ENEMY ALIENS MAY BECOME CITIZENS

Whether They Do or Not They Enjoy Full Rights Before Courts of Canada

SAYS JUDGE ARCHAMBAULT

Dealing With Naturalization Petitions of 52 Germans, 94 Austrians and Seven Hungarians

Germans, Austrians and Hungarians residing in Canada, may become naturalized citizens of the country and whether they become naturalized or not they enjoy the right to take suit before the courts of the country.

Such, in brief, was the ruling of Mr. Justice J. B. Archambault in the Circuit Court on Saturday, His Lordship dealing with the naturalization proceedings in the case of 52 Germans, 94 Austrians and 7 Hungarian subjects, whose applications for admission to Canadian citizenship had been opposed, on account of the fact that they were subjects of states at present at war with Great Britain. His Lordship adjudged that taking into consideration certain provisions embodied in a convention reached at The Hague Conference of 1907 and later ratified by the Powers, subjects of an enemy state were not despoiled of their rights before the law of the land at war with their country. A proclamation issued by the Canadian Governor in Council at the outbreak of hostilities, wherein it was stated that such aliens residing in Canada were to continue to enjoy the protection of the law, was also cited by the Court, Mr. Justice Archambault holding that such "protection" would be non-existent were enemy aliens denied their right before the courts of the land. His Lordship, however, dealt with this point only incidentally, as the question up before the court concerned naturalization alone.

The following is a translation of the Court's ruling:

JUDGMENT OF COURT.

"The question to be settled is the following:

"Is the quality of German or Austrian alien in the present state of affairs an obstacle to their naturalization? In the first place, before entering into consideration of the question put, let us determine the character of naturalization and the functions which this court exercises in connection with naturalization.

"Definition—Naturalization is a sovereign and discretionary act of the public power, by which a person acquires the quality of native (Fr. national) or that of citizen in the state which that public power represents (Weiss). It is to be noted that it is essentially a sovereign and discretionary act. Let it again be noted that it is based on a contract which takes place between the nation and the person joining that nation, by a concurrence of the two wills. The state to which the applicant for naturalization belongs is not consulted in this contract. Whether that state permits or does not permit the expatriation of its subject, recognizes or does not recognize the naturalization, the naturalization has its effect.

"Les prescriptions legales concernant la notionalite sont d'ordre publique internationale. Elles s'imposent donc au respect de tous, sur le territoire ou elles sont en vigeur et ne sauraient etre tenues en schec par la loi nationale ou du domicile des parties. (Pandectes Fr. Vbo. Naturalization No. 623.

"These points having been dealt with, the question now arises as to what power in the conceding state is to pronounce upon naturalization. Is it the legislative power, the administrative power or the judicial power. In France, these functions are entrusted to the administrative power. It is the same in England, where they devolve upon the Secretary of State, who issues the certificate or refuses it, in his absolute discretion, without giving any reason and without there being any appeal from his decision. The United States, on the contrary, have made of them judicial functions and there it is held that the executive branch of the Government cannot prescribe the action of any court on a given application (3 Moore International Law Digest, p. 328).

"According to our law of naturalization (S.R.C. p. 77) the procedure is made up of three acts, the application, the enquete, and the decree or certificate.

"1.—The application is made before certain persons invested with the power to administer oaths of residence and allegiance—the Governor General keeping the power to confer such authorization on special commissioners. (Art. 14.)

"2.—These are persons authorized by law or by special commission who are charged with assuring themselves that the alien has fulfilled the conditions required as to residence and morality (moralite). And if this empowered official of the administration is satisfied with the proof and is convinced of the morality of the alien, he delivers to such alien a certificate.

It is here that the role of the Circuit Court begins. In what does it consist? This certificate is presented to the Circuit Court. The judges cause it to be read publicly in court, indicating the name, residence, profession or quality of the petitioner, and, as art. 19 adds. And when there has been no opposition presented against the naturalization and when no objection has been made during the session of the court, the latter orders that the certificate of the applicant be deposited amongst the court records.

"3.—The certificate of naturalisation is given (A) under the seal of the court or (B) if the certificate has been presented to an authority or person designated by a decree or a pronouncement of the Governor-in-Council, the alien can claim from such authority an authentic certificate of naturalization in conformity with the said decree or pronouncement.

And now is it the intent of this law, the clauses of which, displaying its general tenor, we have thrown into relief, to derogate from common law, as did the law in the United States, and attribute to the judicial authority functions, in matters of naturalization? We do not believe so. We believe that it must be declared that the commissioner who receives the application for naturalization, the oaths of residence and allegiance, and makes the enquete; the judge who orders the reading of the certificate given by the commissioner and who orders the deposit of such certificate amongst the court records; the court

which affixes its seal on the certificate of naturalization, just in the same manner as all persons to whom the administrative power can give the same authorization—all exercise administrative functions.

