AUSTRIA-HUNGARY.

EFFECT OF NATURALIZATION OF A HUSBAND OR FATHER ON WIFE OR MINOR CHILDREN.

Mr. Harris to Mr. Hay.

No. 68.] UNITED STATES LEGATION,
Vienna, January 2, 1900.

SIR: I have the honor to submit the following case:

Anton Macek was born in Vienna, of Austrian parents, on August 13, 1875. Afterwards, on May 6, 1884, his father, Alois Macek, emigrated to the United States with his entire family, and has resided in Chicago ever since. Before his naturalization and while the son Anton was yet a minor, to wit, on August 16, 1894, the father sent him to Austria to be educated at the Academy of Music in Prague. It is stated that it takes six years to complete the course. Anton arrived in Prague on October 1, 1894, and has remained there uninterruptedly ever since. Afterwards, to wit, on October 22, 1894, the father, Alois Macek, as shown by the certificate produced, was naturalized in the superior court of Cook County, Ill.

Anton Macek now applies for a passport, claiming citizenship through the naturalization of his father. Is Anton Macek a citizen of the United States? The answer turns on the meaning of that clause in section 2172, Revised Statutes, which says the minor children, at the time of the naturalization of their parents, shall, if "*dwelling in the United States*, be considered as citizens thereof."

There is no digest of the decisions of the courts in this legation. The Reports of the Supreme Court are lacking since eighth of Wallace; so I have no means of learning if the phrase "if dwelling in the United States" has been judicially construed.

It seems at least three meanings have been put on these words.

1. Such minors during and after minority, *when* dwelling in the United States, will be accorded the rights of citizenship, but if they go abroad the United States will not undertake to protect them. Mr. Marcy said this section "is only a municipal law, and can have no effect beyond the jurisdiction of this country." (Wharton's International Law Digest, II, sec. 184.) On the same page Mr. Fish seems to limit the words to "*when* dwelling in the United States."

2. Such minors, if actually in the United States at the time of the naturalization of the parent, ipso facto become citizens, otherwise not. Mr. Blaine said this section applies "to such children as were *actually residing* in the United States at *the time* of their father's naturalization." (Id., p. 406.)

Mr. Frelinghuysen said our naturalization laws include the naturalized parents "and their children, minors at the time of naturalization, if *within the jurisdiction* of this country." (Id., p. 407.)

3. That the legal residence of a minor (unless manumitted) is with the parent; that therefore Anton Macek was legally residing in the

United States at the time of the naturalization of his father; that "dwelling," as used in this section, is synonymous with "legally residing," rather than "actual residence." And so, although the minor son was not at the time of the naturalization of the father actually within the jurisdiction of the United States, yet he was vicariously present in the person of the father, who is the family head and representative, and by and through him, under this section, the minor son became then and there a citizen of the United States, the same as if he had been personally present at his father's home in Chicago.

This is the view maintained by Mr. Donzelmann, consul at Prague, a lawyer of distinction, and formerly, I think, attorney-general of the State of Wyoming, who sends to the legation this application.

My mind leans to the second view rather than the first or the last. It seems to me that a minor beyond the boundaries of the United State at the time of the judgment of naturalization of the parent is not affected by it, and can not claim the benefit of it.

And this view seems to find expression in your dispatch to me, No. 2, of the 1st of April, 1899, wherein it is said:

> Section 2172 only confers citizenship upon minor children of naturalized aliens when such children were dwelling in the United States; and the Department holds that the prescribed minority residence in this country must have coincided with or been subsequent to the parent's admission to citizenship.

And in the letter of Mr. Hill, Assistant Secretary, therein inclosed, he said:

> No law of the United States confers citizenship upon a minor subject of a foreign power residing within the jurisdiction thereof.

The minor son in this case was an Austrian subject as long as he resided in the United States, and also when he arrived in Prague, and I can not persuade myself that while there he himself, or anyone for him, either by statute or under any rule of international law, could transfer his allegiance to the United States.

And so I have felt it to be my duty to withhold the passport and take your instructions.

I have, etc., ADDISON C. HARRIS.

Mr. Hay to Mr. Harris.

No. 65.] DEPARTMENT OF STATE,
Washington, January 22, 1900.

SIR: I have to acknowledge the receipt of your No. 68, of the 2d instant, in which, submitting the case of Anton Macek, an applicant for a passport, you ask the Department's instructions respecting the true intent of section 2172, Revised Statutes, in its application to the case before you.

That section provides that—

> The children of persons who have been duly naturalized under any law of the United States * * * being under the age of 21 years at the time of the naturalization of their parents, shall, if dwelling in the United States, be considered as citizens thereof.

Anton Macek, according to your statement, was born in Vienna, of Austrian parents, August 13, 1875. In May, 1884, his father, Alois Macek, emigrated to the United States with his entire family and has resided in Chicago ever since. Before his naturalization and while

the son, Anton, was yet a minor—August 16, 1894—the father sent him to Austria to be educated. The father, Alois Macek, was naturalized in the superior court of Cook County, Ill., October 22, 1894; that is, subsequently to the return of the son, Anton Macek, to Austro-Hungarian jurisdiction, where he has since remained.

You have felt it to be your duty to withhold a passport in the view that section 2172 merely confers citizenship upon minors actually residing in the United States at the time of their father's naturalization, in support of which opinion you refer to the Department's instruction to you, No. 2, of April 1, 1899, the pertinent provisions of which you quote.

At the same time you submit to the Department the view, which you state is advocated by the consul at Prague, that the words "dwelling in the United States" refer to the legal residence of a minor which, unless manumitted, is with the parent wherever the minor may happen to be, so that, although not at the time of the naturalization of the father actually within the jurisdiction of the United States, the son, Anton Macek, may be held to have been vicariously present in the person of the father through whom he then and there became a citizen of the United States, the same as though he had been personally present at his father's home in Chicago.

Still another view is brought forward, to the effect that the protective force of section 2172 only applies to the minor children of naturalized aliens while such minor children are actually within the jurisdiction of the United States.

This narrow interpretation is no longer entertained by the Department, although as a proposition in municipal law it has on several occasions in the past been enunciated; but it has been replaced in practice by a quasi conventional interpretation, as will be later shown, by which the acquisition of a parent's citizenship by an alien minor is assimilated to the actual naturalization of the minor himself.

You state that, in the absence of legal authorities in the legation, you have no means of learning if the phrase "if dwelling in the United States" has been judicially construed.

On page 301 of the volume of Foreign Relations for 1890 you will find a carefully formulated instruction sent by Mr. Blaine to Minister Phelps at Berlin, No. 57, February 1, 1890, in which considerable attention is given to the intent and application of section 2172, Revised Statutes. The purport of that opinion (which is understood to have been prepared by Mr. John B. Moore, then Assistant Secretary, and now a known and recognized authority on matters of international law) is that the effect of the American law is to make actual residence in the United States, and not residence at the time of naturalization, the test to the claim of citizenship, inasmuch as the provision relates to children born of parents who are not at the time citizens of the United States, and upon whom the country of the parent, under the same rule of law as that announced by this Government with respect to the children born abroad of citizen parents, might have claims of allegiance. In respect to such persons the words "if dwelling in the United States" recognize a possible conflict of allegiance. In the absence of any such conflict of allegiance being adversely raised by the government within whose jurisdiction the minor may be temporarily dwelling, there could be little doubt that the law of the country which naturalized the father would obtain; and in fact it does obtain, by common consent, in the relations of the United States with Germany. In practice,

therefore, it may be said that the naturalization of the father operates to confer the municipal right of citizenship upon the minor child, if he be at the time of the father's naturalization within the jurisdiction of the United States, or if he come within that jurisdiction subsequent to the father's naturalization and during his own minority.

