

**A** HIGH COURT OF JUSTICE (CHANCERY DIVISION)—16TH, 17TH AND 21ST  
DECEMBER 1971

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COURT OF APPEAL—18TH, 19TH AND 20TH JULY 1972

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**B** HOUSE OF LORDS—26TH, 27TH, 28TH AND 29TH MARCH, 5TH NOVEMBER  
AND 13TH DECEMBER 1973, 6TH, 7TH AND 11TH NOVEMBER 1974  
AND 5TH FEBRUARY 1975

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**Oppenheimer v. Cattermole (H.M. Inspector of Taxes)(1)**  
**Nothman v. Cooper (H.M. Inspector of Taxes)(2)**

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**C** *Income tax, Schedule D—Foreign possessions—Double taxation relief—  
German government pension for past services—Paid to British subject of German  
origin—Whether German nationality deemed to be retained—Double Taxation  
Relief (Taxes on Income) (Federal Republic of Germany) Order 1955 (S.I. 1955  
No. 1203), Sch., arts. II(3), IX(1) and XXI(3); Double Taxation Relief (Taxes  
on Income) (Federal Republic of Germany) Order 1967 (S.I. 1967 No. 25), Sch.,  
D arts. II(3), IX(2) and XXIII(3).*

**E** *The Appellant in the first case was a German subject by birth. Having been  
persecuted as a Jew by the National Socialist regime, he emigrated in April 1939  
to England, where he had since resided. In 1948 he was naturalised as a British  
subject. From 1953 onwards he was in receipt of pensions paid out of the public  
revenue of the Federal Republic of Germany in respect of his work in Germany  
prior to emigration. The double taxation conventions between the United Kingdom  
and Germany provided that such pensions should be exempt from United Kingdom  
tax unless paid to a national of the United Kingdom who was not also a German  
national. It was common ground that under the conventions the meaning of  
“German national” fell to be determined according to English law.*

**F** *The only facts found as regards German municipal law for the purposes of  
the proceedings below the House of Lords were as follows. A German decree of  
1941 provided that Jews of German nationality who were then resident abroad  
should lose that nationality. In 1968 the Federal German Constitutional Court  
decided that the decree of 1941 was absolutely void ab initio (it was initially found  
that the decision had no retrospective effect, but on the remission mentioned below  
that finding was withdrawn). Under a German law of 1913, which was in force  
at all material times, a German who was neither domiciled nor ordinarily resident  
in Germany lost his German nationality if, without first obtaining permission to  
retain it, he had acquired another nationality.*

**H** *The Appellant was assessed to income tax under Case V of Schedule D  
for the years 1953–54 to 1967–68 in respect of his German pensions. On appeal,  
he contended that they were exempt under the double taxation conventions on the  
ground that English law did not recognise the 1941 decree, either (a) as being*

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(1) Reported (Ch.D.) [1972] Ch. 585; [1972] 2 W.L.R. 1045; [1972] 2 All E.R. 529; 116 S.J. 256; (C.A.) [1973] Ch. 264; [1972] 3 W.L.R. 815; [1972] 3 All E.R. 1106; 116 S.J. 802; (H.L.) [1975] 2 W.L.R. 347; [1975] 1 All E.R. 538; [1975] S.T.C. 91; 119 S.J. 169.

(2) Reported (C.A.) [1972] 3 All E.R. 1106; (H.L.) [1975] 2 W.L.R. 347; [1975] 1 All E.R. 538; [1975] S.T.C. 91.

foreign legislation changing the national status of an enemy alien in wartime or (b) because it was penal and confiscatory in character, and accordingly in English law he remained a German national after 1941. For the Crown it was contended (inter alia) that under English law the question whether an individual was a national of a foreign state fell to be determined by reference to the municipal law of that state, and even if the Appellant remained a German national after 1941 he ceased to be so, under the law of 1913, on acquiring British nationality in 1948. The Special Commissioners held that under German law, and also under English law, the Appellant was not a German national after 1948 at latest.

The facts in the second case were similar to those in the first case. On appeal, the Appellant contended that she had not ceased to possess German nationality, and, alternatively, (a) that the payments were in the nature of capital compensation for loss of her career; (b) that they were specifically exempted from German tax and so exempt under s. 22, Finance Act 1961, from United Kingdom tax. The Special Commissioners dismissed the appeal.

In the High Court and above the Appellant maintained her original contentions except that she conceded that the payments were not specifically exempted from German tax; she contended that they were indistinguishable from analogous payments which were so exempted, and, as further alternatives, that the payments did not arise from foreign possessions, or were exempt from United Kingdom tax as ex gratia payments.

The House of Lords remitted the first case to the Special Commissioners for further evidence and findings on the German law. The Commissioners then recited a provision of the Basic Law of the Federal Republic, enacted in 1949, whereunder former German citizens who had been deprived of their nationality between 30th January 1933 and 8th May 1945 for political, racial or religious reasons were entitled to be renaturalised on application, and were to be treated as not having been so deprived if they took up residence in Germany after 8th May 1945 and expressed no wish to the contrary. The Commissioners also recited the decision of the Constitutional Court in 1968 above mentioned, whereunder the 1941 decree was declared to have been absolutely void ab initio, so that a German Jewish refugee who died on or before 8th May 1945 was held never to have lost his German nationality, and a decision of the same Court in 1958 whereunder a German Jewish refugee who had been naturalised abroad in 1946 and later resumed residence in Germany was held to be a German national under the Basic Law, on the ground that in 1946 he could not rely on his German nationality. The Commissioners concluded (a) that, while the Appellant was not deprived of his German citizenship by the decree of 1941, the effect of that decree and the Basic Law was that he was not regarded by German law as having German nationality at the material times since he had neither applied for it nor resumed residence in Germany; (b) that, if and so far as he was a German national up to the time of his naturalisation as a British subject in 1948, he then lost that nationality under the law of 1913, although he could have regained it in the manner provided by the Basic Law.

Held, (1) that English law refers the question whether a person is a national of another state to the municipal law of that state (although, per Lords Hodson, Cross of Chelsea and Salmon, the decree of 1941 by itself constituted so grave an infringement of human rights that it should not be regarded as a law at all); (2) that, irrespective of the effect of the law of 1913, the Appellants must be regarded as having lost their German nationality under the Basic Law of 1949 since they had not taken the appropriate steps to assert it under that law; (3) that the second Appellant's remaining contentions failed.

## CASES

*Oppenheimer v. Cattermole (H.M. Inspector of Taxes)*

## CASE

Stated under the Taxes Management Act 1970, s. 56, by the Commissioners for the Special Purposes of the Income Tax Acts for the opinion of the High Court of Justice.

B

1. At a meeting of the Commissioners for the Special Purposes of the Income Tax Acts held on 19th January 1970 Meier Oppenheimer (hereinafter called "the Appellant") appealed against assessments to income tax in the sum of £800 for each of the years 1953-54 to 1967-68 inclusive.

C

2. Shortly stated, the question for our decision was whether certain pension payments received by the Appellant from German public funds qualified for exemption from income tax under the terms of the Double Taxation Relief Conventions made between the United Kingdom and the Federal Republic of Germany.

D

3. We heard evidence from Dr. Ernst Josef Cohn, a Doctor of Laws of the University of Breslau, formerly Professor of Law at the said University, and an Honorary Professor of Laws in the University of Frankfurt-am-Main.

4. The following documents were proved or admitted before us:

(1) Copy of the Appellant's certificate of naturalisation as a British subject, dated 24th May 1948, and of his oath of allegiance, dated 4th June 1948.

E

(2) Copies of correspondence in German (with English translation in some cases) between the Appellant and authorities of the Government of the Federal Republic of Germany.

(3) Text, with English translation, of part of a decree of 25th November 1941 of the National Socialist Government of Germany, and summary (in English) of the provisions of the said decree. An agreed translation of the relevant portions of the said decree is annexed hereto, marked "A", and forms part of this Case<sup>(1)</sup>.

F

(4) Text, with English translation, of section 25 of the German Nationality Law of 22nd July 1913. An agreed translation of the relevant portion of the said law is annexed hereto, marked "B", and forms part of this Case<sup>(1)</sup>.

Copies of such of the above as are not annexed hereto as exhibits are available for inspection by the Court if required.

G

5. As a result of the evidence, both oral and documentary, adduced before us we find the following facts proved or admitted:

H

(1) The Appellant was born in Germany in 1896. From 1919 to 1938 he was a teacher at a Jewish orphanage at Fürth, Bavaria. On his release in December 1938 from a period of detention in the concentration camp at Dachau he resumed teaching until, in April 1939, he emigrated to England, where he has since resided. He became a naturalised British subject in 1948. The certificate of naturalisation issued to the Appellant shows in the particulars relating to him "Nationality—German".

(2) In 1953 the Appellant was notified by the German Federal Department for Compensation to Employees of Jewish Religious Communities that he had been awarded a pension (the "first pension") with effect from 1st October 1952.

(1) See p. 177 post.

In April 1961 he attained the age of 65, and was awarded a pension (the "second pension") under the provisions of section 25(1) of the "Angestelltenversicherungsgesetz in der Fassung vom 23.2.1957" ("A.V.G.") with effect from 1st April 1961, from which date the first pension was abated by 87·8 per cent. The provisions of section 25(1) of the A.V.G. provide: "An insured person who has reached the age of 65 shall receive a retirement pension, on condition that the qualifying period has been completed." Both the first pension and the second pension were payable out of public funds of the Federal Republic of Germany.

(3) Evidence, which we accepted, was given by Dr. Ernst Josef Cohn, an expert in German law (see para. 3 of this Case) to the following effect:

(a) by a decision of the Federal German Constitutional Court given in 1968, which is binding upon all Federal German courts by virtue of a subsequent decree of the Federal German Government, the decree of 25th November 1941 (exhibit A) was absolutely void *ab initio*;

(b) the said decision had no retrospective effect<sup>(1)</sup>;

(c) the German Nationality Law of 22nd July 1913 (exhibit B) remains in force (with certain amendments not relevant for present purposes) and was unaffected by the said decision;

(d) in his opinion, under German law, if the Appellant had not lost German nationality under the decree of 25th November 1941, he lost the said nationality under the German Nationality Law of 22nd July 1913 on being naturalised a British subject in 1948.

6. No dispute arises regarding figures, and the only question for our decision was whether or not the pension payments made to the Appellant were exempt from United Kingdom income tax (for the years 1953-54 to 1959-60) by virtue of article IX(1) of the Convention between the United Kingdom and the Federal Republic of Germany for the avoidance of Double Taxation which is set out in the Schedule to the Double Taxation Relief (Taxes on Income) (Federal Republic of Germany) Order 1955 (S.I. 1955 No. 1203), and (for the years 1960-61 to 1967-68) by virtue of article IX(2) of the similar Convention set out in the Schedule to the Double Taxation Relief (Taxes on Income) (Federal Republic of Germany) Order 1967 (S.I. 1967 No. 25).

7. It was common ground that, for the aforementioned exemptions to apply, it would require to be shown (i) that when he received the said pension payments the Appellant (who was admittedly a national of the United Kingdom at the material times) was also a German national, and (ii) that the said pension payments fell within the description "remuneration, including pensions, paid in respect of present or past services or work".

8. In regard to the question whether the Appellant was a German national at the material times, "national", in the context in which it appears in article IX of each of the Conventions aforesaid, is not defined in either Convention. Having regard to the terms of article II(3) of each Convention, it was agreed before us that the question fell to be determined according to English law.

9. It was not in dispute that the Appellant was a German national from birth until at least 25th November 1941. On that date there was promulgated, with immediate effect, a decree of the then National Socialist Government of

(1) This finding was based on a misunderstanding of the evidence: see pages 204-7 *post*.

A Germany (exhibit A) depriving of German citizenship Jews whose usual place of abode was outside Germany—a class which included the Appellant.

10. It was contended on behalf of the Appellant:

(1) That, on the authority of *Rex v. Home Secretary* (ex parte L) [1945] K.B. 7 and *Lowenthal v. Attorney-General* [1948] 1 All E.R. 295, the Appellant's loss or purported loss of German citizenship under the said decree (exhibit A) cannot be recognised by the English courts and that, whatever the position might have been under German law, under English law the Appellant remained a German national after 25th November 1941 on the grounds, that (a) English law does not recognise a change of status in its nationals brought about by a decree of a foreign enemy state in wartime, and/or (b) English law will not give effect as far as it relates to matters in this country to a penal and confiscatory decree of a foreign country. In support of the latter contention the following authorities were referred to: *Frankfurter v. W. L. Exner Ltd.* [1947] Ch. 629; *Novello & Co. Ltd. v. Hinrichsen Edition Ltd.* [1951] Ch. 595; Dicey and Morris, *The Conflict of Laws*, 8th edn., pages 75–6; Martin Wolff, *Private International Law*, 2nd edn., pages 129–30.

(2) That payments made to the Appellant by way of both the first pension and the second pension fell within the description “remuneration, including pensions, paid, in respect of present or past services or work”.

(3) That the said payments were exempt from tax under the provisions of article IX of the Conventions aforesaid.

(4) That the appeal should succeed and the assessments should be discharged.

11. It was contended on behalf of the Inspector of Taxes:

(1) that under English law the question whether an individual is a national of a foreign State falls to be determined by reference to the municipal law of that State;

(2) that so far as the English courts are concerned questions of foreign law are questions of fact;

(3) that even if the Appellant did remain a German national after 25th November 1941, which was not admitted, he ceased to be such on applying for and acquiring British nationality in 1948 (not having, prior to said acquisition, applied for and been granted the written permission of the competent German authority to retain his German nationality) by virtue of the German Nationality Law of 22nd July 1913 (exhibit B);

(4) that payments made to the Appellant by way of the second pension did not fall within the description “remuneration, including pensions, paid, in respect of present or past services or work”;

(5) that no exemption was due in respect of payments made to the Appellant by way of either the first pension or the second pension under the provisions of article IX of the Conventions aforesaid;

(6) that the appeal should fail in principle and should be adjourned for the agreement of figures.

12. We, the Commissioners who heard the appeal, took time to consider our decision, and gave it in writing on 18th February 1970, as follows:

(1) These appeals are made against assessments for the years 1953–54 to 1967–68, inclusive, in respect of certain pension payments received by the

Appellant from German public funds under two awards made to him in 1953 (with effect from 1st October 1952) and 1961 respectively. It is not contended before us that the said receipts do not constitute income for income tax purposes, and the first question for our decision is whether or not the receipts are exempt from tax in the Appellant's hands under article IX of the Convention set out in the Schedule to the Double Taxation Relief (Taxes on Income) (Federal Republic of Germany) Order 1955 (S.I. 1955 No. 1203) and the similar article of the Convention set out in the Schedule to the corresponding Order of 1967 (S.I. 1967 No. 25).

(2) Having considered the evidence adduced before us and the arguments advanced to us, we hold that these appeals fail. We find from that evidence that under German law the Appellant ceased to be a German national not later than 4th June 1948, when he became a national of the United Kingdom. We hold that under English law the Appellant was not a German national certainly from 4th June 1948, when he became a national of the United Kingdom. Whatever may have been their effect in determining the nationality of the Appellant under English law between 25th November 1941 and 4th June 1948, we hold that the decisions in *Rex v. Home Secretary (ex parte L)* [1945] K. B. 7 and *Lowenthal v. Attorney-General* [1948] 1 All E.R. 295 do not require us to hold that the Appellant was a German national after 4th June 1948. The Appellant is not, therefore, entitled, in our view, to relief under article IX of the Conventions on the footing that throughout the relevant years he was at one and the same time a German national and a national of the United Kingdom.

(3) In view of this determination we do not need to deal with the Crown's argument that in any event the Appellant was not entitled to the exemption claimed in respect of the payments he received under the 1961 award because those payments were not "Remuneration, including pensions, paid in respect of present or past services or work" within article IX of the Conventions.

(4) We leave figures to be agreed between the parties on the basis of this our decision in principle.

13. Figures were subsequently agreed between the parties, and on 30th June 1970 we adjusted the assessments accordingly.

14. The Appellant immediately after the determination of the appeal declared to us his dissatisfaction therewith as being erroneous in point of law, and on 1st July 1970 required us to state a Case for the opinion of the High Court pursuant to the Taxes Management Act 1970, s. 56, which Case I have stated and do sign accordingly.

Mr. Barrett, with whom I heard and determined this appeal, has since retired from the public service.

15. The question of law for the opinion of the Court is whether our decision in paras. 12(2) and 13 above was correct.

W. E. Bradley } Commissioner for the  
Special Purposes of the  
Income Tax Acts  
( Income Tax Acts

Turnstile House,  
94-99 High Holborn,  
London WC1.

22nd July 1971

A *Nothman v. Cooper (H.M. Inspector of Taxes)*

The facts in this case were similar to those in the first case. The contentions of the parties and the decision of the Commissioners were as follows.

7. It was contended on behalf of the Appellant:

(i) that the payments made to the Appellant were in the nature of damages for a frustrated career and persecution, and accordingly were not of an income nature within Case V of Schedule D, Income Tax Act 1952;

(ii) that the payments, being annuities payable under the law of the Federal German Republic relating to compensation of victims of National Socialist persecution, were, under any such law relating to taxation of such compensation, specifically exempted from tax of a character similar to that of income tax, because (a) on the authority of the decision of the German Court on 12th February 1965 the Appellant was within the specific exemption conferred by section 3 figure 8 of the German Income Tax Law (annexure E); (b) the effect of the Wages Tax Implementing Regulation (Consolidation Decree of 22nd November 1965) was to place the Appellant in a category of persons which resulted in her being exempt from German income tax and that such exemption was retrospective to the years of assessment in question;

(iii) that the payments were exempt from United Kingdom income tax under s. 22(1), Finance Act 1961;

(iv) that the Appellant was exempt from United Kingdom income tax under article IX of the Schedule to the Double Taxation Relief Order (S.I. 1955 No. 1203) because she was a national of the United Kingdom and had not ceased to possess the German nationality which she had acquired at birth;

(v) that the Appellant was not liable to United Kingdom tax in respect of the payments received from the German Government.

8. It was contended on behalf of the Crown:

(i) that the payments received by the Appellant were income arising from a possession out of the United Kingdom, and as such were chargeable to tax under Case V of Schedule D;

(ii) that they were not "payments specifically exempted from tax of a character similar to that of income tax" and therefore exempt from United Kingdom income tax under s. 22(1) of the Finance Act 1961;

(iii) that the Appellant was not at any material time a German national, and article IX of the Schedule to the Double Taxation Relief Order (S.I. 1955 No. 1203) did not, therefore, apply;

(iv) that the appeals should be dismissed.

9. The following cases were cited by the parties: *Chibbett v. Joseph Robinson & Sons* (1924) 9 T.C. 48; *Dott v. Brown* [1936] 1 All E.R. 543; *Lowenthal v. Attorney-General* [1948] 1 All E.R. 295; *Westminster Bank Ltd. v. Riches* 28 T.C. 159; [1947] A.C. 390; *Higgs v. Olivier* 33 T.C. 136; [1952] Ch. 311; *Lilley v. Harrison* (1952) 33 T.C. 344; *Lord Inchyra v. Jennings* 42 T.C. 388; [1966] Ch. 37.

10. We, the Commissioners who heard the appeal, gave our decision as follows:

(i) The payments in question arose under Article 31(d) of the German law of 11th May 1951, which provided for pension payments. We think that the

source from which they arose was a foreign possession within the meaning of Case V of Schedule D. Although the payments were intended as compensation for injury to the Appellant's career, they were not related to any lump sum. They were paid monthly, and we find that they were received as income in the hands of the Appellant. A

(ii) We do not think that the decision of the German Court on 12th February 1965 specifically exempted the payments to the Appellant from tax of a character similar to that of income tax within s. 22(1), Finance Act 1961. That decision was concerned with payments made to persons who were not admitted to public service because of persecution, whereas the payments in question were made to the Appellant under Article 31(d) as a former employee. The German exempting section 3 figure 8 (exhibit E), which was held to apply to the *Referendars*, does not, we think, apply to the Appellant. B C

(iii) Although the letter of 20th April 1966 from the German Paying Authority states that the payments are, under the Wages Tax Deduction Law, as from 1st January 1966 free of Wages Tax under class II, we do not think that this implies that the Wages Tax Implementing Regulation (Consolidation of 22nd November 1965) specifically exempted the payments from German income tax within the meaning of s. 22. We think that the effect of this law was merely to give relief to the Appellant by placing her in tax class II, which, having regard to the amount of her pension, resulted in no German tax being in fact payable. We hold that this did not specifically exempt the Appellant from German tax within s. 22. In any event, we hold that the law of 22nd November 1965 would not give exemption for the purposes of s. 22 prior to that date. D E

(iv) We hold, accordingly, that the payments are not exempt from United Kingdom income tax within s. 22.

(v) The Appellant was born in Germany, and although no express evidence was adduced we are prepared to assume that she was a German national at birth. It was not disputed that she was a national of the United Kingdom at all material times. We hold that on the evidence of the Appellant regarding her activities in the United Kingdom she ceased to be a German national under the decree of 25th November 1941 referred to in *Lowenthal v. Attorney-General* [1948] 1 All E.R. 295, at page 297. We do not think that the *Lowenthal* case requires us to hold that the Appellant was a German national at any material time. We hold, therefore, that, being a national of the United Kingdom without also being a German national, the Appellant was not exempt from United Kingdom income tax under article IX of the Schedule to the Double Taxation Relief Order (S.I. 1955 No. 1203). We dismissed the appeals in principle and left figures to be agreed between the parties. F G

The cases came before Goulding J. in the Chancery Division on 16th and 17th December 1971, when judgment was reserved. On 21st December 1971 judgment was given against the Crown, with costs. H

*Max England* for Mr. Oppenheimer.

