

1953 } JEAN KIEFFER (*Claimant*) APPELLANT;

*May 6, 7
*June 26

AND

THE SECRETARY OF STATE OF }
CANADA (*Respondent*) } RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Enemy, Consolidated Orders re Trading with, P.C. 1023, 1916—Purchase during 1914-18 War of shares of Canadian company from German national by German national; latter acquiring French nationality by Treaty of Versailles—Right to shares as between The Custodian and the purchaser—Treaty of Peace (Germany) Order 1920, P.C. 755 as modified by P.C. 267.

Consolidated Orders respecting Trading with the Enemy, (P.C. 1023 of May 2, 1916) provide by para. 6(1) that after publication of the Orders and regulations thereunder, save as to specified exceptions, no transfer by or on behalf of any enemy of any securities shall confer on the transferee any rights or remedies and, by para. 28(1), that by order of any judge of any superior court of record within Canada such securities may be vested in the Custodian.

The claimant, a German national who acquired French nationality by the Treaty of Versailles as of Nov. 11, 1918, purchased in May and Sept. 1918 Canadian Pacific Ry. Co. shares from a German broker in Germany. By an action brought in the Exchequer Court of Canada he sought a declaration that he was their owner and for their delivery by the respondent to him or payment in lieu thereof. The latter contended that if the claimant had purchased the shares as alleged, he had done so illegally, contrary to the above-cited Orders and, that the shares had become the respondent's property pursuant to a general vesting order made by Duclos J. on April 23, 1919 under the provisions of the said Orders, confirmed by the Treaty of Peace (Germany) Order 1920 and amendments. The claimant admitted that under the decision in *Braun v. The Custodian* [1944] S.C.R. 339, para. 6(1) applied to purchases from an enemy outside of Canada of shares in a Canadian company made subsequent to the publication of P.C. 1023 but argued that para. 6(1) did not apply here because (a) It did not prohibit dealings between two parties both of whom were German nationals and, (b) By the Treaty of Versailles the claimant had acquired French nationality as from Nov. 11, 1918.

Held: 1.—That the nationality of the transferee was immaterial; *Spitz v. Secretary of State for Canada* [1939] Ex. C.R. 162; *Braun v. The Custodian*, supra, applied. The onus was on the appellant to show that the shares purchased by him in 1918 were not owned by the enemy but, even if that were not so, there was evidence in the record that they were.

2.—That so far as s. 34(1) of the Treaty of Peace (Germany) Order 1920 was concerned, the appellant purchased the shares when he was a German national. Furthermore, he did not acquire any title in good faith and for value in accordance with Canadian law.

*PRESENT: Kerwin, Taschereau, Rand, Locke and Cartwright JJ.

Judgment of the Exchequer Court of Canada, Thorson P., dismissing the action (not reported), affirmed.

1953
 KIEFFER
 v.
 SECRETARY
 OF STATE OF
 CANADA

APPEAL from a judgment of the Exchequer Court of Canada, Thorson P., dated June 15, 1950, dismissing the claimant's action with costs.

Redmond Quain, Q.C., Henri St. Jacques, Q.C. and Auguste Lemieux, Q.C. for the appellant.

G. F. Maclaren, Q.C. and L. A. Sherwood for the respondent.

The judgment of the Court was delivered by:—

KERWIN J.:—The appellant claimed a declaration that he had a good title to certain shares of stock and that the respondent, the Secretary of State for Canada as Custodian of Alien Enemy Property, had no interest in, or right or title to them. He also asked for delivery over of the certificates representing the shares, or payment in lieu thereof. The Exchequer Court declared "that the shares never belonged to the claimant but belong to Canada and are vested in the respondent" and dismissed the action.

The appellant was born in 1885 in Alsace-Lorraine and was a German national. In May and October, 1918, he was on leave from military service in the German army and in those months purchased 100 shares and 90 shares respectively of the capital stock of the Canadian Pacific Railway Company. The certificates for these shares were in the names of Nationalbank fur Deutschland or G. Schlessinger-Trier & Co., both German banking houses with headquarters in Berlin, Germany. On the recommendation of a German, he purchased both lots in Strasburg from another German, Albert Bintz, acting as a broker. The certificates had been endorsed in blank by the registered owners and were treated as bearer certificates in the European Exchange.

