The Duty to Recognise Foreign Nationality Laws

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I.

Article 1 of the International Convention on Certain Questions relating to the Conflict of Nationality Laws signed at The Hague on April 12, 1930 [1]) provides that:

> "It is for each State to determine under its own law who are its nationals. This law shall be recognised by other States in so far as it is consistent with international conventions, international custom and the principles of law generally recognised with regard to nationality."

This article appears in a chapter of the Convention entitled "General Principles". With respect to these principles, and to the more particular "rules" laid down in other chapters of the Convention Article 18 provides that:

> "The high contracting parties agree to apply the principles and rules contained in the preceding articles in their relations with each other, as from the date of entry into force of the present convention.
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> The inclusion of the above-mentioned principles and rules in the convention shall in no way be deemed to prejudice the question whether they do or do not already form part of international law".

It is the main purpose of this paper to determine the impact, if any, of the duty of one State to "recognise" the nationality laws of other States, which the Convention creates or confirms upon the shape which domestic nationality codes take and to seek to discover whether the existence of any such duty influences the manner in which nationality questions are dealt with by domestic courts.

II.

In the systems of the conflict of laws employed in some States the concept of nationality plays little part. This arises because the law of the

[1]) League of Nations Treaty Series, Vol. 179, p. 89.

domicile is regarded as the personal law rather than the law of nationality. As a consequence of this way of doing things one finds, for instance, that nationality is relevant in the English system of private international law only as a result of a relatively modern statutory provision permitting British subjects to make their wills in a particular form [2]), of a similar provision permitting marriages of British subjects to be celebrated in particular ways [3]) – and perhaps in connection with certain aspects of legitimacy, legitimation and adoption [4]). It is not relevant in connection with civil jurisdiction [5]). As a result, nationality has had general relevance in the law

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[2]) The will of a British subject made outside the United Kingdom is valid from the point of view of form if made according to the forms of the place of making, of the place of domicile of the testator at the time of its making, or of a place of domicile of origin of the latter which is within the dominions of the Crown. The will of a British subject made within the United Kingdom is similarly so valid if made in accordance with the forms of the law of the place of making: Wills Act, 1861, SS. 1, 2. It is immaterial that the testator subsequently ceases to be a British subject. See generally Dicey, Conflict of Laws, 7th ed. 1958, Rule 116, Exceptions 1, 2.

[3]) A marriage abroad between parties at least one of whom is a British subject by or before a British diplomatic, consular or like representative who is a »marriage officer« within the Acts is as valid as if solemnised in due form in the United Kingdom. Like provision is made for the foreign marriages of H. M. Forces. See the Foreign Marriage Acts, 1892–1947, and see Dicey, *op.cit.*, Rule 30 (4), (5). Possibly the rule that a marriage in a place where use of the local form is impossible is valid if celebrated as nearly as possible according to English forms applies only to British subjects: See Dicey, *op.cit.*, Rule 30 (2). But the limitation here perhaps arises from the nature of the case. Cf. also the case of marriage of a member of a British occupying force: See *ibid.*, Rule 30 (3).

[4]) Special statutory provision exists for the establishment by judicial declaration of the legitimacy of any person who is a British subject or whose right to be such depends on his legitimacy or legitimate descent: Matrimonial Causes Act, 1950, S. 17. See Dicey, *op.cit.*, Rule 64. And see Parry, Nationality and Citizenship Laws of the Commonwealth (1957), p. 350–351. Nationality is irrelevant in any ordinary problem of the conflict of laws concerning legitimation. But a person who is to be deemed legitimated for ordinary purposes of the conflict of laws is not necessarily within the rule of nationality law assimilating legitimated persons to those legitimately born. For the latter rule is confined to persons legitimated *per subsequens matrimonium* and would not include a person legitimated by recognition or acknowledgment. Compare the British Nationality Act, 1948, S. 23 (as to which see Parry, *op.cit.*, p. 330–333) and the common law rule as stated in Dicey, *op.cit.*, Rule 68. Conversely, a person deemed to be legitimated for purposes of nationality law may not be so deemed for ordinary purposes of the conflict of laws – if, as is contended, the Legitimacy Act, 1926, excludes not only domestic legitimation, but also recognition of foreign legitimation, of *adulterini*. See Dicey, *op.cit.*, p. 441–447. A British adoption order may be made irrespective of nationality. But it has no effect on nationality unless the adopter be a citizen of the United Kingdom and Colonies: Adoption Act, 1950, S. 16. See Parry, *op.cit.*, p. 348–350. A foreign adoption order may be recognised in England for purposes of the conflict of laws: Dicey, *op.cit.*, Rule 73. But it has no effect on nationality. As to guardianship see the note following.

[5]) The English courts indeed cling to the rule that an alien enemy has no *persona standi in iudicio*. But the test of enmity here is not nationality but voluntary residence. See

of the United Kingdom in connection only with the enjoyment of political rights [6]), the extent of criminal jurisdiction [7]), the right of residence within the dominions of the Crown [8]), the right to practise certain callings [9]), and the right to own certain categories of property – in modern days, British ships [10]), formerly English land [11]). This situation may or may not have influenced the degree to which the nationality law of the United Kingdom has taken account of foreign nationality laws. At all events it provides us with an example of a nationality law whose points of contact with foreign laws are minimal and which will therefore provide a starting point for the enquiry.

It is certain that, before 1844, the statute law as to nationality of the United Kingdom took no account whatsoever of foreign nationality laws. Its sole concern was to lay down rules as to who became a British subject upon birth or – exceptionally, naturalisation. And the status of a British subject acquired in accordance with the rules laid down was indelible. Any status acquired under the law of any other country was utterly irrelevant. So, for example, a man who was a French national by reason of birth in France was triable for high treason when taken in arms against the King if it proved that his father was born in the United Kingdom, so that the status of a British subject automatically descended to the son [12]).

But the whole law of nationality was not then statutory. It does not follow, however, that the position was any different if the whole law, including, that is to say, the rules of the common law as laid down by the courts, be looked to. It was indeed held in Calvin's Case [13]) that a

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Dicey, *op.cit.*, Rule 17, Exception. There is not, it is thought, any substance in the suggestion sometimes made that English courts will assume civil jurisdiction in actions *in personam* on grounds of the nationality of the defendant. See the views of the writer set out in *ibid.*, p. 1027. In connection with the guardianship and custody of infants it was formerly said that English courts had jurisdiction to make a custody order with respect to a British subject resident abroad on the basis of personal allegiance. But the real basis of the earlier decisions seems to have been domicile rather than nationality and the assertion of jurisdiction in this regard over all British subjects would now be inappropriate owing to the creation of local citizenships within the Commonwealth. See *ibid.*, p. 359–391.

[6]) These restrictions date from the Act of Settlement, 1700. See Parry, *op.cit.*, p. 58. See also *Re Stepney Election Petition, Isaacson* v. *Durant* (1886) 17 Q.B.D. 54.

[7]) See Parry, *op.cit.*, p. 108–110. And see the British Nationality Act, 1948, S. 3 (1). Compare *Joyce* v. *Director of Public Prosecutions* [1946] A C 347.

[8]) See the Alien Restriction Acts, 1914–1919.

[9]) E.g.: that of a solicitor.

[10]) Merchant Shipping Act, 1894, S. 1.

[11]) See Parry, *op.cit.*, chap. 2, *passim.*

[12]) *Proceedings against Aeneas MacDonald* (1747) 18 St.Tr. 858; *Inouye Kamao* v. *The King* (1947) 31 Hong Kong L R 66; Annual Digest etc., 1947, p. 103.

[13]) (1608) 7 Co.Rep. 1a.

"Scottish national" was necessarily an "English national" as a result of the mere personal union of the Crowns of the two countries and without the necessity for the union of the two kingdoms. However, that celebrated case cannot be interpreted as involving any "recognition" by English law of Scottish nationality law. The doctrine that a subject of the Scottish king was necessarily a subject of the English king was very largely conditioned by the circumstance that the status of a subject could only be acquired by birth within the dominions of the King or by descent from a person born within these dominions – or, exceptionally, by royal grant. Hence there was a recognition that the dominions of the English king, after the union, extended to Scotland, and that the personality of the King was indivisible, rather than any recognition of Scottish nationality law.

The case is perhaps seen to be altered when the first decisions on the effect of curtailment of the Crown's dominions are reached. The maxim *nemo potest exuere patriam* ought logically to have involved that the American colonists remained British subjects after their successful rebellion and the recognition of the United States. And this was indeed strongly argued at the time [14]). But, when the matter came, somewhat tardily, to be considered by the courts, it was held that the treaty of peace with the colonists was not to be interpreted in that way because of

> "the inconvenience which must ensue from considering the great mass of the inhabitants of a country to be at once citizens and subjects of two distinct and independent States . . ." [15]).

