AGENCY OF CANADIAN CAR AND FOUNDRY COMPANY, LTD. (UNITED STATES) *v.* GERMANY

(*Sabotage Cases, October 30, 1939, p. 324; Certificate of Disagreement and Supplemental Opinion of American Commissioner, October 30, 1939, pp. 314-324.*)

PROCEDURE: MOTION TO DISMISS, WITHDRAWAL AND RENEWAL. — JURISDICTION: NATIONALITY OF CLAIM. — AMERICAN NATIONAL: DETERMINATION BY MUNICIPAL LAW; NATIONALITY OF CORPORATIONS, CONTROL TEST, EFFECTIVE DOMICILE. Motion of German Agent filed December 7, 1936, to dismiss for lack of jurisdiction request for rehearing of American Agent filed May 4, 1933 (see p. 160 *supra*), in so far as related to claim of Agency of Canadian Car and Foundry Company, Ltd., organized under laws of State of New York, but entirely owned by Canadian corporation. Withdrawal of motion on March 18, 1937, but renewal on April 27, 1937. *Held* that motion should be dismissed: (1) under Treaty of Berlin (preamble and art. I) and Agreement of August 10, 1922, Commission has jurisdiction to hear and determine certain claims of American nationals or American citizens, (2) meaning of " American national " is to be determined under United States

Law, term includes corporations (reference made to Administrative Decision No. V, Vol. VII, p. 119, and to municipal decisions), (3) under United States law, claimant is American national, despite Canadian ownership (reference made to municipal decisions, text writer; control test, effective domicile).

Cross-reference: Witenberg, Vol. III, p. 80 (French text).

Bibliography: Witenberg, Vol. III, pp. 74-80; Woolsey, A. J. I. L., Vol. 35 (1941), pp. 299-301.

CERTIFICATE OF DISAGREEMENT AND SUPPLEMENTAL OPINION OF THE AMERICAN COMMISSIONER ON THE QUESTION OF THE JURISDICTION RAISED BY THE MOTION OF THE GERMAN AGENT, DATED NOVEMBER 24, 1936, AND FILED DECEMBER 7, 1936.

To Honorable OWEN J. ROBERTS, *Umpire:*

On December 7, 1936, the German Agent filed a Motion dated November 24, 1936, in which he moved " to dismiss for lack of jurisdiction the petition for rehearing filed " May 4, 1933, in so far as it related to the claim of the Agency of Canadian Car & Foundry Company, Ltd. At the time this Motion was filed this claim had been pending before the Commission for over nine years. The Motion recites that " the German Agent has been advised that the stock of the Agency " company " has at all pertinent dates been completely owned by the Canadian Car & Foundry Co., Ltd., Inc., a corporation organized under the laws of Canada " and that accordingly it " has no standing as a claimant before this Commission ".

The American Agent on December 28, 1936, filed on behalf of the United States his Answer, and on January 22, 1937, his Brief in opposition to the Motion filed December 7, 1936.

On March 18, 1937, the German Agent filed a notice withdrawing his Motion filed December 7, 1936. On April 27, 1937, he filed a memorandum in which he " renews his request that the Commission dismiss the petitions for rehearing filed on May 4, 1933, as unfounded in fact and in law, and in so far as the claim of the Agency of Canadian Car & Foundry Company, Ltd, is concerned, also on the ground that it does not come within the jurisdiction of the Commission".

On January 12, 1939, the German Agent finally filed his Brief in reply to the Brief of the American Agent filed January 22, 1937.

When the German Commissioner, on March 1, 1939, announced his retirement, under the circumstances set out in the opinion rendered by the American Commissioner on June 15, 1939, and concurred in by the Umpire in his decision, the question raised by the Motion of the German Agent aforesaid was an issue supplementary to the main issues pending before the Commission, which issues included not only the question of the responsibility of Germany for the fires and explosions at Black Tom, New Jersey, but also for the fires and explosions at Kingsland, New Jersey. The action of the German Commissioner in retiring when he did is, in my opinion, tantamount to a disagreement between the two national Commissioners on all issues involved, including the jurisdictional issue raised with respect to the right of the United States to present as it did the claim of the Agency of Canadian Car & Foundry Company, Ltd.

