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William Mackenzie, Individually and as Administrator of the Estate of Mary A. Mackenzie, Deceased, and Others (United States) v. Germany

30 October 1925

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Government of the United States any amount on behalf of the claimants herein or any of them.

Done at Washington March 19, 1925.

Edwin B. PARKER
Umpire

Chandler P. ANDERSON
American Commissioner

W. KIESSELBACH
German Commissioner

WILLIAM MACKENZIE, INDIVIDUALLY AND AS ADMINISTRATOR OF THE ESTATE OF MARY A. MACKENZIE, DECEASED, AND OTHERS (UNITED STATES) *v.* GERMANY

(October 30, 1925, pp. 628-633.)

NATIONALITY OF CLAIMS.—NATIONALITY: DETERMINATION BY MUNICIPAL LAW. —DUAL NATIONALITY: EXPATRIATION. DOCTRINE OF ELECTION. DIPLOMATIC PROTECTION.—INTERPRETATION OF MUNICIPAL LAW: STATE DEPARTMENT PRACTICE.—DAMAGES IN DEATH CASES: PERSONAL PROPERTY. Claim for alleged losses suffered by estate and children of *Lusitania* victim. Application of rules announced in *Lusitania* Opinion, see p. 32 *supra*, and in other decisions. *Held* that nationality determined by municipal law and that, under United States law, decedent's husband, born a British subject in the United States, had American nationality: (1) he never exercised right of expatriation, (2) United States law did not recognize doctrine of election, (3) actually, by residing for some time in England and Canada after attaining his majority, he never elected to be a British subject only, though for that period he might not have been entitled to an American passport and American diplomatic protection under State Department practice; and that, therefore, decedent herself and two sons were American citizens. Damages allowed on behalf of decedent's estate for lost property.

Cross-references: A.J.I.L., Vol. 20 (1926), pp. 595-599; Annual Digest, 1925-26, pp. 273-274; Witenberg, Vol. II, pp. 91-96 (French text).

Bibliography: Borchard, pp. 74-75.

PARKER, *Umpire*, rendered the decision of the Commission.

This case is before the Umpire for decision on a certificate of the National Commissioners certifying their disagreement.

Mary A. Mackenzie, 58 years of age, widow of Robert A. G. Mackenzie, was lost with the *Lusitania*. This claim is put forward on behalf of the administrator of her estate, her son, William Mackenzie, her married daughter, Ethel A. Purrington, and the estate of her deceased son, James R. D. Mackenzie.

The German Agent challenges the American nationality of the claimants and of the claim here presented. A determination of this issue turns on the nationality of Robert A. G. Mackenzie, who, the Umpire finds, was born in the United States of British parents on June 4, 1858. While still a minor his parents with their children returned to England. There Robert married, on February 10, 1879, during his twenty-first year, and there his first child, James R. D. Mackenzie, was born. Soon thereafter he found employment at Hamilton in the Province of Ontario, Canada, whither he went with his wife

and baby, and there his other two children, William and Ethel Annie, were born. The record is barren of evidence of any election made by him to adopt the British nationality of his parents or to renounce his American nationality by birth, save as such election might be inferred from his continued residence in England and in Canada after attaining his majority. In 1894 he, his wife, and their three children took up permanent residence in New Bedford, Massachusetts, where they lived until his death in 1901. So far as disclosed by the record it appears that he and the members of his family, by express declarations and by their course of conduct, consistently regarded and proclaimed him an American national. He repeatedly registered and voted at New Bedford as an American citizen and seems to have possessed to an unusual degree the qualities of good citizenship. His son William, though born in Canada (and hence possessing dual nationality if born of American parents), on attaining his majority, while residing at New Bedford as an American citizen, took the oath requisite to qualifying him to vote and has repeatedly voted as an American citizen.

Citizenship is determined by rules prescribed by municipal law. The issue here presented must be determined by the law obtaining and enforced within the jurisdiction of the United States. Under that law Robert A. G. Mackenzie, who was born in the United States of British parents, was by birth an American national, [1] notwithstanding the Fourteenth Amendment to the Constitution had not then been adopted and the statutes in pursuance thereof had not then been passed. Under the laws of Great Britain then in effect he also possessed British nationality by parentage. This created a conflict in citizenship, frequently described as "dual nationality". The American law makes no provision for the election of nationality by an American national by birth possessing dual nationality. As Robert A. G. Mackenzie was by birth an American national, he could neither divest himself of the duties and obligations of an American citizen nor be divested of the rights of an American citizen, save through expatriation by becoming a naturalized citizen of a foreign state in conformity with its laws or possibly [2] by taking an oath of allegiance to a foreign state. So far as disclosed by this record the right of expatriation was never exercised by him. He therefore remained an American citizen.

