Decision

CARLOS KLEMP (GERMANY) *v.* UNITED MEXICAN STATES

(Opinion of Mexican Commissioner, January 19, 1927. opinion and judgment of Presiding Commissioner, April 11, 1927. Memoria de la Secretaría de Relaciones Exteriores, 1926-1927 (Mexico, 1927), pages 213-220 and 221-235, respectively.)

Interlocutory Judgment

OPINION OF THE MEXICAN COMMISSIONER [1]

First Finding

On 23 August 1926 the German Agent presented Memorial No. 1 containing the claim of Señor Carlos Klemp for damages alleged to have been sustained in the town of San Gregorio Atlapulco, D.F.

Attached to the Memorial as the sole documentary evidence to prove that Señor Carlos Klemp was German was a certificate issued on 26 May 1926 by order of the German Minister in Mexico, worded as follows:

"The German Legation hereby certifies that Mr. Ludwig Karl Klemp, born at Bochum on the 29th day of November 1884, was enrolled in the register of this Legation on the 15th day of December 1905. ... It also declares that Mr. Klemp has always retained his German nationality.—Mexico, D.F.—26 May 1926, by order of the German Minister.—(Seal.) Signed:—Trompke—Vice Consul."

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[1] The translation of the opinion of the Mexican Commissioner is by the United Nations Secretariat.

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Second Finding

In a note dated 18 October 1926 the Mexican Agent raised the dilatory objection that the Tribunal had no jurisdiction, on the ground that the German nationality of the claimant was not proved, said Agent contending that the certificate presented by the other party was insufficient because documents intended to prove acquisition of nationality must be presented in the original for the Commission itself to examine and appraise, and estimates of them by officials of the Government of the claimant were insufficient.

Third Finding

On 11 November 1926 the German Agent presented a written Reply to the effect —

(a) That neither the Convention nor the Rules of Procedure of the Commission contained provisions concerning the nature or value of evidence, so that the Commissioners were therefore free themselves to weigh the evidence;

(b) That this was in accordance with the practice of most former international commissions, in particular that of 1868 between Mexico and the United States, which had accepted a declaration or oath of the claimant himself as sufficient evidence of nationality;

(c) That the certificate presented was an official document and should be accepted as conclusive evidence;

(d) That the objection should be disallowed, as the certificate proved the German nationality of Señor Klemp.

Fourth Finding

On 4 December last the Mexican Agent presented a rejoinder stating that the authenticity of the certificate was not questioned but that it proved only that Señor Klemp was enrolled in the register of the Legation, which was inadequate proof of nationality, because the fact of registration was not recognized by international law as a means of acquiring nationality and, furthermore, the registration would at most only indicate that the official responsible for it was satisfied of the nationality of the applicant for registration, but that in the Arbitration Commission the Commissioners themselves must be satisfied by examination of the documentary evidence of acquisition of nationality.

Fifth Finding

At the session of the Commission held on 10 and 11 January 1927, the two Agents agreed to dispense with the oral hearing referred to in article 19 of the Rules as the final stage of a dilatory objection. The case has therefore reached the point at which the following interlocutory judgment can be pronounced.

First Consideration

The question of the nationality of claimants is of fundamental and primary importance, as it determines whether the Arbitration Commission has jurisdiction. Commissioners are obliged to examine and settle this question first, because otherwise they would run the risk of giving a judgment *ultra vires*, which would be null for having exceeded the terms of the *compromis* which limits the jurisdiction of the Tribunal to claims "for loss or damage sustained by *German citizens*".

Moreover, conformably to the objection, it is the duty of the Commissioners carefully to examine all the documents presented by the parties, and above all to satisfy themselves that each of the claimants is in fact German.

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For these reasons, the value of documents purporting to prove acquisition of nationality by claimants must be assessed by the Commissioners personally, and they cannot divest themselves of this duty or rely upon the examination of these documents by consuls, ministers or other officials or agents of the government of a claimant. Otherwise a matter of fundamental importance, the issue of nationality, would be withdrawn from the jurisdiction of the Commission and left to the discretion of the claimant state to settle, which could not be permitted.

The jurisdiction of Arbitration Commissions in this important matter has been so extended that it is now recognized that they may consider the substance of judgments on naturalization pronounced by courts of countries which have submitted to arbitration, even when there has been no appeal against such judgments and, by the jurisprudence of the country concerned, they are considered final. Ralston, in his work *International Arbitral Law and Procedure*, page 166 [1], cites various cases, among them that of Medina and another, in which the American Commissioner Lowndes and the Spanish Commissioner the Marquis de Potestad laid down this principle in unequivocal terms.

Second Consideration

It is not enough for the claimant government to state that a given person has this or that nationality, in order that the Arbitration Tribunal shall accept the statement without scrutiny. That principle has been consistently maintained. It will suffice to quote the opinions of Ralston and Borchard.

In the case of the heirs of Maninat, which was brought before the Franco-Venezuelan Commission of 1902, Count Peretti de la Rocca, the French Commissioner, stated the following opinion: "I am in the position to hold in justice that if the French Government considers an individual as French and grants him a certificate of French nationality, then that individual fulfils the conditions entitling him to protection under the provisions of the Protocol of 19 February 1902." Subsequently the Umpire of the Commission, Mr. Jackson H. Ralston, a well-known United States authority on international arbitration, decided the point as follows:

"The Umpire maintains that the burden of proof of this essential fact rests upon the claimant; that nationality may not be presumed or conjectured, but must be proved. There is no need to cite authority for any of these propositions; they are elementary." (*Report*, page 44). In other words, the Umpire upheld the competence of the Court to inquire into the question of nationality and not to accept the mere affirmation of the French authorities.

