F. W. FLACK, ON BEHALF OF THE ESTATE OF THE LATE D. L. FLACK (GREAT BRITAIN) *v.* UNITED MEXICAN STATES

(Decision No. 10, December 6, 1929, dissenting opinion by British Commissioner, undated, separate opinion by Mexican Commissioner, December, 1929. Pages 80-97.)

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1. According to the Memorial, the late Mr. Daniel Ludgate Flack carried on business in London, under the name of Daniel Flack and Son, and also in Mexico under the name of D. L. Flack and Son, Mexico (Limited). The latter, according to a certificate delivered by the Registrar of Joint Stock Companies, was incorporated in London under the Companies Acts, 1862-1907, as a Limited Company on the 19th February, 1909. The business of the company was the export from Great Britain of coal, patent fuel, coke and general merchandise. Compensation is claimed for the loss of stocks of coal belonging to the Company which were set on fire at Doña Cecilia during a battle between rebel and federal forces in April 1914. The claim stands in the name of Mr. Frederick William Flack, on behalf of the Estate of the late Mr. Daniel Ludgate Flack, who died on the 9th June, 1920, intestate. After his death letters of administration were given first to his widow and, after her death, to his son, Frederick William Flack. The Company has been dissolved, according to the Registrar's certificate, but the date of its dissolution is not known.

2. The Mexican Agent lodged a demurrer to the memorial on the ground that the certificate issued by a British authority is not sufficient proof of the British nationality of the Company, and also on the ground that it has not been established that Mr. F. W. Flack is, as Executor of the Estate of Mr. D. L. Flack, entitled to represent the Company of D. L. Flack and Son, Mexico (Limited). In his oral argument, and in a brief delivered on the 31st October, 1929 (the third day of the hearing), the Mexican Agent amplified his pleading with the further argument that, as the claim is preferred by F. W. Flack on behalf of the Estate of the late D. L. Flack, the following points should have been proved:

(a) That Daniel Ludgate Flack was a British subject when the damage was caused.

(b) That such and such persons were the heirs of the said Daniel Ludgate Flack.

(c) That the said persons inherited the right to prefer the claim.

(d) That the said persons were British subjects at the time of inheriting.

(e) That Mr. F. W. Flack is entitled to present the claim on behalf of the said persons.

He contended it was necessary to prove that the whole of the issued shares were held by D. L. Flack and that after the dissolution of the Company the right to present the claim was legally vested in him.

The British Agent argued, in reply, that the Registrar of Joint Stock Companies in London is a public official, appointed to register companies in London in accordance with the Companies Acts, and all companies registered by him must be presumed to have been formed in conformity with English law, and that the Certificate of Incorporation issued by him was sufficient proof of the British nationality of D. L. Flack and Son, Mexico (Limited). Moreover, the Company was domiciled in London and all the business was conducted from that place.

Secondly, the British Agent submitted that Mr. F. W. Flack is, as executor of the Estate of the late Mr. D. L. Flack, entitled to claim in respect of the deceased's interests in the firm of D. L. Flack and Son, Mexico (Limited). According to the British Agent, this Company had only one shareholder, Mr. D. L. Flack, to whose Estate all the assets of the Company (including the right to claim) were automatically transferred at the moment the Company ceased to exist.

3. In determining the issue before them the Commissioners must be guided by the rule laid down in the Gleadell case. When allowing the Motion to Dismiss in the claim of *W. H. Gleadell* (Claim No. 19), the Commission declared the principle by which it ought to be guided, namely, that a claim must be founded upon an injury or wrong to a citizen of the claimant Government, and that the title to that claim must have remained continuously in the hands of citizens of such Government until the time of its presentation for filing before the Commission. In the same judgment, the Commission laid down the rule that where the claim is preferred on behalf of an Estate, the nationality of the Executor is of less importance than the nationality of the heirs. Applying this principle to the case under consideration, the majority of the Commissioners are of opinion that in order to decide whether the nationality of the claim was originally British and remained so until the end, the following issues of fact must be determined:

I. Has it been established that the Company D. L. Flack and Son, Mexico (Limited) was a British Company?

II. Has it been established that at the time of the dissolution of this Company all the shares belonged to D. L. Flack?

III. If so, has it been established that D. L. Flack at the time of his death still held all the shares?

IV. If so, has it been established that D. L. Flack was a British subject?

V. Has it been established that F. W. Flack was the only heir of his father?

VI. If not, has it been established that there were other heirs who were British subjects?

4. The questions have been answered as follows:

Question I.—In the affirmative, by the majority of the Commissioners, because in their opinion the Certificate of Incorporation, combined with the fact that

the Company was domiciled in London and the affairs conducted from there, is sufficient proof of the British nationality.

Question II.—The date of the dissolution of the Company does not appear. The last annual return of the Company filed with the Registrar of Joint Stock Companies at Somerset House, London, proves that on the 13th January, 1919, all the shares issued, numbering 2,606, belonged to Mr. D. L. Flack, but there is no evidence as to what happened with regard to those shares between that date and the date of the dissolution, whenever that may have been. The answer to the question is in the negative.

