

THE FIRST NATIONAL BANK OF BOSTON (UNITED STATES) *v.*
AUSTRIA AND WIENER BANK-VEREIN

(November 9, 1928. Pages 89-91.)

The United States on behalf of the claimant, The First National Bank of Boston, an American corporate national (hereinafter designated "American bank"), seeks an interlocutory judgment for kronen 100,952, the balance alleged to have been due it on open account on December 7, 1917, from the

impleaded debtor, the Wiener Bank-Verein, an Austrian corporate national (hereinafter designated "Austrian bank").

The Austrian bank deposited banknotes in the amount claimed with the Circuit Court Innere Stadt, Vienna, which court was at that time the court of competent jurisdiction, and gave the American bank notice of such deposit on December 3, 1919. All of the provisions of section 1425 of the Austrian General Civil Law Code were complied with by the Austrian bank and, under the decision of the Commission in the Hois case,¹ the court deposit made by the Austrian bank operated as a discharge and extinguishment of its pre-war debt to the American bank *unless*, prior to such court deposit, the Government of Austria or the competent Austrian authorities had subjected the American bank's credit balance with the Austrian bank to "exceptional war measures" as that term is used in the Treaty of Vienna.

The American Agent on behalf of the claimant contends that during the war the former Empire of Austria generally so applied exceptional war measures to bank deposits owing to American nationals as to entitle the claimant herein to a present final award in dollars "in respect of damage or injury inflicted upon their property, rights or interests" as provided in paragraph (e) of article 249 of the Treaty of St. Germain carried into the Treaty of Vienna, and in pursuance of the rules laid down by this Commission in Administrative Decision No. II at pages 25 to 28, inclusive.² This contention presents the sole question arising on the record in this case remaining for decision.

No case has been called to the attention of the Commissioner in which American-owned property was in fact subjected to supervision or compulsory administration during the war by virtue of any decree of the Austrian Government, but the American Agent relies on the provisions of several decrees of the former Empire of Austria, particularly those of March 10, 1916, December 19, 1916, and June 18, 1918, which he contends constituted exceptional war measures. These have all been carefully examined by the Commissioner. It will not be profitable to discuss them in detail. One of them prohibited, among numerous other articles, the exportation of gold and other coined metals. Others attempted to regulate traffic and commerce in foreign exchange and in general traffic with foreign countries in an effort to save foreign exchange and Austrian currency for lawful purposes and to prevent speculation to the disadvantage of the Austrian currency as well as the flight of capital from Austria at a time when the preservation of the value of the currency was of vital importance. The obvious purpose of these decrees was to save Austria's liquid resources in gold, foreign exchange, and its own currency for the purchase abroad of the materials most vitally needed. They were applicable to Austrian nationals as well as all other residents of Austria. They were in no sense exceptional war measures *directed against American or other enemy nationals*.

The expression "exceptional war measures" as defined in the Treaty³ "includes measures of all kinds, legislative, administrative, judicial or others, that have been taken or will be taken hereafter *with regard to enemy property*, and which have had or will have the effect of removing from the proprietors the *power of disposition* over their property, though without affecting the ownership, such as measures of supervision, of compulsory administration, and of sequestration; or measures which have had or will have as an object *the seizure of*, the use of, or the interference with *enemy assets*", etc. It is apparent that the decrees

¹ See p. 260 *supra*.

² This volume, pp. 221-222 *supra*.

³ Paragraph 3 of the annex to section IV of part X of the Treaty of St. Germain carried into the Treaty of Vienna.

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.
