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Miliani Case (of a general nature)

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MILIANI CASE

(By the Umpire:)

In cases of double citizenship neither country can claim the person having the same as against the other nation, although it may as against all other countries.

However such matters may be treated by the diplomatic branch of a government, an international commission can only accord damages to a citizen or subject of a claimant country — not to the country itself, and taking no account of offenses to a nation as such.[1]

AGNOLI, *Commissioner* (claim referred to umpire):

Article 4 of the Italian Civil Code declares that " the father being a citizen, the son is likewise a citizen."

The constitution and the civil code of Venezuela declare, instead, that all who are or may be born on Venezuelan soil are Venezuelans. From which it follows that sons of Italians born in Venezuela are Italian citizens according to the law of Italy and Venezuelans according to the law of Venezuela. In the event of conflict between the two provisions, would Italy have the right to protect individuals finding themselves in the juridical condition above mentioned, and would the Mixed Commission be competent to consider the claims of such according to the protocol of February 13, the principles of equity, and the principles of international law?

To both questions I answer in the affirmative. The right of Italy to accord diplomatic protection to the sons of her citizens, wherever born, was expressly reserved by the Royal Government, so far as concerns Venezuela, in a note of the royal chargé d'affaires at Caracas, dated March 13, 1873, by which protest was made against the provisions of the Venezuelan act of February 14 of that year.

The sons of citizens are citizens by the national law, and subsequent legislation by another State can not deprive them of this quality or minimize the rights accruing to them under the former act.

The imposition of a nationality on a preexisting one is a fact juridically abnormal, and certainly can not in any manner vitiate the original one.

We must distinguish between these two facts: The acquisition of the new nationality and the loss of the old one. The first depends exclusively upon the foreign law; the second exclusively upon the home law, and it is clear that the denationalization of an Italian is not to be sanctioned by any but Italian law.

Our law grants the citizen full and absolute liberty to become a foreigner, but insists that the change shall be of his own spontaneous choice. We can not, therefore, consider a foreigner him upon whom a foreign law imposes a new nationality, when it does not appear that he has lost or relinquished his Italian nationality, and we can not abandon him.

Were we to accept such a rule we would arrive at excessive consequences, since we would thereby subject ourselves without discussion to the provision of any foreign law whatever operating upon our citizens in this respect, however illiberal and contrary to general custom it might be in principle.

The consequence being thus illogical and absurd, the principle from which it flows must be erroneous and unacceptable.

Granting that the local law may impose another nationality on the sons of Italian subjects born in Venezuelan territory, it can not thereby deprive them of the quality of Italian citizenship. In regard to this very question the court of Lyons laid down this maxim:

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[1] Same doctrine discussed in British-Venezuelan Commission, Vol. IX of these Reports, p. 385.

Si l'acquisition d'une nationalité est régie par la loi du pays où elle est obtenue, la perte de la nationalité l'est par celle du pays auquel appartenait l'individu naturalisé.

If, therefore, loss of nationality does not take place under the conditions above stated, neither can Italy lose the right to protect the sons of citizens born on foreign soil. If such were not the case, by the operation of special Venezuelan laws all foreigners here residing might be declared citizens of Venezuela, in which event claims would cease to exist, and there would no longer be need of diplomatic representation.

Now there can be no doubt that the limits of diplomatic action are fixed by international law, and can not be restricted by internal legislation.

This right being established, there logically flows therefrom the admissibility of claims of persons coming under this head before the Mixed Commission.

This Commission, be it understood, is governed by the terms of the protocol, which, from our point of view, has referred to it all classes of Italian claims, without distinction or exception.

Why should the Commission deem itself incompetent to pass upon them? Is it not a tribunal which was constituted and accepted by the mutual agreement of both Venezuela and Italy? What motive is there for rejecting the consideration of claims of persons having two nationalities, and therefore entitled to the protection of both countries? None, from the point of view of equity, so the claim be just and well founded. There would only remain the elimination of technical exceptions, but this is already accomplished by the protocol.