*Patrick Medd* for the Crown.

Miss Nothman in person.

The following cases were cited in argument in addition to those referred to in the judgments:—(in *Oppenheimer's* case) *Robinson v. Taylor* [1948] 1 All E.R. 291; *Frankfurther v. W. L. Exner Ltd.* [1947] Ch. 629; *Novello & Co. Ltd.* I



A *v. Hinrichsen Edition Ltd.* [1951] Ch. 595; *Kramer v. Attorney-General* [1922] 2 Ch. 850; (in *Nothman's case*) *Colquhoun v. Brooks* (1889) 2 T.C. 490; 14 App. Cas. 493; *Pickles v. Foulsham* 9 T.C. 261; [1925] A.C. 458; *Westminster Bank Ltd. v. Riches* 28 T.C. 159; [1947] A.C. 390; *Cleaver v. Mutual Reserve Fund Life Association* [1892] 1 Q.B. 147.

B *Oppenheimer v. Cattermole (H.M. Inspector of Taxes)*

**Goulding J.**—The Appellant, Meier Oppenheimer, was born in Germany in 1896 and so became a German subject by birth. He is a Jew, and for many years was a teacher at a Jewish orphanage in Bavaria. He emigrated from Germany after a period of detention in the concentration camp at Dachau, and has lived in England ever since April 1939. He became a British subject C by naturalisation in 1948. Since 1953 he has received certain pensions out of the public funds of the Federal Republic of Germany. He was assessed to income tax in respect of such pensions in the sum of £800 for each of the years of assessment 1953–54 to 1967–68 inclusive. He appealed against the assessments, claiming exemption under the Double Taxation Conventions concluded D between the United Kingdom and the Federal Republic of Germany. The Special Commissioners rejected his claim, and the Appellant has appealed to this Court on the ground that they erred in point of law.

Of the 15 assessments in dispute, the first seven are subject to the Convention signed in 1954. It is set out in the Schedule to S.I. 1955 No. 1203. Article IX(1) of the Convention is as follows:

E “Remuneration, including pensions, paid, in respect of present or past services or work, out of public funds of one of the Contracting Parties shall be exempt from tax in the territory of the other Contracting Party, unless the individual concerned is a national of that other Party without being also a national of the first-mentioned Party.”

It is not now disputed for the purposes of this particular case that the Appellant’s pensions are of the character described in the article. Accordingly, they are exempt from United Kingdom income tax if the Appellant is a national both F of the United Kingdom and of Germany, but are not exempt if he is a national of the United Kingdom alone. By virtue of article II(3) of the Convention, the term “national”, unless the context otherwise requires, has in applying the Convention in this country the meaning which it has under United Kingdom law relating to taxes on income. The eight later assessments are subject to G a subsequent Convention signed in 1964. It will be found in the Schedule to S.I. 1967 No. 25. For the purposes of the present appeal, it did not materially alter the earlier Convention.

Two important German laws were proved by an expert witness before the Special Commissioners. One was a law of 22nd July 1913, which the witness H stated to have been in force at all material times. It provides that a German who is neither domiciled nor permanently resident in Germany loses his nationality on acquisition of a foreign nationality unless he has previous written permission from the appropriate German public authority to retain it. The second law was a well-known decree of 25th November 1941. Among other provisions, it enacted that a Jew of German nationality ordinarily resident I abroad at the date when the decree came into force should lose his nationality forthwith. The Special Commissioners stated—and there can hardly be room

**(Goulding J.)**

for doubt on the primary facts—that the Appellant was included in the class of Jews referred to by this decree. The expert witness proved that by certain judicial and legislative acts in Germany the decree was in 1968 declared absolutely void *ab initio*, but that in German law such declaration had no retrospective effect. A

The Appellant's case before the Special Commissioners and in this Court was founded on the contention that English law will not recognise the loss of nationality effected by the law of 1941, either (a) because it will not recognise changes of the nationality of enemy aliens in wartime, or (b) because the decree is a penal or a confiscatory law. The Special Commissioners appear to have acceded to a short and simple argument on behalf of the Crown. It was said that either the Appellant lost his German nationality by the law of 1941 and never regained it, or he kept it notwithstanding the law of 1941. In the latter case he remained a German national till 1948, and on assuming British nationality in that year lost his German nationality by virtue of the law of 1913. In the Appellant's submission that apparently simple reasoning conceals a fallacy. His argument can best be understood by starting from the observations of Russell J. in *Stoeck v. Public Trustee* [1921] 2 Ch. 67, at page 82. The learned Judge said: B C D

“Whether a person is a national of a country must be determined by the municipal law of that country. Upon this I think all text writers are agreed. It would be strange were it otherwise. How could the municipal law of England determine that a person is a national of Germany? It might determine that for the purposes of English municipal law a person shall be deemed to be a national of Germany, or shall be treated as if he were a national of Germany; but that would not constitute him a national of Germany, if he were not such according to the municipal law of Germany. In truth there is not and cannot be such an individual as a German national according to English law; and there could be no justification for interpreting or expanding the words ‘German national’ in the manner suggested.” E F

The Appellant's case, as I understand it, is this. So far as German municipal law is concerned, he lost his nationality in 1941. Therefore (again in German law) he was not a German in 1948, and the law of 1913 had no operation on him when he took British nationality. However, the law of England (for one reason or another) refuses to recognise the decree of 1941, and (in the words of Russell J.) treats the Appellant as if he remained a national of Germany for the purposes of English municipal law. Such treatment, however, does not justify misconstruing the law of 1913 (a purely German enactment) so as to apply it to a case which in German municipal law never arose or existed. G

I shall examine the validity of that reasoning at a later stage in my judgment. First I must consider the Appellant's assertion that the decree of 1941 is to be disregarded for all purposes of English municipal law. Only if that proposition is correct can he claim to be treated as a German national in applying the double taxation conventions to questions of United Kingdom tax. As I have said, the proposition is put forward on two alternative grounds. I will deal first with the argument that English law must disregard a loss of nationality brought about by a penal or confiscatory law. I can assume that the decree of 1941, well known to have been part of a deliberate policy of persecuting the Jews, was penal or confiscatory in character. There is, however, no uni- H I

(Goulding J.)

A versal principle that English law will not recognise a foreign penal or confiscatory law for any purpose. It will not lend the aid of the English Courts to enforce such a law, it will not give effect to such a law as respects assets situated in England, and it will disregard in England a personal incapacity imposed by such a law. On the other hand, English law will recognise in England a title to property, immovable or movable, acquired under a penal or confiscatory law in the country where the property was situated. Counsel have found no judicial authority, British or foreign, in which a deprivation of nationality has been disregarded on the ground that it was penal or confiscatory. In *Lowenthal v. Attorney-General* [1948] 1 All E.R. 295 the then Attorney-General put forward arguments in relation to this same decree of 1941 similar to those now adduced by the Appellant. However, Romer J. found it unnecessary to express any opinion on the point regarding the penal character of the decree (see page 299), so I have no guidance from that source. One textbook writer has been cited on the point. Dr. Martin Wolff, in his book on Private International Law, 2nd edn., at page 129, has a paragraph on non-recognition of foreign rules as to nationality. In it he says:

D “Deprivation of nationality . . . though generally allowed to any state (in cases of emigration, of treason, of marriage, etc.) may include a violation of international law, for example, if made on purely racial grounds, since this is likely to entail mass emigration and the inundation of foreign countries with aliens, apart from its inconsistency with tenets of humanity and morality.”

E The decree of 1941 was no doubt made on racial grounds, but it applied only to Jews already resident abroad and so could not have the particular effect feared by Dr. Wolff. In my view the English Courts cannot properly or efficaciously undertake the censorship on grounds of humanity or morality of foreign legislation dealing with nationality. Nationality is a fundamental and intimate matter in the constitution of any State, and one essentially under its own exclusive jurisdiction. Accordingly, I decline to disregard the decree of 1941 on the sole ground that it is penal or confiscatory.

F The Appellant treads a somewhat better lighted path when he says that English law refuses recognition to a law altering the nationality of enemy aliens in wartime. The doctrine rests on requirements of public policy, and has been applied in two reported cases. The first is *Rex v. Home Secretary (ex parte L)* [1945] K.B. 7. The proceeding there was an application for *habeas corpus* made in 1944 to a Divisional Court sitting *in camera* by two Austrian Jews who had been seized on shipboard at Port of Spain and brought to the United Kingdom, where they were interned as enemy aliens. They claimed to have lost that quality by the same decree of 1941 which is under scrutiny in the present appeal. What was in effect the judgment of the Court was delivered by Lord Caldecote C.J. He began his judgment as follows:

H “It is conceded that the applicants were enemy aliens when the war broke out, and it is not disputed by counsel for the applicants that an interned enemy alien is not in a position to apply for a writ of *habeas corpus*. If effect must be given to the German decree, so as to deprive these people of their German nationality and to make them stateless, they would, of course, no longer be enemy aliens and they would not come under the disabilities which fall on enemy aliens. The point that arises is one which, for reasons which are not far to seek, has never been

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made the subject of express decision." His Lordship then referred to certain other cases by way of explanation, and continued: "I read that not because the authority is needed, it being conceded that an enemy alien is not in a position to apply for a writ of *habeas corpus*, but to illustrate the proposition which Mr. Brown, on behalf of the applicants, asks us to accept. It is that an enemy alien can throw off his disability by relying on a German law which, in time of war, purported to change his status from that of an enemy alien to that of a stateless person. My reply is that such changes of nationality are not recognised for very obvious reasons. If such changes were to be permitted in time of war enemy agents might acquire facilities which could be used in a way very much to the prejudice of this country. It was pointed out in *Liebmann's case*(<sup>1</sup>) that war is waged nowadays not merely by armies in the field, but by agents in the heart of the enemy country, and to recognise changes of nationality in time of war, which might operate to the prejudice of this country, is to do something which, even if it is necessary to put it on the grounds of public policy, ought not to be done. I have, therefore, no hesitation in saying that the change of nationality relied upon by the applicants as entitling them to make this application is one which these courts will not recognise."

The second reported case on the point is *Lowenthal v. Attorney-General*(<sup>2</sup>), which I have already mentioned. There two German Jews, accompanied by their families, had with the permission of the Home Office settled permanently in England before the war. They held all the issued share capital in a certain private company. In 1944 the company applied for extension of the term of a patent under s. 18(6) of the Patents and Designs Act 1907 (as amended). It was met by the objection that its business was controlled by enemy subjects. An action was consequently brought to obtain a declaration that the two shareholders were stateless persons by virtue of the German decree of 1941. Romer J. gave judgment in January 1948 in favour of the Attorney-General. He considered that the matter was concluded by the judgment of the Divisional Court in *Ex parte L*(<sup>3</sup>), which I have just cited.

On the foregoing authorities the Appellant contends that English law did not recognise his loss of German nationality by the decree of 1941. The Crown has two answers to that. It observes, in the first place, that in both the reported cases enemy aliens were seeking to escape from the disabilities attaching to their status and on grounds of national security were not permitted to do so. The doctrine of non-recognition of loss of enemy nationality should not be extended, says the Crown, to allow an enemy or former enemy to rely on it for his own benefit. Secondly, the Crown points out that both the reported cases related to claims made by aliens during wartime. It says that, though no treaty of peace has been concluded, the state of war between the United Kingdom and Germany was terminated by declaration of the Government of the United Kingdom on July 9th 1951. Since that date, in the Crown's submission, there is no need and no justification for disregarding the changes that actually took place in 1941 under German law. In connection with both his arguments Counsel for the Crown relies on Lord Esher M.R.'s dictum in *Cleaver v. Mutual Reserve Fund Life Association* [1892] 1 Q.B. 147, at pages 153 and 155, that a

(1) *Rex v. Vine Street Police Station Superintendent (ex parte Liebmann)* [1916] 1 K.B. 268.

(2) [1948] 1 All E.R. 295.

(3) [1945] K.B.7.

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A rule of public policy is not to be stretched beyond what is necessary for the protection of the public.

Here I am once more walking in unlighted ways, and have to do the best I can without authoritative guidance. On the Crown's first contention, I think the doctrine enunciated in *Ex parte L*<sup>(1)</sup> cannot now be confined to facts where the security of the State is really in question, since in the patent case, *B Lowenthal v. Attorney-General*<sup>(2)</sup>, both the German Jews were resident here with official permission, and one had actually been serving in the British Army. It is manifestly inconvenient, even in time of war, that an individual should be treated as having one nationality for some purposes of English law and none or another for other purposes of English law. Nor does it seem fair to subject a man to the disabilities of imputed enemy nationality yet deny *C* him any adventitious benefit that might flow from it. Therefore, in my judgment, the Appellant's loss of nationality in 1941 should be disregarded for all purposes of English municipal law, much as a contract offensive to public policy is treated as absolutely void. That conclusion seems to me to accord with Lord Caldecote C.J.'s expressions in *Ex parte L*, where he twice said that the change of nationality relied on by the applicants would not be recognised by the Court. *D* Romer J., in the later case of *Lowenthal*, used more guarded language, but I do not think he sought to narrow the natural interpretation of the words of the learned Lord Chief Justice. I am aware that Lord Caldecote has been criticised by academic writers for going further in *Ex parte L* than the decision required (for an example, see 61 L.Q.R., at pages 126-7). I see some force in the criticisms, but the Chief Justice's reasons, as well as his decision, were *E* expressly adopted by the other two members of the Divisional Court. They made no qualifications in doing so, and in my judgment I am not at liberty in this Court to water down the expressed *ratio decidendi* of *Ex parte L*.

Before leaving the point, I should mention that some writers have cited the dictum of a Circuit Court of Appeals of the United States of America to the effect that no public policy precluded an American Court from recognising *F* the power of Germany to disclaim a Jew as a German citizen by the decree of 25th November 1941. The dictum is in *United States of America ex rel. Schwarzkopf v. Uhl* (1943) 137 Fed. Rep. (2d.) 898, at page 903. It does not in my view cast any doubt on the English decisions, since (to the best of my information) the United States were not at war with Germany until 11th December 1941.

*G* The Crown's second contention also raises considerable difficulties. That the point is open is recognised in Lord McNair's book on the Legal Effects of War, 4th edn. (1966). In a footnote at page 74 of that work the effect of *Ex parte L* and of *Lowenthal's* case is summarised as follows: "An enemy decree made during war and purporting to make enemy nationals stateless will not be recognised by British Courts—at any rate during the war." In *H* my view, unexpected results may follow if at the end of a state of war persons formerly treated as enemy aliens are suddenly found to have lost that status, whether they are deemed to have lost it at the true date of the change or at the commencement of peace. I do not think I am capable of foreseeing the full consequences of either proposition. In the present case it would be an odd thing if the victorious end of a war, which in its later stages was presented

(1) [1945] K.B. 7. (2) [1948] 1 All E.R. 295.

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as a crusade against the barbarities of the National Socialist regime, should lead *ipso facto* to the recognition, hitherto denied, of one of the Nazis' oppressive laws against the Jews. In a remotely analogous field it is to be remarked that public policy insists upon the dissolution, not merely the suspension, of a wide class of commercial contracts between a subject and an enemy, and that the Courts have set their face against attempts to mitigate the rigidity of the doctrine: see *Ertel Bieber & Co. v. Rio Tinto Co. Ltd.* [1918] A.C. 260. On the other hand, inconveniences may also occur if the Crown is held to be wrong on this point. Suppose a Ruritanian subject loses his nationality during a war between the United Kingdom and Ruritania. If recognition of the change is not merely suspended, but permanently denied, he must normally remain a Ruritanian in the eyes of English law for the rest of his life, since no steps will be open to him under Ruritanian law to discharge a quality that he has already lost. However, awkward individual situations frequently arise where there is a conflict of laws, and they can be corrected by Statute (whether or not founded on a peace treaty) if Parliament thinks fit. On the whole, I find myself unable to hold, in the absence of authority, that the decree of 1941 should now be recognised though ignored during the continuance of the war.

The Appellant is therefore right, in my judgment, in saying that for the purposes of English law he was still a German when he acquired British nationality in 1948. He did indeed so describe himself in his application for a certificate of naturalisation. That brings me back to the decision of the Special Commissioners. They say that if the 1941 decree is disregarded the Appellant on naturalisation here must be taken to have lost his German nationality by virtue of the German law of 1913. I do not find this problem altogether easy, for when the law embarks on a course of hypothesis it is hard to say where the make-believe should stop. For myself, however, I cannot see that the non-recognition of one foreign law on grounds of public policy either demands or justifies imputing to an earlier foreign law an operation which, on its true construction in its own system, it evidently could not have. Nor do I think that the Appellant is blowing hot and cold in his argument. He relies on his German nationality by birth. The Crown says he lost it by German law in 1948. He replies, No, in German law I lost it long before, though by your own rules of public policy you cannot assert the fact here. I do not see any vice in that submission.

I therefore judge the Special Commissioners to have erred in point of law, and I allow the appeal. The proper course, I suppose, is to remit the assessments to the Special Commissioners for adjustment or discharge in accordance with this judgment. Is that right, Mr. Medd?

**Medd**—I think they can be discharged, my Lord, because these were special assessments relating to these pension payments only; so I think they can be discharged.

**Goulding J.**—In that case, I allow the appeal and discharge all the assessments.

**Medd**—I am sorry, my Lord. I am instructed that, although that is what appears, we are not absolutely positive about it. Perhaps, for safety's sake, it should be remitted for adjustment. The effect is precisely the same.

**Goulding J.**—I know you are very cautious in these matters, and you did rather surprise me, Mr. Medd.

A **Medd**—It is an almost universal rule, but perhaps it would be wiser to remit it for adjustment.

**Goulding J.**—Mr. Englard, I think that if the Crown say that they want the matter remitted to the Special Commissioners I ought, in accordance with practice, to do it, although it looks as though the result will be the discharge of all the assessments. Do you ask for costs?

B **Englard**—Yes, my Lord.

**Medd**—I cannot resist that, my Lord.

**Goulding J.**—So I allow the appeal with costs and remit the assessments to the Special Commissioners for adjustment or discharge in accordance with the judgment.

**Medd**—I am much obliged, my Lord.

C *Nothman v. Cooper (H.M. Inspector of Taxes)*

**Goulding J.**—In this case the Appellant, Miriam Nothman, was born in Germany in 1915. On leaving school she was denied admission to a university because she was a Jewess. She went to a Jewish teacher training college at Würzburg, and passed the first stage examination there in 1936. The Appellant did not regard this as a full or sufficient qualification, but was prevented, as the Special Commissioners found, by persecution from further qualifying herself in Germany. From 1936 until 1939 she held a number of teaching appointments in Jewish schools in Germany, which were then—as is well-known—operating under increasing difficulties. She came to England in April 1939, and at a later date acquired British nationality.

E After the war the Appellant became entitled under German legislation to monthly payments by way of compensation for National Socialist wrong—“*Unrecht*” is the German term. She was assessed to United Kingdom income tax in respect of such payments for the years 1953–54 to 1962–63 inclusive, and also for 1964–65. The amount of the income as assessed rose by stages from £273 in the first year to £400 in the last. The Appellant appealed against the assessments that I have mentioned, and before the Special Commissioners F she relied on a number of alternative grounds, all of which they rejected. Like the previous appellant, Mr. Oppenheimer, she then appealed to this Court alleging error in point of law.

One of the Appellant’s claims is that she was exempt from United Kingdom income tax under the double taxation conventions which I have referred to in Mr. Oppenheimer’s case because she had not ceased to possess the German G nationality she had acquired at birth. The Special Commissioners accepted the contention that she was a German national at birth, but held that she ceased to be one under the decree of 25th November 1941 discussed in my judgment in the previous case. So far as appears from the Case Stated, the Crown did not as regards the present Appellant rely in the alternative on the German nationality law of 1913. Accordingly, since the decree of 1941 is H (as I have just held) to be disregarded, the Appellant is in my judgment entitled to exemption in the same way as Mr. Oppenheimer. It is thus unnecessary to deal with the Appellant’s alternative contentions, but out of respect for the

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skill and good temper with which she explained her case I will very briefly A  
review them.

First of all, the Appellant argued that the pension she received was not B  
taxable income within the Income Tax Act 1952 at all; that is, it is not "income  
arising from possessions out of the United Kingdom" for the purpose of  
Case V of Schedule D. On this she said that the payments were made to her  
as compensation for the frustration of her career, something that occurred  
once and for all. They have not, she submitted, really the character of a  
pension at all. A healthy and competent worker is not pensioned off at 22.  
What she has received is simply compensation for wrong, paid (in her own  
striking phrase) "for what was done to me, not what I did". In my judgment  
those arguments cannot prevail. It is well settled that an annuity or similar  
periodical payment (as distinct from instalments of a definite capital sum) has C  
the character of income for tax purposes, and apart from special statutory  
provision is taxable accordingly, whatever the consideration for which it is paid.  
Another way in which the Appellant puts this part of her case is that payments  
made out of public funds under German law, which permits their forfeiture in  
certain circumstances, do not arise from a possession as required by Case V of  
Schedule D. They should be treated as mere *ex gratia* payments like the D  
voluntary pension in *Stedeford v. Beloe*<sup>(1)</sup> 16 T.C. 505. Like Lord Sands in  
*Commissioners of Inland Revenue v. Anderstrom*<sup>(2)</sup> 13 T.C. 482, at page 485,  
I should have felt some difficulty if the interpretation of Case V were free from  
authority. But, like him, I feel bound to follow well-known decisions in the  
House of Lords and to give the word "possessions" a wide meaning equivalent  
to sources of income. So I do not think the Appellant can make good her E  
claim to be outside the Act altogether.

