
THE HONOURABLE THE SECRETARY OF STATE OF CANADA AS CUSTODIAN OF ENEMY PROPERTY, PLAINTIFF;

VS.

THE ALIEN PROPERTY CUSTODIAN FOR THE UNITED STATES,

AND

THE CANADIAN PACIFIC RAILWAY COMPANY, DEFENDANTS.

AND

THE HONOURABLE THE SECRETARY OF STATE OF CANADA AS CUSTODIAN OF ENEMY PROPERTY, PLAINTIFF;

VS.

THE ALIEN PROPERTY CUSTODIAN FOR THE UNITED STATES,

AND

IMPERIAL OIL LIMITED, DEFENDANTS.

AND

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THE HONOURABLE THE SECRETARY OF STATE OF CANADA AS CUSTODIAN OF ENEMY PROPERTY, PLAINTIFF;

VS.

THE ALIEN PROPERTY CUSTODIAN FOR THE UNITED STATES,

AND

THE TORONTO POWER COMPANY LIMITED, DEFENDANTS.

AND

THE HONOURABLE THE SECRETARY OF STATE OF CANADA AS CUSTODIAN OF ENEMY PROPERTY, PLAINTIFF;

VS.

THE ALIEN PROPERTY CUSTODIAN FOR THE UNITED STATES,

AND

CITY OF MONTREAL, DEFENDANTS.

Alien Property Custodian—Beneficial ownership in Securities—Canadian Consolidated Orders—Treaty of Peace—Classes of Property passing to Custodian—Canadian War Measures Act—Vesting Order.

Certain "securities" (shares, note certificates and stocks) in the above companies, listed and dealt in on recognized stock exchanges, and the certificates for which were held in the United States, being owned by enemy nationals, were, upon demand of the Alien Property Custodian of the United States, surrendered to him or to others for him, in 1918, under the War legislation of that country, and were subsequently transferred to him on the books of the said companies, or new certificates issued. In regard to one of the above companies no vesting order was ever obtained by the Canadian Custodian, but as to the others vesting orders were obtained subsequent to the action by the American Custodian, namely, in 1919, but none of the "securities" were ever transferred to him nor is it in evidence that such orders were served on the companies.

Held: That the beneficial ownership in or title to the securities herein was in him who held the paper, and that it is the law of the place where the paper was that determined who was the holder. The contention that certificates of securities are but evidence of ownership, is not inconsistent with the idea that an assignment and delivery of the certificates, carries the title and property in the securities.

2. That under The Canadian Consolidated Orders enemy property was not automatically confiscated, but the owners' enjoyment thereof was suspended until the restoration of peace, and, subject to any legisla-

tion to the contrary or anything to the contrary contained in the Treaty of Peace, such enemy was then entitled to his property, or if liquidated, to its proceeds. It was only the transfer of securities by or on behalf of an enemy that was prohibited by the publication of these Orders.

3. That under the Peace Order only two classes of enemy property passed to Canada: 1st. Property in Canada belonging to an enemy on January 10, 1920, and not in the possession or control of the Custodian, and, 2nd. Enemy property in the possession and control of the Custodian on that date.

4. That there was nothing to be found in the Canadian War Measures prohibiting or avoiding the transfers of the securities in issue as made by the American Custodian; that, on the 10th January, 1920, the property, right or interest in the securities mentioned and the title to the same did not belong to an enemy, and was not at that date in the control or possession of the Canadian Custodian; and that the property, right or interest in such securities and the title to the same belonged to the Alien Property Custodian of the United States.

ACTIONS by the Canadian Custodian of Enemy Property against the Alien Property Custodian of the United States of America, to determine the title, as between them, to certain securities issued by the four Companies and Corporations, the other defendants in said actions.

It was contended by the Canadian Custodian that The Canadian Consolidated Orders constituted an absolute bar against the transfer of enemy owned securities in Canadian companies, and that the possession of mere paper certificates of such securities, could not prevail against such measures. And by the American Custodian that it being agreed that the seizures of the certificates were made in conformity with the provisions of the American Trading with the Enemy Act, he became the holder of the title to the securities and was entitled by law and of right to the transfers made on the books of the defendant corporations; and that there is nothing in any Canadian war legislation invalidating the acquisition of the title to the securities, and later, the transfers of the same to the American Custodian on the books of the defendant corporations, the same not having been made by or on behalf of an enemy.

The actions were tried before the Honourable Mr. Justice Maclean, President of the Court, at Montreal.

Aimé Geoffrion, K.C., for plaintiff.

George Montgomery, K.C., and *W. Chipman, K.C.*, for Alien Property Custodian of the United States.

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W. H. Curle, K.C., for The Canadian Pacific Ry. Co.

W. G. Hanna for The Toronto Power Co.

H. W. Shipley for The Imperial Oil Co. Ltd.

No one appeared for The City of Montreal, but Mr. Geoffrion declared the city was ready to have some one appear if necessary, but it would only be to declare that it would abide by the judgment to be given. The contestation was solely between the two custodians.

