REPORTS OF INTERNATIONAL ARBITRAL AWARDS

RECUEIL DES SENTENCES ARBITRALES

Flegenheimer Case—Decision No. 182

20 September 1958

VOLUME XIV pp. 327-390

NATIONS UNIES - UNITED NATIONS
Copyright (c) 2006

claimants to establish that fact and then come forth with the best evidence in lieu thereof. The claimants have not produced any official real property records nor have they given any explanation for their absence.

The Italian Ministry of the Treasury rejected the claim because the official records show that the property belonged to persons other than the claimants. Thereafter the claimants were given 90 days within which to submit additional evidence of title but after the expiration of that time they did not come forth with any new evidence nor did they make any statement to refute the findings of the Italian Ministry of the Treasury. Their inaction, when combined with the complete inadequacy of the evidence already submitted, leaves the Commission no alternative but to reject their claim for failure of proof. Therefore, the Commission

DECIDES:

1. The Petition submitted by the Agent of the United States of America in behalf of Federico and Beniamino d'Annolfo is rejected.

2. This Decision is final and binding.

Rome, June 25, 1957.

The Representative of the United States of America	*The Representative of the Italian Republic*
Alexander J. MATTURRI	Antonio SORRENTINO

FLEGENHEIMER CASE—DECISION No. 182 OF 20 SEPTEMBER 1958 [1]

Claim under Article 78 of Peace Treaty—Exception of inadmissibility—Nationality of claimant—Status of a "United Nations national"—Applicability of first part of paragraph 9 (*a*) of Article 78—Exclusive competence of the State in matters of nationality—Power of investigation of international tribunals—Principle of equality of the States parties—Principle of effectivity—Evidence of nationality—Law to be applied—Theory of effective nationality—Theory of apparent nationality—Acquisition and loss of United States nationality—Bancroft treaties—Treaties concluded by a State member of federated States—Effects of war on treaties—Treaties

[1] *Collection of decisions*, vol. V, Case No. 20.

The following abbreviations have been used in this Decision:

Am. J. Int. (American Journal of International Law).
Annual Digest (Annual Digest and Reports of Public International Law Cases).
Ann. Inst. (Annuaire de l'Institut de Droit International).
Moore Arb. (Moore, *International Arbitrations* (1898)).
Rec. Ac. (Recueil des Cours de l'Académie de Droit International de la Haye).
Rec. Arb. (A. de la Pradelle et N. Politis, *Recueil des Arbitrages Internationaux*).
Recueil C.P.I.J. (Recueil des Arrêts de la Cour Permanente de Justice Internationale).
Rec. C.I.J. (Recueil des Arrêts de la Cour Internationale de Justice).
T.A.M. (Recueil des Décisions des Tribunaux Arbitraux Mixtes institués par les Traités de Paix).
U.N.R.A. (*Reports of International Arbitral Awards*, United Nations).

invoked by a State not party thereto—Supremacy of treaty provisions over municipal law—Principle of estoppel—Applicability of second part of paragraph 9 (*a*) of Article 78 of Peace Treaty—Meaning of expression "treated as enemy"—Interpretation of treaties—Principles of—Interpretation of treaty drafted in various languages not reconciled with one another.

Réclamation présentée au titre de l'article 78 du Traité de Paix — Exception d'irrecevabilité — Nationalité du réclamant — Qualité de « ressortissant des Nations Unies » — Applicabilité de la première partie du paragraphe 9 *a*) de l'article 78 — Compétence exclusive de l'Etat en matière de nationalité — Droit de contrôle du juge international — Principe de l'égalité des Parties — Principe d'effectivité — Preuve de la nationalité — Droit applicable — Théories de la nationalité effective et de la nationalité apparente — Acquisition et perte de la nationalité des Etats-Unis — Traités Bancroft — Traités passés par un Etat membre d'un Etat fédéral — Effets de la guerre sur les traités — Traités invoqués par un Etat tiers — Primauté des traités sur le droit interne — Principe de l'estoppel — Applicabilité de la seconde partie du paragraphe 9 *a*) du Traité de Paix — Signification de l'expression « traitées comme ennemies » — Interprétation des Traités — Principes d'interprétation — Interprétation d'un traité en cas de contradiction entre les versions faisant foi.

The Italian-United States Conciliation Commission established by the Italian Government and by the Government of the United States of America pursuant to Article 83 of the Treaty of Peace with Italy, of February 10, 1947, composed of Messrs. Antonio Sorrentino, Honorary Section President of the Council of State, Representative of the Government of the Italian Republic, Alexander J. Matturri, Representative of the Government of the United States of America, Georges Sauser-Hall, Professor Emeritus of international law at the Universities of Geneva and Neuchâtel (Switzerland), Third Member chosen by mutual agreement between the Italian and United States Governments.

On the Petition dated June 25, 1951 submitted by the Agent of the Government of the United States of America, and filed on the following day with the Secretariat of the Commission *versus* the Italian Government in behalf of Mr. Albert Flegenheimer,

Having seen the *Procès-verbal* of Non-agreement dated August 6, 1954, signed by the Representatives of the High Parties to this dispute, whereby it was decided to resort to a Third Member as provided for by Article 83 of the Treaty of Peace and the Rules of Procedure of the Commission, in order that the controverted issues of this case be resolved:

Having noted that these controverted issues arise out of the preliminary objection of inadmissibility of the Petition raised by the Agent of the Italian Government in his Answer of October 15, 1951;

Having examined the written Pleadings and Defences exchanged by the Agents of the two Governments, as well as the abundant documents submitted by both parties;

Having heard the Agents of the two Parties, assisted by their Counsel, in the oral discussions held at Rome in one of the Court Rooms of the Italian Council of State, from October 3, through October 17, 1957;

Having seen the final Reply and Counter-Reply filed on October 28 and on November 9, 1957 by the Agents of the two Governments, in substitution for the oral Reply and Counter-Reply which, considering the length of the oral discussion, were waived by mutual agreement, with the approval of the Commission;

Having considered that the case is now ready for decision insofar as the preliminary objection of inadmissibility raised by the Agent of the Italian Government is concerned;

I

The Parties reached the following conclusions, in their final Observations filed with the Conciliation Commission, in the Rebuttal of the Agent of the Government of the United States of October 28, 1957, and in the final Counter-Reply of the Agent of the Government of the Italian Republic, of November 9, 1957;

A. American conclusions:

May it please this Honorable Commission:

I. To decide that Albert Flegenheimer has the status of a national of the United States of America and is therefore a United Nations national within the meaning of Article 78, 9 (*a*), first sentence of the Peace Treaty with Italy.

II. To proceed with the examination of the merits of the case, and preliminarily, of the request for evidence filed by the Agent of the United States of America on October 30, 1954;

Alternatively;

III. To decide that Albert Flegenheimer is a United Nations national within the meaning of Article 78, 9 (*a*), second sentence of the Treaty of Peace with Italy;

IV. To proceed as stated under point II above.

V. In case this Honorable Commission does not think that sufficient evidence exists in the records to warrant the granting of our alternative conclusions stated above in point III, to direct the Italian Government to submit or to make available within a period of sixty days, the original or a certified true copy of correspondence, acts and documents at the disposal of the Italian authorities for the years 1940 and 1941 regarding foreign exchange operations of the Società Finanziaria Industriale Veneta, the corporations controlled by that company and of Ilario Montesi, individually, in particular as regards the purchase of Albert Flegenheimer's Finanziaria participation.

B. Italian conclusions:

In conclusion

it is requested that the Hon. Italian-United States Conciliation Commission declare that Mr. Albert Flegenheimer cannot be considered as a "United Nations national" for purposes of Article 78 of the Italian Peace Treaty and therefore declare all the claims made by the United States of America against the Italian Republic in the instant case to be inadmissible, and at the same time make all the necessary provisions thereby involved.

II

THE FACTS:

Having considered the following facts:

1. In its Petition of June 25-26, 1951, the Government of the United States requests cancellation of the sale effected by Albert Flegenheimer on March 18, 1941 of 47,907 shares of the Società Finanziaria Industriale Veneta, of Padua, to the Società Distilleria Cavarzere, controlled by the former Company, whose major portion of capital-stock belongs to Mr. Ilario Montesi, for the sum of $277,860.60, because the actual value of these shares is said to be from four to five million dollars.

The Petition is based on the fact that Albert Flegenheimer, of the Jewish creed, fearing that the anti-semitic legislation enacted in Italy in the month of September 1938 might be applied to him, stipulated an unfavourable contract under conditions of force or duress, so that this contract was void *ab initio*; the allegedly injured individual affirms that he should be restored to his rights on the basis of a settlement of account with Mr. Montesi, by the application of Article 78, paragraph 3 of the Treaty of Peace with Italy of February 10, 1947 and of Article III, section 16 (*b*) of the Lombardo-Lovett Agreement, which came into force on August 14, 1947.

This sale occurred before the United States entered the war, December 8, 1941, but after Italy had entered the war, June 10, 1940.

2. In its Answer of October 15, 1951, the Italian Government raised a preliminary objection based on the fact that Albert Flegenheimer is not a United States national within the meaning of Article 78 of the Treaty of Peace and that the legal action undertaken on his behalf before the Commission was inadmissible.

3. The Agent of the Government of the United States, in his Reply of November 17, 1952, denied that there were grounds for this exception of inadmissibility and, in order to prove Albert Flegenheimer's American nationality, filed a certificate of nationality dated July 10, 1952, as well as the Order of the Acting Assistant Commissioner reproducing *in extenso* the results of the inquests made by the Inspection and Examinations Division (of Immigration and Naturalization Service), of the United States and stating the reasons that led to the issuance of the subject certificate of citizenship.

4. Following several procedural incidents (pleadings), the Italian Surrejoinder, filed on July 30, 1954, supported by numerous opinions of American and neutral jurists, again concludes for the inadmissibility of the Petition on several grounds, *inter alia*, the absence of Albert Flegenheimer's American nationality within the meaning of Article 78 of the Treaty of Peace.

5. On February 18, 1956, the Commission, completed by a Third Member, issued an Order directing that the exception based on Albert Flegenheimer's nationality, be dealt with before any other question involved in the case was to be examined.

6. Insofar as Albert Flegenheimer's nationality is concerned, the facts give rise to certain disputes between the High Parties; and the main issue will be settled in this part of the Commission's Decision, while others shall be dealt with only insofar as they are connected with the legal examination of the subject case.

7. It has been established by the documents introduced in the record that Samuel Flegenheimer, the father of the allegedly injured individual, was born

on August 21, 1848 at Thaiernbach in the Grand Duchy of Baden, from where he emigrated to the United States, at the age of 16 in 1864 according to the Plaintiff Party, and at the age of 18 in 1866 according to the Respondent Party; he was naturalized in the State of Pennsylvania (U.S.A.) on November 7, 1873, upon attaining majority, and after having fulfilled the condition of five-year residence required by the United States law of candidates for naturalization.

He left his new home-country as early as 1874, a fact which is established by the publication of his marriage banns in Germany on January 22, 1876, wherein it is indicated that he already has resided in that country, on that date, for eighteen uninterrupted months.

Samuel Flegenheimer did not return to the Grand Duchy of Baden. He settled in Württemberg, where he was naturalized on August 23, 1894 and where he lived until the time of his death which occurred on May 14, 1929.

He therefore resided eight, at the most ten, years in the United States, according to whether one fixes the date of his emigration in 1866 or in 1864; and he spent the whole of the rest of his life, that is 55 years, in Wurttemberg. He married there three times and a number of children were born of these wedlocks, amongst them three sons were born at Hall (Wurttemberg), Joseph, in 1876, Eugene, in 1888 and Albert in 1890.

8. Albert Flegenheimer and his brothers were included in their father's naturalization in Württemberg in 1894; the eldest was then 18 years old, the middle one was 6 and the youngest, Albert, was 4. The latter lived in Germany from the time of his birth until 1937, that is 47 consecutive years, and in all probability he would have continued to reside there had it not been for the political events which forced him to leave that country.

9. Beginning from the time when the socialist régime seized power in Germany on January 30, 1933, Albert Flegenheimer, like other Germans of the Jewish faith, felt himself, his family and his property threatened in an ever increasing measure by the racial persecutions which began to rage; being apprehensive, he became fearful and acquired the psychology of the hunted man, the concentration camp constantly looming on the horizon of his future. This circumstance explains some of the conflicting statements made by him during the inquests to which he was subjected by the American authorities, as well as certain improvident steps taken by him, and one cannot reproach him nor say that he acted in bad faith.

10. At that time, Albert Flegenheimer and his brother Eugene, when examining the papers of their father who had died four years earlier, discovered that their father had been naturalized in the United States and that it was not impossible that they too had acquired American nationality *jure sanguinis*. They assert that they reproached their mother for having concealed this circumstance which, in their view, took on a very considerable importance in the situation which was developing in Germany, because it constituted for them a sheet-anchor in that it could protect them, as United States nationals, from the very serious threat of persecution which they felt was heavily weighing on their destinies. The probative value of this statement shall be examined under the considerations of law of this Decision.

11. The two brothers, one of whom, Eugene Flegenheimer, had studied law, began to make certain researches in order to find out whether they themselves had preserved their father's American nationality or whether they could eventually recover it. Between 1933 and 1939 they contacted several American Consulates in Europe and even the Embassy of the United States in Paris, but only obtained negative or ambiguous information. Albert Flegenheimer

never submitted a formal claim for recognition of his American nationality to any United States authority, before proceeding with his efforts in the United States itself, as will be set out hereinafter. His brother, Eugene Flegenheimer, abandoned these attempts at the administrative level and applied for naturalization in the United States, where he was in fact naturalized by decree of the (United States) District Court of Seattle (Washington), on January 24, 1944; also Joseph, the eldest of the Flegenheimer sons, was naturalized by decree of that same Court on May 5, 1947.

12. During the month of November 1937, Albert Flegenheimer was peremptorily notified by the Deutsche Bank in Berlin that he was to dispose of all his property in Germany under penality of total confiscation. He was therefore compelled to sell his property for a nominal price. Later he was told he was to leave Germany definitively and, travelling on a German passport, he went to Italy where he still owned other assets which he hoped he could dispose of. But, during the summer of 1938, the Italian Government enacted anti-semitic laws and Albert Flegenheimer considered that the safeguarding of his personal security required that he leave Italy immediately.

He first went to Switzerland where, according to incorrect information given him, he thought he could easily obtain naturalization; in actual fact Swiss law at that time required an actual residence of six years on the basis of a regular permit of domicile. The hope of being able to go to America on a passport other than German, led him to commit the blunder of contacting unscrupulous people who made him part with some of his money in exchange for illusory services and the whole matter ended with the arrest of one of these individuals. On January 10 and May 9, 1939 he was questioned by the Swiss authorities, as a witness and as an injured party, and not as a defendant, so that the Swiss episode can throw no moral discredit on him.

13. Holding on to his German passport because he could obtain no other at that time, Albert Flegenheimer went to Canada; he arrived there on February 10, 1939 and on the 13th of that month he obtained, for the first time, the renewal of his passport No. 44/1939 by the German Consulate at Winnipeg, and, later, on June 10, 1941, by the Swiss Consulate in that city which had taken over the protection of German interests in Canada.

He went back to Switzerland the same year, and later he was in Winnipeg where, on November 3, 1939, he submitted to the Consulate of the United States his first formal claim to be recognized as a national of the United States, on the grounds that he had learned that he had not lost his U.S. nationality under American law.

The Board of Special Inquiry of the Immigration and Naturalization Service of the United States heard him, under oath, on November 22, 1939. During that hearing he confirmed that he only acquired knowledge of his father's, Samuel Flegenheimer's, naturalization in 1933 and stated he had never claimed his right to American nationality, whereas during these proceedings he has contended he took many steps in that direction between 1933 and 1939. These conflicting statements are not inexplicable, however, if one considers that it is proved that he never submitted, before 1939, a formal claim for recognition of his status as an American national, but that he confined himself to making inquiries at American diplomatic and consular agents in Europe in order to learn whether or not he was vested with this nationality, steps which, as has already been pointed out, did not result in the submission of a claim in the technical sense of the word.

14. On November 22, 1939, the aforesaid Board of Special Inquiry, unanimously decided that Albert Flegenheimer was not a United States national

and that he could be admitted in that country only as a German national and for a limited period of six days, as the examination of the question of his nationality was still pending.

On December 14, 1939 the Department of State of the United States informed him that he could not be registered as a United States national because he did not have this quality and that, over a period of many years, he had "manifested an adherence to German nationality". It should be pointed out that he was notified of this decision subsequent to the judgement of the Supreme Court in the *Perkins* v. *Elg* Case of 1939, to which the State Department expressly refers and which shall be analysed in the considerations of law of this Decision, in view of the fact that the Plaintiff Party has attached decisive importance to it.

15. While in America, Albert Flegenheimer was, without his knowledge, divested of his German nationality in application of the national socialist law of July 14, 1933 concerning the withdrawal of naturalizations and the forfeiture of German nationality; the decree of April 29, 1940 affirming this forfeiture was published in the Reichsanzeiger of May 4, 1940.

Neither Party to this dispute denies that Albert Flegenheimer lost, under this law, the German nationality he had acquired by naturalization together with his father in Württemberg in 1894.

Albert Flegenheimer was informed of this forfeiture only later by his Counsel in Italy who carried out negotiations for the sale of his 47,907 shares of the Società Finanziaria Industriale Veneta, subject of the dispute between the two Governments. The price of this sale was fixed at 277,860.60 U.S. dollars. Because Canada, where Albert Flegenheimer then visited, had entered the war against Italy on June 10, 1940, this sum was sent to him in New York on June 6, 1941, in accordance with his instructions.

In connexion with this payment, the Italian Government reproaches Albert Flegenheimer for having then availed himself of his German nationality in order to obtain authorization for said payment by a State which was allied to Germany in a State which was still neutral, as the United States of America declared war on Japan, Germany and Italy only on December 8, 1941; it opposes this attitude to that adopted by Albert Flegenheimer in this dispute where he never ceased to contend that he has always been a United States national uninterruptedly since birth. The Commission, nevertheless, can give no consideration to this criticism, because at that time Albert Flegenheimer was unaware of his forfeiture of German nationality decreed against him and he could justifiably claim no other citizenship than that which appeared from his identity papers. The Italian Ministry of Foreign Exchange was in any event aware of Albert Flegenheimer's legal position, and proof of this is the letter which has been introduced in the record, written on March 11, 1941 to the Società Finanziaria Industriale Veneta, authorizing the transfer of dollars to the United States, and qualifying *expressis verbis* the Flegenheimer brothers as "ex-German Jews". The German nationality of the individual concerned therefore was not a determinant factor in the conclusion of this financial operation.

16. On June 10, 1941, after having travelled about, Albert Flegenheimer was authorized to enter the United States for a temporary sojourn. At that time he had possession of large sums in dollars and it was his intention to do everything in his power to remain in that country until peace had been re-established.

But, following the attack on Pearl Harbor, the United States entered the war on December 8, 1941. Albert Flegenheimer's position became critical because he had entered the United States on a German passport.

On December 13 and 19, 1941 he began by requesting an extension of his sojourn permit and was again submitted to a lengthy questioning on January 31, 1942 at Ellis Island (New York). He testified under oath he had lost his German nationality since May 8, 1940, by legal decree of forfeiture. This is a correct statement which cannot be contradicted by his former statements in view of the fact that at the time he made these statements, he had no knowledge of the German decree in question. But, in view of the fact that he did not yet have sufficient mastery of the English language at the time of the second inquest, his statements appeared to be somewhat conflicting with the results of the inquests made by the Board of Special Inquiry on November 22, 1939. A supplementary questioning occurred in Washington, on February 12, 1942; it resulted in the correction of certain statements made by Albert Flegenheimer during the inquests held prior to January 31, 1942. This supplementary procedure of inquiry is described as irregular by the American attornies of the Italian Government in the proceedings before this Commission; but it cannot be dismissed in view of the fact that said procedure was never challenged or annulled in the United States.

17. On the basis of this supplementary inquest, the Immigration and Naturalization Service of the Department of Justice of the United States, according to the communication sent to Albert Flegenheimer on February 24, 1942, ordered that the latter be given the status of American national and that the record of his entry into the United States at Rouses Point, New York, be amended so as to indicate that he was admitted into the country as an American national, and not as a German national.

18. The State Department did not concur, without reservations, in the decision of the Immigration and Naturalization Service. When Albert Flegenheimer requested that he be given a passport, the issue thereof was refused him by letter dated May 14,1946, on the grounds that it was necessary to await the return of more normal conditions in Europe before journeying thereto. The Department, finally issued a passport to him on October 24, 1946 and accorded him the necessary renewals.

19. On May 8, 1952, Albert Flegenheimer requested the issue of a certificate of United States nationality, which is attached to the record of these proceedings, and which was given to him on July 10, 1952, more than one year after legal action before this Commission was instituted.

The issuance of this document was, however, preceded by a request for information addressed by the Immigration and Naturalization Service to the State Department concerning the inquiries which Albert Flegenheimer claimed to have made at several consulates and at one Embassy of the United States in Europe, between 1933 and 1939, for the purpose of obtaining recognition of his American nationality.

The State Department answered that prior to Albert Flegenheimer's application made at Winnipeg in 1939, there existed no document in its files establishing that steps in that direction were taken by the claimant. The State Department added that even if Albert Flegenheimer had had an occasional conversation with any one of the consular or diplomatic agents of the United States, this would have been the subject of a report which would have been sent to it (the State Department), because "it was well known to citizenship officers in Europe that a person who came in to discuss his status but who declined to execute a formal application when invited to do so, would be likely to apply at some other office and attempt to conceal information which he learned would be damaging to his case".

20. On May 8, 1952, Albert Flegenheimer was again questioned in New York,

under the direction of Eugene C. Cassidy (Examining Officer), at the close of which questioning this official drew up a lengthy report, and the following excerpts thereof deserve special attention:

> It appears highly improbable that the three foreign service officials to whom he says he spoke in three different cities and in different years all neglected to follow the established procedures and customs of the Department of State. This factor plus the subject's own evidence containing correspondence giving the reason why he made no claim to citizenship during this period, leads to the conclusion that he did not, between 1933 and 1939, assert any claim of United States citizenship but on the contrary continued by his actions to show an election of the German nationality which had been conferred upon him by naturalization of his father in 1894 when he was a minor and included in his father's naturalization.