The principle may be broadly stated that no country can naturalize an inhabitant of another country while that person is dwelling within the jurisdiction of the other country; that naturalization is a municipal act valid within the jurisdiction of the naturalizing power, and that, once performed by due operation of law, it is entitled to respect. It is not necessary that naturalization should be a strictly judicial act, as in the case of the original naturalization of an alien father. The minor son is just as much naturalized by the fact of being within the jurisdiction of the United States at the time of the father's naturalization, or coming within that jurisdiction subsequently during minority, as if he himself had been admitted to citizenship by a decree of the court. Somewhat of the same principle is discernible in the theory that marriage, by investing an alien woman with the citizenship of her husband, operates as naturalization when that effect is recognized by statute. The United States statute in this regard, section 1994, Revised Statutes, which provides that any woman marrying a citizen of the United States, who might herself be lawfully naturalized, shall be deemed a citizen, has been held by the Federal courts to be in fact an act of naturalization. In the case of Leonard *v.* Grant (5 Fed. Rep., 11) it was held that the effect of section 1994, when the contingency occurs, is equivalent to the alien woman being naturalized directly by an act of Congress or in the usual mode thereby prescribed. This, however, is an extreme analogy, inasmuch as marriage may be validly performed outside the country of the husband's nationality, or even in the country of the wife's allegiance, with resultant change of the wife's nationality not merely as the effect of the law of the husband's country, but as a generally admitted doctrine of private international law. The act of naturalization, however, is properly performable in the jurisdiction of the naturalizing State.

The view that citizenship acquired by a minor through the parent's naturalization is in effect a process of naturalization according to law, obtains in applying the German-American naturalization treaties, where evidence that a minor child has acquired citizenship through the father, according to the laws of the United States, coupled with evidence that the minor had resided at least five years in the United States, are taken to fulfill the conditions of the treaty—that is, in effect, to show that the minor child has been naturalized according to law.

These points are, however, adverted to for your information merely and not as controlling your action in respect to Anton Macek's application for a passport. Whatever construction be given to section 2172 of the Revised Statutes, it is quite clear that it can not apply to this present case, because the words "if dwelling in the United States" do not fit the circumstances. The applicant was not dwelling in the United States at the time of his father's naturalization, he has not at any time since dwelt in the United States, and of course is not now dwelling here.

Your action in withholding the passport from Anton Macek is approved.

I am, sir, etc.,

JOHN HAY.

EXPULSION OF GUSTAV WOLF LOUIS FISCHER.

Mr. Harris to Mr. Hay.

No. 80.] UNITED STATES LEGATION,
Vienna, March 21, 1900.

SIR: I have the honor to submit my action in the matter of Gustav Wolf Louis Fischer, a naturalized citizen of the United States, who is about being banished from Austria. Mr. Fischer is in the employ of Thomas Cook & Son, and is well known to the American and English people residing in and visiting Vienna.

The case came on suddenly. It presents the same question as stated in my dispatch No. 70 of January 10 last, but in a more precise form. The order of expulsion (banishment) in this case is, as I am informed by Mr. Fischer's counsel, in the same words as that set out in my dispatch No. 70, expelling Charles Steidl.

The question exactly stated is: Whether Austria-Hungary has the right to banish naturalized citizens of the United States who were guilty of no crime at the time of immigration therefrom, and have violated no law since their return?

Article 2 of the treaty provides (1) for punishment of crimes committed before immigration, and (2) for emigrating after enrollment as a recruit or while in military service. Mr. Fischer was not enrolled, but on examination was rejected as not then fit for military service, and thereafter emigrated.

The authorities here admit that Mr. Fischer is protected by the treaty from both military duty and punishment, and their insistence is expressed as follows: "And as we can not punish him we will banish him as an example to our young men." These are the words of the governor. It is said Mr. Fischer was required to get permission to emigrate, and reference is made to section 64 of the military law of April 11, 1889. My answer is: The last clause of article 2 of the treaty of September 20, 1870, declares (as applied to this case) that if Mr. Fischer violated this or any other military law "by or after his emigration," that after naturalization he is not punishable on return.

Inclosed please find (1) a copy of my dispatch to the foreign office; (2) a translation of section 64 of the military code.

I have the honor, etc.,

ADDISON C. HARRIS.

[Inclosure 1.]

Mr. Harris to Count Goluchowski.

F. O., No. 59.] UNITED STATES LEGATION,
Vienna, March 20, 1900.

YOUR EXCELLENCY: I have the honor to present to your excellency the case of a citizen of the United States of America resident in Vienna, who is threatened with banishment from Austria. The facts, as I learn them, are as follows:

Gustav Wolf Louis Fischer was born in Saxony on July 14, 1868. On the death of his father the mother removed to Vienna, where he was naturalized and made a citizen of Austria on November 17, 1885. In March, 1888, in obedience to a notice, he appeared before the proper officers and was examined and pronounced unfit for military service and not accepted as a recruit. Thereupon he emigrated to the United States under the provisions of the treaty of September 20, 1870. He resided in the United States continuously more than five years, and, under and in accord-

ance with the said treaty and the laws of the United States, became a citizen thereof by the judgment of a proper court in the city of Chicago and State of Illinois on December 5, 1893. Afterwards, on the 2d day of March, 1895, the Secretary of State of the United States of America issued to him a passport, which he still holds, as evidence of his American citizenship. No claim is made, to my knowledge, that Mr. Fischer is not a citizen of the United States or his naturalization illegal or his passport improperly granted.

If any claim of either kind is made to this legation, permit me to assure your excellency that it will be thoroughly investigated by my Government, and if found to be true, proper steps will be taken to annul the same.

I learn that the authorities having his case in charge do not question Mr. Fischer's American citizenship, but, on the other hand, make that the ground on which is based the order of banishment.

It seems that some weeks ago he was called before the "Magistratisches Bezirksamt" of the ninth district in Vienna, and an order made to the effect that he be banished. From this Mr. Fischer took an appeal to the governor of Lower Austria, in whose office the case is now pending.

In a conversation had on yesterday with His Excellency Count Kielmansegg, governor, it was suggested that it might be better to present the case to your excellency now rather than later. And it is in accordance with such suggestions that I have the honor to bring the case immediately to your attention.

I submit to your excellency that Mr. Fischer is protected from the threatened punishment by the said convention concerning naturalization.

The first clause of article 1 stipulates that "citizens of the Austro-Hungarian Monarchy who have resided in the United States of America uninterruptedly at least five years, and during such residence have become naturalized citizens of the United States, shall be held by the Government of Austria and Hungary to be American citizens and shall be treated as such."

This clause is unlimited and embraces all citizens. The second article of said treaty reserves unto each country, and so unto Austro-Hungary the right, in this case to punish Mr. Fischer on his return for any action punishable by the laws of this Monarchy, "committed before his emigration." I am informed that no claim is made of the right to punish Mr. Fischer under said clause. The second clause of said article reserves the right of the Austro-Hungarian Monarchy to punish such emigrant after naturalization and return in case "(1) if he has emigrated after having been drafted at the time of conscription and thus having become enrolled as a recruit for service in the standing army; (2) if he has emigrated whilst he stood in service under the flag or had a leave of absence only for a limited time; (3) if, having a leave of absence for an unlimited time, or belonging to the reserve or to the militia, he has emigrated after having received a call into service, or after a public proclamation requiring his appearance, or after war has broken out."