The facts are stated in the reasons for judgment.

THE PRESIDENT, now (February 14, 1929), delivered judgment.

These several causes, which were tried before me largely upon agreed statements of fact, are to determine the title as between the Canadian Custodian of Enemy Property and the Alien Property Custodian of the United States, to certain shares, note certificates and stocks, hereafter to be designated as "securities," and issued by the several defendant corporations, all of which are domiciled in Canada. Each Custodian claims ownership of the property represented by the securities in question, under the provisions of legislation enacted during the Great War by their respective countries dealing with enemy property. These causes were heard together, and I think they may be conveniently disposed of together, without causing any confusion presently or in the event of an appeal.

It should at once be stated that these several proceedings are authorized by the terms of sec. 41 of the Treaty of Peace (Germany) Order, 1920, which in part is as follows:

41 (2) In case of dispute or question whether any property, right or interest belonged on the tenth day of January, 1920, or theretofore to an enemy, the Custodian or, with the consent of the Custodian, the claimant may proceed in the Exchequer Court of Canada for a declaration as to the ownership thereof, notwithstanding that the property, right or interest has been vested in the Custodian by an order heretofore made, or that the Custodian has disposed or agreed to dispose thereof. The consent of the Custodian to proceedings by a claimant shall be in writing and may be subject to such terms and conditions as the Custodian thinks proper.

(3) If the Exchequer Court declares that the property, right or interest did not belong to an enemy as in the last preceding subsection mentioned, the Custodian shall relinquish the same, or, if the Custodian has before such declaration disposed or agreed to dispose of the property, right or interest, he shall relinquish the proceeds of such disposition.

It is desirable at the outset to describe separately the nature of the securities in controversy, the circumstances attending the acquisition of the same as contended for by the respective Custodians in each case, and any other facts which may appear relevant to these matters in the light of the legal position taken by counsel on behalf of each Custodian.

First, as to the securities issued by the defendant corporation, the Canadian Pacific Railway Company. These consisted of shares of the capital stock of the company, and Special Investment Note Certificates. On December 19, 1917, paper certificates representing certain shares of the capital stock of the company, and Special Investment Note Certificates, were in the hands of Speyer & Co., bankers, in New York, who reported the same to the American Alien Property Custodian as property held by them for the account of an enemy, the Deutsche Bank. On the demand of the American Custodian, these certificates were in March, 1918, delivered to his nominee as enemy property, under and in conformity with laws enacted by the Congress of the United States. It is agreed that the owner of these shares and note certificates, at the time of the delivery of the certificates to the American Custodian, was also an enemy within the meaning of the laws of Canada. Upon every certificate there was endorsed a form of transfer and power of attorney in blank, and the certificates in question were at the time of the delivery to the American Custodian endorsed in blank by the registered holder who was not the enemy owner; there were two unimportant exceptions to this, in that two note certificates representing small amounts were not endorsed, although it is agreed they were held by the registered owners on behalf of the Deutsche Bank. There was nothing to indicate that the registered holders of the shares and note certificates were enemy nationals. Under the by-laws or regulations of the Canadian Pacific Railway Company there were, at all material times, registry or transfer offices at New York, London and Montreal. The securities here in question were all registered in New York, and the shares were transferable only upon the New York register.

The Special Investment Note Certificates, it perhaps should be said, contained the obligation of the company, to

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pay the principal amounts therein stated with interest, at the company's bankers, in Montreal, London or New York; they were transferable upon the books of the Trustee, at the transfer offices of the Canadian Pacific Railway in Montreal, New York, or London, in person or by attorney, and upon the surrender of the note certificate. For this purpose the Central Trust Company of New York was the registrar of transfers, and the Bank of Montreal, New York, the transfer agents at New York.

In due course, the certificates of securities so acquired by the American Custodian, were surrendered to the New York registry and transfer offices of the company, and new certificates were thereupon issued in the name of the Bank of Manhattan Company as depositary for the American Custodian. The new certificates so issued, have since been and now are, in the control and possession of the American Custodian. It is agreed that these securities were listed and dealt in on recognized stock exchanges by means of the certificates endorsed in blank, and transferable by delivery. On October 17, 1919, a Vesting Order was made by a Judge of the Superior Court of Quebec purporting to vest the securities in question in the Canadian Custodian.

