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RECUEIL DES SENTENCES ARBITRALES

Mary Federer, Administratrix of the Estate of John J. Federer (United States) v. Austria and Wiener Bank-Verein

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referred to by the American Agent were not directed at or taken "with regard to enemy property" any more than Austrian or neutral property. It is apparent that such decrees did not remove from the American depositors in Austrian banks the power of disposition over their deposits such as "measures of supervision, of compulsory administration, or of sequestration" would have done. It is apparent that these decrees did not have for their object "the seizure of, the use of, or the interference with enemy assets". On the contrary, the records before this Commission indicate that during the years 1917 to 1920 kronen in considerable amounts were transferred directly from Austria to the United States. These do not include payments, believed to have been large, made to neutrals for the purpose of ultimate transfer to the United States where direct transfer was difficult because of the provisions of the United States Trading with the Enemy Act, which had no counterpart in the statutes and decrees of Austria as applied to the United States and its nationals.

The Commissioner holds that the claimant herein has failed to discharge the burden which rests upon it to prove the existence of exceptional war measures of general applicability to the property, rights, and interests of American nationals in the territory of the former Austrian Empire or that its bank deposit was "in fact subjected to measures in the nature of exceptional war measures" [1] within the meaning of the Treaty.

Wherefore the Commission decrees that the Government of Austria is not obligated under the Treaty of Vienna to pay to the Government of the United States any amount on behalf of The First National Bank of Boston, claimant herein.

MARY FEDERER, ADMINISTRATRIX OF THE ESTATE OF JOHN J. FEDERER (UNITED STATES) *v.* AUSTRIA AND WIENER BANKVEREIN

(November 9, 1928. Pages 92-97.)

DEBTS, APPLICABLE LAW, *LEX LOCI SOLUTIONIS*.—INTERPRETATION OF MUNICIPAL LAW, *DEPOSITUM IRREGULARE, REGULARE*, CUSTODY DEPOSIT, BAILMENT. General checking account, established by Mr. Federer, claimant's husband, on January 18, 1917, with Vienna bank. Custody deposit by bank on October 10, 1919, in agreement with Mr. Federer, of balance of account, free of charges, bearing no interest, and at depositor's free disposal: amount placed in special safe for custody deposits, never commingled with bank's own moneys nor treated as part of its assets. *Held* that applicable law is Austrian law: Austrian contract to be performed in Vienna. *Held* also that under sections 1376 and 1377, Austrian General Civil Law Code, the original account *(depositum irregulare)*, a debt within meaning of Treaty of Vienna, terminated on October 10, 1919, and that contract of bailment *(depositum irregulare*, recognized by Austrian Courts and publicists) concluded instead, not giving rise to such debt.

Cross-reference: Am. J. Int. Law, vol. 24 (1930), pp. 181-185.

Bibliography: Prossinagg, pp. 38-40; Bonynge, pp. 32-34.

In accordance with the rules of procedure of this Commission announced in Administrative Decision No. II, the United States, on behalf of the claimant, Mary Federer, the widow and the administratrix of the estate of John J. Federer,

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[1] Administrative Decision No. II at page 28 (this volume, p. 222 *supra*).

deceased, who was an American national through naturalization, seeks an interlocutory judgment for a kronen debt as hereinafter stated.

The facts are these:

(1) On January 18, 1917, John J. Federer resided in the State of New Jersey where he continued to reside to the time of his death, May 7, 1927. On May 23, 1927, his widow was duly appointed and qualified as administratrix of his estate.

(2) On January 18, 1917, Federer established in his own name in Vienna with the Wiener Bank-Verein, an Austrian corporate national (hereinafter designated "bank"), a general checking account in the amount of kronen 30,000 which bore interest at the rate of % 3 per annum.

(3) On September 6, 1919, the bank dispatched to Federer at his address in West New York the following letter:

"In view of the regulations of Peace Treaty we must request you herewith to kindly dispose of your old kronen credit balance by return mail as we would otherwise be compelled to deposit same with the local court. Owing to the complications and inconveniences which through those proceedings may arise for you, we are prepared to place your balance in banknotes into a special custody depot with us, free of any charges, such depot not to bear interest and to be held at your free disposal at any time. We beg to point out to you that your respective instructions must expressly indicate that the deposit with the court is to be avoided by us.

"The mail service between the States and our country being still rather unreliable we would suggest that you upon receipt of the present, cable us as follows: 'Avoid court deposit' from which we shall gather, that you wish us to take your balance into custody depot as outlined above. Should you on the other hand feel disposed to transfer your credit balance to somebody else, please instruct us accordingly and by so doing oblige", etc.

(4) On or about October 10, 1919, the bank received from Federer a cable reading:

"Avoid court deposit".

(5) On October 10, 1919, the bank wrote Federer to his address in West New York as follows:

"We received to-day your cable reading as follows: 'Avoid court deposit' in compliance with which we have today closed your account with us as per enclosed statement, showing a balance in your favor of *K* 32.237.—for which we are debiting you *val. 9th inst.*

"We have placed this amount into your custody deposit with us, bearing no interest but being kept at your free disposal at any time".

