REPORTS OF INTERNATIONAL ARBITRAL AWARDS

RECUEIL DES SENTENCES ARBITRALES

Henry Rothmann (United States) v. Austria and Hungary

11 July 1928

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States on behalf of the Indian Motocycle Company the sum of one hundred two dollars ninety cents ($102.90) with interest thereon at the rate of 5 per cent per annum from May 25, 1915, and that under the Treaty of Budapest the Government of Hungary is obligated to pay to the Government of the United States on behalf of the Indian Motocycle Company the sum of fifty-eight dollars ninety cents ($58.90) with interest thereon at the rate of 5 per cent per annum from May 25, 1915.

HENRY ROTHMANN (UNITED STATES) *v.* AUSTRIA AND HUNGARY

(July 11, 1928. Pages 78-87.)

NATIONALITY OF CLAIM.—NATIONALITY AND RIGHT TO PROTECTION.—NATURALIZATION: MISUSE OF NEW NATIONALITY, EXPATRIATION, EFFECT OF RETURN TO ADOPTED COUNTRY.—INTERPRETATION OF MUNICIPAL LAW.—RESPONSIBILITY FOR ACTS OF MILITARY AUTHORITIES: PERFORMANCE OF MILITARY SERVICE. Arrival of claimant, Austrian by birth, in United States on or about June 6, 1901. Naturalization as United States citizen on June 6, 1906. Return to Austria not later than February 18, 1910, followed by marriage, pecuniary investments and personal activities in local business, conclusion on June 6, 1913, of non-assignable contract with Austrian military authorities for term ending December 31, 1920. Application on April 30, 1915, to American Embassy, Vienna, for passport. Declination of passport by American Department of State on May 28, 1915, on account of statutory presumption of expatriation (Act of Congress, March 2, 1907), but issuance of emergency passport valid only for journey to United States, conditioned on claimant's agreement that he could and would return forthwith to United States for permanent residence. Failure to comply with condition. Order on July 15, 1916, to report to Austro-Hungarian military authorities for military service. Performance of military service until November 3, 1918. Issuance on January 8, 1917, of second emergency passport on same condition as first one. Application on March 22, 1917, to American Embassy, Vienna, for extension of second emergency passport. Denial of extension and cancellation of passport on ground of misrepresentation: claimant applied for emergency passports not for immediate return to United States for permanent residence, but for use in effecting release from military service in order to return to his business. Continued residence in Austria until latter part of 1919, when claimant returned to United States. *Held* that during period when acts complained of occurred claimant not entitled to recognition and protection as American citizen and claim, therefore, not impressed with American nationality: Commission construes and applies to facts Act of Congress, March 2, 1907, *supra*, which provides against misuse of new nationality to avoid obligations to native land, and which for time being deprives of right to recognition and protection as American citizens those against whom statutory presumption of expatriation has arisen, even though presumption is not conclusive and residence abroad for period prescribed by statute does not of itself terminate permanently American citizenship. *Held* also that, even did claimant's return to United States retroactively overcome statutory presumption, this cannot affect nationality of claim.

Cross-reference: Am. J. Int. Law, vol. 23 (1929), pp, 182-186.

Bibliography: Prossinagg, pp. 23-25; Bonynge, pp. 25-27.

This claim is put forward on behalf of Henry Rothmann as a naturalized citizen of the United States to recover $151,613.01 against Austria and Hungary on account of damages alleged to have been sustained by him resulting from enforced military service in the Austro-Hungarian army and from alleged confiscation of real and personal property located in territory of the former Austrian Empire now constituting a part of Poland and also on account of an indebtedness alleged to be due him by the respondent Governments.

The Commissioner finds (1) that the claimant has failed to prove that the Austro-Hungarian military authorities or representatives of either repondent Government seized, confiscated, or damaged any property belonging to him or that either of the respondent Governments is indebted to him and (2) that the claimant has failed to prove that the property located in Austria belonging to the partnership of which he was a member was confiscated by the Austro-Hungarian military authorities or by representatives of Austria or Hungary. It results from these findings that with respect to the items based upon alleged indebtedness and confiscation of and damage to property no liability has been established against the respondent Governments.

