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IN THE MATTER OF M----.

IN STATUS — DETERMINATION PROCEEDINGS.

BEFORE THE CENTRAL OFFICE

Discussion: Subject claims that she derived United States citizenship on August 25, 1947 through permanent residence in the United States since that date, at which time she was under the age of 18 years; her father, B---- K---- M----, having been naturalized on September 4, 1946, by the United States District Court at Philadelphia, Pa., her parents having been legally separated and she being in the legal custody of said naturalized parent.

The questions presented are (1) whether there was a legal separation of the parents, (2) whether subject was a legitimate child and (3) whether the naturalized person had legal custody of subject, as contemplated by section 314 (c) of the Nationality Act of 1940.[i]

The record discloses that subject was born in Czechoslovakia on November 26, 1929, the daughter of B---- and A---- M----, who were then citizens of Czechoslovakia. Her parents had been married on December 29, 1927, in Karlsbad, Czechoslovakia. On June 22, 1940, the marriage of her parents was annuled by the German Provincial Court at Eger, Sudetenland, Czechoslovakia. Subject's father was lawfully admitted to United States for permanent residence on August 4, 1941, and was naturalized as a United States citizen on September 4, 1946. Subject remained with her alien mother in Europe until 1947 when she came to the United States to live with her father. She was lawfully admitted for permanent residence on August 25, 1947, while she was still under the age of 18 years.

The decree of annulment made no provision for the custody of the subject. The father testified that he went to Czechoslovakia in 1947, that subject's mother simply turned custody of subject over to him, that no papers were signed in the matter but that it was agreed that he would assume custody. On April 8, 1948, the mother alleged in an affidavit that the father had obliged himself since August 1947 to educate and support subject, that the father took upon himself to completely provide for her in the future, and that she "declared to consent to that and that their daughter shall remain with her father."

In the grounds for the decision set forth in the decree of the annulment, it was stated that the plaintiff (the mother) requested the annulment of the marriage, that she was a German Aryan and that her spouse was Jewish. It was further held that, neither at the time of the marriage nor at the beginning of their Brussels residence, was she (the mother) acquainted with or conscious of the racial problem, and that only recently was she enabled to lodge her bill of complaints based on the foregoing and on her financial independence from her spouse. It was further stated that the defendant (the father) agreed to the annulment of their marriage and admitted that he was a Czech and Jewish.

The first problem presented is whether the annulment of the marriage constituted a legal separation of the parents, as contemplated by section 314 of the Nationality Act.

In reply to a letter of this Service dated December 22, 1948, the Office of the Law Librarian, Library of Congress, Washington, D.C., submitted a memorandum of law concerning the dissolution of marriage in the Sudetenland on the basis of racial difference between the spouses. This memorandum, in part, contained the following information:

I. SOURCES

Prior to the annexation of the Sudetenland by Hitler the provisions of the Austrian civil code of 1811, as modified by the Czechoslovak law of May 22, 1919, No. 320, with some additional Austrian regulations concerning Roman Catholics, were in force in this region. These laws did not provide for any annulment of marriage because of racial difference.

Under the decree of December 22, 1938, by the German Minister of Justice (Reichsgesetzblatt, 1938, pt. I. p. 1987) certain parts of the German Marriage Act of July 6, 1938 (*ibid*, p. 807) were put into effect in the Sudetenland beginning with January 1, 1939. The decree contained also some special provisions to be applied only in the Sudetenland. But this Marriage Act of July 6, 1938, expressly maintained in force the Hitler discriminatory legislation concerning interracial marriages that was enacted previously, *viz*, the law of September 15, 1935 (Reichsgesetzblatt, 1935, pt. I, p. 1146) with all the decrees issued in its implementation.

Thus, essentially, marriage and divorce in the Sudetenland came under the German discriminatory laws. However, while in Germany proper the new marriage law had in part superseded, and in part combined with, the provisions of the German civil code of 1900 (commonly cited as B.G.B.), in the Sudetenland it superseded, and was combined with, the provisions of the Austrian civil code of 1811 (commonly cited as A.B.G.B.), of certain other Austrian laws and of the Czechoslovak law of 1919. These laws are referred to in the decree of December 22, 1938, as "provisions hitherto in force in the Sudetenland," and they should, therefore, be analyzed in brief together with the provisions of the German law in order to ascertain the law of the Sudetenland during German domination.