I, therefore, certify to the Umpire that there was a disagreement between the American Commissioner and the German Commissioner on the issue raised by the German Agent in his Motion filed December 7, 1936, asking that the petition of May 4, 1933, be dismissed in so far as it relates to the claim of the Agency of Canadian Car & Foundry Company, Ltd., on the ground of lack of jurisdiction.

I am submitting with this Certificate my opinion on the question of jurisdiction raised by the Motion of the German Agent aforesaid:

Supplemental Opinion of American Commissioner

The Memorial in this case was filed on March 26, 1927. In said Memorial it was alleged in the preliminary statement as follows:

" 1. The claimant is and at all of the time hereinafter mentioned was, a corporation organized and existing under the laws of the State of New York (Ex. 392).

" 2. In January of the year 1917 the claimant was the owner of a large assembling plant at Kingsland in the State of New Jersey, known as the ' Kingsland Assembling Plant ', consisting of several acres of land on which were located buildings, machinery, warehouses, railroad tracks, sidings, railway cars, telephone lines, electric light wires, water system and other equipment which was used for the purpose of assembling and packing munitions and supplies which were being manufactured by various companies throughout the United States under contracts owned by the Claimant (Ex. 201).

" 3. On January 11, 1917 there had been accumulated at this assembling plant, one of the largest collections of munitions and supplies destined ultimately for the Allied Governments that had ever been there at any one time (Ex. 10).

" 4. On January 11, 1917 the entire Kingsland Assembling Plant including the buildings, machinery, warehouses, railway tracks, sidings, railway cars, telephone lines, electric light wires, water system and all of the said munitions and supplies, equipment and other property, was totally destroyed by a terrific series of fires and explosions, resulting in a large financial loss and damage to the claimant (Exs. 10, 11, 12, 13, 199, 204, 206), the details of which loss and damage will hereinafter be more fully set forth."

In the Answer of Germany, filed January 17, 1928, referring to the preliminary statement, the Answer states as follows:

" Claimant's allegations as set forth in paragraphs 1-4 of the Memorial are not contested."

There are certain facts upon which the claimant based its right to present its claim and its right to an award, to-wit:

1. Claimant has always had its offices in New York City.

2. Prior to the destruction of the Kingsland Plant claimant employed over one hundred and forty persons at its New York office alone.

3. Prior to the destruction of the Kingsland Plant, claimant had made subcontracts calling for preparation by subcontractors and purchase by claimant of materials in the amount of approximately $66,000,000. Of this total, approximately $60,000,000 was to be paid to American subcontractors and the balance to Canadian subcontractors.

4. At the time of the destruction of the Kingsland Plant, claimant was directly employing American labor to the extent of approximately 2,000 men, and its subcontractors were employing many other laborers.

On December 7, 1936, the German Agent filed a motion, dated November 24, 1936, asking the Commission to dismiss, for lack of jurisdiction, the petition for rehearing dated May 4, 1933, filed on behalf of the Agency of Canadian Car & Foundry Company, Ltd. Prior to the filing of the German Agent's motion the claim had been pending before the Commission for over nine years.

In the " Application for the Support of Claims " executed by Agency of Canadian Car & Foundry Company, Ltd., by its president and secretary on November 22, 1920, and submitted to the Department of State with a letter dated December 1, 1920, from Coudert Brothers, of counsel for the claimant, the full facts respecting the stock ownership of Agency of Canadian Car & Foundry Company, Ltd., and also the stock ownership of Canadian Car & Foundry Company, Ltd., were set out as follows (Answer of American Agent filed December 28, 1936, to German Agent's Motion to Dismiss Petition for Rehearing, filed on behalf of Agency of Canadian Car & Foundry Company, Ltd., p. 5):

" 7. (a) At the time the claimant acquired the claim the shares of stock were held by Canadian Car and Foundry Company, Ltd., the proportion of the shares of stock in that company held by citizens of the United States was approximately 30%, and the proportion of stock held by citizens or subjects of any other country at that time was 30% in Canada, and 40% in England."