In the case of the defendant company, Imperial Oil Limited, incorporated under the laws of the Dominion of Canada, and whose head office is at Toronto, the securities were surrendered in New York on September 14, 1918, to the American Custodian by the agents of the owner, then an enemy under the laws of Canada and the United States; such surrender was made upon the demand of the American Custodian and it is agreed, in conformity with the laws of the United States. The securities here were bearer share warrants. These were authorized by the company's by-laws, and each certificate, as usual, stated that the bearer was entitled to a stated number of shares of the capital stock of the company. The bearer share warrants passed into the possession of the Guaranty Trust Company of New York, as depositary for the American Custodian, and on November 3, 1919, were surrendered by it to the New York agents of Imperial Oil Limited, receiving in exchange therefor certain other bearer shares warrants issued by Imperial Oil Limited, and representing 960 shares of the capital stock of that company. In December, 1921, the then shareholders

of the defendant company were granted the right to subscribe for additional shares on terms and conditions which need not be stated. The Guaranty Trust Company, acting on behalf of the American Custodian, subscribed for and was allotted 96 additional shares and received bearer share warrants for such additional shares. In February, 1925, the Guaranty Trust Company, acting on behalf of the American Custodian, surrendered all the bearer share warrants just mentioned and received in exchange therefor bearer share warrants of Imperial Oil Limited representing 4,224 shares of its capital stock, of no par value. Such bearer share warrants have since been, and are now, in the possession of the American Custodian. On October 14, 1919, an Order was made by a Judge of the Supreme Court of Ontario vesting, it is claimed, in the Canadian Custodian these securities. The Vesting Order and schedule thereto represent one Heinrich Reidmann as the owner of 240 shares of Imperial Oil Co. Ltd. being of the par value of $100 each; it was apparently from the agent of this person, in New York, that the American Custodian seized the bearer share warrants representing these shares. It is agreed that the securities in question in this case, were listed and dealt in on recognized stock exchanges.

A further observation should perhaps be made regarding this case. The defendant company is described as Imperial Oil Ltd. In the exhibits to the agreed statement of facts, there are many references to Imperial Oil Company Ltd. which is apparently another company. Certain by-laws appearing as an exhibit in the case, are described as those of Imperial Oil Company Ltd. The Canadian Vesting Order had reference to shares of the Imperial Oil Company Ltd.; the samples of bearer share warrants, filed as exhibits, purport to be issued some by one company, and some by the other. In fact, it appears from the record that it was shares of Imperial Oil Co. Ltd., that was seized by the American Custodian. I propose assuming that there is but one company involved here throughout; the case was put to me on that footing. I have no doubt this apparent confusion is capable of a ready explanation, and that the substantial issue to be determined stands unaffected by this seeming discrepancy.

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In respect of the case of the defendant company, The Toronto Power Co. Ltd., a company incorporated under the laws of the Province of Ontario, the securities in issue are Guaranteed Debenture Stocks. The certificates of this stock were held in New York, by a banking firm on behalf of one who it is agreed was, at all times material here, an enemy national under the laws of both Canada and the United States. The stock was registered in the books of the defendant company at Toronto, where the principal and interest was payable, in the name of one Wallach, who is not alleged to have been an enemy under the laws of Canada, or the United States, but it is agreed that Wallach held the stock on behalf of an enemy, a German Bank. In May, 1918, delivery of the certificates representing this debenture stock was demanded by the American Custodian, as in the other cases, and the same was thereupon delivered to the Central Union Trust Company of New York, as depositary for that Custodian. The Trust Company surrendered the certificates to the Toronto Power Company in November, 1922, and later, in January, 1923, received on behalf of the American Custodian a new certificate representing the same amount of stock in a new issue. Later, in March, 1926, this stock was transferred into the name of the American Custodian, and is now so registered in the books of the defendant company at Toronto. The certificates did not themselves contain the usual blank form of transfer and power of attorney, but conditions printed on the certificates permitted a transfer by instrument in writing, in the usual common form. The debenture stock in question, it is agreed, was at all material times listed and dealt in on all recognized stock exchanges. On October 14, 1918, an Order was made by a Judge of the Supreme Court of Ontario, vesting the debenture stock in question in the Canadian Custodian.

In the case of the defendant, The City of Montreal, the securities in dispute are debenture stocks issued by that City, payable as to principal and interest only to the registered holder, at Montreal. The stock was transferable on the books of the City at Montreal, only by the registered holder, or by attorney duly constituted; the certificates themselves did not contain a printed blank form of transfer and power of attorney. In conformity with the laws

of the United States, possession of these debenture stock certificates was, on April 26, 1919, demanded by the American Custodian from The Hartford Trust Company at New York, it holding the same as Trustee on behalf of one who was, at all times material here, an enemy under the laws of Canada and the United States, and the same were thereupon surrendered to that Custodian. At this date it appears the stock was registered in the name of The Hartford Trust Company as Trustee for an enemy corporation. Since the surrender of the certificates of stock to the American Custodian, the same or other certificates have since been held by depositaries for such Custodian. The stock is presently registered in the name of The Empire Trust Company for the account of the American Custodian. On August 25, 1919, the stock was transferred from the Hartford Trust Co., to the New York Trust Company, and by the latter transferred to the Empire Trust Co. of New York, on behalf of the American Custodian. It is agreed that the stock in question had at all material times been listed and dealt in on all recognized stock exchanges. No Vesting Order was ever applied for in this case, by the Canadian Custodian.

