

LILY J. COSTELLO, MARIA EUGENIA COSTELLO and ANA  
MARIA COSTELLO (U.S.A.) *v.* UNITED MEXICAN STATES

*(April 30, 1929, concurring opinion by Presiding Commissioner, April 30, 1929,  
concurring opinion by Mexican Commissioner, April 30, 1929. Pages 252-265.)*

---

*Commissioner Nielsen, for the Commission:*

Claim in the amount of \$50,000.00 with interest is made in this case by the United States of America against the United Mexican States in behalf of Lily J. Costello, John Costello, William Costello, Theresa Costello Penico, Maria Eugenia Costello and Ana Maria Costello. The claim is grounded on an assertion of a denial of justice growing out of the failure of Mexican authorities to take adequate steps to apprehend and punish persons who killed Timothy J. Costello, an American citizen, in Mexico in the year 1922 and robbed his home.

During the course of oral argument the United States withdrew all claim in behalf of John Costello, William Costello and Theresa Costello Penico. The remaining claimants are therefore now Lily J. Costello, a sister of Timothy J. Costello, deceased, and Maria Eugenia Costello and Ana Maria Costello, two daughters of the deceased.

The substance of the allegations in the Memorial upon which the claim is grounded is as follows:

At the time this claim arose, and for some time prior thereto, Timothy J. Costello, an American citizen, was residing in the vicinity of Texcoco, State of Mexico, Republic of Mexico, where he was a joint owner of a ranch called La Blanca. He was engaged in the business of dairying and raising dairy cows. On several occasions previous to the time this claim arose depredations had been committed upon the ranch, and Costello had requested the appropriate authorities to furnish adequate police protection to the locality in which the ranch was located but no such protection was afforded. At about 6.30 o'clock in the afternoon of January 4, 1922, while Costello was seated in his home on the ranch, bandits entered the home without warning and brutally assaulted, shot and killed Costello. James Kelly, a partner of Costello, immediately fled from the house, and although pursued by a number of the outlaws, he escaped. The bandits remained in possession of the house for some time, appropriating to their own use valuable personal articles, money and firearms.

Immediately after the murder of Costello, local authorities at Texcoco were notified with a view to having the bandits apprehended and punished for the crime which they had committed. A small number of soldiers was sent to the scene of the crime where they remained throughout the night. No efforts were made by them to ascertain the whereabouts or the identity of the intruders, and on the following morning they returned to their quarters at Texcoco. The body of the deceased could not be cared for until the proper officials had taken due note of the tragedy. It was, therefore, allowed to remain where it fell from Wednesday until Friday afternoon, in a state of decomposition, when the administrative procedure for investigating such cases was finally completed and permission was given to inter the body. The local authorities were indifferent with respect to the apprehension of the intruders and were dilatory in acting. Although James Kelly was in the house with the deceased at the time the crime was committed, and notwithstanding the fact that the crime was committed on January 4, up to January 12, no one in authority had made inquiry of Kelly regarding the attack or the identity of the persons responsible for the crime. While some efforts on the part of the authorities were made to apprehend the persons responsible for the crime, it was not until after sufficient time had elapsed to enable them to escape. No persons have been apprehended or punished for the offense.

Questions were raised by Mexico with respect to the nationality of all persons appearing in the Memorial as claimants. In view of the fact that claim is now made in behalf of only three of these persons, questions of this character of course need to be considered with respect to those three only.

There is satisfactory evidence that Lily J. Costello was born in Philadelphia, Pennsylvania, in 1887. She is therefore a native citizen of the United States.

In reaching a determination with respect to the status of the children of Timothy J. Costello, it is necessary to begin with a consideration of the status of their grandfather, Michael Costello, the father of Timothy J. Costello. It is proved that Michael Costello, who was born in Ireland, was naturalized as an American citizen by a court in Philadelphia on September 19, 1888.