It was similarly held [16]), after a similar interval, that the Hanoverians were not British subjects after the divergence of the Crowns of Britain and Hanover. And the reason now given was that double nationality was not so much inconvenient as legally impossible. Hence it must follow that, since the Hanoverians were certainly subjects of the King of Hanover, they could not be subjects of the Queen of Britain. We have, therefore, with these two decisions, some material upon which to build such a rule as that, at English common law, where territory ceased to be part of the dominions of the Crown and the inhabitants of that territory acquired the nationality of another State, they automatically lost British nationality. To that extent, therefore, it is arguable that English nationality law "recognised" foreign nationality laws even before modern times. But the position is not as clear as might appear. The cases referred to, and also Calvin's Case [17]),

[14]) See Parry, *op.cit.*, p. 73, note 16.
[15]) *Doe d. Thomas* v. *Acklam* (1824) 2 B. & C. 779, 798, *per Abbott*, C.J.
[16]) *Re Stepney Election Petition, Isaacson* v. *Durant* (1886) 17 Q.B.D. 54.
[17]) (1608) 7 Co.Rep. 1a. Cf. Parry, *op.cit.*, p. 41.

proceeded on the assumption that a man was necessarily subject of some State. The possibility that the law of the United States or Hanover did not acknowledge that some or all of the categories of persons losing British nationality had acquired either United States or Hanoverian nationality was not explored. And the theory that no man is stateless is not part of modern English law [18]) and was incompatible with the general attitude of the old law [19]). Moreover, as the present writer has elsewhere sought to suggest, there is very slight evidence that the rule in Calvin's Case [20]) was even applied in practice or that the Hanoverians were ever considered British subjects [21]).

The introduction in 1844, virtually for the first time, of general naturalisation under statute did not, it is apprehended, alter the position. For the executive, in whose hands the grant of naturalisation lay, viewed that process as conferring a status available only within the territory in which it was granted. This involved, it may be claimed, that a national of a foreign State naturalised in England who retained his original nationality was acknowledged to be a dual national: in short, that his foreign nationality was recognised. But this is putting the case too high. For British naturalisation was usually stipulated to be available only within the place of grant quite irrespective of whether or not the grantee retained his original nationality [22]).

The change, it may be more properly said, came only with the Naturalization Act, 1870. That enactment, as is well-known, was passed to implement the terms of the Bancroft Convention with the United States, providing for the mutual recognition of naturalisations as involving expatriation. And now for the first time, the doubtful case of loss of territory by the Crown apart, it became possible for a person who was a British subject to cease to be such. This could occur "when in any foreign state ... [he] voluntarily became naturalized therein" [23]). It could also occur where

> "Any person by reason of his having been born within the dominions of Her Majesty is a natural-born subject, but who also at the time of his birth became under the law of any foreign state a subject of that state, and is still such a subject"

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[18]) *Stoeck* v. *Public Trustee* [1921] 2 Ch. 67; *Hahn* v. *Public Trustee* [1925] Ch. 715.
[19]) Parry, *op.cit.*, p. 6.
[20]) (1608) 7 Co.Rep. 1a.
[21]) *Op.cit.*, p. 6, 59, 79.
[22]) *Ibid.*, p. 70, 76–77.
[23]) S. 6; substantially re-enacted as the British Nationality and Status of Aliens Act, 1914, S. 13.

made a declaration of alienage in due form [24]). Here, therefore, were two new and certain cases in which termination of the status of a British subject was made dependent upon the acquisition or possession of the nationality of some foreign State, and in which recognition of foreign nationality laws was in consequence conceded. But it is to be noted that the recognition of foreign nationality laws involved was confined to the limited context of loss of domestic nationality. It must be noted, too, that the Act made two other breaches in the ancient rule *nemo potest exuere patriam* and that these were of a somewhat different character. For it was provided further that

> "Any person who is born out of Her Majesty's dominions of a father being a British subject may ... make a declaration of alienage ... and shall [thereupon] cease to be a British subject" [25]).

That is to say, a foreign-born British subject was enabled to cease to be such a subject by declaration of alienage without showing that he had acquired and that he retained any foreign nationality. The thought of the draftsman clearly was that a foreign-born British subject would necessarily be also a foreign national *iure soli*. But that was not of course the case in reality. Nor was the possibility of loss of foreign nationality acquired *iure soli* envisaged at all. In the second place the Act provided that "A married woman shall be deemed to be a subject of the state of which her husband is for the time being a subject" [26]). By this form of words the draftsman no doubt intended to combine in one neat formula the rule that a foreign woman marrying a British subject became herself a British subject, which had been first introduced in 1844, and a new, counterpart rule that a woman British subject marrying an alien should cease to be a British subject. It is not to be taken that he intended to attribute to a woman of the latter category a foreign nationality she did not necessarily acquire by the laws of the foreign State concerned. Thus he was, in intention at least, creating merely a second case in which British nationality might be lost irrespective of the acquisition or possession of a foreign nationality. In summary therefore upon the provisions of the Act considered so far, we hove two cases in which foreign nationality laws are recognised in the sense that possession of foreign nationality produces or permits the divestment of British nationality, and two cases in which the divestment of British nationality is permitted or produced without regard to foreign

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[24]) S. 4; re-enacted without any change here material as the British Nationality and Status of Aliens Act, 1914, S. 14 (1).

[25]) S. 4; re-enacted as the British Nationality and Status of Aliens Act, 1914, S. 14 (2).

[26]) S. 10 (1).

nationality in terms of foreign nationality law. Is not the conclusion irresistible that the draftsman would have been equally free to put all four cases on the same basis – and to have selected either basis for all of them? Could he not have made capacity to execute a declaration of alienage dependent in all cases upon possession and retention "under the laws of any foreign state" of the status of "a subject of such state?" Could he not equally have provided that

> "Any British subject may make a declaration of alienage and shall thereupon cease to be a British subject"?

Should he not indeed have provided that

> "Where a woman has married an alien, and was at the time of her marriage a British subject, she shall not be deemed to have ceased to be a British subject unless, by reason of her marriage, she acquired the nationality of her husband"? [27])

But by the same token could he not have provided that

> "the wife of a British subject shall be deemed to be a British subject, and the wife of an alien shall be deemed to be an alien"? [28])

Does not the course he in fact took suggest that he viewed the matter as governed by nothing new than convenience? No doubt the motive of the Statute was the avoidance of plural nationality, and its enactment thus arose, as it were, from an awareness that other States possessed nationality laws. No doubt also the Bancroft Convention may have created a specific duty upon the United Kingdom to recognise the right of expatriation. But it is submitted that the changes considered so far which the Act made disclose no evidence of a duty to recognise foreign nationality laws as such. But for the Bancroft Convention the United Kingdom could have clung to the old law.

It is not necessary to recount in detail all the references to foreign nationality laws made in British nationality legislation subsequent to the Naturalization Act, 1870 [29]). It is sufficient to recall that the rules with

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[27]) These exact words were, in fact, inserted into the later Act (that of 1914) by way of amendment made in 1933. See the British Nationality and Status of Aliens Act, 1914, as amended, S. 10 (2).

[28]) The rule was in fact re-formulated thus in 1914. See *ibid.*, S. 10 (1).

[29]) S. 10 (3) of that Act (cf. the Act of 1914, S. 12 [1]) provided also that "Where the father being a British subject, or the mother being a British subject and a widow, becomes an alien in pursuance of this Act, every child of such father or mother who during infancy has become resident in the country where the father or mother is naturalized, and has, according to the laws of such country, become naturalized therein, shall be deemed to be a subject of the state of which the father or mother has become a subject, and not a British subject". This was in practice strictly construed, no child being treated as within it unless

reference to the effect of naturalisation in a foreign State and to the divestment of British nationality by declaration of alienage remained unaltered in any regard material here in the Act of 1914 [30]). The same was the case with the rule respecting minor children of persons ceasing to be British subjects [31]). The rule respecting married women was, however, reformulated in 1914 – in terms which have been already recited by way of example – so as to avoid the appearance of attributing to a British woman marrying an alien a foreign nationality she might not possess in accordance with the law of the foreign State concerned [32]). And the latter rule was altered in 1933 by an addition – which again has been used as an example already – so as to provide that such a woman should not cease to be a British subject unless by her marriage she should acquire the foreign nationality of her husband under the law of the State concerned [33]). In 1943 a requirement of registration with executive permission of declarations of alienage made in time of war was imposed [34]) – thus reducing still further the element of foreign law involved in capacity to divest British nationality by means of such declarations [35]).

With the complete revision of the nationality law of the United King-

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the process whereby he acquired a foreign nationality was in fact "naturalization". It thus did not apply where A emigrated to the United States and became naturalised there only after the birth in that country of his son, B. For in such a case B acquired the nationality of the United States *iure soli* rather than by naturalisation.

[30]) British Nationality and Status of Aliens Act, 1914, S. 13, 14. It was held during the First World War that a British subject possessing enemy nationality could not effectively execute a declaration of alienage (*Ex parte Freyberger* [1917] 116 L.T. 237; *Sawyer* v. *Kropp* [1916] 85 L.J.K.B. 1446). It was even held that a declaration of alienage could not be made so as to leave the declarant with the nationality of a neutral country (*Vecht* v. *Taylor* [1917] 116 L.T. 446; *Dawson* v. *Meuli* [1918] L.T. 357; *Gschwind* v. *Huntington* [1918] 2 K.B. 420). By contrast, though it is treason in a British subject to become naturalised in an enemy State (*R.* v. *Lynch* [1903] 1 K.B. 444), the courts have not refused to acknowledge the enemy nationality thereby acquired (*Re Chamberlain's Settlement* [1921] 2 Ch. 533; *contra, Ex parte Schumann* 1940 N.P.D. 251 [South Africa]).

[31]) *Ibid*, S. 12 (1).

[32]) *Ibid*, S. 10 (1).