The Examining Officer concluded by making the following recommendation:

> It is therefore recommended that the application of Albert Flegenheimer for a certificate of citizenship be denied.

Nevertheless, on July 10, 1952, the American authorities ordered that a certificate of nationality be issued to Albert Flegenheimer.

21. For purposes of clarity of the case, the Commission considers it necessary to transcribe below the principal excerpts from the conclusions reached in connexion with Albert Flegenheimer's application, by the Acting Assistant Commissioner, Inspection and Examinations Division of the Department of Justice of the United States, James E. Riley, which led to the issuance of the certificate of citizenship dated July 10, 1952; they are as follows:

> The subject's case has twice been decided on the question of election. In 1939 the State Department stated he had elected German nationality, and in 1942 the Service stated there was no evidence to show he had elected German nationality and, therefore, he should be considered a United States citizen. While much of the new evidence that has been added to the case is conflicting . . . there is much to support his allegation that he did attempt to claim United States citizenship many times between 1933 and 1939. It is true his story is in conflict with the known practice of the Department of State in connexion with such matters, but it is difficult to believe one could fabricate a story specifically naming so many people and then have many of those people prepare affidavits corroborating him . . . Accordingly, while no formal application for a United States passport or of registration as a United States citizen was made, the subject did what he thought was appropriate to claim United States citizenship . . . It must also be borne in mind that during all the crucial period between 1933 and 1939 Nazism had risen to great power in Germany and, being Jewish, many of the subject's activities were influenced by a fear of the concentration camp . . . It is a matter of placing credences in the subject's explanations. If he had to be believed only as to certain items, which are they? Only those supported by affidavits of others? It appears there is no choice but to believe all his statements or none.
>
> In the foregoing it is conceded for the moment that the subject was unaware until 1933 that he had a claim to United States citizenship. Evidence has now been introduced establishing that when the subject was married in Stuttgart in 1920 he had to furnish evidence of his German nationality. To accomplish this a copy of the German naturalization certificate relating to his father's naturalization was furnished. He disclaimed any knowledge of such a certificate. The registrar at Stuttgart has stated such documents were requested when one's

citizenship status was in doubt . . . From all this it appears that in 1920 the subject could have become aware of his father's former United States citizenship if he had read the German naturalization certificate he allegedly submitted. He swears he never saw that certificate or any other German certificate of citizenship. Since . . . he denies knowledge of such certificate, it is not possible to establish that he did have such knowledge.

The allegation that the father, Samuel Flegenheimer, had never mentioned during his entire lifetime to his sons the fact of his former American citizenship would appear to be plausible in the light of a general attitude prevailing in Germany . . . displaying it to be a lack of patriotism . . . Again it is a matter of credence . . . Accepting that, there is no alternative to accepting all of the subject's statements . . .

Inasmuch as there is no evidence of any voluntary acts of the subject which may have expatriated him, it is further concluded the subject is a citizen of the United States.

The question of Albert Flegenheimer's American nationality was thus settled by an administrative authority; it was never made the subject of a judicial decision of the United States.

22. In order to be able to benefit by Article 78 of the Treaty of Peace, paragraph 9 thereof provides that the injured party must have been a United Nations national on certain given dates, to wit, September 3, 1943, the date of the Armistice and September 15, 1947, the date of the coming into force of the Treaty.

The Italian Government contends that this condition is not fulfilled and that it cannot, for purposes of application of the Treaty of Peace, recognize Albert Flegenheimer's American nationality on the basis of the documentation submitted during the proceedings before this Commission, because, in order to be in a position to be permitted to exact from Italy the heavy obligations imposed on her by the Treaty of Peace in favour of certain given United Nations nationals, it is necessary that the bond of nationality with one of the United Nations be positive and not subject to denial or criticism.

The Government of the United States contends that it has submitted proof of the existence, which fully satisfied the law, of the United States nationality with which Albert Flegenheimer has been vested, by the certificate of citizenship dated July 10, 1952, introduced in the record, and that the claimant therefore fulfils the conditions required by the Law of Nations in order to be able to benefit by the diplomatic protection of the United States.

III

CONSIDERATIONS OF LAW:

23. A. *Power of the Conciliation Commission established, pursuant to the Treaty of Peace with Italy, of February 10, 1947, of examining the probative value of certificates of nationality submitted by the parties to a dispute.*

As the signatory States of the Treaty of Peace have entrusted the Commission with the task of settling, under the terms of Article 83 of the aforesaid Treaty, all disputes giving rise to the application of Articles 75 and 78, as well as Annexes XIV, XV, XVI and XVII, part B, the Commission has no other powers than those resulting from said Treaty; and the Treaty is its Charter.

In the exercise of its powers, it has the right to examine all questions concerning its jurisdiction, and amongst these questions, one should make a distinction between those which concern its competence and those which concern the admissibility of the Petition.

The competence of the Commission in the instant case is not in doubt. It is based on Article 78, paragraph 3 of the Treaty of Peace which reads as follows:

> The Italian Government shall invalidate transfers involving property, rights and interests of any description belonging to United Nations nationals, where such transfers resulted from force or duress exerted by Axis Governments or their agencies during the war.

It is not disputed between the Parties that the Petition of the U.S. Government is based on this provision: the merits of the case are based on the legal justification of the claim involved.

On the other hand, the admissibility of the Petition of the Government of the United States is uncertain, because there exists a dispute between the High Parties on an element of fact required by Article 78, paragraph 9, letter (*a*) of the Treaty of Peace with Italy which provides:

> United Nations nationals" means individuals who are nationals of any of the United Nations or corporations or associations organized under the laws of any of the United Nations, at the coming into force of the present Treaty, provided that the said individuals, corporations or associations also had this status on September 3, 1943, the date of the Armistice with Italy.
>
> The term "United Nations nationals" also includes all individuals, corporations or associations which, under the laws in force in Italy during the war, have been treated as enemy.

The Italian Government denies that Albert Flegenheimer was a United Nations national on the relevant dates in accordance with the foregoing provision, namely, September 3, 1943 and September 15, 1947, and it is necessary that the Commission settle this issue in order to determine whether the Petition submitted by the Government of the United States is admissible or inadmissible.

24. It is clear that the afore-mentioned provision of the Treaty of Peace, in explaining the meaning of "United Nations nationals" refers to an unquestionable principle of international law according to which every State is sovereign in establishing the legal conditions which must be fulfilled by an individual in order that he may be considered to be vested with its nationality.

The lengthy arguments developed both in the written proceedings and in the oral hearings by the Agents, and Counsel, for both Parties on the title to nationality of the United States, suffice to establish that they (the Parties) consider this right to be determinant in deciding Albert Flegenheimer's nationality and that the Commission will have to submit to the jurisprudential or conventional legal content thereof when it has established the rules that must be applied; in other words, the Commission will have to admit or reject, at the international level, a nationality, the existence or inexistence of which shall be established, in its opinion in full compliance with the law, at the national level.

25. Nevertheless, the Commission recalls that, according to a well established international jurisprudence, where international law and the international bodies who must apply that law are concerned "national laws are simple facts, an indication of the will and the activity of States, just like judicial decisions or administrative measures" (*C.P.I.J.*, Decision of May 25, 1926, case relating to certain German interests in Upper Silesia, series A, No. 7, p. 19).

The result is that, in an international dispute, official declarations, testimonials or certificates do not have the same effect as in municipal law. They

are statements made by one of the Parties to the dispute which, when denied, must be proved like every other allegation. It is the duty of this Commission to establish Albert Flegenheimer's true nationality at the relevant dates specified in Article 78, paragraph 9 of the Treaty of Peace, and it has a right to go into all the elements of fact or of law which would establish whether the claimant actually was, on the aforementioned dates, vested with the nationality of the United States; these investigations are necessary in order to decide whether the international action instituted in his behalf, fulfils the conditions required by the Treaty of Peace from which the Commission cannot deviate. It must therefore freely examine whether an administrative decision such as that taken in favour of Albert Flegenheimer in the United States, was of such a nature as to be convincing.

The profound reason for these broad powers of appreciation which are guaranteed to an international court for resolving questions of nationality, even though coming within the reserved domain of States, is based on the principle, undenied in matters of arbitration, that complete equality must be enjoyed by both Parties to an international dispute. If it were to be ignored, one of the Parties would be placed in a state of inferiority vis-à-vis the other, because it would then suffice for the Plaintiff State to affirm that any given person is vested with its nationality for the Defendant State to be powerless to prevent an abusive practice of diplomatic protection by its Opponent.

The right of challenge of the international court authorizing it to determine whether, behind the nationality certificate or the acts of naturalization produced, the right to citizenship was regularly acquired, is in conformity with the very broad rule of effectivity which dominates the Law of Nations entirely and allows the court to fulfil its legal function and remove the inconveniences specified.

26. During these proceedings, the Agent of the United States and his Counsel have nevertheless persistently contended that the certificate of nationality issued to Albert Flegenheimer on July 10, 1952, under American law, constitutes legally valid proof of his nationality, and that the nature of this proof is such as to be binding on this Commission, unless it were proved that the aforesaid certificate was obtained by fraud or favouritism such as to allow the claimant to avail himself of the diplomatic protection of the United States and, as a consequence, benefit by the reparation provisions of the Treaty of Peace with Italy, and of the Commission's jurisdiction. In the latter part of their allegations, they contended that it would be sufficient for Albert Flegenheimer's American nationality to be plausibly established in order to avoid any challenge and investigation by the Commission.

They invoke several precedents, principally the Rau, Meyer Wildermann and Pablo Najero cases.

The Rau Case was brought before the German-Mexican Claims Commission and decided by that Commission on January 14, 1930; the allegations of the Agent of the Mexican Government were based on the unconstitutionality of a Mexican law concerning nationality; these allegations were rejected because the Commission held it had "no power to pass on the constitutionality of Mexican laws" (*Annual Digest*, 1931-1932, No. 124, p. 251). This precedent is not pertinent with regard to the situation which this Commission is called upon to examine, because in Albert Flegenheimer's case there is no question of constitutionality of the law that is to be applied; the Commission must only investigate whether, in actual fact, the nationality invoked is that resulting from the law applicable to this case in the United States.

The Pablo Najero case, decided on October 19, 1928, by the Franco-

American Claims Commission, gave rise to the following statement by the Commissioners:

> A legal presumption militates in favour of the regularity of all official acts of public officers. An international Tribunal in face of declarations of option accepted by the Government concerned is fully justified in considering these declarations as regular options, and in refraining from entering into an independent examination of the conditions on which their validity depend. (*Annual Digest*, 1927-1928, p. 303).

In support of its theory denying the international court the right of interpretation in matters of nationality when this fact is plausibly established, the Plaintiff Party also lays stress on the *Meyer Wildermann* vs. *Héritiers Stinnes et consorts* Decision, rendered by the German-Rumanian Mixed Arbitral Tribunal on June 8, 1926 wherein, in connexion with the verification of a certificate of nationality, it is stated:

> It is hence the duty of the Tribunal to verify whether the Rumanian Minister of the Interior has performed an act of favour or of justice . . . The Arbitral Tribunal cannot impose an interpretation of municipal law. It must be acknowledged that the Rumanian authorities, when applying their own law and investigating the circumstances of the instant case, has the same latitude enjoyed by tribunals and, above all, administrative courts everywhere. The hypothesis of an act of favour shall be discarded if the challenged decision is reconcilable with a *plausible* interpretation of Rumanian Law and of the circumstances of fact. (*T.A.M.*, vol. VI, p. 493.)

The Agent of the Government of the United States and his Counsel also attach great importance to the Instructions given on November 30, 1881 by Secretary of State Blaine to the United States Commissioner on the Spanish-American Reparations Commission, established under the Treaty of February 11/12, 1871, in connexion with a decision rendered in the Buzzi Case on April 18, 1881; Secretary of State Blaine said:

> . . . I refuse to recognize the power of the Commission to denationalize an American citizen. When a court of competent jurisdiction, administering the law of the land, issued its regular certificate of naturalization to Pedro Buzzi, he was made a citizen of the United States, and no power reside in the Executive Department of this Government to reverse or review that judgment. And what the power of the Executive can not do in itself it cannot delegate to a commission which is the mere creation of an executive agreement. (*Moore Arb.*, vol. III, p. 2592 to 2642, particularly pp. 2618-2619.)

27. In sharp contrast with this point of view, the Agent and Counsel of the Italian Government before this Commission, deny the correctness, as regards the merits, of Secretary of State Blaine's Instruction of 1881 to the United States Commissioner on the Spanish-American Commission. They refer to other instructions given by other American Secretaries of State, on the basis of that same 1871 Treaty, and concerning the same Commission, some of which are prior to while others are subsequent to Secretary of State Blaine's Instruction, so that the latter appears as isolated in American practice and in conflict with the opinions of his predecessors and successors.

In his Instruction of November 18, 1870, prior to the operation of the Spanish-American Commission, Secretary of State Fish expressed himself regarding the manner in which the said Commission was to exercise its powers, as follows:

> Naturalized citizens of the United States will, if insisted by Spain, be required to show when and where they were naturalized, and it will be open to Spain to traverse this fact, or to show that from any of the causes named in my circular of October 14, 1869, the applicant has forfeited his acquired rights; and it will be for the Commission to decide whether each applicant has established his claim. (*Moore Arb.*, vol. III, p. 2563.)

Blaine's immediate predecessor, Secretary of State Evarts, developed this point of view in his letter to the Spanish Minister in Washington, dated March 4, 1880:

> The Government of the United States from the first considered, as it still maintained, that the Commission established under the Convention of 1871 was an independent judicial tribunal, possessed of all the powers and 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 Governments to interfere with, direct or obstruct its deliberations. (*Moore Arb.* vol. III, p. 2599.)

Secretary of State Evarts then pointed out that certificates of American nationality of claimants could always be impeached by Spain when it was established that the proofs submitted were inadmissible in form, or that they were the result of fraud or that, taken together, such proofs were insufficient to establish the demand of American citizenship.

Secretary of State Frelinghuysen who succeeded Blaine made an attempt at clarifying what he defined as the "true rule" in a letter written by him on September 25, 1882 to the United States Counsel before said Commission, wherein he stated:

> The true rule to govern this Commission is, that when an allegation of naturalization is traversed, and the allegation is established *prima facie* by the production of a certificate of naturalization, or by other and sufficient proof, it can only be impeached by showing that the court which granted it, was without jurisdiction or by showing, in conformity with the adjudications of the courts of the United States on that topic, that fraud, consisting of intentional and dishonest misrepresentation or suppression of material facts by the party obtaining the judgment, was practised upon it, or that the naturalization was granted in violation of a treaty stipulation or a rule of international law. (*Moore Arb.*, vol. III, p. 2620.)

The American and Spanish Commissioners accepted this Instruction of Secretary of State Frelinghuysen for themselves on December 14, 1882 and transmitted it to the Umpire as a matter of policy.

Therefore, Blaine's Instruction only played an incidental role in the jurisprudence of international commissions when they are called upon to deal with matters of nationality: it was promptly disavowed and abandoned, to the point where all cases giving rise to this question and brought before the Spanish-American Commission, either before or after Blaine's statement, have resulted in decisions refusing to recognize foreign judgments on this subject (Van Dyne, *Treatise on the Law of Naturalization of the United States* (1907), p. 172-173, 177).

28. The Agent of and Counsel for the Italian Government before this Commission were not satisfied with this refutation and contended that every international jurisdiction is fully at liberty to investigate the existence or inexistence of a nationality invoked before it.

They affirm that the principles invoked by the Government of the United

States in these proceedings do not correspond to positive law and that, in particular, when a certain given nationality is the very condition for the existence of an obligation sanctioned by an international treaty, the international body who must interpret and apply said treaty, is entitled and has the duty to examine, in the utmost freedom, whether such a condition exists in accordance with the Treaty, in order that it may not impose charges on the debtor State, and that it may not confer to the creditor State rights which do not come under the intentions of the High Contracting Parties.

They stress that the Law of Nations itself does not contain any rule by which the acquisition and loss of nationality is established, and on this point reference is made by them to the municipal law of the various States; but this reference is not absolute; it is limited by the powers vested in a body, whose duty it is to give judgment between the Parties, to investigate, by verification and appraisal of the facts, whether nationality was actually acquired or lost, to exclude fraud, favouritism, error and inconsistencies with treaties and general principles of law, even if the rules of municipal law, which may not contain a strict system of regulating the manner of disputing the acquisition or the loss of nationality, or which may be organized in a special manner, would result in recognition in a given person or the quality of a national of a given State. In other words, the International court, even though having the power of applying rules of municipal law in order to establish the nationality of an individual has, in addition, the power to dismiss these rules and to reach, for instance on the basis of a conception of fraud directly inspired by the Law of Nations and which might differ from the notion which it would have in municipal law, the conclusion that the quality if national of a given State should be denied a given individual. The result is that nationality could exist with regard to municipal law, although inoperative in international proceedings, without requiring that the international body express an opinion on this nationality under municipal law, or annul it.

They draw the conclusion from the foregoing allegations that this Commission has the power to examine, within the framework of international law and particularly of Article 78, paragraph 9 of the Treaty of Peace with Italy, the correctness of the administrative document of the United States dated July 10, 1952 which recognizes in Albert Flegenheimer the quality of United States national; if in its appraisal it reaches a conclusion that differs from that of the competent administrative bodies of the United States, the interested person would still remain an American national for the authorities of the United States, but this quality would not be recognized in him by this Commission on the basis of the documents introduced in the record and by the arguments developed during the proceedings.

29. In fulfilling its duties, the Commission can draw its authority from a long series of arbitral precedents, as well as from important qualified legal writings distinctly affirming the power of investigation by the international court in matters of nationality.

The first case in which the question was dealt with is the Medina Case, decided by the United States-Costa Rican Claims Commission on December 31, 1862. This case has a certain analogy with the instant case, in that the Government of Costa Rica contended that Medina's naturalization was not valid because it was not in conformity with United States law; the American Commissioner answered that the Commission must respect a decision which, rendered by an American judge, had the authority of a *res judicata* and, as such, is not contestable in any other jurisdiction, even an international jurisdiction, at least until it was annulled by the judge that had rendered it; it was a

judicial and not a merely administrative act, entailing an interpretation of United States laws and had to be recognized in Costa Rica. But Umpire Bertinatti rejected this argument and stated:

> An act of naturalization, be it made by a judge ex parte in the exercise of his *voluntaria jurisdictio*, or be it the result of a decree of a king bearing an administrative character; in either case its value, on the point of evidence, before an international commission, can only be that of an element of proof, subject to be examined according to the principle *locus regit actum*, both intrinsically and extrinsically, in order to be admitted or rejected according to the general principles in such matter. (*Moore Arb.*, vol. III, p. 2587.)

In the Salem Case between the United States and Egypt, which gave rise to an arbitral decision on June 8, 1932 in connexion with the nationality of the interested party, the majority of the Commission affirmed:

> The Arbitral Tribunal is therefore entitled to examine whether the American citizenship of Salem really exists. Such examination is not impeded by the principle of international law that every foreign State is, generally speaking, sovereign in deciding the question as to which persons he will regard as his subjects, because the bestowal of citizenship is a manifestation of his international independence. In fact, as soon as the question of nationality is in dispute between two sovereign powers, it cannot be exclusively decided in accordance with the national law of one of these powers. In the present case it should be ascertained whether one of the powers, by bestowing the citizenship against general principles of international law, has interfered with the rights of the other power, or if the bestowal of the citizenship is vitiated because it has been obtained by fraud. (*U.N.R.A.*, vol. II, p. 1184.)

In the Hatton Case, decided on September 26, 1928 by the United Mexican States-United States of America General Claims Commission, United States Commissioner Nielsen, who had rendered a dissenting opinion in the Salem Case, affirmed that:

> However, it is proper to observe with reference to this point that, as has already been pointed out, convincing proof of nationality is requisite not only from the standpoint of international law, but as a jurisdictional requirement. (*U.N.R.A.*, vol. IV, p. 331.)

In the Russel Case, which was brought before this same Commission, United States Commissioner Nielsen expressed the opinion that nationality, in international law, is justification for the intervention of Government in the protection of persons or property in another country; that the jurisdictional articles of the Convention of September 8, 1923 between Mexico and the United States of America for the settlement of claims, were established within the framework of this principle, and added:

> . . . The Commission, created by that Convention has the power to deal with the merits of claims only in cases where the claimants possess American nationality. It must of course dispose of the preliminary jurisdictional question of nationality before deciding a case on the merits. (Nielsen, *International Law Applied to Reclamations* (1933) p. 596-597.)

In the Flutie Case, decided in 1903 by the American-Venezuelan Commission, the following opinion was rendered:

> The American citizenship of a claimant must be satisfactorily established as a primary requisite to the examination and decision of his claim. Hence the Com-

mission, as the sole judge of its jurisdiction, must in each case determine for itself the question of such citizenship upon the evidence submitted in that behalf . . . And the fact of such citizenship, like any other fact, must be proved to the satisfaction of the Commission or jurisdiction must be held wanting. (Ralston and Doyle, *Venezuelan Arbitration of 1903.*) [1]

A similar point of view is to be found in the decision of June 8, 1926 rendered by the Rumanian-German Mixed Arbitral Tribunal in the *Meyer Wildermann* vs. *Héritiers Stinnes et consorts* Case (*T.A.M.*, vol. IV, p. 848); in the Case of Religious Property between France, the United Kingdom and Spain on the one hand, and Portugal on the other, brought before the Permanent Court of Arbitration and decided on September 4, 1920 (*U.N.R.A.*, vol. I, p. 27); in the Carlos Klemp Case, decided in 1925, by the German-Mexican Mixed Claims Commission (*Am. J. Int.* 24, 1930, p. 622); in the Lynch Case, decided on November 8, 1929, by the Mexican-British Claims Commission (*U.N.R.A.*, vol. V, p. 227); in the Durcatte Case, decided by the Franco-Mexican Mixed Commission, wherein, against the opinion of the French Commissioner, it was admitted that claimant did not possess French nationality inasmuch as he had lost it by virtue of the provisions of the French Civil Code (Ralston, *The Law and Procedure of International Tribunals* (1926).