The tribunal of arbitration is therefore competent, even in the case where the incubus of a dual nationality bears upon the claimant, because under no circumstances may the local citizenship outweigh the other.

But we may go further. It seems to me that, as between the two nationalities enjoyed by Venezuelan-born sons of Italians, that of Italy ought, for various reasons, to prevail. There is no doubt that the more liberal laws do not regard the mere accident of birth in any country as being of itself sufficient to convey citizenship, but hold, on the contrary, that it should be determined with due regard to family. The contrary principle, sanctioned by various legislations, especially the American (with the exception of the United States, the Supreme Court of which favors the view (based on the act of April 9, 1866, Rev. Stats., U.S., sec. 1992) that children born in the union of foreign parents who have not been naturalized are themselves foreigners), constitutes an abandonment of the rules which inspired the wisdom of the Roman legislator and are a return to the now-condemned system of the middle ages, adopted for political reasons and expediency, but carrying within itself something contrary to the order and peace of the family, in that a father might have ten sons, each of a different nationality. While the ties of family rest on sacred and indissoluble foundations, which are the basis of our social order, there is not always a moral bond, a tie of affection, or a mutual interest between the land and the person born therein.

Cogordan (p. 25) observes:

Il était logique, en effet, sous l'ancien régime, d'attribuer la qualité de français à quiconque était né sur le sol de France; puisque la nationalité n'était que la soumission au Roi; mais quand parut le sentiment de la race, l'idée de la patrie française existant en elle-même, abstraction faite du Roi, et résidant dans l'ensemble des français, il était juste de revenir à la filiation, puisque c'est par la famille qu'on acquiert les qualités physiques et morales qui rattachent l'homme à une race et à une patrie.

The fact of birth in any given country may be a mere accident.

Fiore (par. 330 et seq. of Vol. I of " Diritto Internazionale Privato "), examining the question of a double nationality coming before a tribunal of a neutral State — that is, a tribunal which, like the present Mixed Commission — is not to apply any particular law on the question of citizenship, but determine that of a given person, holding to the principles of international law as well as to the general principles of common law, concludes that such tribunal should admit that " a legitimate son acquires by birth the nationality of his father (Vol. I, p. 334), and adds (p. 335, par. 333):

The principle which bestows upon the son the nationality of the father is derived from Roman law, and rests on the natural tendency of the individual, which warrants the assumption that each desires the citizenship of his father. The oneness and homogeneity of life, of the affections, of the sentiments of family, all render such assumption reasonable, founded as it is on the ties of blood, and surely more rational than that which would attribute to the son the nationality of the soil on which he was born, "*jure territorii.*"

The court of cassation of Belgium, founding itself on the adage, " *Nasciturus pro nato habetur quando de ejus commodo agitur,*" decided that the son of a person who changed nationality after the conception, but before the birth, of said son, may invoke the nationality which his father had at the time of his (the son's) conception, and thereby admitted that citizenship should be considered as a personal right of the individual from the moment of his conception.

According to this ruling the Venezuelan-born sons of Italians first possessed Italian citizenship, and at birth acquired the Venezuelan; but the original and prevailing one, the one to be considered by the Commission, which is not to apply either Italian or Venezuelan laws, but, on the contrary, reject exceptions based on local laws, is surely the Italian.

The Mixed Commission, resting upon sound principles of international law, should hold inefficient the law which would impose citizenship when not only is there no act tending to show a voluntary renunciation of the original nationality, but everything showing a preference for it, as in the case of claimants, who, having a dual citizenship, in fact, choose the Italian, as clearly evidenced by their appearance before this tribunal demanding indemnity due them from Venezuela through the intermediary of the royal Italian legation.