" 8. (a) At the present time the shares of stock of claimant are held by Canadian Car and Foundry Company, Ltd., and the proportion of the shares of stock in that company held by citizens of the United States is approximately 45% and 55% by aliens."

These facts were brought to the attention of the then German Agent.

The United States has espoused the claim of the Agency of Canadian Car & Foundry Company, Ltd. Protests have been made to the State Department in behalf of certain award holders against the further consideration of this claim.

Reduced to its final analysis, the question to be decided on the Motion of the German Agent may be stated as follows:

Where a corporation is chartered under the laws of the State of New York but all of its stock is owned by a parent corporation existing under the laws of Canada, and the New York corporation maintains an office with a large office force of over one hundred forty people in the city of New York, and organizes and operates in the State of New Jersey a plant for the assembling of munitions destined for the Allies, and in this plant it assembles property worth over $66,000,000 and employs 2,000 American workers, and such plant is destroyed by German agents, is the American corporation entitled to maintain its claim before the German-American Mixed Claims Commission under the Treaty of Berlin and the agreement between the United States and Germany for the property thus destroyed, when 30% of the stock in the parent company was owned by citizens of the United States, 30% in Canada and 40% in England?

Under the Knox-Porter Resolution (42 Stat. 105), which was made a part of the Treaty of Berlin, it was provided, in section 2, as follows:

" Sec. 2. That in making this declaration, and as a part of it, there are expressly reserved to the United States of America and its *nationals* any and all rights, privileges, indemnities, reparations, or advantages, together with the right to enforce the same, to which it or they have become entitled under the terms of the armistice signed November 11, 1918, or any extension or modifications thereof; or which were acquired by or are in the possession of the United States of America by reason of its participation in the war or to which its nationals have thereby become rightfully entitled; or which, under the treaty of Versailles, have been stipulated for its or their benefit; or to which it is entitled as one of the principal allied and associated powers; or to which it is entitled by virtue of any Act or Acts of Congress; or otherwise." (Emphasis supplied.)

Under section 5 of the resolution, it is provided that all the property of the German Government or its nationals which was on April 6, 1917, and thereafter in the possession and control of the United States should be retained by the United States until such time as Germany should have made suitable provision for the satisfaction of all claims against Germany

" * * of all persons, wheresoever domiciled, who owe permanent allegiance to the United States of America and who have suffered, through the acts of the Imperial German Government, or its agents, * * * since July 31, 1914, loss, damage, or injury to their persons or property, directly or indirectly, whether through the ownership of shares of stock in German, * * * American, or other corporations, or in consequence of hostilities or of any operations of war, or otherwise, * *."

Under the Treaty of Berlin, the Knox-Porter Resolution was made a part of said Treaty in Article I, which reads as follows:

" Article I

" Germany undertakes to accord to the United States, and the United States shall have and enjoy, all the rights, privileges, indemnities, reparations or advantages specified in the aforesaid Joint Resolution of the Congress of the United States of July 2, 1921, including all the rights and advantages stipulated for the benefit of the United States in the Treaty of Versailles which the United States shall fully enjoy notwithstanding the fact that such Treaty has not been ratified by the United States."

Part VIII, Annex I, of the Treaty of Versailles, which was also incorporated by reference in the Treaty of Berlin, provides that compensation may be claimed from Germany in respect of the following:

" (9) Damage in respect of all property wherever situated belonging to any of the Allied or Associated States *or their nationals*, with the exception of naval and military works or materials which has been carried off, seized, injured or destroyed by the acts of Germany or her allies on land, on sea or from the air, or damage directly in consequence of hostilities or of any operations of war." (Emphasis supplied.)