Question III.—There is no evidence as to the ownership of the shares at the time of the death of Mr. D. L. Flack. Neither is there evidence as to the ownership of the assets of the Company, including the right to claim (assuming the latter was dissolved at the time of the death of Mr. D. L. Flack). The answer is in the negative.

Question IV.—The majority of the Commissioners answer this question also in the negative. There is evidence as to the nationality of the son, but not of the father.

Question V.—There is no indication whatever as to the existence or the number or the names of the heirs of the late D. L. Flack. The answer is in the negative.

Question VI.—The answer must necessarily be the same as to question V.

5. The majority of the Commissioners hold the view that the permanent British nationality of the claim has not been established, and that as long as this has not been done, the Mexican Agent is not bound to answer the Memorial.

The demurrer is therefore allowed, without prejudice to the right of the British Agent to furnish other proof.

The British Commissioner expresses a dissenting view, and the Mexican Commissioner also expresses a dissenting view, but only as regards the proof of the nationality of the Company.

Dissenting opinion of Mr. Artemus Jones, British Commissioner

This is a claim for compensation for the loss of stocks of coal which were set on fire at Doña Cecilia in April 1914 during a battle between rebel and federal forces. The claimant is Frederick William Flack, who was born at Christchurch in Monmouthshire, Great Britain, the son of Daniel Ludgate Flack. The latter carried on business in London under the name of Daniel Flack and Son. He carried on business in Mexico also in the form of a limited liability company registered in London under the title of D. L. Flack and Son, Mexico (Limited). The business of the Company was the export of coal and kindred merchandise from Great Britain to Mexico, and the stocks of coal to which the claim relates were on their way to Tampico when they were destroyed at Doña Cecilia. The nominal capital of the Company was £10,000 divided into £1 shares, but only 2,602 shares were issued. The date of the last annual return filed with the Registrar of Joint Stock Companies was the 13th January, 1919, and on that date all these 2,602 shares were in the name of Daniel Ludgate Flack. (The Company was dissolved at a date unknown.) A certified copy of the return has been produced and it shows that a certain number of these shares held by another person had been transferred to Daniel Ludgate Flack during the year and helped to make up the total of 2,602. On the 9th June, 1920, Daniel Ludgate Flack died intestate, and letters of administration were granted by the English Courts to his widow, Laura Ellen Flack, on the 8th October, 1920. On the 24th January, 1924, the said Laura Ellen Flack died, and at that date the estate of her late husband had not been fully administered. Accordingly on the

7th May, 1924, letters of administration *de bonis non* of the unadministered estate were granted to the claimant.

The Mexican Agent put in a demurrer raising two points. He contended, first, that the certificate issued by the Registrar of Companies, which declares that the Company was registered in England, is not sufficient proof of British nationality; secondly, that the memorial does not establish that the claimant, F. W. Flack, is entitled to represent the firm of D. L. Flack and Son, Mexico (Limited). In his reply to the demurrer the British Agent contended that the certificate of the Registrar of Companies is, under English law, conclusive proof of the fact and that the authority of Mr. F. W. Flack to represent the Company of which D. L. Flack was the owner, is covered by his appointment by the Courts as an administrator *de bonis non*. The demurrer occupied the attention of the Commission on the 29th, 30th and 31st October. On the 31st October the Mexican Agent supplemented his demurrer by a document which raised three fresh points: (1) there was no evidence that all the shares belonged to D. L. Flack, either at the dissolution of the Company or at the time of his death; (2) there was no evidence that D. L. Flack was a British subject; (3) there was no evidence that there might not be heirs, other than F. W. Flack, of D. L. Flack.

The issue which is presented for the determination of the Commissioners is whether the memorial establishes a *prima facie* case so that the claim can be gone into. With regard to the three points raised by the Mexican Agent in his further pleading, there is no difference of opinion among the Commissioners. The only ground on which I do not agree with my colleagues is with regard to the deductions to be drawn from the answers to those questions. Had the British Agent objected to the further pleading put in by the Mexican Agent during the course of the argument, these further questions of fact could not have been raised, but Mr. Shearman (as he has done throughout the work of the Commission) studiously refrained from raising any technical points, and allowed the further pleading to go in. In my judgment the demurrer ought not to be allowed, because these issues of fact raised at a late stage by the Mexican Agent, when the British Agent could not possibly obtain information with regard to them, are not necessary in order to determine the question whether a *prima facie* case for investigation of the claim has been made out. On the two points raised by the Mexican Agent in his demurrer there is sufficient evidence disclosed in the memorial to show that the claim ought to be investigated. The further issues of fact could be well gone into when the merits of the claim are dealt with. It is necessary, I think, that the Commissioners should not lose sight of the fact that the *prima facie* evidence which it is necessary for the memorial to show, stands in a different category from the evidence which the Commissioners may deem necessary to establish the claim when the facts are gone into. The certificate of the Registrar is conclusive of the first point. In the second place there is sufficient evidence in the information contained in the memorial to establish that the Courts who appointed the claimant as administrator *de bonis non* have authorized him to pursue the claim on behalf of the estate of his father. While I regret to differ from the conclusions at which my colleagues have arrived, I agree that the answers to the further questions set out in the President's judgment are in the negative.