It is shown by sworn statements made by Timothy J. Costello before an American Consular Officer in Mexico and by an affidavit executed by his brother, William E. Costello, and his sister, Lily J. Costello, that Timothy J. Costello, a British subject by birth, arrived in the United States in 1896, and resided there about ten years. The evidence before the Commission justifies the conclusion that Timothy J. Costello acquired citizenship of the United States under the provisions of Section 2172 of the Revised Statutes of the United States which reads in part as follows:

“The children of persons who have been duly naturalized under any law of the United States, or who, previous to the passing of any law on that subject, by the Government of the United States, may have become citizens of any one of the States, under the laws thereof, being under the age of twenty-one years at the time of the naturalization of their parents, shall, if dwelling in the United States, be considered as citizens thereof.”

From an affidavit made by Lily J. Costello, and from baptismal certificates executed in Mexico, it may be concluded that Ana Maria Costello and Maria Eugenia Costello were born in Mexico in 1909 and 1912, respectively. They were, accordingly, born American citizens under the provisions of Section 1993 of the Revised Statutes of the United States which reads as follows:

"All children heretofore born or hereafter born out of the limits and jurisdiction of the United States, whose fathers were or may be at the time of their birth citizens thereof, are declared to be citizens of the United States; but the rights of citizenship shall not descend to children whose fathers never resided in the United States."

Although these children were born in Mexico, it appears that their status involves no question of dual nationality in view of the provisions of Article 30 of the Mexican Constitution of 1917 from which it appears that persons born in Mexico of foreign parents in order to be regarded as Mexicans must declare within one year after they become of age that they elect Mexican citizenship, and must further prove that they have resided within the country during the six years immediately prior to such declaration. See also the Mexican law of 1886 relative to citizenship. Costello's children left Mexico before becoming of age and have been living in the United States since 1924.

In view of the facts and the applicable law which have been stated above, it appears that this claim is now made in behalf of three American citizens. According to the record they are all at the present time residing in the United States.

For the purpose of clarifying questions of nationality raised in the case, the Commission requested the American Agency during the course of oral argument to furnish further evidence. In response to this request there were produced copies of records showing that Timothy J. Costello had been registered in the American Consulate General at Mexico City in 1911 as an American citizen; that he was again registered there in 1920, and his registration was approved; but that subsequently in the same year, an instruction was sent to the Consul General disapproving the registration. Without entering into any discussion of the conclusion upon which the Department of State based its action in cancelling the registration of Costello, it may be said that the Commission feels constrained to accept that action as conclusive with respect to Costello's status under the applicable law and regulations. The statutory provisions under which that action was taken are found in Section 2 of the Act of March 2, 1907, 34 Stat. 1228, and read as follows:

"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."

The Department of State decided that Costello had failed to overcome the presumption referred to in the above mentioned statute which was referred to by Attorney General Sargent in an opinion rendered February 8, 1928, as being "so loosely drawn that its operation and effect have been in doubt ever since its passage." As was pointed out in that opinion, questions have at times been raised whether the citizenship of a person who fails to rebut the presumption is terminated or whether merely the right of protection is withdrawn from such a person while resident abroad, although citizenship is retained.

It does not appear that the court of last resort has ever passed upon this point. The question of the effect of an un rebutted presumption was raised

in *Gay v. United States*, 264 U. S. 353, but in that case the court held that the presumption had not arisen against the particular person whose status was under consideration by the court because of protracted residence in the country of his nativity. The court therefore found it unnecessary to make a pronouncement with respect to the effect of the presumption.

In the light of what seems to be a reasonable interpretation of the language of the statute, it seems to be clear that the law should be construed simply to deprive persons of protection while residing abroad and not entirely to nullify their citizenship, and that this interpretation is well supported by the action of both judicial and administrative officials of the Government of the United States.