With respect to the only remaining item, based upon enforced military service in the Austro-Hungarian army, the respondent Governments admit that claimant was forced to perform certain services in connection with their armies. They deny that claimant was ever an American citizen; they allege that if he ever obtained a certificate of naturalization as a citizen of the United States it was by fraud, and that even if he had obtained naturalization he had by his subsequent acts and under the laws of the United States ceased to be an American citizen and had placed himself beyond the protection of the American Government.

In the absence of convincing proof of fraud in obtaining naturalization, and in view of the facts reflected by the record, the inquiry arises. At the time of the alleged occurrences of which complaint is made did claimant have such status of American citizenship as to impress this claim with American nationality?

The Commissioner's conclusions of fact relevant to this question, drawn from the hopelessly conflicting evidence contained in the voluminous and unsatisfactory record, follow.

(1) The claimant, Henry Rothmann, arrived in the United States from Austria on or about June 6, 1901.

(2) On the record presented the Commissioner finds that Rothmann became a citizen of the United States by naturalization on June 6, 1906.

(3) There is evidence in the record tending to prove that claimant left the United States soon after the date of his naturalization and returned to Austria. The date of his return is uncertain. He arrived at Przemysl, Galicia, not later than and probably much earlier than February 18, 1910, on which date, according to the official records contemporaneously made, he entered into a pre-nuptial contract, which was followed by his marriage on March 15, 1910. The registry of marriages described him as a "merchant in Tarnow", Galicia. Soon thereafter he made pecuniary investments and engaged actively in business of a local nature having no relation to American trade or commerce.

(4) On May 4, 1912, claimant purchased an interest in a partnership owning and operating a laundry located at Przemysl. On June 6, 1913, he, as managing partner of the firm of which he was a member, entered into a non-assignable contract with the Austrian military authorities binding the firm and all of its members for a term ending with December 31, 1920.

(5) So far as disclosed by the record, for more than five years after his return to Austria he did not by word or deed indicate any intention ever to return to the United States. On the contrary he apparently held himself out as a resident and citizen of Austria.

(6) On April 30, 1915, claimant applied to the American Embassy at Vienna for a passport, when, so far as disclosed by the record, he for the first time since his return to Austria claimed American citizenship. In passing on this application for a passport the American Department of State, acting through Robert Lansing for the Secretary of State, expressly held that the claimant had not "overcome the statutory presumption of expatriation which has arisen against him, and it [the Department of State] must, therefore, decline to issue a passport to him." However, the issuance of an emergency passport "valid only for the journey hither" was authorized "if he [claimant] makes arrangements to return *forthwith* to this country for permanent residence." There is evidence in the record indicating that such an emergency passport was issued on claimant's application, but if issued it was never used.

(7) There are in the record what purport to be copies of three affidavits made by claimant in connection with his applications for passports. In two of them he stated that he resided uninterruptedly in the United States from 1901 to 1912. In the other he stated that he resided uninterruptedly in the United States from 1901 to 1913. All are misstatements of fact with respect to the date of his return to Austria, material to his application for an American passport.

(8) On July 19, 1916, he was ordered to report to the Austro-Hungarian military authorities for military service, which service, according to his own statements, he sought to avoid on the ground that he was engaged in Austria in an essential war industry and on the further ground that he was an American citizen. Notwithstanding his protests he was required to perform military service as a clerk and interpreter and continued in the service until November 3, 1918, when the army was disbanded and he was discharged.

(9) While this impressment into military service occurred during the period of American neutrality, claimant then made no attempt to obtain the assistance of the diplomatic agents of the United States stationed in Austria to effect his release. The American Department of State had on May 28, 1915, expressly held that claimant was not entitled to the protection of the United States because of failure to "overcome the statutory presumption of expatriation which has arisen against him". If an emergency passport was in fact issued to claimant in the spring of 1915, it was conditioned on claimant's agreement that he could and would return *forthwith* to the United States for permanent residence. He knew that this condition had not been complied with. He knew that the American authorities had held that he was not entitled to protection as an American citizen. He therefore did not seek their assistance to effect his release from military service. On the contrary when, on January 5, 1917, he again applied to the American Embassy at Vienna for a passport he suppressed the fact that he was then and had for some six months been serving in the Austro-Hungarian army, and represented that he was in a position to, and would in fact, proceed immediately to the United States. On these representations an emergency passport limited to use within two months was on January 8 issued to him. On March 22, 1917, he applied to the American Embassy at Vienna for an extension of this passport and then for the first time asked for the interposition of the Embassy to effect his discharge from the Austro-Hungarian army. His application was denied, the passport issued January 8, 1917, was taken up and cancelled on the ground that it had been procured through