Secondly, the Appellant claimed exemption under the Finance Act 1961,  
s. 22. That section is as follows:

"(1) Annuities payable under the law of the Federal German Republic  
relating to the compensation of victims of National-Socialist persecution,  
being annuities which under any such law relating to the taxation of such F  
compensation are specifically exempted from tax of a character similar  
to that of income tax, shall not be regarded as income for any income tax  
purposes. (2) This section shall be deemed always to have had effect . . ."

In this Court the Appellant very frankly conceded that no specific exemption  
from German tax was available to her in respect of the years of assessment G  
now in question. She criticised the prevailing interpretation of the German  
enactments, and submitted that there was no merit in the distinction made  
between her own case and a case, known as that of the *Referendarius*, heard  
by a Federal Revenue Court in Munich, in which the exemption from German  
tax was allowed. However, I am bound to apply s. 22 according to a strictly  
literal construction, and am not at liberty to enlarge its ambit on grounds of  
analogy or of fairness between different cases. I need therefore express no H  
view on the merits of the arguments on this branch of the matter.

Finally, the Appellant relied on broad grounds of international law and  
of justice between different classes of persons. Anticipating the answer that  
my duty is simply to apply English law as it stands, she reminded me, in the

(1) [1932] A.C. 388.

(2) 1928 S.C. 224.



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A most courteous possible way, that the like was said by some of the unsuccessful defendants in the Nuremberg trials. Whatever place international law may ultimately assign to those proceedings, it is in my judgment quite clear that my duty in hearing a Revenue appeal excludes arguments of this category. As Rowlatt J. said in a much-cited passage in *Cape Brandy Syndicate v. Commissioners of Inland Revenue*(1) [1921] K.B. 64, at page 71, "there is no equity about a tax".

However, the present Appellant, like Mr. Oppenheimer, succeeds on the nationality point, and hence does not need her alternative grounds of appeal. In this case also I suppose I must remit the assessments to the Special Commissioners for adjustment or discharge in accordance with my judgment. Is that the case, Mr. Medd?

C **Medd**—Yes, my Lord.

**Goulding J.**—Do you ask for costs, Miss Nothman?

**Miss Nothman**—No, thank you, my Lord.

**Goulding J.**—You have not incurred them?

**Miss Nothman**—I have represented myself. Thank you very much.

**Goulding J.**—If you do not ask for them, that is that. Then I allow the appeal and remit the assessments.

D **Medd**—My Lord, those instructing me think that Miss Nothman may indeed have had a few costs.

**Goulding J.**—I thought she probably incurred costs in copying.

**Medd**—Anyway, my Lord, if she were to ask I would not resist. Indeed, I would invite her to ask for them.

E **Goulding J.**—I think I will allow the appeal with costs, and it will be for her to establish any costs on taxation. Miss Nothman, if you have incurred expenses on copying documents, or something like that, which you can put down to this case, you may send in a bill and see if the Revenue will pay it. But you are not allowed anything for your time and trouble: that is well established, I think.

F **Miss Nothman**—Thank you very much, my Lord.

**Goulding J.**—To be taxed if not agreed. You can probably agree them, Mr. Medd—any small sum she asks for.

**Medd**—I am quite sure the Revenue will do that, my Lord.

G The Crown having appealed against the above decisions, the cases came before the Court of Appeal (Lord Denning M.R. and Buckley and Orr L.JJ.) on 18th, 19th and 20th July 1972, when judgment was given unanimously in favour of the Crown.

(1) 12 T.C. 358, at p. 366.

*J. E. Vinelott Q.C.* and *Patrick Medd* for the Crown. A  
*Gerald Godfrey Q.C.* and *Max Englard* for Mr. Oppenheimer.  
 Miss Nothman in person.

The following cases were cited in argument in addition to those referred to in the judgments:—*Lord Inchyra v. Jennings* 42 T.C. 388; [1966] Ch. 37; *Commissioners of Inland Revenue v. Anderstrom* 13 T.C. 482; 1928 S.C. 224; *Beynon v. Thorpe* (1928) 14 T.C. 1; *Dott v. Brown* [1936] 1 All E.R. 543; *Commissioners of Inland Revenue v. Ramsay* (1935) 20 T.C. 79; *Commissioners of Inland Revenue v. Pattison* 38 T.C. 617; 1960 S.C. 118; *Drummond v. Collins* 6 T.C. 525; [1915] A.C. 1011; *Cowan v. Seymour* 7 T.C. 372; [1920] 1 K.B. 500; *Van den Berghs Ltd. v. Clark* 19 T.C. 410; [1935] A.C. 431. B

**Lord Denning M.R.**—These two cases arise out of the persecution of the Jews in Nazi Germany. Mr. Meier Oppenheimer and Miss Miriam Nothman are Jews. They were born in Germany and lived there all their lives until the persecution. In or about 1948 they became naturalised here and became British subjects. In 1953 or thereabouts the new Federal Government of Germany (as compensation for the injustice which had been done to them) awarded them pensions. The question is whether those pensions, when received here, are subject to English income tax. C D

I will take Mr. Oppenheimer's case first. He was born in Germany in 1896. He qualified there as a teacher, and for some 20 years from 1919 to 1939 he taught at a Jewish orphanage in Bavaria. He was detained for a short time at a concentration camp at Dachau, but soon after his release he left Germany in 1939 for England, and has resided here ever since. In 1948 he applied for naturalisation and became a naturalised British subject. In 1953 the German authorities determined to make compensation to the employees of Jewish religious communities. They awarded Mr. Oppenheimer a pension from 1st October 1952. In 1961 Mr. Oppenheimer became 65 and they awarded him a second pension. Both pensions were payable out of the public funds of Germany. E F

The question is whether Mr. Oppenheimer is liable to pay English income tax on the sums he receives from Germany in respect of those pensions. By reason of conventions against double taxation between England and Germany, it appears that, if he is a national of the United Kingdom *only* but not of Germany (i.e. if he has *single* nationality), he is liable to pay English income tax. But if he has *dual* nationality, that is, if he is a national of Germany as well as of the United Kingdom, he is exempt from having to pay English income tax. G

The Crown asserts that for the years 1953–54 to 1967–68 he was a national of the United Kingdom only, and he has been assessed to tax on the pensions for those years. The Special Commissioners upheld the assessments. Gouling J. reversed the Commissioners. He held that Mr. Oppenheimer had a dual nationality in those years—in that he was a national of Germany as well as of England—and that accordingly under the conventions he was exempt from English income tax. H

The conventions about double taxation relief were agreed in 1954 and 1964 and were made law in this country by S.I. 1955 No. 1203 and S.I. 1967 No. 25. The relevant provisions are substantially the same in each instrument. I will

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A read from the 1967 instrument because it is clearer. Article IX(2) provides that:

“Remuneration, including pensions, paid, in respect of present or past services or work, out of public funds of the Federal Republic . . . shall be exempt from United Kingdom tax unless the payment is made to a national of the United Kingdom who is not also a German national.”

B The term “national” is not defined, but article II(3) provides that:

“In the application of the provisions of the present Convention by one of the Contracting Parties” [i.e. by the United Kingdom] “any term not otherwise defined in the present Convention shall, unless the context otherwise requires, have the meaning which it has under the laws in force in the territory of that Party” [i.e. in the United Kingdom] “relating to the taxes which are the subject of the present Convention.”

C

As a result of that article, it was agreed before the Special Commissioners that the meaning of the word “national” in the conventions fell to be determined by English law. It is plain that under English law Mr. Oppenheimer is a “national of the United Kingdom” within article IX(2). The question is whether under English law he is “also a German national” within article IX(2). If he is also a

D German national, i.e., if he has by English law *dual* nationality, he is exempt from United Kingdom tax, but if he has only *single* nationality (of the United Kingdom), then he is not exempt.

In order to see whether Mr. Oppenheimer is “also a German national” by English law, I turn to see whether he is a German national by German law, though I realise that this is not the ultimate question to be decided.

E *The nationality of Mr. Oppenheimer by German law*

The German municipal law was proved before the Commissioners by Dr. Cohn, a well-known professor of German law residing in this country.

The first relevant German decree was passed on 22nd July 1913. It contained this provision:

F “A German who has neither his habitual residence nor his permanent abode in Germany shall lose his nationality when he acquires a foreign nationality if such acquisition is made upon application by him . . . unless he had the written permission of his native country to retain his nationality.”

If that decree was applicable to Mr. Oppenheimer in 1948, he would by German law have lost his German nationality when he became a naturalised British G subject.

The next relevant decree was made on 25th November 1941. It said:

“A Jew whose usual place of abode is abroad may not be a German citizen . . . A Jew loses German citizenship if, at the date of entry into force of this regulation, he has his usual place of abode abroad.”

H Seeing that Mr. Oppenheimer was a Jew who had his usual place of abode abroad, by German law he lost his German nationality at that time in 1941. It was an objectionable law, but still it was the German law at that time.

According to Dr. Cohn, that decree of 25th November 1941 remained the

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law of Germany until a decision of the Federal German Constitutional Court A  
 given in 1968 by which the decree of 25th November 1941 was held absolutely  
 void *ab initio*, but that decision of the Constitutional Court had no retrospective  
 effect. So the 1968 decision did not, of itself, restore to Mr. Oppenheimer the  
 German nationality which he had lost in 1941. But we were told that, in  
 consequence of the 1968 decision, Mr. Oppenheimer is entitled to apply now B  
 for reinstatement as a German national and has done so; and it will be granted  
 automatically. Dr. Cohn expressed the opinion that, under German law, if  
 Mr. Oppenheimer had not lost German nationality under the decree of 25th  
 November 1941, he lost the said nationality under the German nationality law  
 of 22nd July 1913 on being naturalised as a British subject in 1948. Dr. Cohn's  
 evidence was accepted by the Special Commissioners. They said: "We find C  
 from that evidence that under German law the Appellant ceased to be a German  
 national not later than 4th June 1948, when he became a national of the United  
 Kingdom." I do not think that finding can be challenged. It means that, by  
 German law, Mr. Oppenheimer during the years of assessment did not have  
*dual* nationality. He was not a German national. He was only a national of  
 the United Kingdom. If the question fell to be determined by German law,  
 he would not be exempt from United Kingdom tax. D

*The nationality of Mr. Oppenheimer by English law*

But the question does not fall to be determined by German law. It falls to  
 be determined by English law. It was urged before us that English law must  
 itself apply the German law. At first I thought this was correct: for I thought  
 on the authorities that a country was in charge and solely in charge of the  
 nationality of its citizens; and that when Germany passed the decree of 25th E  
 November 1941 it was effective in English law to deprive Mr. Oppenheimer of  
 his German nationality; and that, however objectionable or atrocious that  
 decree might be, we had to some extent to recognise it as between that country  
 and the individuals concerned. That view was supported by the law as stated  
 by Russell J. in *Stoeck v. Public Trustee* [1921] 2 Ch. 67, at page 82: "Whether  
 a person is a national of a country must be determined by the municipal law of F  
 that country. Upon this I think all text writers are agreed." It was supported  
 also by a decision of the United States Court of Appeals for the Second Circuit  
 relating to this very German decree of 25th November 1941. It is *United*  
*States of America ex rel. Schwarzkopf v. Uhl* (1943) 137 Fed. Rep. (2d.) 898,  
 where it was said (at page 903): "There is no public policy of this country to  
 preclude an American Court from recognising the power of Germany to dis- G  
 claim Schwarzkopf as a German citizen."

But on reconsideration I think those observations have no application to  
 this case. We are here concerned with *dual* nationality. If a man is a British  
 national, owing allegiance here, it is for the English law to say whether he can,  
 consistently with that allegiance, be also a national of another country, owing  
 allegiance to that other country also. I turn therefore to see whether English H  
 law does recognise Mr. Oppenheimer as having, by English law, *dual* nationality.

When Mr. Oppenheimer came to England in 1939 he was a German national;  
 and English law would regard him as such, notwithstanding that he was a  
 refugee from the Nazi persecution of the Jews. When the German authorities  
 passed the decree of 25th November 1941 the English Courts would not recog- I  
 nise it as valid, by English law, to deprive him of his German nationality. Not  
 only was it an objectionable and atrocious law. It was passed at a time when

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A England and Germany were at war; and English law will not recognise any decree of an enemy power which purports to deprive its citizens of their enemy nationality in time of war: see *Rex v. Home Secretary (ex parte L)* [1945] 1 K.B. 7; *Lowenthal v. Attorney-General* [1948] 1 All E.R. 295. So after 1941 Mr. Oppenheimer was regarded by English law as a German national, just as he had been before. The war did not terminate officially until 9th July 1951. So if  
 B nothing more had happened Mr. Oppenheimer would have been regarded by English law still as a German national. But in 1948 Mr. Oppenheimer applied for naturalisation as a British subject and was granted it. This was done under the British Nationality Act 1914, which was then in force. He qualified for naturalisation by his long residence in England since 1939 and by his declared intention to reside here. On 24th May 1948 he was given a certificate of  
 C naturalisation; and on 4th June 1948 he took the oath of allegiance, swearing that he would be "faithful and bear true allegiance to His Majesty King George the Sixth, his heirs and successors according to law".

It is plain that, by being given that certificate and by taking the oath of allegiance, Mr. Oppenheimer, by English law, became a national of the United Kingdom; and I do not see how English law could at the same time regard him  
 D as a national of Germany also. There was at that time, in the eye of the law, a state of war still existing between England and Germany. He could not owe allegiance at one and the same time to both of two countries which were at war one with the other. Nationality and allegiance are twin bed-fellows. One cannot exist without the other. It was in the absolute discretion of the Secretary of State whether to grant him naturalisation or not; and I cannot imagine that  
 E the Secretary of State would at that time grant a certificate of naturalisation to one who was, or claimed to be, still a German national. To my mind, by applying for naturalisation Mr. Oppenheimer renounced his German nationality: and well he might, seeing the way the German authorities had treated him. If he had remained a German national he would have owed allegiance to the German government, and it would have been the obligation of the German  
 F government to protect him. Protection and allegiance are reciprocal: see *Calvin's Case (1609)* 7 Co. Rep. 1, 5a. But the German authorities had long ago, in 1941, repudiated its obligation to protect him. They had by their law deprived him of his nationality, and thus absolved him from any obligation to them. When he took the oath of allegiance here he accepted that repudiation. He became a British national and no longer a German national. He was there-  
 G after habitually and principally resident in the United Kingdom. His effective nationality was British. It was his *single* nationality. I can understand a man having *dual* nationality when each of two countries by its laws grants him its protection and he owes allegiance to each: but I cannot understand his having *dual* nationality when only one of those countries acknowledges him as its national and the other repudiates him. Then he has *single* nationality of the  
 H one country who acknowledges him and not of the other.

The Commissioners said: "We hold that under English law the Appellant was not a German national certainly from 4th June 1948, when he became a national of the United Kingdom." I think they were quite right in so holding.

The result is that for the years in question, from 1953-54 to 1967-68, Mr. Oppenheimer was regarded in English law as a United Kingdom national and  
 I not also a German national. He is not, therefore, entitled under the conventions to exemption from United Kingdom tax. We are told that, as a result of

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the 1968 decision of the Federal Constitutional Court, it is open to Mr. Oppenheimer now to apply for German nationality, and to get it almost automatically. If he becomes a German national, I expect the English law will accept him then as being of dual nationality and will grant him exemption. But he is not exempt for the past years when he was not a German national. A

I come therefore to a different conclusion from Goulding J. I hold, in agreement with the Special Commissioners, that Mr. Oppenheimer is properly assessed to tax. B

Now I turn to Miss Nothman's case. On the point of nationality it is indistinguishable from Mr. Oppenheimer's case. But she has other points. She was born at Frankfurt in 1915. She went to a grammar school and obtained distinction in mathematics. She attended a teacher's training course; but she never became a fully-fledged teacher. She was prevented by persecution from becoming a real teacher. She was employed for a time at a Jewish community school in Marburg for psychopathic children. She was also employed at a secondary school at Darmstadt operated by the Jewish community. In April 1939 she came to England as a refugee from the Nazis. She did very well here. She obtained her degree at Birkbeck College in the University of London, and she has taught mathematics here since that time. She became a naturalised British subject in 1949. In 1952 she became entitled to a payment from Germany by reason of a law of 1951, Article 31(d), which said that: C D

"The former employees of Jewish communities or public organisations who had, or but for persecution would have attained, a right to retirement benefits against the employer shall be entitled from the 1st October 1952 onwards to pension payments on the basis of their former salary payments". E

That law was an act of reparation by the Federal Government for the wrongdoing by the Nazis in 1939. Miss Nothman was accordingly awarded under that Article 31(d) a monetary compensation. Unlike Mr. Oppenheimer, she had not entered upon a career or rendered long service to the German community. Her compensation was not a pension for long service; it was compensation for being deprived of her chosen career. Miss Nothman, in a learned, sustained and courteous argument, has submitted that in the circumstances the pension payments do not fall to be taxed under English law. F

The material provisions are ss. 122 and 123 of the Income Tax Act 1952. Tax under Sch. D is charged on:

"the annual profits or gains arising or accruing—(i) to any person residing in the United Kingdom from any kind of property whatever whether situate in the United Kingdom or elsewhere". G

It is said by the Crown to be charged under Case V:

"tax in respect of income arising from possessions out of the United Kingdom".

The Crown says that these pension payments are income arising from possessions out of the United Kingdom. H

The first point taken by Miss Nothman is that the pension payments were not income but capital. They were paid by way of compensation for being deprived of her chosen career, and should be regarded as a capital sum payable

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A by instalments. She referred to *Laird v. Commissioners of Inland Revenue* (1929) 14 T.C. 395, where the United States Government awarded compensation to a soldier who by war service had been rendered lunatic. Although the compensation was made by annual payments, Lord President Clyde said that it was not proved to be income and therefore it did not come under the tax provision. It is always a nice question whether annual payments are really of an income nature, or whether they are instalments of a capital sum. The Commissioners found that these pension payments were income. They said:

“Although the payments were intended as compensation for injury to the Appellant’s career they were not related to any lump sum. They were paid monthly, and we find that they were received as income in the hands of the Appellant.”

C I see no error in law in that finding, and I do not think we can interfere with it.

The second point made by Miss Nothman was that these were voluntary payments, and as such were not to be regarded as her income. She relied on such authorities as *Chibbett v. Joseph Robinson & Sons* (1924) 9 T.C. 48 and *Stedeford v. Beloe*<sup>(1)</sup> [1932] A.C. 388. She urged that she was not entitled as of right to any payment from the German Government, and that the German Government, having made a law, could revoke it at any time. I am afraid I cannot accept that argument either. This German law was a law which created a binding obligation. The payments under it cannot be regarded as voluntary payments.

The third point made by Miss Nothman was that these payments were not income from “possessions” out of the United Kingdom. The word E “possessions” has been given a very wide meaning. It covers any source of income out of the United Kingdom. That was settled by *Colquhoun v. Brooks*<sup>(2)</sup> (1889) 14 App. Cas. 493 and *Foulsham v. Pickles*<sup>(3)</sup> [1925] A.C. 458. Under those authorities these payments, made annually and regularly from Germany, were income from possessions out of the United Kingdom.

The fourth point made by Miss Nothman was raised by way of analogy to F the cases dealt with by s. 22 of the Finance Act 1961. It says:

“Annuities payable under the law of the Federal German Republic relating to the compensation of victims of National-Socialist persecution, being annuities which under any such law relating to the taxation of such compensation are specifically exempted from tax of a character similar to that of income tax, shall not be regarded as income for any income tax purposes.”

G That section covers pension payments such as those here, but only grants exemption from English income tax if they are “specifically exempted” under the German law from German tax. Miss Nothman agrees that under German law there was no specific exemption from German tax on the payments made to her. But she relied on a case of the *Referendars*. The *Referendars* were young H people who were not qualified because their professional training had not been concluded. In 1961 the German Government awarded compensation to them. In 1963 the German Courts held that those payments were exempt from tax. Miss Nothman suggested to us that her case was for all practical purposes the

(1) 16 T.C. 505. (2) 2 T.C. 490. (3) 9 T.C. 261.

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same. If the *Referendars* were exempt from German tax, so should she be. A  
 She did not, however, wish to test her case in the German Courts. I can see  
 that the position of the *Referendars* is very similar to Miss Nothman's, but I  
 am afraid the similarity is not enough. Section 22 of the Finance Act 1961  
 requires a "specific exemption" from German tax, and there was none in Miss  
 Nothman's case.

On all the points raised by Miss Nothman I find myself in agreement with B  
 the learned Judge. I do not see that she can claim exemption from English tax  
 in regard to these payments. It follows that her cross-notice must fail.

I would therefore allow the Crown's appeal on the main point. In each  
 case I would hold that the decision of the Commissioners was correct.

**Buckley L.J.**—The question which arises in Mr. Oppenheimer's case, and C  
 the first question that arises in Miss Nothman's case, is whether the Respondents  
 are entitled to relief from United Kingdom income tax in respect of a number of  
 years for which they have been assessed to United Kingdom income tax in  
 relation to annual payments received by them from the Federal German  
 Government in the circumstances set out in the Cases that have been stated to  
 the Court. The question arises under article IX of the Double Taxation D  
 Convention of 1955, which was brought into effect by S.I. 1955 No. 1203, and  
 which was subsequently superseded by—or its place was taken by—a later  
 Convention of 1967, which was brought into effect by S.I. 1967 No. 25. The  
 terms of the relevant article in those two Conventions are the same, and I will  
 read from the 1955 Convention, article IX(1):

"Remuneration, including pensions, paid, in respect of present or E  
 past services or work, out of public funds of one of the Contracting Parties  
 shall be exempt from tax in the territory of the other Contracting Party,  
 unless the individual concerned is a national of that other Party without  
 being also a national of the first mentioned Party."