It is not claimed, as I am informed, that Mr. Fischer is subject to punishment under the said clause set out. He was never accepted in the army as a recruit or soldier. But the insistence against Mr. Fischer is that because he is by the treaty free from punishment therefore he shall be banished.

Banishment is punishment. Vattel declares that banishment is "a mark of infamy." Another says it is "a disgraceful punishment."

I submit to your excellency that it is a solecism to argue that because Mr. Fischer is free from trial and punishment under the laws of Austria-Hungary therefore he should be banished. The treaty is the law of this case, and binds both nations and protects the citizens of each while in the lands of the other. He was not subject to punishment at the time of emigration. He has violated no law of this Monarchy since he became a citizen of the United States.

It is said that Mr. Fischer violated section 64 of the military law of April 11, 1889. It is urged, as I am informed, that Mr. Fischer violated said section because he emigrated without the permission of the minister of home defense. I do not pause to inquire whether the contention is well taken. The words of the treaty, as applied to Mr. Fischer, are if he, "by or after his emigration has transgressed the legal provisions on military duty" (except the three instances already provided), "on his return he can not be held to military service, nor remain liable to trial and punishment for the nonfulfillment of his military duty."

In this case all right of punishment, if any, is remitted by the terms of the treaty. Mr. Fischer now stands under this treaty an innocent man; as innocent as if he were a native-born citizen of the United States. I have the honor to respectfully request therefore that your excellency will cause the case to be examined. And if it shall be found that I have misstated or omitted any material fact I beg that your excellency will cause it to be brought to my attention. And on such examination I have

the honor to further request your excellency to take such steps as may be proper to cause said order of banishment to be revoked.

I avail, etc.,

ADDISON C. HARRIS.

[Inclosure 2.—Translation.]

Paragraph 64 of the military law of the 11th of April, 1889.

Discharge for the purpose of emigration may be granted to a member of the army (navy) by the imperial and royal minister of war.

Emigration of such other persons as may be liable for service, as also of such who have not yet reached the age of conscription, is dependent upon the permission of the minister of home defense.

Permission to emigrate may be granted to a recruit, or to a person not yet liable to present himself for military service, or who has not fully satisfied his liability to present himself for military service, then only in case he emigrates with his parents or parent.

The act of emigration is to be considered as effected then only when the person emigrating has, within a year, in fact removed from this Monarchy and settled within the foreign country with the intention there to take up his permanent residence. If emigration does not take place, the person to whom permission was granted must serve out the remainder of his period of service interrupted by his release from the army (landwehr) for the purpose of emigration.

In times of mobilization and war permission to emigrate is not to be granted to any member of the armed force of the Monarchy.

Mr. Hay to Mr. Harris.

No. 79.] DEPARTMENT OF STATE,
Washington, April 13, 1900.

SIR: I have to acknowledge the receipt of your dispatch No. 80, of the 21st ultimo, presenting the case of Gustav Wolf Louis Fischer, who has been ordered to be banished from Austria, in violation of the naturalization treaty between the United States and Austro-Hungary, and reporting your action in the matter.

Consideration of the general question of the asserted right of a government to expel pernicious aliens and of the effect of an existing treaty of naturalization upon the exercise of such right may be aided by a brief review of the status of the matter in the neighboring Empire of Germany, with which the United States has treaties similar to that of 1870 with Austria-Hungary, and in which the conditions surrounding the return of subjects naturalized abroad are much the same as in Austria.

The German Government has for years contended for the right to expel a returning naturalized German-American if his presence in the country of origin be detrimental to the public good. This has been repeatedly explained to cover the case of a young man, liable and fit for military service, who has evaded the conscription by emigration, and after acquiring United States citizenship has returned to his native community, there to sow discontent among his associates by parading his acquired immunity. As the right to expel a pernicious alien is claimed by nearly all governments as a prerogative of sovereignty, and may be exercised against all aliens who disturb the welfare of the State, without distinction being made between those born aliens and those who have acquired alienship by naturalization, this Government has not contested the German position whenever the facts show the circum-

stances of the young man's return are as above stated. I am not aware of any case having arisen in Germany where a young man, rejected for disability, emigrating and becoming naturalized as Mr. Fischer was, has been deemed by the Germans open to the charge of fahnenflucht (flight from the flag), nor would the other circumstances of Mr. Fischer's case operate to his prejudice. He is nearly 32 years of age, past the years of active service. He was born in Saxony, and obviously has not returned to his native community to sow discontent among the less fortunate comrades of his youth by boasting of his American citizenship. He is sojourning in Austria in the employ of a reputable Anglo-American house, so that his presence appears to be logical and to suggest no sinister motive.

The Department desires especially to approve the point you make, that the right of expulsion is claimed because Mr. Fischer emigrated without permission of the minister of home defense. This requirement is a municipal regulation enacted long subsequent to the date of the naturalization convention between the United States and Austria-Hungary. It belongs to a class of minor provisions and restrictions which that convention expressly declares shall not operate to the prejudice of the returning naturalized citizen. The two Governments agreed in 1870 upon the precise conditions under which a person so naturalized in the one country should be exempt from penalty of any kind on his return to the other country. This Government can not be expected to consent to those conditions being amended at the will of the other high contracting party.

Moreover, this Government can not be expected to assent to the general proposition, now in effect put forth, that an American citizen, who, as you have shown, has lost his Austrian status in full conformity with the existing convention between the two countries, and who, as you assert, has done no unlawful act since his return to Austrian jurisdiction, should arbitrarily be subjected to an exemplary penalty in order to deter other Austro-Hungarian subjects from acquiring American citizenship under the terms of the convention of September 20, 1870. If it were shown that Mr. Fischer's presence in Austria is pernicious to the well-being of the State, if actions subversive of order and therefore incompatible with the duty of a good American citizen in a foreign land were attributed to him, I might be disposed to consider the evidence in that regard, and, if it appeared sufficient, withhold remonstrance against his expulsion; but no such charges are stated, or even remotely suggested.

You will continue to press the case.

I am, etc.,

JOHN HAY.

Mr. Harris to Mr. Hay.

No. 98.] UNITED STATES LEGATION,
Vienna, June 27, 1900.

SIR: I have the honor to make a further report in Mr. Fischer's case.

On receipt of your dispatch No. 79 I had a full discussion with Count Lützow, then in charge of the foreign office. (Count Goluchowski and Count Szecsen were in Budapest in attendance on the Delegations.) He took the ground in the conversation that Mr.

Fischer's conduct was merely colorable. In answer I sent a note to the foreign office, of which I inclose a copy. On the return of Count Goluchowski and Count Szecsen an answer was made, of which a translation is inclosed.

It will be observed that it is asserted that Mr. Fischer is "settled" here. The fact is that he declared to me his purpose to remain during the life of his mother. She is not dependent on him for support or care, as she keeps a leading "pension," and her daughter, the wife of an army officer, lives in Vienna. The expulsion is based on the fact that he is an alien, so that the case is, after all, one of expelling an American, formerly a subject of this monarchy, solely because his *presence* is held, by reason of the example, to create discontent among those who have done or are now doing military duty, and to incite young men not yet enrolled to emigrate to escape it.

The question is, May His Majesty's Government expel Mr. Fischer, whose emigration and naturalization and return were affirmatively authorized by the treaty of 1870, merely because his presence without more tends to create discontent?

On yesterday I went over the case fully with Count Szecsen, His Excellency Count Goluchowski not being at the office. Count Szecsen adheres firmly to the doctrine that the treaty in no wise tends to limit the sovereign power of this State to remove any alien whom the Government thinks should not be permitted to remain. He admits his Government would not expel an American without cause, but adheres to the position that presence of itself may be enough in connection with other facts to make a good cause, and that Fischer's escape from military examination and probable service is sufficient, with presence, to make proper cause. He refers to the statement of Count Goluchowski set forth in my dispatch to you (No. 70) as the settled law of this monarchy.