It is convenient here to point out, that in the case in which the Canadian Pacific Railway is a defendant, it was a part of the agreed statement of facts, entered into by the solicitors of the plaintiff and defendant Custodians, that "the securities in question were listed and dealt with on recognized stock exchanges by means of scrip commonly in use, endorsed in blank and transferable by delivery." In the other three cases the stipulation was merely that the securities "were listed and dealt with on recognized stock exchanges." No explanation for this distinction was made. I am going to assume that the intended effect of these agreed statements of facts upon this point was to be the same throughout, and intended as evidence of custom and usage, otherwise my attention should have been directed to the point. Securities listed on stock exchanges are usually traded in by means of scrip or certificates commonly in use, endorsed in blank and transferable by delivery; this must be so of necessity otherwise they could only be traded in with great delays, between members of stock exchanges. Delivery of certificates of securities must be made if bought

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and sold; while there is no evidence upon the point I have no doubt the delivery is regulated as to time by the stock exchanges. However this point is not of much importance, as the legality of the steps taken by the American Custodian to obtain possession of the certificates, is not contested. In all cases here, except the bearer share warrants, the securities were transferable by written instrument in writing in the common form, either upon the certificate itself, or by another separate instrument and in all such cases the registered owner had executed the usual transfer and power of attorney, though perhaps in blank in most cases.

The several Vesting Orders that have been mentioned, and which were made under the provisions of Canadian Consolidated Orders respecting Trading with the Enemy, and which I shall hereafter refer to as Canadian Consolidated Orders, purported to vest in the Canadian Custodian, the securities mentioned and described in a schedule attached to each Vesting Order. The Custodian was in all cases authorized and empowered by the Vesting Orders to cause the securities and each of them, to be transferred into his own name as such Custodian, and to vote upon and manage such securities. None of the securities in question, mentioned in the several Vesting Orders, were in fact transferred into his name; there is no evidence that they were served upon the defendant corporations, or that any demand was ever made upon them to transfer these securities into the name of the Custodian; the many transfers and registrations made concerning some of the securities, by some of the defendant corporations, as already related, are difficult to understand, if either had been done. The Judges of the Court to which any jurisdiction was committed under Canadian Consolidated Orders, were empowered to make rules for the practice and procedure to be adopted for the purpose of the exercise of such jurisdiction; if any such rules were made my attention was not directed to the same. In England, rules were adopted under the Trading with the Enemy Act, and they contained the provision that proceedings on any application under the Act should, so far as not provided for in such rules, be conducted in accordance with the ordinary practice dealing with similar matters of the Court to which application was made.

Briefly stated, the case of the plaintiff Custodian is that Canadian war measures, such as Canadian Consolidated Orders, constituted an absolute bar against the transfer of enemy owned securities in Canadian companies, and that the possession of mere paper certificates of such securities, could not prevail against such measures. On the other hand, it is substantially the contention of the defendant Custodian, that, it being agreed that the seizures of the certificates were made in conformity with the provisions of the American Trading with the Enemy Act, he became the holder of the title to the securities and was entitled by law and of right to the transfers made on the books of the defendant corporations; and that there is nothing in any Canadian war legislation invalidating the acquisition of the title to the securities, and later, the transfers of the same to the American Custodian on the books of the defendant corporations, the same not having been made by or on behalf of an enemy.

The case of the plaintiff Custodian may now be considered. Ordinarily speaking no one can get the benefits of ownership in securities, except through and by means of the paper certificates. Certificates of corporate shares, stocks or bonds, particularly those listed on stock exchanges, are to-day regarded as some form of property; in some cases as negotiable instruments. They are bought and sold like chattels in the market, they pass from hand to hand without any action on the part of the issuing corporation, they are transferred and pledged as collateral security for loans without leave of the corporation and frequently beyond its domicile, they are taxed in the hands of the holder or in the estate of a decedent; all this is frequently done under the blank endorsement of the registered owner, and transfer is made by delivery, and for all practical purposes paper certificates are treated by the world to-day as property. Where they pass from hand to hand by delivery, the transfer being signed in blank by the registered owner, the plain legal effect of this practice is, that the transferor who executes the transfer in blank confers on the holder of the document for the time being, authority to fill in the name of the transferee and to register the same when he so desires. The beneficial ownership in or title to the security is in him who holds the paper, and it is the law of the place where the paper is that determines who is the holder

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The contention that certificates of securities are but evidence of ownership, is not inconsistent with the idea that an assignment and delivery of the certificates, carries the title and property in the securities. Particularly would this seem to be true of securities put into circulation in the market, through the medium of recognized stock exchanges, where such securities are listed. It may be true that some further act by the transferee is required to perfect his right and title, and that the original transferor who continues to be the registered owner, is the only shareholder entitled to vote, until the transferee obtains registration in his name. The delivery of the certificate however passes the title, which will enable the holder to have the shares vested in himself by registration in the books of the company, without risk of his right being defeated by any other person deriving title from the registered owner, and the company is, if in Canada, upon the request of the holder, bound to register the shares in the name of such holder or his nominee, and to issue a new certificate in such name in exchange for the old one. Apart from the exceptional war measures, which must be considered, that I apprehend is the law of Canada, as it is of England. That much would seem to be beyond controversy.