The majority of international tribunals has thus accepted this concept. It would be purposeful to mention, further, from a series of precedents which could still be lengthened, the following excerpt appearing in the decision rendered by the Franco-Mexican Reparations Commission, Prof. Verzijl acting as Umpire, on April 6, 1928, in the Georges Pinson Case:

> . . . It is the duty of an international tribunal to determine the nationality of claimants in such a manner that, insofar as the tribunal is concerned, this nationality is positive, irrespective, in principle, of the requirements of the national laws of each claimant individually. The national provisions are not devoid of value in his respect, but it is not bound by them. (*U.N.R.A.*, vol. V, p. 371.)

30. the foregoing point of view is, in any event, that which has been upheld on many occasions by the Agents of the Government of the United States during international proceedings.

Hence, in his Answer concerning the Castaneda and de Leon Case, which was pending before the American and Panamanian General Claims Commission in 1926, the Agent of the Government of the United States said:

> It is admitted by the Government of the United States that proof of the nationality of claimants is of fundamental importance, since the jurisdiction of the Commission depends upon the proof thereof, and the facts regarding citizenship must be established in the record before the Commission, to bring the claim within the jurisdiction of the Commission under Article 1 of the Convention. (*Hunt's Report*, State Department Publication No. 593 (1934), p. 663.)

The same point of view was further expressed in the Yanquez Case which was pending before the same Commission in 1926; the Government of the United States then contended that:

> Numerous claims have been dismissed by Claims Commissions, not only for the lack of evidence regarding the citizenship of the claimant, but also because of the inadequacy of such evidence. (*Ibid.*, p. 723.)

Lastly, it is purposeful to quote, in part, the answer given by United States Secretary of State Evarts on February 9, 1880, to a protest of the Minister of

[1] *U.N.R.A.*, vol. IX, p. 151.

Spain who expressed dissatisfaction with a decision of the United States-Spanish Claims Commission, concerning American nationality:

> "I sincerely hope that the views I have had the honour to submit to you may satisfy you that the contention on the citizenship of the claimants, dependent upon naturalization, is as fully a question of judicial determination for the tribunal in respect to the admissibility of evidence, its relevancy and its weight, and in respect to the rules of jurisprudence by which it is to be determined, as any other question in controversy in the case." (*Moore Arb.* (1898), vol. III, p. 2600.)

31. Abundant doctrine in international law confirms the power of an international court to investigate the existence of the nationality of the claimant, even when this is established *prima facie* by the documents issued by the State to which he owes allegiance and in conformity with the legislation of said State. This opinion is supported, in particular, by distinguished American authors of international law, such as the late professors Borchard and Hyde. The former expresses himself as follows in his report to the Institute of International Law on the diplomatic protection of citizens abroad:

> . . . It is the duty of the defendant State to look into the question as to whether the individual, in whose behalf the Petition is submitted, actually is a national of the plaintiff State . . . Therefore, a mere statement by the claimant State concerning the fact that claimant is its national should not be sufficient. (*Ann. Inst.* 1931, vol. I, p. 277-278.)

The latter author makes a more specific reference to the practice followed by the United States and sums it up as follows:

> If the validity of the naturalization of an individual claimant (or of one through whom a claim is derived) is challenged in a case before an international tribunal, the Department of State appears to recognize the reasonableness both of the right of contest and of the decision of the question by the arbitral court. The consent to its jurisdiction is believed to be implied from the agreement for the submission of claims. Such tribunals have not hesitated to impeach certificates of naturalization when the evidence warranted such action. (*Hyde International Law, Chiefly as Interpreted and Applied by the United States* (2nd revised Edition, 1945), vol. 2, p. 1130-1131.)
>
> (See also Makarov, *Allgemeine Lehren des Staatsangehörigkeisrechts* (1947) p. 329, who wrote that international jurisdictions were not satisfied, in many cases, with the submission of an act of naturalization and proceeded themselves with an investigation of its legal validity, by looking into whether the conditions of naturalization had been fulfilled; he notes that qualified legal writings were able to draw from these precedents the conclusion that the possibility of subjecting to a new investigation the validity of naturalization acts was "well established" by international tribunals. The same opinion is voiced by Sandifer, *Evidence before International Tribunals* (1939), p. 149.)

32. This Commission does not intend to espouse an argument which would lead to extremes the logical consequences of the freedom of international jurisdictions when examining questions of nationality.

It could not disregard the scope of the presumption of truth *omnia rite acta praesumantur* of the decisions rendered by the official authorities of a State acting in the sphere of their duties and in matters over which they have internal jurisdictional power. But there is here involved only a *juris tantum* presumption which could be reversed by contrary evidence.

33. The Commission is thus faced with the question of the law that is applicable to the evidence of disputed nationality. In the jurisprudence of the

various States, this law is either the *lex fori* or the *lex causae*, namely, the law of the State with which, it is contended, the individual has a bond of citizenship.

Now, the Commission has no other *lex fori* than the provisions of the Treaty of Peace which it must apply and the general rules of the Law of Nations; and neither the former nor the latter contain any requirements as regards evidence of a disputed nationality. It must further notice that the application of the *lex causae* could constitute an obstacle to the jurisdictional mission entrusted to it by the signatory States of the Treaty of Peace, because this law could, by the operation of formal evidence, force it to recognize a nationality the actual existence of which it has the right and the duty to investigate.

Umpire Bertinatti affirmed the foregoing in his decision rendered on December 31, 1862, by the Commission for Claims against the United States and Costa Rica, in the Medina Case, the most important excerpt thereof being the following:

> The certificates exhibited by them being made in due form, have for themselves the presumption of truth; but when it becomes evident that the statements therein contained are incorrect, the presumption of truth must yield to the truth itself.
>
> It has been alleged in behalf of the claimants that even admitting that their acts of naturalization are intrinsically void, it is not in the power of the Commission to reject them as proof, if they are not first set aside as fraudulent by the same tribunal from which they were obtained.
>
> To admit this 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.
>
> . . . Consequently this Commission judges according to truth and justice, and cannot be prevented from examining the intrinsic value of an act exhibited as evidence by any limitation or extrinsic objection arising from a matter of form established by the municipal law of the United States. The claimants having chosen to place themselves under the jurisdiction of this Commission, must bring before it proofs which are really true and not merely considered so by a fiction introduced by the municipal law of the United States. (*Moore Arb.* (1898), vol. III, p. 2587-2588.)

This Commission cannot neglect remarking that this decision by Umpire Bertinatti, the first which has affirmed the powers of investigation of the international court in matters of nationality, was the subject of severe criticism on the part of two distinguished French jurists, the late Professors de la Pradelle and Politis who do not accept that the international court may, when an act of naturalization is valid in form, "investigate whether the authority that issued such certificate did or did not do so in conformity with the laws"; it can only require that the act be in conformity with international law and issued without "fraud" (*Recueil Arb.* (1923) vol. II, p. 176). But this restrictive interpretation of the powers of the international court is not predominant in international jurisprudence. If it is correct that a body established by States cannot freely interpret municipal law, this Commission intends to follow the jurisprudence of the International Court of Justice which permits it to "verify, by its own knowledge, the application of municipal law in connexion with the facts alleged or denied by the parties in order to determine whether these are correct or incorrect". Decision of April 6, 1955, Nottebohm Case (2nd phase) *C.I.J.* 1955, p. 52, *Liechtenstein* vs. *Guatemala*.

A similar viewpoint has already been adopted by the Permanent Court of International Justice (Decision of March 26, 1925, Case of the *Mavrommatis Concessions in Jerusalem, Greece* vs. *Great Britain, C.P.J.I.*, series A, No. 5, p. 30).

It has been further alleged by one of the jurists of the Plaintiff that, in order to successfully deny a nationality, proof of which consists in an official statement of the national State, the other Party must establish the existence of so serious a cause as to affect the validity of the acquisition of nationality within said national State; if the irregularity alleged is not liable to entail cancellation under the municipal law of that State, this irregularity cannot be brought up before an international court.

But this restriction, in its absolute form, does not appear to find support in international jurisprudence; in the Salem Case, the Arbitral tribunal certainly held that the international court must examine municipal law of the State which contends that a person is its national, but the opinion has not been expressed that the nullity in municipal law must be presupposed so that the other State may contest the nationality. It is the opposite idea that emerges from the following excerpt of that decision:

> In order to decide the question of fraud it will be necessary to examine if the false representation with which the nationality of a certain power has been acquired refer to those points on which, according to the law of this power, the acquisition of nationality is essentially dependent. So far the notion of fraud cannot be construed without taking into consideration the national law of the power which bestowed the citizenship, . . . The objection of the American Government that such proof can only be furnished to the American courts who, under the law of June 29, 1906, section 23, are competent to deprive any naturalized person of citizenship, if fraud is proved, is not admissible before an international arbitral tribunal. The judgment of a national court may be indispensable to engender the legal effects of such a fraud under national law, but nevertheless in a litigation between States regarding the nationality of a person the right of one State to contest, as acquired by fraud, the nationality claimed by the other State cannot depend on the decision of the national courts of this State. (*U.N.R.A.*, (1949), vol. II, p. 1185.)

One could also add that from the standpoint of practice it may frequently be impossible for the international court to have knowledge of the grounds for nullity, under municipal law, in matters of nationality, as the laws are often silent in this respect and jurisprudence does not cover all the eventualities that might occur, and this is exactly so in the Flegenheimer Case, i.e., a case of "first impression" submitted to the court for the first time.

34. The Commission, in conformity with the case law of international tribunals, holds that it is not bound by the provisions of the national law in question, either as regards the manner or as regards the form in which proof of nationality must be submitted. And this is in harmony with the opinion expressed by the Franco-Mexican Reparations Commission in the George Pinson Case:

> An international tribunal . . . may lay down stricter requirements than those contemplated under national legislation, for instance for the purpose of unmasking naturalizations obtained in *fraudem legis* but it may also be satisfied with less strict requirements in cases where it does not appear to it to be reasonably necessary to set in motion the entire apparatus of formal proofs . . . it is much more logical not to bind the tribunal to any national system of proof, but to give it complete freedom of investigation of the evidence submitted, as the case may warrant. (*U.N.R.A.*, vol. V, p. 371.)

35. The Commission, on the basis of the research made in jurisprudence and authoritative doctrine, holds that its powers of investigation as to whether Albert Flegenheimer validly acquired United States nationality is all the less disputable in that no American judgment of naturalization has been introduced during these proceedings but a mere administrative statement which, according to the international practice commonly followed, is subjected to the valuation of every court, whether national or international, to which the question of the validity of a nationality is submitted.

The Commission nevertheless considers that the observations made by the commentators of the Medina Case cannot be ignored, and that international jurisdictions must act with the greatest caution and exercise their powers of investigation only if the criticism directed by one Party against the allegations of the other, not only are not manifestly groundless, but are of such gravity as to cause serious doubts in the minds of their Members with regard to the reality and truth of the nationality invoked.

36. In the instant case, the grounds for doubt in connexion with Albert Flegenheimer's nationality are so numerous and so patent, that the Commission could allow him to benefit by Article 78 of the Treaty of Peace with Italy only if all the doubts, raised in its mind over the facts on the basis of which the certificate of United States nationality was issued, were dispelled.

These facts are first of all connected with the validity of Samuel Flegenheimer's naturalization in the United States from which flows the acquisition *jure sanguinis*, of his son Albert's American nationality; subsequently with the loss by the latter of his American nationality as a result of his naturalization together with his father in Württemberg in 1894, when he was still a minor; with the long sojourn of the interested party, as a German national, in Germany from 1904 to 1937, with his entry into Canada on February 10, 1939 before the outbreak of World War II, on a German passport which was renewed to him a few days later by the German Consulate at Winnipeg, and then in 1941 by the Swiss Consul in that city, who had taken over the protection of German interests.

The Commission's grounds for doubt are further increased when acquiring knowledge, from the documents in the record, of the fact that all inquiries for information made by Albert Flegenheimer at consular offices and even at an Embassy of the United States in Europe in connexion with his American nationality only resulted in negative or dubious answers; that, if he succeeded in obtaining an authorization of making, at the outset, only temporary sojourns in the United States, his case gave rise to conflicting decisions by the State Department and by the Immigration Service of the Department of Justice of the United States; that at the time of the inquests to which he was subjected by American officials, he made statements which are not entirely consistent; that the authorization which was accorded to him to enter the United States as a German national was only modified by a decision of the Immigration and Naturalization Service of February 24, 1942, in the sense that he was thereafter qualified as a citizen of the United States, but that the subsequent inquests which resulted in this amendment of the record of his entry, are defined as irregular by the American Counsel for the Italian Government in these proceedings.

This Commission cannot fail to take notice of the fact that the State Department on May 14, 1946 refused at first to issue an American passport to Albert Flegenheimer, and that if later, on October 24, 1946, it did decide to issue a passport, it specified that this document would not be renewed; that even after the institution of legal action before this Commission on behalf of Albert

Flegenheimer on June 26, 1951, the application for a certificate of citizenship made by him gave rise to a dispute between the State Department and the Department of Justice of the United States; that on May 8, 1952 Albert Flegenheimer then swore to an ex parte affidavit in which he explained his case; that the Examining Officer nevertheless concluded that his application should be refused, but the Acting Assistant Commissioner held that the petitioner was to be considered as a United States citizen on the basis of his own statements, on the scarcely convincing grounds that there could be no other alternative than that of considering them as completely incorrect or entirely correct; that he concluded by following this latter course which resulted in the issuance of the certificate of nationality of July 10, 1952, more than one year after the Petition was submitted to this Commission. Lastly, this Commission cannot but be impressed by the fact that the precedent of the Supreme Court of the United States in the *Perkins* vs. *Elg* Case (1939), which instigated the decision of the American administrative authorities in Albert Flegenheimer's favour, was already known at the time the preceding negative decisions were rendered, and that the effects which the Bancroft Treaties might have had on the nationality of Albert Flegenheimer were not examined by the American authorities. Hence, Albert Flegenheimer's nationality is far from presenting such a character of certitude and of clarity as to entail conviction.

37. This Commission owes it to itself, as it owes it to the two States who have placed their confidence in it so as to assure a correct application of Article 78 of the Treaty of Peace with Italy, to make an objective search for the truth and to clarify the legal position which, as far as the Commission, in its capacity as an international organ, is concerned is Albert Flegenheimer's factual position.

In the fulfilment of this duty, the Commission feels it is not bound by the unilateral statements of either of the two States. It cannot directly consider, without a thorough investigation, an assertion of faith made by an official of the United States in connexion with the statements of the interested person to the point of giving rise to certain international obligations to be borne by the Italian Republic; but it cannot lightly reject a nationality which is recognized by the Plaintiff State, because its powers of investigation are not so extensive as the Agent of and Counsel for the Italian Government would have it believed.

38. It is therefore important to establish in as precise a manner as possible the limits within which an international jurisdiction is entitled to investigate the acquisition or the loss of nationality by a person whose nationality is established *prima facie*. These limits may concern the form in which a certificate of citizenship is issued; they may also concern the merits when an official certificate, regular as to form, is inconsistent with the conditions of merit required by law, by the case law of the State whose nationality is claimed or by the international treaties to which said State is a party.

From the standpoint of form, international jurisprudence has admitted, without any divergence of views, that consular certificates as well as certificates issued by administrative bodies which, according to the national legislation of the subject State do not have absolute probative value, are not sufficient to establish nationality before international bodies, but that the latter are nevertheless entitled to take them into consideration if they have no special reasons for denying their correctness.

From the standpoint of merit, even certificates of nationality the content of which is proof under the municipal law of the issuing State, can be examined and, if the case warrants, rejected by international bodies rendering judgement

under the Law of Nations, when these certificates are the result of fraud, or have been issued by favour in order to assure a person a diplomatic protection to which he would not be otherwise entitled, or when they are impaired by serious errors, or when they are inconsistent with the provisions of international treaties governing questions of nationality in matters of relationship with the alleged national State, or, finally, when they are contrary to the general principles of the Law of Nations on nationality which forbid, for instance, the compulsory naturalization of aliens. It is thus not sufficient that a certificate of nationality be plausible for it to be recognized by international jurisdictions; the latter have the power of investigating the probative value thereof, even if its *prima facie* content does not appear to be incorrect. This is particularly true before international arbitral or conciliation commissions who are called upon to adjudicate numerous disputes following troubled international situations that are the outcome of war, internal strife or revolutions.

39. B. *On Albert Flegenheimer's* jure sanguinis, *acquisition of United States nationality.*

The Government of the United States contends that Albert Flegenheimer acquired United States nationality through filiation, *jure sanguinis*, at birth, on July 4, 1890, in German territory, because he was born of a father who at that date was vested with United States nationality and had not yet been naturalized in Württemberg.

The Italian Government denies this and claims that Samuel Flegenheimer secured his naturalization in the United States in 1873 in a fraudulent manner, and that, consequently, it was null and devoid of effects; furthermore, even supposing, by way of hypothesis, that he had validly secured the said naturalization, he would have lost his American nationality because of the lack of *animus revertendi* to the United States and as a result of his having taken up permanent residence in Germany since 1874, so that, on the date of the birth of his son Albert, in 1890, he could not have transmitted to him *jure sanguinis* a nationality which he had never acquired or which he has previously lost.

This Commission is hence called upon to pass on the validity and the actual existence of the American nationality of an individual who, in any event, had possession thereof from 1873 through 1894, the year in which he was naturalized in Württemberg, without it ever being contested, and to decide whether the nullity of the citizenship of an individual who died in 1929 can still be raised before it (the Commission).

Although, at first sight, the opening of an inquiry regarding a person now many years deceased would appear to be somewhat unusual, the Commission does not intend to shun the issue, because the very nature of acquisition of nationality by filiation entails a probatory examination which necessarily extends to the citizenship of the claimant's ascendants; it can hence embrace many generations if the law which is recognized as applicable by the Commission does not exclude proof *ad infinitum* by laying down certain presumptions like that, for instance, of the French nationality Code (Article 143).

In order to evaluate Samuel Flegenheimer's naturalization in the United States in 1873—likewise in order to decide whether it must admit or deny the effects of the American nationality of his son Albert—the Commission must naturally make an analysis of United States law such as it existed at the time when the facts entailing the acquisition or the loss of American nationality of these persons occurred, exclusive of all developments, amendments or restrictions this law may have been subjected to subsequently, either by the enactment of laws, by international treaties or by jurisprudence.

40. The XIVth Amendment of the United States Constitution provides:

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.

In the instant case, the regularity of Samuel Flegenheimer's naturalization, as to form, is not questioned; likewise, the fact that he complied with the five-year residence condition in the United States before naturalization, in conformity with the Act of February 10, 1855, chapter 71, section I (10 Stat. 604/1855) is not denied by the High Parties. The criticism raised by the Italian Agent and his Counsel is directed at the following points:

41. (*a*) Samuel Flegenheimer, it is objected, at the time of his naturalization, had no intention of residing permanently in the United States.

Even though this condition was required by a United States statute only in the law of June 29, 1906 [34 Stat. 596 (1906)], the Supreme Court expressed the opinion that this condition was implicitly contained in previous laws; in fact, in 1913, it ruled that:

> . . . by necessary implication the prior laws conferred the right to naturalization upon such aliens only as contemplated the continuance of a residence already established in the United States. . . . By the clearest implication those laws show that it was not intended that naturalization could be secured thereunder by an alien whose purpose was to escape the duties of his native allegiance without taking upon himself those of citizenship here, or by one whose purpose was to reside permanently in a foreign country and to use his naturalization as a shield against the imposition of duties there, while by his absence he was avoiding his duties here. Naturalization secured with such a purpose was wanting in one of its most essential elements—good faith on the part of the applicant . . . True, it was not expressly forbidden; neither was it authorized. But, being contrary to the plain implication of the statute, it was unlawful, for what is clearly implied is as much a part of a law as what is expressed. [*Luria* vs. *United States*, 231 U.S. 9 (1913).]

In its decision the Supreme Court ordered that the certificate of nationality issued to Luria be cancelled, on the grounds "that the taking up of a permanent residence in a foreign country shortly following naturalization has a bearing upon the purposes with which the latter was sought and affords some reason for presuming that there was an absence of intention at that time to reside permanently in the United States is not debatable".

In the case *United States* vs. *Ellis*, 185 fed. 546 (Circuit Court, Eastern District of Louisiana, 1911) a similar judgment was rendered.

(*b*) Samuel Flegenheimer, it is also objected, acted in bad faith when he submitted his application for naturalization because he had no intention to reside permanently in the United States; and the Supreme Court, in the case cited above, admitted that this intention was an element of good faith required of candidates to naturalization.

(*c*) Samuel Flegenheimer, it is further objected, went to the United States at the age of sixteen (or eighteen), in 1864 (or in 1866), just prior to being called up for military service in his country of origin, the Grand Duchy of Baden, at a time when Germany was living through a troubled period known as the Bismark era, and to have abandoned his new home country less than one year after securing naturalization, not for the Grand Duchy of Baden, where he was liable to indictment for violation of his military duties, but for Württemberg, of which country he was not a citizen prior to his emigration to America, and where he secured naturalization as soon as he reached an age to be dispensed with every obligation of serving in the German armies; he lived there uninter-

ruptedly until he was eighty-one. This conduct was considered as a fraudulent naturalization by the Supreme Court of the United States in the Knauer Case, concerning an individual who was naturalized in 1937 and who, after having taken an oath of allegiance to the United States, swore loyalty to Hitler. The Court said:

> Moreover, when an alien takes the oath with reservations or does not in good faith forswear loyalty and allegiance to the old country, the decree of naturalization is obtained by deceit. The proceeding itself is then founded on fraud. A fraud is perpetrated on the naturalization court. (*Knauer* vs. *United States*, 328 U.S., 654 (1945).)

In order to establish that this conception was that expressed by American statesmen at the time when Samuel Flegenheimer secured naturalization, the Italian Government invokes a communication written by Secretary of State of the United States, Fish to Bancroft, then Minister to Berlin, in which he indicates the reasons justifying a revision of the nationality treaties between the United States and several specific States of the German Empire:

> A German can now come to America, obtain his naturalization papers through the operation of our laws, return to Germany and reside there indefinitely as an American citizen, provided he does not reside the requisite time for renunciation in the territories under the jurisdiction of the particular power of whom he was formerly a subject. It is true that such a course would be a fraud upon the United States and a fraud upon the German Empire. . . . It is for the interest of neither to perpetuate this. (Letter, June 4, 1873; *vide* Wharton, *International Law Digest*, p. 377-378.)