I insisted that two or more lawful acts could not be used to produce an unlawful result; that the emigration, naturalization, and return of Mr. Fischer were each by the treaty lawful, and he had done no wrongful act since his return. And I protested with emphasis against the rule laid down in his note already inclosed, and said I would confer with you on my return.

I ought to add that it has been said to me on more than one occasion that His Majesty's Government had asked, through its minister in Washington, to take up with our Government the question of making some modifications of the said treaty, but had not as yet been encouraged to proceed. The exact modifications were not stated.

While writing this dispatch I learned through Mr. Fischer that he has asked that the order of expulsion be postponed until September and that it was granted on yesterday.

I have, etc.,

ADDISON C. HARRIS.

[Inclosure No. 1.]

Mr. Harris to Count Lützow.

F. O., No. 72.] UNITED STATES LEGATION,
Vienna, May 31, 1900.

YOUR EXCELLENCY: Referring to our late conversation touching the case of Mr. Wolf Gustav Louis Fischer, I understand the position taken by your excellency to be that it is apparent that his emigration and naturalization was not bona fide as to

the United States, but merely a cover to escape military duty in Austria. Intention is a matter of fact to be shown by contemporaneous conduct. I beg leave to meet the inference put against him by the fact that while in America he was a member of the Illinois National Guard, and rendered military service to that State, and to the United States, in the Pullman strike; also that for years he was in the employ of Marshall Field, the greatest merchant in Chicago, and also that on coming to Vienna he took service in a non-Austrian company. These facts appear from his military certificates and his personal statement on file in this legation, copies whereof I beg to inclose to you herewith.

I venture to submit that if it be permissible to question the bona fides of his naturalization (except in the usual way) that these facts repel any inference or presumption that his citizenship is colorable or his presence here is not entirely guaranteed by the treaty.

I avail myself at the same time of this opportunity, etc.,

ADDISON C. HARRIS.

[Inclosure 2.—Translation.]

Count Szecsen to Mr. Harris.

VIENNA, *June 5, 1900.*

The Imperial and Royal ministry of foreign affairs did not fail, in view of the need possibly arising for further competent action in the case, to inform the Imperial and Royal ministry of the interior of the contents of the esteemed note of the 20th of March, 1900, Foreign Office No. 59, relative to the matter of the expulsion of the naturalized American citizen, Gustav Wolf Louis Fischer.

According to information furnished by the ministry of the interior the following are the facts underlying the matter:

Gustav Wolf Louis Fischer, born June 14, 1868, in Chemnitz, Saxony, was a legalized citizen of Vienna before acquiring naturalization in the United States of America.

It is true that Fischer fulfilled his duty by reporting for examination in the first class in 1888, and was at that time classified as "remanded" (Zurückzustellen); but before fulfilling his further obligations by reporting for later examination he emigrated without permission to the United States, and, secure against punishment by virtue of the protection which Article II of the treaty of September 20, 1870, now afforded him as a citizen of the United States, he returned to take a permanent position in Vienna.

The Imperial and Royal police direction of Vienna, having its attention called to the action of Fischer in regard to the nonfulfillment of his duty by not reporting for his later examinations, ordered, in accordance with item 5 of paragraph 2 of the law of the 27th of July, 1871, Imperial Law Bulletin No. 88, concerning maintenance of public order, the expulsion of the aforementioned from the kingdoms and lands represented in the Reichsrath.

Fischer appealed against this order to the Imperial and Royal Statthalterci (office of the governor), but the latter, in decision of the 9th of May, 1900, No. 40739, declared itself unable to grant his appeal.

Further appeal against the decision of the Imperial and Royal Statthalterci above referred to is, according to paragraph 7 of the law just cited, not permissible.

Inasmuch as the Imperial and Royal ministry has the honor to inform his excellency, the envoy extraordinary and minister plenipotentiary of the United States of America, Mr. Addison C. Harris, of the foregoing, it is believed that in order to enable a correct understanding of conditions, the following remarks should be added:

The opinion expressed in the esteemed note, referred to at the beginning of this reply, to the effect that the order of expulsion in question is a *punishment* not permitted by the treaty of the 20th of September, 1870, can not be considered correct, when viewed from the standpoint of Austrian law.

The order of expulsion is in no wise to be regarded as a punishment placed upon Fischer because he has not completely fulfilled his military obligations here in this country, as is clearly evident from the one fact that this order is issued by the Vienna police direction, which is an *administrative body*, whereas, had the punishing of an offense against the military regulations been in question, only the judicial or the military officials would have been competent to act in the matter.

And equally little has the expulsion in question any direct connection with the fact that the aforementioned individual acquired naturalization in the United States. The same measures could just as well, under similar conditions, be applied to a per-

son belonging to some other third state, regarding whom the monarchy had reason to maintain the same views as in Fischer's case.

The order against the latter possesses, in fact, no other significance than that of an administrative act which really springs from consideration for public order, and is based on the belief that the latter suffers offense when a person, by assuming foreign citizenship, avoids performance of those duties to his country which are placed upon him as upon all his fellow-citizens, and then, protected by this new citizenship from the punishment otherwise resultant from this avoidance of duty, returns and settles permanently in the midst of his former countrymen, who find themselves in a condition not so favorable as is his.

Such an act is not only provocative of discontent in all those who fulfill their obligations to the State, be their fulfillment voluntary or compulsory, but it acts also as a bad example, and were such proceedings unchecked or of frequent occurrence, would work positive harm to the defensive power of the State.

According to the view points here indicated—which alone have been productive of the order of expulsion issued against Gustav Wolf Louis Fischer—the methods of the Imperial and Royal officials can be regarded only as an act of precaution which the common considerations of State demand for the paralyzing of the damaging influence of such occurrences, and which in no wise is connected with the obligations stipulated for the contracting parties in the treaty of the 20th of September, 1870.

So far as a number of data contained in the esteemed note of the 31st of May, 1900, Foreign Office No. 72, which has been received in the meantime, are concerned, and which are intended to serve as proof that Fischer received his naturalization in the United States in bona fide and not in a certain degree merely pro forma, it may be stated in reply that in those fundamental, and, as it were, prophylactic, considerations which, as was indicated above, were decisive in the removing of the frequently mentioned individual from Austrian territory, no weight was attached to the ascertaining and fixing of the personal *intentions* which may have led him to emigrate from the monarchy and caused him to seek citizenship in the United States.

The offensive impression and the corruptive influence of the action under discussion lie in the *extreme conditions* under which Fischer, who was still pledged to duties to the State in this country, accomplished his naturalization in America, and also in his return here to settle in Austria. It is immaterial whether the intention to return, after avoiding military duty, was already formed in his mind, as it is in the majority of such cases, or whether the intention to return, perhaps originally nonexistent, was formed at a later date.

The undersigned avails himself at the same time of this opportunity to renew, etc.,

SZECSEN.

Mr. Hay to Mr. Harris.

No. 96.] DEPARTMENT OF STATE,
Washington, July 19, 1900.

SIR: I have to acknowledge the receipt of your No. 98, of the 27th ultimo, in further reference to the case of the naturalized citizen Gustav Wolf Louis Fischer, whose expulsion from Austro-Hungarian territory upon his return to his native place to take up an apparently indefinite residence had been previously reported by your No. 80, of March 21.