Many and conflicting principles and authorities were submitted by counsel, relating to such questions as, the situs of shares or certificates of shares, the degree of usage necessary in law to constitute a security a negotiable instrument, what securities are simple contract debts or choses in action, the capacity of corporations to have more than one domicile, the power to tax securities outside the domicile of the issuing corporation, the law of succession duties, and questions of a similar nature, but I have concluded that all these furnish little or no assistance in the matters under consideration. If it were not for particular war legislation there would not, I apprehend, be any issue here; the title to the securities would clearly be in the hands of the holder of the paper certificates, and the defendant corporations could not successfully resist the demand of the holder to register the same in his name. The ownership of and title to the securities here, are, in my opinion, in the holder of the certificates, unless there be something in the war legislation of Canada which dis-

possessed him of that title, or which prevented his ever acquiring the same. It appears therefore to me, that the real issue involved in all these proceedings is to be determined upon a consideration of Canadian Consolidated Orders, The Treaty of Peace, and the Treaty of Peace (Germany) Order (1920); if the Canadian Custodian is by law entitled to the securities, it is by virtue of some provision to be found in one or all of these exceptional war measures, that is, special legislation modifying temporarily the ordinary rules of law.

In an enquiry into what exceptional war measures enacted by Canada, if any, modified the ordinary rules of law obtaining in respect of the rights of a holder of certificates of securities, the first to consider is, Canadian Consolidated Orders. It will assist in an interpretation of these Orders if it is understood that it was not the purpose of the Orders to confiscate thereunder private enemy property. It was stated over and over again by the Courts in England during the war, that the private property of an enemy subject, was not during the war subject to confiscation, but his right of enjoyment therein was suspended until the restoration of peace, and subject to any legislation to the contrary, or anything to the contrary contained in The Treaty of Peace, when peace came, he was entitled to his property, or if liquidated its proceeds, with any fruits it may have borne in the meantime. Even if this statement of the law, prior to the war, be not concurred in by all recognized authorities upon international law, it is immaterial, because, by the British Trading with the Enemy Act, that for the time clearly became the law, if it was not already the law. *In re Ferdinand, Ex-Tsar of Bulgaria* (1). The corresponding legislation in Canada was almost in the precise language of the British Act. Canadian Consolidated Orders was then primarily designed to prevent the use of, or control by, enemy nationals, of their property within Canada, and thus to weaken the financial resources of the enemy. To ensure the effectual execution of this public policy, it was necessary to grant wide and arbitrary powers to some officer of government. Under this legislation, a Custodian of enemy property was appointed whose func-

(1) (1921) 1 Ch. D. 107.

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tions included receiving, holding, preserving and dealing with the property of enemy nationals. By section 1 (*d*) "securities" included shares, bonds, debentures or other obligations issued by or on behalf of any corporation, whether within or without Canada. By section 6, no transfer of any securities made after the publication of these Orders, unless under licence, by or on behalf of an enemy, conferred upon the transferee any right or remedy in respect thereof, and any company or other body by whom such securities were issued was prohibited from taking any cognizance of or otherwise acting upon any notice of any transfer; much reliance is placed on this section by the Canadian Custodian. Entry in any register or branch register kept within Canada, of any transfer of any securities therein registered in the name of an enemy was prohibited, except by leave of a court or the Secretary of State. Extensive powers were granted the Custodian; such as the right to inspect documents and books, company registers, to demand and receive payments of dividends arising from enemy property, and many other similar powers. Section 28 (1) provided, that any Superior Court of Record might by order vest in the Custodian any real or personal property, and any legal or equitable rights therein, belonging to or held or managed for or on behalf of an enemy, if such vesting was deemed expedient for the purposes of Canadian Consolidated Orders. Among the classes of persons or bodies which might apply for such an order was the Custodian, or any department of the Government of Canada. If the Custodian by any Vesting Order was empowered to transfer any securities, the company in whose books the securities were registered, was required on request of the Custodian to register such transfers in the name of the Custodian, or other transferee, notwithstanding any regulations of the company, and notwithstanding that the Custodian was not in possession of the scrip or certificates relating to the securities transferred. The Custodian was required to hold any money paid to, and any property vested in him, under authority of Canadian Consolidated Orders until the termination of the war, and thereafter to deal with the same as the Governor in Council might by Order in Council direct.