(6) The special custody deposit referred to in that letter was erected by placing banknotes to the amount of kronen 32.237, representing Federer's balance, in a special safe which served solely as a receptacle for so-called "custody deposits" accepted by the bank. No other moneys or securities were placed in that safe nor were the contents of that safe ever commingled in any way with the bank's own moneys nor were they ever treated as part of its assets. A cashier of the bank (see exhibit Bb in docket No. 335) testified with respect to the custody deposits of Federer and other American customers as follows:

"... upon the transfer of a customer's account from a current account to a custody deposit, banknotes in the amount of the balance were actually placed in a separate safe which served solely as a receptacle for such custody deposits. In case of a disposition being ordered, banknotes in the amount required were removed from this safe and disposed of in accordance with the order of the party. Today also the custody deposits remain separately kept."

The deposit of kronen 30,000 established by Federer with the bank on January 18, 1917, was a general deposit—*depositum irregulare*—known to the jurisprudence of both Austria and America. [1] Under it the bank acquired the ownership of the funds deposited which were intermingled with its other funds. The security of the depositor was based solely on the credit of the depositary. The equivalent of the funds deposited were at the disposal of the depositor, yet they were not withdrawn from commerce but belonged to and were used by the depositary. The depositor was not entitled to the return of the fungible things deposited but only to things of equal quantity and quality, that is, of the same amount and the same kind. This deposit constituted a debt within the meaning of the Treaty of Vienna.

The sole question for decision in this case is, on the facts stated what, if any, debt is now due and owing by the bank to the claimant within the meaning of the Treaty of Vienna?

Upon receipt of the bank's letter to him of September 6, 1919, three courses were open to Federer:

(1) To withdraw his credit balance or transfer it to another;

(2) To agree that the bank should convert this credit balance into a "custody deposit"; or

(3) To decline to pursue either of these courses, whereupon the bank would have deposited the amount of the credit balance in the local court at Vienna in pursuance of the provisions of section 1425 of the Austrian General Civil Law Code.

Under the Hois case, [2] had Federer declined to pursue either course (1) or (2) the bank would clearly have been within its rights in pursuing the third course, which would have resulted in the discharge and extinguishment of its indebtedness to Federer. The latter, however, with a view to avoiding the court deposit, expressly agreed that the bank should place his balance in banknotes into a special custody deposit to be erected by the bank, free of any charge to him, to bear no interest, and to be held by the bank, at his free disposal at any time. In pursuance of this express agreement Federer's balance in banknotes was placed by the bank in a special safe which served solely as a receptacle for such custody deposits and Federer so informed. These banknotes were never commingled with the bank's own money or treated as part of its assets. They have been held ever since subject to Federer's free disposal.

The contract between the bank and Federer was an Austrian contract to be performed in Vienna and is governed by the laws of Austria. [3] Under those laws the general deposit, the original account current, the *depositum irregulare*, was terminated and a new liability, based on the custody deposit agreement, was created in its stead. Sections 1376 and 1377 of the Austrian General Civil Law Code in translation read:

Section 1376 ."The change without the addition of a third party takes place when the legal basis or when the principal substance of a debt is changed, so that the old obligation is transformed into a new one."

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[1] Serafini, Del Deposito Irregolaro, Giurista d. Napoli VI; u. 36 e. 53 (1863); Muehlhauser, Umfang und Geltung des *depositum irregulare* (1879); Niemeyer, *Depositum irregulare* (1889); Neumann-Hofer, Depositen-Geschäfte und Depositen-Banken (1894); Schey, Obligations-Verhältnisse, Sec. 50, S. 351; Ehrenzweig's System, Sec. 358, S. 383 f.; Pfaff, Geld als Mittel Pfandrechtlicher Sicherstellung, 39; Schey, Sec. 50, S. 353 f.; Morse on Banks and Banking, 5th edition, sec. 186 and 289.

[2] See p. 260 *supra*.

[3] Hois case, p 260 *supra*.

Section 1377. "Such a change is called a novation. By virtue of this contract the principal obligation ceases and the new one simultaneously comes into force."

The decisions of the Austrian courts and the writings of Austrian publicists recognize in Austrian commercial and banking usage and practice the existence of a custody deposit, a special deposit, the *depositum regulare*, where the depositary has no right to use the thing deposited but is obligated to return it. In such a case the property deposited does not become part of the assets of the bank and must not be mingled therewith. The title to the deposit remains in the depositor whose relation to the bank is not that of creditor to his debtor but of a bailor to his bailee.

The rule, in so far as applicable to this case, is thus stated by Ehrenzweig, *System des Österreichischen allgemeinen Privatrechtes*, volume 2, paragraph 358, page 335 (translation):

"In the ordinary *Summendepositum* [aggregate deposit] the recipient obilges himself to return, if not the things received, the same number of things of the same kind, which must, however, be always kept separate from his own property and must be held in custody as the property of another. The depositor remains the owner; the custodian is merely entitled to replace individual pieces by others of the same kind. The rule is the same when money is (specially) deposited unsealed, as also in the case of a bank deposit of securities without a list of specific serial numbers. The banker in such deposits is not required to exercise any special caution to prevent the exchange between the same kinds of securities belonging to different customers. The interests of the depositor are not affected by such change."