Edwin, L. Borchard, in his work *Diplomatic Protection of Citizens Abroad*, pages 486 and 487, states: "There has been some expression of opinion in the Department of State to the effect that the presentation of a claim, on behalf of a claimant alleged to be an American citizen, to an international commission should preclude all examination by the commission into the citizenship of the claimant, on the ground that the Department's determination should be considered final. International commissions, however, have freely assumed the right to pass upon the citizenship of a claimant, testing it in first instance by the municipal law of the claimant's country. For example, when Sir Edward Thornton became Umpire of the Mixed Claims Commission between the United States and Mexico under the Treaty of July 4, 1868, he acted on the principle that the term 'citizenship' in the convention meant citizenship according to the law of the contracting parties and declined to recognize a declaration of intention or domicile, singly or together, as conferring citizenship."

[1] Translator's note. *The Law and Procedure of International Tribunals*, revised edition (Stanford, 1926), p. 176-177 (?).

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Third Consideration

It is settled international law that nationality is a fact which must be proved, and that the burden of such proof is on the claimant. This will be seen from the following opinions:

Holtzendorf, in his *Elements of International Law*, section 31, states that "it is necessary that there should be no doubt concerning the nationality of the claimant against a wrong; and that if any question concerning it does arise, the *onus probandi* rests upon the claimant".

The Anglo-Chilean Commission (1884-1887), in judgments Nos. 6 and 86, decided that evidence of nationality of claimants must be presented as a condition precedent to the hearing of the claim.

The Italo-Chilean Tribunal decided similarly in judgments Nos. 26, 30, 31, 32, and especially in No. 47, which contains several important Considerations, the last of which establishes that the Tribunal may itself hold, without a motion by the party concerned, that it has no jurisdiction.

Fiore, in his *Private International Law*, Vol. II, section 354, says: "Citizenship, like any other legal incident, must be proved, and the person interested in asserting and establishing that a certain citizenship should be attributed to him must prove it as a fact."

Fourth Consideration

Concerning proof of the nationality of claimants, the rule laid down by Fiore, based on the universally recognized principle of *locus regit actum,* should be accepted. This rule, accepted by the German Agent in his Reply, establishes that "nationality must be proved according to the law of the country in which the party concerned claims to have acquired citizenship when proof of acquisition of citizenship is required, and according to the law of the country of origin when proof of loss of citizenship is required". (Fiore, *loc. cit.*)

The certificate presented by Mr. Carlos Klemp proves that he is enrolled in the register of the German Consulate. Therefore, inquiry should be made whether by German law enrolment in a Consular register is conclusive proof of acquisition of German nationality.

According to the principles of international law Mr. Carlos Klemp can have acquired German nationality only by birth within German territory, or by being the son of German parents and opting for German nationality, or by naturalization. In the two former cases the issue is his civil status.

According to the German Civil Code, the civil status of an individual is proved by entries in the Register of Civil Status, and no German law has been cited by the Agent of the claimant Government according to which the civil status of persons can be proved in German courts by consular registration certificates.

Naturalization must be proved by presentation of the original document issued for the purpose by the Government concerned, in accordance with the principles of international law, for in this case also the German Agent cited no law obliging German courts to accept consular registration certificates as proof of naturalization.

Furthermore, there is no known German law stating that nationality is acquired by the mere fact of registration at a consulate or legation of the German Republic.

It must therefore be concluded that the certificate accompanying Memorial No. 1 is insufficient proof of the German nationality of Señor Carlos Klemp.

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Fifth Consideration

Concerning the arguments adduced by the German Agent in his written Reply, the following points should be noted:

It is true that neither the Convention nor the Rules of Procedure of the Commission contain provisions concerning the nature or value of evidence; but this does not mean that the Commissioners have absolute discretion to estimate the value of evidence, for such cases are governed by international law, which is true equity and which, where proof of nationality is involved, invokes the national law of the claimant country.

It is true that the Mexican-United States Commission set up in 1868 established by an Order of 21 January 1870 rules for proving nationality or citizenship, which stated that a declaration on oath by the claimant, indicating the place and date of his birth, sufficed. But it is equally true that the Order of 21 January 1870, or rather, all the rules approved by the 1868 Commission concerning evidence and the authenticity of documents, were revoked by the Commission itself because it was not empowered or entitled to make rules on these matters. Consequently the references made by the German Agent to the 1868 Commission are valueless, the more so as, the Mexico-German Commission having established no special rules concerning proof of nationality, there is no analogy between the cases.

The 1868 Commission made many awards rejecting claims on the ground that the proof of the nationality of the claimants by indirect means, such as consular certificates, was insufficient. The following are instances, *inter alia: Tomás Warner* v. *United States of America* (*Moore*, pages 2533 and 2539); *Spencer* v. *Mexico* (*Moore*, page 2778); *Barrios* v. *United States of America;* and the opinion of Borchard, who states in paragraph 212 of the above-mentioned work that the Claims Commission, under the Treaty of 4 July 1868 between Mexico and the United States, held that "recognition of citizenship by a consul or a certificate from a consul, or aid furnished by the American Minister, were held each as insufficient evidence of citizenship". In addition, Wadsworth, the American Commissioner on the 1868 Commission, in casting his vote concerning the negotiations following raids by bandits, stated that the Commission had been excessively strict in regard to nationality. In the case of *Brockway* v. *Mexico,* Umpire Thornton rejected a consular certificate as inadequate proof of nationality (*Moore,* page 2534).