[33]) *Ibid.*, S. 10 (2), as amended. By the insertion of S. 10 (3) similar provision was made for the case where the husband ceased to be a British subject during the continuance of the marriage.

[34]) British Nationality and Status of Aliens Act, 1943, S. 7.

[35]) It is worthy of note that the Act of 1914, S. 7 A, as introduced in 1918, provided that where a certificate of naturalisation was revoked "the former holder thereof [should] be regarded as an alien and as a subject of the state to which he belonged at the time the certificate was granted". The effects of revocation of a certificate of naturalisation could in general be extended by executive direction to the wife and minor children of the holder. Where they were not so extended the wife could within six months make a declaration of alienage effective as regards herself and any minor children notwithstanding that she and they might in consequence become stateless.

dom effected by the British Nationality Act, 1948 in implementation of the scheme for the introduction of local citizenship of each country of the Commonwealth the references, direct or indirect, which that law makes to foreign nationality laws have been much reduced. For the rule that naturalisation in a foreign State is productive of automatic loss of the status of a British subject, what remains of the rule concerning loss of nationality on marriage, the rule that the nationality of a minor child of a person ceasing to be a British subject to some extent followed the nationality of the parent, and even the device of the declaration of alienage – all these have been swept away. They are replaced by a single and uniform rule that any citizen of the United Kingdom and Colonies who is possessed of the citizenship of some other country of the Commonwealth or of the Republic of Ireland also, or of the nationality of a foreign country, may divest himself of citizenship of the United Kingdom and Colonies by declaration – subject only to executive consent in time of war in the case of a person who is a foreign national [36]). But the law of course makes references to the citizenship laws of the other countries of the Commonwealth, and of the Republic of Ireland. For, under the new scheme of things, certain transitional cases apart, the very quality of a British subject is enjoyed only through, and consists only in, possession of citizenship of the United Kingdom and Colonies or of some other country of the Commonwealth [37]). Further, possession of citizenship of another country of the Commonwealth or of the Republic of Ireland constitutes, as does marriage with a citizen in the case of a woman [38]), an indefeasible title to citizenship of the United Kingdom and Colonies, subject, however, to the satisfaction of a relatively benign requirement as to residence [39]) – which does not, incidentally, apply to a woman marrying a citizen. It is also laid down that the child of a citizen of the United Kingdom and Colonies by mere descent who is born in another country of the Commonwealth shall acquire citizenship of the former country at his birth if he does not upon that event acquire the citizenship of the country in which he is born [40]). This, by the way, seems to constitute the first and only instance of a rule whereby acquisition, as distinct from loss, of British nationality has been made dependent, at least in part, upon the law of another country. In summary it may be said that, though the rule *nemo potest exuere patriam*

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[36]) British Nationality Act, 1948, S. 19.
[37]) *Ibid.*, S. 1.
[38]) *Ibid.*, S. 6 (2).
[39]) *Ibid.*, S. 6 (1).
[40]) *Ibid.*, S. 5 (1), proviso (d).

has not been restored, the law has in very large measure returned to the state in which it stood before 1870. If the references to the laws of the other countries of the Commonwealth and of Ireland may by regarded as in some sense domestic references, as indeed they largely are, it may thus be said that the sole acknowledgment of foreign nationality or foreign nationality law the present law of the United Kingdom makes arises from the circumstance that a domestic national who is simultaneously possessed of a foreign nationality may in time of peace divest himself of his domestic status.

III.

It is submitted that the picture is not very different if regard be had to the nationality laws of countries other than the United Kingdom [41]).

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[41]) The major provisions material to the theme of this paper of the laws of the other countries of the Commonwealth and of the Republic of Ireland which, together with the new law of the United Kingdom, have now replaced the former uniform, or almost uniform, law of the common status of British subjects may be summarized as follows:

C a n a d a : – voluntary and formal acquisition outside Canada of "the nationality or citizenship of a country other than Canada" produces the automatic loss of citizenship (Canadian Citizenship Act, 1946, as amended, S. 15). Any natural-born Canadian citizen who at birth or during minority, and any Canadian citizen whatsoever who on marriage, became or becomes "under the laws of any other country a national or citizen of that country" is able to renounce citizenship by declaration if "still such a national or citizen" (*ibid.*, S. 16). A Canadian citizen "who, under the laws of another country, is a national or citizen of such country and who serves in the armed forces of such country when it is at war with Canada" generally ceases thereby to be a citizen (*ibid.*, S. 17). Acquisition by a Canadian citizen other than natural-born in Canada of "the nationality or citizenship of a foreign country" is in general a ground for the discretionary revocation of citizenship (*ibid.*, S. 19 [2] [a]). The child of a parent ceasing to be a Canadian citizen, likewise ceases or may be directed to cease to be such "if he is or [upon his parents' so ceasing] becomes, under the law of any country other than Canada, a national or citizen of that country" (*ibid.*, S. 20 [1], [2]).

A u s t r a l i a : – The child of an Australian citizen not ordinarily resident in Australia or New Guinea who is born in another country of the Commonwealth is disabled from acquisition of Australian citizenship at his birth if, "under the law of [the country wherein he is born], he becomes a citizen of that country at birth" (Nationality and Citizenship Act, 1948–1955, S. 11). Acquisition by voluntary naturalisation of "the nationality or citizenship of a country other than Australia" produces the automatic loss of Australian citizenship (*ibid.*, S. 17). Acquisition at birth or minority of such a nationality or citizenship constitutes, whether or not it be retained, a title to renounce citizenship (*ibid.*, S. 18 [1]). But Australian citizenship may also be renounced without any such title by a person who acquired that citizenship during minority by naturalisation (*ibid.*, S. 18 [2]). Where the wife of a person renouncing or deprived of Australian citizenship is concerned, it is a condition for renunciation of Australian citizenship that she shall have acquired "under the law of some country other than Australia, the nationality or citizenship of her husband" (*ibid.*, S. 18 [3]). Service in the armed forces of a country other than Australia by an Australian citizen who "under the law of [a n y] country other than Australia, is a national or citizen of that country" is productive of the automatic loss of Australian

citizenship (*ibid.*, S. 19). The child of a person ceasing to be an Australian citizen loses the status of such a citizen "if he is or [upon his parents' so ceasing] thereupon becomes, under the law of some country outside Australia, a national or citizen of that country" (*ibid.*, S. 23 [1]). This rule does not apply where the parent is deprived of Australian citizenship by discretionary executive action, when the deprivation of the child's citizenship lies in the unfettered discretion of the executive (*ibid.*, S. 23 [2]).

New Zealand: – Possession of citizenship of another country of the Commonwealth or of the Republic of Ireland or of the nationality of a foreign country is a prerequisite to renunciation of citizenship (British Nationality and New Zealand Citizenship Act, 1948, S. 21). Naturalisation in a foreign country and the voluntary exercise of any of the privileges or performance of any of the duties of a foreign nationality simultaneously possessed are discretionary grounds for deprivation of citizenship (*ibid.*, S. 22).

South Africa: – The child of a citizen not in the service of the Union Government or of a person or association established in the Union, or not ordinarily resident in the Union, is disentitled from acquisition of South African citizenship at his birth in another country of the Commonwealth "if under the law of that country he becomes a citizen of that country . . ." (South African Citizenship Act, 1949, S. 6 [2]). Acquisition by naturalisation of "the citizenship or nationality of a country other than the Union" productes the automatic loss of South African citizenship (*ibid.*, S. 15), The rules as to capacity to renounce South African citizenship by declaration are the same as those for the renunciation of Australian citizenship (*ibid.*, S. 16 [1], [2]). S. 16 (4) provides further that the wife of a person ceasing to be a South African citizen by renunciation or deprivation may herself renounce citizenship by declaration, but only when she has "acquire[d], under the law of a country other than the Union, the citizenship or nationality of her husband" – though apparently without regard to whether or not she still retains that citizenship or nationality.

Southern Rhodesia: – Provisions as to renunciation of citizenship identical with New Zealand (Southern Rhodesian Citizenship and British Nationality Act, 1949, as amended, S. 26).

Ceylon: – "A person who is a citizen of any country other than Ceylon under the law in force in that country shall not be granted citizenship by registration unless he renounces citizenship of that country in accordance with that law." (Citizenship Act, 1948, as amended, S. 14 [2]). There is power to exempt any particular person from this rule (*ibid.*, S. 14 [3]). Capacity to renounce citizenship is not in general dependent upon possession or acquisition of any other national status, but registration of a declaration of renunciation may be withheld in time of war if "by operation of any law enacted in consequence of [the] war, the declarant is deemed for the time being to be an enemy" (*ibid.*, S. 18). Renunciation of citizenship of any other country is normally a condition for the retention of citizenship of Ceylon acquired by descent beyond the age of 22 (*ibid.*, S. 19 [1]–[4]). Voluntary acquisition of another citizenship produces the loss of citizenship of Ceylon however acquired, and citizenship of Ceylon acquired by registration may not be retained beyond the age of 22 unless citizenship of another country acquired by mere operation of law is renounced (*ibid.*, S. 19 [5], 20 [1], [2]). A purported renunciation of another citizenship which is "not in accordance with or not effective under the law" thereof is a bar to the acquisition, retention or resumption of citizenship of Ceylon (*ibid.*, S. 20 A).