So the question in each case is whether in the relevant years the Respondent  
 was a national of the United Kingdom and was also a national of Federal  
 Germany. If the Respondent was a national of the United Kingdom and was F  
 not also a national of Federal Germany, he is not entitled to relief. Both  
 Respondents were citizens of the United Kingdom by naturalisation; and the  
 question is whether at the relevant times they were also nationals of Federal  
 Germany for the purposes of this article. Now, it is common ground that that  
 question has to be answered as a question of English law, but that in English  
 law it is treated as a question of fact which has to be decided in the light of G  
 evidence as to the German domestic law on the subject. That was pointed out  
 by Russell J. in *Stoek v. Public Trustee* [1921] 2 Ch. 67 in a passage which was  
 cited by Goulding J. in his judgment<sup>(1)</sup>. Russell J. said (at page 82):

"Whether a person is a national of a country must be determined by H  
 the municipal law of that country. Upon this I think all text writers are  
 agreed. It would be strange were it otherwise. How could the municipal  
 law of England determine that a person is a national of Germany? It  
 might determine that for the purposes of English municipal law a person  
 shall be deemed to be a national of Germany, or shall be treated as if he  
 were a national of Germany; but that would not constitute him a national

(1) See page 168 ante.



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A of Germany, if he were not such according to the municipal law of Germany. In truth there is not and cannot be such an individual as a German national according to English law; and there could be no justification for interpreting or expanding the words 'German national' in the manner suggested."

The reasoning of that passage appears to me to be unanswerable. There is no doubt that in the years of assessment under consideration neither of the Respondents was by German law a German national, because under the decree of 1941 to which my Lord has referred each of them had lost his or her German nationality. Under German law the decree of 1913 could not have applied to them in 1948 because they had already lost their German nationality in 1941. But it is contended that we should pay no attention to the law of 1941, on one or other of two grounds. First, it is said that the decree of 1941 was a law of a penal or confiscatory nature of a kind which the Courts in this country will not recognise. Secondly, it is said that it was a law made when this country and Germany were in a state of war, purporting to alter the status of persons in this country who were enemy aliens, and that the Courts in this country will not recognise such a law. Taking the first of those two points first, it is well established that the Courts in this country will not give effect to legislation of another country which is penal or confiscatory, at any rate if it is of a discriminatory or oppressive character, in relation to matters within the competence of the Courts of this country. But in my view that principle cannot have any application to the question of whether or not a particular person is or is not a national or citizen of the country whose law is criticised. The law may be as oppressive as can be; nevertheless, within the country whose domestic law it is, it is effective to deprive the person concerned of whatever that law affects—in this case, citizenship. The question being whether by the domestic law of that country the person is or is not a citizen of the country, it is of no avail to say that the law is one which the Courts of this country should not recognise: that does not alter the fact that the answer to the question whether or not the person is a national or citizen of the country must be answered in the light of the law of that country, however inequitable, oppressive or objectionable it may be. No authority can be found in the books one way or the other upon this point. At any rate, no case has been found by the industry of Counsel, and I am sure that had there been a case it would have been forthcoming. But we were referred to the American case which my Lord has mentioned, *United States ex rel. Schwarzkopf v. Uhl* (1943) 137 Fed. Rep. (2d.) 898, at page 903, where, in a Circuit Appeals Court in the United States, the learned Judge said:

"There is no public policy of this country"—that is the United States—"to preclude an American court from recognising the power of Germany to disclaim Schwarzkopf as a German citizen. The cases relied upon by the respondent relate to giving effect to foreign confiscation of property having an American situs—an entirely different matter from conceding that a foreign state may determine for itself who shall have the rights and privileges of citizenship."

It seems to me that the views there expressed are such as must commend themselves as being correct, and I feel unable to accept the argument which Mr. Godfrey presented to us that we should ignore the 1941 decree upon the basis that it was a penal decree.

As to the other point, it is clearly established by authority in this country—the cases we were referred to were *Rex v. Home Secretary* (ex parte L) [1945]

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1 K.B. 7 and *Lowenthal v. Attorney-General* [1948] 1 All E.R. 295—that the Courts in this country will not in wartime recognise laws passed in a foreign country purporting to alter the status of enemy aliens in this country. The reason for that is, I think, clear; it would be extremely embarrassing for security reasons and other reasons if during wartime enemy aliens could suddenly be disembarassed of their status as enemy aliens in this country. That reason no longer operates as soon as the state of war ceases to exist; and I can see no reason why such a law made by a foreign country should not be given effect to or recognised in this country once the particular reason for refusing to recognise it, which is connected with the existing state of war, is removed. Mr. Godfrey has contended that, once such a law has been refused recognition in the Courts of this country, that position must be maintained for all time. With respect to his argument, I cannot see any reason for so holding. On the contrary, it seems to me that common sense indicates that as soon as the particular cause for refusing to recognise the law and give it effect in this country is removed it should have the same effect as any other foreign law and should be recognised accordingly. So in my view on neither of those grounds is it possible to say that we should not recognise the effect of the 1941 decree; and if the 1941 decree is taken into consideration it is clear that at the relevant times neither of the Respondents was a national of Germany.

That disposes of Mr. Oppenheimer's case. It does not, however, dispose of a number of points which were raised by Miss Nothman. She has contended that the sums which she received are not taxable in this country, first of all, because they are compensation and, as she contends, should not therefore be regarded as income payments but rather as instalments of a capital sum. They are not of course related to any capital sum: they are payments in the nature of an annuity. The fact that they are compensatory payments made to her in consequence of actions of the German Government in the 1930s by which she was deprived of the opportunity to pursue her career as a teacher in Germany does not seem to me to indicate one way or the other whether they should be regarded as capital or income payments. Compensation may be given either in the form of a lump sum or in the form of a source of income for the compensated person, and the mere fact that these are compensatory payments does not seem to me, in spite of Miss Nothman's very interesting and very able argument that she has presented to us, to help to solve the problem. These payments were awarded to her under Article 31(d) of the German law, a translation of which is exhibit A to the Case Stated in her appeal. In that paragraph they are described as "pension payments". They are payments which I think admittedly will continue indefinitely during her life. A pension is something which may be earned by service or may be given voluntarily. I see no inconsistency in saying that somebody may receive a pension who has done nothing whatever to earn it, notwithstanding that it is a purely voluntary act by the person granting the pension, and the fact that these sums which are payable to Miss Nothman are not payable to her in relation to any service that she has given to the German Government or the community in Germany or any part of the German community does not I think deprive them of their character as income payments in the nature of a pension.

Then she has contended that this is a voluntary payment and that these payments to her are in effect a series of gifts. She has argued that they are not payable under any contract—which is quite correct—and she has contended that the German Government could at any moment revoke the law under

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- A which she receives them. It may be, for all I know, that the German Government could at any moment revoke the law under which she receives them; but in the years in which she received them, and in respect of which she has been assessed to tax in respect of them, they were sums payable to her by the German Government under an obligation imposed upon the German Government by a German law, and had she not received any instalment I feel certain that she must
- B have had a right to enforce payment of it to her. There is no finding that these are voluntary payments. They do not appear to me to have the character of voluntary payments. The pension awarded to her is not shown to be a terminable pension. It is a pension granted to her for an undefined period during her life, payable under a law, and payable I think as a matter of obligation. So I cannot accept the arguments which Miss Nothman has presented upon the
- C footing that these are voluntary payments.

Then a question was raised as to whether these could be said to be taxable under Case V of Schedule D as being payments arising from a possession outside the United Kingdom. As Lord Denning M.R. has said, it has been decided in cases of the highest authority in this country that the word "possession" in this context is one which must be given a very wide interpretation

D extending to any source of income outside the United Kingdom. It appears to me that the payments to Miss Nothman of this pension—to use the term which is used to describe it in Article 31(d) as translated—are payments which she received from a source of income which had been created for her benefit outside the United Kingdom, and as such in my judgment they fall within the terms of Case V.

- E This case is not within the special exemption contained in s. 22 of the Finance Act 1961 because these are not payments that are specifically exempted from tax in Germany. In fact Miss Nothman is receiving her remittances from Germany subject to deduction of German tax. She has said that she thinks that if she litigated the matter in Germany she could obtain exemption from tax on the same lines as were accepted in the *Referendars'* case, to which she drew
- F our attention. But that is not the position today; nor was it the position in any of the years of assessment under consideration. In those years she was in receipt of her pension subject to deduction of tax, and in my judgment in those circumstances the case cannot be said to fall within the terms of s. 22 of the Finance Act 1961.

For these reasons and for the reasons which my Lord has given, I think the

G Crown's appeals succeed and the points raised by Miss Nothman fail. But I would like to pay tribute to the immense amount of work which Miss Nothman must have done and the very intelligent and helpful way in which she presented her case, which has enabled us to give really very close attention to her argument. I hope she will feel that it has been considered in the way it deserves.

**Orr L.J.**—I agree that these appeals should be allowed.

- H With regard to the issue of double taxation relief, which arises in both appeals, the first question is whether the Nazi decree of 1941 which deprived both Respondents of German nationality is to be disregarded under English law, either on the ground that it contains penal or confiscatory provisions and on that account should be wholly disregarded, or on the narrower ground that English law for reasons of public policy will not recognise in respect of an enemy
- I alien any change of his nationality effected by his domestic law in time of war. For the reasons given by Buckley L.J., I am satisfied that the decree in question,

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however offensive its character, does not fall to be disregarded for the present purpose on the ground that it contains penal or confiscatory provisions; but in my judgment it did when passed fall to be treated as ineffective under English law on the ground that it is contrary to public policy that an enemy alien should be allowed to escape from the disabilities of that status by virtue of a change in his nationality effected by his domestic law in time of war. A

The further question then arises, whether such a change of nationality is to be disregarded by English law for ever or merely until the termination of the state of war. There is no case on this point one way or the other; but since in my judgment a change of nationality effected by an alien's domestic law ought to be disregarded by English law to the extent only that public policy so requires, and since the reason of public policy for disregarding such a change in the case of an enemy alien disappears with the cessation of the state of war, I consider that the correct view of the rule of public policy here in question is that it merely suspends recognition of the change of nationality during the continuance of the state of war. It follows that from 9th July 1951 English law, in my judgment, was bound to recognise the German decree of 1941 as effective, and from that date onwards both Respondents have had no other nationality than British. B C D

I would add, before leaving the question of double taxation relief, that in my judgment the German law of 1913 whereby a German national loses his German nationality on acquiring, on his own application, a foreign nationality, has no relevance to the present appeal. That law by its terms could not apply to a citizen of Germany who had already lost his German nationality at the time of his becoming a citizen of another country. E

I would add only a few words as to the second Respondent's claim that she is not liable at all to United Kingdom taxation in respect of the payments in question. She has claimed that these payments were merely voluntary payments which could be terminated at any time, but there is no evidence and no finding recorded in the Case Stated to that effect, and the documents before us, whilst showing that the payments can be determined in certain defined events, do not indicate in any way that they could be terminated at the pleasure of the German authorities. In the end I think Miss Nothman really confined her argument to the point that the German Legislature could revoke at any time the law under which these payments were made. That is a circumstance that would affect very many pensions, and in my judgment is no ground for holding that the pension is not taxable while the legislation subsists. I have no doubt that in the years in question, had it been necessary to do so, Miss Nothman could have sued for the payment of these sums. It follows that that ground of appeal in my judgment is without substance. F G

Miss Nothman also claims that the payments should be treated as instalments of a capital sum awarded as compensation in respect of her being deprived of a career and for her other sufferings at the hands of the Nazis. I have every sympathy in respect of those sufferings, but it is clear, in my judgment, first, that no capital sum by way of compensation was ever fixed of which these could be instalments; and secondly, that they constituted what is described in the German legislation as a pension and were provided to each Respondent in lieu of pensions that they would have earned and received had they been allowed by the Nazis to pursue their careers. I can find in this respect no help for the Respondent's case in the material she laid before us about the *Referendars*, whose maintenance H I

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A payments derive from the same German legislation as the Respondents' pensions, but have under German law been distinguished from the Respondents' pensions as respects the incidence of German tax.

With regard to the remaining points of appeal, I agree entirely with what my Lords have said; and, notwithstanding the very attractive manner in which Miss Nothman has put forward her case, I am unable to find any ground for B any of those contentions. I agree that in the event the Crown's appeal must be allowed and the second Respondent's cross-appeal dismissed.

**Lord Denning M.R.**—I think costs have been provided for by agreement?

**Vinelott Q.C.**—May I tell your Lordship what Order we require? With regard to the assessments, I think the right course would be to remit the assessments to the Commissioners for the amount to be determined, as a precaution, C in case there is some minor adjustment which has to be made. With regard to the costs, we have, as I told your Lordship, in this appeal agreed to pay Mr. Oppenheimer's costs on a common fund basis; and I think there ought to be an order for his protection in those terms. As regards Miss Nothman, I ought to tell your Lordship exactly what the position is. We agreed to pay her costs on the issue of principle in the same way, but not on other matters.

D **Lord Denning M.R.**—I think you might—

**Vinelott Q.C.**—May I elaborate it? We are put in a difficulty because it is never right for the Crown to finance litigation except where there is some point of principle that radically affects the Crown's practice and which they want to have reviewed in a higher Court. That is why that arrangement was made in those terms. Having considered that, I have considered this matter further E with my instructing solicitors, and we feel there would be grave difficulty in endeavouring to apportion any part of the costs, and indeed any endeavours to make an apportionment might merely increase the costs disproportionately. In the circumstances your Lordship will see this is not at all on principle and concession in any other case. I feel it would not be right to try to make that apportionment: that we will pay our own costs and we will pay such costs, if F as Miss Nothman may have incurred. I do not know if she wants an Order. I think it would be as well.

**Lord Denning M.R.**—The appeal of the Crown will be allowed. No Order as to costs except that you will pay the costs of Mr. Oppenheimer on the common fund basis, and we hope you will pay the costs of Miss Nothman.

**Vinelott Q.C.**—And we ask for no Order against her for costs. We are G quite prepared to pay Miss Nothman's costs.

**Lord Denning M.R.**—Then we make an Order for payment of Miss Nothman's costs?

**Vinelott Q.C.**—Yes.

**Godfrey Q.C.**—May it please your Lordships, may I respectfully ask for leave to appeal to the House of Lords? I can give your Lordships in four H sentences four reasons why I ask for that. First, the case includes many other cases which are subject to double taxation and many people would hope to be exempted. Secondly, two points have been considered in the case, both of them virtually wholly free from authority: one on the penal and confiscatory

point; and the second, virtually free from authority, whether after the war a penal disqualification still continued, and whether it is permanently effective or not. That is one of public interest in this country and of international interest also; and for that reason, coupled with the one that your Lordships are differing from the learned Judge, I ask for leave to appeal to the House of Lords. A

**Buckley L.J.**—The international interest must be fairly academic, must it not? B

**Godfrey Q.C.**—Most international interest is. There is no point in going into the reasons beyond that, but there are reasons why.

**Vinelott Q.C.**—My Lord, it is not the practice of the Crown to oppose or offer any observations on the point other than that, my Lords, the Crown's generosity on the matter of costs must not be taken to extend to the House of Lords. One would not, of course, seek to disturb any Order made in this Court, but we cannot give any undertaking or assurance as to what course we might take in the House of Lords. C

**Godfrey Q.C.**—With regard to that, may I say that when I told your Lordships there were so many cases and I should ask for leave to appeal, it would be a question as to whether those sorts of other cases would be prepared to join, now that maintenance is no longer illegal, and join with Mr. Oppenheimer in an appeal which he possibly could not undertake on his own. There are reasons to think that may be forthcoming. D

**Buckley L.J.**—Are you asking that only on behalf of Mr. Oppenheimer?

**Godfrey Q.C.**—I must. I have no right to do otherwise. As to Miss Nothman, she has already indicated to me that she would like leave to appeal to the House of Lords, and, although I cannot formally apply on her behalf, I would ask your Lordships for leave for that. I know she would want me to say this, that she would want leave to appeal not only on the question of principle. E

**Lord Denning M.R.**—Yes—on the other points.

**Godfrey Q.C.**—So I would ask on her behalf for leave to appeal on all the points which she has put to the Court. F

**Lord Denning M.R.**—Yes; if we give leave to appeal, as a rule we do not make any distinction.

*(The Court conferred.)*

**Lord Denning M.R.**—You shall have your leave, Mr. Godfrey and Miss Nothman.

**Miss Nothman**—Thank you very much. G

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The taxpayers having appealed against the above decision, the cases came before the House of Lords (Lord Hailsham of St. Marylebone L.C. and Lords Hodson, Pearson, Cross of Chelsea and Salmon) on 26th, 27th, 28th and 29th March, 5th November and 13th December 1973, when *Oppenheimer's* case was remitted to the Special Commissioners for further findings as to the German law. In proposing the order for remission Lord Cross of Chelsea said (*see* H

- A [1975] 2 W.L.R. 347, at pages 351-2) that their Lordships had become aware that there were grounds for thinking that the findings of the Commissioners as to the relevant German law might have been based on inadequate material and that, in particular, article 116(2) of the Constitution of the Federal Republic enacted in 1949, before the years of assessment in question, might have a bearing on the point to be decided. They had therefore put the appeal back into the list for further argument, and as a result of the discussion which then ensued it became clear, and was accepted by counsel on both sides, that the case ought to be sent back to the Commissioners.

SUPPLEMENTAL CASE

Stated under the direction of the House of Lords.

- C 1. On 13th December 1973 the House of Lords made an Order in the following terms:

D "That this case be and the same is hereby remitted back to the Commissioners for the Special Purposes of the Income Tax Acts for further consideration, and with a direction that they amend the Case Stated by finding on further consideration of the evidence already adduced, and on consideration of any further evidence the parties may adduce, and taking into account any relevant decisions of the German Courts and their necessary implications and any other provision of German law: (a) whether for the purposes of German municipal law the Appellant was deprived of his German citizenship by the decree of 25th November 1941; (b) if the Appellant was not deprived of his German citizenship by the said decree, whether for the purposes aforesaid he was deprived of German citizenship by the German Nationality Law of 22nd July 1913 on being naturalised a British subject on 24th May 1948, and taking into account his oath of allegiance on 4th June 1948; (c) if the Appellant was deprived of German citizenship by the said decree or by the said German Nationality Law at any time prior to the assessment years, whether (i) his German citizenship was reinstated or deemed to be reinstated by the Constitution of the Federal Republic or by any legislation or judicial decision or under any other provision of German law, or (ii) his German citizenship would have been reinstated at any time before or during the relevant years of assessment if he had applied for German citizenship under Article 116 of the *Grundgesetz* 1949. And It Is Further Ordered, that the said Commissioners do report the amended Case to this House."

H Of the two Commissioners who heard Mr. Oppenheimer's appeal on 19th January 1970 one has since retired from the public service and was not available to carry out the direction of the House of Lords. One of the parties was not prepared to consent to the proceedings being continued before the continuing Commissioner under the terms of s. 45(3), Taxes Management Act 1970. With the agreement of both parties to the appeal, the proceedings were continued with the continuing Commissioner and another Commissioner.

I 2. At a further meeting of the Commissioners for the Special Purposes of the Income Tax Acts held on 29th April to 3rd May 1974 inclusive, we had read to us the Order of 13th December 1973, and heard evidence from Dr. Franz Paul Jaques, a member of the English Bar, a practising German lawyer and a Doctor of Law of the University of Hamburg, together with further evidence from Dr. Ernst Josef Cohn, and the observations of Counsel on all the evidence adduced before us.

3. In the course of their evidence the two witnesses produced the following documents: A

(a) An English translation edited by the Linguistic Section of the German Foreign Office of the Basic Law for the Federal Republic of Germany (hereinafter referred to as "the Basic Law").

(b) A translation of Article 116 of the Basic Law (hereinafter referred to as "Article 116"). B

(c) A translation of a decision of the German Federal Constitutional Court (hereinafter referred to as "the Constitutional Court") dated 10th July 1958 (hereinafter referred to as "the 1958 decision").

(d) A translation of a decision of the Constitutional Court dated 14th February 1968 (hereinafter referred to as "the 1968 decision").

(e) A translation of a decision of the German Supreme Court dated 11th July 1962 (hereinafter referred to as "the Dutch decision"). C

(f) A translation of a decision of the Court of Appeal of Berlin dated 21st November 1970 (hereinafter referred to as "the Luxembourg decision").

(g) A translation of a decision of the District Court of Berlin dated 1st November 1968 (hereinafter referred to as "the Hong Kong dentist decision"). D

(h) A translation of a decision of the District Court of Berlin dated 12th February 1971 (hereinafter referred to as "the mental incapacity decision").

(i) A translation of extracts from notes 4, 5 and 6 of the Commentary on the Basic Law by Schmidt-Bleibtreu and Klein, 3rd edn. (1973), pages 962 *et seq.*

(j) An article by Dr. F. A. Mann on "The Present Validity of Nazi Nationality Laws" published in the Law Quarterly Review of April 1973. E

These documents are attached to and form part of this Supplementary Case<sup>(1)</sup>.