Sixth Consideration

With regard to consular certificates in particular, it should be stated that, generally speaking, they have been considered insufficient proof of nationality, not only because they constitute indirect evidence inadmissible by commissions arbitrating on matters of so great importance, but also because admission of certificates of this kind might give rise to insoluble conflicts in cases of dual citizenship. Both the doctrine and the jurisprudence in these cases have been to reject the claims and, since it is necessary to prove positively the existence of dual citizenship, and that cannot be done without a thorough inquiry into nationality, which cannot be made if the only evidence is in the form of consular certificates presented by each party claiming a given nationality.

Consequently, the doctrine most nearly conforming to universal jurisprudence supports the decision that the German Agent may not confine himself to presenting a certificate issued by the diplomatic or consular authority of his nation, but must exhibit to the Commission the actual documents in virtue of which the diplomatic or consular authorities registered the claimant as a national and issued the appropriate certificate to him.

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On page 8 of his written Reply, the German Agent cites the Decree of 6 July 1871 for the purpose of interpreting the German Constitutional Act of 8 November 1867 with regard to the reorganization of the Federal consulates. The Decree provides that "before making an entry in the register, the consul must be satisfied that the person in question possesses the nationality of the German Reich or of one of the Federal States of Germany. This can be proved only by presenting a valid national passport or a *Heimatschein* (certificate of origin). If doubts arise concerning the validity of these documents, the Chancellor of the German Reich or the government of the State concerned must be consulted and enrolment in the register postponed until their reply is received".

This proves that, even for mere enrolment in the register, documents must be presented to prove the origin and nationality of the person requesting enrolment. Those are the documents which must be presented to this Commission for examination, provided that they contain direct proof of acquisition of German nationality by the claimant—for instance, a birth certificate issued by the official in charge of the Civil Register. When these documents required by consuls for enrolment in their registers do not directly prove acquisition of nationality—e.g., a passport—they are no sufficient evidence of the nationality of claimants before this Arbitration Tribunal, even though sufficient for consuls, as the latter, in case of doubt, may consult the Chancellor of the German Reich and postpone enrolment in the register, whereas this Commission cannot consult either of the two claimant Governments or postpone its decisions.

Seventh Consideration

Registers are kept at Legations or Consulates mainly for statistical purposes and in order to have at hand a record for rapid consultation in cases where persons are in urgent need of protection. (Borchard, *op cit.*, page 516, final paragraph.) It is easily understandable that such matters being less important and fundamental than the examination of the nationality of claimants before a Mixed Commission of Arbitration seeking indemnities from a foreign Government, similarly the evidence of nationality required by consuls for registration will necessarily also be much slighter.

While the fact of enrolment in the register of a consulate might be considered equivalent to a declaration of intention to acquire nationality, arbitration tribunals have uniformly decided that declarations of intention are insufficient for acquiring and proving nationality (Ralston, *The Law and Procedure of International Tribunals*, page 166, section 300).

Eighth Consideration

As the German nationality of the claimant is not proved, the Court is not competent to deal with the claim presented on behalf of Señor Carlos Klemp in accordance with Articles I and IV of the Convention of 16 March 1925 between Mexico and the German Republic.

In view of all the foregoing considerations, the undersigned considers that the objection based on lack of jurisdiction should be upheld and that the Mexican Agent is not obliged to reply to Memorial No. 1 presented by the German Agent on behalf of Señor Carlos Klemp.

Mexico City, 19 January 1927

(Signed): FERNANDO IGLESIAS CALDERÓN

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Opinion and Decision of the Presiding Commissioner [1]

ANTECEDENTS

Memorial No. 1 of the German Agent submits the claim of Señor Carlos Klemp for damages which he alleges to have suffered in the town of San Gregorio, Atlapulco, D.F.

The Mexican Agent has entered a dilatory exception, that the Mixed Commission is without power to act in the absence of proof of the German nationality of the claimant. He qualifies as insufficient proof of nationality the certificate that accompanies the Memorial, and which was executed by the German Vice-Consul in Mexico; a certificate in which it is stated that Klemp, born in Bochum, November 29, 1884, was inscribed in the Register of the German Legation on December 15, 1905, and in which it is also stated that he has always preserved his German nationality. The Mexican Agent maintains that the original documentary proof of nationality must be presented direct to the Commission in order that the Commission may consider it and pass upon its legal value, the estimation by the functionaries of the complaining government not being sufficient. (Brief of the Mexican Agent of October 18, 1926.)

In his Reply, the German Agent observes that, in the absence of rules, in the Claims Convention as well as in the Regulations of the Mixed Commission, governing the submission of proof of nationality, the Commission is to judge the merits of the proof that is adduced and that, inasmuch as the Consular Certificate presented is a public document, the Commission must give it complete probatory value. (Reply of the German Agent of November 11, 1926.)

In his Answer, the Mexican Agent observes that, without doubting the authenticity of the certificate, it only proves that Klemp is inscribed in the Register of the Legation, which in itself is not sufficient proof of nationality, not only because the act of registering is not the means recognized by international law for acquiring nationality, but also, because, in the best of cases, such registration would only indicate that the functionary, charged with its keeping, is convinced of the nationality of the applicant for registration; and before the Mixed Commission such a conviction must give way to that formed by the Commissioners through an examination of the documents that prove the acquisition of nationality. (Answer of the Mexican Agent of December 9, 1926.)

The parties having waived the oral hearing provided for in article 19 of the Regulations by which the Mixed Commission is governed, it is necessary to pass upon the dilatory exception that has been entered. The German and Mexican Commissioners having failed to reach an agreement upon the Resolution, which should be made in this instance, it therefore corresponds to the undersigned to render such verdict.