The next matter to consider is the Treaty of Peace. Articles 297 and 290, with the annex thereto, of the Treaty of Peace, made final and binding all acts done by the Allied or Associated Powers in pursuance of any exceptional war measures, and gave a general authorization to Allied and Associated Countries to retain and liquidate, according to its laws, all property, rights and interests controlled by them, or belonging to enemy Germans at the date when the Treaty came into force, and at that time within allied territory. The German owner lost all his interest in property in Canada by the Treaty of Peace, and could make no claim for the property, rights or interests so retained, or contest in any way the retention. Germany bound herself to deliver within six months from the coming into force of the Treaty of Peace, to each Allied or Associated Power all certificates, deeds or documents of the title held by its nationals and relating to property rights or interests situated in the territory of any Allied or Associated Power, including any shares, stock, debentures or other obligations, of any company incorporated in accordance with the laws of that Power.

Then followed The Treaties of Peace Act, Chap. 30 Statutes of Canada 1919, which authorized the Governor in Council to make such orders as were necessary to give effect in Canada, to the Treaty of Peace. In pursuance of this authority The Treaty of Peace (Germany) Order 1920 was enacted, and which I shall refer to as the Peace Order. The Peace Order contains provisions for giving effect to the Treaty of Peace and to the charges made therein against enemy owned property in Canada. Turning now to Part II of the Peace Order, section 33 enacts that:—

(1) All property, rights and interests in Canada belonging on the 10th day of January, 1920, to enemies, or theretofore belonging to enemies and in the possession or control of the Custodian at the date of this order shall belong to Canada and are hereby vested in the Custodian.

(2) Notwithstanding anything in any order heretofore made vesting in the Custodian any property, right or interest formerly belonging to an enemy such property, right or interest shall belong to Canada and the Custodian shall hold the same on the same terms and with the same powers and duties in respect thereof as the property, rights and interests vested in him by this Order.

By section 34 all Vesting Orders and all other orders made in pursuance of Canadian Consolidated Orders or in pursuance of any other Canadian war legislation, and all

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acts done or to be done in the execution of any exceptional war measures with regard to the property, rights and interests of enemies, were validated and confirmed, and declared final and binding upon all persons, subject however to the provisions of section 33 and section 41. It was further provided by section 34 (4) as follows:—

> The provisions of this section shall not be held to prejudice any title to property hereto acquired in good faith, and for value and in accordance with Canadian law by . . . . a national of any of the Powers allied or associated during the war with His Majesty.

It is quite plain that the mere publication of Canadian Consolidated Orders did not automatically operate as a forfeiture or a vesting of enemy property, in the Canadian Custodian. Enemy property passed to the Custodian when vested in or paid to him, in pursuance of these Orders. It was only the transfer of securities by or on behalf of an enemy, that was prohibited by the publication of these Orders. Securities held or suspected to be held by or on behalf of an enemy, might by order of the Court be vested in the Custodian and registered in his name for the time being; any such Vesting Order if acted upon by the Custodian would have been a bar to any registration by the American Custodian, or any other person, whatever his title or rights might be, until the end of the war when his claim of right to the same would be heard and determined. In no case, apparently, did the Canadian Custodian exercise his power of requiring securities mentioned in any Vesting Order, to be registered in his name. The possession of the certificates, and the title to the securities came into the hands of the American Custodian, before any Vesting Orders were made by the Courts. That could not well have been prevented by any Canadian war measure. The transfer of the registered title of the securities to the American Custodian, on the books of the defendant corporations, was in no way contrary to Canadian law, and was not, I think, a transfer contemplated by section 6 of Canadian Consolidated Orders; it was not a transfer made by or on behalf of an enemy. The seizures and transfers made by the American Custodian effectually accomplished the purpose of Canadian Consolidated Orders, that is, it removed from the enemy proprietors of the securities the power of control over their property. It is difficult to believe that the legislature intended that if an allied or associated power

lawfully acquired within its own territory, in furtherance of the purposes for which Canadian Consolidated Orders were enacted, the beneficial interest in or title to enemy owned securities of a Canadian company prior to any authorized act of the Canadian Custodian vesting the title to the securities in him, that its representative, here the American Custodian, was to be denied a transfer and registration of the securities in his name or that such a transfer was one prohibited by Canadian Consolidated Orders.