4. As a result of the evidence, both oral and documentary, adduced before us we find the following facts proved or admitted:

#### *Background information*

(a) (i) The basis of the German law relating to nationality is the 1913 law, which in section 17 thereof sets out grounds for loss of nationality and in Article 25 thereof provides for loss of German nationality by reason of the acquisition of a foreign nationality (*see* exhibit B of the original Case Stated). This law is hereinafter referred to as "the Nationality Law". F

(ii) The Nazis came into power in Germany in 1933, and in July of that year there was passed a law which gave the Government power by decree to deprive of their German nationality individuals considered undesirable. Under that law numerous Germans were individually deprived of German citizenship. In 1935 there was enacted another Act which created two classes of citizens, those of German or kindred blood and, secondly, all others. This Act enabled the German Government by decree to deprive of their nationality citizens in the second class. The 1941 decree or "11th Ordinance" (*see* exhibit A of the original Case Stated) was made under this 1935 legislation. G H

(iii) The Nazis surrendered to the Allied Powers on 8th May 1945, and shortly thereafter the 1941 decree was repealed by Allied Military Government

(1) Not included in the present print.



A Legislation. It is generally accepted by German lawyers that this repeal by the appropriate occupying authority was without any retrospective effect.

(iv) Between 1945 and 1948 the Governments of the various German *Länder* in the United States zone of occupation of Germany passed a uniform law whereunder expatriates resident in the respective *Länder* were given the right to apply to have their expatriation declared null and void.

B (v) The new constitution of the Federal Republic of Germany was promulgated as the Basic Law on 23rd May 1949.

(vi) By a declaration dated 9th July 1951 the Government of the United Kingdom declared that the state of war between the United Kingdom and Germany had ended.

C (vii) There is a presumption in German law that German civilians who went missing during the Second World War or who were sent to concentration camps and never came out had died on 8th May 1945, the day on which the German armed forces surrendered to the Allied forces.

(viii) The Constitutional Court is the Supreme Court in Germany in relation to matters affecting the constitution as enacted in the Basic Law. Its jurisdiction is set out in Article 93 of that law.

D The decisions of the Constitutional Court are declaratory, and therefore retrospective. A decision of the Constitutional Court declaring a Federal Statute valid or invalid must be published in the official gazette and when published has the force of a Statute. Other decisions of the Constitutional Court (for instance, those interpreting the Constitution) do not have the force of a Statute, but all governmental agencies and all Courts are none the less bound not only by the decision but by the principle on which it is based. That part of the reasoning of the Constitutional Court which is not essential to its decision is not binding on other Courts but in practice is normally followed.

E (ix) In 1948, when the Appellant was applying for British nationality, conditions in Germany were such that he could not have effectively made application under the Nationality Law for the written permission of the competent authority to retain his German nationality.

F (x) The following terms are used in succeeding paragraphs: "expatriate" or "persecutee": a German affected by a decree made under the Nazi legislation of 1933 or 1935; hence "expatriation" and "expatriated"; "Germany": the Federal Republic of Germany; "Article 116": Article 116 of the Basic Law.

G (b) It was agreed between the parties to the appeal that before considering what answers should be given to the questions posed to us it was desirable to consider the decisions of the German Courts, the translations of which are attached to this Supplemental Case. These decisions are all concerned with various matters affecting the rights and liabilities of expatriates. As they make plain, the question of the proper treatment of these individuals under the law was a peculiarly sensitive one for the new German State. It was anxious, on the one hand, to restore to the expatriate the nationality which the Nazis had purported to take away, but it was not disposed, on the other hand, to force such restoration on an unwilling recipient. This somewhat ambivalent attitude finds expression in the various cases and makes them neither easy of reconciliation nor productive of clear principles of general application.

H (c) We turn now to consider the relevant decisions.

I (i) We were referred to two decisions of the Federal Constitutional Court. The later of these two decisions, the 1968 decision, dealt with a German Jewish

refugee who had emigrated to Amsterdam shortly before the Second World War, had apparently been deprived of his German nationality by the 11th Ordinance and had subsequently been deported from Amsterdam in 1942. Since nothing was known of his fate thereafter, he was presumed to have died on 8th May 1945 in accordance with the relevant compensation law. The question which fell to be decided was whether he had died a German national or without nationality. As we understand the evidence of the expert witnesses, three points decided by the Constitutional Court form part of the binding *ratio decidendi* of that case: (a) that the 11th Ordinance was void *ab initio*; (b) that Article 116(2) was not directly applicable to persecutees who died before 8th May 1945; and (c) that German nationality should be forced on persecutees who died before 8th May 1945 as little as on those who died after that date; only if there were any concrete indications showing that the persons in question, knowing that they could return to a free, democratic and lawful Germany—a Germany governed by the rule of law—would not have wanted to make use of this possibility, was it to be assumed that they wished to renounce their German nationality. In relation to these points there was substantial agreement between the witnesses; divergence between their views emerged when it came to reconciling the 1968 with the 1958 decision and applying Article 116(2) to persecutees who survived 8th May 1945.

In the course of the decision of the Constitutional Court in the 1968 case the following passage occurs following a reference to and citation of Article 116(2) (we give a translation which, in the light of the evidence adduced before us, in our view correctly conveys the meaning of the original German text):

“In formulating this article the constitutional legislator proceeded from the assumption that the 11th Ordinance was void *ab initio*. This means that the persecutees have never lost their German nationality by virtue of the expatriation. They may of course have lost it for some other reason, especially through acquisition of a foreign nationality. The effect of Article 116(2) of the Constitution in such a case is that even these persons can regain German nationality by taking up residence in the Federal German Republic or by making an application. For persecutees who have not acquired a foreign nationality the effect of Article 116(2) is that notwithstanding the fact that they did not lose their German nationality by expatriation the German State does not treat them as Germans unless they assert their German nationality by taking up residence or making an application. Thus far Article 116(2) gives effect to the idea that no persecutee should have German nationality forced upon him against his will.”

Following this passage and a review of the legislative history of Article 116 there occurs a further passage on which the views of the witnesses diverged (we give a translation which, in the light of the evidence adduced before us, in our view correctly conveys the meaning of the original German text):

“The persecutees who died before 8th May 1945 cannot be treated differently from those who survived the coming into force of the Basic Law. Both groups were victims of the National Socialist regime. There is no good reason for differentiating between them with regard to the consequences arising from ‘expatriation’. Even in the case of persecutees affected by the 11th Ordinance who died before 8th May 1945 it must be borne in mind that they may have wanted to renounce their German nationality.”

- A Dr. Jaques approached these passages on the basis that it was fundamental to the decision of the Constitutional Court that the 11th Ordinance was void *ab initio* and had not deprived the persecutees affected by it of their German nationality. In the case of a persecutee who died before the Basic Law took effect, in the absence of the clearest possible evidence of an intention to renounce German nationality, he must be taken to have died a German since nothing
- B had occurred to deprive him of his German nationality. The reference to persecutees who survived being entitled to similar treatment implied that they too retained their German nationality, since nothing had occurred to deprive them of it. Assertion of German nationality in one of the ways contemplated in Article 116(2) would be no more than declaratory. Article 116(2) could not itself be said to have deprived the persecutees of their German nationality
- C since its purpose was indemnificatory: it was certainly not the function of Article 116(2) to give effect to the National Socialist legislation declared by the Constitutional Court to be void *ab initio*. The principle of not forcing German nationality on a persecutee against his will was to be met by the State not considering a persecutee as a German national until he himself took one of the simple steps identified in Article 116(2) to assert his German nationality.
- D Dr. Cohn took a different view. In the passage cited he considered that what the Constitutional Court was saying with regard to persecutees who survived was that, notwithstanding the fact that they did not lose their German nationality by virtue of the 11th Ordinance, which was void, none the less the German State would not treat them as being Germans unless they relied on their nationality by residence or application. It had been suggested that they
- E retained a kind of shadowy, theoretical or "half" nationality. But Dr. Cohn preferred to interpret the words used somewhat differently. The Constitutional Court did not say that surviving persecutees still possessed German nationality. It only said that they did not lose it through the expatriation which the 11th Ordinance purported to effect. Though not in the position of having lost their nationality, they no longer currently had it unless they established
- F residence or made application. Any other conclusion would result in German nationality being forced upon them. The Constitutional Court was in effect saying to such persecutees, "Although you have not been expatriated, unless you assert your nationality you are deemed not to be Germans." The furthest Dr. Cohn felt himself able to go in expressing the matter in English terms was to say that a persecutee in the position of the Appellant could not be said to
- G have been deprived of his German nationality by the 11th Ordinance, but, having survived 23rd May 1949 and not having established residence in Germany or made application under Article 116(2), he is now treated as if he had been so deprived.

- (ii) The relevance of the 1958 decision of the Constitutional Court, on which the views of Dr. Jaques and Dr. Cohn also diverged, was in relation to
- H the question whether, if the Appellant still had German nationality when he applied for British nationality in 1948, he then lost it by virtue of the Nationality Law which provides in effect that a non-resident German loses his German nationality if he acquires a foreign nationality without first obtaining permission to retain his German nationality.

- I The 1958 case concerned a German Jewish refugee who abandoned his residence in Germany in 1934, settled in the United States of America, was expatriated in 1938, was granted United States nationality in 1946, and in 1948 returned to live in Germany. He claimed to be a German national by virtue of Article 116(2), second sentence. The following passage occurs in the course

of the decision of the Constitutional Court (we give a translation which, in the light of the evidence adduced before us, in our view correctly conveys the meaning of the original German text):

“The Appellant’s expatriation for racial reasons in 1938 is therefore by Article 116(2), second sentence, of the Basic Law deemed not to have taken place. According to the clear wording and meaning of this provision he did not lose his German nationality by the expatriation. The loss of this nationality can also not be derived from (or based on) his naturalisation in the United States of America in 1946 by virtue of Section 17 number 2 and Section 25(1) of the Nationality Act; those provisions presuppose that the person concerned enjoyed the effective possession of German nationality at the time when he acquired a foreign nationality. That is not the case if at the material time he was not in a position to rely on his German nationality; for, if an expatriation pronounced *before* that time is only declared invalid by a law enacted *after* that time, then the person in question had no reason at the material time to take the legal consequences of the acquisition of a foreign nationality under the German Nationality Law into consideration. A contrary view would also have the effect of frustrating the indemnificatory purpose of Article 116(2), second sentence, of the Basic Law and would result in the person in question being treated by his home country in a manner contrary to good faith.”

The 1958 case concerned a refugee who had returned to live in Germany. If he had in fact acquired residence in Germany and had indicated no contrary intention, he was clearly entitled to be treated under the second sentence of Article 116(2) as never having been deprived of his nationality. Dr. Jaques, however, regarded the decision as having a wider application. He thought it to be an absolute and clear-cut authority for the proposition that the acquisition of a non-German nationality by a persecutee prior to 23rd May 1949 did not result in loss of his German nationality by virtue of section 25 of the German Nationality Law. He understood the last sentence of the above quoted passage to mean that to hold that section 25 of the Nationality Law applied to such a persecutee would not only frustrate the indemnificatory purpose of Article 116(2) but also—and quite independently—be contrary to “good faith”, which is a paramount and well defined principle of German law comparable to the concept of equity in English Law, which made it inappropriate to apply the Nationality Law to a citizen who would have no cause to consider the consequences of his application for foreign nationality and who, moreover, at the relevant time would have been unable to obtain permission to retain his German nationality had he recognised the need to do so. Dr. Jaques saw no conflict between what he regarded as the authoritative finding of one division of the Constitutional Court in 1958 and the comments of the other division in 1968 that persecutees who had not lost their German nationality by virtue of the purported expatriation “may of course have lost it for some other reason, especially through acquisition of a foreign nationality”, because this was true of persecutees who had acquired a foreign nationality after 23rd May 1949. He did not think it possible that the Court in 1968 intended to overrule the 1958 decision.

Dr. Cohn, on the other hand, took a different view of the passage cited from the 1958 decision. At the date when that decision was made the effect of Article 116(2) was thought to be that it brought about a retrospective regrant of German nationality to a refugee who returned and took up residence in Ger-

A many. In 1958 it was still generally thought that the expatriations of 1941 were legally effective notwithstanding the abrogation of the decree of 1941 by the Allied Military Government legislation. The question which the Court had then to decide was whether the effect of section 25 of the German Nationality Law was that the German nationality retrospectively regranted was none the less lost by the intervening event of the refugee having acquired United States  
B citizenship. Article 116(2), second sentence, the Constitutional Court said, had an indemnificatory purpose: in other words, it was to be retrospective in its effect. That retrospective effect must counter the effect of section 25 of the Nationality Law. This case, Dr. Cohn explained, was the only decision dealing with a returning persecutee retrospectively regranted German nationality. The Court was concerned only with the question whether Article 116(2) overruled  
C the Nationality Law in the case of expatriates returning to Germany, and it answered this question in the affirmative.

As to the passage in the 1968 decision which refers to persecutees who may have lost their German nationality through acquisition of a foreign nationality, Dr. Cohn found nothing inconsistent between this passage and the 1958 decision. In the 1968 decision the meaning of the comment was that a persecutee  
D who had not lost his German nationality by reason of the 11th Ordinance would as a rule lose it if he subsequently acquired a foreign nationality. The significance of Article 116(2) for such a persecutee was that even he could recover his German nationality by taking up residence in Germany or applying for a grant.

(iii) In addition to the 1958 and 1968 decisions of the Constitutional Court  
E we were referred to two decisions of the Berlin District Court, the Hong Kong dentist decision of 1968 and the Mental Incapacity decision of 1971, to a decision of the Berlin Court of Appeal, to the Luxembourg decision of 1970, and to a decision of the Supreme Court, the Dutch decision of 1962.

In the latter case the Supreme Court held that the 1941 decree had never been law and was void *ab initio*. However, by virtue of the fact that the unlawful laws and decrees of the Nazis were actually applied within the sphere of  
F power of the Nazis to the legal relationships of those concerned, factual conditions were created which could not simply be treated as if they had never happened. The Court therefore recognised the validity of a declaration of death made by a foreign Court which could have had jurisdiction only on the footing that the deceased expatriate had lost his German nationality, although  
G on the correct view of the law the expatriate had not lost his German nationality by his expatriation.

In the Luxembourg case the Court of Appeal dealt with the case of a persecutee who died in October 1945, after 8th May 1945 but before the coming into force of the Basic Law. Following the 1968 decision of the Constitutional Court the Berlin Court of Appeal held that such a persecutee was not deprived  
H of his German nationality by the 11th Ordinance but was to be taken to have retained it in the absence of any concrete indication that he wanted to relinquish German nationality. In the 1971 decision of the Berlin District Court this principle was extended to a persecutee who died in England in 1956 but who by reason of mental incapacity could not exercise his intention to comply with one of the sets of facts provided for in Article 116(2). The Court held the  
I application of Article 116(2) to be excluded since it could be applied only to those cases in which the persons in question had a chance to make known their intention by complying with one or other of the sets of requirements referred to in the Article.

We understood the implication of these last two decisions to be that Article 116(2) applied to a persecutee who survived the coming into force of the Basic Law and was thereafter in a position to avail himself of one or other of the means of asserting German nationality indicated by the Article. Dr. Jaques was constrained to agree that it was implicit in these decisions that, in the case of a persecutee who was not mentally incapacitated when the Basic Law was adopted, one could look simply to Article 116(2) to see whether or not he was a German national. He stopped short, however, of accepting any suggestion that the Basic Law could be treated as a ground for loss of nationality. Dr. Cohn, as we understand his evidence, took the view that it was implicit in what was said in these cases about the application of Article 116(2) that a persecutee who survived the coming into force of the Basic Law and enjoyed full capacity did not have German nationality unless he reapplied for it or returned to live in Germany.

The 1968 decision of the Berlin District Court dealt with a persecutee who died in Hong Kong in 1954. The Court held that he died a German national notwithstanding that he had made no application under Article 116(2). In reaching this conclusion the Court in terms disagreed with the reasoning of the 1968 decision of the Constitutional Court:

“This Division is not able to accept this interpretation of the law, which is based on the wording of Article 116(2) and its legislative history. Nationality is a membership in a State and in accordance with the dominant view constitutes a legal quality, a legal status of a person . . . If it is true that the persecutees whose case was covered by the 11th Ordinance never lost German nationality by virtue of their expatriation . . . then a loss can also not have taken place by virtue of the rule contained in Article 116(2). It is incompatible with the dominant view that nationality is a legal quality that a refugee who has not acquired a foreign nationality is not considered as having lost his German nationality and yet is not to be treated by the German State as a German national so long as he has not by taking up residence or applying for naturalisation (viz. under Article 116(2)) asserted (or relied on) his German nationality.”

Dr. Jaques took the view that in this passage the members of the Court were criticising the 1968 decision of the Constitutional Court but that the District Court's decision, to the effect that a persecutee who neither adopted a foreign nationality nor decided against German nationality must be treated in the same way as those who did not survive the coming into force of the Basic Law and must accordingly be treated as a German national unless he clearly evinced a contrary intention, was consistent with what had been said by the Constitutional Court. Dr. Cohn, however, was of the view that the District Court clearly understood the 1968 decision of the Constitutional Court and deliberately deviated from it. Insofar as the 1968 decision of the Constitutional Court dealt with the position of persecutees who survived the coming into force of the Basic Law the principles stated by the Court were not essential to its decision and were therefore strictly not binding on the Berlin District Court.

(d) In the light of what he took to be the German law having regard to the cases mentioned Dr. Jaques answered the question whether for the purposes of German municipal law the Appellant was deprived of his German citizenship by the 1941 decree with a firm No. Dr. Cohn found the matter too complex for a simple answer, Yes or No. By the 1968 decision of the Constitutional Court the 1941 decree was held to be invalid and as not depriving the Appellant of his German citizenship. But on the coming into effect of the Basic Law

A the Appellant was no longer treated by the German State as a German national unless he applied for a regrant of his nationality or returned to Germany, and it followed that from then on he was no longer a German national. The effect of the 1968 decision, taken in conjunction with the 1941 decree and Article 116(2), was that from 23rd May 1949 the Appellant was effectively deprived of German nationality.

- B To the second question, "If the Appellant was not deprived of his German citizenship by the said decree whether for the purposes aforesaid he was deprived of German citizenship by the German Nationality Law of 22nd July 1913 on being naturalised a British subject on 24th May 1948, and taking into account his oath of allegiance on 4th June 1948", Dr. Jaques again gave the simple answer No. Dr. Cohn's answer was that, although the Appellant was not
- C deprived of his German citizenship by the said decree, he was, by virtue of having been naturalised as a British subject and having taken the oath of allegiance in 1948, no longer effectively a German national unless he either returned to Germany or was regranted German nationality. So far as Dr. Jaques was concerned there was no question of the Appellant having lost his German nationality and therefore no question of his citizenship being reinstated.
- D Dr. Cohn considered that nothing had occurred by which the Appellant's citizenship had been reinstated but that it would have been reinstated if he had returned to Germany or had applied under Article 116(2).

5. On considering the whole of the evidence of the two expert witnesses and the cases which were cited and explained to us, it seems to us that the question put to us as to the Appellant being "deprived" of his German citizenship is precisely the question to which the German Courts have carefully and deliberately avoided giving an answer. The reasons for this avoidance are twofold: on the one hand, the Courts were concerned that nothing should be said which might suggest that the 11th Ordinance was valid—it was void *ab initio*. On the other, it was inappropriate to fasten on expatriates the German nationality of which the 11th Ordinance had purported to deprive them unless

F they gave some indication that they would welcome its retention. In the case of those who had never had an opportunity to indicate a preference, in the absence of concrete proof to the contrary it was to be assumed that they would have welcomed retention. In the case of those who survived and could evince a wish one way or the other, the German State would not recognise the expatriates as German nationals without their taking the first step.

G For these same reasons we find ourselves unable to answer the questions as framed with a simple Yes or No. We prefer the approach of Dr. Cohn to that of Dr. Jaques on grounds of consistency and because we think that it reconciles the decisions cited to us. Accordingly, we answer the questions put as follows:

H (a) The Appellant was not deprived of his German citizenship by the decree of 25th November 1941. The effect of the decree and of Article 116(2) of the Basic Law was that in the relevant years of assessment for the purposes of German municipal law the Appellant was not regarded as having German nationality unless and until he chose to assert it by returning to Germany to live or by making application.

I (b) When the Appellant was naturalised a British subject and subsequently took the oath of allegiance the German Nationality Law of 22nd July 1913 applied, so that the Appellant, if and so far as he was a German national at that time, ceased to be a German national, subject, however, to his being able to

avail himself of the opportunity afforded by Article 116(2) of the Basic Law of A asserting his German nationality and thereby securing recognition as a German national.

(c) (i) Nothing occurred prior to the years of assessment which had the effect of reinstating the Appellant's German citizenship or which otherwise resulted in his being treated as a German national for the purposes of German municipal law. (ii) Had he applied at any time before or during the relevant B assessment years under Article 116(2) (as he did subsequently), the Appellant would thereafter have been treated as a German national for the purposes of German municipal law.

W. E. Bradley } Commissioners for the  
H. H. Monroe } Special Purposes of the  
C } Income Tax Acts

Turnstile House,  
94-99 High Holborn,  
London WC1V 6LQ  
12th September 1974

The cases came again before the House of Lords (Lords Hailsham of D St. Marylebone, Hodson, Pearson, Cross of Chelsea and Salmon) on 6th, 7th and 11th November 1974, when judgment was reserved. On 5th February 1975 judgment was given unanimously in favour of the Crown.

*Sir John Foster Q.C.* and *Max England* for Mr. Oppenheimer.

Miss Nothman in person.