Separate opinion of Dr. Benito Flores, Mexican Commissioner

I. The British Agent, on behalf of F. W. Flack, and the latter as the representative of the Estate of D. L. Flack, claim the sum of $52,225.88, on the strength of the following facts:

That Daniel Ludgate Flack was the owner of the whole of the issued shares of the firm of D. L. Flack and Son, Mexico (Limited); that on the 9th June, 1920, he died intestate and letters of administration were granted to his widow, Laura Ellen Flack; but that the latter, having died on the 24th January, 1924, without having fully administered the estate of the late Daniel Ludgate Flack, letters of administration *de bonis non* were granted to the claimant, F. W. Flack.

II. That the said Daniel Ludgate Flack carried on business under the name of Daniel Flack and Son, and also in Mexico under the name of D. L. Flack and Son, Mexico (Limited), which was a British Company; that the nominal capital of the said Company was £10,000.00, divided into £1 shares; that of the said capital only 2,602 shares were issued, and that on the 13th January, 1919, the date of the last return filed with the Registrar of Joint Stock Companies at Somerset House, London, these 2,602 shares stood in the name of Daniel Ludgate Flack.

III. That the business of the Company consisted of the export of coal from Great Britain; that in April 1914 the Company had stored on a wharf adjoining the River Panuco at the Town of Doña Cecilia 5,567,027 kilos. of coal, brought out from England.

IV. That early in 1914 the town was attacked and bombarded by rebel forces; that as a result of such bombardment the stocks of coal belonging to the Company were set on fire, only a small portion thereof having been salvaged.

V. The following documents have been submitted with the claim:

(a) Certificate of Incorporation.
(b) Certified copies of invoice and bill of lading.
(c) Translation of notarial act drawn up at request of Mr. J. Hermosillo.
(d) Translation of notarial act drawn up at request of Mr. R. Everbusch.
(e) Birth certificate of F. W. Flack.
(f) Letters of administration in favour of Mrs. L. E. Flack.
(g) Letters of administration in favour of Mr. F. W. Flack.
(h) Letter dated the 11th July, 1914, from His Majesty's Consul at Tampico.
(i) Letter dated the 3rd February, 1926, from Messrs. Deloitte, Plender, Haskins and Sells.
(j) Sworn statement of Frederick William Flack.

VI. The Mexican Agent entered a Demurrer, supported by the following pleas:

A certificate issued by British authorities is not proof sufficient of the British nationality of D. L. Flack and Son (Limited), and the claimant, Frederick William Flack, is not, as administrator of the estate of D. L. Flack, entitled to represent D. L. Flack and Son, Mexico, (Limited).

VII. The British Agent maintained the positions taken by him in the Memorial.

VIII. On the 29th October this Demurrer began to be examined by the Court, and during the discussion the Mexican Agent, with the assent of the British Agent, amended the Memorial corresponding to the said Demurrer, by laying down the following points:

(a) That it should be shown that Daniel Ludgate Flack was a British Subject at the time the damage was caused.
(b) That such and such persons were the heirs of Daniel Ludgate Flack.
(c) That those persons inherited the right to claim.
(d) That those same persons were British subjects at the time of inheriting.

(e) That Mr. F. W. Flack is the administrator, entitled to claim on behalf of the persons having actually inherited.

The Mexican Agent ended by contending in his amendment:

I. That no proof has been shown that the Company was an English Company.

II. That it has not been proved that the whole of the shares in the Company were allotted to Daniel L. Flack.

III. That no proof has been shown that after the dissolution of the Company the right to prefer the claim was allotted to Daniel Ludgate Flack.

All the above points were again submitted to discussion, and the hearing of the case once closed, the Presiding Commissioner laid before the Commissioners of Mexico and Great Britain the following six questions for decision:

I. Has it been established that the Company, D. L. Flack and Son, Mexico (Limited) was a British Company?

II. Has it been established that at the time of the dissolving of this Company all the shares belonged to D. L. Flack?

III. If so, has it been established that D. L. Flack, at the time of his death, still held all the shares?

IV. If so, has it been established that D. L. Flack was a British subject?

V. Has it been established that F. W. Flack was the only heir of his father?

VI. If not, has it been established that the other heirs were British subjects?

Questions II, III, IV, V and VI were answered in the negative by the three Commissioners.