Before the liberation of Czechoslovak territory took place the president of the Czechoslovak Republic in exile issued "a constitutional decree of August 3, 1944, concerning the restoration of legal order" which was retained in force and repromulgated after the liberation of Czechoslovakia as an appendix to the proclamation of the Minister of the Interior of July 27, 1945, Collection of Laws (Zbirka Zakonu), 1945, law No. 30. By the above decree the laws and decrees issued after October 30, 1938, and up to the liberation of Czechoslovakia, were declared "not to be a part of the Czechoslovak legal order" (section 1). Those provisions of these laws and decrees "which, by content, are not in conflict with the wording or the democratic principles of the Czechoslovak Constitution" might be temporarily applied during the period of transition (section 2). But the application of provisions in the sphere of the "law of domestic relations" and some other spheres was unconditionally prohibited, and the decree was declared to take effect

in this respect upon the expiration of 3 months after its promulgation, i.e., on November 8, 1945.

Consequently, all the above-mentioned German Laws affecting marriage ceased to be effective on that day. However, the decisions, decrees, or orders issued by administrative authorities and courts under these laws were not invalidated automatically, but the parties concerned were allowed to petition for such invalidation in the presence of certain circumstances specified by law (*id*. sec. 6 also decree of April 9, 1946 No. 76). Thus, a dissolution of marriage granted under the Hitler laws remains in effect unless it was invalidated on the ground of such petition.

II. CONTEST AND INVALIDATION OF INTERRACIAL MARRIAGES CELEBRATED BEFORE JANUARY 1, 1938

The German Marriage Act of July 6, 1938, in section 4 referred, with regard to the prohibition of marriages of persons of "German or kindred blood" with those of "alien blood," to the law of September 15, 1935, for the protection of German blood and marriage and to decrees issued in its implementation.

This law of September 15, 1935, provides as follows:

SECTION 1. Marriages between Jews and Reich subjects of German or kindred blood shall be forbidden. Marriages entered into in violation of this law shall be null and void, even if they have been celebrated abroad in order to circumvent this law.

Action for annulment may be brought only by the government attorney.

SECTION 2. Extramarital intercourse between Jews and Reich subjects of German or kindred blood shall be forbidden.

However, neither this law nor the law of July 6, 1938, contain any provisions concerning mixed marriages which were celebrated before their enactment, but the decree of December 22, 1938, provides as follows:

DECREE OF DECEMBER 22, 1938

SECTION 19. (1) The validity of a marriage entered into before January 1, 1939, in accordance with the laws theretofore in force in the Sudetenland shall be judged under such laws.

(2) If the ground of invalidity (of a marriage) is identical with a ground which justifies the dissolution of a marriage under the (German) Marriage Act (of 1938), the provisions of this act concerning the dissolution of marriage shall apply. The period of time for the filing of the suit for dissolution (section 40 of the Marriage Act) shall expire not sooner than December 31, 1939.

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SECTION 25. The dissolution of a marriage entered into prior to January 1, 1939, may be petitioned on ground set forth by the (German) Marriage Act (of 1938), insofar as the

provisions of law hitherto in force in the Sudetenland do not provide for a ground of invalidity which would justify, under section 19, subsection (2), the dissolution of the marriage. The period of time for bringing an action for dissolution (section 40 of the Marriage Act) shall expire not sooner than on December 31, 1939.

Consequently, although as a rule a marriage celebrated before January 1, 1939, does not come under the restrictive provisions of the German discriminatory laws (section 19, subsection (1)), it may be attacked within the specified period of time. There are two instances when such an attack is permissible; first, when the old law provided for a "ground for invalidity" which is identical with a "ground for dissolution" provided for by the new German law (section 19, subsection (2)); and, second, when the new German law provided for such "ground for dissolution" of the marriage which had no counterpart among the "grounds for invalidity" under the former laws.

The obscurity of the language is explained by two reasons, one that the Hitler government was not prepared to give to the new laws any unconditional retroactive effect and thereby to shake all the mixed marriages celebrated before the enactment of discriminatory laws. The second reason was that they desired to leave open a back door for such attack.

Furthermore, the provisions concerning the termination of a marriage under the old German law (B.G.B.) and the Austrian law (A.B.G.B.) are different from those of the Hitler laws which, in addition, employ a new terminology. The German law, the civil code of 1900 (B.G.B.), provided, on the one hand, for divorce (*Scheidung,* sections 1567 *et. seq.*) and, on the other hand, for the annulment of marriage (*Nichtigkeit,* sections 1323 *et seq.*). The Austrian code provided for termination of marriage because of its invalidity (Ungultigkeit) or by divorce (*Ehetrennung*) as well as for legal separation (for which the term employed is identical with German divorce, namely *Scheidung*), which had the same effect as divorce except that the separated spouses could not enter into a new marriage (A.B.G.B., section 103).

