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INTERNATIONAL LAW—STATUS OF GERMANY—NATIONALITY LAWS—VOTING IN GERMAN ELECTION AS FORFEITURE OF UNITED STATES CITIZENSHIP—Petitioner, an American citizen living in Germany, voted in the January 27, 1946 election of local officials in Rodach, Germany, American Zone of Occupation, held under the direction and with the approval of the Office of Military Government for Bavaria. Petitioner was issued a certificate of loss of nationality, based on section 801(e) of the Nationality Act of 1940,¹ which provides that American nationality is lost through "voting in a political election in a foreign state." *Held*, petitioner had not lost her citizenship. The Rodach election was held in "territory then ruled and governed by the United States and was held by permission and under the direction and by the authority of the United States"² and was not a political election in a foreign state within the meaning of section 801(e). *Brehm v. Acheson, Secretary of State*, (D.C. Tex. 1950) 90 F. Supp. 662.

In traditional international law, wars are ended either by subjugation or by agreement. Subjugation involves annihilation of the vanquished state;³ agreement assumes its continued existence,⁴ and is preceded by a period of belligerent occupation during which the laws of the occupied state are respected and the activities of occupation are confined to the restoration of law and order.⁵ The post-war situation in Germany does not fit easily into either of these categories. Following the unconditional surrender of the German military forces⁶ and the arrest of Doenitz and his associates, Germany was without an indigenous government. The functions of government were carried on by the occupants, and their Berlin Declaration of June 5, 1945, became the basic legal document of the occupation period. Its preamble states:

¹ 8 U.S.C.A. (1940) §801. Section 801(e) is as follows: "A person who is a national of the United States . . . shall lose his nationality by: . . . (e) Voting in a political election in a foreign state or participation in an election or plebiscite to determine the sovereignty over foreign territory."

² Principal case at 663.

³ 3 HYDE, INTERNATIONAL LAW, 2d ed., 2389 (1945).

⁴ *Id.* at 2391.

⁵ *Id.* at 1876 ff. The state of belligerent occupation is governed by articles 42-56 annexed to the Hague Convention of 1907, 2 MALLOY'S TREATIES 2288. On the necessity for going beyond the Hague provisions, see Kelsen, 38 AM. J. INT. L. 689 (1944) and Franklin, "The Legal System of Occupied Germany," INTERPRETATION OF MODERN LEGAL PHILOSOPHIES, ESSAYS IN HONOR OF ROSCOE POUND 263 (1947).

⁶ 13 DEPT. OF STATE BUL. 106 (1945), 59 Stat. L. 1857, signed May 8, 1945.

"The Governments of the United States of America, the Union of Soviet Socialist Republics and the United Kingdom, and the Provisional Government of the French Republic, hereby assume supreme authority with respect to Germany, including all the powers possessed by the German Government. . . . The assumption . . . does not effect the annexation of Germany."⁷

This declaration was supplemented and implemented by decisions at Potsdam, where a definitive statement was made regarding the agencies of government:

"In accordance with the agreement on control machinery in Germany [the Berlin Declaration], supreme authority is exercised on instruction from their respective governments, by the Commanders in Chief . . . each in his own zone . . . , and also jointly, in matters affecting Germany as a whole, in their capacity as members of the Control Council."⁸

The writers are agreed that the powers being exercised pursuant to these agreements far exceed the rights of belligerent occupants. They are also agreed that the Control Council functioned as the *de facto* government of Germany.⁹ But attempts to trace the territorial sovereignty of Germany under Allied control have led to controversy. Professor Kelsen has urged that the Berlin Declaration marked the end of the German State, that sovereignty vested at that time in the four occupying powers jointly, and that governmental sovereignty is being exercised by the Control Council on behalf of those four Powers.¹⁰ Others believe that Germany continues to exist as a state and that the powers of government are being exercised by the Allies on behalf of the German people;¹¹ the British

⁷ 12 DEPT. OF STATE BUL. 1051 (1945), 60 Stat. L. 1649.

⁸ 13 DEPT. OF STATE BUL. 153 at 154 (1945), issued August 2, 1945.