misrepresentation, and the protection of the American Government was expressly denied him.

(10) Throughout the period of the happenings complained of the claimant's actual status as viewed by the competent American authorities was that of a naturalized American citizen who had failed to overcome the statutory presumption (Act of March 2, 1907) that he had ceased to be an American citizen arising from a residence of more than two years in the foreign state from which he came.

(11) The evidence points strongly to the conclusion (as expressed in the findings of the American Embassy of March 22, 1917), that claimant misrepresented the facts in order to procure emergency passports which he did not intend to use for immediate return to the United States for permanent residence, and that his sole purpose in attempting to have such passports issued to him was to procure evidence to bolster up his claims of American citizenship for use in effecting his release from military service in order that he might return to look after his business in Galicia.

(12) The claimant at different times and under varying conditions has given irreconcilable testimony with respect to the date of his return from the United States to Austria, the purpose of his return, and the length of his stay in his native land—all material to the determination of his citizenship status then in issue. Some of this testimony was given under circumstances clearly indicating that the misstatements were deliberate and could not have been due to faulty memory on claimant's part.

(13) Claimant's credibility is impeached by his own testimony as well as that adduced by the Agents of the respondent Governments. His oft-repeated statement that from the time of leaving the United States to return to his native land, Austria, it was and continued to be his fixed intention to return and reside permanently in the United States is not supported by testimony, direct or circumstantial, of any other witness and is negatived by his own acts.

(14) In court proceedings in which claimant was a defendant, instituted to liquidate the partnership hereinbefore mentioned of which claimant was a member, a decree was on June 9, 1917, entered by an Austrian civil court directly impeaching claimant's integrity and credibility.

(15) Although released from military service on November 3, 1918, claimant remained in Austria looking after his property interests certainly until the latter part of 1919 and the date of his return to the United States is not disclosed by the record.

In determining the status of claimant's citizenship at the time of the occurrence of the events of which he complains, it becomes necessary to construe and apply to the foregoing conclusions of fact section 2 of the Act of the Congress of the United States effective March 2, 1907, entitled "An Act in reference to the expatriation of citizens and their protection abroad", which provides:

"That any American citizen shall be deemed to have expatriated himself when he has been naturalized in any foreign state in conformity with its laws, or when he has taken an oath of allegiance to any foreign state.

"When any naturalized citizen shall have resided for two years in the foreign state from which he came, or for five years in any other foreign state it shall be presumed that he has ceased to be an American citizen, and the place of his general abode shall be deemed his place of residence during said years: *Provided, however,* that such presumption may be overcome on the presentation of satisfactory evidence to a diplomatic or consular officer of the United States, under such rules and regulations as the Department of State may prescribe: *And provided also,* that no American citizen shall be allowed to expatriate himself when this country is at war."

Opinions and decisions construing and applying the provisions of this statute are not readily reconciled. [1] In seeking its purpose it must be borne in mind that the admission by a nation of an individual to citizenship implies not only the duty of protection by that nation but the assumption by the individual of the correlative obligations and duties inherent in citizenship. When an individual foreswears allegiance to his native country and takes the oath of allegiance to the United States of America, that nation will exact from its new citizen the assumption by him in fact as well as in name of the duties which he owes to it, and cannot tolerate his treatment of his new allegiance as a mere form to be used as a cloak to be put on or laid off to suit his convenience and merely to protect him against the discharge of the duties and obligations which he previously owed to his native country or which he assumed toward his adopted country. To permit such use to be made of the privilege of acquiring American citizenship through naturalization would be to permit the perpetration by the individual of a fraud on both his native and his adopted nation.