The German law of July 6, 1938, recognized three ways of terminating marriage: (a) Annulment (*Nichtigkeit,* sections 20-32); (b) dissolution (*Aufhebung der Ehe,* sections 33-47) which may be petitioned on some grounds for nullity (German law) or invalidity (Austrian law) of marriage arising under prior laws; (c) divorce (*Ehescheidung,* sections 46-80).

Under both the old and new law a marriage could be contested in case of a mistake relating to the person of the other spouse. Under German law the marriage could be contested on this ground only within 6 months after the mistake was discovered (section 1339). If the court decided for the plaintiff, the marriage would be declared null and void from the very beginning. The Hitler laws declared a mistake to be a reason not for an annulment or for "invalidity" but for the "dissolution" of a marriage which is effective only from the day when the decision becomes final, as in the case of a divorce (sections 37 and 42). Thus, a dissolution under the Hitler law did not affect the legitimacy of the offspring and, in general, had the effect of a divorce and not of an annulment.

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IV. CUSTODY OF THE CHILDREN IN CASE OF DISSOLUTION OF THE MARRIAGE

In dissolving a marriage or granting a divorce under the law of July 6, 1938, the court in the Sudetenland did not have to enter any order concerning the custody of the children. This was reserved to the jurisdiction of a special "Guardianship court" which in general was charged with guardianship matters in which it proceeded under the rules of nonadversary proceedings with a great deal of informality and in which it had to take jurisdiction only if it was warranted by the absence of an agreement between the parties or by other circumstances. The statutory provisions on this subject matter do not furnish any formal criterion for the granting of custody to one or another spouse but in fact leave it to the court to find "whatever under the circumstances is most conducive to the welfare of the child" (section 81, *infra*).

LAW OF JULY 6, 1938

IV. CONSEQUENCES OF THE DISSOLUTION

SECTION 42. (1) The (legal consequences) of the dissolution shall be determined by the provisions concerning the legal consequences of a divorce.

(2) In the cases falling under sections 35 through 37 the spouse who has known the ground for dissolution shall be considered guilty. * * *

CUSTODY OF THE CHILD

SECTION 81. (1) If the marriage has been dissolved the guardianship court (*Vormundschaftsgericht*) shall decide which spouse shall be entitled to the custody of a common child. Whatever under the circumstances is most conducive to the welfare of the child shall be the deciding factor.

(2) If there are several common children the custody of all children shall be granted to the same parent provided no other arrangement is required for special reasons or is compatible with the welfare of the child.

(3) The custody shall be granted to a spouse who has been adjudged solely or preponderantly guilty only in case this serves the welfare of the child for particular reasons.

(4) The guardianship court may grant the custody to a curator if, for special reasons, this is required for the welfare of the child.

(5) The guardianship court may change the decree at any time if the welfare of the child so requires.

(6) The divorced spouses shall be heard before the decree. The interview may be omitted if it would be impracticable.

The Austrian civil code as amended before Hitler carried similar provisions, as follows:

AUSTRIAN CIVIL CODE

SECTION 142. If, upon separation from bed and board or upon divorce, the spouses enter into an agreement regarding the custody and education of the children without the consent of the court then the court shall decide whether all, or which children, should be given to the father or mother, taking into consideration the particular circumstances of the case with a view to the interest of the children, the occupation, personality and characteristics of the spouses and the reasons for the separation or divorce. Nevertheless, the other spouse shall have the right to have personal relations with the child. The court may regulate the relations in greater detail. The cost of education shall be borne by the father.

Under changed circumstances the court may without regard to its earlier arrangements or to the agreements of the spouses, make the new arrangements necessary in the interest of the children.

Thus, it appears that, prior to the annexation of the Sudetenland by Hitler, there was no provision in effect providing for the annulment of any marriage because of racial difference. However, subsequent to the annexation of the Sudetenland to Germany, marriage and divorce came under the German discriminatory laws. The German Marriage Act of July 6, 1938, and the law of September 15, 1935, provided for the dissolution of marriage where certain racial differences existed. The German law of July 6, 1938, recognized three ways of terminating marriage: (a) annulment, (b) dissolution (Aufhebung der Ehe, secs. 33 to 47), and (c) divorce. The German decree of December 22, 1938, permitted the dissolution of mixed marriages in the Sudetenland, even though the marriage had been performed prior to January 1, 1939. Such marriage could be dissolved where it was entered into by mistake. However, under the Hitler laws, a mistake was a reason not for an annulment but for the dissolution of a marriage which is effective only from the day when the decision becomes final, as in the case of a divorce (secs. 37 and 42).