By the agreement dated August 10, 1922, between the United States and Germany, the German-American Mixed Claims Commission was created and authorized to settle certain categories of claims enumerated therein. The categories are as follows:

(1) Claims of American citizens, arising since July 31, 1914, in respect of damage to, or seizure of, their property, rights and interests, including any company or association in which they are interested, within German territory as it existed on August 1, 1914;

(2) Other claims for loss or damage to which the United States or its nationals have been subjected with respect to injuries to persons, or to property, rights and interests, including any company or association in which American nationals are interested, since July 31, 1914, as a consequence of the war; and

(3) Debts owing to American citizens by the German Government or by German nationals.

It will be observed, therefore, that the Commission is given jurisdiction to hear and determine the claims of *American nationals* or *American citizens*, in respect to the categories of claims defined by the treaties and by the agreement between the two governments.

Whether a claimant is an American national or not must be determined under the laws of the United States.

As to the meaning of the terms " American national ", Parker, Umpire, has defined it thus (Decs. and Ops., p. 189):

" The term ' American national ' has been defined by this Commission in its Administrative Decision No. I as ' a person wheresoever domiciled owing permanent allegiance to the United States of America '. ' National ' and ' nationality ' are broader and apter terms than their accepted synonyms ' citizen ' and ' citizenship'. Nationality is the status of a person in relation to the tie binding such person to a particular sovereign nation. That status is fixed by the municipal law of that nation. *Hence the existence or nonexistence of American nationality at a particular time must be determined by the law of the United States.* As pointed out by the German Commissioner in his opinion, the use in the Treaty of Berlin of the broad term 'nationals ' and of the phrase ' all persons, wheresoever domiciled, who owe permanent allegiance to the United States ' was clearly intended to embrace and does embrace, not only citizens of the United States but Indians and members of other aboriginal tribes or native peoples of the United States and of its territories and possessions. The use of the words ' permanent allegiance ' as part of the phrase ' all persons, wheresoever domiciled, who owe permanent allegiance to the United States ', far

from limiting or restricting the meaning of the term 'nationals' as used elsewhere in the Treaty, makes it clear that that term is used in its broadest possible sense." (Emphasis supplied.)

On the same subject Dr. Kiesselbach, former German Commissioner, includes corporations within the term "citizens" and "nationals" (Decs. and Ops., p. 160):

"One class — those 'who have American nationality (such as citizens of the United States, including companies and *corporations*, [1] Indians and members of other aboriginal tribes or native peoples of the United States or its territories or possessions, etc.)' — and the other — those 'who are otherwise entitled to American protection in *certain* [1] cases (such as certain classes of seamen on American vessels, members of the military or naval forces of the United States, etc.)'. It is obvious that the circumscription of the first class squares with the term used in the Treaty of Berlin, 'claims . . . of all persons, wheresoever domiciled, who owe permanent allegiance to the United States', and that class two comprises claimants who manifestly do *not* owe *permanent* allegiance to the United States — not being *nationals* of the United States."

It is clear, therefore, that the term "national" being broader than "citizen", and being used "in its broadest possible sense" includes corporations.

This is in accord with the decisions of the Supreme Court of the United States in *Society for the Propagation of the Gospel* v. *New Haven*, 8 Wheat. 464; *United States* v. *Northwestern Express Company*, 164 U. S. 686.

The next question to be decided is, whether the corporation claimant in this case is an American national, or, to put the question in another form, whether the fact that its stock was all owned by a Canadian corporation caused it to be an alien corporation and therefore made it impossible to present a claim to this Commission for the injury inflicted to its property in New Jersey.

The decision of the Supreme Court of the United States in the case of *Hamburg-American Co.* v. *U. S.*, 277 U. S. 138, would seem decisive of this question.