India: – Voluntary acquisition of "the citizenship of any foreign state" produces the automatic loss of Indian citizenship (Constitution, Art. 9). Possession of the quality of "a citizen or national of another country" is a qualification for the making of a declaration of renunciation of citizenship (Citizenship Act, 1955, S. 8 [1]). "Any citizen of India who by naturalisation, registration or otherwise voluntarily acquires ... the citizenship of another country shall, upon such acquisition ... cease to be a citizen of

Thus, under the French Ordonnance of 19 October, 1945 [42]) although 24 the attribution of French nationality tothe legitimate child born in France of a mother there born and to the illegitimate child born in France of a parent there born is qualified by

«la faculté de répudier cette qualité dans les six mois précédant sa majorité»,

by Article 31 it is stipulated that

«nul ne peut répudier la nationalité française s'il ne prouve qu'il a, par filiation, la nationalité d'un pays étranger . . .».

Article 38 qualifies the rule that a foreign woman marrying a French national automatically acquires French nationality by providing that any such woman

«dans le cas où sa loi nationale lui permet de conserver sa nationalité, a la faculté de déclarer antérieurement à la célébration du marriage qu'elle décline la qualité de Française».

Also under Article 87

«Perd la nationalité française, le Français majeur qui acquiert volontairement une nationalité étrangére»,

India [otherwise than in time of war]". But a "question ... as to whether, when or how any person has acquired the citizenship of another country" does not necessarily fall to be answered in terms of the law of that citizenship but is rather to "be determined by such authority, in such manner, and having regard to such rules of evidence" as may be prescribed (*ibid.*, S. 9).

Pakistan: – Any citizen of Pakistan who "is at the same time a citizen or national of any other country, . . . shall, unless he makes a declaration according to the laws of that other country renouncing his status as citizen or national thereof, cease to be a citizen of Pakistan" (Pakistan Citizenship Act, 1951, as amended, S. 14 [1]). Any person who "remains, according to the law of a state at war with Pakistan, a subject of that state" is liable to be deprived of citizenship by naturalisation (Naturalisation Act, 1926, as amended, S. 8 [2] [e]). The effects of the revocation of a certificate of naturalisation may be extended at discretion to the child of the holder without regard to the resultant national status of such child. But they may be similarly extended to the wife of the holder only if, *inter alia*, "by reason of the acquisition by her husband of a new nationality, she has also acquired that nationality" (*ibid.*, S. 9 [2]). Though a person who has acquired the status of a citizen of Pakistan by naturalisation during minority is at liberty to renounce that status whether or not he possesses any alternative status, and though if he does so his minor children will in all cases likewise cease to be citizens, his wife will not also so cease "unless by reason of the acquisition by her husband of a new nationality she has also acquired that nationality" (*ibid.*, S. 10).

Republic of Ireland: – Voluntary acquisition of "another citizenship" is a discretionary ground for the revocation of a certificate of naturalisation (Citizenship Act, 1956, S. 19 [1] [e]). So also is possession of nationality in terms of the law of an enemy State (ibid., S. 19 [1] [d]). An Irish citizen "who . . . is or is about to become a citizen of another country and for that reason desires to renounce citizenship" may lodge a declaration of alienage and, upon lodgment of the declaration or, if not then a citizen of that country, upon becoming such, shall cease to be an Irish citizen" (*ibid.*, S. 21 [1]).

[42]) The text of the Ordonnance, and of the legislation cited hereinafter in this section, is taken from the United Nations Legislative Series, Laws Concerning Nationality (1954).

as well as, under Article 91,

«. . . le Français même mineur, qui, ayant une nationalité étrangère, est autorisé, sur sa demande, par le Gorvernement français, à perdre la qualité de Français».

Similarly, under Article 93 the rule that an illegitimate child acquiring French nationality through his mother loses that nationality if legitimated by the marriage of his mother with a foreign national does not in at least some cases apply unless he has acquired the nationality of his father. The capacity of a French woman marrying a foreign national to renounce French nationality by declaration made in anticipation of marriage likewise exists only «lorsque la femme acquiert ou peut acquérir la nationalité du mari, par application de la loi nationale de celui-ci» [43]). And, though naturalisation may be revoked, the effects of revocation may be extended to the wife or children of a person concerned only «à condition qu'ils . . . aient conservé une nationalité étrangère» [44]).

Under S. 25 of the Lex Delbrück German nationality is ordinarily lost upon the acquisition of a foreign nationality. But where an illegitimate German national is legitimated by a foreign national he apparently loses German nationality irrespective of whether or not he acquires any other [45]). The former rule that a woman German national marrying a foreign national lost German nationality whether or not she acquired any other has, however, now gone. In Italian law a person born in Italy of foreign parents acquires Italian nationality at birth if he does not acquire the nationality of his parents under the law thereof [46]). The voluntary acquisition of a foreign nationality, coupled with the establishment of foreign residence, produces the automatic loss of Italian nationality [47]). The involuntary acquisition of a foreign nationality is a qualification for the repudiation of Italian nationality [48]). An Italian woman loses her nationality on marriage with a foreigner if she may thereupon acquire the nationality of her husband [49]). Such a woman who marries a person subsequently acquiring a foreign nationality loses her Italian nationality if she acquires in fact the new nationality of her husband [50]). Children of persons ceasing to be Italian nationals likewise cease to be such only if they acquire a foreign nationality [51]).

[43]) Art. 94.
[44]) Art. 100.
[45]) S. 16 (5).
[46]) Law of 13 June, 1912, Art. 1 (3).
[47]) *Ibid.*, Art. 8 (1).
[48]) *Ibid.*, Art. 8 (2).
[49]) *Ibid.*, Art. 10.
[50]) *Ibid.*, Art. 11.
[51]) *Ibid.*, Art. 12.

Although a person born outside the United States and its possessions, only one of whose parents is an American national (i.e. a citizen), will acquire American nationality (citizenship) at birth provided that the relevant parent had resided in the United States for ten years prior to the birth, such a person forfeits that nationality unless he enters the United States and is physically present there for five years before attaining the age of 28 [52]). This rule applies irrespective of the resultant status of the person concerned. Foreign naturalisation works an automatic forfeiture of American nationality in the case of a person of full age [53]). But so also does taking an oath of allegiance to a foreign State without acquiring the nationality thereof, and likewise the mere participation in a political election in a foreign State, as well as many other acts [54]). And the provisions of the laws referred to are of course very usual and one or other of them is to be found in the law of almost every country.

On the other hand there are probably to be found nationality laws which take no account whatsoever of foreign laws. This position is almost approached by the law of Bolivia. Thereunder, for instance, a Bolivian woman marrying a foreigner retains her nationality and, though Bolivian nationality is expressed to be lost upon the acquisition of a foreign nationality, it may in such a case be recovered by the establishment of domicile in Bolivia [55]). And the extremely inadequate translation of the Chinese law which is available suggests a similar state of affairs. For thereunder, for instance, although the wife of an "alien" or a child legitimated by an "alien" may or will lose Chinese nationality [56]), it is not explicitly indicated that this is the case only where the foreign nationality of the husband or parent has been acquired. Similarly, although a person who "wishes ... to acquire the nationality of a foreign country" may with executive consent renounce Chinese nationality [57]), it is not made clear that the foreign nationality in contemplation must in fact be acquired. It is, however, hard not to suspect that these ambiguities are the result of incorrect translation. The law of Iraq is very much like that of Bolivia in that nationality lost thereunder as a result of foreign naturalisation is recoverable by the reestablishment of residence [58]). Iraqui nationality acquired at birth may, apparently, be renounced notwithstanding that the person concerned is thereby

[52]) Public Law 414 of 27 June, 1952, S. 301 (7).
[53]) *Ibid.*, S. 349 (a) (1).
[54]) *Ibid.*, S. 349 (a) (2)–(10).
[55]) Constitution, Art. 40, 41.
[56]) Nationality Act of 5 February 1929, Art. 10 (1), (2), (3).
[57]) *Ibid.*, Art. 11.
[58]) Law of October 9, 1924, Art. 13, as amended.

left stateless [59]). An Iraqui woman marrying a foreign national in all cases loses her nationality [60]). Children of Iraqui nationals ceasing to be such similarly lose Iraqui nationality invariably [61]). Israeli nationality is, except in one case, acquired and is lost without regard to the possession or non-possession of any other nationality by any person concerned [62]). The provision of the Jordanian Law of 1954 are perhaps somewhat ambiguous in translation. For though a Jordanian national "may renounce his Jordanian nationality and acquire the nationality of a foreign State" [63]) it is not made clear that the one transaction is dependent on the other. If it be so, it is apparently the only case in which the acquisition or loss of Jordanian nationality is dependent upon the possession or non-possession, or the acquisition or non-acquisition, of any other nationality, save that naturalisation is not granted to "any person unless he loses by such naturalisation the nationality he possesses at the date thereof" [64]). The laws of Nicaragua [65]) and Portugal [66]) are very similar to those of Bolivia [67]). The Roman customary law, which still largely governs nationality of San Marino, takes no account of any other nationality law [68]). Nor does the nationality law of Uruguay [69]), nor, apparently, that of Venezuela [70]).