*J. E. Vinelott Q.C.* and *Patrick Medd Q.C.* for the Crown. E

The following cases were cited in argument in addition to those referred to in the speeches:—(in *Oppenheimer's* case, at the resumed hearing after the remission) In re *Chamberlain's Settlement* [1921] 2 Ch. 533; (in *Nothman's* case) *Chibbett v. Joseph Robinson & Sons* (1924) 9 T.C. 48; *Commissioners of Inland Revenue v. Ramsay* (1935) 20 T.C. 79; *Dott v. Brown* [1936] 1 All E.R. 543; *Beynon v. Thorpe* (1928) 14 T.C. 1; *Commissioners of Inland Revenue v. Pattison* 38 T.C. 117; 1960 S.C. 118; *Laird v. Commissioners of Inland Revenue* (1929) 14 T.C. 395; *Stedeford v. Beloe* 16 T.C. 505; [1932] A.C. 388; *Westminster Bank Ltd. v. Riches* 28 T.C. 159; [1947] A.C. 390; *Drummond v. Collins* 6 T.C. 525; [1915] A.C. 1011. F

**Lord Hailsham of St. Marylebone**—My Lords, I have had the advantage of G reading in draft the illuminating opinion about to be delivered by my noble and learned friend Lord Cross, and since in almost everything I agree with it my own opinion can be correspondingly short.

The decisive point in the first case is whether, during the relevant years of assessment, the Appellant Meier Oppenheimer was a dual national possessing the German nationality which had been his by birth in addition to the British H nationality which he acquired by naturalisation in 1948. If this question is answered affirmatively he can claim the advantage of article IX of the Double Taxation Conventions between this country and the Federal Republic of Germany in respect of the pension he receives from the Republic. Otherwise his appeal fails.



(Lord Hailsham of St. Marylebone)

- A It is true that under the terms of the Conventions the question must be decided by English law (see art. II(3)), but English law requires as a rule that the question of foreign nationality falls to be decided according to the municipal law of the foreign state concerned: see *Stoek v. Public Trustee* [1921] 2 Ch. 67, especially at page 82. According to English law that municipal law is a question of fact. It is, of course, the case that Russell J. in the course of *Stoek's* case
- B accepted that in exceptional cases English law might attribute a particular foreign nationality to persons who might not in fact possess it, as may have been done in *Ex parte Weber* [1916] 1 K.B. 280; [1916] 1 A.C. 421 and *Rex v. Vine Street Police Station Superintendent (ex parte Liebmann)* [1916] 1 K.B. 268. These, however, were cases in which a person who had never acquired British nationality was classed as an enemy alien in time of war owing to his continuing
- C connection with the enemy state. I can see no reason for invoking such exceptional considerations here. It is also true that in time of war English law will for certain purposes disregard changes of status made by the enemy state during the war: cf. *Rex v. Home Secretary (ex parte L)* [1945] K.B. 7; *Lowenthal v. Attorney-General* [1948] 1 All E.R. 295. But I agree with the Court of Appeal that this particular doctrine no longer applies after the end of hostilities.
- D It appears quite clearly from the Supplemental Case that the Appellant's status for the relevant years of assessment in the municipal law of the Federal Republic depends on Article 116(2) of the *Grundgesetz* or Basic Law, as construed in the light of the decisions of the Constitutional Court, e.g. in 1968. The Commissioners have found as a fact that in those years the Appellant was not regarded as a German citizen, according to German law, unless he applied for
- E it, which he had not done during those years of assessment, and I can see no reason for disputing this finding. On the contrary, were I to attempt the task on the basis solely of Article 116(2) and the German decisions exhibited to the Case, I should reach the same conclusion. In arriving at their own conclusion the Commissioners enjoyed in addition the oral evidence on this point of two
- F German lawyers. The case below was argued largely on the question whether English Courts would recognise the infamous decree of the National Socialist regime of 25th November 1941, which purported to deprive the Appellant of his German nationality on the ground that he was a Jew. Goulding J. upheld the Appellant's contention on the grounds stated in the cases of *Ex parte L* and *Lowenthal v. Attorney-General* which were cited before him. But, as I have said, I agree with the Court of Appeal that this ground, founded on the public
- G policy of a belligerent United Kingdom, continued only during the continuance of the state of war between this country and Germany. In the light of the Supplemental Case the opinion of Buckley and Orr L.JJ. that the National Socialist decree, for all its discriminatory character, was effective to deprive the Appellant of his citizenship cannot be supported, since the effect of the 1968 decision of the Constitutional Court and the findings of the Commissioners
- H can now be seen to contradict this possibility. The position is governed by the present Federal Law and not by the National Socialist decree, and the conflicting considerations which led the Federal legislature to adopt the particular solution contained in Article 116(2) of the *Grundgesetz* are adequately stated by the Constitutional Court in their 1968 decision, and in the Commissioners' finding. It is clear that the Federal legislature did not recognise the
- I National Socialist decree, but sought to deal with a difficult practical problem on humane and reasonable lines which left persons in the position of the Appellant outside German nationality unless and until they applied to receive it. The

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position would have been the reverse had the Appellant gone to live in Germany. A  
 In that case the law of the Federal Republic would have presumed that he wished  
 to be recognised as a national *ab initio* unless he unequivocally expressed a wish  
 to the contrary. What would have been the decision in English law had the  
 point fallen to be decided at a point of time before the *Grundgesetz* came into  
 operation, or if the Constitutional Court had reached a different conclusion in  
 1968, is, perhaps fortunately for us, academic. The arguments for and against B  
 are set out in the article in the Law Quarterly Review which led, directly or  
 indirectly, to the remission of the case to the Commissioners: see "The Present  
 Validity of Nazi Nationality Laws" by F. A. Mann, 89 L.Q.R. 194. I would  
 prefer to express no concluded opinion upon it. But I do point out, with the  
 author of the article above referred to, that only in a relatively small proportion  
 of cases is the possession of dual nationality an advantage to the possessor. C  
 There would seem small value in adding hardship to injustice in order to  
 emphasise the cruel nature of the injustice. I quite see the force of the argument  
 contained in the opinions of my noble and learned friends Lord Cross and Lord  
 Salmon to the effect that the validity of a law cannot depend on its effects on  
 individuals. But with due respect to that argument, foreign municipal law is  
 not a question of law but of fact, and the only way known to English law of  
 disregarding an unpleasant fact is to create the legal fiction that it does not exist. D  
 I do not think that such fictions always serve a useful purpose, and where they  
 do, among the criteria would certainly be included the effect of the proposed  
 fiction on individuals, but not, I venture to think, the distasteful nature of the  
 facts. It may well be that English law will not give a single and unequivocal  
 answer to the problems raised by the unjust and discriminatory legislation of a  
 foreign country: see, for instance, *Aksionairnoye Obschestvo A. M. Luther v.*  
*James Sagor & Co.* [1921] 3 K.B. 532; *Princess Olga Paley v. Weisz* [1929] 1 K.B.  
 718; and cf. also *Frankfurter v. W. L. Exner Ltd.* [1947] Ch. 629 and *Novello &*  
*Co. Ltd. v. Hinrichsen Edition Ltd.* [1951] Ch. 595. American law appears to  
 have fallen short of rejecting the National Socialist decree, at least when the  
 consequence of doing so would have been the internment of the propositus: F  
 see *United States ex rel. Schwarzkopf v. Uhl* (1943) 137 Fed. Rep. (2d.) 898. The  
 fact remains that, for the purposes of the case before us, the National Socialist  
 decree falls to the ground, the Constitutional Court of the Federal Republic  
 having declared it for the purposes of the municipal law as from the first  
 "Unrecht" and not law, and we cannot do other than hold that it was invalid.

The remaining judgment in the Court of Appeal was that of Lord Denning G  
 M.R., who based his reasoning on the effect in English law of the application  
 of the Appellant for British naturalisation in 1948. With great respect to  
 the learned Master of the Rolls, I do not find this reasoning convincing. It  
 proceeds upon the basis, which is contrary to *Stoeck v. Public Trustee*<sup>(1)</sup>, that  
 English law can decide who is and who is not a German national, and appears  
 to assume that the coexistence of British and enemy alien nationality is an  
 impossibility. But this is not so: cf. *Kramer v. Attorney-General* [1923] A.C.  
 528. Quite apart from this, I find it impossible to apply the doctrine of election  
 or renunciation, which is appropriate enough in the law of contract, to questions  
 of national status in the absence of a Statute to that effect, and even if I were  
 able to do so I would not be prepared to decide this case on the basis of any  
 election either by the Appellant or the Crown unless the conduct relied on as I

(1) [1921] 2 Ch. 67.

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A establishing election were absolutely unequivocal; and I am not persuaded that in 1948 either the Crown or the Appellant were fully aware that the Appellant had any surviving rights in his nationality of origin which he could elect to renounce.

B The Commissioners have found that, if they were wrong about their decision on the National Socialist decree, the Appellant would nevertheless have lost his nationality under German law by virtue of the so-called Delbrück Law of 1913 when he applied for British naturalisation in 1948. The Crown indicated that if it were necessary they would seek to support this finding of fact. We did not hear the Crown fully upon this. But I would wish expressly to reserve any opinion upon this point. Not only is it difficult to reconcile this position with the 1958 decision of the Constitutional Court, but one seems to enter a strange looking-glass world if one were compelled to hold that the Appellant lost a nationality which no one at the time believed he possessed, and which he himself almost certainly did not then wish to retain, simply because he did not ask permission to retain it from authorities who did not then exist, and who, if they had existed, would almost certainly have refused the application on the ground that they had no jurisdiction to grant it.

D In my view the appeal fails on the ground that I have stated. The Supplemental Case establishes that in the assessment years the Appellant is not to be regarded as a German national.

E I turn now to the second appeal, that in *Nothman v. Cooper*. In this case also I agree with the opinion expressed by my noble and learned friend Lord Cross of Chelsea, and it follows that in my opinion this appeal must be dismissed. The Appellant conducted her own appeal with conspicuous courtesy and ability. She accepted expressly that on the principal matter of contention her case stood or fell with the appeal of Meier Oppenheimer. By leave of your Lordships she also raised a number of other points which she had argued below, but had disclaimed hitherto as matters she desired to place before the House of Lords. These points are (1) that the "pension" she received was not income, but a payment by way of compensation for a frustrated career, and so not assessable to British tax even if her sole nationality were British; (2) that the payments were purely voluntary and therefore in the nature of gifts, and (3) that the source of income was not a foreign possession within the meaning of income tax law as defined in *Colquhoun v. Brooks*<sup>(1)</sup> (1889) 14 App. Cas. 493 and *Foulsham v. Pickles*<sup>(2)</sup> [1925] A.C. 458. I desire to say nothing about these points except that I agree with the opinions of Lord Cross of Chelsea in this House and of Goulding J. and Lord Denning M.R. upon them.

G **Lord Hodson**—My Lords, for the reasons given by my noble and learned friend Lord Cross of Chelsea, with which I am in complete agreement, I would dismiss these appeals.

H Since the case has in the end been argued on a different basis from that which obtained in the Court of Appeal, it is not strictly necessary to consider the reasons given by the members of that Court in connection with the notorious 1941 decree. My noble and learned friend Lord Pearson has, however, expressed in the opinion which he has prepared a position which in effect confirms that taken by the majority of the Court of Appeal, expressed by Buckley L.J. in the following passage, [1973] Ch. 264, at page 273<sup>(3)</sup>:

(1) 2 T.C. 490. (2) 9 T.C. 261. (3) See page 183 ante.

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“ . . . the answer to the question whether or not the person is a national or citizen of the country must be answered in the light of the law of that country however inequitable, oppressive or objectionable it may be.” A

I do not agree that this is a correct view of the relevant international law, and as at present advised am of opinion that Lord Cross's approach, consistent with that of Martin Wolff in his work on *Private International Law*, 2nd edn. (1950), at page 129, is to be preferred. The Courts of this country are not in my opinion obliged to shut their eyes to the shocking nature of such legislation as the 1941 decree if and when it falls for consideration. B

**Lord Pearson**—My Lords, I have had the advantage of reading the opinion prepared by my noble and learned friend Lord Cross of Chelsea, and I agree that these two appeals should be dismissed for the reasons given by him.

On the other hand, I am not able to agree with my noble and learned friend as to the conclusion which should have been reached if the relevant German law had consisted, as we thought it did, simply and solely of the 1941 decree and the 1913 law. When a government, however wicked, has been holding and exercising full and exclusive sovereign power in a foreign country for a number of years, and has been recognised throughout by our Government as the government of that country, and some legislative or executive act of that government, however unjust and discriminatory and unfair, has changed the status of an individual by depriving him of his nationality of that country, he does in my opinion effectively cease to be a national of that country and becomes a stateless person unless and until he has acquired some other nationality (as the Appellant Oppenheimer did in this case). Suppose then that the wicked government is overthrown. I do not think it would be right for the Courts of this country on their own initiative to disregard that person's change of status which in fact had occurred and deem that it never had occurred. A decision on that fictitious basis might be no kindness to the person concerned, who might be quite content with his new status and unwilling to have his former status artificially restored to him. The problem of effecting any necessary rectification of the position created by the unjust decree of the wicked government is a problem for the successor government of the foreign country, and we know that in the present case the problem was dealt with by the successor government of West Germany by its Basic Law of 1949. But if the successor government had not dealt with the problem, I do not see that the Courts of this country would have had any jurisdiction to restore to the person concerned his lost nationality of the foreign country. There is the rule of public policy that our Courts may refuse to recognise in wartime a change of the nationality of an enemy alien, but that rule would cease to apply at the end of the war, which would be at latest when the war was officially declared to be at an end. C D E F G

I would dismiss the appeals.

**Lord Cross of Chelsea**—My Lords, the question at issue in the appeal in *Oppenheimer v. Cattermole* is whether the Appellant, Mr. Oppenheimer, is liable to pay United Kingdom income tax for the tax years 1953–54 to 1967–68 inclusive on certain pension payments which he received during those years from German public funds. Mr. Oppenheimer, who is a Jew, was born in Germany in 1896. From 1919 to 1939 he taught at a Jewish orphanage in Bavaria, but in 1939, after having been detained for a short period in a concentration camp, he succeeded in leaving Germany and coming to this country, I H I

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A where he has lived ever since. On 4th June 1948 he was granted a certificate of naturalisation and became a British subject. As a former employee of a Jewish religious community he has been since 1953 in receipt of a pension payable out of the revenues of the German Federal Republic. Conventions with regard to double taxation relief were made between the United Kingdom and the Federal Republic in 1954 and 1964 and made law in this country by the Double Taxation Relief (Taxes on Income) (Federal Republic of Germany) Orders 1955 and 1967<sup>(1)</sup>. Article IX(1) of the former Convention—which the Appellant contends is applicable to the first seven assessments in dispute—runs as follows:

C “Remuneration, including pensions, paid, in respect of present or past services or work, out of public funds of one of the Contracting Parties shall be exempt from tax in the territory of the other Contracting Party, unless the individual concerned is a national of that other Party without being also a national of the first-mentioned Party.”

D Article IX(2) of the second Convention, which the Appellant contends is applicable to the other eight assessments, is to the same effect. The Appellant is, of course, a national of this country, and the Crown admits for the purpose of this case that the pensions in question fall within the description in the Conventions. The point at issue is whether the Appellant was in the years of assessment not only a British subject but also a German national.

E Article II(3) of the 1954 Convention states that in the application of its provisions by one of the contracting parties any term not defined therein shall unless the context otherwise requires have the meaning which it has under the laws in force in the territory of that party relating to the taxes which are the subject of the Convention. There is a similar provision in the 1964 Convention, and neither Convention contains any definition of the term “a national”. Accordingly, the question whether the Appellant was a German national during the years of assessment has to be determined by English law. But, as Russell J. pointed out in *Stoeck v. Public Trustee* [1921] 2 Ch. 67, at page 82, English law refers the question whether a person is a national of another State to the municipal law of that State—though it may in certain circumstances “deem” a person to be a national of that State although he is not in fact a national of it. The Special Commissioners, to whom the Appellant appealed against the assessments made on him by the Inspector of Taxes, heard evidence from Dr. Cohn, an expert in German law called by the Crown, and in the light of it found that under German law the Appellant ceased to be a German national not later than 4th June 1948, when he became a national of the United Kingdom. At the request of the Appellant the Special Commissioners stated a Case for the opinion of the Court, and in view of the subsequent history of this case it is important to set out what was the material to which, according to the Case Stated, Dr. Cohn referred them and what was their understanding of the effect of his evidence in relation to it. First, they had before them and exhibited to the Case parts of a decree made on 25th November 1941 by the National Socialist Government providing that a Jew of German nationality who had his usual place of abode abroad when the decree came into force should lose his nationality forthwith. Secondly, they had before them and exhibited to the Case part of the German Nationality Law of 22nd July 1913, which provides that a German who has neither his natural residence nor permanent abode in

(1) S.I. 1955 No. 1203; S.I. 1967 No. 25.

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Germany loses his nationality on acquiring a foreign nationality unless he had the previous written permission of the appropriate German authority to retain it. Thirdly, the Case states that Dr. Cohn gave evidence to the following effect:

“(a) by a decision of the Federal German Constitutional Court given in 1968, which is binding upon all Federal German courts by virtue of a subsequent decree of the Federal German Government, the decree of 25th November 1941 (exhibit A) was absolutely void *ab initio*; (b) the said decision had no retrospective effect; (c) the German nationality law of 22nd July 1913 (exhibit B) remains in force (with certain amendments not relevant for present purposes) and was unaffected by the said decision; (d) in his opinion, under German law, if the Appellant had not lost German nationality under the decree of 25th November 1941, he lost the said nationality under the German nationality law of 22nd July 1913 on being naturalised a British subject in 1948.”

Two points are to be particularly noted: *first*, that, whether or not Dr. Cohn referred to it in his evidence, the Case Stated makes no reference to Article 116 of the Constitution of the Federal Republic of Germany enacted in 1949, which, as will hereafter appear, is of vital importance in this case; and, *secondly*, that the Case Stated attributes to Dr. Cohn the opinion that in the 1968 decision the Federal German Constitutional Court held that the 1941 decree was void *ab initio* but that nevertheless the decision had no retrospective effect. It is clear from the evidence given by Dr. Cohn on a later occasion that the Special Commissioners who signed the original Case Stated must have misunderstood the evidence which he was giving with regard to the 1968 decision. As a result of the absence from the Case of any mention of Article 116 and the presence in it of the statement that the 1968 decision had no retrospective effect, the case was argued in the High Court and in the Court of Appeal and on the first occasion before this House on the footing that the only material to be considered in order to decide whether or not the Appellant was a German national during the years of assessment was (a) the 1941 decree and (b) the 1913 law. The case came first before Goulding J., who reversed the decision of the Special Commissioners. He held, first, that English law would not recognise the decree of 25th November 1941 as having any effect with regard to the Appellant, since it purported to alter during wartime the nationality of someone who was then an enemy alien, and, secondly, that the Appellant had not lost his German nationality by the law of 22nd July 1913, since under German law he had already ceased to be a German national before he became a British subject—although our law regarded him as still a German national. The Crown appealed to the Court of Appeal (Denning M.R. and Buckley and Orr L.JJ.), who reversed the decision of Goulding J. and restored that of the Commissioners. The Master of the Rolls held that, whatever the position might be under German law, English law would not regard an enemy alien who had been naturalised as a British subject during wartime as continuing thereafter to be a national of the enemy country as well as a British subject. Buckley and Orr L.JJ. based their judgments on a different ground—namely, that, although English law would not recognise a change in the status of an enemy alien effected by the alien’s domestic law during wartime, that non-recognition only lasted so long as the state of war lasted, and that consequently when the state of war between this country and Germany came to an end our law would recognise that the Appellant had been deprived of his status as a German national by the decree of 25th November 1941. The Appellant appealed to this House from the decision

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A of the Court of Appeal, and the Appellate Committee heard arguments from both sides on the basis of the findings as to German law made by the Commissioners and set out in the Stated Case. But before we reported our views to the House we became aware from an article by Dr. F. A. Mann on "The Present Validity of Nazi Nationality Laws" in the Law Quarterly Review, vol. 89, at page 194, that the findings of the Commissioners as to the relevant German law were almost certainly based on inadequate material. We therefore put the appeal back into the list for further argument, and as a result of the discussion which then ensued it became clear—and was accepted by counsel on both sides—that the case ought to be sent back to the Commissioners for further findings as to the relevant German law. This House therefore made an order in the following terms:

C "That this case be and the same is hereby remitted back to the Commissioners for the Special Purposes of the Income Tax Acts for further consideration, and with a direction that they amend the Case Stated by finding on further consideration of the evidence already adduced, and on consideration of any further evidence the parties may adduce, and taking into account any relevant decisions of the German Courts and their necessary implications and any other provision of German law: (a) whether for the purposes of German municipal law the Appellant was deprived of his German citizenship by the decree of 25th November 1941; (b) if the Appellant was not deprived of his German citizenship by the said decree, whether for the purposes aforesaid he was deprived of German citizenship by the German Nationality Law of 22nd July 1913 on being naturalised a British subject on 24th May 1948, and taking into account his oath of allegiance on 4th June 1948; (c) if the Appellant was deprived of German citizenship by the said decree or by the said German Nationality Law at any time prior to the assessment years, whether (i) his German citizenship was reinstated or deemed to be reinstated by the Constitution of the Federal Republic or by any legislation or judicial decision or under any other provision of German law, or (ii) his German citizenship would have been reinstated at any time before or during the relevant years of assessment if he had applied for German citizenship under Article 116 of the *Grundgesetz* 1949. And It Is Further Ordered, that the said Commissioners do report the amended Case to this House."