Question I was answered affirmatively by the Presiding Commissioner and by the British Commissioner; the Mexican Commissioner answered said question I in the negative, contending that it has not been shown that D. L. Flack and Son, Mexico (Limited) was an English Company, and he for that reason expresses a concurrent opinion, so that the Demurrer entered by the Mexican Agent may be upheld, not only because of the negative answer to questions II, III, IV, V and VI, but also because it has not, in his opinion, been fully shown that D. L. Flack and Son, Mexico (Limited) was a Company of British nationality. He bases his opinion upon the following:

Considerations

I. The nationality of physical persons, i.e., the bond uniting a person to a particular nation, has never been laid open to doubt. On the contrary, doubt has arisen when the thought occurs that there may be a person without any nationality; in the case of artificial, or civil, or juridical persons, however, the problem is a different one. In the first case, the bond uniting the individual to the State consists in his submitting to its laws, so as to be able to appeal to the said State for protection in case of necessity. Rights and duties are correlative to one another. In the second case, artificial persons cannot always be considered as identical with physical persons; they cannot, for instance, at a given moment, render military service, as an individual can, or comply with any other similar requirement on the part of the Government to which they have submitted. And by reason of the lack of similarity between physical and artificial persons, and by the legal fiction upon which the latter rest, the opinions of jurists have become divided, especially after the World War, some of them contending that limited companies should have no nationality at all.

M. de Vareilles-Sommières; *Les Personnes Morales*, 2nd edition, No. 1503, says:

"La vérité, écrit cet auteur, est que la personne morale n'étant qu'un résumé et une représentation des associés, n'étant qu'eux-mêmes fondus par l'imagination en un seul être, elle n'a point de nationalité propre, elle n'a aucune autre nationalité que la leur, ou plutôt elle n'a aucune nationalité, car elle n'est qu'un procédé intellectuel, qu'une image dans notre cerveau. Seuls les associés ont une nationalité."

A. Pillet (*Des Personnes morales en droit international privé*, un vol., Paris, 1914, Nos 82 et suivants), eminent professor of the Faculty of Law in Paris, shares the opinion of M. de Vareilles-Sommières, criticizing the fact that the endeavour has been made to extend to artificial persons a notion above all intended for physical persons, and asks:

"Les sociétés ont-elles, de même que les individus, une nationalité?[1]

Lorsqu'il s'agit de personnes vivantes, les principaux points de rattachement de la personne à un droit déterminé sont la nationalité et le domicile, deux notions différentes l'une de l'autre, la seconde étant un pur fait, la première supposant une construction juridique. De ces deux notions on sait que la première est la plus récente et qu'autrefois le domicile seul était pris en considération; il était surtout un élément matériel, car il consistait dans un certain lieu, le centre des affaires.

"La réception de l'idée de nationalité qui, dans le plus grand nombre des pays, est venue réduire l'importance de la notion du domicile, peut être considérée comme un signe du triomphe d'un certain idéal sur les pures relations matérielles. L'acquisition de la nationalité ne dépend pas, en effet, d'un simple fait comme l'acquisition d'un domicile; elle résulte de la volonté du législateur et aussi un peu de celle du sujet; elle engendre un lien purement idéal sur lequel les diverses circonstances de la vie des nationaux peuvent n'exercer aucune atteinte.

"L'une des causes du succès de l'idée de nationalité et du recul de l'idée de domicile provient de la solidité plus grande que la nationalité confère à l'emprise exercée par l'État sur l'individu. L'État demeure le maître absolu des lois sur la nationalité. Il est maître de légiférer sur la nationalité comme il l'entend et, en particulier, soit de fortifier le lien national, soit aussi, dans les cas où la persistance de ce lien lui paraît nuisible, de le trancher, même dans les cas extrêmes, sans la participation de la volonté de l'individu.

"Quoi qu'il en soit, il est certain que la nationalité et le domicile sont les deux grands points de rattachement de la personne au droit. Dans les pays où la nationalité et le domicile exercent chacun leur influence, il s'est produit entre leurs domaines une certaine séparation et dans leur autorité respective l'établissement d'un certain ordre, l'empire de la nationalité concernant plutôt la loi applicable, celui du domicile, la compétence du juge. De telle sorte qu'en général, et sous réserve d'assez nombreuses exceptions, l'individu est soumis, dans les rapports internationaux, à la loi déterminée par sa nationalité, c'est-à-dire à sa loi nationale, et, au point de vue de la compétence judiciaire, à l'autorité du juge de son domicile.

"C'est cette méthode que l'on a voulu transporter de la condition des personnes physiques à celle des sociétés. Il fallait en effet également pour elles un principe de rattachement afin de déterminer la loi à laquelle chaque société est soumise.

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[1] C'est là ce que dit très nettement le tribunal de Lille, 21 mai 1908 (S., 1908, 2. 177); voir aussi trib. com. Liège, 1er fév. 1901 (Clunet, 1901, p. 367); et surtout Cass. Rome, 13 sept. 1887 (Clunet, 1889, p. 510). Ce dernier arrêt pousse l'assimilation au point de confondre le simple fait de la constitution à l'étranger, en matière de société, à la circonstance de la naissance hors d'Italie d'un enfant issu de parents italiens.