The manner in which a nationality law taking little or no account of foreign law operates is well demonstrated upon a consideration of the details of Israeli law. Thereunder nationality is acquired by "return" to the territory of Israel upon the part of a Jew, by residence in that territory in certain cases, by birth of an Israeli parent or by naturalisation [71]). It is lost by renunciation or by revocation of naturalisation [72]). It is, however, a prerequisite of naturalisation that the applicant should have "renounced his prior nationality or [have] proved that he will cease to be a foreign national upon becoming an Israel national" [73]). This case apart, "acquisition

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[59]) *Ibid.*, Art. 14.
[60]) *Ibid.*, Art. 17.
[61]) *Ibid.*, Art. 18 (2).
[62]) Nationality Law of 1 April, 1952. See the text, *infra.*
[63]) Arts. 15, 17.
[64]) Art. 12 (3).
[65]) Constitution of 1950, Arts. 17–22.
[66]) Civil Code, Arts. 18–22.
[67]) See p. 350, *supra.*
[68]) Memorandum of Secretary of State, United Nations Legislative Series, Laws Concerning Nationality, 396.
[69]) Constitution of 1951, Arts. 73–81.
[70]) Constitution of 1953, Arts. 22–27.
[71]) Nationality Law of 1 April, 1952, S. 1, S. 2–9.
[72]) *Ibid.*, S. 10, 11.
[73]) *Ibid.*, S. 5 (a), (b).

of Israel nationality is not conditional upon renunciation of a prior nationality" [74]) and "An Israel national who is also a foreign national shall, for the purposes of Israel law, be considered as an Israel national" [75]). There is no condition attached to capacity to renounce Israeli nationality other than that the *de cujus* shall not be an inhabitant of Israel [76]).

IV.

Now are decisions to be found in which the courts of State A have held a person to be a national of State B? Clearly there are. Thus in *Kramer* v. *Attorney-General* [77]) a British court held the *de cujus* to be a German national – though, it must be remarked, in a particular context and in circumstances in which it would not have been improper to have come to exactly the opposite conclusion, because the *de cujus* was undoubtedly a British subject [78]). Another decision of a similar sort was *R.* v. *Home Secretary ex parte L.* [79]). Here again the context was a limited one. But, this apart, the case is a telling one because the *de cujus* was held to be a German national when he was not such in German law [80]). It thus provides an instance of a national court refusing, for whatever reason, to recognise a foreign nationality law [81]). The case possesses, moreover, the advantage that it concerned a matter which has been litigated in many countries – the effect of the Nazi denationalisation decrees of November 25, 1941. The latter decree was not denied effect in the equally wellknown American case of *U.S. ex rel. Schwarzkopf* v. *Uhl* [82]). There the Court observed that

> "if we were to ... look solely to German law to determine his status, [the *de cujus*] would not be a German citizen"

because of the decree and declared that there was

> "no public policy of this country to preclude an American court from recognising the power of Germany to disclaim Schwarzkopf as a citizen".

This language is ambiguous as evidence of the existence or non-existence of a duty to recognise the power referred to. Furthermore, if the Court in

[74]) *Ibid.*, S. 14 (a).
[75]) *Ibid.*, S. 14 (b).
[76]) Cf. *Ibid.*, S. 10.
[77]) [1923] A.C. 528.
[78]) See p. 366, *infra*.
[79]) [1945] K.B. 7.
[80]) See p. 365, *infra*.
[81]) Cf. Lauterpacht, The Nationality of Denationalized Persons (Jewish Year Book of International Law, 1948, p. 162).
[82]) 137 F. 2d. 898; Annual Digest, etc., 1943–1945, p. 188. The report of this and the succeeding decisions of courts other than English courts is taken from the series "Annual Digest (and Reports) of Public International Law Cases", now the "International Law Reports".

a sense applied the denationalisation decree *qua* German law, it failed to apply the whole of German law. For the *de cujus* was an Austrian Jew already resident in the United States at the time of the *Anschluss*. He was in consequence held not to be a German national because the

> "generally accepted principle of international law" was "that when territory is transferred to a new sovereign by conquest or cession the inhabitants of the territory become nationals of the new government only by their own consent, express or implicit", so that "Germany can impose citizenship by annexation (collective nationalization) only on those who were inhabitants of Austria in 1938".

Discoverable decisions of the courts of other countries upon the effect of the Nazi denationalisation decrees were influenced by the Allied annulment of these decrees which took place after the Second World War and by some confusion as to the precise results of that annulment. Thus the Swiss Federal Tribunal first of all assumed, in *Levita-Mühlstein* v. *Federal Department of Justice and Police* [83]), that the Allied action would oblige

> "the German authorities which function in Germany under the Allied occupation [to] recognize the German nationality [of a person within the scope of the decree] if they were called upon to make a pronouncement on the matter".

As a consequence that Court did not need to act upon the view it also expressed that the Nazi legislation involved

> "an incompatibility with Swiss public policy which, according to general principles, prevents the application of [that legislation] in Switzerland".

That case, therefore, stands very much on the same footing as the S c h w a r z k o p f case insofar as the present enquiry is concerned. The Court did in fact apply the relevant foreign law – or what it conceived to be that law, as it stood at the time of the proceedings. And whether or not it did this on the basis of a duty so to do is not to be deduced from its observations concerning a possible case where the duty might not exist which did not in fact arise. It is significant, however, that the Swiss court, as the American, spoke of public policy as governing the area of the exception. And, in putting the matter on this basis, the Swiss Court pointed out that it

> "had always held that States have sovereign power to lay down the conditions of the acquisition and retention of citizenship. It [is] considered to be doubtful whether that power is limited by international law".

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[83]) Entscheidungen des Schweizerischen Bundesgerichtes, vol. 72 (1946) I, p. 407; Annual Digest, etc., 1946, p. 133.

In *Rosenthal* v. *Eidgenössisches Justiz- und Polizeidepartement* [84]), however, the Swiss Federal Tribunal reversed itself on both points, holding that

> "It is immaterial whether [a] foreign [nationality] law ... satisfied Swiss notions ob public policy"

and that the Allied measures of repeal had

> "no retroactive effect. Moreover, they apply exclusively to the occupied territory".

Upon both these cases it is to be noted, incidentally, that the issue was not whether a person was or was not a German national, but whether a woman had lost Swiss nationality in consequence of her marriage with such a person in pursuance of a domestic rule that she should be considered to do so if the law of her husband's nationality provided that she should acquire that nationality. There may here seem to be a distinction without a difference. But perhaps this is not so. For, as has been seen [85]), the existence of a rule that domestic nationality is lost upon the acquisition of a foreign nationality through marriage argues nothing in favour of a duty of recognition of foreign nationality law. A decision upon the basis of such a rule does not necessarily reinforce the case for a duty of this sort. Having regard to this, it is significant that the Swiss Court said in the Mühlstein case that

> "Swiss authorities can only decide as a preliminary question of law whether a person possesses a certain foreign nationality. Their decision on that point is a consideration on which the judgment of the actual question at issue will be based. It has not the importance of a judgment on the merits which had become effective. It has not the authority of *res judicata*" [86]).

But against this must be set the statement in the later case that

> "Statelessness [of a Swiss woman marrying a foreigner] may result from two circumstances. The first is the denial of nationality to the wife by the national law of the husband. It is, accordingly, the duty of the Court to inquire into the status of the husband, and into the provisions of his national law relating to the acquisition of nationality by marriage ..." [87]).

However, it may be doubted whether the reference here is to any duty of other than exclusively domestic import [88]).

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[84]) Entscheidungen des Schweizerischen Bundesgerichtes, vol. 74 (1948) I, p. 346; Annual Digest, etc., 1948, p. 255.

[85]) See p. 342, *supra*.

[86]) See note 83, *supra*.

[87]) See note 84, *supra*.

[88]) As to the conflict of opinion of the French courts upon the effects of the annulment of the Nazi denationalisation decree see in particular: *Gunguéné* v. *Falk* (Revue Critique de Droit International Privé vol. 39 [1950], p. 580; Annual Digest, etc., 1949

The Supreme Court of Israel, sitting as a Court of Appeal, likewise held in *Casperius* v. *Casperius* [89]) that a German Jewish immigrant denationalised in 1941 died stateless because the Allied annulment of the denationalisation decree could not be construed automatically to restore German nationality. It refused, moreover, to be swayed by the argument that it ought not to recognise the Nazi law at all because of its barbarous character. Upon this point the Court observed:

> "[T]his idea, in itself, is sound; however, it is not competent to enable our testator to acquire the nationality of the Nazi State. This is not like any other legal question. Otherwise, we reach the ridiculous conclusion that, precisely because of the barbarism of the Nazi laws, a man in Israel will have to be regarded as a citizen of that barbaric State. It goes without saying that all the Nazi racial laws stand condemned in our eyes, but we are not prepared to rely on that invalidity in order to recognize, so far as concerns a Jew, the legal nexus with that base régime. Our opinion, therefore, is that despite the unconcealed anti-semitic motives of that Law, it was capable of snapping the legal tie between the State and the citizen."

This language perhaps ignores that the law reprobated was in effect recognised as "snapping the legal tie" between *de cujus* and pre- and post-Nazi Germany.