In that case it was held that under the Trading with the Enemy Act of October 6, 1917, sec. 2, property in this country owned by a domestic corporation was non-enemy property, even though an enemy owned all of its stock.

In that case the Court of Claims sustained a demurrer to the petition of the Hamburg-American Line Terminal & Navigation Company seeking to recover compensation for its property, which was taken by the United States at the beginning of the war. Claimant was incorporated under the laws of New Jersey, but its entire capital stock had long been owned by the Hamburg-American Line, a German corporation. In reversing the Court of Claims, Mr. Justice McReynolds said (p. 140):

"The court below evidently proceeded upon the view that the property of appellant corporations should be treated as owned by an enemy because their entire capital stock belonged to a German corporation. And as the property was seized during the war with Germany it held there could be no recovery. Without doubt Congress might have accepted and acted upon that theory. * * * But Congress did not do so; it definitely adopted the policy of disregarding stock ownership as a test of enemy character and permitted property of domestic corporations to be dealt with as non-enemy. * * *

"In Behn, Meyer & Co. *v.* Miller, Alien Property Custodian, 266 U. S. 457, we held the status of the corporation was not fixed by the stockholders' nationality, and said —

"'Before its passage the original Trading with the Enemy Act was considered in the light of difficulties certain to follow disregard of corporate identity and

[1] Emphasis supplied.

efforts to fix the status of corporations as enemy or not according to the nationality of stockholders. These had been plainly indicated by the diverse opinions in *Daimler Co.* v. *Continental Tyre & Rubber Co.*, 2. A. C. (1916) 307 . . ."

In *Daimler Co.* v. *Continental Tyre & Rubber Co.*, 2 A. C. (1916) 307, cited by Mr. Justice McReynolds, the House of Lords reversed the holding of that case by the court below (s. c. [1915] 1K. B. 893).

In that case Lord Parker put forward for determining the character of a corporation the test of " control " and had imputed to a corporation the character of an enemy if the " control " was in the hands of alien enemies. On entering the war the United States deliberately refused to adopt the test of " control ".

In *Hamburg-American Co.* v. *U. S.*, cited and quoted above, Solicitor General Mitchell (afterwards Attorney General of the United States), in confessing error in the decision of the Court of Claims, used the following language (277 U. S. 138, 139):

" Congress has adopted the policy of determining the status of corporations as enemy or not without regard to nationality of their stockholders, and the United States admits error in the decision of the Court of Claims insofar as it held that the property of New Jersey corporations was enemy-owned because all their stock was enemy-owned.

" As the appellant in each case is to be dealt with as a citizen of the United States, notwithstanding its stock was enemy-owned, then upon the taking of the use of its property a contract to pay just compensation for use was implied.

* * * * * * *

" The United States concedes that the judgment should be reversed and compensation awarded for the value of the use."

It is a settled general rule in America that regardless of the place of residence or citizenship of the incorporators or shareholders, the sovereignty by which a corporation was created, or under whose laws it was organized, determines its national character. *Philippine Sugar Estates Development Co.* v. *United States*, 39 U. S. Court of Claims, 225; *Fritz Schultz, Jr., Co.* v. *Raimes & Co.*, 99 Misc. 626; *Princeton Min. Co.* v. *First Nat. Bank*, 7 Mont. 530, 19 Pac. 210; 17 Fletcher Cyc. Corp., Permanent Edition, sec. 8298, p. 29; 14a C. J. 1213. See, also, *Janson* v. *Driefontein Consol. Mines*, (1902) A. C. 484.