Bearing in mind that the courts of the Republic dispense justice with no less impartiality than does the Commission, and considering as well that while the sentences of the former are susceptible of immediate execution, those of the latter are subject to some years' delay and to the fluctuations of Venezuelan custom-house receipts, it is evident that a claimant having two nationalities who turns to this tribunal rather than to the local courts for justice in spite of all delay, impliedly testifies his choice for Italian nationality. Various reasons, both in law and in equity, exist why this Commission should accept well-founded claims of Venezuelan-born sons of Italians. But the strongest, to my mind, is that, the Italian nationality of the claimants having been established, the nationality of their claims can not be denied, and that therefore they should be treated according to the provisions of article IV of the Washington protocol of February 13 of this year.

Claims of this character have been received and adjudicated in the French-Venezuelan Commission, before which the question of nationality of sons of French citizens born in Venezuela was not even raised. Our own are, therefore, under Article VIII of the above-mentioned protocol, entitled to equal treatment.

AGNOLI, *Commissioner* (additional opinion):

With one or two exceptions, in which damages for which claims were presented to this Commission were suffered in person by Venezuelan-born sons

of Italians, all claims of persons finding themselves in regard to citizenship in the condition above mentioned were by them presented as representatives of deceased fathers, who had themselves suffered the losses on which the claims were based and about whose citizenship there was and could be no question.

The undersigned maintains that Venezuelan-born sons of Italians are competent to present claims before this Commission, not only because of the reasons assigned in the first part of this memorial, but also because said claims are of Italian origin, since in nearly all cases indemnity is asked for damages suffered by persons unquestioningly recognized as Italian by their heirs.

The gist of the question at issue, therefore, lies in deciding whether the original nationality of the claim shall be taken as the fundamental and decisive reason for its admission to the Commission.

The Commissioner for Italy feels no hesitancy in taking the affirmative on this point, being impelled thereto by every consideration of law, of logic, and of equity. The lack of time and the amount of work before him compel him to sum up briefly as follows:

The protocol makes no restriction as to the presentation of claims. To restrict the range of that instrument would be equivalent to an infringement of its spirit.

All requisitions, acts of personal violence, forced loans, illegal imprisonment — in short, all damages inflicted upon an Italian by the Venezuelan Government, or by its agents, or committed against an Italian on Venezuelan soil, when not characterized as acts of private malice, constitute an offense against the Italian Government, because by their nature and repeated occurrence they take on a political character and establish the right of intervention, and that of exercising a protective action — that is to say, a diplomatic action.

If to-morrow an Italian is killed in Venezuela, or his private interests are damaged, under circumstances which establish lack of diligence or prevention on the part of the Venezuelan Government, the Kingdom of Italy intervenes and claims. Would it be admitted in the course of diplomatic negotiations that Venezuela might object that the murdered man had no heirs, or that his heirs were born in Venezuela, and by this quibble escape the granting of adequate satisfaction? Certainly not, because in the person of the citizen the nation has been offended. Did the United States stop to inquire whether there were any heirs of the American citizen assassinated by brigands in Asia Minor when they demanded and obtained an indemnity of $100,000 from the Turkish Government?

Did France undertake to determine the nationality of the widows or children of the Italian operatives murdered at Aigues-Mortes, when an indemnity was awarded them on the demand of the Italian Government?

Now, should an exception, which would not be admitted, and I believe would not even be offered in the course of a simple convention between governments, be accepted before a mixed commission? No, because the mixed commission was constituted for the purpose of giving effect in its results to the diplomatic action which preceded it.

The Washington protocols were not drawn with a view to restricting the rights of claimant governments, but to affirm them in the solemnity of an international agreement.

Let us suppose that a principle contrary to the foregoing is admitted; what will be the consequences? The first would be that every debtor government would seek to retard to the utmost the fulfillment of its obligations, and each passing year would see diminished the amount of indemnity to be paid. Each death of a claimant leaving no heirs, or leaving heirs born on foreign soil having laws like those of Venezuela, would mean the virtual annulment of the claim.

We would therefore see negligence compensated, or, what is worse, encouraged.

But let us consider another result, and as a practical case, that of the claim of Poggioli recently submitted to this Commission.