(*d*) Lastly, the Respondent Party finds support in the fact that as Samuel Flegenheimer left the United States a few months after acquiring naturalization without *animus revertendi*, he must be deemed to have had the intention of expatriating himself and to have lost, on these grounds, his American nationality, even if it were to be assumed that he had acquired it in good faith and without fraud.

In this connexion the Respondent Party refers to the Act of March 2, 1907 (Ch. 2534), section 2, paragraph 2, which established a presumption of expatriation against all aliens who leave the United States after securing naturalization and who reside at least two years in their country of origin or five years in another State. The Respondent Party can, however, cite only one judicial decision in support of its theory, a decision which is prior to the enactment of the aforesaid law; it was rendered by the Court of Appeals of Kentucky, in connexion with Mr. and Mrs. Alsberry, United States nationals who established their residence in Texas in 1824, at a time when this State was not yet a part of the United States. The Court said:

> . . . As Thomas Alsberry and his wife settled themselves in Texas, in 1824, with the ostensible purpose of making it their permanent home, and especially as she remained there, with the same apparent intention, for years after his death, and even until after revolutions had been effected in the political relations of that country, its independence had been declared, and a new constitution, to which she should be presumed to have been a party, had been adopted, we are of the opinion that she as well as he, should be deemed to have ceased—so far as by her own act she could cease—to be a citizen of the United States . . . (*Alsberry* vs. *Hawkins*, 39 Ky. (9 Dana) 177 to 180 (1839).)

The Respondent Party contends that, although prior to the law of 1907, statutes did not contain an accurate description of the acts which could entail

the loss of United States nationality, it was nevertheless clearly admitted that departure of a naturalized national from the United States without *animus revertendi* automatically entailed the loss of American nationality; the Respondent Party cites, in this connexion, numerous assertions made by Statesmen, including many Secretaries of State of the United States, and of American jurists. The Respondent Party also refers to the decision rendered in 1925 by the Supreme Court in the *Mandoli* vs. *Acheson* case (344, U.S. 133, 136-137).

42. In examining these various arguments, this Commission must note that they are not of such a nature as to give it certainty that, during the period under consideration, and under the laws then in force in the United States, Samuel Flegenheimer did not regularly acquire the nationality of that Power by naturalization or that he had lost the benefits thereof.

It is admitted by the American authors themselves that nationality laws, especially during the period of time that must be taken into consideration, namely from 1873 through 1890, did not have the same technical accuracy which they acquired after the beginning of the twentieth century, especially the laws of June 29, 1906 and March 2, 1907 the provisions of which were used and developed by more recent laws, the Nationality Act of October 14, 1940 and the Immigration and Nationality Act of 1952 as well as the copious jurisprudence which ensued therefrom.

In the Commission's opinion, neither these legislative texts, nor the principles of jurisprudence set forth by the United States' courts following the beginning of the twentieth century, can be retroactively applied, unless an exception is expressly provided by positive law, in order to deny the American nationality of an individual who was vested in it for decades, without his status, as an American citizen, having ever given rise to a dispute while he was living, so that it represented a veritable possession of a status; this could only be contested on the basis of formal texts or a judicial decision concerning the interested person directly, subsequent to an analysis of his particular condition. If the Commission were to follow a different path, it would be led, by an abstract reasoning, to conclusions which would conflict with the content of the records introduced in the case, and thus with reality; it would be faced with the impossibility of establishing the exact date on which Samuel Flegenheimer ceased to be an American national, and consequently of determining whether he transmitted *jure sanguinis* some kind of nationality to his son Albert, or whether the latter should be considered as stateless since birth.

The Commission is strengthened in its conviction that its manner of envisaging the situation, in holding that criticism which is directed against the validity of Samuel Flegenheimer's naturalization, leads to subjective provisions of a psychological nature which escape a definite judicial appraisal in the absence of the party concerned.

Although the whole of Samuel Flegenheimer's conduct raises serious suspicions, they only concern the motives underlying the various changes of nationality which he underwent at a time when those motives were not contemplated by the positive laws of the United States.

As Samuel Flegenheimer had already lost his American nationality following his naturalization in Württemberg in 1894, more than ten years before the enactment of the law of June 29, 1906, the Commission entertains serious doubts as to whether the absence of the intention to permanently reside in the United States could, under the circumstances, entail the invalidity of his naturalization in that State. The American judicial decisions ruling on the nullity of American nationality on these grounds, which have been cited during these proceedings, concern cases which were decided after the enactment of the

law of June 29, 1906. Unlike what is provided in this latter law, former legislation did not require from a candidate to naturalization any statement under oath regarding his intention to permanently reside in the United States, whereas he did have to take such an oath under the 1906 Act.

Nevertheless, in the Luria Case, which raised the question of the validity of a naturalization secured as early as 1894, the naturalization was cancelled by the Supreme Court on October 20, 1913 because the interested party had left the United States only a few months after being naturalized, to take up residence in South Africa. The Supreme Court rendered its decision on the basis of the law of June 29, 1906, by admitting a presumption of revocation of a naturalization, extended by the last paragraph of section 15 of this law, to naturalizations accorded under the authority of former laws, because this presumption was implicitly included in the latter. It should be pointed out, however, that proceedings could not be instituted in an American court after 1894 because Samuel Flegenheimer had already lost his American nationality at that time, as the result of his naturalization in Germany. On these first grounds the Commission holds it cannot take into consideration, without reservations, the Luria case precedent in order to declare that Samuel Flegenheimer's naturalization in the United States was null and void because of lack of *animus manendi*.

It must furthermore take note of the fact that no judicial action for nullity was instituted against the interested party by the American authorities, as was the case in the Luria proceedings. In fact, it appears from the text of the law of June 29, 1906 that cancellation of a naturalization, because of the lack of *animus manendi*, is not incurred under the law; this only creates a presumption of fraud which the person concerned can rebut by countervailing evidence; the law expressly provides for this in section 15 which reads as follows:

> That it shall be the duty of the United States district attorneys for the respective districts, upon affidavit showing good cause therefor, to institute proceedings in any court having jurisdiction to naturalize aliens in the judicial district in which the naturalized citizen may reside at the time of bringing of the suit, for the purpose of setting aside and cancelling the certificate of citizenship on the ground of fraud or on the ground that such certificate of citizenship was illegally procured. In any such proceedings the party holding the certificate of citizenship alleged to have been fraudulently or illegally procured shall have sixty days personal notice in which to make answer to the petition of the United States; and if the holder of such certificate be absent from the United States or from the district in which he last had his residence, such notice shall be given by publication in the manner provided for the service of summons by publication or upon absentees by the laws of the State, or the place where such suit is brought. If an alien who shall have secured a certificate of citizenship under the provisions of this Act shall, within five years after the issuance of such certificate, return to the country of his nativity, or go to any other foreign country, and take permanent residence therein, it shall be considered prima facie evidence of lack of intention on the part of such alien to become a permanent citizen of the United States at the time of filing his application for citizenship, and, in the absence of countervailing evidence, it shall be sufficient in the proper proceeding to authorize the cancellation of his certificate of citizenship as fraudulent . . .

It is not denied by the High Parties to this dispute that a suit for cancellation of Samuel Flegenheimer's naturalization could not be instituted at this time because the law requires that he be notified of the petition and that it be followed by a hearing of the individual concerned and by the submission of

defenses and procedural acts which can no longer be accomplished by reason of his demise.

Therefore, the first argument raised by the Italian Government against the validity of Samuel Flegenheimer's naturalization cannot be accepted.

The same thing can be said, and for the same reasons, of the second argument of the Italian Government which consists in denying that Samuel Flegenheimer acted in good faith. It is true that there has been introduced in the record of the case an excerpt of the application, submitted under oath, by Samuel Flegenheimer on November 7, 1873, to the Court of Pittsburgh (Pennsylvania, U.S.); he swore that the facts set out in his application were true and that for the past three years he had had the bona fide intention of becoming a United States national. But, evidently, this statement can only be referred to the naturalization conditions, such as they existed, at that time, required of and known by the candidates. In the Luria Case, the Supreme Court did not exclude *a priori*, a change in the candidate's intention which would not exclude good faith; it affirmed that, if, in actual fact, the candidate, at the time he submitted his application, intended to reside permanently in the United States, and that if his subsequent residence abroad was established on grounds which were reconcilable with that intention, he was completely at liberty to prove it, because there were involved elements of a decision on which he alone was in a position to supply the necessary information. Now, at this time, no useful inquiry could be carried out to that effect by this Commission.

The whole of the Italian Government's allegations concerning the interested nature of the motives underlying Samuel Flegenheimer's naturalization, who is said to have obeyed, above all, the urge of evading military service in Germany, is plausible, even though it is not proved by the documents of these proceedings that he was compelled to do active service in the army of his country of origin, when it was proven his son Albert was exempted. It is nevertheless not decisive because, at the time he secured naturalization, the United States was not concerned with the motives which induced a candidate to apply for naturalization. This was noted by American Secretary of State Frelinghuysen, in his Instruction of September 25, 1882:

> The only question in each case, is whether the person claiming to be naturalized citizen has been naturalized. There is no law of the United States requiring the applicant to disclose the motive which induces him to change his nationality. (*Moore Arb.* (1898), p. 2620.)

If, at that time, naturalization secured by candidates for the only purpose of evading their military duties in their respective countries grew to such an extent as to constitute a genuine evil custom against which the American authorities have vigorously reacted as a consequence, it is no less certain that on the date of Samuel Flegenheimer's naturalization in the United States, these practices were not forbidden by positive law and did not constitute a violation of the naturalization laws. The citations of declarations and opinions of American Statesmen and learned jurists who condemned them and which are abundantly reproduced in the written defences and supporting opinions submitted by the Italian Government, were directed at obtaining an amendment of the laws or of the international treaties then in force; manifestly, they concerned the *lex ferenda* and not the *lex lata*. The Commission thus holds that it cannot consider them for the purpose of evaluating Samuel Flegenheimer's naturalization.

Lastly, the final argument of the Italian Government does not seem to be better founded, namely, that even if Samuel Flegenheimer's naturalization

could not be considered as null and devoid of effects by the Commission on the grounds of fraud against the American law, he lost the benefits of said nationality by his expatriation resulting from his return to Germany, because the term expatriation does not have the mere material meaning of abandonment of residence in the United States, but the legal meaning of the loss of American nationality.

In this connexion the Commission is again led to conclude that the Act of March 2, 1907, entitled "an Act in reference to the expatriation of citizens and their protection abroad" does not appear to be applicable in order to decide whether, in 1890, Samuel Flegenheimer was still a national of the United States. Likewise, the decision of the Supreme Court in the *Mandoli* vs. *Acheson* Case, referred to by the Italian Government, because it was rendered in 1952, that is, many decades after the enactment of the Act of 1907, is not of such a nature as to clarify Samuel Flegenheimer's legal position, as it existed in 1874, the year of his return to Germany, and in 1890, the year in which his son Albert was born. It should in fact be noted that, in the aforesaid decision, the Supreme Court made an analysis of the origins of said Act of 1907 and came to the conclusion that the Congress of the United States did not accept the proposal of sanctioning an extensive doctrine on expatriation by emigration, but confined itself to introducing in the new law a mere presumption of loss of American nationality limited to naturalized persons, "native born" citizens being excluded. This restriction refutes all arguments tending to describe the Act of 1907 as a synthesis of the principles indisputably recognized and previously followed by unwritten law. The situation is similar to that which existed prior to the Act of 1907 with regard to the effects of a naturalization obtained without a sincere desire to permanently reside in the United States. At that time, American law on expatriation was not very clear and gave rise to uncertain interpretations, wherefore it was impossible to establish whether the departure of a naturalized citizen without *animus revertendi* entailed, as a consequence, the loss of American nationality, or merely an interruption thereof which involved a refusal by the Administration to extend diplomatic protection. It was only under the "Nationality Act" of 1940 that expatriation, that is the complete loss of American nationality, was automatically connected with the materialization of certain objective conditions, laid down by law, without any consideration of the intention of the individual concerned.

The Act of March 2, 1907, Section 2, on the contrary, provided that:

> When any naturalized citizen shall have resided for two years in the foreign State from which he came, or five years in any other foreign State, it shall be presumed that he has ceased to be an American.

Also, according to this provision, it is a question of a *juris tantum* presumption which can be reversed by countervailing evidence during the course of judicial proceedings, which were never instituted against Samuel Flegenheimer; the requirement of a special action for cancellation in order that the nullity of a naturalization may be decided, has been admitted in a recent case, the *Laranjo* vs. *Brownell* suit, adjudicated in 1954 by the U.S. District Court of California.

But as regards the period prior to 1907, and especially that between 1874 and 1890, United States law did not provide for such presumption of loss of citizenship by expatriation, and, unlike section 5 of the Act of June 29, 1906, no retroactivity was assigned by the legislator to Section 2 of the Act of March 2, 1907 (Hackworth, *Digest of International Law*, vol. III (1942), p. 300). Borchard comments on the Act of 1907, which appears to admit only a loss of diplomatic protection, as follows:

> By paragraph 2 of the Act of 1907, two years' residence of the naturalized citizen in the country of origin or five years' residence in any other country create a presumption that he has ceased to be an American citizen, and unless that presumption is rebutted by showing some special and temporary reason for the change of residence, the obligation of protection by the United States is deemed to be ended. (*Diplomatic Protection of Citizens Abroad* (1915), p. 531.)

Even though preserving its freedom in evaluating the facts which, as far as the Commission is concerned, are the laws, administrative practice and the jurisprudence of States, the Commission cannot adopt results which would be inconsistent with such positive rules of international law like those linking nationality with diplomatic protection. If these two institutions appear to be separate in the law of the United States, prior to 1907, this is only a consequence of the discretionary power recognized to all States in the field of diplomatic protection because these do not give rise to a subjective right to the benefit of the individual but are dominated by reasons of expediency which the State freely evaluates. But the Court cannot draw therefrom any conclusion with regard to the legal nationality of persons who have been refused diplomatic protection. It is hence clear that the Commission cannot insert in American positive law, preceding the Act of 1907, a cause for the loss of nationality by emigration without *animus revertendi* which is not provided for therein, and which, even under the authority of the law which subsequently sanctioned it, gave rise in the United States to disputes with regard to its scope and veritable meaning.

43. Furthermore, as the Commission does not have jurisdictional powers to decide on the nationality of persons who are not directly connected with the dispute between the High Parties, which it has been called upon to adjudicate, it is of the opinion that, in order to determine Samuel Flegenheimer's nationality, it should abide by the formal evidence submitted to it; it must therefore eliminate from its investigations all questions implying an evaluation of the subjective intentions of a person whose interests are not at stake and who cannot be heard. The Commission can thus only notice that no positive proof of the loss of American nationality, undeniably acquired by naturalization by Samuel Flegenheimer in 1873, has been introduced. The *Alsberry* vs. *Hawkins* precedent invoked, apart from the fact it is old, does not appear to be determinant by reason of the fact that if the emigration of Mr. and Mrs. Alsberry to Texas goes back to a date that is prior to the incorporation of that State into the American Union, the decision of expatriation of the Federal Court of Kentucky was rendered subsequent to the declaration of independence of Texas, during a time of political transition, whose influence on the decision is difficult to specify; the interested persons lived in Texas and had acquired citizenship by virtue of the Common Law, at a time when rules on nationality had not yet been made uniform in the United States by Federal Law.

The result of the foregoing considerations is that the Commission must take notice of the fact that on the date of Albert Flegenheimer's birth, July 4, 1890, Albert's father, Samuel Flegenheimer, was still vested with the nationality of the United States and that he therefore transmitted to his son, *jure sanguinis*, the quality of a national of the United States, under the Act of February 10, 1855, Revised Statutes, 604, Section 1993 of which reads as follows:

> All children heretofore born or hereafter born out of the limits and jurisdiction of the United States, whose fathers were or may be at the time of their births citizens thereof, are declared to be citizens of the United States; but the rights of citizenship shall not descend to children whose fathers never resided in the United States.

The conditions of this legal provision are fulfilled, because even though Albert Flegenheimer was born in Germany, it is not denied and it is moreover proved that his father, an American national, had previously resided in the United States. They can thus benefit by the XIVth Amendment to the Constitution of the United States.

44. C. *On the loss, following naturalization in Württemberg, of the United States nationality by Albert Flegenheimer.*

It is henceforth expedient to investigate whether, as a result of his naturalization in the United States in 1873, Samuel Flegenheimer lost his nationality of origin, namely that of the Grand Duchy of Baden and whether later, following his naturalization in the Kingdom of Württemberg in 1894, he lost his title to United States nationality and if, possibly, this latter expatriation was extended to his son Albert who was a minor at the time it occurred.

The two High Parties to this dispute concur in admitting that United States law considers the voluntary naturalization of an American national abroad as cause of loss thereof, under reservation of special clauses introduced in international treaties, because naturalization abroad was considered, subsequent to the nineteenth century, as the most manifest and effective proof of expatriation, although this is not the only manner in which expatriation can occur.

The Act of March 2, 1907 sanctioned this principle in Section 2, which reads as follows:

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

The Parties disagree, however, on the question as to whether or not Albert Flegenheimer's position is governed by the Bancroft Treaties stipulated by the United States with the Grand Duchy of Baden on July 19, 1868 and with Württemberg on June 27, 1868. This is affirmed by the Agent of the Italian Government and is categorically denied by the Agent of the Government of the United States. The Parties also disagree on the effects of the father's expatriation on the nationality of his son, then a minor: Italy affirms, while the United States denies, that Albert Flegenheimer lost his American nationality as the result of his naturalization in Württemberg, at a time when he was still a minor.

45. The so-called Bancroft Treaties constitute a pattern of agreements concluded by the United States with a large number of European and American States with a view to settling certain nationality conflicts, and, in fact, to put a stop to the malpractices committed by European emigrants who acquired American nationality for the sole purpose of avoiding their military duties in their respective countries, and later returned thereto when in possession of United States citizenship papers, without any intention of returning to this latter country.

The first of these Treaties was negotiated by George Bancroft, United States Minister in Berlin, with the Northern German Confederation, on February 22, 1868, and it was followed, in that same year, 1868, by four treaties with the Grand Duchy of Baden, with Bavaria, with the Grand Duchy of Hesse and with Württemberg. The United States concluded similar treaties with Austria-Hungary, Belgium, Denmark, Great Britain and Sweden and Norway, between 1868 and 1872. Later, between 1902 and 1928, the United States concluded further treaties of this kind with the States of Central and South America and other European States. All these treaties go under the general name of Bancroft Treaties, even though they were not all negotiated by this diplomat, because

they have certain common features. But they do not contain provisions that are wholly alike; there are two types of Bancroft Treaties and even those concluded with the five afore-mentioned German States do not all belong to the same category. They can therefore be interpreted one for the other only with caution because many of them have certain peculiarities which are not to be found in the treaties concluded with other States. The Agent of the Government of the United States and his Counsel have nevertheless contended that it was necessary to interpret the Treaty with the Confederation of North Germany in order to establish the meaning of the Treaties with the Grand Duchy of Baden and with Württemberg but did not notice that their provisions do not fully agree. They are not, therefore, mutually complementary.

It is also expedient to point out that the five treaties concluded with specific German States are not interchangeable, even if the provisions of some of them are alike. It should not be denied that, in confederation of States and in federated States, the member States of which have maintained a limited international sovereignty permitting them to conclude agreements with foreign States in certain spheres, the treaties binding on a particular State cannot be extended to another member of the Union, even if this latter member were linked with that same foreign State by a Treaty containing similar provisions.

The legal position was not modified by the establishment of the German Empire, on January 18, 1871, because the United States did not conclude similar treaties with all the members of the new federative State, but only with the States of the old Confederation of North Germany and the other four which have been mentioned; it is therefore not possible to admit that the conditions established by one of these treaties, conditions which in any event are not entirely alike, can be applied to all Americans of German origin, whatever the particular State in which they have gone to reside. The question is an important one in the case submitted to this Commission, because if Samuel Flegenheimer applied for naturalization in the United States when he was a citizen of Baden, he did not return to the Grand Duchy of Baden after securing his American naturalization, but to Württemberg, so that the provisions of both treaties should apply to him, one for his connexion with the Grand Duchy of Baden and the other for his connexions with Württemberg. This solution must be unquestionably resorted to, because the American authorities themselves have admitted that each one of the Bancroft Treaties referred to above, concluded with the various German States, had its own territorial sphere of application; this is the reason why, as early as 1873, they proposed to the Government of the Reich in Berlin to extend to the whole of the German Empire, the provisions of the Treaty concluded in 1868 with the Confederation of North Germany; but the German Government did not act on this proposition (Sieber, *Das Staatsbürgerrecht im internationalen Verkehr* (1907), vol. I, p. 520; Hackworth, *Digest of International Law*, vol. III, p. 384; Moore, *Digest of International Law*, vol. III, pp. 364 *et seq.*)

46. The right of the Italian Government to find support in the Bancroft Treaties was denied by the Government of the United States for two reasons: in the first place because the Treaties are no longer in force; and in the second place because as far as Italy is concerned they are a *res inter alios acta* in view of the fact that she was not a party thereto.

Neither of these two objections is founded.

It cannot be denied that the Bancroft Treaties between the United States and the German States expired on April 6, 1917 as the result of the fact that the United States entered World War I, by virtue of the rules of the Law of Nations which provide that treaties between States are cancelled by the out-

break of war between the signatory States, with the exception of treaties concluded in contemplation of war and of collective treaties which are merely interrupted between the belligerent States, but continue to deploy their effects between neutral and belligerent States. They (the Bancroft Treaties) were not subsequently resumed.

The Bancroft Treaties nevertheless fully deployed their effects until April 6, 1917 (Hackworth, *Digest of International Law*, vols. III, p. 334 and V, p. 386), that is, during the whole of the critical period during which Samuel Flegenheimer changed nationality for the first time in the United States, and a second time in Württemberg, hence from 1874 to 1894. Their provisions may have exercised influence, first on the loss of Samuel Flegenheimer's Baden nationality as the result of his naturalization in Pittsburgh, the validity of which is admitted by the Commission, and, subsequently, on his own American nationality and on the American nationality of his son Albert Flegenheimer, whose *jure sanguinis* acquisition of United States nationality is likewise admitted by this Commission. The result is that, in order to examine the political status of these two individuals vis-à-vis Germany, it is indispensable to take into consideration the law that was applicable at the time at which these changes in nationality occurred, that is, in the first place, the Bancroft Treaties in the German-American relationships and, in the second place, in a supplementary and subsidiary manner, if it was established that these treaties had no influence on the nationality of the individuals concerned, the provisions of German municipal law on the loss of nationality, namely the provisions of the German Imperial Law of June 1, 1870 concerning the acquisition and loss of the nationality of the Empire and of the States. The facts which must be legally examined, in fact, occurred under the authority of these conventional and legal provisions.