OPINION OF THE GERMAN COMMISSIONER

Although various international mixed commissions have decided that, in the absence of suspicious circumstances, the mere presentation of the claim by the Agent is sufficient to prove the nationality of the claimant, the German Commissioner does not adhere to such conception.

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[1] The following portion of the translation is from Am. J. Int. Law, Vol. 24, 1930, pp. 611-624.

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After establishing that the question of nationality must be decided according to the local law of the country of the claimant, and considering that the probative merit of the inscription in the Register is denied, the German Agent has made, in his Opinion and Award, an examination of the principal German laws concerning the matter. (Draft of Resolution of the German Commissioner.)

The German legislation applies the system of *Lex sanguinis* in contraposition to the system of *Lex soli*. In consequence, he says, the fact that a person was born in German territory does not establish that he is of German nationality, but such nationality can only be accredited when the person dealt with was born of German parents, no matter whether the birth took place in German or foreign territory. (Article 39 of the Nationality Law.)

German legislation has provided for the *Heimatschein*, a certificate of origin, intended for use "during a sojourn in a foreign country". The high administrative authorities authorized to issue it, always before so doing, must make the necessary investigations as to the lineage and the nationality of the parents and of the ancestors of the solicitant.

There have been established also, since 1867, the Consular Registries, and the Regulation of 1871 provides that the Consuls, before making the registration, must assure themselves that the registrant is a German, and this fact can only be accredited upon the submission of a valid passport or of a *Heimatschein*.

According to the German Commissioner, the following are the rules that must control in the matter of nationality:

(a) German nationality, always, when not based on naturalization, marriage with a German, or the legitimization of an illegitimate child of a German, is based on origin from German parents, and not on the fact of having been born in German territory.

(b) Those coming within the exceptions indicated in the previous paragraph must exhibit their certificates of naturalization, marriage, or legitimization, as the case may be.

(c) In those cases in which the nationality is connected with the lineage of the individual, the proof of said nationality is made, with either the *Heimatschein* issued by the superior administrative authorities, or with the Certificate of Registration executed by the German Consuls, "in which, generally, an entry must only be made upon the presentation of a certificate of origin" *(Heimatschein)*. (Draft of Resolution of the German Commissioner.)

In the judgment of the German Commissioner, the Consular Certificate of Registration has the probative force of a public instrument, because such character is given it by paragraph 15 of the German Law of November 8, 1867, concerning the Consular Service. The German Commissioner adds, that the certificate is sufficient proof of nationality because, the matter of nationality being within the province of and confined to the internal law of the country of the claimant, it must be considered proven when it is so under the law of the country of which the claimant is a national.

The German Commissioner also bases his Opinion and Award upon, the benevolent practice that has been observed, in this respect, by previous mixed commissions. He cites the decisions reported by Moore *(International Arbitrations*, III, pp. 2155 and 2332), in which they accept, as sufficient proof of nationality, simply the affidavit of the claimant, or the mere certificate by the Governor of a Mexican State, notwithstanding the lack of authority of this latter functionary to issue documents of such a nature. (Moore, *International Arbitrations*, III, p. 2532.)

He invokes, finally, the doctrines supported in the works of König, *Handbuch des Deutschen Konsularwesens* (8th ed., pp. 251 *et seq.*); Borchard, *The Diplomatic Protection of Citizens Abroad* (New York, 1925, pp. 515 *et seq.*), and the

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article of Jordan "*Des preuves de la Nationalité et de l'Immatriculation*", (*Revue de Droit International et de Législation Comparée*, 1907, pp. 267 to 295).

And concludes, after acknowledging that the "prima facie" authority of the certificate can be nullified by better evidence to the contrary, adduced by the Agent of the objecting country, that it is his opinion and judgment that the dilatory exception must be rejected.

OPINION OF THE MEXICAN COMMISSIONER

The probative documents of nationality of the claimants must be weighed, by the Commissioners, personally, for such is their unavoidable obligation, and they cannot abide by the examination that has been made by the Consuls, Ministers and other functionaries and agents of the complaining government. (Interlocutory Resolution.)

The privative jurisdiction of mixed commissions has been carried to the extreme of establishing their right of reviewing the decisions upon naturalization rendered by the tribunals of the countries that are parties in the arbitration. (See: Ralston, *Law and Procedure of International Tribunals*, Ed. 1926, pp. 176 and 177.)

The Mexican Commissioner supports his opinion that a declaration to such effect by the complaining government is not sufficient proof of nationality by citing the findings of Umpire Ralston, in the case of the heirs of Maninat (French-Venezuelan Commission of 1902, Rapport, p. 44); of Umpire Thornton (*Mixed Commission between Mexico and the United States of 1868*, Borchard, pp. 486 and 487), of this same Umpire in the *Brockway* case (Moore, *op. cit.*, p. 2534), and analogous decisions in the cases of *Warner* v. *United States of America*, *Spencer* v. *Mexico*, *Barrios* v. *United States of America* (Moore, *op. cit.*, pp. 2533, 2535, 2539 and 2778.)

Applying the rule of *locus regis actum* it is found that the certificate exhibited by the claimant Klemp, proves that he is inscribed in the Consular Register; but examination must be made whether, according to the laws of Germany, this registration is proof of German nationality. The Mexican Commissioner maintains that no German law gives to the registration the character of proof of nationality. The civil status is proved, according to the Civil Code of Germany, by the acts of the Registry of the civil state.

The Mexican Commissioner calls attention to the fact that the consular certificates are not sufficient proof, not only because they constitute an indirect means, inacceptable to arbitral commissions, but because such acceptance might permit conflicts, impossible of solution, to arise in cases of double citizenship. The claims of an individual who has double citizenship, of the complaining country and of the defending country, have been constantly rejected, and mixed commissions could not do so unless they had the right to completely study the basic question of nationality.