The firm of Poggioli Brothers (and I do not enter here into any consideration of the value of the evidence) suffered heavy damages through the operations of governmental agents. The firm was composed exclusively of Silvio and Americo Poggioli, brothers, both Italians, born on Italian soil. Among the damages for which claim is made was the wounding of Silvio, who remains a cripple, and the murder of Americo, whose heirs, associated in the claim and forming now part of the existing firm of the same name, are the widow, daughter of an Italian but born in Venezuela, and several minor children, likewise born in this Republic.

The claim of Silvio Poggioli, for himself and his heirs, may not be denied for reasons of nationality, *because, though badly wounded, he was not killed.* The share of the claim demanded for Americo and his family may be rejected, and why? Because Americo was not merely wounded, he was killed, and to his widow and children, born in Venezuela, this Commission should award nothing. It would have perhaps been better to suppress Silvio as well; then there would be no occasion to discuss the Poggioli claim.

If the Commissioner for Italy could believe that a principle contrary to the one he is advocating is to prevail in this Commission, he would consider it his duty to advise the heirs of Americo Poggioli and all other claimants analogously situated to withdraw their claims, so as to leave a way open to future diplomatic action on the part of his Government.

The case is quite different when the claimants have voluntarily assumed Venezuelan nationality, either by naturalization or marriage, acts in which may clearly be seen a deliberate renunciation, excepting, however, the case of Berti-Nieves, in which the marriage of the Italian claimant to a Venezuelan was not solemnized until after the stipulation of the protocol at Washington.

It is an elementary rule in logic that any principle which leads to unjust or absurd consequences must itself be deemed unjust and absurd.

I invite the attention of my Venezuelan colleague and of the honorable umpire to decision No. 34 of the American-Venezuelan Mixed Commission of Revision in the case of Albino Abbiatti,[1] who suffered damages while he was an Italian citizen, and, being subsequently naturalized as an American citizen, presented his claim before that Commission, which in its just sentence enunciated these two principles: " The infliction of a wrong upon a State's own citizen is an injury to it," and that " in claims they must have been citizens at least when the claims arose."

No opinion was filed by Doctor Zuloaga.

RALSTON, *Umpire:*

The above-entitled claim is referred to the umpire upon difference of opinion between the honorable Commissioners for Italy and Venezuela.

The claim is based upon " vales " or receipts given by certain chiefs in 1871 and 1872, and as well upon seizures said to have been made by revolutionary and governmental chiefs in 1899 and 1900. The claim for the events of 1871 and 1872 during his lifetime belonged to Michele Miliani, an Italian subject, who was married to Matilde Miliani May 29, 1872, she then being a Venezuelan citizen. He died in Valera, Venezuela, in 1890. Their children were apparently born in Venezuela, which, by legal presumption, may be considered

[1] Moore, p. 2347.

still their residence, though no proof is offered on the subject. The widow has always lived in this country.

It is urged against the claim, first, that the earlier part is barred by prescription, thirty-one years having elapsed since its origin, and it never having been presented to the Venezuelan Government; and in addition, second, that the widow and children, claiming as of their own right for the later damages and by inheritance as to the earlier ones, are to be regarded as Venezuelan citizens. The latter objection will be discussed.

So far as the rights of the widow are concerned, the questions affecting them were disposed of in the case of the estate of Sebastiano Brignone,[1] wherein it was held that in the event of conflict of laws the status of a woman born in Venezuela, married here to an Italian, and becoming a widow and always residing here, was to be determined by the laws of Venezuela, the land of her domicile, which declared her to be Venezuelan. The condition of the widow in this case being identical, her claim must be rejected for want of jurisdiction, but without prejudice to her other remedies.

The case of the children deserves careful consideration. The Italian civil code provides:

ART. 4. È cittadino il figlio di padre cittadino.

The Venezuelan constitution provides:

ART. 8. Los venezolanos lo son por nacimiento ó por naturalización.
(a) Son venezolanos por nacimiento:
1. Todas las personas que hayan nacido ó nacieren en el territorio de Venezuela, cualquiera que sea la nacionalidad de sus padres.