On December 1, 1910, Attorney General Wickersham rendered an opinion to the Secretary of Commerce and Labor, 28 Ops. Atty. Gen. 504, with respect to the case of a native of Syria who was naturalized in the United States and subsequent to his naturalization returned to his native country, where he married a Syrian woman and remained for more than two years and then returned to the United States bringing with him his wife. The Attorney General stated in his opinion that the man did not by his residence abroad cease to be an American citizen, and that his wife should also be deemed to be a citizen and not subject to exclusion under the immigration laws, although she was afflicted with trachoma, a contagious disease. Mr. Wickersham expressed the view that the Act of March 2, 1907, was limited to naturalized citizens while residing in foreign countries beyond the period stated in the Act, the object thereof being to relieve the Government from the obligation to protect such citizens after residence abroad of a sufficient time to raise the presumption that they do not intend to return to the United States, and that the Act did not apply to citizens who returned to the United States. This opinion of the Chief Law Officer of the Government appears to furnish the most reasonable interpretation of which this vague and uncertain language of the statute is susceptible.

It is, of course, well established that the Executive under the Constitution of the United States is charged with the protection of the lives and property of American citizens abroad. Under the Act of March 2, 1907, Congress has sanctioned action on the part of the Department of State, acting under the direction of the President, in prescribing certain rules under which naturalized citizens resident abroad for specified periods must bring themselves in order to receive the continued protection of the Government while so resident. In carrying out the statute and the rules prescribed pursuant thereto, the Department is performing executive functions in relation to the protection of citizens abroad, as it did prior to the enactment of the statute, in the exercise of a discretion not defined by these specific rules. The law provides for naturalization through judicial action and for the cancellation of naturalization through judicial proceedings. There appears to be no good reason to believe that any intent should be imputed to Congress to authorize the Department of State to cancel the citizenship of persons abroad by prescribing rules to which such persons must conform in order to prevent themselves from becoming denaturalized. The Act contains no such express authorization. It makes no mention of cancellation of citizenship. It does not seem to be reasonable to suppose that Congress intended to prescribe a forfeiture of citizenship through residence abroad in the absence of explicit language such as is used in the provisions of the law relating to expatriation by naturalization under the laws of a foreign country or by the taking of an oath of allegiance to a foreign Government.

When dealing with the specific subject of loss of citizenship Congress in clear terms prescribed the manner in which that takes place. The first paragraph of Section 2 of the Act of March 2, 1907, reads as follows:

“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 on oath of allegiance to any foreign state.”

It seems pertinent to note the title of the Act of March 2, 1907, which is “An Act in Reference to the Expatriation of Citizens and their Protection Abroad.”

Presumably executive officials of the United States have been guided by Mr. Wickersham's opinion since the date of its rendition. The Department of State which has been so very largely concerned with the construction of these provisions, has evidently acted in accordance with Mr. Wickersham's opinion. See *Compilation of Certain Departmental Circulars Relating to Citizenship, Registration of American Citizens, Issuance of Passports, Etc., 1925*, pp. 34, 45, 120.

On March 31, 1916, an opinion was rendered by Judge Hough of the District Court of the United States for the Southern District of New York from which it may appear that the Act of March 2, 1907, was given a construction at variance with that put upon it by Attorney General Wickersham. *United States ex rel. Anderson v. Howe*, 231 Fed. 546. A person named Anderson came to the United States from Sweden in 1891, was naturalized in 1905, and in the year following returned to Sweden, where he remained continually until 1915, when he again returned to this country. On his arrival in New York the immigration authorities found him insane and nearly penniless. He having been held as an alien within the prohibited classes, and ordered deported by the Secretary of Labor, a writ of *habeas corpus* was taken out in his behalf. The Court discharged the writ and remanded the relator. Anderson had not presented to any diplomatic or consular officer of the United States evidence to overcome the statutory presumption. Judge Hough stated that, although he thought that the presumption was rebuttable, Anderson was subject to exclusion as an alien. Without going into a discussion of the facts in the Anderson case, it may be observed that they differed considerably from the facts in the case dealt with in the opinion rendered by Attorney General Wickersham. If Anderson was an alien it would seem that he could have become an American citizen only through naturalization conformably to the provisions of the naturalization law, and it is not clear why or how he should rebut any presumption that had arisen against him in order again to obtain American nationality.