The Mexican Commissioner adds, that the citation by the German Commissioner of the stipulation of the Regulation of the Consular Law providing that the Consul cannot proceed to inscribe in the Registry until there has been exhibited to him by the solicitant, either a passport or a *Heimatschein*, strengthens his conviction that such documents must be presented to the Mixed Commission for their examination.

On the other hand, the consular registrations of nationals residing abroad are principally for statistical purposes, and are utilized in urgent cases of protection. (Borchard, *op. cit.*, p. 516.) Feeling those objects to be of less importance than the submission of a claim to a government before an international mixed commission, it is readily comprehended that the examination of nationality,

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and of the proof required by the Consul before proceeding to register, is very cursory.

Upon these considerations, the Mexican Commissioner is of the opinion, and decides, that the dilatory exception of incompetence must be allowed.

Opinion of the Presiding Commissioner

PRECEDENTS ESTABLISHED BY OTHER TRIBUNALS

In determining cases similar to this, Arbitral Commissions have adopted entirely divergent criterions. It has not been possible to find any decision which, by its reasoning and amplitude, may be considered as setting a precedent in the matter.

In view of such a situation, the Umpire has deemed it useful to review in this opinion those precedents, opinions and legal precepts which are most applicable to the case at hand.

In the Spanish-Venezuelan Mixed Commission, the Umpire decided, in the case of Esteves, a naturalized Spaniard, that the enrolment in consular registries of Spanish residents, and the certificate that evidences it "constitute proof of nationality which can give way only to a more convincing proof to the contrary, which has not been attempted, nor made in the present case". In reaching this decision he took into consideration: (1) that the Spanish Law, article 26 of the Civil Code, provides that "Spaniards, who transfer their domiciles to foreign countries are under obligation to prove in every case that they have preserved their nationality and so declare to the Spanish diplomatic or consular agents," who will enrol them in the Register of Spanish Residents, and (2) that the Spanish Consular Regulation, articles 26 and 32, empower the Spanish Consuls to grant letters of residence or security to their nationals and it charges them with the duty of making a Register of the Spanish residents in the district. (*Esteves* v. *Venezuela*, *Venezuelan Arbitrations of 1903*, Washington, 1904, pp. 922-923.)

In the General Claims Commission between the United States and Mexico (*Parker* v. *Mexico)* it was established that the birth certificate "should be admissible, and while desirable, it should not constitute an exclusive proof. The fact of nationality should be proven as any other fact".

Citizenship must be alleged in the Memorial and, in each case, if denied, it must be proven. (Ralston, *op. cit.*, p. 173.)

When there is no dispute or cause for suspicion, the mere presentation of the claim by the Agent of the complaining country has been considered as satisfactory. (*Tipton* v. *Venezuela*, Ralston.—*op. cit.* p. 173.) Nevertheless, in the Tipton case, Umpire Thornton held that "the commission has certainly a right to expect more positive proof of citizenship than the memorial signed by Tipton and others, and the circumstance of the United States Minister's having helped them in their difficulties". (Ralston.—*op. cit.*, p. 174.)

The general rule adopted by mixed commissions has been the following: When the claimant is a citizen of both countries (complainant and defending) the claim has no place because neither country has the power of imposing its laws on the other to establish a right. When the rights are equal the claim cannot proceed. (Ralston, *op. cit.*, p. 172.)

Nevertheless, the British-American Mixed Commission of 1871, in the Halley case, decided, contrary to the vote of the American Commissioner, that an American-born child of an English father was able, as the last beneficiary, to recover against the United States. (Moore, *op. cit.*, p. 2241.)

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In the *Brissot* case, United States and Venezuelan Mixed Claims Commission, the Venezuelan Commissioner Andrade established the following principles: Every independent State has the right to determine who is to be considered as citizen or foreigner within its territory, and to establish the manner, conditions, and circumstances, to which the acquisition, or loss of citizenship, are to be subject. But for the same reason that this is a right appertaining to every sovereignty and independence, no one can pretend to give an extraterritorial authority to its own laws regarding citizenship, without violence to the principles of international law, according to which the legislative competence of each State does not extend beyond the limits of its own territory. Otherwise, anyone could be at the same time a citizen of two States, which is as inadmissible as not to be a citizen of any State at all. (Moore, *op. cit.*, p. 2457.)

In the *Brockway* case, the American Umpire Thornton held that a Consular Certificate that credited a claimant with American citizenship was insufficient proof. (*Brockway* v. *Venezuela*, Moore, *op. cit.*, p. 2334.)

A simple certificate of baptism was also held insufficient evidence of nationality because it was not proved that, although the person baptized had the same name as the claimant, that this certificate pertained to the claimant. (*Suarez* v. *Mexico*, Moore, *op. cit.*, p. 2449.) It has been decided, repeatedly, that a certificate of naturalization is not conclusive proof of citizenship before a court.

In the Fluties case, the American-Venezuelan Commission ruled that, although he was regularly naturalized, he had had no right to the naturalization and had, therefore, perpetrated a fraud upon the court which had naturalized him. The certificate of naturalization, it was added, is not conclusive, because the United States was not a party to the act. (*Venezuelan Arbitrations of 1903*, pp. 44 and 45.)

It was declared in this case, that the commission is an independent judicial tribunal possessed of all the powers, and is endowed with all the properties which should distinguish a court of high international jurisdiction, alike competent, in the jurisdiction conferred upon it, to bring under judgment the decisions of the local courts of both nations, and beyond the competence of either government to interfere with, direct, or obstruct its deliberations. (Moore, *op. cit.*, p. 2599.)