But the German Agent contends that the continued residence of Robert A. G. Mackenzie in England and Canada after attaining his majority amounted in law to an election by him to remain a British national and operated as a renunciation and a forfeiture of his American nationality. It is insisted that this is the American rule established by the executive branch of the Government of the United States and long recognized in its diplomatic correspondence. It may be that some of the instructions issued by the Department of State of the United States to its diplomatic and consular representatives are susceptible of the construction which the German Agent would place upon them, [3] but it is believed that when carefully analyzed they should not

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[1] United States *v.* Wong Kim Ark (1898), 169 U. S. 649.

[2] Prior to the Act of March 2, 1907, there was no statute expressly providing that the taking of an oath of allegiance to a foreign state would work expatriation.

[3] Acting Secretary of State Porter to Mr. Winchester, Minister to Switzerland, Foreign Relations of the United States (hereinafter cited as "Foreign Relations") 1885, page 811; Secretary of State Bayard to Mr. Lee, Minister to Austria-Hungary, Foreign Relations 1886, page 12; Secretary of State Bayard to Mr. Vignaud, Minister to France, Foreign Relations 1886, page 303; Secretary of State Bayard to Count Sponneck, Minister of Denmark, Foreign Relations 1888, page 489; Acting Secretary of State Seward, December 31, 1878, to the American Minister at Paris concerning Henry Tirel, 20 MS. Instructions to France, 7.

be so construed. [4] The error into which the German Agent has quite naturally fallen arises through the use of loose language confusing the permanent loss of citizenship with the loss for the time being of diplomatic protection. This confusion is due to a failure to bear in mind that the right to protection does not necessarily follow the technical legal status of citizenship. [5] While the American Department of State may in the exercise of its sound discretion well decline to issue a passport to, or intervene on behalf of, or otherwise extend diplomatic protection to an American by birth of foreign parents so long as he resides in the country of the nationality of his parents, it is not believed that it has, by departmental rule or otherwise, asserted the power to strip of American citizenship one so born. At all events the Umpire holds that the American State Department does not possess and has never possessed such power, and that the Congress of the United States has not as yet seen fit through legislation to adopt the rule adopted by numerous other countries under which the anomalous status of dual nationality must be terminated through election by the party possessing it within a reasonable fixed time after becoming *sui juris*. Much might be said in favor of adoption by the United States and other nations of a multilateral treaty, supplemented by municipal legislation, looking to the abolition of dual nationality or its termination through enforced election under appropriate restrictions. But it is not competent for this international tribunal to consider what the municipal law of the United States with respect to its citizenship should be, but only to find and declare that law as it is, to the extent necessary to determine the jurisdiction of this Commission and the liability of Germany under the Treaty of Berlin.

The Umpire holds that as Robert A. G. Mackenzie was born an American citizen and never exercised his right of expatriation by the only methods prescribed by the law of the United States he remained an American citizen to the time of his death. But even if the American law had during the life of Robert A. G. Mackenzie recognized the doctrine of election as applicable to one born an American citizen and possessing dual nationality, still this would not change the Umpire's disposition of this case on the record presented. In each case cited by the German Agent the American State Department was dealing with a person, born in the United States of alien parents, who had gone to the country of which they were nationals and had continued to reside therein after attaining his majority, and held that such continuing residence constituted such strong *evidence* of his having elected to take the nationality of his parents as to justify the Department, in the exercise of its discretion and during the continuance of his residence in the country of the nationality of his parents, in declining to issue to him a passport or extend to him diplomatic protection. But the German Agent has confused evidence of an election with

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[4] See particularly General Instruction No. 919 (Diplomatic Serial No. 225-A) issued to the diplomatic and consular officers of the United States on November 24, 1923, by Secretary of State Hughes.

See also Secretary of State Evarts to Mr. Cramer, Minister to Denmark (1880), III Moore's Digest of International Law (hereinafter cited as "Moore's Digest"), page 544; Acting Secretary of State Porter to Mr. Winchester, Minister to Switzerland, Foreign Relations 1885, page 811, and III Moore's Digest, pages 545-546; Secretary of State Olney to Mr. Uhl, Ambassador to Germany (1896), III Moore's Digest, at page 551; Secretary of State Olney to Mr. von Reichenau, Foreign Relations 1897, at page 183; Ex parte Chin King (Circuit court, District of Oregon, 1888), 35 Federal Reporter 354.

[5] Secretary of State Fish to Mr. Niles, October 30, 1871, 91 MS. Dom. Letters 211, III Moore's Digest, page 762.

the fact of election. Continued residence in the country of which the parents were nationals is strong evidence from which may be inferred an election of the nationality of the parents by one born in the United States of aliens. But such inference is by no means conclusive, nor is such evidence of election exclusive, but it may be rebutted by other competent evidence. Such election is a fact and may be established as any other fact. In the event of conflict in the evidence with respect to the election, if any, actually made, the evidence must be weighed and the conflict decided as any other issue of fact.