Then there is the effect of the Peace Order to consider. As stated this Order enacted that all property, rights and interests in Canada belonging on the 10th day of January, 1920, to enemies, or therefore belonging to enemies but in the possession or control of the Custodian, became vested in and subject to the control of the Custodian, and became the property of Canada. For the reasons already stated, the securities in question were not in my opinion in the control or possession of the Custodian, and they were not the property of enemies, on the date mentioned; the property, right or interest in the same was not in an enemy but in another. If under the terms of the Peace Order, enemy property in Canada, or enemy property in the control of the Custodian, became vested in Canada, that cannot in my opinion have reference to any securities, the title to which had lawfully passed to one not an enemy before any Vesting Order in respect of the same was made in Canada, or which had been registered in the name of the American Custodian before any Vesting Order made was acted upon by the Canadian Custodian and before the enactment of the Peace Order. I wish to emphasize the fact that only two classes of enemy property passed to Canada under the provisions of the Peace Order; first, property in Canada belonging to an enemy on January 10, 1920, and not in the possession or control of the Custodian, and next, enemy property in the possession and control of the Custodian on that date. The property here in dispute does not belong to either class. The enemy ownership had entirely vanished, and it was not in the possession or control of the Custodian. If the securities were, on January 10, 1920, owned by a German enemy national, and if on that date the certificates of such securities were in Germany in the hands of that enemy owner, but later were found in the

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hands of a third party not an enemy who claimed the same, that of course would be a different case.

It is however to be pointed out that in one case, that of the defendant corporation Toronto Power Co., Ltd., the first registration of title made in the books of this company in Canada by the American Custodian, was after the enactment of the Peace Order. If the legal effect of the Vesting Order and the Peace Order, were to transfer the property in these particular securities to the Canadian Custodian, notwithstanding that he had not required the transfer of the securities into his name upon the company register, even all that would not and does not place the question of the rights of the American Custodian in such securities beyond consideration. Section 4 (2) of the Peace Order, as I have already pointed out, provides in effect, that if others claim any right in such securities, it is for the Court to decide whether or not any property, right or interest, in such securities belonged on the 10th day of January, 1920, to an enemy, or to another, notwithstanding that the property right, or interest has been vested in the Custodian by an order theretofore made, or by the Peace Order. If the property right or interest did not belong to an enemy, in the opinion of the Court, then the Custodian is to relinquish such property, right or interest. It was obvious that some machinery had to be provided to determine the rights of non-enemy claimants of property, officially held or claimed as enemy property, because bona fide disputes would arise inevitably as to whether certain property on January 10, 1920, was enemy property or not. Therefore we are again returned to the question of the effect in law of the seizures of the certificates made by the American Custodian, and upon which I have already expressed my conclusions. I should perhaps again refer to section 34 (4) of the Peace Order, which states that, notwithstanding the provisions of section 34, which validates everything done under Canadian Consolidated Orders or any other Canadian war legislation, the provisions of that section shall not be held to prejudice " any title to property heretofore acquired in good faith, and for value, and in accordance with Canadian law, by a national . . . of any of the Powers allied or associated with His Majesty during the war." I attach some importance to this provision; its purpose re-

quires no comment. I think it is clear that the American Custodian by obtaining possession of the certificates acquired title to the property in question in good faith, according to the laws of the United States, and not in violation of Canadian law, before any Canadian Vesting Orders were made, and before the enactment of the Peace Order. If a private citizen of the United States had in good faith and for value acquired title to securities belonging to an enemy, the Court would be bound I think to hold that the same was property not belonging to an enemy, and the title would be confirmed in the United States citizen. I know of no reason why the quality of the claim of the American Custodian should be held to be inferior to that of the private citizen.

Two American cases were discussed at considerable length by counsel of both Custodians, and they must be briefly considered. I shall first refer to *Miller* v. *Kaliwerke* . . . . and three other cases, usually referred to as the *Miller Case* (1). Here the property in issue consisted of certificates of stock and voting trust certificates, alleged to belong to certain alien enemies. The American Trading with the Enemy Act, authorized the Custodian to reduce enemy captured property into his possession, and in the case of securities to require new certificates to be issued to him in the place of the old certificates which had not been captured, but which were presumed to be in the possession of the registered owner. Primarily the question was, to whom should new certificates be issued, the American Custodian, or the enemy owner claimant. In two of the four cases before the Court, the British Public Trustee intervened, alleging his seizure in England of certain of the certificates of the securities in question, and the vesting of the same in him by Vesting Orders made by the Board of Trade prior to any demand made by the American Custodian, and claiming that he became vested with the ownership of the certificates and with the beneficial interest in the stock, or voting trust certificates, just as if the same had been then and there duly conveyed and transferred to him by the enemy owner. The court of first instance merely held that the old certificates were to be cancelled, and that new certificates were to be issued to the American Custodian, with-

(1) (1922) 283 Fed. Rep. 746.

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out any decision as to the question of ownership of the securities, as between the American Custodian and the Public Trustee. On appeal, it was held by the appellate court, that under the terms of the American Trading with the Enemy Act, the Custodian was authorized to deal with such stock in the same manner as he would with any other enemy owned property and regardless of the situs of the certificates; that the Act authorized the Custodian to require the issuance to him of certificates for stock owned by an alien enemy and seized by him without the presentation of the old certificates for cancellation, and that no claim of right was good against it; that any claim of right must be made under section 9 of the Act, which made provision for the determination of the rights of the bona fide holder of the certificates who was not an enemy; and that the sole remedy of the Public Trustee for the determination of his claim was under section 9 of the American Trading with the Enemy Act and not under the procedure which was in fact taken. It will be seen therefore that this case is not authority upon the point to be determined here, as the decision did not proceed upon the merits of the claim of the Public Trustee, and did not purport to determine the claim of the Public Trustee. I might point out, that Canadian Consolidated Orders granted to the Canadian Custodian power to have vested in him securities registered in the name of an enemy, and to have new certificates issued to him, though he was not in possession of the old certificates, just as was authorized by the American Trading with the Enemy Act. If this was done in prejudice of the rights of any person not an enemy, provision was made, as I have already stated, by the Peace Order section 41, whereby those rights might be adjudicated by a Court. These very proceedings were taken and heard under that provision of the Peace Order.