In the *Medina* case, Umpire Bertinatti said, "to admit this (the certificates as absolute proof) would give those certificates in a foreign land or before an international tribunal an absolute value which they have not in the United States, where they may eventually be set aside, while Costa Rica, not recognizing the jurisdiction of any tribunal in the United States, would be left with no remedy. Moreover, this commission would be placed in an inferior position, and denied a faculty which is said to belong to a tribunal in the United States." (*Medina* v. *Costa Rica*, Moore, *op. cit.*, p. 2588.)

OPINIONS, LEGAL PRECEPTS AND JUDICIAL DECISIONS

The authority to maintain a Registry of Nationals has been granted to the Consuls only by certain nations, and although they are numerous, it cannot be said that this is a universal practice and, in consequence, a rule of international law.

Some countries have granted this authority to its consular functionaries recently. The United States instituted Registers of Nationals in its Consulates abroad only since 1907 (Borchard, *op. cit.*, p. 667), which gives greater force to what has been said in the previous paragraph.

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The power of consular registration and of issuing copies of the entry must be taken in connection with the power of issuing certificates of matrimony, because both refer to acts of the civil status and to the exercise of administrative functions.

Marriages cannot be performed in consulates and legations but when the law of the country of the Consul or Agent permits it to be done; but the validity of marriages, in countries other than that of the Agent or Consul, depends upon general practice and the understanding these countries have of the doctrines of international law.

According to Westlake (*Traité de Droit International*, Oxford, 1924, page 302). "The general recognition of the international validity of marriages performed at consulates or legations finds no place among these doctrines."

The above-cited construction is confirmed by the Rules established in 1887 by the Institute of International Law, to govern the conflict of laws in matters of matrimony and divorce. In them, after declaring that it is enough, and is necessary, for the marriage to be valid everywhere, that the forms prescribed by the law of the place of celebration have been observed, they add that "it is desirable to admit, as a pretended exception, the validity of diplomatic and consular marriages, in the case where both contractants belong to the country of the Consulate or Legation." (*Institut de Droit International*, by James Brown Scott, 1920, p. 115.)

The League of Nations, Committee of Experts for the Progressive Codification of International Law, designated, in 1926, a sub-committee charged with considering the problems relative to nationality and with proposing solutions. Speaking of the proof of nationality, this sub-committee said in its report:

Among others, there are some questions of form relative to proof of nationality which are of great practical importance in international relations and urgently require solution in order to improve the position—often a very precarious one—of persons required to furnish certificates constituting official and absolute proof of nationality. The system of registration, which is provided for by the laws of several countries (Belgium and Italy; and of the idea of a *casier civil* proposed in France) might be generalized by an international agreement; although it would not remove all difficulties, it would to some extent mitigate them. There could be no doubt of the practical importance of such a reform, which would have to be introduced into the internal law of each State. (Special Supplements to the *American Journal of International Law*, Vol. 20, July and October, 1926, p. 44.)

Article 12 of the Draft of a Convention that closes the report reads as follows:

As between the contracting parties, nationality shall be proved by a certificate issued by the competent authority and confirmed by the authority of the State. The certificate shall show the legal grounds on which the claim to the nationality attested by the certificate is based. The contracting parties undertake to communicate to each other a list of the authorities competent to issue and to confirm certificates of nationality. (*Ibid.*, p. 48.)

The preceding shows clearly that, in the judgment of the sub-committee reporting, the Certificates of Consular Registration do not constitute proof of nationality. In order to constitute such proof, they need the confirmation of the authority of the State, and must contain the legal reasons on which the document is based. The simple copy of the entry inscribed in the Register does not constitute absolute proof.

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The Grotius Society has recommended and suggested rules regarding compulsory registration, maintaining that by this means, the uncertainties at present obtaining in international relations would necessarily disappear. The recommendation alluded to says:

Registration only fixed nationality with regard to the State which introduces it. Were all States to adopt it, there would be a foundation for an international solution of all difficulties which exist at any uncertainty and universal agreement and practical uniformity. (*Transactions of the Grotius Society*, Vol. IV, "Report of the Committee on Nationality and Registration", p. 52.)

The system recommended by the Grotius Society has been adopted by English law in section I, 1. b. V. of the British Nationality and Status of Aliens Act, 1914, 1922.

On their part, the States that previously formed a part of the Austro-Hungarian Empire dealt with the problem in article 2 of the draft of a convention signed at Rome:

As between the high contracting parties, nationality shall be proved by a certificate issued by the authority competent under the law of the State concerned and countersigned by the authority to which the said authority is responsible. This certificate shall state on what legal basis the claim to the nationality which the certificate is intended to prove rests. Each of the high contracting parties shall, however, be entitled, whenever it considers it necessary, to require that the contents of the certificate shall be confirmed by the central authority of the State. (Draft Convention between the Austro-Hungarian Succession States, signed April 6, 1922.)

The international probative force of the acts of a notary, or other functionary that, according to the laws of his country, has the powers of a notary, must be considered in connexion with the arrangements of international conventions if there [are] any, and in the absence thereof, by the *lex fori*, without prejudicing that the form of such acts be considered by the *lex loci*. (*Institut de Droit International*, Scott, 1920, p. 225.)

In consequence of the preceding rules, consular certificates do not have, by themselves, sufficient probative force in countries other than that of the Consul that issues them, and even in the latter, are subject to such credit as may be given to them by its prevailing law.

By way of example, may be cited the faculty of the Consuls to license sailors. The certificate that they issue must contain the provisions upon which they are based, to indicate that their action is official and that they have jurisdiction. (Puente, *The Foreign Consul*, Chicago, 1926, p. 62.)