The view that a person who has not rebutted the presumption becomes an alien does not appear to be supported by other opinions rendered by Federal or State courts.

It is interesting to note that Judge Learned Hand, in *Stein v. Fleischman Company*, 237 Fed. 679, referred to the Anderson case and stated that it was one in which the treaty with the relator's country of origin, Sweden, was such that a renewal of residence in Sweden in itself repatriated the naturalized American citizen. As the case came before the court, said Judge Hand, the relator's residence, Sweden, had to be accepted as a fact, and “language regarding the Act of 1907 was therefore obiter.”

In *Thorsch v. Miller*, 5 Fed. (2d) 118, Chief Justice Martin of the Court of Appeals of the District of Columbia stated that the court took judicial notice of the interpretation given the Act by the Department of State, that

the presumption "continues to exist only while the naturalized citizen continues to reside abroad, and that upon the return of the individual to the United States and upon his establishment there in good faith of a permanent residence the reason for the presumption disappears."

In *Nurge v. Miller*, 286 Fed. 982, a suit to recover property taken by the Alien Property Custodian of the United States from a man who went to Germany in 1909 and did not return until after the Armistice, Judge Campbell said:

"I have, however, examined all of the cases cited and believe that the presumption may be, and in the case at bar has been overcome by the return of the plaintiff and the proof of his intention during all of his absence to remain a citizen of the United States."

See also *United States v. Eliassen*, 11 Fed. (2d) 785; and *Banning v. Penrose*, 255 Fed. 159.

It is interesting to consider, in connection with the case before the Commission, the case of *Nelson v. Nielsen, et al.* decided by a State court, the court of last resort of Nebraska, on April 16, 1925, 113 Neb., 453. In May of 1908, Chris Nelson, a naturalized citizen of Danish origin, sailed for Denmark. On the 18th day of December of the same year he was married in that country to a subject thereof, and by her he had a daughter, Hertha Oman, born on the 28th day of May 1910. In 1913 he returned to Nebraska to attend to some legal business in connexion with his land, after which he went back to Denmark, where he died, November 21, 1915. Subsequently his estate was duly settled by proceedings before a probate court in the State of Nebraska, and his personal property was distributed to his widow and daughter, the court adjudging that these persons were his sole heirs, and were entitled to his real estate by descent.

Their title to the real estate was later contested by a brother of the deceased. The Supreme Court said that the statutory presumption which had arisen against the deceased on account of his protracted residence abroad was enacted to relieve the Government of the United States from the duty of protecting its citizens long abroad in certain cases, and that the presumption could be rebutted not only by the presentation of evidence to a diplomatic or consular officer but by other sufficient means and circumstances. In the light of the evidence before the court it was further said that there was no difficulty in deciding that Nelson was to his death a citizen of the United States. His daughter, whose nationality was determined by that of the father, was also a citizen, said the court. And it further stated that while it might be that the widow, as a naturalized citizen, should have registered before an American consul in Denmark in order to retain her citizenship, in the absence of proof that she had not done so, she would be considered a citizen, having become one by her marriage to Nelson.

In an Act approved March 4, 1923 (42 Stat. 1516) Congress made provision for the return in certain cases of property seized by the Alien Property Custodian during the war between the United States and Germany. By Section 21 of that Act it was provided that the claim for the return of property "of any naturalized American citizen" should not be denied on the ground of any presumption of expatriation which had arisen against him under the Act of March 2, 1907. The Act therefore refers to a person against whom a presumption had arisen as an "American citizen" and not as an alien.

Sufficient citations have been made to show that neither the executive

department of the Government nor the legislative department nor the judiciary, with the possible exception of a single judge, have construed the Act of March 2, 1907, to effect a cancellation of citizenship of persons against whom the presumption therein stated has run.

