loss of American citizenship. *Ex part Gilroy, supra*, at pp. 125, 126.


88 Par. 173.
that the right of the bearer to the protection of the United States was 

"limited and qualified by the obligations and duties which attach to him
(or her) under the laws of the Kingdom (Empire or Republic)
of

in which he (or she) was born (his [or her] father being
then a citizen of the United States), and, where he (or she) now
resides."81

This qualified form of passport seems to have been abandoned in 1885. Indeed, there is apparently no more reason for using a qualified form in case of a person born abroad of an American father than there is for using it in case of a person born in the United States of an alien father, for this country, following the dictate of common sense, has recognized its inability to make its claims to the allegiance of such a person prevail over the claims of the country of the father's nationality, when the person concerned is actually within its jurisdiction. Thus, in an instruction of May 3, 1892, Secretary Blaine, after authorizing the American Minister in Berlin to issue a passport to one Ludwig Henckel, who was born in the United States January 10, 1874, of a German father, said:

"In issuing him a passport, however, it is proper that the legation should inform him that it does not guarantee him against any claim which may be asserted to his allegiance or service by the Government of Germany while he remains in that country. Having been born of a German father, conflicting claims with respect thereto may arise, which it is not the purpose of this Government by the issuance of a passport to in anywise prejudice."82

The rule laid down in Attorney General Hoar's opinion of 1869 had been stated in very similar terms by Lord Malmesbury in a despatch of March 13, 1853, to Lord Cowley, in discussing the question of extending the protection of the British Government to persons born abroad of British parents and residing in the countries of their birth.83 Through an oversight Cogordan, in his book on nationality,84 spoke of Lord Malmesbury's despatch as relating to the status of persons born in Great Britain of alien parents, and his error has been followed by a number of writers, including Pradier-Fodéré.85 However, if the question had been presented to Lord Malmesbury as stated by Cogordan, that is, if it had related to the status of a person born in Great Britain of French parents, he would no doubt have decided it to the same effect, namely, that the law of the country having the person within its jurisdiction must prevail. "In the case of conflicting claims "to the allegiance of individuals," says Cockburn,

"British statesmen appear to have applied the legal maxim melior est conditio possidentis, and to have adopted the convenient doctrine that

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81 Consular Regulations 1870, 40, 288; 3 Moore, 521.
82 For. Rel. 1892, 189; 3 Moore, 533.
83 Report of the British Naturalization Commission of 1868, appendix, 67;
Cockburn, Nationality (1869) 100, 110.
84 La nationalité (2d ed. 1890) 30.
85 Droit international public (1887) sec. 1652, note.
the State in whose dominions the individual happened to be was entitled to claim him.\textsuperscript{88}

Calvo, who treated the subject of dual nationality with the greatest care, seems to have come to the conclusion that the only solution is the adoption of general international conventions recognizing the principle just referred to. However, the need of such conventions is doubtful, since the rule, which is simply one of necessity, has been generally recognized without them. Furthermore, this "game of grab," so to speak, is no solution of dual nationality, but merely a \textit{modus vivendi}.

What, then, is the solution?

**POSSIBLE SOLUTIONS**

The writer has set forth above the laws of the various countries of the world relating to nationality by birth and such provisions as they contain for election in cases of dual nationality. This review was made, not for the purpose of informing the reader concerning the laws of any particular country or countries, but rather for the purpose of presenting a general view of the various laws and of showing wherein they resemble one another and wherein they differ. Pradier-Fodéré, after considering at some length this whole subject, and dismissing the rule laid down by Lord Malmesbury, under which a person may be protected as a British subject in one country but not in another, as leading to "confusion" and "chaos," also discards the "droit d'option," or right of election, as practically ineffective, for the reason that this right is generally held to accrue at the age of majority, whereas, in most countries which have compulsory military service liability therefor arises before the age of majority is reached.\textsuperscript{87} He proceeds to propose rather radical changes in nationality laws generally, by which the right to the protection of any country would be governed by the domicil of the individual, rather than his nationality. Under this system domicil would in effect override nationality. Other publicists of note have advocated the same principle. I shall not undertake to discuss it in the present article further than to express my opinion that, because of its vagueness and uncertainty, it would lead to more confusion than the present clash of nationality laws.\textsuperscript{88} The principal difficulty in the provisions of nationality laws concerning election lies in the fact that they do not coincide. Consider, for example, the case of a man who was born in France twenty-three years ago of a British father, is still domiciled in France and has taken no steps to indicate what nationality he wishes to elect. Under French law\textsuperscript{89} he is considered French because of his having been born in France and domiciled there when he attained his majority and his having failed to signify an election of British nationality within the year following; but under British law he is considered British, because of his father's nationality and his own failure


\textsuperscript{89} An interesting discussion of domicil and nationality may be found in Borchard, \textit{Diplomatic Protection of Citizens Abroad} (1915) 555.

\textsuperscript{88} Civil Code, Art. 8, sec. 4.
to make a declaration of alienage after attaining majority. It can hardly be said that international law furnishes any solution of this case, because if it is true that international law recognizes election, it recognizes it merely as a principle and not as a definite rule of action.