G Pursuant to this Order the Special Commissioners held a meeting on 29th April to 3rd May 1974, at which they heard further evidence from Dr. Cohn, and also evidence from Dr. Jaques, another expert on German law, who was called on behalf of the Appellant. In the course of their evidence the witnesses, as well as referring to the 1941 decree and the 1913 law, also referred to Article 116 of the Basic Law for the Federal Republic of Germany promulgated on 23rd May 1949, and to six decisions of various German Courts, including two H decisions—one given in 1958 and the other in 1968—of the Federal Constitutional Court, which is the Supreme Court in Germany in relation to the interpretation of the Basic Law—the latter decision being the decision referred to in the original Case Stated. Translations of Article 116 and of the relevant parts of all these decisions were attached to the Supplemental Case which the Commissioners stated in pursuance of the Order of the House. This Case further I contains a full statement of the views expressed by Dr. Cohn and Dr. Jaques respectively on the legal questions which arise.

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Shortly after the collapse of the Nazi regime in May 1945 the 1941 decree A  
was repealed by Allied Military Government legislation. It is, however,  
generally accepted by German lawyers that this repeal had no retrospective  
effect. When the newly established Federal Republic of Germany came to  
frame its constitution it had to decide what persons were to be its nationals.  
This was a difficult and delicate question for several different reasons. In the  
first place—and this, of course, is the aspect of the matter with which we are  
concerned in this case—it had to decide what to do about those persons who had  
been deprived of their German nationality by Nazi legislation. On the one  
hand, the new Germany was anxious not to appear to treat the 1941 decree as  
valid in any way; but, on the other hand, it had to face the fact that many of  
those affected by it had made their homes abroad and had no intention of  
returning to Germany, and that such persons, many of whom had become  
naturalised in other countries, might well not welcome having German nation-  
ality, which they thought they had lost, thrust upon them without their consent.  
Other problems which the framers of the Basic Law had to face, but which are  
of no relevance in this case, were, of course, the status in the Federal Republic  
of those “Germans” who had taken refuge there in the later stages of the war  
and of the “Germans” in the Soviet zone of occupation. D

At this point it will be convenient to refer to Article 116 of the Basic Law.  
It runs as follows:

“(1) A German person within the meaning of this Basic Law is,  
subject to further legal provisions, any person who possesses German  
nationality or has been admitted into the sphere of the German Reich  
according to the position on 31st December 1937 as a refugee or exile, E  
member of the German people or as the spouse or descendant of such a  
person. (2) Former German citizens who were deprived of their German  
nationality between 30th January 1933 and 8th May 1945 for political,  
racial or religious reasons, and their descendants, are to be renaturalised  
on application. They shall be considered as not having been deprived of  
their nationality, provided that they have taken up their residence in F.  
Germany since 8th May 1945 and have not expressed any wish to the  
contrary.”

It is, of course, with para. (2) that we are concerned. Reading the translation  
simply as a piece of English without the aid of a German lawyer or of German  
decisions, I would have interpreted it as saying that the Nazi legislation must be  
taken as having effectively deprived those falling within its terms of their  
German nationality unless they had returned to live in Germany after the war  
and had not expressed a wish not to be German nationals. On the other hand,  
those still abroad could regain the German nationality which they had lost  
whenever they wished by applying for it to the appropriate authority. The  
Appellant, though he has now made such an application, did not make it until  
after the years of assessment with which we are concerned. Accordingly, if H  
the meaning of Article 116(2) was what I have suggested—and it appears that for  
some time after 1949 it was widely thought in Germany that that was its true  
meaning—it would be clear that he was not a German national in the years of  
assessment. It would also be clear that the 1913 law could have had no  
application in his case, since he would not have been a German national when  
he was naturalised here. But the 1968 decision of the Federal Constitutional I  
Court shows that it is wrong to interpret Article 116(2) as saying—even if only



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A by implication—that the Nazi legislation had deprived any one of his German nationality. The Court in that case had to decide whether some one affected by the 1941 decree who died before the end of the war—i.e., 8th May 1945—and had not been naturalised in another country died a German national or a stateless person. It held that he died a German national because the 1941 decree was “to so intolerable a degree irreconcilable with justice that it must be considered to have been void *ab initio*”. It was common ground between B Dr. Cohn and Dr. Jaques that this decision had retrospective effect and that in the light of it the Appellant remained a German national notwithstanding the 1941 decree at least until he became a British subject in 1948.

Accordingly, the questions to be decided were (1) did he lose his German nationality under the 1913 law when he became a British subject, and (2) if he did not, did he lose it in 1949 by reason of the enactment of Article 116 of the Basic Law? Dr. Cohn answered both these questions in the affirmative, while C Dr. Jaques answered them in the negative. The Special Commissioners preferred the views of Dr. Cohn on both points, and since foreign law is a question of fact it might be argued that the view taken by the Commissioners was binding on us even if we disagreed with it—unless indeed it was one which D we thought no one could reasonably entertain. But in a case of this sort it would, I think, be unfortunate if we were obliged to give effect to a view as to the relevant foreign law which we thought to be wrong, and we did in fact hear a full argument from Sir John Foster in support of the opinion of Dr. Jaques. I propose, therefore, to proceed on the footing that it is open to us to decide the questions at issue for ourselves, but for reasons which will hereafter appear E I shall assume in favour of the Appellant that he did not lose his German nationality on becoming naturalised here in 1948 and confine myself to the question whether he lost it by reason of the enactment of the Basic Law in 1949. The passage in the judgment of the Federal Constitutional Court in the 1968 case which deals with the position of persons affected by the 1941 decree who were alive when the Basic Law took effect ran as follows:

F “In formulating this article the constitutional legislator proceeded from the assumption that the 11th Ordinance was void *ab initio*. This means that the persecutees have never lost their German nationality by virtue of the expatriation. They may of course have lost it for some other reason, especially through acquisition of a foreign nationality. The effect of article 116(2) of the Constitution in such a case is that even these persons G can regain German nationality by taking up residence in the Federal German Republic or making an application. For persecutees who have not acquired a foreign nationality the effect of article 116(2) is that, notwithstanding the fact that they did not lose their German nationality by expatriation, the German State does not treat them as Germans unless they assert their German nationality by taking up residence or making an H application. Thus far article 116(2) gives effect to the idea that no persecutee should have German nationality forced upon him against his will.”

If one looked simply at the language of Article 116(2)—in particular, at the word “renaturalised”—the first sentence quoted above might be difficult to justify. But the Federal Constitutional Court supported its interpretation by reference to the views expressed during the preparation of the law by members I of the Committee of the Parliamentary Council responsible for its wording. The part of the quoted passage which is, of course, particularly relevant for

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present purposes is the sentence: "For persecutees who have not acquired a foreign nationality"—and I am assuming that the Appellant's naturalisation here in 1948 can be disregarded—

"the effect of article 116(2) is that, notwithstanding the fact that they did not lose their German nationality by expatriation, the German State does not treat them as Germans unless they assert their German nationality by taking up residence or making an application."

The effect of Dr. Cohn's evidence was that no distinction could sensibly be drawn between not being treated as a German by the German State and not being a German, and that accordingly the Appellant, assuming that he was a German national immediately before 23rd May 1949, ceased then to be a German national until he either applied to become a German national again or took up residence in Germany. The effect of Dr. Jaques's evidence, on the other hand, was that Article 116 of the Basic Law could not be taken to have deprived any one of his German nationality and that the Appellant continued to be a German national after the enactment of the Basic Law, although he would not be recognised as such by the German authorities unless he applied to be recognised or took up residence.

Applying my mind as best I can to the problem of interpreting Article 116(2) of the Basic Law in the light of the 1968 decision of the Federal Constitutional Court, I prefer—as did the Special Commissioners—the view of Dr. Cohn to the view of Dr. Jaques. I find the conception of a man being by German law a German national but at the same time not being by German law treated or recognised as a German national very hard to grasp, and although it may look at first sight odd that a man who had not lost his German nationality by the 1941 decree should lose it in 1949 under the operation of the Basic Law, this apparent oddity disappears if one bears in mind the conflicting considerations which the framers of the Basic Law had to try to reconcile. On the one hand, they were unwilling to admit that the 1941 decree had ever been part of the law of Germany, but at the same time they did not wish to thrust German nationality on people who did not want it. As a compromise—if one reads the Basic Law as the Federal Constitutional Court read it—they drew a line at the date of the enactment of the Basic Law. Up to that date people who fell within the scope of the 1941 decree retained their German nationality unless they had given some positive indication that they rejected it; but after the date of the coming into force of the new Constitution it was up to the persons concerned to give some positive indication that they wished to be nationals of the new Germany either by living there or by applying for German nationality.

That Dr. Cohn's reading of the 1968 decision is the right one is, I think, confirmed by two decisions of other German Courts dealing with persons affected by the 1941 decree who died after the enactment of the Basic Law. The first (called in argument the "mental defective" case) was decided by the Berlin District Court in 1971. The question to be decided was whether a German Jew who left Germany in 1933 to settle in this country and died here in 1956 in a psychiatric institution died a German national. He had not been naturalised here, and from before the date of the enactment of the Basic Law until the date of his death he had been continuously under mental disability. The Court held that, as he had never been able to apply his mind to the question whether or not to apply for German nationality under the provisions of Article

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- A 116(2), he remained clothed with his original German nationality, of which the 1941 decree had not deprived him.

“Article 116(2)”—to quote a passage from the judgment—“can be applied only to those cases in which the persons in question have or have had the possibility of making known their intention by complying with one or other of the set of requirements referred to.”

- B It is, however, implicit in the decision that had the propositus not been mentally incapable on 23rd May 1949 he would have lost his German nationality on that date. It might, I suppose, be argued that the conception of a “possibility of making known their intention” included not only mental capacity but also actual knowledge of the terms of Article 116(2), and that no one should lose his German nationality under the article until the lapse of a reasonable time for making his application after the date when he became aware of the terms of the article; but such an interpretation might obviously give rise to disputes of fact which would be very hard to resolve, and it is not surprising that, so far as the evidence before us goes, it has never been advocated by any one.

- The other decision (called in argument the “Hong Kong dentist” case) was decided by the Berlin District Court in 1968. The propositus in that case was a Jewish dentist who left Germany in 1937 and eventually settled in Hong Kong, where he died in 1954. He never became naturalised in any other country, and according to Dr. Cohn’s view of the meaning of the 1968 decision of the Federal Constitutional Court he died a stateless person, since he had not applied for German nationality after the enactment of the Basic Law. The District Court held that he died a German national because there was no evidence that he had done anything to show that he wished to renounce his German nationality. But, as I read the decision, this was not because the Court interpreted the 1968 decision of the Federal Constitutional Court differently from Dr. Cohn, but because it thought that the Constitutional Court had been wrong to draw a line at the date of the enactment of the Basic Law and to say that, whereas up to that date “persecutees” were German nationals unless they had done something to show that they wished to renounce German nationality, after that date they ceased to be German nationals unless and until they took steps to acquire German nationality. The District Court may have been entitled to take a different view on this point from the Federal Constitutional Court, since in the 1968 decision the point at issue was the status of persons within the scope of the 1941 decree who had died before the end of the war, and what the Court said about those who were alive when the Basic Law was enacted was only an *obiter dictum*; but I think that we should follow any views expressed by the Constitutional Court on the meaning of the Basic Law, even if not part of the *ratio decidendi*, unless they conflict with *dicta* of the same Court in other cases. For these reasons, I think that, even if one assumes that the Appellant did not lose his German nationality when he became naturalised in this country in 1948, he ceased to be a German national from 23rd May 1949 until he applied to become a German national after the years of assessment.

- Logically, of course, the question whether the Appellant lost his German nationality when he became a British subject in 1948 comes before the question whether he lost it on the coming into force of the Basic Law—for it is common ground that if he ceased to be a German national on naturalisation here in 1948 he did not become one again until he applied under Article 116(2) after the relevant years of assessment. At first sight the passage from the 1968 decision

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quoted above would seem to point conclusively to the view that he *did* lose his German nationality in 1948 by the operation of the 1913 law. The Court, after saying that "the persecutees" had not lost their German citizenship by their expatriation under the 1941 decree, went on to say: "They may, of course, have lost it for some other reason, especially through acquisition of a foreign nationality." But against this one has to set what was said by the Federal Constitutional Court itself in a decision in 1958 on which Dr. Jaques strongly relied. The propositus there was a German Jew who emigrated to the United States of America in 1934; became naturalised as an American citizen in 1946; later returned to live in Germany, and had never evinced any intention not to be a German national. In 1956 the Munich Court of Appeal issued a provisional extradition warrant against him on the request of the Swiss Government in respect of criminal offences of which he was accused, but the Federal Constitutional Court quashed the order on the ground that he was a German national. After pointing out that he had not lost his German nationality by the Nazi legislation, the Court dealt with the effect of his naturalisation in the United States as follows:

"The loss of his nationality can also not be based on his naturalisation in the United States of America in 1946 by virtue of section 17 no. 2 and section 25(1) of the Nationality Act; those provisions presuppose that the person concerned enjoyed the effective possession of German nationality at the time when he acquired a foreign nationality. That is not the case if at the material time he was not in a position to rely on his German nationality; for, if an expatriation pronounced *before* that time is only declared invalid by a law enacted *after* that time, then the person in question had no reason at the material time to take the legal consequences of the acquisition of a foreign nationality under the German Nationality Law into consideration. A contrary view would also have the effect of frustrating the indemnificatory purpose of article 116(2), second sentence, of the Basic Law and would result in the person in question being treated by his home country in a manner contrary to good faith."

That case differs, of course, on its facts from this case, because the appellant there had returned to live in Germany whereas the Appellant here has not done so. But though the second reason for their conclusion given in the last sentence of the quoted passage would not apply here, the first reason is expressed in general terms which would appear on their face to apply to Mr. Oppenheimer's naturalisation as much as to that of the appellant in that case. We did not hear a full argument from Mr. Vinelott, for the Crown, on this branch of the case, and it may be that he would have convinced me that there is no inconsistency between what is said as to the effect of naturalisation in another country before the enactment of the Basic Law in the 1958 and 1968 decisions respectively. But as it is, I prefer to leave open the question whether, had Mr. Oppenheimer died between 4th June 1948 and 23rd May 1949, he would have been a German national at the date of his death, and to rest my decision on the point that, having survived the enactment of the Basic Law, he ceased thereupon to be a German national until he applied to be one.

Counsel for the Appellant further submitted that even if, contrary to his main argument, his client was not, after the enactment of the Basic Law, a German national in the fullest sense of the word, the right which he undoubtedly possessed to become a German national whenever he wished placed him in

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- A such a special position that English law—which under the Double Taxation Conventions is the law to be applied—should regard him as having been a German national during the years of assessment. For this he relied on the decision in *Ex parte Weber* [1916] 1 K.B. 280; [1916] 1 A.C. 421. Weber was born in Germany in 1883. He left that country in 1898, and after living for two or three years in South America came to this country about 1901, and was still
- B living here when the authorities interned him in 1915. He applied for a writ of habeas corpus on the ground that he was not an “enemy alien” but a “stateless person”—having lost his German nationality either (a) under German laws of 1870 and 1873 by reason of his continuous residence outside Germany for ten years or more or (b) under section 26 of the 1913 law (already mentioned) on attaining the age of 31 on 30th January 1914—that being the latest date
- C on which he was liable for military service in peace time. The Courts were not satisfied that it would be right to regard him as other than an “enemy alien”, since although he might have lost any rights which a German national had against the German State it appeared that he was still under an obligation to serve in the German army in time of war, and further that he could claim to be “renaturalised” as of right if he returned to Germany. I do not think
- D that that case assists the Appellant here. It is one thing to say that a right to claim German nationality at will constitutes a sufficient link with Germany to justify the authorities in treating a man as an “enemy alien” at a time when this country is at war with Germany, and quite another thing to say that our law ought to treat a man who has such a right as a German national for the purposes of these Double Taxation Conventions although by German law he is not a German national. For these reasons I think that the *Oppenheimer*
- E appeal fails and should be dismissed.

- As the members of the Court of Appeal in giving their judgments proceeded—through no fault of their own—on a wholly false view of the German law applicable to this case, the reasons which they gave for dismissing the appeal are, strictly speaking, irrelevant. In particular, of course, the shocking character of the 1941 decree, upon which so much of the argument in the Courts below and in the first hearing before us centred, ceases to have any bearing on the case when once one appreciates that the problem posed by that decree was tackled by the Federal Republic before the years of assessment in the Basic Law of 1949. But as the judgments below have been reported and I do not in all respects agree with them, I shall state as briefly as I can what conclusion I would have reached if the relevant German law had consisted, as we thought that it did, simply and solely of the 1941 decree and the 1913 law.
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- There are four arguments to be considered. The first ran as follows: (a) at the outbreak of the war in 1939 Mr. Oppenheimer, who was then undoubtedly a German national resident in this country, became an “enemy alien”; (b) the cases of *Rex v. Home Secretary* (ex parte L) [1945] K.B. 7 and *Lowenthal v. Attorney-General* [1948] 1 All E.R. 295 show that the Courts of this country will not recognise a change in the status of an “enemy alien” effected during the war under the law of the enemy country, and (c) this non-recognition does not end with the war. The first two steps in the argument are plainly right, but the third is, I think, wrong. In reaching the conclusion that our Courts should continue to refuse recognition to the change of nationality effected by the 1941 decree even after the end of the war because it was a change effected during the war Goulding J. was to some extent influenced by the
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character of the decree (see [1972] Ch. 585, at page 595F<sup>(1)</sup>), but the character A  
of the decree has no relevance to this argument. The refusal of our Courts to  
recognise a change in the status of an "enemy alien" effected during wartime  
is not confined to changes effected by laws passed by the enemy state during  
the war, and may operate to deny recognition to changes effected by legislation  
of a wholly unobjectionable character. For example, if under a law of the  
enemy state passed before the war a female national loses her nationality on B  
marrying a national of another state, a female national of the enemy state who  
was living in this country and married during the war a national of this or of  
some third country would be regarded by our Courts as remaining an "enemy  
alien" even after her marriage so long as the war continued, at all events so  
far as regards matters connected with the conduct of the war. But there is no  
reason in sense or logic why our Courts should continue to regard her as a C  
national of the former enemy state for any purpose after the end of the war  
although by the law of that state she is no longer a national of it. I agree with  
Buckley and Orr L.J.J. that the doctrine of public policy in question merely  
suspends recognition during wartime. I would add, however, that I incline  
to think that "during wartime" for this purpose should be interpreted in a D  
commonsense way as "until the end of the fighting". It appears to have been  
assumed in the Courts below that the relevant date would be not 8th May 1945  
but 9th July 1951, when the Government of this country declared that the state  
of war had ended. The man in the street would have been very surprised to be  
told in 1950 that we were still at war with Germany; and as at present advised  
I can see no reason why the suspension of recognition of changes of nationality  
should be artificially extended in this way. It is not clear from the report of E  
*Lowenthal v. Attorney-General*<sup>(2)</sup> whether the relevant date was 28th April 1944,  
when the summons under s. 18 of the Patents and Designs Act 1907 was issued,  
or some date after 8th May 1945. If the latter was the case I doubt whether the  
decision was right.

The second ground upon which it was argued that English law should  
deem Mr. Oppenheimer to have remained a German national notwithstanding F  
the 1941 decree was that the decree was "confiscatory". "Confiscatory legisla-  
tion" is a somewhat vague phrase, which is sometimes used to cover not only  
expropriation with no or only inadequate compensation but also compulsory  
acquisition for full compensation. But it is clear that, if foreign legislation on  
its true construction purports to divest the owner of particular property here G  
of his title to it, our Courts will not give effect to the transfer even if the foreign  
legislation provides for full compensation. I cannot see, however, how this  
rule could have assisted Mr. Oppenheimer here. Even if one regards his status  
as a German national as being a bundle of rights and duties, those rights and  
duties were not themselves locally situate here. The right to claim exemption  
from United Kingdom tax given to him by the Convention if he was a German  
national at the relevant time was no doubt situate here. In the same way, if H  
a testator who died in 1953 had left him a legacy if he was *not* a German national  
at the date of his death, the right to claim the legacy if he could fulfil the condi-  
tion would have been a right situate here. If the 1941 decree deprived him of  
his German nationality in the eyes of English law, that no doubt would entail  
the consequence that his position with regard to rights then existing or sub-  
sequently arising in this country which were dependent on his being or not I

(1) See pages 171-2 *ante*. (2) [1948] 1 All E.R. 295.

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- A being a German national would have been changed by the decree; but I do not think that the fact that the legislation by which a foreign State deprives a man of his status as one of its nationals can be described as "confiscatory" necessarily entails the consequence that our law should deem him to remain a citizen of that State for the purpose of deciding whether or not he is entitled to property rights in this country. Suppose, for example, that it was the law of Ruritania that any Ruritanian citizen who was convicted of treason by a Ruritanian Court should forfeit all his property wherever situate to the Ruritanian State and should also cease to be a citizen of Ruritania. Our Courts would certainly refuse to entertain an action by the Ruritanian State to obtain possession of the traitor's property here; but I can see no sufficient reason why we should continue to regard him as a Ruritanian citizen for the purpose of deciding whether or not he was entitled to property here, his right to which depended on his being or not being a Ruritanian citizen at some point of time.