When it is considered that the status of a great number of parents and children, as well as property rights, the nature and extent of which can not be estimated, must have been affected by the interpretation given to the law by both administrative and judicial officials over a long period of time, it seems proper to assume that a reasonable construction such as that placed upon the Act by Attorney General Wickersham would not lightly be set aside by any court. See with respect to the principle of contemporaneous interpretation, *Stewart v. Laird*, 1 Cranch 299; *The Laura*, 114 U. S. 411.

If the view should be taken that residence abroad for specified periods, coupled with the failure to rebut the statutory presumption, results in loss of citizenship, it would be uncertain when citizenship is nullified—whether that takes place after the expiration of the statutory periods, or after a consular or a diplomatic representative has passed upon the evidence submitted by persons against whom the presumption has run, or after the Department of State has passed upon it, or after persons have been notified of rulings made in their respective cases. There appears to be nothing in the law of 1907 to justify the view that Congress intended to legislate in such uncertain terms with respect to such a serious question as the cancellation of American citizenship.

It also seems to be unreasonable to suppose that Congress enacted a measure which would seem clearly to be in derogation of the authority vested in it under the Constitution. By Article I, Section 8, of the Constitution Congress is empowered to establish a uniform rule of naturalization. It would seem to be obvious that just as naturalization takes place through the exercise of a legislative function, denaturalization can only be effected by the legislative department of the Government, and not by an executive department like the Department of State. In connection with both naturalization and denaturalization Congress has imposed certain functions on the judiciary.

Under authorization from Congress, the Department of State has prescribed certain rules with respect to the rebuttal of a presumption arising from protracted residence abroad. These rules require proof explanatory of such residence. They relate to residence abroad for business purposes, or for reasons of health, or because of unforeseen exigencies, or for other specified reasons.

Undoubtedly Congress would have the constitutional power to enact a law declaring that, whenever the Department of State shall ascertain that a naturalized citizen has lived abroad for any specified period, such citizen shall cease to be an American citizen. The denaturalization here would take place upon the simple ascertainment of a fact by the Department. In such a case the legislative department would not be delegating its power to make a law but merely the power to determine some fact or state of things upon which, according to the terms of the law, that Department's action should depend. Two outstanding points in *Field v. Clark*, 143 U. S. 649, one of the most interesting cases in which the subject of the delegation of legislative power has been discussed, seem to be that discretion must not be vested in the Executive authorizing him in effect to make law, and that such discretion as the Executive has must relate to the execution of the law.



Congress could probably itself prescribe rules similar to those framed by the Department and declare that, whenever a naturalized citizen failed, in the judgment of the Department, to rebut a presumption in accordance with such rules, he should cease to be an American citizen. While in such a case undoubtedly a considerable measure of discretion on the part of the Department of State would be involved in ascertaining whether a naturalized citizen brought himself within these rules, it would seem, in the light of decisions of the Supreme Court bearing on the subject of delegation of legislative power, that an Act might properly be framed within the limits of constitutional authority.

But it would seem to be clear that Congress could not properly say that a naturalized American citizen residing abroad should cease after certain specified periods to be an American citizen, unless he complied with certain rules prescribed by the Department of State to determine conditions under which he might remain a citizen or be denaturalized. Such a law would appear clearly to have the effect of delegating to the Department of State authority to prescribe rules with respect to the denaturalization of American citizens, and in effect to give judicial application to such rules. There seems to be nothing in the law of 1907 to justify the conclusion that Congress undertook to enact such a law.

According to a ruling of the Department of State, Timothy J. Costello evidently was not considered to be entitled to protection of his Government at the time he was killed in Mexico. But he was an American citizen at that time. He was not a Mexican. And he had not by any action of his Government been outlawed as a man without a country. There was nothing in any established rule of domestic policy that would have precluded his Government from extending protection to him at some future date after he had returned to his own country to reside.