It thus appears that a conflict of laws again exists, Italy claiming her nationality for the children of her subjects, without limitation as to the location of their birth, and Venezuela claiming as her citizens those born within her territory, irrespective of the nationality of their parents. Which should control?

England, the United States, Portugal, and nearly all the Central and South American States accept the rule followed by Venezuela, while Germany, Austria, Hungary, France, Sweden, and Switzerland follow broadly the rule adopted by Italy. Either theory has, therefore, very respectable support.

It is urged on behalf of the Italian rule that Venezuela should not be deemed to have power perforce to confer nationality irrespective of the desires of the person concerned; that a child is Italian not merely from the time of birth but from the time of conception, and that the Venezuelan law, operating from birth, can not change a nationality already established.

The doctrine that citizenship is fixed by conditions existing from the moment of conception, while occasionally referred to by courts and writers, is not so far established by reason or authority in international disputes as to induce the umpire to largely regard it. To base citizenship upon the conditions of such an uncertain moment would be to introduce into the international law an element of doubt.

In the umpire's opinion, therefore, the natural moment for determining the commencement of citizenship is that of birth, both laws from that moment receiving such effect as they may deserve. Assuming this position, it can not be contended that Venezuela, more than Italy, has given an enforced citizenship.[2]

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[1] See *supra*, p. 542.

[2] On pourrait élever un doute sur la question de savoir si le bienfait attribué au fils né, dans notre royaume, d'un étranger non domicilié depuis dix ans, pourrait

In discussing the rule that place of birth determines citizenship Cogordan (La Nationalité, p. 39) says that " the eminently practical spirit of the English Government has inspired a wise solution," in that Lord Malmesbury, in writing to Lord Cowley, ambassador at Paris, on March 13, 1858, said that if England recognized as English, children born in England of foreign parents she did not pretend to protect them as such against the authorities of the parents' country, which claimed them, above all when they voluntarily returned to that country; in other words, the Frenchman born in England would be protected by England in Germany, Italy, everywhere, in fact, except in France, where he could be legally called to military service.

Restating the same rule as existing in certain States, Tchernoff (Protection des Nationaux Résidant à l'Étranger, p. 470) says:

Un individu à double nationalité n'en aura qu'une dans le territoire de chacun des États qui le considèrent comme leur sujet. C'est la pratique de l'Angleterre et de la Suisse.

It follows from the foregoing that while the children of Miliani may with absolute legal propriety be recognized as Italians in Italy, or by Italy in any country other than Venezuela, in this country, and, as a consequence (following the decisions cited in the Brignone case, and accepting the domicile as furnishing the rule in case of conflict), before this tribunal, they must be considered, for the purposes of this litigation, as Venezuelans.[1]

The umpire is the more disposed to the rule above indicated because certain equities in the case favor it. Miliani came to Venezuela some time prior to

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s'étendre aussi au fils conçu dans le royaume et né à l'étranger, en vertu du principe infans conceptus pro nato habetur, quoties de commodo ejus agitur. Nous sommes d'avis que le législateur ayant employé le mot nato, on ne peut étendre la disposition à l'enfant concepto, et que la fiction par laquelle on répute comme déjà né l'enfant seulement déjà conçu ne peut valoir dans tous les cas. Pourtant, si le père eût continué à tenir domicile dans le royaume après la naissance de l'enfant, et si la naissance à l'étranger pouvait être considérée comme un fait accidentel et de passage, la disposition de l'article 8 pourrait être appliquée. Le fait seul de la conception, quelquefois difficile à constater et susceptible de nombreuses contestations, ne peut par lui-même être suffisant pour fixer une qualité aussi importante que celle de la nationalité. Mais si, indépendamment du fait d'avoir été conçu, l'enfant avait été élevé et avait reçu l'éducation dans le royaume, les facilités de l'article 8, fondées sur les attractions instinctives pour les lieux où l'enfant se développe et passe son enfance, ne devraient pas être refusées, par le seul motif qu'il était accidentellement né à l'étranger pendant un voyage (1).