The third ground on which it was argued that English law should pay no regard to the 1941 decree was that it was contrary to international law. In his judgment Buckley L.J. says<sup>(1)</sup>:

- D ". . . the answer to the question whether or not the person is a national or citizen of the country must be answered in the light of the law of that country however inequitable, oppressive or objectionable it may be":
- [1973] Ch. 264, at page 273E. With all respect, I cannot agree that that is the law. If a foreign country purported to confer the benefit of its protection on and to exact a duty of allegiance from persons who had no connection or only a very slender connection with it, our Courts would be entitled to pay no regard to such legislation, on the ground that the country in question was acting beyond the bounds of any jurisdiction in matters of nationality which international law would recognise. In this respect I think that our law is the same as that of the United States as stated by the Circuit Court of Appeals (2nd Circuit) in *United States ex rel. Schwarzkopf v. Uhl* (1943) 137 Fed. Rep. (2d.) 898. Schwarzkopf, who was then an Austrian national, came to the United States in 1936 with the intention of living there permanently. By a decree of 3rd July 1938 the German State—which had annexed Austria on 13th March 1938—purported to make him a German citizen, and on 9th December 1941 he was arrested by the American authorities as a German citizen under a Presidential decree made in view of the imminence of war between the United States and Germany. The Court held, in reliance on a number of authorities referred to in the judgment, that the German decree of 3rd July 1938, so far as it purported to impose German nationality on persons who at that time had no connection with Germany, must be disregarded by the American Courts. It may be said perhaps that, though international law sets limits to the jurisdiction of sovereign States so far as concerns the granting of nationality, it sets no limits whatever to their power to withdraw it. I am, not prepared to accept that this is so. I think, for example, that Martin Wolff, *Private International Law*, 2nd edn. (1950), at page 129, may well be right in saying that if a State withdraws its citizenship from some class of its citizens living within its borders to which it has taken a dislike and of whom it would be glad to be rid, other States are not obliged to regard such people as "stateless". Mr. Vinelott was prepared to concede that this might be so; but he pointed out

(1) See page 183 ante.

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that the 1941 decree was only aimed at persons who had already left Germany A  
 for good and that emigration was a common and well-recognised ground for  
 the withdrawal of nationality. This is, of course, true, and if the decree had  
 simply provided that all Germans who had left Germany since Hitler's advent to  
 power with the intention of making their homes elsewhere should cease to be  
 German nationals, it may be that our Courts would have had to recognise it, B  
 even though many of those concerned were not in truth voluntary emigrants  
 but had been driven from their native land. But the 1941 decree did not  
 deprive *all* émigrés of their status as German nationals. It only deprived  
*Jewish* émigrés of their citizenship. Further, as the later paragraphs of the  
 decree show, this discriminatory withdrawal of their rights of citizenship was  
 used as a peg upon which to hang a discriminatory confiscation of their property. C  
 A Judge should, of course, be very slow to refuse to give effect to the legislation  
 of a foreign State in any sphere in which, according to accepted principles of  
 international law, the foreign State has jurisdiction. He may well have an  
 inadequate understanding of the circumstances in which the legislation was  
 passed, and his refusal to recognise it may be embarrassing to the branch of  
 the Executive which is concerned to maintain friendly relations between this  
 country and the foreign country in question. But I think—as Upjohn J. thought D  
 (see *In re Helbert Wagg & Co. Ltd.* [1956] Ch. 323, at page 334)—that it is part  
 of the public policy of this country that our Courts should give effect to clearly  
 established rules of international law. Of course, on some points it may be by  
 no means clear what the rule of international law is. Whether, for example,  
 legislation of a particular type is contrary to international law because it is  
 “confiscatory” is a question upon which there may well be wide differences of E  
 opinion between communist and capitalist countries. But what we are concerned  
 with here is legislation which takes away without compensation from a  
 section of the citizen body singled out on racial grounds all their property on  
 which the State passing the legislation can lay its hands and, in addition,  
 deprives them of their citizenship. To my mind a law of this sort constitutes F  
 so grave an infringement of human rights that the Courts of this country ought  
 to refuse to recognise it as a law at all. There are no doubt practical objections  
 to adopting that course with this law, for in many, if not most, cases the persons  
 affected by the 1941 decree would not have wished to remain German nationals.  
 Dr. Mann in his article quotes several cases in which Courts in different coun-  
 tries, while characterising the 1941 decree as “atrocious” or “barbarous”, have  
 yet given effect to it for this reason. But it surely cannot be right for the  
 question whether the decree should be recognised or not to depend on the  
 circumstances of the particular case. Moreover, in some cases—as for instance G  
 where the propositus is dead and what is in issue is the law to be applied to the  
 devolution of his estate—it might be impossible to say which law he would have  
 wished to govern the matter. If one held—as I would have held—that Mr.  
 Oppenheimer remained a German national in the eyes of our law notwith- H  
 standing the 1941 decree, the further question would have arisen whether in the  
 eyes of our law he lost his German nationality in 1948 under the law of 1913,  
 although by German law as it was then he was not a German national when he  
 was naturalised here. It would not, however, have been necessary for me to  
 form a view of my own on this point, since Mr. Vinelott was prepared to accept  
 as correct the view expressed by Goulding J. in the following words<sup>(1)</sup>: I

“... I cannot see that the non-recognition of one foreign law on grounds

(1) See page 172 ante.



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- A of public policy either demands or justifies imputing to an earlier foreign law an operation which, on its true construction in its own system, it evidently could not have."

- Finally, it is necessary to consider the reason given by Lord Denning M.R. for allowing the appeal from Goulding J. It was, as I understand it, that even if Mr. Oppenheimer was a German national by German law in the years of assessment, English law, which is the law to be applied in construing the Convention, would not regard him as a German national as well as a British subject in view of the circumstances in which he became a British subject. Our law is, of course, familiar with the concept of dual nationality—indeed, the relevant part of the Double Taxation Convention proceeds on the footing that a man may be at one and the same time a British subject and a German national—and the English law which is to be applied in deciding whether or not Mr. Oppenheimer was a German national at the relevant time is not simply our municipal law but includes the rule which refers the question whether a man is a German national to the municipal law of Germany. Of course, the fact that our law recognises that a man as well as being a British subject is also a German national does not in the least affect either his rights or his duties as a British subject. Consequently, in time of war between the countries concerned a man with dual nationality may find himself in a very unenviable position. As Viscount Cave L.C. pointed out in *Kramer v. Attorney-General* [1923] A.C. 528, at page 538, he may be forced to fight in the British army and yet have his property confiscated under the Peace Treaty as the property of a German national. Lord Denning M.R. was not, I am sure, intending to deny any of this; but he thought that the particular circumstances in which Mr. Oppenheimer became a British subject made it impossible for him thereafter to be considered by our law as having German nationality whatever German law might say on the point. His judgment, as I read it, contains two different reasons for this conclusion—though they are not, if I may say so, very clearly distinguished. The first depended on the character of the 1941 decree. By it—the argument runs—Germany repudiated its obligations to Mr. Oppenheimer, and he accepted the repudiation by applying for British citizenship, so that even if the 1941 decree were to be declared "void *ab initio*" by German law he would be in the eyes of English law precluded from asserting that he had remained a German national. For my part, I cannot accept that concepts drawn from the law of contract can be imported in this way into the law of nationality. The second reason was a more general one—namely, that if the Secretary of State grants a certificate of naturalisation to a national of a country with whom this country is then at war, English law will deem him to have thereupon lost his previous nationality for good, whatever the law of the foreign country may say. If a certificate of naturalisation is granted in peacetime Lord Denning M.R. would, I think, accept that the man in question would in the eyes of English law retain his other nationality if he did so by the law of the other country. But he considered that the conception of an enemy alien being granted a certificate of naturalisation in wartime and still remaining thereafter in the eyes of our law under a duty of allegiance to the enemy Sovereign as well as to the Queen of England was an impossible one, and that accordingly after the grant our law would regard him as having only a single nationality—namely, British nationality—even after the end of the war. I do not myself see any need to draw a distinction between naturalisation in time of peace and naturalisation in time of war. In either case the man in question comes under a duty of allegiance

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to the Queen which is not affected in any way by the fact—if it be a fact—that A  
by the law of the foreign country in question he remains a national of it.

In the result, therefore, if the relevant German law had been what we assumed it to be when the appeal was first argued I would have been in favour of allowing it; but in the light of the German law as we now know it I would, as I have said, dismiss it.

I turn now to consider the appeal in *Nothman v. Cooper*. Miss Nothman B  
was born in 1915 in Frankfurt. She went to a grammar school and obtained distinction in mathematics. As she was a Jewess she could not go to Frankfurt University, but she took a teacher's training course at a Jewish teachers' training college, where she passed an examination in March 1936. During the next three years she held various teaching posts in the dwindling and persecuted Jewish community in Germany, and eventually—in April 1939—came to this country. C  
The Crown accepts for the purposes of this appeal that she has become a British subject. Under a law enacted in 1951 by the Federal Government of Germany former public servants who had suffered injury in their careers through the Nazi persecution became entitled to apply for compensation (*Wiedergutmachung*). Article 31(d)(1) of the law provided that former employees of Jewish communities or public organisations who had or but for the persecutions would have attained a right to retirement benefits against their employers should be entitled D  
from 1st October 1952 onwards to pension payments on the basis of their former salary payments. In 1956 Miss Nothman was awarded as from 1952 a basic monthly compensation under this article. She was assessed to United Kingdom income tax in respect of the payments which she received in the tax years 1953–54 to 1964–65 inclusive on the footing that they were income arising from possessions out of the United Kingdom. She appealed to the Special Commissioners E  
against the assessments, arguing (1) that she was a German national in the years in question and therefore exempt from United Kingdom income tax under the Double Taxation Conventions previously mentioned, and (2) that for various reasons the payments which she received were not subject to United Kingdom tax. The Special Commissioners held that she was liable to United Kingdom F  
tax, and this decision was upheld both by Gouling J. and the Court of Appeal. On her appeal to this House Miss Nothman, who presented her case with ability and courtesy, was prepared on the first point to adopt the arguments which had been submitted by Sir John Foster on behalf of Mr. Oppenheimer; but on the second point she addressed to us—as she had to the Court below—several arguments with which it is necessary to deal. In the first place, she pointed out G  
that the payments in question were not really pension payments at all, but were in truth compensation for having been deprived of the opportunity of following her chosen career. They were therefore in the nature of damages and should not be treated as income payments. But the payments, even if not properly described as “pension” payments, are not instalments of any ascertained capital sum, and I cannot see any more than could the Commissioners or the Courts H  
below why they are not received by Miss Nothman as income. Her second contention was that the payments were not assessable to tax because they were “voluntary payments”. It is, of course, true that she received them because the Federal Republic decided of its own volition to do something towards making good to persons in the position of Miss Nothman the wrong done to them by the Nazi government, and no doubt what the Federal Republic has I  
given it could if it wished take away. But the payments which Miss Nothman F

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A receives under the law while it is in force cannot be regarded as a series of voluntary gifts. Then she argued that the payments were not income from a "foreign possession"; but those words mean simply income derived from a source outside the United Kingdom, and I think that Miss Nothman's rights under the German law in question constitute such a source. Finally, Miss Nothman referred us to s. 22(1) of the Finance Act 1961, which says:

B "Annuities payable under the law of the Federal German Republic relating to the compensation of victims of National-Socialist persecution, being annuities which under any such law relating to the taxation of such compensation are specifically exempted from tax of a character similar to that of income tax, shall not be regarded as income for any income tax purposes."

C Unfortunately, however, as Miss Nothman admits, the German authorities have not granted to the payments being made to her any "specific exemption" from tax—although according to her they ought, consistently with their approach in other cases, to have exempted them.

D In the result, therefore, I think, as the Courts below thought, that the decision of the Special Commissioners in Miss Nothman's case was correct and that her appeal must also be dismissed.

**Lord Salmon**—My Lords, I am in entire agreement with all the views expressed in the speech of my noble and learned friend Lord Cross of Chelsea. I wish to add only a few observations of my own.

E The original Case Stated made no mention of Article 116(2) of the Basic Law enacted by the Federal German Republic in 1949. Neither your Lordships at the first hearing of this appeal nor the Court of Appeal nor Gouling J. had any opportunity of considering this vitally important enactment. Accordingly, in the Courts below and at the first hearing before your Lordships, the appeal was necessarily conducted on the basis that the principal point for decision was whether or not our Courts were bound to recognise the Nazi decree of November 1941 as effective in English law to deprive Mr. Oppenheimer of his German F nationality. On that basis, I was unhesitatingly in favour of allowing the appeal. The relevant parts of the Nazi decree read as follows:

G "Clause 2. A Jew loses German citizenship—(a) if at the date of entry into force of this regulation he has his usual place of abode abroad, with effect from the entry into force of this decree; (b) if at some future date his usual place of abode is abroad, from the date of transfer of his usual place of abode abroad. Clause 3. (a) Property of Jews deprived of German nationality by this decree to fall to the State. (b) Such confiscated property to be used to further aims connected with the solution of the Jewish problem."

H The expense of transporting large numbers of men, women and children, in all about six million, even without heat, food or sanitary arrangements, must have been considerable. So no doubt was the expense of erecting, equipping and staffing concentration camps and gas chambers for their extermination. Evidently, the Nazis considered it only natural that the confiscated assets of those who had been lucky enough to escape the holocaust should be used to finance it.

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The Crown did not question the shocking nature of the 1941 decree, but argued quite rightly that there was no direct authority compelling our Courts to refuse to recognise it. It was further argued that the authorities relating to penal or confiscatory legislation, although not directly in point, supported the view that our Courts are bound by established legal principles to recognise the 1941 decree in spite of its nature. The lack of direct authority is hardly surprising. Whilst there are many examples in the books of penal or confiscatory legislation which according to our views is unjust, the barbarity of much of the Nazi legislation, of which this decree is but an example, is happily unique. I do not consider that any of the principles laid down in any of the existing authorities require our Courts to recognise such a decree, and I have no doubt that on the grounds of public policy they should refuse to do so.

I recognise that it is particularly within the province of any State to decide who are and who are not its nationals. If a foreign State deprives one of its nationals of his nationality, *as a rule*, our Courts will follow the foreign law and hold that the man in question shall be treated as not being a national of that foreign State. That principle was restated by Russell J. in *Stoek v. Public Trustee* [1921] 2 Ch. 67, at page 82. Russell J. recognised, however, that circumstances could arise in which a man might be treated as a national of a foreign State for the purpose of English law although he was not a national of that State according to its own municipal law. I do not suppose that in 1921 it would have been possible for anyone to be sufficiently imaginative or pessimistic to foresee anything like the decree of 1941. But had Russell J. been able to do so, he might well have concluded that there could be nothing which could afford a stronger justification for English law treating a man as a German national in spite of the fact that by German law he had lost his German nationality.

The principle normally applied by our Courts in relation to foreign penal or confiscatory legislation was correctly stated by Goulding J.: see [1972] Ch. 585, at page 592(1). The comity of nations normally requires our Courts to recognise the jurisdiction of a foreign State over all its own nationals and all assets situated within its own territories. Ordinarily, if our Courts were to refuse to recognise legislation by a sovereign State relating to assets situated within its own territories or to the status of its own nationals on the ground that the legislation was utterly immoral and unjust, this could obviously embarrass the Crown in its relations with a sovereign State whose independence it recognised and with whom it had and hoped to maintain normal friendly relations. In *Aksionairnoye Obschestvo A. M. Luther v. James Sagor & Co.* [1921] 3 K.B. 532, the Soviet Republic by a decree passed in June 1918 declared all mechanical sawmills of a certain capital value and all woodworking establishments belonging to private or limited companies to be the property of the Soviet Republic. In 1919 agents of the Soviet Republic seized the plaintiffs' mill in Russia and the stock of wood it contained. In 1920 the Soviet Republic sold a quantity of this stock to the defendants, who imported it into England. The plaintiffs claimed a declaration that they were entitled to this stock on the ground that the 1918 decree of confiscation was so immoral and contrary to the principles of justice as recognised by this country that our Courts ought not to pay any attention to it. It was held, however, that, as the

(1) See page 169 *ante*.

(Lord Salmon)

A Government of this country had recognised the Soviet Government as the *de facto* government of Russia prior to the 1918 decree, neither the decree nor the sale of the wood to the defendants in Russia could be impugned in our Courts. The reasons for this decision are illuminating, since they illustrate one of the important differences between the present case and the host of other cases (of which the *James Sagor* case<sup>(1)</sup> is an example) in which foreign penal or confiscatory legislation has been considered in our Courts. At pages 585-9, Scrutton L.J. said:

C “But it appears a serious breach of international comity, if a state is recognised as a sovereign independent state, to postulate that its legislation is ‘contrary to essential principles of justice and morality.’ Such an allegation might well with a susceptible foreign government become a *casus belli*; and should, in my view, be the action of the Sovereign through his ministers, and not of the judges in reference to a state which their Sovereign has recognised. . . . Individuals must contribute to the welfare of the state, and at present British citizens who may contribute to the state more than half their income in income tax and super tax, and a large proportion of their capital in death duties, can hardly declare a foreign state immoral which considers (though we may think wrongly) that to vest individual property in the state as representing all the citizens is the best form of proprietary right. I do not feel able to come to the conclusion that the legislation of a state recognised by my Sovereign as an independent sovereign state is so contrary to moral principle that the judges ought not to recognise it.”

E The alleged immorality of the Soviet Republic’s 1918 decree was different in kind from the Nazi decree of 1941. The latter was without parallel. But even more importantly, England and Russia were not at war in 1918, whilst England was at war with Germany in 1941—a war which, as Goulding J. points out, was presented in its later stages as a crusade against the barbarities of the Nazi regime of which the 1941 decree is a typical example. I do not understand how, in these circumstances, it could be regarded as embarrassing to our Government in its relationship with any other sovereign State, or contrary to international comity or to any legal principles hitherto enunciated, for our Courts to decide that the 1941 decree was so great an offence against human rights that they would have nothing to do with it.

G It is for these reasons that I respectfully disagree with the findings of Buckley L.J., in which Orr L.J. concurred, that our Courts would have been obliged to recognise the decree of 1941 as effective to deprive Mr. Oppenheimer of his German nationality. It has been said that this decree conferred a positive benefit upon many of those whom it deprived of their German nationality. This may be so, but there is no such finding in the Case Stated, and it is not permissible to travel outside the Case to explore these possibilities. In any event, I doubt whether the question whether an enactment is so great an offence against human rights that it ought not to be recognised by any civilised system of law can depend upon its impact upon the facts of any particular case.

H Mr. Oppenheimer was exempt from English income tax in respect of his German pension if, but only if, he had a German as well as an English nationality during the tax years in question. He undoubtedly had no German nationality

(1) [1921] 3 K.B. 532.

(Lord Salmon)

at the relevant period because of the decree of 1941—if that decree was effective A  
to prevent him from being treated in English law as a German national. As  
I have, however, already indicated, the decree, in my judgment, should not be  
recognised by our Courts as having any effect in English law for any purpose.  
Although this view would have entitled Mr. Oppenheimer to succeed on the  
Case as originally stated, it is of no avail to him on the Case as now re-stated.  
The findings in the Case, as re-stated, relating to German law, and in particular B  
to Article 116(2) of the Basic Law of 1949, throw an entirely new light upon  
this appeal. It is now clear that during the tax years in question Mr. Oppen-  
heimer's nationality under German municipal law did not in any way depend  
upon the decree of 1941. Indeed, by enacting the Basic Law of 1949, the  
German Federal Republic cleansed German municipal law of its contamination  
by the Nazis and did everything possible to rectify the injustice which the C  
Nazi decrees had perpetrated. The German Federal Government were careful,  
however, not to thrust German nationality upon anyone against his will if the  
decree of 1941 had purported to deprive him of it. The Basic Law accordingly  
enabled anyone affected by the decree who wished to be a German national  
to be "renationalised" and treated for all purposes as a German national by  
German municipal law. Such a person had only to apply, at any time, for D  
German nationality and his application would automatically be granted.  
Alternatively, if he returned to and resided in Germany without declaring a  
wish not to be a German national he would be regarded, in German law, as a  
German national. If he did neither of these things, it would be assumed that  
he did not wish to be a German national and his wish would be respected. In  
such circumstances German law would treat him as not being a German national E  
national—which, as the Commissioners have found in the re-stated Case, would  
mean that in German law he was not a German national. Mr. Oppenheimer  
did not return to Germany, nor did he make any application under Article  
116(2) until after the tax years in question. Had he made any such application  
at any time between those years and 1949 he would immediately from the date  
of his application have been regarded by German municipal law as a German F  
national and therefore also treated in English law as a German national. It  
was not the odious Nazi decree of 1941 but his own failure to apply in time under  
the benevolent Article 116(2) of the Basic Law enacted in 1949 which deprived  
him of exemption from United Kingdom income tax for the tax years in  
question.

My Lords, I would accordingly dismiss Mr. Oppenheimer's appeal. I G  
would also, for the reasons given by my noble and learned friend Lord Cross  
of Chelsea, dismiss Miss Nothman's appeal.

*Questions put:*

*Oppenheimer v. Cattermole*

That the Order appealed from be reversed.

*The Not Contents have it.*

That the Order appealed from be affirmed and the appeal dismissed.

*The Contents have it.*

That, by consent, the Respondent do pay to the Appellant his costs in  
this House on a common fund basis, such costs not to include the costs of the H

A proceedings before the Special Commissioners to whom the case was remitted by this House for further consideration.

*The Contents have it.*

*Nothman v. Cooper*

That the Order appealed from be reversed.

*The Not Contents have it.*

B That the Order appealed from be affirmed, and the appeal dismissed.

*The Contents have it.*

That, by consent, the Respondent do pay to the Appellant her costs in this House on a common fund basis.

*The Contents have it.*

C [Solicitors:—Rayner & Co. (for Mr. Oppenheimer); Solicitor of Inland Revenue.]

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