The grounds advanced by Count Lutzow in justification of the course of the Austro-Hungarian authorities in decreeing Mr. Fischer's expulsion coincide nearly with those put forward by the German Government on many occasions where a naturalized German, who by the acquisition of a foreign citizenship procures legal immunity from military service or from the penalties attaching to its nonfulfillment, has returned to his native neighborhood under circumstances asserted to be prejudicial to the interests of the State. The note addressed to you by Count Szecsen on the 5th ultimo takes the same position. The similarity between the Austrian and the German arguments in this regard has already been noted in my instruction No. 79, of April 13, 1900.

The case would offer no essential difficulty were the circumstances of Mr. Fischer's return to Austro-Hungarian jurisdiction such as to suggest that he belongs to the objectionable class of aliens whose expulsion for high political motives is conceded to be the prerogative of a sovereign state. In the exercise of this prerogative it is but reasonable that the expelling government should be prepared to justify its action by showing to the alien's government that his presence in the land of his origin is, in fact, pernicious to the public welfare.

The argument of the Austro-Hungarian Government is that Mr. Fischer, having partly fulfilled his military duty by reporting for examination and having been remanded for a later examination, thereby assumed an obligation which he evaded by unpermitted emigration while still an Austrian subject; and that, having secured immunity by naturalization abroad, his return to his native city and residence among his former countrymen less favorably situated than he is not only provocative of discontent, but acts as a bad example, calculated, if often repeated, to work positive harm to the defensive power of the state.

The weakness of this position is that it does not rest upon any averment of offensive conduct on Mr. Fischer's part which would justify the individual application in his case of the right of expulsion, but, rather, appears to lay down a general principle whereby the expulsion of every American naturalized Austro-Hungarian, who was under admitted liability to serve at the time of emigration, would be a necessary proceeding under the general policy of the State. Such a sweeping doctrine would to a serious extent neutralize the provisions of our naturalization treaty with Austria-Hungary. That instrument, weighing all the circumstances under which persons of military age might emigrate without fulfillment of their obligations, discriminated between the classes securing immunity by naturalization and those not so securing it. It can not be expected that this Government will acquiesce in a comprehensive enlargement of the nonimmune class by the ex parte act of the other contracting party.

In the numerous questions of this nature which have arisen between the United States and Germany, each case has been dealt with upon its individual merits. No attempt, so far as I can recall, has been made to enunciate a general doctrine like that now advanced by the Austro-Hungarian Government. Certainly no such position has been acquiesced in by this Government, tacitly or otherwise.

I observe that in Mr. Fischer's case the exercise of the right of expulsion is claimed to rest in "the extreme conditions under which Fischer, who was still pledged to duties to the State in this country (Austria), accomplished his naturalization in America, and also in his return here to settle in Austria." So far as this deals with the merits of his case, it comprises two distinct propositions—his action prior to naturalization and his action since. The first, as I have suggested, is covered by the stipulation agreed upon by the negotiators of the naturalization treaty, and involves no public turpitude on Mr. Fischer's part since his return. The second, by imputing to him the intention to *settle* in Austria, brings his case within the express terms of Article IV of the treaty, whereby indefinite residence in the country of origin imports no disability and does not constrain the returning emigrant to resume his original allegiance. Such resumption is to be his voluntary act, and failure to resume original citizenship can not be held to

impute to him pernicious conduct, injurious to the welfare of the State, without materially altering and expanding the stipulations of the naturalization treaty in favor of one contractant and not in favor of the other. If the two-years' residence clause (as in Article IV of convention of February 22, 1868, between the United States and the North German Union) were found in the existing convention of 1870 between the United States and Austria-Hungary, the question of Mr. Fischer's alleged settlement in Austria might afford a basis of discussion. But that stipulation of the German convention, the existence of which was doubtless known to the negotiators of the Americo-Austrian convention, was not incorporated therein by them, probably for reasons satisfactorily understood by them.

Article IV of the treaty of 1868 between the United States and the North German Union provides that "if the German naturalized in America renews his residence in North Germany without the intent to return to America, he shall be held to have renounced his naturalization in the United States." This article further declares that "the intent not to return may be held to exist when the person naturalized in the one country resides more than two years in the other."

Article IV of the treaty of 1870 between the United States and Austria-Hungary provides that the emigrant from one State who has resided in the other uninterruptedly for at least five years, and has become a naturalized citizen thereof, "shall not, on his return to his original country, be constrained to resume his former citizenship; yet if he shall, of his own accord, reacquire it and renounce the citizenship obtained by naturalization, such a renunciation is allowable, and no fixed period of residence shall be required for the recognition of his recovery of citizenship in his original country."

Both treaties contemplate the possible resumption of original allegiance by a returning emigrant. The North German treaty provides that if the German naturalized in America renews his residence in North Germany without the intent to return to America, he shall be held to have renounced his naturalization in the United States. It further expressly declares that the intent not to return may be held to exist after a residence of two years.

But neither of these provisions is incorporated in the Austrian treaty. Instead, it is declared that if the returning emigrant shall, of his own accord, reacquire his original citizenship and renounce the citizenship obtained by naturalization, such renunciation is allowable. It is added that no fixed period of residence shall be required for the recognition of the recovery of citizenship in the original country. It was the evident intention of the framers of the latter treaty that the emigrant returning to the country of his origin should not by mere residence there recover his original citizenship. The treaty contemplates the performance on his part of an act of renunciation of his acquired citizenship on the one hand, and of reacquisition of his original citizenship on the other. Whenever this is affirmatively done it may be recognized, but not until then.

On the whole, as Mr. Fischer's case stands, I fail to see that any individual circumstances have been alleged to make his expulsion an exceptional necessity for the protection of the Austro-Hungarian State. The fact that his residence in the Empire until next November has been permitted upon his application would suggest that if he be in

fact a pernicious alien, his perniciousness is not of an alarming or even pronounced character, and strengthens the impression I derive from the correspondence that his expulsion is not exemplary for specific cause, but is in the execution of a general policy which does not chime with the provisions of the existing treaty.

In the various German cases to which I have adverted, the postponement of the expulsion for a reasonable time to allow the person expelled to close up his affairs is generally obtained on the individual's petition and is followed by his voluntary departure from the territory of the sovereign, thus virtually constituting an amicable disposal of the matter by mutual consent. Mr. Fischer, it now appears, has asked that the order of expulsion be postponed until September, and his petition has been granted. This arrangement may be deemed to embrace a voluntary engagement on his part to quit Austro-Hungarian territory by a given date and he will be expected to abide thereby, thus disposing of his particular case. You will so advise him.

Although Mr. Fischer's case may be regarded as withdrawn from active international discussion, the principles upon which this Government rests in contesting the general claim of the Austro-Hungarian Government in the matter of the expulsion of pernicious aliens for cause remains unaltered, being in no wise prejudiced by Mr. Fischer's action in accepting a postponement of his departure. You should make our views upon this point and upon the broader point of expulsion for individual cause clear to the minister of foreign affairs.

In view of the frequent references to the course of Germany in analogous cases, I inclose for your information extracts from a very full and able report which, at my request, has been made to me by the United States ambassador at Berlin, showing the practice prevailing in this regard in the German Empire, and including a comparison thereof with the claim set up by the Austro-Hungarian Government.

I am, sir, etc.,

JOHN HAY.

[Inclosure.]

Mr. White to Mr. Hay.

No. 1228.] EMBASSY OF THE UNITED STATES,
Berlin, April 21, 1900.

SIR: I have the honor to receive your instruction No. 1012 of March 2, inclosing copy of a dispatch from the minister of the United States at Vienna, which reports the banishment of certain naturalized American citizens from Austro-Hungary, and asking, first, my views on the points raised by the minister in said dispatch, and, secondly, for a report as to any laws which may be in force in the States of the German Empire relative to expulsion.