In an attempt to provide against such imposition by naturalized citizens, the Congress of the United States enacted the second paragraph of section 2 of the Act of March 2, 1907, above quoted. Its purpose is thus expressed by the Committee on Foreign Affairs in reporting the bill to the House of Representatives:

"... The citizenship of the United States should not be sought or possessed for commercial or dishonest ends. To guard against this evil, this bill provides that a naturalized citizen who leaves this country and dwells elsewhere continuously for five years shall be presumed to have abandoned his citizenship. This presumption can be overcome, but such a provision as this would be a great assistance to the Department of State, would avoid possibilities of international complications, and will prevent those who are not entitled to its protection from dishonestly hiding under the American flag".

This statute provides a definite rule, in terms of time of residence in a foreign state, fixing the status of one who after acquiring American citizenship through naturalization takes up his residence abroad. Previous to its adoption competent Government authorities were required, under circumstances of great difficulty, to apply general principles to the facts of each particular case in determining the right to protection abroad of one who had become an American citizen through naturalization. This involved inquiring into the motives prompting the individual to reside in a foreign state and his intentions with respect to remaining there or returning to the United States. The statute substituted a definite rule, comparatively simple and uniform in its application—a rule of expediency. It is a rule of evidence but something more. It fixes the correlative rights and obligations of the Government of the United States and the individual concerned for the period during which it remains in effect. While the presumption of law is not conclusive and residence abroad for the period prescribed by the statute does not of itself terminate permanently American citizenship, nevertheless when the statutory period has run and the legal presumption has arisen against the individual he has for the time being forfeited all right to be recognized as an American citizen and protected as such. He can overcome

[1] Sinjen *v.* Miller, 281 Federal Reporter (hereinafter cited as Fed.) 889; Miller *v.* Sinjen, 289 Fed. 388; United States *ex rel.* Anderson *v.* Howe, 231 Fed. 546; Banning *v.* Penrose, 255 Fed. 159; Stein *v.* Fleischmann Co., 237 Fed. 679; Nurge *v.* Miller, 286 Fed. 982; Thorsch *v.* Miller, 5 Fed. (2nd) 118; Nelson *v.* Nelson, 113 Nebraska 453; 28 Opinions of Attorneys-General 504; Opinion of Attorney-General Sargent rendered February 8, 1928; Compilation of Certain Departmental Circulars, etc., Department of State, 1925, pages 119 to 126; Departmental Order No. 438 issued by Secretary of State, dated March 6, 1928.

this statutory presumption (at least so long as he resides abroad) by complying with the rules prescribed by the Department of State in pursuance of the statute, which rules while in effect are as binding as the terms of the statute itself.

The real question here presented is, what is the nationality of the claim here asserted as determined by the status of claimant's citizenship during the material period when the acts complained of by him occurred? This status must be determined by the law then in effect as applied to evidence now produced but then available. Neither the United States nor Austria could foresee, or were required to forsee, future events or the future state of mind of claimant which would impel him or not at some indefinite future time to pursue a course tending to overcome the legal presumption raised by the statute against him.

Claimant was voluntarily in Austria, the land of his birth, and subject to its jurisdiction. He sought to avoid obligations of citizenship to his native land on the ground that through naturalization he had become an American citizen. But he had voluntarily placed himself beyond the jurisdiction of his adopted country and sought to be recognized by it as its citizen, not in order to return to the United States and serve it but to avoid serving Austria. He was concerned with promoting his selfish interests free from obligation to either his native or his adopted country. At a time when the relations between the United States and the Central Powers were reaching the breaking point, when the United States was interested in having within its jurisdiction all of its citizens capable of rendering military service, its Embassy at Vienna issued to claimant an emergency passport for immediate use in returning to the United States. In applying for this passport claimant deliberately suppressed the fact that he was then and had for some six months been serving in the Austro-Hungarian army. The passport was issued on claimant's misrepresentation that he was in a position to proceed at once to the United States and would do so. When these facts came to the knowledge of the American authorities they at once took up and cancelled the passport, refused so interpose to assist him in procuring release from military service, for which assistance he then for the first time applied, and expressly declined to recognize him as an American citizen. Prior to that time the American Department of State had expressly held that the statutory presumption of expatriation had arisen against claimant and this presumption and holding remained in effect.