"On aurait pu créer de toutes pièces ce point de rattachement, en constituant une règle juridique nouvelle et particulière aux personnes civiles, par exemple, les obliger de se conformer, pour leur constitution, aux lois en vigueur au lieu du centre de l'exploitation de leur industrie ou de leur commerce. [1]

"On aurait pu sans doute suivre cette méthode. On ne l'a pas fait cependant. On a préféré le procédé plus commode de l'analogie; il a paru plus rapide et plus simple d'étendre purement et simplement aux personnes civiles les principes qui avaient été déjà dégagés pour la condition des personnes physiques.

"De là un premier inconvénient est venu, c'est la confusion des notions de nationalité et de domicile en ce qui concerne les personnes civiles. Il est, en effet, impossible de rattacher la nationalité des sociétés comme celle des personnes physiques au lieu où elles naissent, car une société ne naît pas matériellement comme une personne vivante. On ne fait donc que reculer la question et non la résoudre, puisqu'il faut alors se demander quel est le lieu de naissance de la société. Or, avec cette nouvelle question, toutes les difficultés ressuscitent. On ne peut pas davantage admettre la possibilité d'une naturalisation pour les personnes purement civiles.

"On a en réalité absolument confondu à l'égard des sociétés les deux notions de nationalité et de domicile; de telle sorte que ce que l'on appelle nationalité des sociétés n'est, en réalité, qu'une espèce de domicile. Cette nationalité découle de l'établissement de la société dans un lieu déterminé. Il a donc fallu donner ici à la notion de nationalité un sens qu'elle n'a nulle part ailleurs et qui la rapproche par trop de la notion de domicile.

"A vrai dire, on objectera peut-être que les navires ont bien, eux aussi, une nationalité. Et l'on serait tenté de la rapprocher de celle de sociétés. Mais, la nationalité des navires résulte d'une inscription sur les registres de la douane faite à certaines conditions; elle se rattache à l'accomplissement d'une formalité juridique déterminée, tandis que la nationalité des sociétés résulte du choix fait par ses fondateurs d'un certain lieu dans lequel ils l'établissent.

"Quel est ce lieu? Ou, en d'autres termes, quel est le pays dont la personne civile doit avoir la nationalité?

"C'est sur ce point que s'est produit, aussi bien dans la doctrine que dans la pratique, un très grave embarras qui dure depuis fort longtemps et qui n'est point encore résolu à l'époque actuelle. Ainsi que nous le verrons, il a son origine et son caractère inéluctable dans la mauvaise définition donnée à la question qu'il s'agit de résoudre."

The tendency of modern jurists is now that of laying down in positive precepts the principle that artificial persons should not be considered as entitled to have any nationality. This has already been contemplated by the jurists of the American continent, at the Conference of Rio de Janeiro, following the opinion of a notable internationalist, Mr. Irigoyen, in the case of the Rosario Bank, who said (Report of the Ministry of Foreign Affairs, Vol. i, p. 385, 1887):

[1] En République Argentine, ainsi que nous l'avons déjà indiqué (supra No. 66), l'idée de nationalité des personnes morales n'a pas été admise. M. Zeballos (Clunet, 1905, p. 606), en donne notamment pour raison que "le système de droit international privé codifié par la République Argentine élimine soigneusement de ces solutions tout élément politique. Il traite les questions d'après l'école de Savigny au point de vue absolument scientifique. En conséquence, les personnes vivantes ou juridiques n'ont pas de nationalité dans leur rapport avec le droit privé. Elles doivent être soumises à une législation privée certaine et permanente, et cette racine de leur vie juridique est celle du domicile. Il convient de remarquer cependant que cette façon de présenter les choses est nettement exagérée, puisqu'elle ne tient à rien moins qu'à exclure la notion de nationalité, même pour les personnes physiques. On peut se refuser à donner une nationalité aux personnes morales sans tomber dans cet excès.

"The Bank of London is a Limited Company; it is a juridical person, which exists for a particular purpose. Juridical persons owe their existence solely to the laws of the country authorizing them, and consequently are neither national nor foreign. A Limited Company is a juridical person distinct from the individuals which compose it, and is not, even when composed of aliens exclusively, entitled to diplomatic protection. It is not the individuals who are joined, but merely their investments, in an anonymous form, which signifies, according to the meaning of that word, that such companies have neither name, nor nationality, nor any individual responsibility."

The Mexican Delegation at Rio de Janeiro supported the principles announced by the Argentine Delegate, at the International Commission of Jurists in that city, and at the meeting of the 30th April, 1927, having sought their inspiration in the valuable opinion of Doctor Bernardo Irigoyen. It is since the Great War that the principle of whether artificial persons should or should not have a nationality has been most warmly discussed.