* * * * * * *

It seems well to add something regarding some more general characteristics of a large class of cases which, in outward appearance at least, are not unlike these—cases in which foreign governments, and, in the matter now under consideration, the Austro-Hungarian Government, may suspect a *prostitution of American citizenship*. Whether this feeling of theirs be just in the present instance or not, it can not be denied that American representatives abroad have constantly to be on their guard against this evil, so injurious not only to proper relations between our own Government and others, but to the good name of our country. As to my own experience of it, which now covers many years in various posts, I trust that I may be allowed to say that my sympathies have always been and are now strongly with all bona fide

claims made by American citizens of foreign birth for protection in the country of their origin. Every German-American who, after acquiring rights as an American citizen, has shown by using them that he appreciates their value, and who, having done so, returns to his native country for any legitimate purpose, has my fullest sympathy and commands my most earnest efforts. Much of my time as minister at this post twenty years ago, as minister at St. Petersburg at a more recent date, and during my present stay here as ambassador, has been devoted to such cases, and any efforts I have made in behalf of this class of my fellow-citizens I have regarded not merely as a duty but as a pleasure. It gives me satisfaction to say that I recall no case in which the embassy has been unable to secure the friendly attention of the German Government to cases evidently bona fide, and I would regret to believe that the Austro-Hungarian Government would not yield to proper representations in similar cases.

Of course the cases of young men of military age who, having secured naturalization, return immediately afterwards to visit their family and others present peculiar difficulties, and these difficulties are frequently increased by their indiscretion and even by conduct to which a much worse name might be applied. It is, of course, galling to the military authorities of a nation, in which the military service of all its sons is considered the fundamental condition of national existence, to have young men who have disappeared just at the military age reappear among their old comrades, who are going through their military service, and display proofs of American citizenship, which appear to the authorities to be in the nature of a fraud. Still, even in these cases, difficult as they are, whenever there is evident bona fides, and also a reasonably discreet conduct on the part of the person returning, he has, as a rule, been allowed to remain long enough to visit his relatives.

I, of course, do not defend the practice of ordering such person out of the country; I would much prefer to have them allowed to remain for the time named in the Bancroft treaties, but I state the case as it undoubtedly appears to the German authorities, and I feel bound to say that but for this exercise of what they consider not only a right inherent in German territorial sovereignty, but as an absolutely necessary safeguard to good order and even to the national existence, I do not believe the Bancroft treaties would be allowed to stand. Only recently a minister of the Crown argued to me that, in the interest of Germany, those treaties ought never to have been made, and it is hardly possible that we could ever obtain them again on the terms on which Mr. Bancroft obtained them—at a time when the North German Confederation was especially anxious to secure the good opinion of the United States.

The German Empire in its present development would, in my opinion, take a view much less favorable, and we should very likely have upon us the old condition of things in which there was no acknowledged right of German-Americans to remain in Germany. Under such circumstances no American citizen of German birth could know whether it was best for him to revisit his native land or not, no matter how long he had been a citizen of the United States, and the inevitable result would be not only unfavorable to trade, but exceedingly injurious to anything like good relations between the two countries.

In view of all these considerations, while aiding the applications of all our American citizens of German birth who show good faith, I have done what I could to resist all efforts to prostitute American citizenship.

On this point let me remind the Department again of what it so well knows, that such efforts to use American citizenship for unworthy purposes are of constant occurrence. Hardly a day passes that there do not come to this embassy persons who have made the briefest possible stay in the United States, and demand passports clearly for the purpose of passing their lives here free from all obligations either to the country of their birth or of their adoption. Many of these have not the slightest appreciation of their real rights or duties as Americans, have no feelings in common with those of American citizens, and some are not even able to write or speak the English language. Their conduct makes it perfectly clear that if they found more advantage of any sort arising at any time from their old allegiance than from their new citizenship they would be quite ready to resume the former. The more respectable of these seek merely to promote their own interest or pleasure, not hesitating apparently to take any oath which may be necessary to secure the renewal of a passport. Others come for purposes even less respectable, and some even for criminal purposes, as our records in more than one case will show.

Under these circumstances, while advocating all effective measures for the protection of bona fide American citizens of foreign birth when they return to Europe, I am slow to advocate anything like drastic measures likely to arouse ill feeling between our own Government and any other and sure to render the securing of the rights of bona fide American citizens of foreign birth when abroad more difficult.

It is often said that Great Britain is more prompt and energetic in protecting her subjects than our country is in protecting her citizens. So far as this assertion has to do with the protection of British subjects of foreign birth in the country of their origin I need hardly remind the Department that it is without foundation. Great Britain never protects her foreign-born naturalized subjects in the land of their birth; if they revisit it they do so at their own risk. This is perfectly understood in every European capital and has received an indorsement from no less an authority than the late Chief Justice Alexander Cockburn, who, in his work on Nationality, in treating of those cases where claims on the score of allegiance are made by other governments on such British subjects as are said to be under the obligations of a two-fold nationality (as, e. g., by virtue of naturalization), says:

"In this respect the Government of this country has acted, it must be confessed, in modern times at least, with extreme forbearance and caution, preferring to disappoint what might have been thought the reasonable expectations of its subjects rather than advance pretensions which might clash with the rights of other powers. In the case of conflicting claims to the allegiance of individuals, British statesmen appear to have applied the legal maxim 'Melior est conditio possidentis,' and to have adopted the convenient doctrine that the state in whose dominions the individual happened to be was entitled to claim him."[1] (See Cockburn on Nationality or the Law relating to Subjects and Aliens, p. 107.)

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As to the second subject mentioned in your instruction, namely, "Any laws which may be in force in the States of the German Empire relative to expulsion," regarding which a report is desired, I have the honor to make the following statement:

The "law of expulsion" in the German Empire is exceedingly complex, and may be most conveniently treated under the three main headings given, as follows:

(1) *General principles.*—These are to be found in the various treatises by eminent jurists and publicists on the subjects of "International law," "Private international law," and "Constitutional and public law." Regarding this division of the subject, I assume that no statement is required, unless, indeed, the Department desires some account of the more recent enunciation of these general principles from the German point of view, as given in the very considerable number of recently published works in Germany dealing with the "Conflict of laws," and especially with the "State law" of the various States in their relation to the Empire since 1870, and to other nations.

(2) *Treaty provisions.*—These will of course be found in the collection given under the title "Treaties and conventions between the United States and other powers, 1776–1887;" also any other treaty provisions touching the matter, all of which the Department already possesses.

(3) *Statutes, decrees, and regulations of the German Empire and of the respective States thereof.*—It is with especial reference to this division of the subject that I assume a report is required.

I note that in Mr. Harris's dispatch reference is made to the Austro-Hungarian "expulsion law" (Imperial and Royal Law Bulletin, No. 88), to which in one case is assigned the date of June 27, 1871, and in another that of July 27 of the same year. This law, presumably in force throughout the Dual Monarchy, while resting on the basis of inherent sovereign right, enumerates the cases in which the right of expulsion may be exercised, and prescribes the manner in which it is to be carried out.

No similar law exists in the German Empire, nor am I aware of such a law existing in any State thereof. The whole procedure in this country regarding the expulsion of foreigners seems in a somewhat confused condition and can only be rightly understood by reference to the imperfect federal character of the Empire. Three different kinds of expulsion may be recognized in the precedents afforded by the recent history of Germany.