The Oberlandesgericht of Celle held [90]) that a native Austrian acquiring German nationality as a result of the *Anschluss* lost that nationality upon the fact of the re-establishment of Austria, whilst denying, to a degree, that the Austrian law restoring nationality had any influence upon the situation. The Court said:

> "The re-establishment of Austria as an independent State resulted in a change in the nationality of the respondent. He again became an Austrian national, and lost German nationality. The Austrian *Staatsbürgerschaftsüberleitungsgesetz* is admittedly not conclusive for the determination of the question whether he acquired Austrian nationality, seeing that it is only valid for the territory of Austria. And no provision of the nationality law of the Reich of 23 July 1913, which is binding on German courts, leads to the conclusion that the respondent has lost German nationality. However, the acquisition of Austrian and the loss of German nationality by the respondent follows from rules of international

p. 224); *Terhoch* v. *Daudet* (Dalloz Hebd., 1947, Jurisprudence, p. 240; Annual Digest, etc., 1947, p. 121); *Bertolo* v. *Alexander* (Dalloz Hebd., 1949, Jurisprudence, p. 551; Annual Digest, etc., 1949, p. 225); *Kurzmann* v. *O'Rea* (Dalloz Hebd., 1947, Jurisprudence, p. 47; Annual Digest, etc., 1946, p. 136); and cases cited – *ibid.*, 136. See also *Goldstrom* v. *Société la Foncia* (Dalloz Hebd., 1946, p. 226; Annual Digest, etc., 1946, p. 142); *Fretel* v. *Wertheimer* (Gazette du Palais, 1948 [1 Sem.], p. 275; Annual Digest, etc., 1948, p. 287).

[89]) International Law Reports, 1954, p. 197.

[90]) Nationality (State Succession) Case (Annual Digest, etc., 1948, p. 217).

law, which are part of German law, and even override German legislative provisions which conflict with them. According to the principles of State succession it must be recognised that former Austrians who were resident in Austria at the time of its re-establishment in 1945 without more acquired Austrian nationality and lost the German nationality which they had acquired solely as a result of the union of Austria and Germany. Thus even according to German law the respondent must be regarded as being no longer a German citizen but an alien ...".

The issue in the case was in fact whether either of the parties to divorce proceedings was a German national. And notwithstanding that the respondent husband (who was at all times resident in Austria) was, as has been seen, held not to be such a national, the appellant wife, a native German at all times resident in Germany, was held to have retained her original status. On this aspect of the case the Court said:

"The question whether the appellant has lost German nationality can only arise if it is found that she has, as the wife of the respondent, acquired Austrian nationality. It is not necessary to decide whether she acquired that nationality by virtue of the Austrian nationality law, for that law, as stated above, has no validity in Germany. No provision of German law deprives the respondent of German nationality. Nor is there a principle of international law that the nationality. It is not necessary to decide whether she acquired that nationality Different considerations might arise if there were a matrimonial home in Austria in addition to the appellant's domicile in Luneburg. Then it might be argued that, according to international law, the appellant also was affected by the change of nationality, not directly as the wife of the respondent, but by virtue of the fact that she shared the domicile of her husband as a result of her marriage and thus belonged to the territory which was detached from Germany and again became independent ...".

This decision appears to attribute Austrian nationality to at least the respondent upon some basis other than Austrian legislation. A similar suggestion is to be found in the Nationality (Secession of Austria) Case[91]), where the German Supreme Administrative Court said:

"[I]t is a general rule of international law that a State is alone competent to determine how its nationality shall be acquired and lost. ... Accordingly the plaintiff [a former Austrian national domiciled at all material times in Germany] has not lost her German nationality by virtue of any general rule of international law ... It cannot be denied that those persons actually domiciled in the territory of the Republic of Austria acquired Austrian nationality, either by vitue of the re-establishment of that State or by virtue of the Law of July 10, 1945. The Court is not concerned with the question whether persons

[91]) International Law Reports, 1954, p. 175.

so domiciled lost their German nationality as a result of the re-establishment of the Republic of Austria and their acquisition of Austrian nationality, but it must not be thought that this Court would necessarily answer that question in the negative. Well-known teachers of international law take the view that an emancipation of this kind results in an automatic change of nationality ... However, even in the view of these teachers, the loss of the old nationality is automatic only so far as concerns persons who are within the sphere of power of the new State, the loss of nationality of the old State taking place at the moment when the new State is established or re-established".

On the other hand, as respects a person actually resident in Austria, the Court of Appeal of Frankfurt observed that, though there was no applicable German legislation and no firm rule of international law discoverable,

"The Federal Constitutional Court and the Bavarian Court of Appeal seem to take the view that at least those Austrians who are living in Austria and who no longer have any citizenship contacts with Germany are no longer claimed as citizens by Germany, and have therefore lost their German nationality by virtue of the recognition of the legislation enacted by Austria. The Court adopts this view ..." [92]).

This would appear to be the only suggestion that Austrian law had any influence on the matter in this series of decisions. But they are open to the construction that the German courts assumed that international law, and therefore the rule that upon the establishment of a new State persons resident within its territory acquire its nationality, which these courts averred to be a rule of international law, applied as part of the law of Austria as, under the Constitution, it applies as part of the law of Germany.

In *Wasservogel* v. *Federal Department of Justice and Police* the Swiss Federal Tribunal held a former Austrian resident in Switzerland to have recovered Austrian nationality by virtue of the operation of the Austrian legislation, dismissing the argument that the construction of the latter as operating independently of the will of individuals "would lead to forcible naturalisations, which are contrary to international law and hence inadmissible" [93]) because, the re-established Austria being a continuation of the former State, there was a personal connection between it and the nationals of the latter which justified its legislating for them. The actual issue was rather whether a Swiss woman who had married a former Austrian national

[92]) Austrian Nationality Case (International Law Reports, 1953, p. 250). The decisions referred to in this case are, apparently, the Austrian Nationality Case (International Law Reports, 1951, p. 248) and the decision of the Bavarian Court of Appeal referred to in the note to the latter.

[93]) Entscheidungen des Schweizerischen Bundesgerichtes, vol. 75, I, p. 289; Annual Digest, etc., 1949, p. 184.

had lost domestic nationality than whether the latter possessed a particular foreign nationality. But, as the Court observed,

> "If the foreign law were to be disregarded on the ground that it conflicts with public policy, this would not alter the fact that the nationality of the husband – and, consequently, of the wife – would be determined by the competent State according to its own law. A different decision by the Swiss authorities would not have any effect with respect to the husband; for the wife it would involve double nationality or statelessness, both of which are contrary to Swiss public policy".

The remarks made above with reference to the Rosenthal case thus apply also in regard to this decision.

In *Nederlands Beheers-Instituut* v. *Nimwegen and Männer* [94]) the Court of Appeal of Arnhem treated as a German national a former Czech national who had acquired German nationality as a result of the German acquisition of the Sudetenland in 1938, notwithstanding the re-establishment of the State of Czechoslovakia. This was because it was considered controversial whether there was a positive rule of international law to the effect that a forced treaty of cession was a nullity. Moreover, the Czech Presidential decree of August 2, 1945 providing that Sudetenlanders of German or Hungarian ethnic origin who had acquired German or Hungarian nationality upon the transfer of territory should be divested of Czechoslovak nationality implied at least indirect recognition of that acquisition, though it could not of itself operate to grant German citizenship to any individual. The case is of interest because the problem was not looked at exclusively in terms of German law. It is, however, indecisive for present purposes for reasons already explained. A similar decision was that of the Council for the Restoration of Legal Rights of the Hague in *Re Baroness Von Scharberg* [95]). In the German Nationality (Annexation of Czechoslovakia) Case [96]) the German Federal Constitutional Court also referred to Czech and other "indirect recognition" of the imposition of German nationality on inhabitants of Bohemia and Moravia in 1939, though in fact holding that the international invalidity of domestic nationality legislation was domestically irrelevant. Besides the Czech Presidential Decree the Court referred the British Distribution of German Enemy Property Act, 1949, which was to be interpreted as involving that

> "all compulsory naturalizations after [December 31, 1937] which were connected with acts of annexation must be regarded as invalid insofar as the

[94]) International Law Reports, 1951, p. 249.
[95]) *Ibid.*, p. 257.
[96]) International Law Reports, 1952, p. 319.

persons affected thereby are being claimed as nationals by the States whose territories have been annexed. Where they have not been so claimed, German law need not regard them as non-German ...".

In *U.S. ex rel. Reichel* v. *Carusi* [97]) the United States Court of Appeal for the Third Circuit, in holding that a person of German race born in Bohemia who had acquired German nationality following the German annexation was to be treated as an enemy, similarly rejected the contention that "because the Sudetenland has been reincorporated into Czechoslovakia the appellant has become a Czechoslovak citizen". This it was said "might be ... arguable ... had the appellant remained in Krinsdorf. Since he has been in the United States since 1935 no substantial question arises ...".

But it may be doubted whether it can serve any useful purpose to pursue this survey of decisions further. For many other cases are to be found in which domestic tribunals, confronted with the question whether a person possessed the nationality of a particular foreign State, clearly applied the law of that State without question. Such cases are indeed so numerous that it is quite unprofitable to give examples of them. It is merely of interest to point out that the Swiss courts, for instance, applied the Russian denationalisation decree of 1921 so as to reach the conclusion that a former Russian national had become stateless notwithstanding that Switzerland had not accorded recognition to the Soviet government of Russia [98]). The circumstance that such recognition had not been granted was not even alluded to – though in *Rajdberg v. Lewi* [99]) Poland's recognition of the Soviet regime was adduced as a justification for the Supreme Court of Poland's arriving at a similar decision. The absence of any Belgian recognition of the incorporation of Latvia in the Soviet Union was specifically held to be irrelevant by the Civil Tribunal of Brussels in *Pulenciks* v. *Augustoviks* [100]), though with respect to the like case of Lithuania a German court sitting in an occupied zone felt itself to be in a situation of some embarassment when it appeared that the Nazi Reich had recognised the government of the U.S.S.R. as superseding the autonomous regime but that the Occupying Power had not [101]). In general, where decisions such as have been assembled here are to be found, in which courts have apparently decided

[97]) 157 F. 2d. 732; Annual Digest, etc., 1946, p. 119.

