ality in prospect. It is hardly to be expected that smuggling under foreign flags will disappear completely under the new order. Certainly foreign states will wish continuing assurance of uniform and predictable treatment for their vessels carrying liquors "listed as sea stores or cargo destined for a foreign port." It is not at all unlikely, therefore, that the liquor conventions may be found of continuing mutual advantage even under the new dispensation.

EDWIN D. DICKINSON

### REVISING OUR NATIONALITY LAWS

On June 6, 1906, the House Committee on Foreign Affairs reported to the House their opinion that it would be desirable to have a study made by the Department of State regarding any changes in or additions to existing legislation covering citizenship of the United States, expatriation, and protection of citizens abroad, which seemed to be desirable. Secretary of State Root acted upon this suggestion by appointing a committee or board consisting of Mr. James Brown Scott, then Solicitor for the Department, Mr. David Jayne Hill, then Minister to the Netherlands, and Mr. Gaillard Hunt, then Chief of the Department's Passport Bureau. The 538 pages of the admirably annotated report prepared by these three persons were published as House Document No. 326 of the Second Session of the 59th Congress, and many of the specific recommendations which were there proposed became law through the passage of the Act of March 2, 1907.

Since that time there have been passed a number of acts having to do with the same subjects. The legislation does not seem to have been inspired by the modern vogue for long-range planning. On the status of married women alone we have had the Cable Act of September 22, 1922, two separate acts of July 3, 1930, and the act of March 3, 1931. Some of the existing difficulties were pointed out by the State Department's expert on nationality questions, Mr. Richard W. Flournoy, Jr., Assistant Legal Adviser, Department of State, in an able address before the Federal Bar Association in Washington on February 15, 1932. He concluded his address by saying:

> The question arises whether it would not be desirable to call a halt to piece-meal nationality legislation, and submit the whole subject, including proposals contained in pending bills, to a committee composed of representatives of the interested branches of the government, with a view to careful study and the drafting of a comprehensive, well rounded and understandable code, for consideration by the appropriate committees of Congress.[1]

This plan has been followed. On June 23, 1928, the Secretary of State had designated three officials of the Department of State to study and to make recommendations for revision of the nationality laws. This committee submitted a report on March 29, 1929, but no action was taken upon it until by Executive Order No. 6115, dated April 25, 1933, President Roosevelt desig-

[1] Department of State Press Releases, Feb. 20, 1932, Weekly Issue No. 125, p. 178.

nated the Secretary of State, the Attorney General, and the Secretary of Labor "a committee to review the nationality laws of the United States, to recommend revisions, particularly with reference to the removal of certain existing discriminations, and to codify those laws into one comprehensive nationality law for submission to the Congress at the next session." The preliminary work is being carried on by a Committee of Advisers, composed of six officials of the Department of State, six of the Department of Labor, and one of the Department of Justice. The subject matter has been divided into five parts, each of which has been allocated to a separate sub-committee. The five subdivisions are:

1. Acquisition of nationality through naturalization;
2. Acquisition of nationality at birth;
3. Loss of nationality;
4. Nationality in outlying possessions of the United States;
5. Drafting, coördination and miscellaneous.

It seems that in every respect the method of bringing about the much needed revision and "codification" has been excellent. It promises well for the results. No doubt the committee will profit also from the experiences of the 1930 Hague Conference for the Progressive Codification of International Law and from the work of the Harvard Research in International Law; both of these sources reveal the international considerations to be borne in mind in drafting nationality laws and afford full data on the rules adopted by other countries. It is a remarkable thing that we have so long allowed our laws on these subjects to remain in so heterogeneous and complicated a condition. A few observations may be ventured on existing difficulties for which it may be expected the proposed revision will provide remedies.

In the first place, many good results would be obtained by coördination and verbal simplification of the procedural requirements for naturalization. Even the practicing attorney must admit that the applicant for naturalization in a normal case should be able to find out what is required of him without taking advice of counsel. If statutory simplification is accompanied by simplification of the necessary administrative regulations, both government officials and prospective citizens will applaud.