This first conclusion facilitates the solving of the question asked: Does the character or quality of subject of an inimical state remove from the alien the capacity to formulate an application for naturalization?

This question leads us to study the incapacities which may accrue to subjects of inimical states as a result of war.

There are three systems or theories.

The first, according to the authors who favor it, is a corollary of the ancient law which would have it that war should produce effects or relations as between subject and subject. Thus, if war makes enemies of the states and their subjects at one and the same time, all rapports de droit cease by the very fact of the existence of war; and particularly contracts between the belligerents are suspended; new ones cannot be formed and the right of action on subjects of the inimical state is not recognized in law.

The second system resembles the first. It attributes to war the same consequences—but it holds that war would not ipso facto produce such incapacities; before these disabilities can be produced the intervention of the sovereign is required to declare them.

In the third system war does not produce effects as between subject and subject, but between state and state, and it affects the subject only indirectly insofar as is required to attain the end or object (of the war).

This is a modern theory and it is attributed to Jean Jacques Rousseau. It is probably based on the idea expressed by Montesquieu to the effect that in times of peace we should seek to enjoy as much good as possible: in times of war to suffer as little evil as possible . . . All authors are in accord in saying that the first system is a fundamental rule of English public international law. It is therefore the rule prevailing in our law. It is meet, however, to ascertain whether or not this law admits of some tempering provision (temperament) as to the "jus standi in judicio." Hall teaches that when subjects of an inimical state are authorized to remain in the country, they are relieved of these disabilities.

"When persons are allowed to remain, either for a specified time or during good behavior, they are exonerated from the disabilities of enemies for such time as they, in fact, stay and they are placed in the same position as other foreigners except that they cannot carry on a direct trade in their own or other enemy vessels with the enemy country."—Hall, International Law, p. 388.

But a proclamation of the Governor-General-in-Council, dated 15th of August expressly says:

"1. That all persons in Canada of German or Austro-Hungarian nationality, so long as they quietly pursue their ordinary avocations, be allowed to continue to enjoy the protection of the law and be accorded the respect and consideration due to peaceful and law-abiding citizens; and that they be not arrested, detained or interfered with unless there is reasonable ground to believe that they are engaged in espionage or are engaging or attempting to engage in acts of a hostile nature or are giving or attempting to give information to the enemy or unless they otherwise contravene any law, order-in-council or proclamation."

Does it not appear clear from the text of this proclamation issued according to instructions received from the Government of His Majesty that the subjects of the German and Austrian states residing in Canada do, according to the rule of law governing war conditions above cited (Hall), preserve the right to contract, and that their right of action—that is to

say, the right to enter suit to obtain judgment granting them what belongs to them or what is due them—is admissible in law. For, if it were otherwise, how could we say in the words of the proclamation that it is permitted them "to pursue their ordinary avocations, and to continue to enjoy the protection of the law"? What sort of protection of the law would it be if such residents were refused the right "Standi in Judicio."

Do not these instructions of the Government of Great Britain, and the proclamation indicate an evolution of the English law regarding war, in conformity with the spirit of the conference at The Hague in 1907? Article 23B of this conference added to article 23, governing the laws and customs of war on land, reads as follows: "It is forbidden to declare extinguished, or suspended or not admissible in law the right of nationals of the adverse party."

In truth, the English authors rose up and protested strongly against the introduction of this clause, which, in their opinion, struck at a fundamental rule of English public law. Here is how one of their number, Thomas Erskine Holland, commented upon the ratification given by Great Britain to this provision: "It is most unfortunate," he says, "that the clause (H), the transformation of which had escaped the attention of our delegates to the conference, should now be covered by the ratification given by Great Britain on the 27th of November to the agreement concerning the laws and customs of war on land. The best way out of the difficulty would be, by unanimous consent, to wipe out the clause as being null, because it is unintelligible" 3 Nys. Droit Internationale, p. 69. Merignac (Traite de droit internationale, Vol. III., p. 112, footnote) says that this clause will be binding on English jurists of the future if they desire to respect international law. And ought it not be thus, at least until the arbitration tribunal asked for by Holland has edicted the nullity of this clause? The instructions given by the Government of Great Britain and the proclamation of August 15 seem to resolve the question in the affirmative.

The conclusions to which we have come are the following: It seems to us that in the present state of affairs public international law upholds the right of action of German and Austrian subjects living in Canadian territory.

At any rate the functions of this court, in matters of naturalization being of an administrative character, the incapacity to take suit before the law with which German and Austrian subjects might be stricken does not extend to applications for naturalization.

When the commissioners or other duly authorized persons have received applications for naturalization, have administered the oaths of residence and allegiance, and have produced before this court the requisite certificates according to the instructions of the administrative power whence their authority flows, we see nothing which authorizes us to refuse the reading and depositing of such certificates.