(1) Confr. Richelot, t. I, p. 115; Caen, 5 février 1813; affaire Montalembert. V. Émigré. (Note de M. Fiore.)

La même solution est donnée par la jurisprudence française. Il est admis, en effet, et enseigné que l'enfant né à l'étranger, de parents étrangers, ne pourrait se prévaloir des dispositions de l'article 9 du Code civil, bien qu'il eût été conçu en France: la maxime infans conceptus pro nato habetur, quoties de commodis ipsius agitur, n'étant point applicable dans ce cas, parce qu'il résulte, et du texte de l'article 9 et de la discussion au Conseil d'Etat, que c'est exclusivement à la naissance sur le sol français qu'est attaché le bénéfice dont il s'agit. Voir Zachariæ, édition d'Aubry et Rau. I^e partie, Chapitre IV, § 70, t. I^er, note 1, p 209, et les auteurs cités par les annotateurs. P. Pradier-Fodére.

(Fiore, Droit International Privé, livre I, pp. 113, 114).

[1] The rule here laid down is that accepted by Bluntschli, who says (Droit Public Codifié, sec. 374):

" Certaines personnes ou familles peuvent exceptionnellement être ressortissants de deux états différents ou même d'un plus grand nombre d'états.

" En cas de conflit la préférence sera accordée à l'état dans lequel la personne ou la famille en question ont leur domicile; leurs droits dans les états où elles ne résident pas seront considérés comme suspendus."

1871, and died in 1890 at the age of 56 years. He had married in 1872. His children were all born here, and, so far as appears, have never claimed Italian citizenship till now, or lived in Italy. It is scarcely to be supposed that they have any intention of living upon Italian soil. To declare them to be Venezuelans is not to deny them anything that they have ever felt in any essential way they possessed, and an option to choose Italian citizenship is scarcely to be inferred from the fact that their mother has seen fit in their names to file a claim before this Commission.

Another consideration may be added. Michele Miliani, the father, deliberately established his domicile and married in Venezuela, choosing that his children should there and under her laws first see the light of day. While he had not power to select the land of his own birth, he could control that of his children. In so far as a father may be considered as selecting the citizenship of his children he did so, and under all the circumstances of the case it seems proper they should abide the consequences of his actions.

The foregoing considerations make it unnecessary to discuss the question of prescription.

The umpire has not discussed the suggestion that the claim, largely at least, was Italian in origin and should be considered, even if not now Italian, because involving an infraction of international duty on the part of Venezuela toward Italy which would survive even change of citizenship on the part of the individual claimant. It is sufficient to observe that all the considerations for or against a claim which appeal to the diplomatic branch of a government have not necessarily a place before an international commission. For instance, unless specially charged, an international commission would scarcely measure in money an insult to the flag, while diplomatists might well do so. On the other hand, commissions have and exercise jurisdiction over contract claims, while the diplomatic branch of government, although usually reserving the right, rarely presses matters of this nature. While it remains true that an offense to a citizen is an offense to the nation, nevertheless the claimant before an international tribunal is ordinarily the nation on behalf of its citizen. Rarely ever the nation can be said to have a right which survives when its citizen no longer belongs to it. Italy, save when her own pecuniary rights are affected, recovers nothing for her own benefit before a tribunal such as this, however much her own dignity may have been affected by the treatment of her subjects.

A decree may therefore be entered dismissing the claim, but without prejudice to such rights as the claimants may have elsewhere.

PETROCELLI CASE

The Government is liable for loss from having so taken possession of property as to especially expose it to destruction, but not for damages incident to ordinary warlike operations.

RALSTON, *Umpire:*

This case is submitted to the umpire upon difference of opinion between the honorable Commissioners for Italy and Venezuela.

While the claim is for 45,000 bolivars, embracing a large number of items, very few circumstances are so established by proof as to be worthy of consideration, and these only will be discussed.

It appears that the Government troops in the month of May, 1902, entrenched themselves in front of the claimant's dwelling house at a street corner in Ciudad Bolívar, and that as a result a battle raged around that house for five days,