The record discloses that subject's parents were married on December 19, 1927. The mother obtained a decree on June 22, 1940, in the German Provincial Court at Eger, Sudetenland, which territory was then annexed to Germany. The decree was based on the allegations by the mother that her husband was Jewish and that only recently had she been able to lodge her complaint on such fact and on her financial independence from her husband. The decree provided that it was an "Aufhebung einer Ehe." In the grounds of the decision it was stated "The foregoing action is an action brought in accordance with section 37 of the marriage law. In consideration of defendant's consent and the credibility of plaintiff's assertion concerning the time element when she became aware of her mistake, the petition was granted as being legally valid."

In view of the foregoing, it must be concluded that the decree obtained by the mother, pursuant to section 37 of the marriage law of July 6, 1938, was a dissolution of the

marriage but not an annulment. It was effective only from the day when the decision became final which was June 22, 1940. It, therefore, could not affect the legitimacy of offspring born during the continuance of the marriage relationship. While, under the decree of August 3, 1944, issued by the President of Czechoslovak Republic in exile, a decree issued in accordance with the German discriminatory laws could be invalidated, a petition to invalidate was required. The record fails to show that the mother filed such a petition.

Consequently, the dissolution of the marriage of the parents must be considered as being valid and as constituting a "legal separation" of subject's parents, within the meaning of section 314 (c) of the Nationality Act of 1940. It must also be concluded that subject was the legitimate child of such marriage.

The record further discloses that custody was not awarded in the dissolution proceedings, and, in accordance with the law in effect at that time, the decree was entered (A-168432, F---- C---- W----, Apr. 3, 1947; sec. 81 of the law of July 6, 1938, *supra*) there was no statutory grant of custody.

It is the view of this Service that, in the absence of judicial determination or judicial or statutory grant of custody in the case of legal separation of the parent of a person claiming citizenship under section 314 (c), the parent having actual uncontested custody is to be regarded as having "legal custody" of the person concerned for the purpose of determining that person's status under section 314 (c). (F---- C---- W----, A-168432, Apr. 3, 1947; W---- K----, A-168342, Apr. 2, 1947).

From the foregoing, it is concluded that subject's father had "legal custody" of subject at the time of her admission for permanent residence into the United States on August 25, 1947. Accordingly, subject derived United States citizenship on August 25, 1947, through permanent residence in the United States since that date, at which time she was under the age of 18 years; her father, B---- K---- M----, having been naturalized on September 4, 1946, by the United States District Court at Philadelphia, Pa., her parents having been legally separated and she being in the legal custody of said naturalized parent.

It is ordered, That the application of B---- C---- M---- M---- for a certificate of citizenship be granted, citizenship having been derived on August 25, 1947.

NATIONALITY ACT OF 1940

http://tesibria.typepad.com/whats_your_evidence/1940_nationality_act_54_stat_ch3_s301-322.pdf

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SEC. 314.

A child born outside of the United States of alien parents, or of an alien parent and a citizen parent who has subsequently lost citizenship of the United States, becomes a citizen of the United States upon fulfillment of the following conditions:

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(a) The naturalization of both parents; or

(b) The naturalization of the surviving parent if one of the parents is deceased; or

(c) The naturalization of the parent having legal custody of the child when there has been a legal separation of the parents; and if-

(d) Such naturalization takes place while such child is under the age of eighteen years; and

(e) Such child is residing in the United States at the time of the naturalization of the parent last naturalized under subsection (a) of this section, or the parent naturalized under subsection (b) or (c) of this section, or thereafter begins to reside permanently in the United States while under the age of eighteen years.

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This provision was recycled in the **Immigration and Nationality Act of 1952** as:

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CHILD BORN OUTSIDE OF UNITED STATES OF ALIEN PARENT; CONDITIONS UNDER WHICH CITIZENSHIP AUTOMATICALLY ACQUIRED

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SEC. 321. Children born outside of United States of alien parent.

(a) A child born outside of the United States of alien parents, or of an alien parent and a citizen parent who has subsequently lost citizenship of the United States, becomes a citizen of the United States upon fulfillment of the following conditions:

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(1) The naturalization of both parents; or

(2) The naturalization of the surviving parent if one of the parents is deceased; or

(3) The naturalization of the parent having legal custody of the child when there has been a legal separation of the parents or the naturalization of the mother if the child w^as born out of wedlock and the paternity of the child has not been established by legitimation; and if

(4) Such naturalization takes place while such child is under the age of sixteen years; and

(5) Such child is residing in the United States pursuant to a lawful admission for permanent residence at the time of the naturalization of the parent last naturalized under clause (1) of this subsection, or the parent naturalized under clause (2) or (3) of this subsection, or thereafter begins to reside permanently in the United States while under the age of sixteen years.

(b) Subsection (a) of this section shall not apply to an adopted child.

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Repealed as of Feb. 27, 2001.