"By the regular Sammeldepositum [mingled deposit], the property taken over is mingled with other property of similar depositors. The banker mingles securities of the same kind in a common mass. Possibly even lottery pieces in which the gain or loss is proportionately allocated amongst the depositors. In the case of the mingled deposit, the bailee does not become the owner . . . each depositor is the owner of the amount which belongs to him and he is entitled to reclaim the same in any denominations or things out of the common mass."

Professor Joseph von Schey, an outstanding Austrian publicist *(Die Obligationsverhaeltnisse des Österreichischen allgemeinen Privatrechtes*, paragraph 54, in translation) says:

"The growth of commercial relations has developed another form of deposit of substitutable things, in which the things given in custody are not kept separately in specie, but are mingled in one mass with similar deposits of other customers. The name *Sammeldepot* or *Vermengungsdepositum* suggests itself for deposits of this class (the words *Sammeldepot* and *Vermengungsdepositum* both mean the same thing, a commingled deposit). The depositor in this case is not entitled to demand the return of the identical things, but only the delivery of the same amount of things of the same kind out of the aggregate mass of deposits of the same kind. At the same time, it cannot be said that because the depositor is responsible not for the return of the same things, but for the same amount of similar things, this deposit becomes an irregular deposit; for the fungibles so received have not been placed at the custodian's free disposal, but were delivered to him for actual though not for separate custody. He must at all times hold in actual custody the actual amount of the same things which he has received for custody from his different depositors and not have merely, as in the case of an irregular deposit, usual 'banking cover' for the same. He is therefore economically not in a position to make even the slightest use of deposits of this sort for his own account. The individual depositor does not 'credit'

him; every depositor remains the owner of his portion of the total mass of deposits, is entitled to alienate the same and to reclaim it in case of bankrupty. This modification of the agreement of deposit therefore also belongs to the category of regular deposits."

The Commissioner holds that on the erection of the "custody deposit" on or about October 10, 1919, the relation of creditor and debtor which was established between Federer and the bank on January 18, 1917, was terminated and replaced by an entirely new contract of bailment. Therefore on the coming into effect of the Treaty of Vienna there existed no debt owing by the bank to Federer upon which to base the interlocutory judgment prayed for.

Wherefore the Commission decrees that the Government of Austria is not obligated under the Treaty of Vienna to pay to the Government of the United States any amount on behalf of the claimant, Mary Federer, administratrix of the estate of John J. Federer, deceased.

GEORGE AND THERESA ZOHRER (UNITED STATES) *v.* AUSTRIA AND POSTSPARKASSEN-AMT IN WIEN

(November 9, 1928. Pages 97-99.)

BONDED PUBLIC DEBTS: COLLECTION OF INTEREST COUPONS.—DEBTS: RATE OF INTEREST. Purchase of Austrian War Loan bonds through American broker and Austrian bank. Bonds held for claimants by bank which collected interest coupons but, without authority from claimants, credited proceeds to broker who paid only part of them to claimants. *Held* that interlocutory judgment should be entered for part of proceeds not turned over to claimants, with interest on amount of each coupon from date of maturity at 2 per cent per annum (contractual rate between broker and bank).

Bibliography: Prossinagg, pp. 40-41; Bonynge, pp. 38-39.

In accordance with the rules of procedure of this Commission announced in Administrative Decision No. II, the United States on behalf of the claimants, George and Theresa Zohrer, seeks an interlocutory judgment for a kronen debt alleged to be due them by the Postsparkassen-Amt in Wien (Austrian Postal Savings Bank in Vienna), hereinafter called "impleaded debtor".

The facts are these:

(1) The claimants are American citizens by virtue of their naturalization on July 6, 1915.

(2) On or about February 28, 1916, the claimants, through the Transatlantic Trust Company (a corporation created under the laws of New York), jointly subscribed and paid for bonds of the Third Austrian War Loan of the face value of kronen 20,000 bearing interest at the rate of $5\frac{1}{2}\%$ per annum.

(3) The impleaded debtor issued to and in the name of the claimants a deposit certificate *(Rentenbuch)* which it delivered to the claimants through the Transatlantic Trust Company. The bonds subscribed and paid for by claimants were held by the impleaded debtor for the claimants.

(4) In these transactions the Transatlantic Trust Company acted solely as a broker. The impleaded debtor knew that the bonds, for which it had issued to the claimants a deposit certificate *(Rentenbuch)*, had been paid for and were owned by the claimants.

(5) The deposit certificate *(Rentenbuch)* issued by the impleaded debtor and held by the claimants, among other things, provided (translation): "The coupons of the bonds deposited shall be collected by the Postal Savings Bank