[98]) *Lempert* v. *Bonfol* (Entscheidungen des Schweizerischen Bundesgerichtes, vol. 60, I, p. 67; Annual Digest, etc., 1933–1934, p. 290); *Von Fliedner* v. *Beringen* (Entscheidungen des Schweizerischen Bundesgerichtes, vol. 60, I, p. 263; Annual Digest, etc., 1933–1934, p. 287).

[99]) Annual Digest, etc., 1927–1928, p. 294.

[100]) International Law Reports, 1951, p. 49.

[101]) Lithuanian Nationals Case, Annual Digest, etc., 1948, p. 48.

that the *de cujus* was or was not of the nationality of a particular foreign State upon some basis other than that of the law of that State, there have existed, moreover, circumstances which would permit of its being said that there applied the admitted exceptions to the duty to recognise foreign nationality laws – that the otherwise applicable law offended, if not against "international conventions", against "international custom and the principles of law generally recognised with regard to nationality" [102]).

V.

There thus appears a situation which, though it may be obvious, is certainly striking. The law of nationality of one State need scarcely refer to that of any other. If it does it will do so only in that it may provide that acquisition, possession or retention of the nationality of a foreign State shall or may constitute a circumstance occasioning or permitting the loss of domestic nationality, or – much more rarely – the non-acquisition of the latter [103]). And in this very limited context the test of acquisition or possession of the nationality of a foreign State is, generally and subject only to relatively specific exceptions, exclusively the law of the latter State [104]). Any duty of recognition of foreign nationality laws is thus an imperfect and eccentric one. In fact, it is a tenable thesis that it does not exist at all or that, insofar as it must be taken to have been imposed by the Hague Convention of 1930 upon the parties thereto, it has no meaning.

The Convention apart, it is conceived that there is very little evidence that there exists any duty upon a State to define the rules governing acquisition and loss of domestic nationality – to frame its own nationality law, that is – in any manner involving reference to foreign law. There is no necessity, that is to say, to provide that naturalisation in a foreign State shall be productive of loss of domestic nationality, nor to provide that marriage with foreigners shall have any effect upon the nationality of women nationals – and so forth [105]). Even under the Convention, moreover, the necessity is not increased – except perhaps in one case. If, indeed the law of a State party to the Convention causes a woman to lose domestic nationality upon marriage with a foreigner, this consequence must be conditional on her acquiring the nationality of her husband [106]). If, similarly, that law provides that a child shall lose domestic nationality upon legiti-

[102]) See Art. 1 of the Hague Convention of 1930, set out at p. 337, *supra*.
[103]) See in especial p. 345, *supra*.
[104]) See p. 342, *supra*.
[105]) See p. 345, *supra*.
[106]) Art. 8.

mation or adoption by a foreigner, a similar limitation applies [107]). But the law even of a State party to the Convention need not contain provisions to this effect – as, for instance, the laws of the several members of the Commonwealth, who together comprise some one eighth of the totality of States, often do not [108]). The case where the Convention is exceptionally compulsive is that of the person "possessing two nationalities acquired without any voluntary act on his part" – the most typical case of plural nationality in which the nationality of one State is acquired *iure soli* and that of another *iure sanguinis*. Such a person at least must be permitted to renounce the nationality of a State which is not the State of his "habitual and principal residence" even though the law of that State accords no wider rights of renunciation of its nationality [109]).

Only two other provisions of the Convention – apart from Article 1 itself – can be pointed to as indicative of the existence of a duty to recognise foreign nationality laws even on the basis of that instrument. These are its Articles which lay down that

> "Any question as to whether a person possesses the nationality of a particular State shall be determined in accordance with the law of that State" [110])

and that

> "A State may not afford diplomatic protection to one of its nationals against a State whose nationality such person also possesses." [111])

The first of these rules represents, as has been seen, the general practice of national courts. It is not, as laid down in the Convention, expressed to be subject to any exception, such as Article 1 itself contains, arising from the inconsistency of the relevant foreign law with "international conventions, international custom and the principles of law generally recognised with regard to nationality". But that is presumably immaterial – or at least involves no more than that a court of a country should in relevant circumstances logically say:

> "We admit that the *de cujus* is (or is not) a national of foreign State X in terms of X law. But because X law offends against e.g.: international custom, we are not bound to recognise it. As a consequence the existence (or non-existence) of X nationality is immaterial to us."

Such an attitude could perhaps be described as implying non-recognition of X n a t i o n a l i t y as well as of X nationality law, if the distinc-

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[107]) Arts. 16, 17.
[108]) See p. 346 note 41, *supra*.
[109]) Art. 6.
[110]) Art. 2.
[111]) Art. 4.

tion had any importance. It would in reality imply further a failure to determine a question of X nationality in terms of X law. Thus the limitations upon the duty of recognition of foreign nationality laws, stated, together with that duty, in Article 1 of the Convention must generally apply in relation to the duty to determine questions of possession or non-possession of the nationality of a particular foreign State by (*scilicet* exclusive) reference to the law of that State. It is possible, however, to conceive of a case where this might not be so. If, for instance, the law of a State provided, in conformity with the Convention, that an involuntary plural national resident abroad might renounce domestic nationality, and if the foreign nationality possessed by the *de cujus* had been imposed, for instance, contrary to the provisions of a treaty, the domestic court might well say:

> "We admit that the *de cujus* is an X national because the law of X says so and we are bound to apply that law for the determination of that question. We admit further that if the *de cujus* is an involuntary plural national he may renounce domestic nationality. But we deny that his X nationality is effective for this purpose because it arises under a law we are not bound to recognise."

The distinction, however, is slight.

The fact, moreover, that the duty to recognise nationality laws is not absolute but is qualified in the sense explained renders it impossible to determine whether the practice of national courts admits of its existence. Apparent instances of refusal to acknowledge the duty may well be instances in which the qualifications upon it legitimately apply. The language of courts is, further, frequently confused and obscure. But that language, it is submitted, suggests that the duty the Convention lays down makes no impact upon domestic nationality laws. Courts frequently say that questions of the nationality of a foreign State must be referred to the law of that State – even that there is a duty in this regard. But it is to be deduced that the allusion here is to the obligation of Article 2 of the Convention, or of the rule recited therein, rather than to Article 1. Courts similarly say that the *de cujus* cannot be construed to have acquired or lost the nationality of a particular foreign State because that State's legislation producing that result is contrary to international law. But this involves, as has been seen, a reliance upon a limitation of the obligation to determine foreign nationality questions by foreign law as much as, or rather than, of the alleged duty to recognise foreign nationality laws.

It is submitted, in fine, that the latter duty is an otiose conception insofar as domestic nationality laws are concerned. It may have some significance in international law – especially in view of the rule that a plural

national may not be protected by any State of which he is a national as against any other of which he is also a national. But the investigation of this question would call for the examination of a wholly different category of materials and also of the relationship between nationality and protection, which is not absolute [112]). Insofar as domestic nationality laws are concerned, however, they make, as has been seen, strikingly little reference to foreign laws – for the obvious reason that they are concerned wholly with the acquisition and loss of domestic nationality. But, even though this be obvious, it is worth while exploring two further matters. The first is whether the rule that the courts of one State will generally determine whether a person possesses the nationality of another by reference to the law of that other does not result from logical necessity rather than any duty of an international character. The second is whether any difference is discernible in the practice in this regard of these States which do, and of those which do not, employ nationality as a connecting-factor of the conflict of laws.

As to the first of these matters, A. N. Makarov has observed that the rule in question is possessed of an universality rare in legal science [113]). This is indeed a striking circumstance. But is it not equally an obvious one, arising from the nature of the case? For the distinction between the question "Is A of X nationality?" and the question "Is A domiciled (or resident) in State X?" is of the same order as that between the question "Is A a member of X University?" and "Is A a student?" If, as in English law, a man is deemed to be domiciled in the country which is his permanent home, whereas, as in the United States, he is deemed to be domiciled in any country in which he is residing without any present intention of departing or, as in France, he is held to be domiciled in a country only if he has satisfied certain formalities, then it is manifest that an English, an American and a French court may arrive at different decisions as to the domicile of the same man [114]). But if it be universally agreed that nationality consists in a nexus between an individual and a State in terms of the law of that State, then there can be only one answer to the question whether a man is a national of a particular State – an answer to be arrived at by application of the law of the State concerned. It may naturally be argued that there is no necessity for agreement that nationality connotes the concept described. But it surely does. The term is simply shorthand for the quality of "belonging" to a State according to rules laid down by

112) Cf. the Nottebohm Case (Second Phase) (I. C. J. Reports, 1955, p. 4).
113) Allgemeine Lehren des Staatsangehörigkeitsrechts, 1947, p. 161.
114) Cf. In Estate of Jones (1921) 192 Iowa 78; Re Annesley [1926] Ch. 692.

the law of that State for the determination of the existence or non-existence of that quality.