C'est surtout, says Georges Demassieux (*Le Changement de nationalité de sociétés commerciales*, page 28), depuis le début de la Grande Guerre que la notion de nationalité des sociétés a trouvé beaucoup d'adversaires. De la guerre naquit une préoccupation nouvelle, trop justifiée bien souvent et tout à fait légitime. Il existait, sur le territoire français, des sociétés à qui l'on avait jusqu'alors reconnu, sans conteste, la nationalité française. Les sociétés commerciales ayant leur siège social en France constituées d'après les règles de la loi française, étaient, en effet, regardées comme françaises. Lorsque survint la guerre, on s'aperçut que certaines d'entre elles étaient dirigées par des sujets allemands, que leur capital avait été, en majeure partie, fourni par des Allemands, en un mot, qui résume bien la situation, que ces sociétés étaient "contrôlées par des Allemands."

Des sociétés ayant leur siège social en France, constituées, d'après les dispositions de la loi française, par conséquent françaises aux yeux de tous, étaient en réalité entre des mains ennemies, servaient des intérêts ennemis: allemands, austro-hongrois ou turcs. Il y avait là une situation paradoxale qui amena de distingués juristes à douter sérieusement de la notion même de nationalité des sociétés, laquelle aboutissait, dans son application, à d'aussi déplorables contradictions. Il leur sembla que cette notion ne signifiait rien, qu'elle était fausse, et qu'attribuer une nationalité à des êtres moraux, à des êtres fictifs, était une conception non seulement inutile, mais dangereuse, puisque, en temps de guerre, les manœuvres de l'ennemi risquaient de pouvoir impunément se perpétrer à l'abri de l'étiquette: "société nationale."

En 1917, M. Thaller, Professeur à la Faculté de droit de Paris, écrivait, dans la *Revue politique et parlementaire*. [1] "Entre l'idée de nationalité et celle de personnes fictives ou abstraites, il y a une impossibilité d'adaptation, une antinomie. La nationalité procède de la famille agrandie. Pas plus qu'une société ne possède un statut de famille, pas plus elle ne saurait prétendre au statut sous lequel les individus d'une même nation sont placés. La nationalité est faite de traditions, de mœurs communes, d'un esprit propre aux hommes qui font partie de l'État, différent de l'espèce des autres États, des autres races. En l'absence de ces éléments constitutifs, peut-il être question de nationalité?"

Aux côtés de M. Thaller, M. Lyon-Caen, M. Landry, député, M. Camille Jordan, juriste très versé dans les questions de nationalité, combattirent vigoureusement la notion de nationalité des sociétés. [2] Dans son fort intéressant ouvrage

[1] *Revue politique et parlementaire*, année 1917, page 297.

[2] *Bulletin mensuel de la Société de législation comparée*, janvier-mars 1927, article de M. Lyon-Caen, p. 535 et suiv. Numéro d'octobre-décembre 1927, article de M. Jordan, p. 534.

sur la "*Nationalité des sociétés de commerce*,[1]" M. Pepy considère que la nationalité des sociétés, d'après les idées généralement admises, ne peut que consister dans la soumission aux lois d'un État sur la constitution et le fonctionnement des sociétés. La véritable nationalité, au contraire, que seule peuvent posséder les individus, consiste dans l'emprise d'un organisme politique sur une personne humaine. C'est cette emprise qui forme le fond, la substance même de l'idée de nationalité. La Français ne relève pas seulement de la législation française, il voit de plus son activité dirigée, absorbée même par les forces propres de la communauté française. Cette communauté ne s'occupe que des êtres vivants, qui, seuls, peuvent lui être unis par ce lien personnel intime qui constitue la nationalité. Mais ce lien ne peut se concevoir à l'égard d'une entité juridique qui ne peut en avoir d'autre avec la communauté nationale que le fait *d'avoir son fonctionnement régi par ses lois*. Les sociétés n'ont pas de véritable nationalité, et vouloir leur en donner une, c'est fort dangereux. "C'est entretenir l'équivoque dans les idées, la confusion dans les esprits," dit M. Pepy.

Par la thèse de M. Pepy, les mesures prises par le Gouvernement français, pendant la guerre, à l'encontre des sociétés contrôlées par l'ennemi, se trouvent parfaitement justifiées. Si les sociétés commerciales ne pouvaient avoir de nationalité, elles n'étaient pas plus françaises qu'allemandes, austro-hongroises ou turques. Que certaines d'entre elles fussent dangereuses, cela suffisait pour que, dans l'intérêt supérieur de la défense nationale, on agît de rigueur avec elles, et qu'on sequestrât leurs biens.

Les idées des détracteurs de la notion de nationalité des sociétés trouvèrent leur écho dans la jurisprudence. Un jugement du tribunal mixte franco-allemand de 30 novembre 1923,[2] dénie à une société la possibilité d'avoir une nationalité. Il s'agissait, en l'espèce, d'une société en commandite simple établie à Paris, qui demandait à être considérée comme ressortissant d'un pays allié ou associé, aux termes de l'art. 297 e. du traité de Versailles. Le tribunal mixte, adoptant les motifs d'une précédente décision qu'il avait rendue le 30 septembre 1920,[3] considère que les sociétés en commandite, en tant que personnes morales, n'ont pas de nationalité proprement dite, et que celle-ci dépend de la majorité des associés. Voici les termes dont il se sert: "Attendu que les sociétés en commandite n'ont pas de nationalité proprement dite, puisqu'une telle nationalité d'une part confère des droits (tels que le droit de vote, le droit d'être nommé à des fonctions publiques, la protection contre l'extradition, &c.), et d'autre part impose des obligations (telles que le service militaire), qui ne peuvent s'appliquer qu'aux personnes physiques." Plus loin, le même jugement proclame que "la nationalité de la majorité des associés détermine le caractère de l'entreprise qui forme l'objet de la société."