First. Each of the German States still retains the sovereign right of expulsion, so that a foreigner may, in certain cases, be expelled from one State, but continue to

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[1] Note by the Department of State, July 17, 1900:

"The British rule in this regard is prescribed by statute, seventh clause of the act 33 Victoria, chapter 14. All passports issued to naturalized British subjects are subject to the qualification mentioned in the statute and bear an indorsement in the following language:

" 'This passport is granted with the qualification that the bearer shall not, when within the limits of the foreign state of which he was a subject previously to obtaining his certificate of naturalization, be deemed a British subject, unless he has ceased to be a subject of that state in pursuance to the laws thereof, or in pursuance of a treaty to that effect.' "

reside thereafter unmolested in another State of the Empire, his expulsion from the former only having effect in the territory within which the authorities of that State have jurisdiction.

Second. In certain other cases where the reasons for expulsion are such as would make the stay of the foreigner in any one of the States of the Empire objectionable, Imperial laws have been passed whereby an expulsion by the authorities of one State becomes effective not only in that State but within the whole Empire, thus effectually banishing the individual from Germany.

Third. There is another kind of expulsion which, though in form identical with that last preceding, is so different in its real nature as to warrant its treatment as a separate class, namely, the expulsion by the Prussian authorities of persons, either individually or en masse, for certain grave reasons of state, as examples of which may be mentioned the expulsion of Poles from certain German States, of Frenchmen and others from Alsace-Lorraine, and of inhabitants of Schleswig-Holstein. These expulsions have usually been carried out by Prussia or through Prussian initiative, and take the second form above given, but for reasons which concern not only Prussia but the whole of Germany. When it is remembered that Prussia is the leading member of the German Confederation, that the King of Prussia is the German Emperor, that the chief functionaries of the Kingdom are also leading officials of the Empire, and that an expulsion by these Prussian authorities is given effect as an expulsion from the Empire by virtue of Imperial laws passed for reasons of the Imperial welfare, it will be seen that they are in substance indirect expulsions by the Empire, though in form mere State expulsions effective throughout the other States.

Referring to the first class above given, namely, expulsion by a State from its own proper territory only, I take Prussia as an example, and on referring to a leading authority on Prussian State law I find the statement: "Measures of expulsion can be exercised against foreigners, partly for certain punishable acts which have been made the subject of judicial sentence, and partly as purely police measures taken in the interest of safety and order." (Rönne, "Das Staats-Recht der Preussischen Monarchie," 2 Band, 2 Abtheilung, sec. 381, p. 134.)

This is also doubtless a true statement of this principle as contained in the State law of each of the other States of the German Empire.

The distinction to be held in mind is whether the expulsion is to be effective as a banishment—

a. From the whole German Empire, or only

b. From the territory of the expelling State.

The power by which the authorities of any particular State are given extended jurisdiction to expel from the Empire is contained in various Imperial laws and decrees. As examples of these may be mentioned—

1. Certain sections of the Reichs-Strafgesetzbuch.
2. The Imperial law regarding the expulsion of the Jesuits.
3. The Imperial law regarding the Social Democrats, etc.

To sum it up, it may be said that, first, as regards the power of expulsion the respective States exercise this right by virtue of their inherent sovereign power and the usages sanctioned by international law; second, that the procedure whereby it is given effect is for the most part contained in "Administrative Bestimmungen" and "Ministerielle Erlasse," which, not being in the form of public statutes and often embodied in secret orders of the State and Imperial authorities, are not available for examination.

Concerning the right of expulsion as well as the manner, the procedure above indicated has been modified in certain cases by special treaties, as, for instance, the convention between the German Empire and Russia of February 10, 1894, for the exchange of undesirable persons, subjects of either of the two countries, to the other, respectively; also a convention with Switzerland bearing date April 27, 1876.

Should the Department desire further and more exact information as to the actual procedure in the matter of expulsion prevailing in the various German States, the cases in which such expulsion is given effect in the whole Empire, etc., a somewhat extended and careful examination of the question would have to be made, and this would necessarily require considerable time. Such an extended report, however, has not appeared to be called for by the Department's instruction, and I therefore beg to submit simply the above considerations.

I am, etc

ANDREW D. WHITE.

MILITARY SERVICE CASE OF FRANZ RATH.

Mr. Harris to Mr. Hay.

No. 86.] UNITED STATES LEGATION,
Vienna, April 9, 1900.

SIR: I have the honor to submit the following case for instructions:

Franz Rath was born in Austria in 1865. He served in the army from April 22, 1882, until December 31, 1886, when he was transferred to the reserve, wherein he was liable to call for six years. The practice is to call the reserves annually for a few weeks' maneuvers.

It would seem from his statement that he responded to these calls as long as he remained in Austria.

During the said six years, that is to say, on September 10, 1887, he was given a "pass" to go to America by the proper authorities (in the usual form) as follows: "Good until the recall of the bearer hereof, as a sergeant in the Imperial and Royal Infantry Regiment No. 4," signed by the "Bezirkshauptmann" at Mistellach, Lower Austria.

Under this permission Mr. Rath emigrated, and was registered with the Austro-Hungarian consul-general in New York City in compliance with a military regulation, under which his officers were informed of his address.

Early in 1889 his officers issued to him in the usual manner a written notice or "call" into service for the annual manuevers. This notice was forwarded to said consul-general, and by him served on Mr. Rath. He did not comply. He states that the service was made on February 26, to appear at Mistellach (the regimental quarters) on March 1 following.

If the notice is to be regarded by our Government I am inclined to the opinion that this was not a valid excuse, as it would seem his duty was to obey the call as far as possible, and return without delay. He could have come to Austria in less than two weeks, and before the manuevers were over.

During said month of March he addressed a petition to the military authorities for an extension of his "pass." This was denied in a letter, as follows:

IMPERIAL AND ROYAL AUSTRO-HUNGARIAN CONSULATE AT NEW YORK,
August 6, 1889.

SIR: You are informed herewith that the Imperial and Royal Bezirkshauptmannschaft at Mistellach has not been able to comply with your demand for prolongation of your passport, because you did not appear at the military exercises in March of the current year (1889). You are therefore considered as a deserter, and will be treated as such.

BALITSCHEK,
Imperial and Royal Consul.

Since then Mr. Rath has made in his own behalf ineffectual attempts to have the charge of desertion struck from the military rolls. His name is read off as a deserter at every annual meeting of the reserves. The purpose is self-evident.

Mr. Rath was naturalized in the city court of Utica, Oneida County, N. Y., on October 13, 1891, and is a teacher of music in that city. He has asked this legation to intervene in his behalf to have the charge of desertion and also his name stricken from the military rolls in order that he may visit his father and other relatives.

Two questions seem to arise:

First. Should the legation intervene on behalf of naturalized Americans while they are not within Austria-Hungary?

I find it has sometimes been done, and I have in one instance. Yet I am not at all sure that it is proper diplomatic practice. There are many cases similar to this. And it seems well that it be settled whether it is the duty of this legation to intervene at the request and in behalf of every naturalized citizen who may find himself liable to arrest in case of return.

Second. May a member of the reserve or the militia, who emigrates with or without a "pass" before "having received a call into service" for the annual meeting (or muster), be notified in the United States through the Austro-Hungarian consuls in America, or otherwise, to return, and in default declared "deserters" and punishable as such on return after naturalization, and while bearing a passport from the Department or holding one issued by this legation?

By the military laws the young men are put into active service in their 21st year. They serve for three years (with a few exceptions) and then pass for seven years into the reserve, subject to annual call for the yearly muster.

The insistence of this monarchy is, that during this period of seven years it may call an emigrant back, and if he fails to come mark him a "deserter" and punish him as such, although he holds an American certificate of citizenship. I have declined to accept this construction of the treaty.