The objection raised that Italy has no title to invoke the Bancroft Treaties because she was not a party thereto, is also unfounded. It is a foregone conclusion that Italy is obligated to bear the heavy burdens of reparation and restitution which she accepted under the Treaty of Peace of 1947, only if the persons involved are nationals of one of the "United Nations". She has no obligation of this kind, under a reservation which will be examined in letter F of this Decision, towards nationals of other States, especially not towards persons of German nationality. She has a right to require that the "United Nations" nationality be established in each case, and to oppose all rebuttal evidence against the allegations of the opponent Parties. That if this rebuttal evidence flows from conventional provisions concluded with a third State, there is no reason why Italy should not invoke them, preliminarily, insofar as they create objective conditions which can be forced not only upon her but on every other State as well. In other words, the treaty is as legitimate source of nationality vis-à-vis third States as the provision of municipal law of a State which is not a party to an international dispute and which is invoked by one of the States engaged in this controversy. No distinction should be made according to whether a rule establishing the nationality of a person is contained in the municipal law of a State or in a treaty concluded by the State with another State. It is the duty of this Commission to clarify, by resorting to these Treaties, Samuel and Albert Flegenheimer's nationality; and their effects on the legal position of these persons have operated long before this dispute between the United States and Italy arose.

47. The Commission further adds to the foregoing considerations that the question of priority of a subsequent law on the rights acquired by an international treaty does not arise for the United States, because the "Nationality Act" of 1940 provides in Section 504:

> The repeal herein provided shall not terminate nationality heretofore lawfully acquired nor restitute nationality heretofore lost under any law of the United States or any treaty to which the United States may have been a party.

By this express provision the United States legislature intended to preserve the prior status of nationality of a person, whether he or she acquired or lost, by virtue of a treaty concluded with the United States, his or her nationality, thus deviating, in an obligatory manner, from the jurisprudence generally adopted by the American courts, according to which municipal law and international treaty have equal value, so that a legal provision can modify or abrogate a treaty in force prior to its enactment, in the same way as it can be modified or abrogated by a treaty concluded subsequently. This Commission is all the more justified in abiding by Section 504 of the "Nationality Act" of 1940, regarding the consideration of a status established by an international treaty in that this provision is in conformity with the principle of priority of international law which it must follow in that it is an international body and has the duty of observing international law, in conformity with the jurisprudence of the Permanent Court of International Justice which has affirmed:

> It is a generally accepted principle of international law that in the relations between Powers who are contracting Parties to a treaty, the provisions of municipal law cannot prevail over those of a treaty. (*P.C.I.J.*, series B, No. 17, p. 32; in the same sense, series A, No. 24, p. 12; series B, No. 5, p. 26; series A/B, No. 46, p. 167).

48. The Parties to this dispute are in complete disagreement on the meaning of the Bancroft Treaties. The Agent of the United States and his Counsel consider them as agreements whose essential purpose is to eliminate disputes between States in connexion with the diplomatic protection of persons naturalized in a State and returning subsequently to their country of origin, while the Agent of the Italian Republic and his Counsel consider them mainly as conventions governing the nationality of the subjects of one of the contracting States residing in the other, and containing therefore provisions on the acquisition and the loss of title to citizenship of persons whose legal position the signatory States have agreed to settle.

In order to determine their exact scope, it is indispensable to go back to the origin of these Treaties; their conclusion was due to the initiative of the Government of the United States.

As the United States owed its prosperity to a constant flow of European immigrants, beginning with the nineteenth century, it was concerned with attaching legally and in a final manner all this new population to the territory wherein it resided. It forcefully affirmed the right of every individual to change his nationality and to expatriate. In this policy of assimilation of aliens the United States clashed with the law of numerous European States which were desirous of preserving, often for military reasons, their emigrated nationals, either because these States constantly followed the principle of perpetual allegiance, or because they subjected the loss of the nationality of origin to governmental authorization (acts of manumission) which was frequently refused to individuals who were still liable to military service in their home country, or, further, because they did not admit that naturalization abroad entailed, by operation of law, the loss of the nationality of origin of their nationals and required the fulfilment of formalities (application for expatriation, specific renunciation) in order to liberate the naturalized individuals from all ties and bonds with the State of origin.

The United States set out with the idea that the naturalization of all aliens

established in its territory was to entail immediately the loss of their previous nationality; it inversely admitted that naturalization of its nationals abroad directly caused the loss of American nationality. Following a long and concordant practice which goes back to 1793, when American Secretary of State Jefferson affirmed the rights of every American national to divest himself of his nationality, it [the United States] enacted the law of June 27, 1868 which admitted the right of expatriation to be one of the fundamental principles of the Republic (Revised Statutes, tit. XXV, section 1999). Later this law was drawn up in statute form by the Act of March 2, 1907 which provides:

> Sec. 2. That any American citizen shall be deemed to have expatriated himself when he has been naturalized in any foreign State in conformity with its law, or when he has taken an oath of allegiance to any foreign State.

It defended this principle in its international intercourse with regard to both American nationals naturalized abroad and aliens naturalized in America, without however succeeding in having it prevail completely with respect to the latter. Numerous disputes arose, above all, in connexion with immigrants who applied for naturalization for the sole purpose of avoiding their civic and military duties in their country of origin and who returned to that country after having obtained title to American nationality, and requested the diplomatic protection of the United States against their former country, when the latter still intended to consider them as its own nationals and required them to accomplish their military service. These cases cropped up by the thousand beginning from the middle of the nineteenth century.

The conflict between American law on naturalization and the law of numerous foreign States, who thwarted the freedom of expatriation of their nationals, caused a very considerable increase of persons in possession of dual nationality and gave rise to disputes over diplomatic protection. The Bancroft Treaties are, above all, treaties establishing the nationality of persons, and in a manner which is not alike in all of these treaties, as the United States has not always succeeded in obtaining recognition of the principle of the loss, by operation of law, of the nationality of origin as the result of the naturalization of nationals of one of the contracting Parties in the territory of the other. Diplomatic protection was considered only incidentally.

The genesis of the Bancroft Treaties, historically, is to be found in the tendency of the United States to abolish, to the greatest extent possible, the dual nationality resulting from the conflicts of laws between conditions governing naturalization and conditions governing expatriation. When analyzing their provisions this purpose should be borne in mind.

49. All the Bancroft Treaties concluded with the German States reveal one peculiarity in common: they sanction the following principle, the pertinence of which is manifest in the instant case:

> The nationals of one of the contracting Powers who have been naturalized in the territory of the other Party and have resided therein uninterruptedly for a period of five years shall be held to be nationals of the naturalizing State by their country of origin and shall be treated as such.

On the other hand the content of all the Bancroft Treaties is not alike in connexion with the legal position of naturalized persons who return to reside in their country of origin. In this respect one is confronted with two diversities in these Treaties:

(*a*) In some of these treaties these naturalized persons are considered to have renounced their nationality of adoption when they do not intend to return

to the country of their naturalization, as *animus revertendi* was presumed to be lacking after two years' residence in their country of origin (Confederation of Northern Germany, Bavaria, Hesse and Württemberg).

(*b*) In the treaty with Baden, these naturalized persons cannot be compelled to re-acquire their nationality of origin, but they can renounce their naturalization and be voluntarily redintegrated in their nationality of origin, without the necessity of observing any time limit with regard to residence before obtaining recognition of the nationality of their country of origin.

It is evident that these two types of Bancroft Treaties can have different effects on the nationality of persons falling under their provisions.

Under reservation of particular agreements between the contracting States, such as concordant statements or annexed protocols, it has been contended that in the treaties of the former type, like the one concluded with the Confederation of Northern Germany, the question of dual nationality was not settled and the point as to whether or not, subsequent to naturalization in one of the contracting States, the question of nationality of the immigrant still existed vis-à-vis his State of origin, was not resolved by the Treaty and was left to the municipal legislation of the other Party. The naturalized immigrant was to be treated solely as an alien in his country of origin until it was presumed that he had *animus manendi*. The treaty merely interrupted his citizenship of origin and did not annul it; it did therefore settle only the question of diplomatic protection between the United States and the aforesaid Confederation, and it was for the municipal legislation of the latter to decide whether the nationality of origin of a person naturalized in the United States still existed or had come to an end. This is the viewpoint of the Agent of the United States and his Counsel in the instant case; it is based on the *Bericht der Vereinigten Ausschüsse des Bundesrates für das Landheer und Festungen und Justizwesen* (Dzialosynski, *Die Bancroft Vertrage* (1913) p. 45.)

This Commission cannot render an opinion on the foregoing interpretation because the Bancroft Treaty between the United States and the Confederation of Northern Germany is not applicable in the instant case. It will confine itself to point out that this interpretation cannot be extended, by way of analogy, to the provisions of the other Bancroft Treaties concluded with German States, where the question was clearly settled by special protocols; these provide that the naturalized immigrant who returns to reside in his country of origin without the intention of going back to the country of his naturalization, does not recover his nationality of origin by the mere fact of taking up residence therein but can be redintegrated in the nationality of this latter country only by a new naturalization, just like any other alien. This is the solution which is sanctioned in the relationship between the United States and Bavaria, Hessen and Wurttemberg. The result is that these treaties have a direct bearing on nationality, that they do away with dual nationality, as the citizenship of origin is undeniably lost by a naturalization abroad accompanied by a five-year residence, because in case of return to the former country, the person concerned must become naturalized in order to re-acquire it.

In the latter type of Bancroft Treaties, that concluded with the Grand Duchy of Baden, it is undeniable that the contracting States intended to settle directly the question of the nationality of naturalized persons, because it is stated therein, *expressis verbis*, that the nationality of origin can be recovered, in cases where the person concerned returns to reside in his former home-country, only if the latter files an application, in other words, it is lost as the result of naturalization in the other contracting State. The accumulation of nationalities was hence done away with by the treaty itself. This stipulation is also to be found in the Bancroft Treaties with Austria, Belgium, Denmark and Sweden and Norway.

After a careful analysis of these conventional texts, the Commission is convinced that the Bancroft Treaties with the Grand Duchy of Baden and Württemberg, in the relationship with the United States, not only had the purpose of regulating the diplomatic protection of naturalized persons but of determining their nationality as well. There now remains to be examined what bearing these Treaties had on the status of Samuel and Albert Flegenheimer.

50. By his naturalization in the United States in 1873, Samuel Flegenheimer lost his nationality of origin, that of Baden, in application of the "Naturalization Convention" of July 19, 1868 concluded by this State with the Grand Duchy of Baden, Article I of which stipulates:

> Citizens of the Grand Duchy of Baden who have resided uninterruptedly within the United States of America five years, and before, during or after that time, have become or shall become naturalized citizens of the United States, shall be held by Baden to be American citizens and shall be treated as such.

The expressions "shall be held" and "shall be treated" do not only refer to the obligation of the Grand Duchy of Baden to consider its nationals who have been naturalized and who have resided for five years in the United States as American nationals and to treat them as such, that is to say not to impose upon them the execution of civic duties nor of interposing in their behalf through diplomatic channels, but imply a loss of the Baden nationality, by virtue of the Treaty of July 19, 1868. This can in no way be doubted because of the existence of Article IV of the aforesaid Treaty which provides:

> The emigrant from the one State, who, according to the first article, is to be held as a citizen of the other State, shall not on his return to his original country be constrained to resume his former citizenship; yet if he shall of his own accord re-acquire it and renounce the citizenship obtained by naturalization, such a renunciation is allowed, and no fixed period of residence shall be required for the recognition of his recovery of citizenship in his original country.

It clearly appears from the foregoing text that naturalization in the United States entailed the loss of Samuel Flegenheimer's Baden nationality, because, if he had returned to his former home-country, he could have recovered this nationality only by making an application therefor and renouncing his American nationality. A case of dual nationality never arose in the person of Samuel Flegenheimer, because, at the very time when he acquired American nationality, all the conditions causing the loss of his Baden nationality were fulfilled, namely, his naturalization in the United States and his five-year residence in that country.

51. After being naturalized in the United States, Samuel Flegenheimer returned to Germany, but did not take up residence in his former country of origin, namely, the Grand Duchy of Baden, so that the Bancroft Treaty of July 19, 1868 concluded with that State was not applicable, as regards the consequences of this return, to his nationality. He did not lose his United States nationality under this Treaty, because, on the one hand, he did not fulfil the conditions of Article IV which contemplated a return of the naturalized person to the Grand Duchy of Baden itself, and, on the other hand, even supposing that it was applicable to him, the aforesaid Article IV does not, unlike the provisions made in many other Bancroft Treaties, provide for the automatic loss of the nationality acquired in the United States in cases where the naturalized person returns to reside in his country of origin, without *animus redeundi* to America.

He thus took up permanent residence in Württemberg as an American national, and it is likewise in this quality, and not as a former Baden national, that

he applied for and obtained Württemberg naturalization in 1894, following an uninterrupted residence of twenty years. As the result of this naturalization he directly and finally lost his United States nationality by virtue of Article 1, paragraph 2 of the Bancroft Treaty of July 27, 1868 concluded between the United States and Württemberg, wherein it is provided that:

> Reciprocally: citizens of the United States of America who have become or shall become naturalized citizens of Württemberg and shall have resided uninterruptedly five years within Württemberg shall be held by the United States to be citizens of Württemberg and shall be treated as such.

In the foregoing text, like in the corresponding text of the Treaty with the Grand Duchy of Baden of July 19, 1868, the expression "shall be held" and "shall be treated" do not have the meaning of a mere interruption of the American nationality and of the loss of title to the diplomatic protection of the United States, but of a complete annulment of the title to the nationality of that State, by virtue of the Treaty itself. The Commission must reach this conclusion when faced with the Protocol signed at Stuttgart, on the same date as the Treaty, July 27, 1868, which, although making specific reference to Article 4 of the Treaty, explains very clearly that naturalized persons, in application of Article I, lose, as a result of their naturalization, their preceding naturalization; Part III of this Protocol reads as follows:

> It is agreed that the fourth article shall not receive the interpretation, that the naturalized citizen of the one State, who returns to the other State, his original country, and there takes up his residence, does by that act alone recover his former citizenship; nor can it be assumed, that the State, to which the emigrant originally belonged, is bound to restore him at once to his original relation. On the contrary it is only intended, to be declared, that the emigrant so returning, is authorized to acquire the citizenship of his former country, *in the same manner as other aliens* in conformity to the laws and regulations which are there established. Yet it is left to his own choice, whether he will adopt that course, or will preserve the citizenship of the country of his adoption. With regard to this choice, after a two years residence in his original country, he is bound, if so requested by the proper authorities, to make a distinct declaration, upon which these authorities can come to a decision as the case may be, with regard to his being received again into citizenship or his further residence, in the manner prescribed by law.

The Commission could interpret this document established by common agreement of the High Contracting Parties, in no other way than as a recognition of the principle constantly defended by the American authorities in their relationship with foreign States, namely that the nationality of origin is lost *ipso jure*, by virtue of the Bancroft Treaty concluded with Württemberg; it draws the conclusion therefrom that even a Württemberg national, if naturalized in the United States, when returning to reside in his country of origin can re-acquire the nationality of this latter country only like any other alien, this means without the slightest doubt that he had lost that nationality as a result of his naturalization in the United States, by virtue of Article I of the aforesaid Treaty, and that, in application of the principle of reciprocity which is at the basis of the Bancroft Treaties, this is all the more so in the case of an American who secures naturalization in Württemberg.

The Commission is of the opinion that Article 4 of the Bancroft Treaty with Württemberg of July 27, 1868 is not applicable to the instant case; it reads as follows:

> If a Württemberger naturalized in America renews his residence in Württemberg without the intention to return to America he shall be held to have renounced his naturalization in the United States. . . . The intent not to return may be held to exist when the person naturalized in the one country resides more than two years in the other.

Samuel Flegenheimer never fell under the provisions of this Article, because he was not a Wurttemberg national naturalized in the United States, but an individual of Baden origin. On the other hand, the Bancroft Treaty of July 19, 1868 with the Grand Duchy of Baden (Art. 4) fails to recognize this loss of American naturalization as the result of the return to reside in the country of origin without *animus revertendi* to the United States; it only provides for a new naturalization in the country of origin accompanied by a voluntary renunciation of the naturalization secured in the United States; but this provision also was inapplicable to Samuel Flegenheimer who could not be qualified as a Baden national returning to his country of origin. The two treaties are not complementary and the provisions of one cannot be invoked in order to make good the inapplicability of the provisions of the other. It is therefore by virtue of Article I, paragraph 2 of the Treaty between Württemberg and the United States that Samuel Flegenheimer and the members of his family, under his control and guardianship as a husband and as a father, lost their American nationality.

52. Samuel Flegenheimer's naturalization in Württemberg was formally extended, by the very act under which he secured said naturalization, to his wife and to his minor children, namely, Joseph who was then 18 years old, Eugene who was 6 and Albert who was 4. The three of them, through their father, lost under the Bancroft Treaty concluded between the United States and Württemberg, the American nationality they had acquired *jure sanguinis*. The collective effects of Samuel Flegenheimer's naturalization on the members of his family, under his control and guardianship as a husband and as a father, are explicitly confirmed by the excerpt from the Register of families of the Schwäbisch-Hall district, as well as by a statement, introduced in the record, of the Government of the district of his domicile in Württemberg (Königliche Kreisregierung) of August 23, 1894. They fulfilled the conditions of domicile required by the Treaty of July 27, 1868; although Albert was only four years old on the date of the naturalization of his father, he too falls under the provisions of this Treaty. The Protocol annexed thereto explicitly provides in Part I (1):

> It is of course understood, that not the naturalization alone, but a five years uninterrupted residence is also required, before a person can be regarded as coming within the treaty; but it is by no means requisite, that the five years residence should take place after the naturalization.

It is therefore immaterial whether the five-year uninterrupted residence is placed before or after the grant of naturalization; it is in any event established that Albert Flegenheimer resided uninterruptedly for more than five years in Württemberg, since birth and immediately after his naturalization. One could admit that he lost title to United States nationality only in 1895, a chronological verification that is devoid of all pertinence for the purpose of settling this dispute.

53. Moreover, the Bancroft Treaty of July 27, 1868, like the others, does not specifically decide the question of the extension, to the minor children of an American national, of the loss of United States nationality by the head of the family who secured naturalization in Württemberg. As the collective effects assigned to a naturalization under the laws of a State do not have as a necessary corollary an expatriation with collective effects in the State of origin, the law

of which may have adopted, by way of hypothesis, the principle of individual expatriation, the question must be settled by an interpretation of the Treaty that is binding on the two Parties.

A literal interpretation of Article 1, paragraph 2 of the Treaty between Württemberg and the United States of July 27, 1868, leads to the recognition that all of Samuel Flegenheimer's minor children, who were naturalized with him, lost by this fact, like him, their American nationality.

The starting point of the *processus* of all interpretation of an international treaty is the text on which the two Parties have agreed; it is evident that the main point of an international agreement lies in the concordant intent of such Parties and that, without this concordance, there are no rights or obligations which arise therefrom. The written word, Max Huber of the Institute of International Law affirmed, in the art of interpreting texts, has just as important a place as mathematics have in the art of engineering; it aims at precision and this can be obtained only by a choice, after extremely careful thought, of the expressions employed. As Vattel, the Swiss jurist pointed out already in the eighteenth century, "when an act is worded in clear and precise terms, when the meaning is manifest and does not lead to anything that is absurd, there is no reason for refusing this act the meaning that it naturally displays. To search elsewhere for probable inferences so as to restrict or extend it, means an intent to evade it" (*Le droit des gens*, livre II, chap. XVII, paragraph 263).

International jurisprudence has made an extensive application of this rule of interpretation. The Permanent Court of International Justice in fact affirmed:

> The Court's task is clearly defined. Having before it a clause which leaves little to be desired in the nature of clearness, it is bound to apply this clause as it stands, without considering whether other provisions might with advantage have been added to or substituted for it. (Advisory Opinion of September 15, 1923, Acquisition of Polish Nationality, *P.C.I.J.*, series B. No. 7, p. 20.)
>
> (See also, series B, No. 2, p. 22 and Decision of the Mixed Claims German-American Commission, of November 1, 1923 concerning the interpretation of the Treaty of August 25, 1921 between the United States and Germany (*Lusitania* Case), in Witenberg, *Decision of the Commission* (1926), I, p. 37).

The Treaty of July 27, 1868 does not afford any exception to the rule of the loss of American nationality following the naturalization in Württemberg of minor children included in their father's change of nationality. There is therefore no ground for inserting it in the text of the Treaty and taking it for granted; "*ubi lex non distinguit, nec nos distinguere debemus*". Such is the wisdom of centuries.

A teleological interpretation of the aforesaid Treaty does not lead to a different result. As the genesis of the Bancroft Treaties discloses, the main concern of the United States in concluding these treaties was to put a stop to the evil usage and inconveniences of dual nationality, by adopting the rule that every naturalization in the United States accompanied by a permanent residence, entailed as a consequence, automatically, the loss of the former allegiance; and the United States succeeded in obtaining this result only by admitting, in their turn, by way of reciprocity, that American nationality would not continue to exist following naturalization, accompanied by permanent residence, of an American national abroad. Therefore, the principal purpose of these treaties is to link every naturalization in a State, the seriousness and sincere character of which is proved by a durable residence, with expatriation in the other State.

A search for the agreed intent of the contracting Parties, at the time the Bancroft Treaties were concluded, does not lead to another result.

In German law, in the interest of the unity and nationality of the family, the naturalization of the father as well as his expatriation was extended to his wife under his marital control and authority, and to his children under his fatherly control and authority (paragraph 11, 14a, 19, 21 sub-paragraph 2 of the German nationality law of June 1, 1870 that was applicable at the time of Samuel Flegenheimer's naturalization in the United States in 1873 and in Württemberg in 1894).

The same conditions applied in the United States where, beginning with the first Naturalization Act of March 26, 1790, it was admitted that the naturalization of the parents was extended to their minor children who resided with them in the United States.