It is true that in this instance the question as to whether the artificial person under discussion has any nationality or not, is not being gone into, because the Mexican Government had already undertaken to pay compensation to *English Companies* having sustained damage, but if the renowned jurists to whom I have referred, are contending for the abolition of the principle of nationality in the case of artificial persons, international Tribunals, when called upon to solve the problem in a specific instance, should, with all the more reason, proceed with great care before upholding the nationality of a given person, if the facts serving as the ground for their decision do not conform exactly to universally recognized principles, and more especially to the laws of the country the protection of which is invoked.

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[1] *De la nationalité des sociétés de commerce*, par M. Pepy, un vol., 1920, p. 92 et suiv.
[2] D. Hebd., 1924, p. 131.
[3] J. Clunet, 1923, p. 600.

II. Nationality is a question which must be decided in accordance with internal law, as decided by the Permanent Court of International Justice, in various judgments. The Laws of England do not state when a Company is of British nationality, and the decisions of English Courts do not fix unvarying rules for determining when a Company is of such nationality. On the contrary, there are decisions of English Courts openly contradictory to one another, some of them admitting the principle that the nationality of a company should be determined by the laws under which it was organized and registered, while other courts have ruled that the nationality of a company should be determined by the place where its operations are carried on, i.e., its principal place of business.

III. The certificate of incorporation of the Company (annex 1) produced by the demandant Government, only shows that D. L. Flack and Son, Mexico (Limited) was organized under the Companies Acts, 1862 to 1907, as a Limited Company, on the 19th February, 1909, and that said Company was dissolved; but it cannot be inferred from this that the said Company is of British nationality. There is no law providing that a Company is an English Company through the mere fact of having been organized in accordance with the English laws. In the present case the doubt as to the British nationality of the Company arises out of the fact that D. L. Flack and Son, Mexico (Limited) had the Republic of Mexico as its only centre of operations, or at least the Company for Mexico, as the British Agent himself assures us in his Memorandum.

Georges Demassieux, in *Le Changement de Nationalité des Sociétés Commerciales*, p. 45, says:

"En Angleterre, nous le dirons plus loin, une société, pour être anglaise, doit avoir son siège administratif sur le territoire national. Mais une société 'limited' doit, pour avoir la personnalité, remplir la formalité de l'enregistrement *de ses statuts* sur un registre spécial tenu par un fonctionnaire appelé registrar. Une société 'limited' ne peut avoir la nationalité anglaise si elle n'a pas accompli cette formalité."

In this case all that we know is that D. L. Flack and Son, Mexico (Limited) was incorporated on the 19th February, 1909; but we do not know whether the articles of association of said Company were registered or not; we do not know either whether the said Company had its *siège social* in Mexico, and all that we know is that it was incorporated under the English law; but for the purpose of effecting all its transactions in Mexico. It would have been desirable that the British Agent had submitted a copy of the deed of incorporation with this Memorial. This would have saved time and argument; but the lack of that document, or rather the omission on the part of the demandant Government, cannot be transformed into an affirmative statement to the effect that the Company is a British Company, to the detriment of the interests of a sovereign nation, which has graciously acquiesced in the payment to *British subjects* of damage suffered by them, although not bound to do so under International Law.

IV. International Jurisprudence precedents differ too much to make it possible to decide with absolute exactness, without fear of error, as to the nationality of a company.

Borchard, "*The Diplomatic Protection of Citizens Abroad*," p. 617, paragraph 277, says:

"S 277. *Citizenship of Corporations.*

"The nationality of corporations is one of the most actively discussed questions of the law of continental Europe. While some writers dispute the possibility of corporate nationality, the fact that the legislation of practically all countries takes account of foreign corporations, has persuaded publicists to endeavour

to establish the criteria of a national corporation. In some countries, little help is obtained from positive legislation.

"A corporation may be attached to a territory by three elements. The first is the place where it is created or founded, where the legal formalities of its constitution, authorization and inscription have been carried out. The second is the place where the home office, the active management or centre of administration, or what the French call the *siège social* is located. The third is the place where it carries on the purpose of its organization, its actual operations, its centre of exploitation *(principale exploitation)*.