But the precise case before the Commission is one in which complaint is made that proper steps were not taken to apprehend and punish the murderers of an American citizen. That the Department of State might have been unwilling to protect Costello had he sought its protection shortly before his death can in no way be determinative of the right of the United States at this time to invoke the rule of international law requiring effective measures with respect to apprehension and punishment of persons who injure an alien. That rule is invoked in this case with a view to obtaining compensation for three American claimants now resident in the United States.

One of the claimants, Costello's sister, is a native citizen. Costello's daughters were born American citizens. They are not naturalized citizens in the sense in which that term is generally used. The presumption referred to in Section 2 of the Act of 1907, applies to naturalized citizens only. It is possible that one of the daughters may have been born after the presumption arose against their father, but it is not at all certain that this is a fact. Even if it were and in some way that could affect her status as an American citizen, both daughters are now resident in the United States, and their citizenship seems to be unquestionable.

In passing upon the complaint of negligence with respect to the apprehension and punishment of the persons who participated in the killing of Costello and the robbery of his home, the Commission is confronted, as it has been repeatedly in other cases, with the difficulty of basing any conclusion on meager and vague evidence. Information in communications sent to the Department of State by American Consular and Diplomatic representatives

in Mexico City is of too general and meagre a character to furnish the basis of a pecuniary award. The most definite statements furnished are found in a brief letter of January 9, 1922, transmitted by the American Consular representative at Mexico City to the American Chargé d'Affaires in Mexico. It is stated in that letter that during the evening in which Costello was killed a small detail of soldiers went to his home, remaining there all night, but that they accomplished nothing and made no effort to find the robbers or to ascertain who they were or from whence they came. It is further stated that no one in authority made inquiry of Mr. Kelly regarding the circumstances; that as the body of Costello could not be cared for until the officials had taken due note of the tragedy, it was allowed to lie where it fell from Wednesday evening until Friday afternoon; and that no steps appeared to have been taken by the authorities other than the sending of the military detail. It is not explained in this letter what opportunities the Consul had to obtain information respecting the actions of the authorities. From copies of communications exchanged between Mexican officials which have been produced by the Mexican Agency it appears that some investigations were made; also that soldiers encountered the bandits and killed the leader because he resisted arrest.

As was pointed out in the opinion of the Commission in the *Archuleta* case, Docket No. 175,<sup>1</sup> the Commission must reach a conclusion on the strength of the evidence produced by both parties. Evidence furnished by the respondent Government must of course be considered both with respect to what it may show against contentions advanced in defense to the claim and with respect to what may be revealed in support of such contentions. But the mere fact that such evidence is meagre can not in itself justify an award in the absence of concrete and convincing evidence produced by the claimant Government. In the light of the unsatisfactory evidence before the Commission, the Commission is constrained to dismiss the claim.

*Dr. Sindballe, Presiding Commissioner:*

I concur in the conclusion reached by Commissioner Nielsen, but it does not seem to me that the authorities quoted by him warrant a deviation from the wording of Section 2 of the Act of March 2, 1907, according to which a naturalized citizen in certain cases shall be presumed to have ceased to be an American citizen, as long as he does not rebut the presumption by returning to the United States with the intent of establishing a permanent residence there or otherwise, and it does not appear that after the statutory presumption first arose against Timothy J. Costello, anything ever occurred which might have put him in a position to overcome the presumption.

*Fernández MacGregor, Commissioner:*

I concur in the opinion of the Presiding Commissioner. This Commission has jurisdiction over the instant case, since at least two of the claimants are American citizens, but in view of the fact that Timothy J. Costello died without overcoming the presumption of having lost his American citizenship, it could not be said that Mexico was in relation to the United States under an international obligation of punishing his murderers and thus, the alleged failure to prosecute does not constitute as to the United States an international delinquency.

---

<sup>1</sup> See page 376.

*Decision*

The claim made by the United States of America in behalf of Lily J. Costello, Maria Eugenia Costello and Ana Maria Costello is disallowed.

---