The solution of the problem of dual nationality advocated by a number of the leading authorities on international law is simply the adoption by all countries of a single uniform rule for determining native citizenship, such rule to be based upon the principle of *jus sanguinis*. Vattel favored this principle, with a very important qualification. "By the law of nature," he declared,

"children follow the condition of their fathers, and enter into all their rights; the place of birth produces no change in this particular, and cannot, of itself, furnish any reason for taking from a child what nature has given him; I say 'of itself,' for civil or political laws may, for particular reasons, ordain otherwise. But I suppose that the father has not entirely quit his country in order to settle elsewhere. If he has fixed his abode in a foreign country, he is become a member of another society, at least as a perpetual inhabitant; and his children will be members of it also."

Especial attention is called to the qualification contained in the last two sentences quoted, which involve an important concession to the principle of *jus soli*.

It is natural that Bar and Pradier-Podéré should favor the determination of nationality by the single principle of *jus sanguinis*, but it is somewhat surprising to find that such English writers as Hall and Cockburn also recommend the universal adoption of *jus sanguinis*, although the latter recommends the same exception which Vattel long ago suggested. It is to be noted that the authors just mentioned all belong to European countries, which are not confronted with the problem of a very large alien population, constantly augmented by immigration. This problem is peculiar to the United States and other countries of the Western World. They deem it to be to their interest to make citizens out of the strangers within their gates as soon as they can be assimilated, and it is believed that they will hesitate a long time before adopting a system which will result in doubling, and more than doubling, their alien population. They will doubtless persist in believing that they can keep a better hold upon the millions of children of aliens born within their territories by continuing to recognize them as citizens from birth. The principle of *jus soli* which sprang from the feudal system of the old world has found in the new world a new and very real reason for existing. There seems to be no likelihood, then, that countries of this hemisphere will be willing to adopt the principle of

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*British Nationality and Status of Aliens Act, 1914, secs. 1, 14.*  
*Vattel, Law of Nations (1758) Book 1, ch. 29, sec. 215.*  
*Bar, op. cit. note 61, at p. 50.*  
*Op. cit. note 83, at p. 188 ff.*  
*See also Minority Report of the British Naturalization Commission of 1868.*
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jus sanguinis unconditionally and discard the principle of jus soli; although it is perhaps possible that they might be willing to adopt Vattel's rule, which is really a compromise (perhaps the only possible compromise) between the two principles. Theoretically it would seem very desirable, since it embodies the best elements of both principles, and would result in preventing altogether the existence of dual nationality. It would grant citizenship to the children of domiciled aliens, but not to those of alien sojourners. Such a rule ought to satisfy the needs of the countries of the western hemisphere as well as the needs of other countries. There is no reason, in principle, for granting citizenship to children born in the territory of a country to mere sojourners therein. However, there are two difficulties in the way of adopting Vattel's rule in the United States. The first is that domicil is in many cases not easily determined, and the second is that the principle of jus soli is embedded in the Constitution of the United States, and no compromise rule of nationality could be adopted without amending the 14th Amendment. The first difficulty is not believed to be insuperable, since, for purposes of nationality, an arbitrary rule might be adopted for determining domicil, as for example that actual residence in a country would raise a presumption of domicil and that a continuance of such residence for a certain period, say ten years, would confirm such presumption. As proof that Vattel's rule is not impracticable, it may be remarked that it is already to be found in varying forms in the laws of Colombia, Nicaragua, France, Italy, The Netherlands, Switzerland, and Bulgaria. The second objection would seem to be more serious, because of the practical difficulty of amending the Constitution, in the absence of a large organized body of persons desiring it.

Writers on international law who have given the subject of dual nationality careful study agree, for obvious reasons, that the universal adoption of a rule of nationality which would prevent altogether the possibility of dual allegiance would be preferable to the adoption of a uniform rule of election, for dual nationality even during the years of minority is an anomaly and results in complications and uncertainty which should be avoided if possible. However, if it is found impossible to effect some such compromise as that suggested by Vattel an effort should be made to have a uniform rule of election adopted.

"It is obvious that Vattel's rule in effect makes native citizenship depend neither upon descent nor place of birth, but upon the parental domicil." The Institute of International Law, in a meeting at Venice, on September 29, 1896, adopted certain Resolutions concerning citizenship, of which Article 3 reads in part as follows:

"Art. 3. L'enfant né sur le territoire d'un état, d'un père étranger qui lui-même y est né, est revêtu de la nationalité de cet état, pourvu que dans l'intervalle des deux naissances, la famille à laquelle il appartient y est eu son principal établissement, et à moins que, dans l'année de sa majorité, telle qu'elle est fixée par la loi nationale de son père et par la loi du territoire où il est né, il n'est opté pour la nationalité de son père."