In 49 Law Quarterly Review (1933), 334-349, there is a very instructive article on " The Nationality of Corporations ", by R. E. L. Vaughan Williams, K. C., British Member of Anglo-German Mixed Arbitral Trubinal under Treaty of Versailles (1920-1928). In arguing against what is known as the " control " test, the author says (p. 342):

" Logically it seems impossible to reconcile such a view with the notion of the separate legal entity of a corporation, as distinct from its incorporators, while the practical difficulties in the way of applying the ' control ' test of nationality are obvious. Shares in modern companies constantly pass from nationals of one country to nationals of another and with them participation in control. Is a company to change its nationality with fluctuations in the distribution of its shares among holders of different nationalities? Moreover, with the growing popularity of bearer shares, how is this distribution to be ascertained at any given moment? As a French writer has pointed out, the application of the ' control ' test during the War was only possible because the outbreak of hostilities, crystalized ' the then existing state of things."

The author argues in favor of the theory that the nationality or effective domicile of a corporation is at its *siège social effectif*, and this is defined as the place at which the corporation has made the center of its affairs; where are found

concentrated its activities and its juridical life, and where its essential organs function. Measured by this test, the claimant in this case had its principal office from which its affairs were managed, in the United States, at New York City, and its activity and juridical life were concentrated either in New York City or in Kingsland, New Jersey. In order to sue that corporation, a creditor would have to seek either the courts and laws of the State of New York or the courts and laws of the State of New Jersey, and not the courts and laws of Canada. In case of insolvency, the bankruptcy laws of the United States would apply and the rights of the various classes of creditors would be determined thereby. Its tangible and intangible property were taxable either in New York City or in Kingsland, New Jersey, and it was required to pay to the United States a federal income tax. Therefore, even if the doctrine contended for by the learned author be applied, the claimant in this case is not an alien corporation and is entitled here to present its claim.

In the Brief of the Agent of Germany, filed January 12, 1939, there are a great many allegations, many of them taken from secondary sources, from which it is claimed that this case has a Canadian aspect, and from which it is argued that the claimant is not an American national or American citizen within the meaning of the Treaty of Berlin, the Treaty of Versailles and the Agreement of August 10, 1922, between America and Germany. The whole basis of the German Agent's argument is that the claimant here was entirely owned and controlled by the Canadian parent concern and, therefore, that the claim is not impressed with American nationality.

The authorities relied on by the German Agent, so far as they sustain his argument, are based upon the proposition that the *control* of the corporation was in alien hands.

Even under the facts as alleged by the German Agent in his brief, it would seem clear, as held by the New York courts, that, while there may be said to be some form of *remote* control in the parent company, the *direct effective* control of the claimant company was in the New York corporation and not in the Canadian corporation (see *Dollar Co.* v. *Canadian C. & F. Co., Ltd.*, 100 Misc. N. Y. 564; aff'd 180 App. Div. N. Y. 895). Certainly the activities and property of the claimant company were fully impressed with American nationality.

If we were to adopt the rule contended for by the German Agent, we would be applying in this case a doctrine and principle exactly opposite to that adopted by Congress at the outbreak of the War and applied by the Supreme Court of the United States in the cases of *Hamburg-American Company* v. *U. S.* 277 U. S. 138, and *Behn, Meyer & Co.* v. *Miller* 266 U. S. 457, and we would be reversing the general rule as laid down by the state and federal courts of the United States.

If we were to adopt the rule contended for by the German Agent, the effect would be that, under the two cases last cited, an American corporation, in which the stock is entirely held by a German corporation, would have a valid claim against the United States for property seized and taken during the war; but an American corporation, with property and large activities in the United States, whose stock is owned by a Canadian corporation, would have no valid claim against Germany for property destroyed in this country by German saboteurs before this country entered the War. Such a rule would result in the tacit recognition of the proposition that a foreign nation may, in anticipation of war, send its saboteurs to this country and destroy valuable property therein, and escape any claim for such destroyed property, if perchance such a corporation has stockholders who are alien to the country of the saboteurs.

I am, accordingly, of the opinion that the Motion of the German Agent filed December 7, 1936, should be dismissed and that an award should be entered in

favor of the claimant company pursuant to the Order of this Commission of June 15, 1939.

Respectfully submitted.

Christopher B. GARNETT,
American Commissioner

Oct. 30, 1939.