This certificate can be disputed before the courts because the Consul "has no power to authorize an illegal act". *Hall* v. *Cappell* (7 Wall. (U.S.) 553): *The Amado*, Newberry Adm. 400. (Puente, *op cit.*, p. 63.)

It may also be recalled, that a Consular Certificate has no weight before an Admiralty Court, because International Law only recognizes Consuls in commercial transactions, and not as functionaries invested with the authority of authenticating judicial proceedings. (*Catlett* v. *Pacific Insurance Company*, 1 Paine 394, Fed. Cas. 2,517, Puente, *op. cit.*, p. 63.)

In reviewing an appeal from the action of an inferior tribunal, the Court of Appeals of Kentucky reversed the judgment of the lower court and held, that a passport, issued by a United States Consul, only entitled the bearer to that courtesy and respect which are due to a citizen of the United States from foreign governments, through whose territories he might pass. "It was for that purpose alone they were given, and for no other purpose can they

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be legitimately used. They certainly cannot, we think, be used as evidence in a court of justice, for the purpose of proving facts, of the character they were admitted to prove in this case.

"These facts, from their nature, were susceptible of being established by the testimony of witnesses, upon oath; and it is a settled rule, that for the establishment of facts of this sort, the sanction of an oath is indispensable; and, of course, the *ex parte* statement or certificate of any one, not upon oath, whatever may be his character or station, cannot be admitted as evidence of the truth of such facts. A consul, by the law of nations, is, no doubt, possessed of high and extensive powers; but he is not, properly speaking, a judicial officer; and it is accordingly held, that his certificate is not only not entitled to the character of a judgment, but that it ought not to be admitted as evidence of the fact therein stated." (Stowell, *Consular Cases and Opinions*, ed. 1909, p. 163.)

In some legislation this probative merit is restricted as occurs, for example, in the United States, where the passports are considered as intended for identification and protection in foreign countries, and not to facilitate entry into the United States, that matter being under the supervision of the Department of Labor. (Borchard, *op. cit.*, p. 510.) The instructions concerning passports prescribed by the Department of State, December 21, 1914, decrees that emergency passports and consular registration certificates should not be accepted as conclusive evidence of citizenship. (Borchard, *op. cit.*, p. 512), and it seems worthy of mention that even the passports that are issued by the State Department, after very careful consideration, have been held by local courts of the United States as insufficient judicial evidence of citizenship. (Borchard, *op. cit.*, p. 489.)

The Consular Certificates of Registration provide the registree a means of summarily proving his nationality to the authorities of the place where he is residing (Borchard, *op. cit.*, p. 516); but they cannot be considered as sufficient to prove nationality before an International Mixed Commission that takes jurisdiction independent of the territorial jurisdiction of the countries that subscribe to the pact of Arbitration. (Borchard, *op. cit.*)

Certificates of Consular Registration do not have the same effect in all countries which have authorized their issuance. Their fundamental purpose is to give the government of the consul information respecting the number and residence of its nationals abroad, and to permit the registree to manifest his desire to retain and maintain his original citizenship, and to afford an official record of his identity and political status to the consul and to the local authorities. (Borchard, *op. cit.*, p. 667.)

As evidence that the probative value of consular certificates is not incorporated among the accepted principles of international law, the circumstance must be cited that some treaties explicitly authorize such character of proof. Thus, the Treaty of 1863 between Spain and the Republic of Argentine provides in article 7 that the simple inscription in the Register of Nationals of the Legation or Consulate of either country will be sufficient formality to make the respective nationality certain.

OPINION OF THE PRESIDING COMMISSIONER

Whereas,

1. The nationality of a person is an integral part of his civil status and must be proven in the manner established by local law of the country whose nationality the interested party claims, is a principle accepted by both parties to the present claim and is in accord with the general doctrine of International

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Law. (Fiore, *Derecho Internacional Privado,* Sec. 354; Borchard, *Diplomatic Protection of Citizens Abroad,* p. 486; Ralston, *The Law and Procedure of International Tribunals,* 1926 ed., p. 160.)

2. In accordance with the most frequent provisions of different laws [of Germany], the civil status is proven with the Records of the Civil Registry.

3. The German Law of Nationality, of June 1, 1870, provides in paragraph 2, that citizenship in a Federal State is acquired only through origin, legitimization, marriage, by acceptation—for a German—by naturalization—for an alien; without there appearing, among these exclusive manners of acquiring nationality, the registration in the German Consular Registries abroad.

4. The Law of 1867, prior to the Nationality Law of 1870, organized a Consular Service, and in Paragraph 12 provided that "each Consul must maintain a Register of nationals that are resident in his official district, and who present themselves to him for that purpose"; and the regulatory Decree of this Law, dated July 6, 1871, provided that "Before making an entry in the register, the Consul must convince himself that the person referred to possesses the nationality of the German Empire, or the nationality of one of the German Federal States. The proof of this can only be credited by the presentation of a valid national passport, or by a certificate of origin *(Heimatschein).* If doubts arise as to the validity of these documents, the Chancellor of the German Empire or the Government of the respective State must be consulted, and suspend the entry in the Register until the receipt of the decision . . .

"Concerning the entry in the Register, they must issue to the solicitant at his request a certificate in the form usual to the place . . .

"A cancellation in the Register must be made when the person registered dies; or leaves the consular district; or when he loses the nationality of the German Empire, or the nationality of one of the Federal States; and besides, when the registree so requests."

5. According to the preceding, the Consuls must demand, of the solicitants for registration, the documents proving their nationality, which can be no other, by mandate of the Law, than a valid national passport of a *Heimatschein,* namely, the certificate of origin that corresponds to the respective entry in the Civil Register, in those countries that have established such a service under denomination.