"When these three elements are combined in one country, it is hardly open to question that the corporation has the nationality of that country. But when the three elements or some of them are located in different countries, the nationality of the corporation is not always easy to determine. Taking into consideration the three factors mentioned and some others, the following systems as to the determinative criterion of the nationality of a corporation have all had their adherents: It is governed (1) by the nationality of the State which authorizes its existence (Fiore and Weiss); (2) by that of the State within whose jurisdiction it has been organized (Brunard and Cassano); (3) by the nationality of the stockholders (Vareilles-Sommières); (4) by that of the country of subscription of domicile of the majority of the stockholders at the time of subscription (Thaller); (5) *by that of the country where it has its principal place of business, a system followed, with variations, by the legislation of most countries;* (6) the jurisdictional judge may determine the nationality on all the facts. Other solutions have been offered, e.g., that the will of the corporation or of the state should alone determine its nationality.

"Leaving aside all theoretical arguments, it may be said that the majority of States in their legislation have accepted *the country of domicil (siège, Sitz)* as the nationality of the corporation. The question then arises, is the domicil the centre of administration, the 'home office', or is it the centre of exploitation, where the business is carried on? Among the countries of Europe with the exception of Spain, which attributes Spanish nationality to corporations incorporated in Spain or administered from, or doing business in Spain, *and of Italy, Portugal and Romania,* which consider as domestic corporations those doing business within their borders (centre of exploitation), the majority adhere to the system by which nationality follows the country in which the *centre of administration* (the *siège social*) is located."

Jackson H. Ralston, in *The Law and Procedure of International Tribunals*, p. 155, paragraph 278, says:

"278. The mixed commissions sitting by virtue of the Versailles and subsequent treaties have several times rendered decisions upon the general subject. Thus, for instance, it has been held that a corporation formed in Germany and controlled by Frenchmen can claim, as a victim of exceptional measures of war, a house which has its site for business affairs in Germany, but of which no associate is German, cannot be considered as a German subject; under the terms of the treaty of peace the nationality of a corporation is fixed for the purpose of the interests which these treaties have in view, not according to the law under which they were constituted nor according to the site of their principal establishment of business, but according to the interests controlling them; a corporation or association composed of individuals all of the same nationality cannot have a nationality different from theirs. *Where there is no question of custody or liquidation, but there are mere contract relations between private parties, a joint stock company's nationality is determined by the location of the principal place of business unless this is merely nominal.*"

V. The Anglo-Saxon system for determining the nationality of limited companies is not uniform either. Borchard, *op. cit.*, p. 619, paragraph 275, says:

"*Anglo-American Law.*

"In Anglo-American law no such theoretical conflicts as have prevailed in continental law appear to have found a place. The conception of domicil with respect to corporations has been applied in cases of taxation and of belligerent rights, and for these purposes the seat of the corporation has on occasion *been considered the place where the business is carried on.* For other purposes the question of domicil and nationality is decided by practical considerations, the most important of which is the place of incorporation.

"In the United States the citizenship of corporations is judged almost exclusively according to the place of incorporation, which involves, in most municipal cases, the determination of State citizenship. Only thirteen States even require residence on the part of any of the incorporators and only six require State citizenship. New York appears to be the only State demanding United States citizenship. While the courts have made numerous distinctions between natural persons and corporations in the matter of citizenship, they have held a corporation to be a citizen for the purposes of suit under the federal constitution, and under the Act to provide for the adjudication and payment of claims arising from Indian depredations. The Supreme Court, moreover, has held that for jurisdictional purposes there is a conclusive presumption of law that the persons composing the corporation are citizens of the same State with the corporation, and, 'although an artificial person,' a corporation is 'to be considered as a citizen of the State as much as a natural person.'

"While it has been held that a corporation could be an alien enemy as well as an individual, it has not been definitely established whether the place of incorporation governs enemy character, or whether this is determined according to each place where the corporation has a branch and does business. In earlier cases, the place of actual business has been held to control; more recently, however, it has been held in England that the place of incorporation and registration, and not the place of operation governs. The British proclamation of the 9th September, 1914, in regard to trading with the enemy, provides that in the case of incorporated bodies enemy character attaches only to those incorporated in an enemy country. On the other hand, for the purposes of the effect of war on patents, designs and trade-marks, a British corporation controlled by or carried on wholly or mainly for the benefit of subjects of an enemy State was to be deemed an alien enemy."

VI. The foregoing considerations at least serve to show that the problem of the nationality of a limited company under international law is not an easy one to solve, when, as in this case, the Company was incorporated under the Laws of England, but to operate in Mexico. If the claimant Company had had its domicile in Great Britain, if its shareholders had been British and its principal place of business had been in England, the Mexican Commissioner would have agreed with his colleagues in acknowledging its British character; but this last element is lacking and he does not, for that reason, accept that opinion.

VII. The Mexican Commissioner holds, furthermore, that it is not necessary to decide this first question of the interrogatory in either sense, because the Demurrer having been upheld on the strength of the other grounds proposed, said Demurrer would, on the assumption that a British Company were involved, also be sustainable.

The Mexican Commissioner bases his opinion on the foregoing considerations, dissenting from his estimable colleagues in regard to the nationality of

the claimant Company; but he concurs, however, in all the other points which gave rise to the decision of this Court upholding the Demurrer entered by the Mexican Agent.