It is sometimes said that there are occasionally to be found legislative provisions violative of the rule the Convention lays down – instances, that is, in which the authorities of State A attempt to attribute, or as the case may be, to deny, the nationality of State B to an individual on some basis other than that of the law of State B. Such a provision is perhaps to be found in the rule laid down by the Naturalization Act, 1870 of the United Kingdom to the effect that "A married woman shall deemed to be a subject of the state of which her husband is for the time being a subject" [115]). But this is a dubious construction of that form of words. It ignores, in the particular case, that the law of the United Kingdom has in general, and in the whole context of that or any other statute concerned with domestic nationality law, no occasion to distinguish between foreign nationals of different categories. Thus if it be asked what is the result of insisting, according to the strict letter of the admittedly ineptly worded rule, that a woman British subject who has married a German national is herself a German national, the answer is that she cannot be regarded as a British subject – and nothing more. It is not to be argued further that she is entitled, or not entitled, to do something which only German nationals are entitled to do. For neither the particular statute nor any other general law – and the applicability of the provision under discussion for the interpretation of any other general law is of course subject to examination – entitles or disentitles German nationals as such, or for the matter of that any other particular category of foreign nationals as such, to do anything.

As to the further question whether any distinction is observable in the practice of those States which do, and those which do not, employ nationality as a connecting-factor of the conflict of laws, it may be admitted that the confinement of the context of nationality questions to the sphere of political status rather than civil status must influence the character of such questions as may arise. An English court, it may be said, has no occasion to determine whether a person is, for instance, a French national for the purpose of determining the succession to his movables because it will hold that this questions is governed by the law of his domicile. But for a German court the question is very different. This may very well be the case. Does not this very circumstance, however, necessarily involve that no duty of recognition of foreign nationality laws is to be deduced from the rule that questions as to the possession or lack of the nationality of a particular foreign State are to be determined according to the law

[115]) S. 10 (1). See p. 342, *supra*.

of that State? Does not it even suggest that the latter rule may in a sense be disregarded? For the conflicts rules of a country may indeed provide, for example, that succession to movables is governed by the law of the nationality of a deceased intestate. But can they not equally provide that the law of the domicile shall govern the question? And does it not therefore follow that it would be equally legitimate to apply the *lex fori* to the determination of nationality? Is it not, in fact, the case that the *lex fori* could legitimately be applied to the substantive question – that in short, a State is not obliged to have any system of conflict of laws? Further, coming to the specific problem of the Hague Convention, has that instrument anything to do with the conflict of laws?

The law of the United Kingdom, as has been said, is not concerned to differentiate between sub-categories of aliens – who are simply persons who are not British subjects – for any general purpose. The sole nationality question which has arisen in general has been whether the *de cujus* be a British subject or not. Whatever the answer to that question, it is generally irrelevant that he is, or is also, a national of any foreign State and, if so, a national of foreign State A rather than foreign State B. These matters have only become relevant in the context of special statutory or treaty regulations or of the application of a test of enmity in time of war. Thus as long ago as the period of the peace settlement following the French Revolutionary and Napoleonic Wars, upon a provision of the Treaty of Paris, 1815 for the restoration of the property of British subjects seized by the revolutionary authorities the question arose whether it applied so as to benefit a person who was a French national by reason of being born in France of a father there born but who was also a British subject as a result of descent from a paternal grandfather born in Scotland. It was decided that the *de cujus* was a French subject rather than a British subject for the purposes of the treaty [116]). A like question arose upon the provisions of the Treaty of Versailles and was decided in the same fashion, the property of a German national being held not exempt from regulations governing the disposal of property of "German nationals" by the circumstance that he was also a British subject [117]). Similarly, in a case discussed already, *R.* v. *Home Secretary, ex parte L* [118]) there arose, or appeared to arise, the question whether the *de cujus*, who was admittedly not a British subject, was a German national. He had in actuality been deprived of German nationality under German law as a result of the Nazi denationalisation of

[116]) Drummond's Case (1834) 2 Knapp P. C. 295.
[117]) *Kramer* v. *Attorney-General* [1923] A. C. 528.
[118]) [1945] K. B. 7.

exiled Jews. But the decision of the question what nationality he really possessed was in a sense evaded on the basis of a rule which in effect amounts to no more than a rule of evidence: the rule that the courts will not pay attention to changes from enemy nationality in time of war. The alleged basis of this rule, which bears a close resemblance to that which prize courts apply with respect to transfer of vessels from the enemy flag, is that, were such changes acknowledged, it would be easy for the enemy to send his agents into the realm, clothed in the neutrality of statelessness. It is submitted that the rule is not one of substance. Its application in this particular case is, moreover, open to criticism [119]).

One result of the confinement of the generality of nationality questions encountered in the law of a particular country to the simple question whether a person is or is not a national of that country is, historically, an unwillingness to admit of the legal possibiliy of plural nationality. This was in fact, as has been seen [120]), a motive for the decision that the Hanoverians were no longer British subjects after the Crowns of the United Kingdom and Hanover had ceased to be united.

> "But that a man rightfully and legally in the allegiance of one sovereign could be also rightfully and legally treated as a traitor by another [i.e. on the ground of a competing allegiance], cannot be the law",

averred Lord Chief Justice Cockburn in *Isaacson* v. *Durant* [121]). And even as late as the case concerning the application of the provisions of the Treaty of Versailles to which we have referred, we find Younger, L. J. delivering a powerful minority judgment to the effect that it must surely be "an essential principle of English law . . . that a person cannot at once be a British subject and a German national" [122]). Similar observations are to be found in decisions of American courts [123]). Concededly, however, both British and American courts no longer maintain that plural nationality is an impossibility. But their conversion in this regard argues nothing in favour of the existence of a duty of recognition of foreign nationality laws. Indeed, upon consideration the possibility of plural nationality appears as a logical consequence of a strict confinement of concern with nationality questions to the mere ascertainment of whether or not a person possesses domestic nationality. The point emerges with especial clarity from the

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[119]) See British Year Book of International Law, vol. 23 (1946), p. 378.
[120]) See p. 340, *supra*.
[121]) (1886) 17 Q. B. D. 54, 63.
[122]) *Kramer* v. *Attorney-General* [1922] 2 Ch. 850, 878.
[123]) E. g.: *Von Zedtwitz* v. *Sutherland* (1928) 26 F. 2d. 525.

opinion of the United States Supreme Court in *Perkins* v. *Elg* [124]), perhaps the leading American case having to do with plural nationality. For there it was said:

> "As municipal law determines how citizenship may be acquired, it follows that a person may have a dual nationality. And the mere fact that the plaintiff may have acquired Swedish citizenship by virtue of the operation of Swedish law, on the resumption of that citizenship by her parents, does not compel the conclusion that she has lost her own citizenship acquired under our law . . .".

Upon a retrospective view it is clear that the organs of the common law must have recognised the possibility of plural nationality. For, when England applied both the *ius soli* and the *ius sanguinis*, she cannot have expected that no foreign State should do the same. But the possibility constituted, as it still largely does, a mere extra-legal fact.

Even if it be granted, however, that the concept of nationality entertained by the law of a country whose conflicts system does not employ that concept may be a distorted and restricted one, what is the result? Is the law of a country which employs that concept more frequently, and for purposes of determining civil status, more likely to admit of a duty of recognition of foreign nationality laws than the law of a country whose sole concern with nationality is ordinarily to determine whether a person is a domestic national or not? Such a question takes us back once more into the realm of the fundamental theory of the conflict of laws. As has been pointed out already, the very circumstance that States are free to elect between nationality and domicile as alternative connecting-factors of the conflict of laws tends to negate the possibility that there can be any duty to recognise foreign nationality laws. And even if the local law theory of conflicts now prevailing in the Anglo-Saxon world, which would of course no less deny that possibility, is not universally accepted, the fact that there is no universally accepted theory must lead us to the same conclusion. Besides, to what result could a denial of the validity of the concept of nationality entertained in the common law countries possibly lead? That concept is the reflection of an attitude that questions of domestic nationality fall, naturally, to be determined by domestic law and that questions of foreign nationality are generally irrelevant. The *lex fori* does not, in short, decide questions of foreign nationality. The reason for this is no doubt that they are not permitted to arise, issues of civil status being decided according to the alternative test of domicile. But let the range of questioned be extended. Let the law of a country employ nationality as a

[124]) (1939) 307 U. S. 325; Annual Digest, etc., 1938–1940, p. 351.

connecting-factor in the conflict of laws. Must it not still follow that the *lex fori* does not apply for the determination of foreign nationality? The alternative is indeed sometimes canvassed [125]) but it may not improperly be described as heretical. And its adoption must involve a denial of any duty to recognise foreign nationality laws. Finally, it cannot have escaped notice that the survey of domestic nationality codes undertaken in this paper was not confined to the countries which do not employ nationality as a conflicts connecting-factor. Yet no difference was to be observed in the sorts of references made to foreign law in the legislation of the "nationality countries" and in those made in the laws of countries employing alternative tests of civil status [126]).

[125]) See especially Florio; Nazionalità della Nave e Legge della Bandiera (1957) Ch. 2.
[126]) See p. 346 f., *supra*.