In the second place, certain lacunæ in the existing statutes should be filled, particularly as these have been revealed in the course of judicial interpretation. As to racial qualifications, the definition of "free white persons" is still ambiguous. In the Ozawa case [2] the Supreme Court identified the term with "Caucasian." But in the Bhagat Singh Thind case,[3] the same court a year later, explained that the words were "not of identical meaning—*idem per idem*"—but that the statutory expression must be interpreted "in the popular sense of the word." We now know the last word on the eligibility of Chinese, Japanese, and Hindus, but lower court decisions on other peoples, particularly

[2] 260 U. S. 178. [3] 261 U. S. 204.

of the eastern Mediterranean area, are conflicting. Nor are we in a position to say what fraction of non-white blood is sufficient to disqualify. It may, however, be true that these points will continue to defy statutory definition. In covering the qualifications for naturalization, it is to be hoped that the committee will take the dissenting view of Mr. Justice Holmes in the Schwimmer case [4] relative to the applicant's willingness to bear arms. The minority of three in that case grew to four in the Macintosh case a year later; [5] politically it may be easier to await the further shift from minority to majority,[6] but it would be sounder to attack the problem by a change in the law.

Attention should also be directed to the unsatisfactory situation regarding cancellation of naturalization certificates in view of the cumulative provisions of Sections 11 and 15 of the Act of June 29, 1906.[7]

The Act of March 2, 1929, partially eliminated questions arising out of residence requirements with particular reference to temporary visits abroad as breaking the continuity of residence here.

The problem of determining residence in a foreign country sufficient to raise the presumption of expatriation under Section 2 of the Act of March 2, 1907, still causes difficulty. Attorney General Wickersham's ruling to the effect that return to the United States for permanent residence terminates the presumption [8] should be given legislative sanction, provided the whole scheme of presumptions is to be retained. If it is retained, provision should be made to determine definitely the status of a presumptive expatriate; there is no need to have persons long occupying a shadowed and uncertain zone midway between citizenship and alienage. It is a curiously absurd and frequently overlooked fact that there are, under our present laws, large numbers of persons who can transmit American nationality to their foreign-born children though they themselves are presumed to have lost that nationality. The Citizenship Board of 1906 evidently made their recommendations with the idea that protracted residence abroad would entail actual loss of citizenship. Under Attorney General Wickersham's ruling, however,[9] this is not the effect of the statute. There is much to be said for the view of the 1906 Board, particularly with reference to the cases of naturalized citizens permanently residing in their native countries and of persons born with dual nationality permanently residing in the foreign state of which they are nationals. It may nevertheless be considered desirable to retain a classification of citizens not entitled to the pro-

[4] (1929), 279 U. S. 644.

[5] 283 U. S. 605.

[6] *Quære* whether the court could distinguish its earlier decisions on the basis of the unconvincing argument grounded on the Briand-Kellogg Pact as urged by the petitioner but rejected by the District Court in *In re Beale* (1933), 2 F. Supp. 899.

[7] 34 Stat. 596; and see, for example, United States *v.* Ness (1917), 245 U. S. 319; United States *v.* Sakharam Ganesh Pandit (1926), 15 F (2d), 285; Hazard, "Res Judicata in Naturalization Cases in the United States," this JOURNAL, Vol. 23 (1929), p. 50.

[8] 28 Op. Atty. Gen. 504.

[9] As followed by the courts in Miller *v.* Sinjen (1923), 289 Fed. 388, and Camardo *v.* Tillinghast (1929), 29 F (2d), 527.

tection of the United States, as in the case of foreign-born American citizens who fail to register and to take the oath now required by statute. Since protection may always be extended or withheld at the discretion of the Secretary of State, this classification, however, represents chiefly a rule of domestic convenience. When dealing with cases of dual nationality acquired at birth, it is highly desirable that the law provide for an election, expressed or implied from conduct, in order that such status may be determined when the individual comes of age and that he should not continue indefinitely to have the nationality of two states.