The diligence of the German Agent has pointed the Umpire to no instance where an American national by birth has been denied diplomatic protection by the American Department of State where he was residing in and had a permanent residence in the United States, notwithstanding the fact that, after attaining his majority, he may have continued to reside for a term of years in the country of his alien parents. Such inferences as may be drawn from the instructions of the State Department tend toward a recognition not only of American citizenship but the right to diplomatic protection in such a case.[6] This is the case here presented. The American Department of State, through the American Agent before this Commission, is contending that Robert A. G. Mackenzie never elected to become a British national but at all times elected to remain and did remain an American national. The Umpire finds as a fact that the record here presented sustains this contention.

It follows that Mary A. Mackenzie, widow of Robert A. G. Mackenzie, was an American national when she met her death on the *Lusitania*. It likewise follows that James R. D. and William Mackenzie, who were born abroad of American parents, and who on attaining their majority were residing in the United States and continued to reside therein, were American nationals at the time of their mother's death. The contention of the German Agent that the decedent and her two sons did not possess American nationality at the time of her death is therefore rejected. Ethel Annie Mackenzie married Ralph Forbes Purrington, an American national, in 1908. Her American nationality is not challenged. James R. D. Mackenzie died on January 12, 1921, and was survived by his wife and daughter, Hattie May Warner Mackenzie and Margaret L. C. Mackenzie.

Mary A. Mackenzie was 58 years of age at the time of her death. She had no earning capacity. No one was dependent upon her and she made no contributions to anyone which are susceptible of measurement by pecuniary standards. Her children all maintained establishments of their own. She resided with her married daughter, and the inference from the record is that she was dependent upon her children for support.

The personal property, including cash, belonging to the decedent and lost with her was of the value of $300.

Applying the rules announced in the *Lusitania* Opinion and in other decisions of this Commission to the facts as disclosed by the record herein, the Commission decrees that under the Treaty of Berlin of August 25, 1921, and in accordance with its terms the Government of Germany is obligated to pay to the Government of the United States on behalf of William Mackenzie, Administrator of the Estate of Mary A. Mackenzie, Deceased, the sum of three hundred dollars ($300.00) with interest thereon at the rate of five per cent per annum from May 7, 1915; and further decrees that the Government of Germany is

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[6] See particularly instruction by Secretary of State Hughes and other authorities cited in note 4 *supra*.

not obligated to pay to the Government of the United States any amount on behalf of the other claimants herein.

Done at Washington October 30, 1925.

Edwin B. PARKER
Umpire

HENRY CACHARD AND H. HERMAN HARJES, EXECUTORS OF THE ESTATE OF MEDORA DE MORES (UNITED STATES) *v.* GERMANY

(October 30, 1925, pp. 633-635.)

NATIONALITY OF CLAIMS: DETERMINATION BY NATIONALITY OF BENEFICIARIES, NOT OF CLAIMANTS IN REPRESENTATIVE CAPACITY. *Held* that claim not impressed with American nationality: though executors of estate, claimants herein, are American citizens, possible beneficiaries of award are French.

Bibliography: Kiesselbach, *Probleme*, pp. 161-163.

PARKER, *Umpire*, rendered the decision of the Commission.

This case is before the Umpire for decision on a certificate of the National Commissioners certifying their disagreement.

Medora de Mores, an American national, the widow of the Marquis de Mores, was the beneficiary of a trust fund, held by a German financial institution as trustee, which, during the years 1917 to 1919, was subjected to exceptional war measures by the Government of Germany, to her damage. She died on March 1, 1921, leaving two wills, one a holographic will made on November 1, 1917, disposing of all of her property in Europe; the other made December 14, 1917, disposing of her property in the United States and Canada. Her European estate, in which there is no interest impressed with American nationality, is being administered under the first will by two executors, one of whom is an American citizen residing in Paris, and the nationality of the other is not disclosed. Her estate in the United States and Canada is being administered under the second will by the two executors claimants herein, both of whom on March 1, 1921, and November 11, 1921, were, and since have remained, American nationals and residents of Paris. The testatrix bequeathed the sum of $20,000.00 to an American national residing in the United States and the residue of her estate to her two sons, Louis and Paul Manca de Vallombrosa, who were on her death and have ever since remained residents and nationals of France. The American beneficiary has been paid in full by the executors from the proceeds of the American estate, which is amply sufficient for the payment of all succession taxes, expenses of administration, commissions, and liabilities generally of the American estate. The entire amount of any award made in this case would therefore inure to the benefit of French nationals—the testatrix's sons, Louis and Paul Manca de Vallombrosa.

The fact that this claim is put forward on behalf of executors acting in their representative capacities and that these executors are American nationals does not in itself impress the claim with American nationality. [1] The contrary

[1] Halley, Administrator, and Grayson, Administrator, British-American Commission under Treaty of May 8, 1871, Hale's Report 19, Howard's Report 15, III Moore's Arbitrations 2241-2242; Wulff *v.* Mexico (1876), reported in II