⁹ Kelsen, "The Legal Status of Germany," 39 AM. J. INT. L. 518 (1945); Mann, "The Present Legal Status of Germany," 1 INT. L. Q. 314 (1947); Fahy, "Legal Problems of German Occupation," 47 MICH. L. REV. 11 (1948); Rheinstein, "The Legal Status of Occupied Germany," 47 MICH. L. REV. 23 (1948); Jennings, "Government By Commission," 23 BRIT. Y. B. INT. L. 112 (1946); FRIEDMAN, *THE ALLIED MILITARY GOVERNMENT IN GERMANY* (1947).

¹⁰ In a cogent analysis, Professor Kelsen has termed Germany a *condominium* of the four occupying powers, meaning that, through complete subjugation or *debellatio* of Germany these powers have annexed and jointly exercise sovereignty over Germany. He sees the denial of annexation as a statement of good intention without legal effect although the *condominium* may be temporary and may end by the transfer of sovereignty to a new German state. As examples of well-known *condominiums*, he cites the authority exercised by Great Britain and Egypt over the Sudan since 1914 and that of Austria and Prussia over Schleswig-Holstein and Launburg from 1864 to 1866. Kelsen, "The Legal Status of Germany," 39 AM. J. INT. L. 518 (1945); also, Wright, "The Law of the Nuremberg Trial," 41 AM. J. INT. L. 38 (1947); Schwarzenburger, "The Judgment of Nuremberg," 21 TULANE L. REV. 329 (1947). The view that the German State has ended is reflected in the Constitution of the Free State of Bavaria, Art. 178: "Bavaria will join a future democratic federal state." Office of the Military Government (U.S.), *CONSTITUTIONS OF THE GERMAN LAENDER* 70 (1947). See NAWIASKY, *DIE VERFASSUNG DES FREISTAATS BAYERN*, 258 (1946).

¹¹ Professor Mann feels that the *condominium* analysis ignores the expressed intent of the Allied Powers. He suggests that this is a new experiment in international law, that under international law Germany is now a dependent state, and that the Allies exercise a *co-imperium*, i.e., "several states jointly exercise jurisdiction or governmental functions and powers in territory belonging to another state." He suggests the League mandates, United

Government has taken the position not only that Germany has survived as a state but that the war with Germany has not ended and German nationals are still enemy aliens in England.¹² Dividing Germany into zones and conferring absolute power on the commanders-in-chief in their respective zones (even though that power is exercised on direct instruction from individual governments) does not affect the territorial sovereignty of Germany, whatever its status may be.¹³ These acts were done by authority of the four powers acting jointly; the powers of the United States in Germany, no matter how extensive or absolute, were given by virtue of the Berlin Declaration and the joint authority therein assumed and not by the vesting of any part of German sovereignty in the United States. Yet the court in the principal case has impliedly stated that for purposes of the Nationality Act, Germany is not a foreign state, so that a vote cast in a German election, at least in the American zone, is not much different from a vote cast in Alaska. The judge felt strongly that petitioner had done nothing to merit involuntary expatriation,¹⁴ but could not conscientiously find that she had voted against her will and so bring the case within the doctrine of *Inouye v. Clark*.¹⁵ The election was a zonal affair carried out under the direction of the United States Military Government acting, by definition, on instructions from the United States.¹⁶ The opinion reflects the popular American attitude on the status of the Military Government in Germany; the reasoning used and the

Nations trusteeships, and the status of Cuba under the Treaty of 1898 are other examples of *co-imperiums*. Mann, "The Present Legal Status of Germany," 1 INT. L. Q. 314 (1947); FRIEDMAN, THE ALLIED MILITARY GOVERNMENT OF GERMANY 65 (1947); Jennings, "Government By Commission," 23 BRIT. Y. B. INT. L. 112 (1946). Professor Rheinstein is concerned with the fiduciary duties of the Allies to the German people under the *co-imperium*: Rheinstein, "The Legal Status of Occupied Germany," 48 MICH. L. REV. 23 (1948). In *Clark v. Allen*, 331 U.S. 503, 67 S.Ct. 1431 (1947), the Supreme Court refuted the argument that Germany was not bound by a pre-war treaty with the United States because Germany was no longer a state, stating that the assumption of power by the Control Council was "wholly consistent with the maintenance and enforcement . . . of pre-existing treaties."