The question considered by the Supreme Court in the Chin Bow case [10] should be reconsidered. The Act of February 10, 1855, in declaring that foreign-born children of American citizens are themselves citizens, adds that "the rights of citizenship shall not descend to children whose fathers never resided in the United States." The Supreme Court has ruled that this provision requires residence of the father in the United States before the birth of the child. The opinion is supported by the argument that the opposite result would incorporate as citizens persons who had little or no contact with this country. But apparently under the Supreme Court rule, if *A* were born in the United States and resided here until he was three years old and thereafter always resided abroad,[11] his foreign-born children would be citizens though they had no contacts whatever with this country. But if *A* were born abroad of American parents, lived there until his marriage, and six months after the birth abroad of a child, removed to the United States with his family for permanent residence here, his child would be an alien. The test provided by the statute is obviously inadequate to accomplish the judicially-interpreted legislative intent.

Whether or not it be due to a puritanical survival, it is notable that our nationality laws have not included the provisions so commonly found in the nationality laws of other countries relative to illegitimate children and foundlings. It is believed to have been the practice of the Department of State, in accord with the opinion of Van Dyne,[12] to rule that the foreign-born illegitimate children of American mothers are born citizens. This rule should be made definite by Congress. Perhaps the constant pressure of women's organizations for equal rights in nationality matters, a pressure which existing statutes have not yet relaxed, will result in a revival of the measure, introduced in the last session of the Congress, for conferring citizenship at birth upon all foreign-born children of American mothers as well as of American fathers. The very considerable augmentation of cases of multiple nationality under such a rule will, of course, have to be kept in mind. The demands for equality and some of the objections might be met by a suggested statutory provision

[10] (1927), 274 U. S. 657.

[11] *Cf.* United States (William Mackenzie) *v.* Germany, U. S.-Germany Mixed Claims Commission (1926), *Decisions and Opinions*, p. 628; this JOURNAL, Vol. 20 (1926), p. 595.

[12] Citizenship of the United States (1904), p. 49.

whereunder foreign-born children would be Americans at birth only if both parents were American citizens. It is undoubtedly the question of equality for women which is contemplated in that part of the Executive Order creating the present committee which mentions revisions "particularly with reference to the removal of certain existing discriminations."

In view of the decision of the Circuit Court of Appeals, Ninth Circuit, in Lam Mow *v.* Nagle,[13] it might be well to follow the English precedent and to cover in the statute cases of children born on American ships and on foreign ships in American territorial waters. The Circuit Court's decision may well be questioned on the ground that it did not follow the lead of the Supreme Court in the Wong Kim Ark case where the Fourteenth Amendment on this point was said to be declaratory of the common law and was interpreted in the light of common law principles. The applicability of the Fourteenth Amendment in this respect to our insular possessions should also be considered.

This is not the place to set forth a complete analysis of our nationality laws. It may safely be assumed that the experts charged with the task of recommending revisions are thoroughly familiar with the operation of all our nationality laws and will have in mind all situations which need to be covered for the first time or to be dealt with in a new way. It is not to be expected that either the *ius soli* or the *ius sanguinis* will be abandoned, but it might be well to consider limitations on both principles based upon the individual's connection with the United States. From this point of view the Italian laws are instructive. Fundamentally all nationality laws should be based on four principles:

1. Adoption of basic rules suited to the *mores,* institutions, and conditions of the country and its population;
2. Sufficient particularity to avoid uncertainty as to the status of groups of persons;
3. Simplicity of administration;
4. Avoidance of international complications.

PHILIP C. JESSUP

## REALISM *V.* EVANGELISM

In recent years the possibility and best method of achieving durable peace has been a bone of contention between two schools of thought, both seeking the adjustment of international disputes and the reconciliation of conflicts of interest by peaceful means. Both schools also agree on the necessity of some forms of international organization to achieve the desired goal. Their differences lie in their estimation of the facts and in their degree of confidence in certain methods. The one school, founding its views of progress and of hope for peace on close observation of the conduct of states and peoples and on tried experience, has urged the strengthening of rules of law, as the time-tested cement of the social structure, and the promotion of negotiation, mediation,

[13] (1928), 24 F (2d), 316.