The same collective effects on the nationality of minor children were attributed to the expatriation of Americans, heads of families, following naturalization abroad. In the case of Baldura Schmidt, who was included in the naturalization of his father in Germany, in 1923, Secretary of State Stimson affirmed:

> The Department knows of no sufficient ground for contending that the nationality of a minor child cannot be changed, without the child's consent, by the act of a parent in obtaining naturalization in a foreign State, especially in view of the fact that the law of this country provides for the naturalization of a parent in the United States, without requiring the consent of the child . . . Such being the case, it would be inconsistent for this government to hold that Americans who have been naturalized in foreign countries during minority through naturalization of their parents have retained their American nationality. (Hackworth's *Digest*, III, p. 238).

It was nevertheless admitted in Steinkauler's case in 1875, that the native born child of a naturalized parent, subsequently included in the restoration of the latter into his country of origin, has the right to elect American nationality upon reaching majority, provided he returns to the United States. Several Instructions of Secretaries of State in this direction were given to American diplomatic representatives abroad (*Moore, Arb.*, III, p. 542-544, 548).

Although this right of election was not included in any positive law, at that time, it was considered as a legal rule constantly admitted and sanctioned by the Supreme Court in the *Perkins* vs. *Elg* Case in 1939, subject to the provisions contained in international treaties.

This right of option was never analysed very thoroughly by American jurists, so that it was not possible to establish whether for the minor children involved, it is a question of loss of American nationality under a resolving condition of option and of return to the United States, or of redintegration in their American nationality suspensively conditioned upon option and return to the United States. In the first case, these minors would lose their American nationality as a result of the naturalization of their father abroad, and would only be vested with the nationality of their father during the whole of their minority, but could re-acquire their American nationality by an option entailing the cancellation of the loss which had previously occurred; in the second case these minor children would maintain their nationality during their minority, they would thus have simultaneously the quality of American nationals and of nationals of the country of naturalization of their father, but would still be required to elect in favour of American nationality and to return to the country of their birth; failing the option, they would lose this latter citizenship and would remain vested only with the nationality acquired by their naturalized father.

The Commission must note that the Treaty of 1868 with Württemberg contains no reservation in favour of this right of option. If it had been the intent

of the contracting parties to admit it, they would have introduced certain provisions in their agreement which the Commission cannot presume. It is in fact the custom of introducing in international conventions, directed at combating or preventing dual nationality, special rules if the right of option is reserved to minor children naturalized with their parents in one of the contracting countries, as is particularly the case in the Franco-Swiss Convention of July 23, 1879, and of establishing, very accurately, this right of option which must be made use of within certain time limits and before certain designated authorities.

The gap of the Treaty in this connexion leads the Commission to note that Württemberg has always applied, in its municipal law, the principle of naturalization and expatriation with collective effects, and that the same principle was generally followed by the United States until 1939, and this fact appears, *inter alia*, from the Tobiassen case which, although criticized by the Supreme Court in the *Perkins* vs. *Elg* Case, establishes the status of American law prior to 1939. The Tobiassen Case involved a minor child (a girl), an American national who, when eight years old, was included in her father's re-acquisition of Norwegian nationality; this case was brought before the United States Courts in 1932, where Attorney General Mitchell affirmed:

> The law of Norway . . . is analogous to our statutes . . . by virtue of which foreign born minor cildren of persons naturalized in the United States are declared to be citizens of this country . . . Inasmuch as under our laws a foreign-born minor child obtains a citizenship status through the naturalization of the father, it seems to me inconsistent . . . to deny a like effect to similar laws of Norway. (36 op. Attys. Gen. 535 (1932).)

The Commission concludes therefrom that the contracting Parties did not so much intend to deviate from this principle in a treaty, like the Bancroft Treaty concluded on January 28, 1868, as they intended to do away with cases of dual nationality and the abuse which had arisen therefrom.

It is impossible for the Commission to admit that Albert Flegenheimer retained the nationality of the United States and that he was consequently vested with German-American dual nationality from 1894 until the German decree of April 29, 1940 under which he forfeited his German nationality, when the clear text of an international treaty classifies him in the category of Americans expatriated by naturalization and when proven facts establish that he considered himself as vested with German nationality alone.

In any event, the principle of collective expatriation was only recently clearly specified in paragraph 401 (*a*) of the 1940 Nationality Act in the following terms and established that Albert Flegenheimer forfeited his right of option since 1913, should this law be applicable to him, which is not the case, however:

> A person who is a national of the United States, whether by birth or through naturalization shall lose his nationality by: (*a*) Obtaining naturalization in a foreign State, either upon his own application or through the naturalization of a parent having legal custody of such person: *Provided, however*, that the nationality shall not be lost as the result of the naturalization of a parent unless and until the child shall have attained the age of twenty-three years without acquiring permanent residence in the United States.

Even under this principle, the legal position of Albert Flegenheimer would not be modified.

54. Hence, on this point the Commission reaches the conclusion that Albert

Flegenheimer, following his naturalization in Germany in 1894, lost his American nationality and that he was never simultaneously vested with both German and United States nationality.

55. D. *On the question as to whether Albert Flegenheimer recovered, subsequent to his naturalization in Germany, his title to United States nationality.*

The Agent of the Government of the United States and his Counsel, after having denied that the Bancroft Treaties could have caused the loss of American nationality of minor children included in their father's naturalization in Germany, lay heavy stress on the right of election recognized to these minors, after reaching majority, in favour of United States nationality provided they establish their permanent residence in that country.

In this connexion they invoke numerous American judicial precedents, and among these the *Perkins* vs. *Elg* Case, adjudicated in 1939, and the *Mandoli* vs. *Acheson* Case, adjudicated in 1952, both of them by the United States Supreme Court.

56. The Claiming Party attaches a decisive importance to the *Perkins* vs. *Elg* precedent, because it was decided in favour of a minor person, falling under the provisions of the Bancroft Treaty of May 26, 1869, concluded between the United States on the one hand and Sweden and Norway on the other, and because the Supreme Court specifically recognized, in the person concerned, a right of election, after reaching majority, in favour of American nationality.

Miss Elg's position in fact and in law is not the same as that of Albert Flegenheimer.

Miss Elg was born in New York in 1907 of Swedish parents who had acquired United States nationality by naturalization in 1906. In 1911, at the age of four, her mother took her to Sweden where she resided until 1929. In 1922 her father went to Sweden in this turn and never returned to the United States; in 1934 he made a statement before an American Consul in Sweden, under the terms of which he expatriated himself voluntarily, because he did not wish to preserve his American nationality and intended to remain a Swedish national.

In 1928, shortly before reaching majority, Miss Elg inquired at an American Consulate in Sweden what the possibilities were to receive an American passport in order to return to the United States; in 1929, eight months after her twenty-first birthday, she obtained this passport and returned to the United States as a national of that country, where she permanently resided. In 1935-1936 her title to American nationality was challenged by the American authorities and the legal proceedings which followed terminated in a decision of the Supreme Court wherein Miss Elg was recognized to be an American national.

The Court based its opinion on the administrative precedents wherein an American minor, born in the United States, who had acquired a foreign nationality through his father, had been recognized the right to elect between this and the American nationality, at the age of twenty-one, by his return to the United States, in view of the fact that expatriation, except for treaties, can only be the consequence of voluntary naturalization abroad and is not extended to minor children who are passively included in that of their parents. The Supreme Court admitted that this administrative practice was a consequence of the constitutional provision conferring title to nationality to all persons born in the United States and submitted to its jurisdiction.

The Court, after formally reserving contrary conventional rules, examined the Bancroft Treaty of 1869 between the United States and Sweden and Norway, and in view of the fact that the case involved the return of a naturalized person to the United States, his country of origin, took as a basis Article III

of that Treaty and the Protocol annexed thereto; the aforesaid Article III reads as follows:

> If a citizen of the one party, who has become a recognized citizen of the other party, takes up his abode once more in his original country and applies to be restored in his former citizenship, the government of the last named country is authorized to receive him again as a citizen *on such conditions as the said government may think proper.*

In connexion with this Article the Protocol provides:

> It is further agreed that if a Swede or Norwegian, who has become a naturalized citizen of the United States, renews his residence in Sweden or Norway without the intent to return to America, he shall be held by the Government of the United States to have renounced his American citizenship.

In interpreting these texts, the Supreme Court admitted that they specifically authorized the United States to receive "as a citizen on such conditions as the said Government may think proper" a child born in America and who, taken to Sweden when he was still a minor, chose to return to the United States upon reaching majority. The Court further affirmed:

> And if the Government considers that a native citizen taken from the United States by his parents during minority is entitled to retain his American citizenship by electing at majority to return and reside here, there would appear to be nothing in the treaty which would gainsay the authority of the United States to recognize that privilege of election and to receive the returning native upon that basis. Thus, on the facts of the present case, the treaty does not purport to deny to the United States the right to treat respondent as a citizen of the United States, and it necessarily follows that, in the absence of such a denial, the treaty cannot be set up as a ground for refusing to accord to respondent the rights of citizenship in accordance with our Constitution and laws *by virtue of her birth in* the United States. (U.S.R. 307 (1939) p. 338.)

This Commission believes that this precedent, the importance of which it does not deny, is applicable, in the interpretation of an international treaty to the specific case of election of American nationality by a minor child born in the United States territory, of parents who were naturalized in the United States, and later taken by them to their country of origin where the latter reacquired, by virtue of a special applicable authorization of the Bancroft Treaty, their nationality of origin, under conditions established at the discretion of the Government of that country, hence without a naturalization procedure; election of nationality must be accompanied by a return to the United States shortly after the minor child reaches majority.

None of these particular circumstances have occurred in the instant case. Albert Flegenheimer's position in fact differs from that which appeared in the *Perkins* vs. *Elg* case, on essential and numerous points.

(*a*) In the first place, Miss Elg was born in the United States of parents who resided in that country, She thus had the status of a *jure soli* native born American national, by virtue of the Constitution of the United States, whereas Albert Flegenheimer was born in Germany of a father who had been a resident of that country for many years and who had been formerly naturalized in the United States; he thus acquired American nationality *jure sanguinis*, by virtue of Section 1993 of the Revised Statutes.

(*b*) In the second place, Miss Elg was taken to Sweden by her mother when she was four years old, while her father remained in the United States until

she was fifteen years old; it has not been established that she was included in the Swedish decree of naturalization granted to her father, because the latter confined himself to declare he no longer wished to retain his American nationality; whereas Albert Flegenheimer who was specifically included in his father's act of naturalization in Wurttemberg, resided uninterruptedly with his parents in Germany during the whole of his youth and, after attaining majority, until 1937, that is a total of 47 years; he left Germany because of the political events which disturbed Germany after the coming into power of the national-socialist régime; the reasons of his emigration are comprehensible, but do not prevent the Commission from noting that all his family and business interests were in Germany where he created a family, where his children were born, that he received a German education, that he never lived in America until he was almost fifty and that his assimilation into the American people and life had not even begun in 1939, when he filed his first application for recognition of his American nationality.

(c) In the third place, even before reaching majority, Miss Elg secured information on her American nationality and went to the United States shortly after her twenty-first birthday. She proceeded without delay in her election of nationality, thus giving proof of a real attachment to the country of her birth; she resided permanently in that country, and her nationality was challenged only six years later; whereas Albert Flegenheimer did not make an election in favour of American nationality until he was 49 years old, under the pressure of political events and in the furtherance of his business.

In the *Perkins* vs. *Elg* decision the Supreme Court many times stressed the fact that the right of election in favour of American nationality must be exercised "on attaining majority" (p. 329, 334, 338, 339, 340 and 346), and although no peremptory time limit is provided by positive law, the decision affirms that Miss Elg "promptly made her election and took up her residence in this country accordingly". Albert Flegenheimer tries to explain away the delay in his election of American nationality and comes to the conclusion that he is not barred from this privilege. He explains it on the following grounds:

In the first place, he contends that he was unaware of his father's naturalization in 1873 and of his own *jure sanguinis* title to American nationality until 1933, after the death of his father, when he learned of the latter's American passport; he claims he can furnish proof of this by the numerous affidavits and statements introduced in the records of the case. This Commission, by virtue of its freedom of evaluation of evidence, is all the less inclined to recognize the probative force of ex parte affidavits and statements established by third parties, inasmuch as it is difficult to reconcile them with the birth certificate of the individual concerned wherein it is stated that his father, Samuel Flegenheimer, was naturalized in Württemberg in 1894 together with his family; although this document does not show the American nationality of his father it seems hardly likely that Albert Flegenheimer did not have the slightest curiosity in this respect and did not try to discover what the former nationality of his father was, a fact which he could have very easily discovered by consulting the register of marriages, which is public in Germany, and in which Samuel Flegenheimer's American nationality is mentioned; it also seems strange that he never had knowledge of Württemberg's Kreisregierungs attestation establishing his own naturalization in that State.

Subsequently, Albert Flegenheimer refers to the requests for information made by him at various United States Consulates and an Embassy in Europe, between 1933 and 1939, which, in his opinion, establishes his election of American nationality. But these were intermittent steps, devoid of all legal

ing, because no trace of them was ever discovered in the files of the State Department, prior to this formal application submitted to the United States Consulate in Winnipeg on November 3, 1939. Even if one were to accept Albert Flegenheimer's version with regard to his late discovery of Samuel Flegenheimer's naturalization in the United States, his election of American nationality, which occurred 49 years after his birth, 28 years after reaching majority, and 6 years after the date on which he claims he discovered he had a right of election, would appear to the Commission to be too dilatory to justify the application to his case of the jurisprudence of the Supreme Court in the *Perkins* vs. *Elg* Case, and, consequently, of Article 78 of the Treaty of Peace with Italy.

(*d*) In the fourth place, the Bancroft Treaty concluded with Sweden and Norway confers a discretionary power on the contracting State, which applied to Miss Elg's case, for establishing the conditions of redintegration of a naturalized person in her nationality of origin, whereas the Bancroft Treaty with Württemberg contains very clear and precise provisions to the contrary, namely, the naturalized person who returns to his country of origin can recover the nationality thereof only "in the same manner *as other aliens* in conformity to the laws and regulations which are there established" (Protocol and Art. IV of the Treaty).

This Commission holds that, unlike what was admitted by the Supreme Court in the Elg Case, Albert Flegenheimer was never vested with dual nationality and that, therefore, the *Perkins* vs. *Elg* Case is not applicable to his case by reasons of fact and of law.

Albert Flegenheimer's nationality was established by the special provisions of the Bancroft Treaty with Württemberg which do not harmonize with those of the Treaty concluded by the United States with Norway and Sweden on the point analysed herein; they lead to a conclusion other than the one admitted in the *Perkins* vs. *Elg* Case.

57. One could object that since April 6, 1917 this Treaty is no longer in force and that it could therefore no longer prevent the dilatory exercise of the right of election by Albert Flegenheimer on November 3, 1939. But the Commission has already pointed out that, in order to determine the conditions and the effects of a naturalization, the legal and conventional provisions at the time the act was accomplished apply, an issue which is in any event admitted by the Agent of the United States and his Counsel. Now, from 1894, the date of Albert Flegenheimer's naturalization, until he attained majority in 1911, and even later during a period of five years, until April 1917, the Bancroft Treaty with Württemberg was actually in force and definitively established the nationality of the individual concerned. The Commission is of the opinion that, even if only by way of hypothesis the jurisprudence developed by the Supreme Court in the *Perkins* vs. *Elg* Case were to apply, he lost his American nationality before the repeal of the aforesaid Treaty.

In analysing the practice followed by the Department of State subsequent to the principles affirmed by the Supreme Court in the *Perkins* vs. *Elg* Case, it was not contended that no retroactive application thereof was made by the Administration to cases which had been dealt with many decades before. The practice of the Department of State was modified soon after the subject decision was rendered by the Supreme Court, and it is summed up in the following manner in a judgment of the District Court of New Jersey of November 17, 1953, concerning the *Rueff* vs. *Brownell* Case (116 F. Supp. 298, 302-303, 1953):

> . . . a minor, being a citizen of the United States who acquired derivatively the nationality of a foreign state through the foreign naturalization of a parent

will not, in the absence of specifically applicable treaty stipulations, be considered by the Department as having lost his or her citizenship of the United States *provided shortly before or shortly after attaining majority the person concerned manifests his or her election to retain American citizenship and to return to the United States to reside.* (Emphasis by the Court.)

The Commission recalls that Section 504 of the Nationality Act of 1940, to which it already has had occasion to refer, specifically preserves that nationality status previously established by a person, whether this person has acquired or lost American nationality, and does not confer any retroactive effects on the provisions of the new law. Finally, the Commission notes that Albert Flegenheimer's older brothers, who were in the identical legal position in which he stood, very logically came to the conclusion that they could not acquire American nationality by election and applied for and secured their naturalization in the United States, in 1944 and 1947 respectively. This was the only method to be followed in order to regularly obtain the status of American nationals.

58. The second precedent of the Supreme Court, invoked by the Plaintiff Party, is of no interest in the solution of the dispute submitted to the Commission.

The *Mandoli* vs. *Acheson* Case, adjudicated in 1952, involved a conflict between a *jure soli* and a *jure sanguinis* nationality. Mandoli was born in the United States of parents who had not been naturalized in that country; he thus had the status of a native born citizen by virtue of American law, and that of an Italian national, in application of Italian law. His parents returned to reside in Italy when he was still a minor; when he was 15 years old he made unsuccessful attempts to return to the United States; he renewed these attempts when he was 29 or 30 years old and, later, twice during the following eleven years. He finally obtained permission to enter the United States in order to obtain judicial recognition of his title to American nationality. On the basis of these facts, the Court decided that Mandoli had not expatriated himself, a solution which was unavoidable because the individual concerned had been vested with two nationalities since birth and the *Perkins* vs. *Elg* doctrine on the expatriation of minors included in the naturalization of their parents abroad was not involved, it was not a question of election in favour of American nationality, but the recognition of title to nationality acquired *jure soli* in the United States and which had given rise to a dispute. The Commission does not consider this precedent to be pertinent for the purpose of resolving the question of Albert Flegenheimer's nationality.

59. The judicial decisions rendered by the lower courts of the United States, cited by the Plaintiff Party in support of its conclusions, are not pertinent; they were, in any event, all rendered subsequent to the Nationality Act of 1940.

The case which has the greatest similarity with the Albert Flegenheimer case, is the *Rueff* vs. *Brownell* judgment, which was decided by the District Court of New Jersey on November 17, 1953. The Petitioner was born in Germany in 1910 of United States native born nationals, and she herself was a *jure sanguinis* United States national; she was naturalized in Germany during minority, in 1918, together with her mother who had emigrated to that country. Following several steps taken at American Consulates, beginning in 1934, she applied, in 1939, shortly after the *Perkins* vs. *Elg* decision, for an American passport which was refused; she went to the United States in 1945 and renewed her request to be issued a certificate of nationality in 1949. Following another refusal by the Administrative authorities, she submitted her request to the American courts. The District Court held she was an American national by virtue of Section 1993 of the Revised Statutes.

The *Rueff* vs. *Brownell* Case is similar to the Albert Flegenheimer Case because of certain peculiarities in common: birth of the person involved outside of the United States, collective effects of naturalization abroad, delay in election of American nationality. But they differ, on the other hand, on some very important points: American origin of Rueff's parents, whereas Samuel Flegenheimer was a naturalized American of Baden origin who promptly abandoned the United States; tardiness in the exercise of the right of election overstepping all tolerable measures in the Albert Flegenheimer Case; and, above all, absence of a nationality treaty stipulation in the Rueff Case, since all Bancroft Treaties concluded with the various German States were repealed on April 6, 1917, prior to her mother's naturalization. This precedent is therefore not pertinent to the case submitted to this Commission.

The other decisions invoked by the Plaintiff Party were rendered by United States Courts of Appeals, and they too do not appear to have sufficient analogy with the instant case for them to be considered by the Commission.

The *Perri* vs. *Dulles* Case, decided by the Court of Appeals on July 24, 1953, involved an Italian, born in Italy in 1913 of a father of Italian origin, naturalized as an American national, later redintegrated in his Italian nationality in 1926 together with his son, then a minor. The nationality of the latter was not established by treaty stipulation because Italy concluded no Bancroft Treaty with the United States. The Court considered him to be exactly like a dual national, namely, an American national *jure sanguinis* and an Italian national by the collective effects that Italian law attributes to the redintegration of the father in Italian nationality; the Court applied the Nationality Act of 1940 and sent the case back to the District Court for examination as to whether or not the individual concerned could benefit by the supplementary delay in election provided for in Section 401 (*a*) of said Act.

The *Lehmann* vs. *Acheson* Case was decided by the Court of Appeals on July 29, 1953; here too a dual nationality was involved. Lehmann, a Swiss who was born in the United States in 1921, was brought to Switzerland in 1924; his father remained in America and was naturalized as an American national without thereby losing his Swiss nationality. The son, who also had title to Swiss citizenship, performed his military service in Switzerland and the Court decided that this compulsory service did not have the effect of depriving him of his American nationality with which he was vested *jure soli*. There are no treaty stipulations on nationality between the United States and Switzerland, but merely a convention of November 11, 1937, relating to the military obligations of certain dual nationals.

The *Podea* vs. *Acheson* Case, decided on January 10, 1950, and the *Richter* vs. *Dulles* Case, decided on May 17, 1957, only concern questions of expatriation as a result of oaths taken to foreign States by native born Americans and do not raise any naturalization problem.

60. E. *On the inadmissibility of the Petition on grounds other than the absence of United States nationality.*

The Commission, taking as a basis the Bancroft Treaty concluded on July 27th, 1868, between the United States and Württemberg, is of the opinion that Albert Flegenheimer lost his American nationality through the naturalization of his father in Württemberg, in 1894, and that he never subsequently recovered it, either because he did not have a legal possibility to do so by virtue of laws which were applicable at the time of his naturalization in Germany, or, in the hypothesis most favourable to him, because it must be admitted that the right of election he claims he had in favour of American nationality was exercised too late by him.

The Commission can therefore dispense with entering upon the remedy of law based on expatriation, resulting from an absence of *animus redeundi*, of persons naturalized in the United States, as the result of prolonged residence in their country of origin or in another foreign State. In the interest of an exhaustive analysis of Albert Flegenheimer's position vis-à-vis the United States, the Commission nevertheless considers it its duty to investigate whether the other remedies of law invoked are well founded or groundless.