My view has been and is that under Article I citizens of Austro-Hungary on residing in America five years uninterruptedly may renounce their allegiance to His Majesty, and be adopted as American citizens, whether they bear a "pass" or not, and regardless of any "call" served upon them in the United States. Our courts are not required by the treaty to inquire as to such matters.

I am informed the practice in Europe is often otherwise, and that the inquiry is made whether the applicant, if of military age, has performed his military service in his native country; and if not to refuse naturalization.

My further view is that unless the emigrant at the time of leaving the monarchy comes within one of three specific provisions in Article II, then he can not be punished after naturalization for any act or default under the military laws happening "by or after his emigration."

If in error I beg to be set right. If I am right, it would not, in my judgment, be at all improper to express in clear words the true view to His Excellency Count Goluchowski at no distant day.

I have, etc.,

ADDISON C. HARRIS.

Mr. Hay to Mr. Harris.

No. 86.] DEPARTMENT OF STATE,
Washington, May 10, 1900.

SIR: I have to acknowledge the receipt of your dispatch, No. 86, of the 9th ultimo, in which you submit, for the instructions of the Department, the military service case of Franz Rath, who, after performing active service in the Austro-Hungarian army, went to the United

States with a pass, became a naturalized citizen of the United States, and is now declared a deserter because he failed to answer a military call.

You are aware that our courts admit aliens to citizenship upon compliance with the requirements of our naturalization laws without regard to any claims upon them of the country of their origin.

Unless the emigrant, at the time of leaving Austria-Hungary, came within one of the three specific provisions of Article II of the treaty, he is not, upon return to Austria, subject to military service or trial and punishment under the military laws. The treaty expressly declares that he can neither be held to military service nor remain liable to trial and punishment for the nonfulfillment of military duties.

Rath does not come within the description of either of the three provisions of Article II referred to.

The questions raised in this case appear to be pretty thoroughly covered by the case of Ladislao Sedivy, the correspondence concerning which is printed in Foreign Relations for 1896, pages 6 et seq., which was made a test case by your predecessor, Mr. Tripp. The position taken by Mr. Tripp was that a returning American citizen of Austro-Hungarian birth can not be punished for a crime committed by act of emigration *but only for an offense committed before emigration*, and that *in all cases when the member of the reserve corps emigrated before receiving a call into active service he was guilty of no crime against the military laws of Austria-Hungary and was not subject to arrest upon his return nor to punishment as a deserter.* This position was conceded by the Austrian authorities.

You may represent these views of the Department to His Majesty's Government.

I am, etc., JOHN HAY.

OFFER AND ACCEPTANCE OF USE OF HOSPITAL SHIP MAINE FOR WOUNDED AUSTRIAN SOLDIERS.

Mr. Herdliska to Mr. Hay.

No. 115.] UNITED STATES LEGATION,
Vienna, August 4, 1900.

SIR: I have the honor to inform you that this legation received a letter dated July 21, 1900, from the ladies of the executive committee of the hospital ship *Maine*, stating that the ship had sailed on the 12th of that month for Chinese waters, and requesting the legation to notify the Government of this country that if any of their wounded required aid they would be welcomed on board the *Maine*, and that every possible assistance would be given to them. A copy of this communication was inclosed in a note addressed by me to the Austro-Hungarian foreign office on July 24. On July 27 Count Szecsen, on behalf of the foreign minister, stated that the communication had been immediately brought to the attention of the naval section of the Imperial and Royal ministry of war. He at the same time requested me to express to the ladies of the executive committee the warmest thanks of the Imperial and Royal Government for their kind offer. On the following day,

July 28, the committee in question was informed by letter of the steps taken by this legation, a copy of Count Szecsen's reply (in translation) being at the same time inclosed.

Copies of all the correspondence in this case are respectfully submitted herewith.

I have, etc., CHARLES V. HERDLISKA.

[Inclosure 1.]

AMERICAN HOSPITAL SHIP MAINE,
30 Curzon street, London W., July 21, 1900.

The AMERICAN AMBASSADOR TO THE COURT OF AUSTRO-HUNGARY.

SIR: The ladies of the executive committee of the American hospital ship *Maine* desire to inform you that this ship sailed on July 12 for Chinese waters. Will you please notify the Government to which you are accredited that if any of their wounded require aid they will be welcome to the *Maine*, and every assistance possible will be given them.

Faithfully, yours,

JENNIE RANDOLPH CHURCHILL, *Chairman.*
JENNIE G. BLOW, *Honorary Secretary.*

[Inclosure 2.]

Mr. Herdliska to Count Szecsen.

UNITED STATES LEGATION,
Vienna, July 24, 1900.

YOUR EXCELLENCY: I have the honor to inclose to your excellency herein a copy of a letter received by this legation this morning from London from the chairman and honorary secretary of the American hospital ship *Maine*, in which the legation is informed that the *Maine* sailed from Southampton, England, for Chinese waters on the 12th instant, and in which the legation is requested to notify the Imperal and Royal Government that any of His Majesty's wounded in China who may require aid will be welcome to the *Maine*, and that every assistance possible will be given them.

In having the honor and pleasure of bringing this information to the attention of your excellency, I avail myself at the same time, etc.,

CHARLES V. HERDLISKA.

[Enclosure 3.—Translation.]

Count Szecsen to Mr. Herdliska.

Referring to the esteemed note of the 24th instant, Foreign Office, No. 82, the contents of which were immediately brought to the attention of the Imperial and Royal ministry of war of Austria-Hungary (marine section), the Imperial and Royal ministry of foreign affairs has the honor to most respectfully request the chargé d'affaires of the United States of America to convey to the ladies of the executive committee of the hospital ship *Maine* the warmest thanks of the Imperial and Royal Government for their kind offer.

The undersigned avails himself at the same time, etc.

Vienna, July 27, 1900.

For the minister:

(Signed) SZECSEN.

[Enclosure 4.]

UNITED STATES LEGATION,
Vienna, Austria, July 28, 1900.

LADY JENNIE RANDOLPH CHURCHILL, *Chairman*, and
MISS JENNIE G. BLOW, *Honorary Secretary,*
Of the Executive Committee of the American hospital ship Maine, London.

LADIES: I beg to acknowledge the receipt of your very esteemed communication of the 21st instant, informing this legation that the *Maine* sailed for Chinese waters

on the 12th instant, and requesting this legation to advise the government of Austria-Hungary that "if any of their wounded require aid they will be welcome to the *Maine*, and every assistance possible be given them."

In reply I beg to advise you that, immediately upon the receipt of your very kind note, I communicated the contents thereof to the Count Szecsen, Imperial and Royal acting minister for foreign affairs, and I am now in receipt of a reply from him, a translation of which I have the honor to inclose to you herewith, in which he requests me to convey to the ladies of the executive committee of the hospital ship *Maine* the warmest thanks of the Imperial and Royal Government for their kind offer.

I am, ladies, etc.

CHARLES V. HERDLISKA.

Mr. Hill to Mr. Herdliska.

No. 106.] DEPARTMENT OF STATE,
Washington, September 13, 1900.

SIR: I have to acknowledge the receipt of your dispatch No. 115, of the 4th ultimo, reporting your action in bringing to the notice of the Austro-Hungarian Government the statement that if any of their wounded required aid in Chinese waters they would be welcomed aboard the *Maine*, and that every possible assistance would be given them by the ladies of the executive committee of the vessel.

You are instructed, when a suitable occasion shall be offered, to express this Government's high appreciation of the action of the executive committee in the matter.

I am, sir, etc.,

DAVID J. HILL.