The other American case is, *Disconto-Gesellschaft* v. *U.S. Steel Corp., The Public Trustee, et al* (1). This case is usually referred to as the Disconto case. Certificates of shares in the defendant company were seized in London by the Public Trustee from an enemy owner, and the plaintiff, the enemy owner of the certificates or the securities prior to the seizure, and the Public Trustee, were each seeking

(1) (1925) 267 U.S.R. 22.

a declaration of ownership in the shares, and the issuance of new certificates. The German holder contended that the domiciliary law was exclusive; and the only way in which the securities could be acquired was by some action at the domicile of the corporation. The Court of first instance granted a decree declaring that the Public Trustee be registered as a shareholder, and that appropriate certificates be issued to him. The case eventually went on appeal to the Supreme Court of the United States, and the judgment of that Court, delivered by Mr. Justice Holmes, sustained the claim of the Public Trustee to be registered as the shareholder of the shares. It was held that the Public Trustee got a title good as against the plaintiff by the seizure of the certificates; that the things done in England transferred the title to the Public Trustee by English law; and that it is the law of the place where the paper is, that determines who is the owner. The American Custodian made no claim to the certificates or securities and consequently was not a party to the action. It is not, as suggested, to be inferred from the decision of the Supreme Court of the United States in the Disconto case, that had the American Custodian exercised his right of seizure of the shares as in the Miller case, and had the Public Trustee proceeded under section 9 of the American Trading with the Enemy Act that the result would not have been the same. In any event, the Disconto case is not authority for the suggestion that had the American Custodian been a party to the action, the Court would have denied the claim of the Public Trustee to the shares, even assuming he were before the Court in the manner provided by statute.

We therefore return to the question: Is there anything to be found in the Canadian exceptional war measures, which prevents the operation of the ordinary rules of law in the case where certificates of securities acquired in good faith and for value, by a person not an enemy, prior to any effective Vesting Order placing the possession and control of the securities in the Canadian Custodian, and before the enactment of the Peace Order? I do not think there is. I am of the opinion that there is nothing to be found in the Canadian war measures which prohibited or avoided the transfers of the securities in issue as made by the American

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Custodian on the books of the defendant corporations; that they now are in law properly registered in his name; and that on the 10th day of January, 1920, they were not in the possession or control of the Canadian Custodian, nor were they then enemy owned property. Might I further observe that these cases should not be looked upon from a narrow point of view in jurisprudence. They must be dealt with broadly as the nature of the issues demand. It is a case between administrative officers of two sovereignties, hence the undesirability of invoking rules of public law that perhaps may properly be regarded as outworn. I refer to such matters as the law pertaining to prerogative rights, the powers of sovereignties in time of war, etc. The principal parties to these proceedings came into court on an equal footing of legal right; and so far as any rules of equity might be invoked by them, they are also on an equal footing.

In view of what I have already said, I do not think it necessary to discuss at length any of the facts distinguishing some of the cases from others. The cases involving the Canadian Pacific Railway Company securities and Imperial Oil Limited bearer warrants might well be distinguished from the other cases; in the former instance it is agreed the shares passed from hand to hand by delivery, and nothing remained to be done in Canada to perfect the title of the American Custodian to the shares or note certificates, in the latter case, the securities were negotiable instruments. *Goodwin* v. *Robarts* (1); *Bechuanaland Exploration Co.* v. *London Trading Bank* (2), and *Edelstein* v. *Schuler Co.* (3). The case involving the securities issued by the City of Montreal is different from all others in that no Vesting Order was ever made.

Accordingly I am of the opinion that, on the 10th day of January, 1920, the property, right or interest in the securities mentioned in these several proceedings, and the title to the same, did not belong to an enemy, and was not at that date in the control or possession of the Canadian Custodian; that the property, right or interest in such

(1) (1875) L.R. 10 Exch. 337. (2) (1898) 2 Q.B.D. 658.
(3) (1902) 2 K.B. 144.

securities, and the title to the same, belonged to the American Custodian; and there will be a declaration to that effect.

There will be no order as to costs, as between the plaintiff and defendant Custodians. The matter of the costs of the defendant corporations is reserved until the settlement of the minutes of judgment.

Judgment accordingly.

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