61. The Commission is of the opinion that it can reject outright the argument of the Respondent Party affirming that, by virtue of Section 2 of the Act of March 2, 1907, Albert Flegenheimer lost his title to American nationality, to all intents and purposes of law, for having taken an oath of allegiance to the Kingdom of Württemberg, because a clear, categorical and convincing evidence of this oath has not been submitted. The Italian Government assumes this oath was taken because the Constitution of the Kingdom of Württemberg of September 25, 1819, which remained in force until May 20, 1919, required that the oath of allegiance was to be taken by all native born Württemberg citizens, upon attaining the age of 16, or by all naturalized citizens on the date of their naturalization (Constitution of the Kingdom of Württemberg, Chapter III, Article 20).

The Commission is of the opinion that Albert Flegenheimer, who was born in Württemberg as a United States national, does not fall under the category of persons who were to take the oath of allegiance when 16 years old; on the other hand, as he was four years old on the date of his naturalization, he could not have taken the oath at that time; it is possible that the subject oath was required of his father, Samuel Flegenheimer, but no document has been introduced in the record proving that this oath was actually taken by him. The Commission could not be satisfied with evidence based on inference in order to determine the nationality of the individual concerned.

62. The Respondent Party attaches much importance to the theory of effective nationality, according to which, even supposing that Albert Flegenheimer was solely an American national, this nationality could not be productive of effects in the intercourse with Italy in order to obtain the application of Article 78 of the Treaty of Peace, in view of the fact that, during half a century, the individual concerned was considered as and considered himself to be a German national by his conduct, his sentiments, his interests. The Respondent Party contends that a nationality is not effective when it confines itself to establishing a nominal link between a State and an individual, and is not supported by a social solidity resulting from a veritable solidarity of rights and duties between the State and its national. As was decided by the International Court of Justice in the Nottebohm Case, between Liechtenstein and Guatemala, in its Decision of April 6, 1955, and from which Italy intends to gain advantage:

> Conferred by a State, it only entitles that State to exercise protection vis-à-vis another State, if it constitutes a translation into juridical terms of the individual's connexion with the State which has made him its national. (*Recueil C.I.J.*, 1955, p. 23.)

Italy therefore considers that no effective bond of nationality exists between the United States and Albert Flegenheimer, even if it were to be admitted that he was an American national on purely legal and nominal grounds. Italy concludes by saying that, on the international level, and whatever Albert Flegenheimer's position may be in connexion with American municipal law, the United States is not entitled to exercise, in his behalf, the right of diplomatic protection, nor can they resort to the Commission to plead his case.

The Agent of the Government of the United States and his counsel rebut this argument in pointing out that their Opponents cannot, inasmuch as they are in a position of a third State, raise the question of effective nationality, because Italian nationality is not at stake, and, furthermore, if it were intended to apply this doctrine, it would be necessary to admit, at least beginning from the forfeiture of German nationality decreed in 1940 by the German authorities against the individual concerned, that American nationality was the only effective nationality, because Albert Flegenheimer left Germany definitively in 1937 to take up residence in the United States in 1941, the seat of his domicile, of his family and business interests.

The Commission is of the opinion that it is doubtful that the International Court of Justice intended to establish a rule of general international law in requiring, in the Nottebohm Case, that there must exist as effective link between the person and the State in order that the latter may exercise its right of diplomatic protection in behalf of the former. The Court itself restricted the scope of its Decision by affirming that the acquisition of nationality in a State must be recognized by all other States,

> subject to the twofold reservation that, in the first place, what is involved is not recognition for all purposes but merely for the purposes of the admissibility of the Application, and, secondly, that what is involved is not recognition by all States but only by Guatemala.

The Court further clarified its thought by affirming:

> The Court does not propose to go beyond the limited scope of the question which it has to decide, namely whether the nationality conferred on Nottebohm can be relied upon as against Guatemala in justification of the proceedings instituted before the Court. (*Recueil C.I.J.*, 1955, p. 17)

The Court has thus distinctly affirmed the relative nature of its decision, and this Commission is of the opinion that the doctrine in support thereof cannot be opposed to the Government of the United States in this dispute.

The theory of effective or active nationality was established, in the Law of Nations, and above all in international private law, for the purpose of settling conflicts between two national States, or two national laws, regarding persons simultaneously vested with both nationalities, in order to decide which of them is to be dominant, whether that described as nominal, based on legal provisions of a given legal system, or that described as effective or active, qually based on legal provisions of another legal system, but confirmed by elements of fact (domicile, participation in the political life, the centre of family and business interests, etc.). It must allow one to make a distinction, between two bonds of nationality equally founded in law, which is the stronger and hence the effective one.

Application thereof was made in cases of dual nationality, like the Carnevaro Case, decided on May 3, 1912, by the Court of Permanent Arbitration, between Italy and Peru,[1] as well as in many decisions rendered by Mixed Arbitral Tribunals established under the Treaties of Peace from 1919 to 1923, especially the Franco-German Tribunal in its decision of July 10, 1926, in the *De Barthez de Monfort* vs. *Treuhändler* Case, and the Hungary-Jugoslav Tribunal in its Decision of July 12, 1926, in the Baron de Born Case. (*Revue générale de droit international public*, 1913, p. 329; *T.A.M.* vol. VI, p. 806, 809 et p. 499, 503)

The 1930 Hague Convention concerning certain questions relating to the conflicts of nationality laws has, likewise, placed this theory at the basis of its

[1] *U.N.R.A.*, vol. XI, p. 397.

Article 5, which is strictly limited to cases of multiple nationality and which reads as follows:

> In a third State, the individual possessing more than one nationality shall be treated as if he were vested with one nationality only. Without prejudice to the rules of law applied in the third State in matters of personal status and subject to the conventions in force, this State may, in its territory, recognize exclusively amongst the nationalities possessed by such individual, either the nationality of the country in which he mainly and principally resides, or the nationality of the State to which, according to the circumstances, he appears to be more attached in fact.

The theory of effective or active nationality was nevertheless limited in its application by the principle of the unopposability of the nationality of a third State, which, in an international dispute caused by a person with multiple nationalities, permits the dismissal of the nationality of the third State, even when it should be considered as predominant in the light of the circumstances; this was the decision rendered on June 8, 1932, by the Arbitral Tribunal in the Salem Case, disputed between the United States and Egypt, when this latter country invoked the Persian nationality which the claimant possessed, besides Egyptian nationality, to obtain a rejection of the claim of the United States (*U.N.R.A.*, vol. II, p. 1188).

Reference should also be made, in the same sense, to the decision rendered on June 10, 1955, by the Italian-United States Conciliation Commission, completed by a Third Member, de Yanguas Messia, in the Strunsky Mergé Case[1] involving a native born American national who had married an Italian subject whose nationality she had acquired, without however losing her American nationality, and was hence in the legal position of a person vested with dual nationality; the Commission took into consideration the Italian nationality which it held to be predominant, but pointed out that effective nationality does not allow a Respondent State to invoke, against the Plaintiff State that accords protection to one of its nationals, the fact that the latter is also in possession of the nationality of a third State; the result is that American subjects who are not in possession of Italian nationality, but, of the nationality of a third State, can be considered as United Nations nationals under Article 78 of the Treaty of Peace, even when the predominant nationality is that of the said third State (Archives of the Commission, No. 55).

But when a person is vested with only one nationality, which is attributed to him or her either *jure sanguinis* or *jure soli*, or by a valid naturalization entailing the positive loss of the former nationality, the theory of effective nationality cannot be applied without the risk of causing confusion. It lacks a sufficiently positive basis to be applied to a nationality which finds support in a state law. There does not in fact exist any criterion of proven effectiveness for disclosing the effectiveness of a bond with a political collectivity, and the persons by the thousands who, because of the facility of travel in the modern world, possess the positive legal nationality of a State, but live in foreign States where they are domiciled and where their family and business centre is located, would be exposed to non-recognition, at the international level, of the nationality with which they are undeniably vested by virtue of the laws of their national State, if this doctrine were to be generalized.

The Commission wishes to specify that it is by virtue of the rules of state positive law, and not on the grounds of social, family, sentimental or business effectiveness, that it is led to objectively determine that Albert Flegenheimer

[1] *Supra*, p. 236.

who was never vested with dual nationality, lost title to his American nationality, in application of the international treaties concluded by the United States. Likewise, it is also on the basis of an American state law that he acquired American nationality at birth through a German father who became a naturalized American.

63. The Agent of the Italian Government and his Counsel, in connexion with the foregoing, have further contended that, always working on the assumption that Albert Flegenheimer had preserved his American nationality, the United States Petition should be rejected by virtue of what they describe as apparent nationality. The explanation of this theory lies in the fact that the allegedly injured individual, at the time of the March 18, 1941, transaction, availed himself of his German nationality in order to obtain, in matters of transfer of currency, certain advantages which were reserved by Italy to countries that were her allies; they contend that because Albert Flegenheimer, always used a German passport, even after his *ex autoritate* denationalization in Germany, in 1940, he could not now avail himself of his American nationality in order to benefit by the advantages which the Treaty of Peace guarantees to United Nations nationals. Italy envisages therein additional grounds for affirming that the proceedings instituted in behalf of the protection of Albert Flegenheimer's interests are inadmissible even if the latter's nationality was effective and at the same time the only legal one.

The Agent of the Government of the United States and his Counsel deny the existence of a rule of public international law permitting the granting of predominance to a nationality invoked by an allegedly injured party when he does not possess that nationality.

The Commission cannot follow, on this point, the Italian Government's arguments; they appear to be unfounded in fact and in law.

In fact, the Commission has noted that Albert Flegenheimer's German nationality was not a decisive factor when the Italian Ministry of Exchange and Foreign Currency, on June 6, 1941, authorized the payment of 277,860.60 dollars in New York, because the said Ministry described the Flegenheimer brothers in its authorization as *Ebrei ex-germanici* (former German Jews) and had knowledge at that time of the fact that Albert Flegenheimer had lost his German nationality (see *supra*, the considerations of fact No. 15).

From the legal viewpoint, the Commission notes that the doctrine of apparent nationality cannot be considered as accepted by the Law of Nations. In international jurisprudence one finds decisions based on the *non concedit venire contra factum proprium* principle which corresponds to the Anglo-Saxon institution of estoppel; it allows a Respondent State to object to the admissibility of a legal action directed against it by the national State of the allegedly injured party, when the latter has neglected to indicate his true nationality, or has concealed it, or has invoked another nationality at the time the fact giving rise to the dispute occurred, or when the national State has made erroneous communications to another State thus fixing the conduct to be followed by the latter.

Wilson Case, *Moore Arb.* vol. III, No. 2, p. 555; Decision of July 26, 1927, of *C.P.I.J.* Chorzow industrial plant Case (jurisdiction), *C.P.I.J.*, series A, No. 9, p. 31. See also Borchard, *Ann. Inst.* 1931, I, p. 368 and 399 *et seq.*

The Rothmann precedent invoked by the Respondent Party seems to be of little pertinence. That case which was adjudicated by the tripartite Commission between the United States, Austria and Hungary in 1928, concerned a former Austrian national who had been naturalized in the United States, had

returned to Austria where he had resided for a number of years posing as an Austrian and had been drafted into military service in Austria during World War I, after the American diplomatic mission in that State had affirmed, upon being questioned by the Austrian authorities, that Rothmann had lost his American nationality by virtue of the Act of 1907. When the war was over, Rothmann was redintegrated in his American nationality, by virtue of Section 2, paragraph 2 of the Act of 1907, by rebutting the presumption of voluntary expatriation following a prolonged sojourn in his country of origin. The United States accorded him its protection for obtaining from Austria compensation for the damages he had suffered as the result of having been drafted in the Austrian Army. Judge Parker rejected the Petition filed by the United States, without referring to any so-called doctrine of apparent nationality, but merely taking as a basis the fact that on the date on which the damage occurred, the American authorities did not consider Rothmann as a United States national. Judge Parker affirmed:

> The Commissioner rejects the contention that the subsequent overcoming of the presumptions (of expatriation) can affect the nationality of this claim which has arisen during the time when the claimant was not entitled to recognition and protection as an American citizen; especially as the very existence of the claim turns on the state of claimant's citizenship at the time it arose. (*Am. J. Int.* 1929, vol. XXIII, p. 182 *et seq.* (186).)

If the predominance of an apparent nationality over every other nationality were a rule of general international law, Judge Parker could have all the more easily adopted it in that the legal appearance of the loss of American nationality had been created by an official statement of the American authorities later claiming compensation for their national who was injured by that very statement. In this case there is no apparent nationality artificially created either by a third State, Germany, or by the individual concerned, Albert Flegenheimer; the latter was in good faith when he used his German passport, subsequent to the issuance of a decree of which he was unaware and under which he forfeited his German citizenship, because he was vested with German nationality and German nationality alone from 1894 to 1940.

The predominance of apparent nationality over legal nationality, on the other hand, was dismissed in the *Wildermann* vs. *Stinnes* Case, by the decision of the Mixed German-Rumanian Tribunal of June 8, 1926, which refused to give any importance to the non-fraudulent use of a foreign passport; in this decision it is affirmed that:

> It is an established fact that the petitioner was requested to lecture at Oxford University, that until 1922 he passed himself off as a Russian and that in 1922 he had his Russian passport renewed in England. The Minister of Home Affairs did not envisage thereby a tacit renunciation of Rumanian nationality. . . . On the other hand, so long as the petitioner did not succeed in having his Rumanian nationality recognized, he was forced to use the only passport which he could obtain, that is to say, a Russian passport. The compulsory renewal of this Russian passport could have no meaning and the petitioner's whole attitude, beginning from the time when he gained knowledge of his rights in Rumania, manifestly rules out his alleged tacit renunciation to his Rumanian nationality." (*T.A.M.*, vol. IV, 485 *et seq.* (495).)

Barring cases of fraud, negligence or serious errors which are not proved in the instant case, the Commission holds that there is no rule of the Law of Nations, universally recognized in the practice of States, permitting it to recognize a nationality in a person against the provisions of law or treaty stipulations,

because nationality is a legal notion which must be based on a state law in order to exist and be productive of effects in international law; a mere appearance cannot replace provisions of positive law governing the conditions under which a nationality is granted or lost, because international law admits that every State has a right, subject to treaty stipulations concluded with other States, to sovereignly decide who are its nationals.

64. *On the question of the applicability to Albert Flegenheimer of Article 78, paragraph 9* (a) *sub-paragraph 2 of the Treaty of Peace with Italy.*

Article 78, paragraph 9 (*a*), sub-paragraph 2 of the Treaty of Peace with Italy of February 10, 1947, places persons who were treated as enemies in Italy during World War II on the same level as United Nations nationals; it reads as follows:

> The term "United Nations nationals" also includes all individuals, corporations or associations which, under the laws in force in Italy during the war, have been treated as enemy.

In its Order of February 18, 1956, the Commission decided to examine the question of Albert Flegenheimer's nationality firstly. In the Brief submitted by the Agent of the United States on this question on May 30, 1956, resuming the arguments already developed in its Reply of November 17, 1952, the question of the applicability of this provision was raised; the Agent of the Italian Government dealt with this question in his Reply Brief, filed on October 15, 1956, and the two Agents conclusively explained their respective positions on this point in their final Rebuttal Observations, by the Agent of the Government of the United States on October 28, 1957, and in the final Counter Reply, by the Agent of the Italian Government on November 9, 1957. The Commission intends all the more to affirm that this question cannot be eliminated from the discussions in that it is closely linked with the question of Albert Flegenheimer's nationality, by virtue of the Treaty of Peace itself.

65. The Agent of the Government of the United States contends that the aforesaid Article 78, paragraph 9 (*a*), sub-paragraph 2 of the Treaty of Peace has the effect of including in the expression "United Nations nationals" all individuals, who were not necessarily "treated" as enemies, but considered as such under the legislation in force in Italy during the war.

He bases this interpretation on the Russian text of the afore-mentioned article, where the word "*rassmatrivat*" which is used therein has only one meaning, that of "considering" because the expression "treated" can be obtained in Russian by the words "*obchoditsia*" or "*podvergnut dejstwiyu*", which terms are not employed in the Russian text of the Treaty. As Article 90 of the Treaty considers the English, French and Russian texts as authenticated originals, the United States Agent contends that the Russian text also should be taken into consideration in order to obtain the exact meaning of Article 78, paragraph 9 (*a*), sub-paragraph 2, and in this connexion he refers to Decision No. 32 of the French-Italian Conciliation Commission of August 29, 1949,[1] which affirmed:

> whatever the genesis of the two texts may be, it is not lawful to give exclusive consideration to one of these texts (French and English); the interpreter should rather try to clarify one by making use of the other. (*Recueil des décisions*, 1er fasc., p. 100.)

He justifies the preference to be given to the Russian text by the Italian translation of the Treaty, where the term "traités", or "treated", is translated

[1] Volume XIII of these *Reports*.

by the expression "considerate", which corresponds exactly with the Russian text. Although the Italian translation does not have the value of an authenticated original, the United States Agent contends that it can be opposed to the Italian Government in the instant case, in that it expresses in a clear and unequivocal manner the meaning attached by it to that Article of the Treaty. He reaches the conclusion that the word "*traités*" or "treated", was intended by the contracting Parties to mean "considered" and that the Italian Government is not allowed, by virtue of the doctrine of estoppel, to give that provision another meaning in order to modify the extent of its obligations.

On the basis of this argument, the Agent of the United States invokes Article 3 of the Italian War Law (Law Decree 1415) of July 8, 1938, establishing the two following conditions under which a person, who is not a national of an enemy State, can nevertheless be considered as an enemy subject: (1) if said person is stateless; (2) if said person resides in an enemy country. He draws the conclusion therefrom that on the date of the conclusion of the allegedly vitiated contract as the result of duress, that is March 18, 1941, Albert Flegenheimer fulfilled these two conditions because he had forfeited his German nationality and resided in Canada, a country then at war with Italy; in his opinion, Albert Flegenheimer is thus entitled to the benefits of Article 78 of the Treaty of Peace.

The Italian Government denies the correctness of this argument and contends that the mere possibility of being considered as enemy is not sufficient to entitle one to the restitution and restoration imposed by this Treaty on Italy, but that it is necessary that these actually have been treated as enemy, and invokes the jurisprudence established by the Conciliation Commission in similar cases.

66. This Commission holds that the arguments of the Plaintiff Party are not well founded because:

(*a*) The Commission does not deny that the texts of the Treaty, prepared in three languages, all have the same value of authenticated originals, and that the interpreter must reconcile them one with the other.

In French, the *Littré* dictionary gives no less than twenty-three meanings to the word "*traiter*", none of which has the purport of "*considérer*"; that which comes closest is that of "giving such and such qualification"; but it is not the usual meaning. It is universally admitted in international law that the natural meaning of the terms used must be taken as the starting point of the *processus* in interpreting treaties. In its natural sense, the word "*traiter*" in French means: "to act towards a person in such and such a manner". The usual meaning of the English word "treat" is no different, according to the Harraps Standard French and English Dictionary. The expression "*considéré*" in French, may have five meanings, according to the *Littré* dictionary, and the following are those that could be taken: "have regard to, take into account, believe, esteem"; the same applies in English.

Therefore, the expression used in the Russian text cannot be reconciled exactly with the French and English texts of the Treaty; it would mean that the said Treaty would have to be applied to persons who, under the provisions of the laws in force in Italy, were believed, or seemed to have been enemies. Article 78, paragraph 9 (*a*), sub-paragraph 2 would not be thereby devoid of meaning, but it must be admitted that it would lead to a solution which would conflict with the other provisions of the Treaty. The preference accorded to the Russian text by the Plaintiff Party is the result of a true and proper vicious circle, because it offers as proof of the correctness of its solution the very supposition from which it started.

On the other hand, it is not admissible to take the Italian translation of the Treaty to corroborate one of the three authenticated originals, nor to contend that the Italian Government is bound by the Italian text, on the grounds that this translation should be an indication of the manner in which Italy has understood her obligations arising out of the Treaty. The Commission holds that the principle of "estoppel" or "*non concedit venire contra factum proprium*", could be opposed to the Respondent Party only if, by declarations to the contracting States, or by conclusive acts, or even by an attitude regularly taken towards them, it had given Article 78, paragraph 9 (*a*), sub-paragraph 2 of the Treaty of Peace an interpretation corresponding to the Russian text, but not by a translation devoid of official value, and which, according to the allegations of the Agent of the Italian Government, is, in actual fact, the collective work of all the contracting States, who purposely refused to give it any character of authenticity. It is therefore devoid of all international legal significance and Italy has never accepted the meaning resulting out of the Russian text.

It cannot be denied that the interpretation of the text of a treaty can be made only by using the versions that have been declared to be authenticated originals by the Treaty itself.

(*b*) When the texts of an international treaty prepared in different languages cannot be exactly reconciled with one another, the Commission, according to the teachings of international law, believes that adjustment should be made on the basis of a common denominator which answers the meaning of all the texts stated to be authenticated originals by the Parties. It is universally admitted that treaties can confer rights and impose obligations on the contracting States only within the limits within which the intent of these States became manifest in a concordant manner. It is clear that the expression "*considéres*" of the Russian Treaty, includes "*traités*" or "treated", because a person who was not a United Nations national, but who was treated as enemy by the Italian Government, must have forcibly been first considered as enemy by the aforesaid Italian Government, whereas the reverse proposition is not correct.

(*c*) The true and proper meaning of all international treaties should always be found in the purpose aimed at by the Parties.

The Russian text of Article 78, paragraph 9 (*a*), sub-paragraph 2 of the Treaty of Peace, does not seem to answer the intent of the contracting Parties, at the time they drew up the Part VII concerning property, rights and interests, particularly Nos. 1 to 4 of Article 78, for the purpose of assuring restoration to persons injured by exceptional war measures introduced in Italian legislation. A restoration of property, rights and interests is not conceivable unless these were previously injured in such a manner as to engage the responsibility of the Italian State, subject only to material and direct war damages caused by military operations.

This is especially evident in Article 78, No. 3 of the Treaty of Peace which provides:

> The Italian Government shall invalidate transfers involving property, rights and interests of any description belonging to United Nations nationals, where such transfers resulted from force or duress exerted by Axis Governments or their agencies during the war.