This proposed rule, which is partly modeled after Article 8 of the French law of June 26, 1889, might be found satisfactory to countries of emigration, but it would not be satisfactory to countries of immigration.
Such a rule could be adopted only by international conventions, supplemented by uniform legislation in the several countries. It will perhaps not be easy to devise a rule which would be acceptable to all countries, but it does not seem to be beyond the range of possibility. The British rule, which allows persons born in England of alien parents, as well as those born abroad of British parents, to renounce British nationality upon attaining majority seems liberal enough, but it has the disadvantage of making the election depend entirely upon a bare declaration, without any reference to the actual or intended domicil of the declarant. As a general principle, it seems desirable to have election determined by facts, rather than by mere words, or, to be more specific, to have it determined by the domicil of the person concerned at the time when he reaches majority. A special provision would have to be made to cover the cases of persons who, at the time of attaining majority, are domiciled neither in the country of their birth nor in that of their parents' nationality. As we have seen, the principle of having dual nationality solved by domicil is already recognized in the laws of France and several other European countries, as well as in the laws of a number of Latin American countries. The French law allows persons born in France of alien parents and domiciled there at the time of attaining majority, to renounce French nationality within a year thereafter. It does not seem to the writer desirable to permit such renunciation unless coupled with removal from the territory. In time of actual or threatened war it would certainly be undesirable for persons of alien parentage to escape military and other obligations of citizenship by a mere declaration of alienage while remaining in the territory. The adoption of the proposed rule would not mean replacing nationality by domicil; it would merely mean having nationality, in cases of dual nationality, determined by domicil at a certain time, that is, at the time when the person concerned reaches his majority. It would mean letting his own actions speak for him and terminate the unsatisfactory state of dual nationality. For this purpose it would be quite possible to adopt the age of eighteen as the age of majority. Also it might be necessary to prescribe an arbitrary rule for determining domicil. Perhaps in a few cases hardship would be caused by the application of the proposed rule, but in most cases, it is believed, it would result in placing the obligations of citizenship where they justly belong.

The general adoption of the above, or some other, uniform rule of election would certainly be better than allowing the present conflicts of law to continue, but the more one considers the whole question, the more he becomes convinced that the only true solution of the question is the adoption of a uniform rule of nationality. There is no apparent reason why Vattel's rule should not be acceptable to countries of emi-

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88 During the recent war the government of the United States declined to recognize the validity of the election of foreign nationality by persons born in the United States of alien parents and still domiciled in this country.
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gration and countries of immigration alike. Generally speaking, the actual, as well as the legal, domicil of children is governed by that of their parents, and their national sympathies and aspirations usually follow those of their parents. Therefore it is of no practical advantage to a country to claim the children of their nationals who have established themselves permanently in foreign countries. On the other hand, it is of little, if any, practical advantage to a country to claim the nationality of children born in its territory of aliens temporarily sojourning therein. The adoption of Vattel's rule by the United States, through an amendment of the Fourteenth Amendment to the Constitution, would not involve a very radical change in our law of citizenship.99

Until a solution of the problem of dual nationality shall have been reached through an international agreement, this government will no doubt continue to observe and apply, according to its best judgment, the principle of election, which has been established by many precedents; for, as we have seen, the Secretary of State, in the extension of protection abroad, has a wide discretion, and is obliged to take into consideration not only the strict provisions of municipal law, but what, with due regard to the claims of the foreign country as well as those of this country and the individual in question, appear to be the true equities in each case which arises.100

99 Since writing the above, I have read a discussion of this question by Geouffre De Lapradelle, in his Nationalité d'origine, under the headings, "Domicile Paternal" (p. 94-105), and "Hypothèse d'une Loi Unique" (p. 388-419). He concludes first, that a single, uniform law of nationality is necessary, to prevent the present conflicts, and second, that such law should be based upon jus sanguinis. However, for reasons mentioned above, it is entirely out of the question for countries of the Western Hemisphere to adopt the principle of jus sanguinis alone. In a review of Prentiss Webster's book on Citizenship, contributed by Professor Munroe Smith to the Political Science Quarterly in 1911, mentioned by De Lapradelle, I find the following expression of opinion, which seems to agree with my own conclusions. With reference to the development of the French law, Professor Smith says:

"The reaction which began in the laws of February 12, 1851, and December 16, 1874, has culminated in the law of June 26, 1889, which practically establishes the principle of the family domicile. This principle had already been incorporated in the Italian and Dutch laws; and it is probably here rather than in the pure jus sanguinis that we have the germ of the general law of the future" (6 Pol. Sci. Quart. 737).

100 For a discussion of the attempts which have been made to settle questions of dual nationality by separate treaties, between interested countries, see Borchard, Dp. cit., 590, 591. The provision proposed for insertion in the naturalization treaty between the United States and Costa Rica, quoted by Mr. Borchard, was good, except in so far as it allowed a person born in either country of citizens of the other to renounce allegiance to the country of birth, after attaining majority, although remaining domiciled therein. As actions, rather than mere declarations, should decide questions of domicile (see opinion of Washington, J. in The Venus, 8 Cranch, 253, 281), so also they should, as far as possible, determine election of nationality. It is wrong in principle for a person to be allowed to renounce permanent allegiance to the country of his birth while continuing to reside there indefinitely. Nationality and allegiance should be grounded upon realities and not supported by mere technicalities.