On behalf of the claimant it is contended that his return in the latter part of 1919 to the United States, where he has since resided, has retroactively overcome the legal presumption which the statute raised against him during the material period and the presumption must be treated as if it had never existed. The Commissioner expressly declines to deal with the effect, operating prospectively, of a return to the United States by one against whom the statutory presumption of expatriation has arisen while residing abroad, or how this presumption can be overcome after such return, as a decision of these questions is not necessary to a disposition of this case. The Commissioner rejects the contention that the subsequent overcoming of the presumption can affect the nationality of this claim which had arisen during the time when claimant was not entitled to recognition and protection as an American citizen; especially as the very existence of the claim turns on the status of claimant's citizenship at the time it arose.

The effect of the rule here contended for would be to permit the Government of the United States to say to the Government of another State: This man is not today entitled to protection as an American citizen, but if today you do not treat him as such he may, at his election and by his voluntary act, at some indefinite time in the future, change his status, whereupon the United

States will then on his behalf demand that your Government pay damages for its failure to give to him now the recognition to which he is not entitled.

The purpose of the statute is to deny the protection due an American citizen to one against whom an unrebutted presumption of expatriation has arisen. That purpose would be defeated if claimant could, subsequent to the events forming the basis of a claim, overcome the presumption, and then as an American citizen demand and receive compensation as damages resulting from acts against which he was not entitled to protection.

The nationality of the claim here asserted is determined by the status of claimant's citizenship at the time the claim arose, and as at that time the claimant was not entitled to and was expressly denied recognition and protection as an American citizen the claim cannot be impressed with American nationality through the subsequent acts of claimant, even should such acts operating prospectively be held to overcome the legal presumption which the statute had raised against him. His citizenship, as determined by the statutory rule then in effect, and all of his rights dependent thereon were permanently impressed upon the claim here asserted, and the nationality thereof cannot be affected by claimant's subsequent acts.

On the record submitted the Commissioner holds that throughout the material period claimant was not entitled to recognition or protection as an American citizen; that because of his then status the competent authorities, designated to act for the United States in dealing with him and others similarly situated, expressly declined then to recognize him as an American citizen or to interpose then to obtain his release from military service in the Austro-Hungarian army; that on claimant's behalf the Government of the United States cannot now complain that the Austrian authorities then pursued a like course and declined to recognize claimant as an American citizen; and that this claim, based on enforced military service by claimant, who at the time had presumptively ceased to be an American citizen, is not one which from its inception was impressed with American nationality, and hence does not fall within the terms of the Treaties of Vienna and of Budapest.

For the reasons stated the Commission decrees that neither the Government of Austria nor the Government of Hungary is obligated under the Treaty of Vienna or of Budapest to pay to the Government of the United States any amount on behalf of Henry Rothmann, claimant herein.

LOUIS ZECCHETTO (UNITED STATES) *v.* AUSTRIA AND HUNGARY

(July 11, 1928. Pages 87-88.)

NATIONALITY OF CLAIM.—NATIONALITY AND RIGHT TO PROTECTION.—NATURALIZATION: EXPATRIATION, EFFECT OF RETURN TO ADOPTED COUNTRY.—INTERPRETATION OF MUNICIPAL LAW. Naturalization of claimant, Italian by birth, as United States citizen on April 14, 1902. Return to Italy not later than 1914. Purchase on September 5, 1916, of real property in Italy. Alleged damage caused by Austro-Hungarian troops on November 11-21, 1918. Return to United States after 1918 to reside. *Held* that claimant failed to prove that his claim on account of damage, if any he ever had, was impressed with American nationality at time it arose (reference made to Henry Rothmann award, p. 253 *supra*). Claim disallowed.

This claim is put forward on behalf of Louis Zecchetto as a naturalized citizen of the United States to recover the sum of $10,904.00 against Austria