6. The circumstances; 1st, of the Consuls being obliged to examine the documents presented by the solicitant and not being permitted to proceed with the entry without convincing themselves that the solicitant possesses German nationality; and, 2nd, of being, in cases in which the validity of the documents presented is doubted, obliged to consult the Chancellor of the Government of the respective Federal State and to suspend the entry until the receipt of the superior decision; show that, in the very intention of the German Law, the nationality is proven precisely by means of the documents of the civil status, which give, to the consular inscription based upon them, the legal merit that corresponds to it by law, without it constituting a definite proof of nationality.

7. The Consular Certificates of Registration summarily evidence a presumption of nationality, being subject to cancellation in those cases provided for by the Law (paragraph 12); to which must be added, that such certificates can be annulled or revoked, as well when the Consul is convinced that the entry was made through error or a mistaken interpretation of the documents

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that were taken into consideration in making it, as when the superior authorities of Germany or of the Federal State so determine in cases of revision or of civil or criminal processes that may concern them.

8. The Consular Certificates of Registration establish nationality only for purposes of statistics; of complying with the laws of compulsory military service; of payment of taxes upon income from an estate a national, resident abroad, may have in his own country; of acquisitions of property, of inheritances or legacies; or of pensions and maintenances, etc.

9. Such Consular Certificates of Registration are of domestic nature as *prima facie* proof of nationality, and can serve and be utilized in an exigency to establish the presumption that the bearer has the right to protection; as in the case of arbitrary acts of the local police or molestation to the person or property, if the local law authorizes such protections; but they are not sufficient evidence of nationality in claims against the State for alleged damages or injuries, especially when these claims are prosecuted before a mixed commission or tribunal of international arbitration whose initial duty it is to consider the true nationality of the claimant.

10. If the Consul is obliged to be convinced of the effective nationality of whoever applies for registration, before proceeding to inscribe him, yet more imperative is the duty of the international mixed commission to study and decide upon such nationality; because in this right and duty have great importance to the Consul, as an act that will affect the internal law of his country, they weigh with much more force upon the mixed commission, because of it being an act that will determine presumptions and effects upon the external law, since that pertains to the international relations between two countries.

11. To grant to the Consul the absolute power of appreciating and deciding upon the documentary evidence submitted by a solicitant for registration, would be tantamount to creating him a Judge to determine the right to submit claims to an international mixed commission, thus trespassing upon the essential obligation of the Commission to ascertain the nationality of the claimants, on which they base the very right to claim before it.

12. The duty of the Commission to establish, by itself, the nationality of the claimants, before granting or denying them the right to initiate their actions is, by its very nature, not delegatable, and it would be a delegation of such primary power and duty, to compel it to recognize as immovable, or sufficient, the mere record of the consular registration.

13. The preceding conclusions become still more evident, if we take into consideration the difficulties that are presented by cases of dual nationality or of conflicts of nationality, arising from the doctrines of *jus soli* and *jus sanguinis*. If the consular registration is sufficient proof of nationality, it would follow that the registree, in spite of having double nationality, is a national of the country with which he is registered, thus preventing any attempt which the other country might make of having him considered as its own national. In cases of dual nationality, the consular certificate would decide upon which is the proper nationality and, if the criterion taken by the Consul is that imposed by the law of *jus sanguinis*, the criterion imposed by the law of *jus soli* would be, through his own act and volition, ignored. The Consul would decide, in this manner, not subject to appeal, a question in which the sovereignty of two countries is involved; in effect, for example, a child of a German, born in Mexico, is a German, according to German Law, and could be entered in the German consular registries in Mexico; but, this child, born in Mexico of a

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German father, is a Mexican, and the certificate of registration as a German would have no weight with the Mexican authorities.

14. A similar difficulty occurs in the case of a married woman. There are laws that provide that a married woman acquires the nationality of her husband, others that provide that a female national who marries an alien retains her original nationality, and there is one that attributes to the alien the nationality of the woman he marries. A claimant who attempts to initiate his action before a mixed commission, invoking his character as an alien by means of a consular certificate of a country that extends to the married woman the nationality of her husband, should not be heard.

15. Equal difficulty presents itself in cases involving laws that, in specific instances, revoke the citizenship of nationals who reside for a certain number of years abroad, or who accept honors or employment from foreign governments, without permission from their own. The certificate of consular registration, in such cases, would lose all its value.

16. It is not juridical to attribute to the Consul, who is a functionary of a merely administrative and commercial character, the power of passing upon nationality in cases that require, each one of them, a special examination into the circumstances and the respective national laws; for identical reasons consular certificates of registration must not be considered as sufficient proof of nationality.

17. Germany, a country of *jus sanguinis*, considers as a German, the son of a German, even when born on alien territory, the fact of his birth in Germany having no influence upon the acquisition of nationality.

18. The certificate, which is presented in this case, records that the claimant, Klemp, born in Bochum (Germany), is entered in the Consular Registries. The fact of having been born on German territory does not impress upon him the character of a German national; from which it follows that, the very document invoked as exclusive proof of the nationality of the claimant, shows that it is not proven pursuant to German Law.

Decision of the Presiding Commissioner

Therefore,

Upon these considerations, in view of the opinions, legal precepts and judicial decisions heretofore cited, and after hearing the divergent opinions of the Commissioners of the parties, the Umpire, forming a majority with the Mexican Commissioner, decides that the proposed dilatory exception is pertinent and is allowed, without prejudicing the right of the German Agent to present other proof of the nationality of the claimant.

Washington, D.C., April 11, 1927.

Miguel Cruchaga,
Presiding Commissioner.

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