A person can be "believed to be, or esteemed to be" an enemy without any injury resulting thereby either to himself or to his property, rights or interests; for such injury to materialize, it is necessary that there be a concrete course of action by the state authorities, having prejudicial consequences for

the person against whom such course of action is taken. The negotiators did not aim at creating an "enemy status", whereby it would be sufficient for the subject conditions to materialize under Italian law to make the provisions of the Treaty of Peace applicable. The meaning to be given to the Article in question is hence one of concrete, effective treatment, meted out to a person by reason of his enemy status, and not by abstract considerations envisaging the mere possibility of subjecting him to a course of action by the State of such a nature as to cause injury on the grounds that such a person would fulfil the conditions for being considered, under the terms of a legal provision of municipal law, as an enemy person.

(*d*) It should be furthermore considered that the provision contained in Article 78, paragraph 9 (*a*), sub-paragraph 2 of the Treaty of Peace, is a rule of an exceptional character, in that it extends the diplomatic protection of the United Nations to persons who are not their nationals; like every exception, it must be interpreted in a restrictive sense, because it deviates from the general rules of the Law of Nations on this point. Likewise for this reason the English and French texts of the Treaty answer the intentions of the co-contracting Parties better than the Russian text.

(*e*) The interpretation of the Article in question of the Treaty of Peace through Article 3 of the Italian War Law of July 8, 1938, does not lead to the conclusion proclaimed by the Plaintiff Party. If it is correct that the Treaty refers to this law for determining who are non-enemy persons and can nevertheless be held to be an enemy "under the terms of the legislation in force in Italy during the war", it adds, in the French and English texts, which the Commission considers to be the correct expression of the intent of the Parties, that they must have been treated as enemies. Two conditions must hence be simultaneously fulfilled for entailing the application of Article 78, paragraph 9 (*a*), sub-paragraph 2 of the Treaty of Peace:

(1) A regulation of principle, contained in Italian legislation in force during the war, of considering certain persons as enemies, even though they did not possess the nationality of a State at war with Italy; this is the case of stateless persons residing in enemy countries;

(2) Implementation of this provision by actual treatment meted out to a person because he is enemy.

67. The interpretation set forth herein confirms in full the interpretation which had already been given this article in several previous decisions of the Italian-United States and the French-Italian Conciliation Commissions.

In the Bacharach Case (No. 22),[1] decided on February 19, 1954, by agreement of the Representatives of the United States and Italy, without resort to a Third Member, this viewpoint was adopted in the following terms:

> The Agent of the Government of the United States of America refers also to the provisions of Art. 3 of the Italian War Law which declares that stateless persons residing in enemy countries are considered enemy nationals; but this provision contains an abstract statement which is not sufficient in itself alone to constitute treatment as enemy; this provision could become important only in the event that it were the basis for any restrictive measure that may have been taken against the claimant or her property, which does not seem to be the case. . . . To be treated as enemy necessarily implies on the one hand that there be an actual course of action on the part of the Italian authority (and not an abstract possibility of adopting one), and on the other hand that said course of

[1] *Supra*, p. 187.

action be aimed at obtaining that the individual who is subjected to it be placed on the same level as that of enemy nationals. (Archives of the Commission.)

The Agent of the Government of the United States points out that this decision refers to a position of fact which differs from that of Albert Flegenheimer, because Mrs. Bacharach was a Jewish person who left Italy before war broke out, on September 7, 1938, for fear of the racial persecutions, and left her furniture in a storage room in Milan where it was destroyed as the result of an air raid on August 12-13, 1943; in the Albert Flegenheimer case, the cancellation of a derogatory contract is involved. The Commission believes that if the facts are different, the applicable principles are the same, because the property of the person concerned were not subjected to sequestration or other measures of control on the part of the Italian Government or its agents.

The argument contained in the Bacharach decision with respect to the meaning of Article 78, paragraph 9 (*a*), sub-paragraph 2 of the Treaty of Peace, was confirmed by three decisions rendered by the Italian-United States Conciliation Commission, completed by a Third Member, on September 26, 1956; these decisions involved the Treves,[1] Levi[2] and Wollemborg[3] cases, in which the Commission distinctly established that the applicability of this Article presupposes a concrete course of action by the Italian authorities on the basis of the legislation in force in Italy during the war, actually subjecting the person concerned to measures intended for enemy nationals (Archives of the Commission). The French-Italian Conciliation Commission, completed by a Third Member, adopted the same interpretation in the Case of Società Generale dei Metalli Preziosi, in its decision No. 167 of March 9, 1954;[4] this case involved a company established under Italian law, but attached by the Italian authorities by reason of the importance of a French Company's participation in its capital stock. The Commission affirmed:

Because the measures, described above, were taken against her in Italy, the Società Generale dei Metalli Preziosi, under Article 78, paragraph 9 (*a*), sub-paragraph 2, must be considered as having been treated as enemy by the Italian Government. (*Recueil des Décisions*, 5e fasc., p. 12.)

68. The Agent of the United States has nevertheless tried to establish that Albert Flegenheimer was actually treated as enemy during the war, under the Italian laws. He points out, a fact which cannot be denied, that beginning on April 29, 1940, Albert Flegenheimer became a stateless person because his German nationality was forfeited, and that furthermore, as he had resided in Canada in 1940 and in 1941, he was domiciled at that time in a State that was at war with Italy, thus fulfilling the conditions required by the Italian War Law of 1938 for the purpose of treatment as enemy. As proof of actual treatment as enemy by the Italian authorities, the Agent of the United States cites the three documents, described below, connected with the sale of Albert Flegenheimer's 47,907 shares of the Società Finanziaria Industriale Veneta:

(*a*) A letter dated June 15, 1940 written by his general attorney, Mr. Valenti, in Milan, to Mr. Montesi, reading as follows:

I have been informed that ISTCAMBI, because of the measures taken against subjects of enemy States, has *deferred* the transfer of the Finanziaria shares.

---

[1] *Supra*, decision No. 144, p. 262.
[2] *Supra*, decision No. 145, p. 272.
[3] *Supra*, decision No. 146, p. 283.
[4] Volume XIII of these *Reports*.

I have, in turn, hastened to explain to the informer that no restrictive measures can be applied against Mr. Flegenheimer, a German national, because the circumstance that he resides in Canada is irrelevant.

(*b*) A certificate of the Italian Consul General in New York dated September 18, 1940, affirming that Albert Flegenheimer submitted a German passport from which it appeared that he was a German national and resided at 1795 Riverside Drive, New York.

(*c*) A letter dated March 11, 1941, written by the Ministero Scambi e Valute to the Società Finanziaria Industriale Veneta, the most important excerpts of which are the following:

We refer to your letters of February 26th ult., with which you have forwarded a list of the foreign Corporations which will purchase, cash payment, your shares owned by the Flegenheimer brothers, Albert and Joseph, jewish persons formerly German nationals, and at present deposited in Italy in the "Foreign Jews' dossier".

. . . In connexion with the foregoing, we confirm our agreement to the operation indicated above, while, in order that appropriate instructions may be issued to the competent bodies, we request you to specify the amounts for which the subject shares are to be transferred to the "Distilleria di Cavarzere".

69. The Plaintiff Party believes that Albert Flegenheimer, on the basis of these documents, inasmuch as he was a stateless person residing in an enemy country during World War II, fulfilled the conditions of Article 3 of the Italian War Law of 1938, and that it was for this reason that the Italian authorities, prior to the derogatory contract of March 18, 1941, impeded the first business transaction plan, and, after its conclusion, raised difficulties in connexion with the transfer of the price of the sold shares, because the authorization to pay the $277,860.60 in New York was given only three months after the conclusion of the contract, namely on June 11, 1941; he was thence actually treated as enemy at a time when the Italian authorities could no longer consider him as a German national because they themselves qualified him as a Jew, formerly a German national.

The Agent of the Government of the United States contends that the Italian Government, after alleging in the course of these proceedings, that the remittance in dollars to New York had been possible only because Flegenheimer had deceived the Italian Government by invoking his German nationality in order to benefit by a treatment reserved to the nationals of an allied State, can now no longer justify a measure it had taken in favour of the person by stating that it was once more misguided by the fact that Albert Flegenheimer had told the Italian Consul General in New York that he was domiciled in that city, at a date (June 1941) when the United States was not yet at war; the principle of estoppel would oppose this.

He concludes therefrom that the Italian authorities treated Albert Flegenheimer as enemy twice, first in 1940 and then in 1941; insofar as necessary, he formulated his conclusions in this connexion under No. V.

70. This Commission fails to discover, either in these documents or in these allegations, proof of a treatment as enemy meted out to the individual concerned by the Italian authorities.

Lawyer Valenti's letter of June 15, 1940, refers to a former deed of sale of May 1, 1940, with the Société Générale de Sucreries et Raffineries Roumaine, in Brussels (a Company of the Montesi Group); this sale related to the same 47,907 shares of the Società Finanziaria Industriale Veneta which were the property of Albert Flegerheimer; the price of $239,535 was to be paid to the

Société Générale de Belgique in Brussels as soon as possible, in favour of the Bank of Manhattan Company at New York. The shares were to remain on deposit with the Banca Popolare Cooperativa Anonima di Novara until confirmation was received by this Italian bank from the aforesaid Société Générale de Belgique that the amount in dollars had been received. A stake of 1,400,000 lire was the object of a supplementary contract of May 16, 1940. It had been agreed that if within the time limit of ten days after the Italian bank had received the sold shares, the amount due in dollars was not paid, the contract would be cancelled and considered null and void. In the supplementary contract, it was furthermore provided that the amount in lire was to be paid "as soon as Istituto Nazionale per i Cambi con l'Estero had confirmed . . . the authorization to effect the operation already given by the Ministero Scambi e Valute in its communication of April 1, 1940 . . . and April 30, 1940 . . . against the withdrawal of the sold shares". It was further stipulated that the sale of the shares would be revoked and cancelled if the remittance of the sold shares was not made within the time limit of one month beginning from May 16, 1940, and that the contract would likewise be invalidated and cancelled if the purchasing company did not effect payment of the $239,535 due to the Société Générale de Belgique, or failed to obtain from this latter company a statement establishing that it had effected remittance of this sum to the Bank of Manhattan Company at New York.

As Italy entered the war on June 10, 1940, these contracts do not fall under the provisions of Article 78, paragraph 3 of the Treaty of Peace which contemplates only contracts concluded during the war, under force or duress exerted by the Italian Government or its Agents. Lawyer Valenti's letter of June 15, 1940, does not furnish proof that the Italian authorities ordered the withholding of the transfer of Albert Flegenheimer's shares; the difficulties which were pointed out were in any event promptly removed as the result of the German nationality which was at that time attributed to the individual concerned. There is no indication permitting one to admit that he was treated as enemy by reason of his statelessness, because the Italian authorities were unaware at that time, as Flegenheimer himself was unaware, of the fact that he had lost his German nationality a few days before the conclusion of the contract, namely on April 29, 1940, because the forfeiture decreed against him by the authorities of his country of origin was published in the *Deutscher Reichsanzeiger und Preussischer Staatsanzeiger*, No. 103, only on May 4, 1940, thus subsequent to the conclusion of the principal contract of May 1, 1940. This lack of knowledge as to the true status of the individual concerned appears also from the statement of the Italian Consulate General in New York of September 18, 1940, affirming Albert Flegenheimer's German nationality on the basis of the German passport submitted by the latter and affirming, further, that he was domiciled in New York. It appears that the Agent of the United States wishes to take advantage of this incorrect information in order to rebut the theory of apparent nationality propounded by Italy; but this criticism is badly directed, because it is not a question of ascertaining whether the individual concerned made improper use of his German nationality, but whether or not the Italian authorities treated him as enemy, notwithstanding his apparent nationality, because he was a stateless person and was residing in an enemy country at the same time. This question must be settled negatively.

In actual fact, the execution of the former contract was impeded by the German invasion of Belgium, which began on May 10, 1940, as the purchasing Company's head office was in Brussels. Neither Albert Flegenheimer's statelessness, nor his domicile in Canada were the cause of the impediment. Proof of the foregoing is found in lawyer Valenti's letter of July 16, 1940, wherein it

is noted that the Istituto Nazionale per i Cambi con l'Estero had authorized the transfer of Albert Flegenheimer's 47,907 Finanziaria shares. The impossibility to pay the price of the sale at Brussels in favour of a New York bank is due to the measures taken by the occupying Power in Belgium during World War II, and it is as the result of the application of the stipulations concurred by the parties that the contracts of May 1 and May 16, 1940, became null and void and could not be carried out.

They were replaced by the contract of June 6, 1941, which was concluded with an Italian company of the Montesi group, before the United States entered the war on December 8, 1941, at a time when Albert Flegenheimer resided there. His status of statelessness was known on that date, but he was not domiciled in a country that was Italy's enemy. He thence did not fulfil the necessary conditions for being considered as an enemy person under the terms of Article 3 of the Italian War Law of 1938, and, in fact, he was not treated as such. The letter dated March 11, 1941, of the Ministero per gli Scambi e per le Valute, invoked by the Agent of the Government of the United States, establishes that the operation of the sale had not been hindered by the Italian Government or its agents; on the contrary, the latter authorized the payment to the Bank of Manhattan Company at New York of the price established in the new contract of sale, namely, $277,860.60 which sum, however, was immediately blocked upon arrival because the American nationality of the individual concerned had not been recognized by the United States, which country he had entered on a German passport.

Treatment as enemy, according to the final written observations (Rebuttal) of the Plaintiff Party would flow from a delay of less than three months in the transfer of dollars to the New York bank, effected on June 6, 1941, while the second contract was dated March 18, 1941, delay which the Plaintiff attributes to the knowledge of Albert Flegenheimer's statelessness by the Italian authorities and to his residence in Canada, an enemy country, so that, in their opinion, he automatically fell, under the terms of the Italian legislation, within the category of persons considered as enemy. This argument does not appear to be sufficient to establish that the individual concerned was treated as enemy by Italy, as the 1938 War Law provided that enemy nationals, or individuals considered as such, were under prohibition to perform any operation in connexion with their securities or property (Article 312), under penalty of having their securities or property sequestered (Article 295) or, possibly, of submitting these securities or property to forced sale and sequestration of the proceeds. It is not alleged that any such measure was taken against the individual concerned by the Italian authorities, who, on the contrary, authorized a bank transfer of the price in dollars, in free currency and without any reduction, and liberated the securities owned by Albert Flegenheimer from the blocking applied to all foreigners, under the Italian laws on currencies, without consideration of their nationality or religion. The Commission fails to see in this three months' delay, which appears to be normal in time of war, a hostile treatment, as this must have the characteristics of a discriminatory and prejudicial treatment which was not applicable to all non-Italian property, rights or interests.

71. This Commission is of the opinion that the English and French texts of Article 78, paragraph 9 (*a*), sub-paragraph 2, of the Treaty of Peace with Italy, correspond better than the Russian text to the intention of the negotiators and the conditions which they intended to settle and, therefore, these must prevail over a less adequate text drawn up in another language.

Furthermore, as the Plaintiff has not established that Albert Flegenheimer

was even plausibly treated as enemy by the Italian authorities, under the terms of Italian legislation, the Commission holds as non-pertinent the conclusion directed at obtaining from the Italian Government the production of all the acts and documents in the possession of the Italian authorities, for the years 1940 and 1941, concerning foreign exchange operations of the Società Finanziaria Industriale Veneta, of the corporations controlled by the said Company, as well as those concerning Mr. Montesi personally, particularly those relating to the purchase of Albert Flegenheimer's ownership interest in Finanziaria.

72. In the Lovett-Lombardo Agreement, concluded on August 14, 1947, and described as "Memorandum of Understanding between the Government of the United States of America and the Italian Government concerning the settlement of certain wartime claims and related matters", invoked by the Plaintiff Party, the Italian Government, as a result of the waiver by the Government of the United States of certain claims based on the Treaty of Peace and the concession by the latter of certain advantages to Italy, in particular that of allowing her to rebuild the tonnage of her commercial fleet, consented to a broad extension of the protection accorded by Article 78 of the aforesaid Treaty to American nationals who claimed the restitution of their property and interests which had been transferred as the result of measures of seizure or control on June 10, 1940, or thereafter.

The Commission is of the opinion that in the instant case this Agreement cannot obtain the effect of giving Article 78, of which it is only a broad interpretation, the authority of according American nationals, on certain claims, an extension of protection; this protection, in fact, rests, completely on the fundamental condition established by this Article, that is, title to United States nationality with which the individual concerned must be vested in order that he may avail himself of the subject Agreement. It therefore presupposes that the injured party must be in a position to submit evidence, to the full satisfaction of law, of his status of United Nations national, a condition which the Commission cannot hold as having been fulfilled in Albert Flegenheimer's case.

73. G. *On the relevant dates for the applicability of Article 78 of the Treaty of Peace with Italy.*

Article 78, paragraph 9 (*a*), sub-paragraph 1, of the Treaty of Peace with Italy, provides:

> "United Nations nationals" means individuals who are nationals of any one of the United Nations, or corporations or associations organized under the laws of any of the United Nations, at the coming into force of the present Treaty, provided that the said individuals, corporations or associations also had this status on September 3, 1943, the date of the Armistice with Italy.

Therefore, the dates which serve as criteria are September 3, 1943 and September 15, 1947 (coming into force of the Treaty).

The Lovett-Lombardo Agreement contains another solution in its Article V:

> For the purpose of this *Memorandum* of Understanding, the term "nationals" means individuals who are nationals of the United States of America, or of Italy, or corporations or associations organized under the laws of the United States of America and Italy, at the coming into force of this *Memorandum* of Understanding, provided that under Article 3 above, nationals of the United States of America shall, for the purpose of receiving compensation, also have held this status either at the time at which their property was damaged or on September 3, 1943, the date of the Armistice with Italy.

A lengthy dispute arose between the High Parties to these proceedings on the question as to whether the admissibility of a Petition for restoration or restitution is subject to proof of United Nations nationality:

(*a*) on the date on which the damage was suffered by one of their nationals as well as on the other two dates established by the Treaty of Peace; or

(*b*) on the dates of September 3, 1943 and September 15, 1947, if this nationality was acquired subsequent to the date of the damage; or

(*c*) alternatively, either on the date of the damage, or on that of the Armistice (Lovett-Lombardo Agreement); or even

(*d*) only on the date of the coming into force of the Treaty of Peace (September 15, 1947), when the damage occurred after the Armistice, because the military operations continued until the surrender of the German troops in Italy.

The Government of the United States contends that no consideration should be given to the date of the damage and that it is sufficient that the claimant was in possession of the nationality of the United Nations on the dates specified by the Treaty of Peace in order that he be admitted to the benefits of Article 78 of this Treaty, whereas the Italian Government contends, on the contrary, that the date on which the damage occurred must always be given consideration and that the claim of the United States in behalf of Albert Flegenheimer, who alleges to have suffered injury by a contract concluded under duress on March 11, 1941, cannot be accepted by the Commission because of the absence of a fundamental condition of the general Law of Nations requiring that the injured party be a national of the claiming State on the date on which he sustained damage.

The Commission holds that this question can be left open in the instant case because it would be important only if Albert Flegenheimer's title to American nationality were proved to the satisfaction of law, which in the Commission's opinion it is not, in which case consideration would have to be given to the German nationality of the individual concerned, by virtue of either the effective nationality theory or the apparent nationality theory, which the Commission also rejects. It is sufficient for the Commission to note that Albert Flegenheimer has failed to prove that he was a United Nations national on either of the dates specified in Article 78, paragraph 9 (*a*), sub-paragraph 1 of the Treaty of Peace, namely on September 3, 1943 and September 15, 1947. It would be the same if, in application of the Lovett-Lombardo Agreement, consideration were to be given to the date of the damage, June 11, 1941, or to the date of the Armistice with Italy, September 3, 1943.

CONCLUSIONS:

On the basis of the foregoing considerations of fact and of law, this Commission concludes:

1. that Albert Flegenheimer acquired by filiation the nationality of the United States, at birth, in Wurttemberg on July 4, 1890;

2. that he acquired German and Württemberg nationality as the result of his naturalization in Württemberg on August 23, 1894, and thereby lost, after five years' residence in his new home country, his American nationality, under the Bancroft Treaty concluded on July 2, 1868, between the United States of America and Wurttemberg;

3. that he never re-acquired his American nationality after reaching majority;

4. that he was therefore vested solely with German and Württemberg nationality, after five years' residence in Germany, that is, beginning from 1895 until the German decree of April 29, 1940, published on May 4, 1940, declaring he had forfeited that nationality;

5. that he became stateless beginning from this latter date, but that he did not prove that he was treated as enemy by the Italian authorities during his stay in the countries at war with Italy, Canada first and later the United States;

6. that he was never naturalized in the United States since he took up residence in that country in 1941/1942;

7. that the certificate issued to him by the United States authorities on July 10, 1952, subsequent to the filing of the Petition in the instant case with this Commission, on June 25, 1951, and after the new administrative investigations by the American authorities in 1952, which were also held subsequent to the date of the pending legal action, is not of a nature to prove, to the full satisfaction of law, that Albert Flegenheimer fulfils the conditions required by Article 78, paragraph 9 (*a*), sub-paragraph 1 of the Treaty of Peace with Italy, for the purpose of being considered as a United Nations national; nor does he fulfil the conditions required by Article V of the Lovett-Lombardo Agreement;

8. that it is not established that he fulfils the conditions of Article 78, paragraph 9 (*a*), sub-paragraph 2 of the aforesaid Treaty of Peace.

For the foregoing reasons, and dismissing all contrary conclusions of the High Parties to this dispute,

DECIDES:

I. That Albert Flegenheimer cannot be considered a United Nations national for the purposes of Article 78, paragraph 9 (*a*), sub-paragraph 1 of the Treaty of Peace with Italy;

II. That Albert Flegenheimer cannot be considered a United Nations national within the meaning of Article 78, paragraph 9 (*a*), sub-paragraph 2 of the Treaty of Peace with Italy;

III. As a consequence, the Petition filed in his behalf on June 25, 1951, by the Government of the United States is rejected on grounds of inadmissibility;

IV. That this decision is final and obligatory.

The dispositions of this decision are adopted by unanimous vote, although on some points of law the Representative of the United States of America is not in agreement.

DECIDED at Geneva, at the domicile of the Third Member, on this 20th day of September, 1958.

The Third Member

Georges SAUSER-HALL

The Representative of the United States of America	*The Representative of the Italian Republic*
Alexander J. MATTURRI	Antonio SORRENTINO