¹² *Rex v. Bottrill ex parte Kuechenmeister*, 1 All E. R. 424 (1946). The court held the certification by Mr. Bevin, the Secretary of State for Foreign Affairs, affirming the existence of a state of war between Great Britain and Germany, to be binding on the English courts. Most of the writers believe the war ended with the surrender and the assumption of authority by the Allies. Friedman suggests that even though the war has not ended officially, the laws of peace apply de facto between Germany as represented by the Allied Control Council and the rest of the world: "The Legal and Constitutional Position of Germany under Allied Military Government," 3 RES JUDICATAE 133 (1947).

¹³ *Supra* note 9.

¹⁴ The opinion points out that petitioner, while greatly influenced because of her position as interpreter for Rodach's mayor, did not vote under duress. In this respect the case differs from two similar cases in Japan: *Meyoko Tsunashima v. Acheson*, (D.C. Cal. 1949) 83 F. Supp. 473 and *Hatsuye Ouye v. Acheson*, (D.C. Hawaii 1950) 91 F. Supp. 129, where the facts showed actual duress imposed by MacArthur's Headquarters.

¹⁵ (D.C. Cal. 1947) 73 F. Supp. 1000; see also *Tadayasu Abo v. Clark*, (D.C. Cal. 1948) 77 F. Supp. 806. In both cases formal renunciation of United States citizenship obtained by duress was held not to result in expatriation under §801(f) of the Nationality Act of 1940.

¹⁶ 18 DEPT. OF STATE BUL. 559 at 560 (1948).

almost complete lack of citation of authority¹⁷ indicate that the relevant theories of international law were never presented to the court. The importance of the legal status of occupied Germany is growing with the passage of time. Courts should be aware of the significance of decisions contrary to the international law on this point and should look, if they must, for other ways in which to find the Nationality Act inapplicable.¹⁸

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¹⁷ The first citation was Department of State Publication 2783, European Series 23, on the OCCUPATION OF GERMANY, POLICY AND PROGRESS FOR 1945 AND 1946, which in one instance used the word "sovereign" loosely; the second was *Archawo v. Acheson*, (D.C. Cal. 1949) 83 F. Supp. 473, in which it was held under similar facts that Japan was not a foreign state within the meaning of the Nationality Act and that an election directed by MacArthur's Headquarters was a "supreme and independent act of the United States Government." The result is as tenuous in the *Archawo* case as in the principal case because United States authority in Japan is derived from international agreements [The Potsdam Declaration Offering Terms for Japanese Surrender, 13 DEPT. OF STATE BUL. 137 (1945) and the Moscow Communiqué of December 27, 1945, 13 DEPT. OF STATE BUL. 1027 (1945)]. See Schwarzenburger, "The Judgment of Nuremberg," 21 TULANE L. REV. 329 (1947). See HOLBORN, AMERICAN MILITARY GOVERNMENT (1947), on the whole problem of occupation in the post-World War II period.

¹⁸ It is hard to see that the inequities in the principal case are greater than in *Savorgnan v. United States*, 338 U.S. 491, 70 S.Ct. 292 (1950) digested in 44 AM. J. INT. L. 409 (1950), where citizenship was held to have been lost through signing an oath of allegiance to Italy written in a language petitioner did not understand. While further authority on this point is practically non-existent, there does seem to be a tacit assumption in the cases decided since 1940 that the rule of *Perkins v. Elg*, 307 U.S. 325, 59 S.Ct. 884 (1939), does not apply to the provisions of §801 of the Nationality Act of 1940; see *Attorney General v. Richetts*, (9th Cir. 1947) 165 F. (2d) 193, in which voting in Canada without intention of expatriation did not result in loss of citizenship because the 1940 provisions were not applicable. The principal case assumes that doing the act defined results in expatriation without regard to intent, but its attempt to avoid the operation of the act would be less serious had it been based on a finding that the election was not "political" or that the provision was ambiguous because not reasonably intended to apply to an election conducted by American occupation officials. On the general types of expatriation see Roche, "Loss of American Nationality," 99 UNIV. PA. L. REV. 25 (1950).