The position of the Custodian has been explained in *Spitz v. Secretary of State of Canada* (1) and *Braun v. The Custodian* (2). By paragraph 1 of Order 6 of Canadian Order in Council P.C. 1023, of May 2, 1916:—

6. (1) No transfer made after the publication of these orders and regulations in the *Canada Gazette*, (unless upon licence duly granted exempting the particular transaction from the provisions of this subsection)

(1) [1939] Ex. C.R. 162.

(2) [1944] S.C.R. 339.

1953
 KIEFFER
 v.
 SECRETARY
 OF STATE OF
 CANADA

by or on behalf of an enemy of any securities shall confer on the transferred any rights or remedies in respect thereof and no company or municipal authority or other body by whom the securities were issued or are managed shall, except as hereinafter appears, take any cognizance of or otherwise act upon any notice of such a transfer.

Kerwin J.

The appellant admits that under the decision in the *Braun* case this paragraph applies to purchases from an enemy outside Canada of shares in a Canadian company made subsequent to May 6, 1916, the date of publication of P.C. 1023 in the Canada Gazette. However, it was argued that the paragraph did not apply to the purchases here in question (1) because it did not prohibit dealings between two parties, both of whom were at the time German nationals and (2) because of the appellant's nationality. As to the first, while the appellant points out that P.C. 1023 is intituled "Consolidated Orders respecting Trading with the Enemy", paragraph 6(1) is clear and unambiguous, and the argument fails.

The Treaty of Versailles signed June 28, 1919, became effective at midnight on January 10, 1920. Under Section V thereof the appellant as an Alsace-Lorrainer acquired French nationality as from November 11, 1918, but this circumstance does not assist him. In the *Spitz* case the claimant was born in Slovakia, Hungary. While a subject of Czechoslovakia, which was recognized by the Allied Powers as an independent republic in October, 1918, he bought shares of stock from an enemy but he was held not entitled to succeed against the Custodian. That decision was approved in the *Braun* case where the claimant was a United States citizen who, under a general licence granted to citizens of that country, had purchased shares in Germany from an enemy. Braun also failed in his action against the Custodian. In both cases the nationality of the transferee was immaterial. The vesting order of Mr. Justice Duclos of April 23, 1919, referred to in the cases cited and made under paragraph 1 of Order 28 of P.C. 1023 also vested the shares here in question in the Custodian. If, because of Order 6(1) the appellant acquired no title to the shares, the fact that the order of Mr. Justice Duclos was made after the purchase by the appellant is of no significance.

None of the provisions of the Treaty of Peace referred to on behalf of the appellant affects the matter. By c. 30 of 10 Geo. V., Parliament enacted "An Act for carrying into effect the Treaties of Peace between His Majesty and certain other Powers",—including Germany. By subsection 1 of section 1:—

1. (1) The Governor in Council may make such appointments, establish such offices, make such Orders in Council, and do such things as appear to Him to be necessary for carrying out the said Treaties, and for giving effect to any of the provisions of the said Treaties.

In pursuance of this enactment, "The Treaty of Peace (Germany) Order, 1920" was passed by the Governor General in Council (P.C. 755). In Part II thereof, "Property, Rights and Interests", paragraph 32 provides that a German national who had acquired *ipso facto* in accordance with the provisions of the Treaty the nationality of a Power allied or associated during the war with His Majesty shall not be considered as a German national within the meaning of Part V. However, by paragraph 33 it was provided:—

33. All property, rights and interests in Canada belonging on the tenth 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.

In 1924, upon a recital that the Secretary of State had reported that P.C. 755 contained certain clauses which were ambiguous and that others were found to require modification, the Governor General in Council, by P.C. 267, repealed paragraph 33 and substituted the following therefor:—

33. All property, rights and interests in Canada belonging on the 10th day of January, 1920, to enemies, or heretofore belonging to enemies, and in the possession or control of the Custodian at the date of this Order are hereby vested in and subject to the control of 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 be vested in and subject to the control of the Custodian, who shall hold the same on the same terms and with the same powers and duties in respect thereof as the property, rights and interest vested in him by this Order.

1953
 KIEFFER
 v.
 SECRETARY
 OF STATE OF
 CANADA
 Kerwin J.

1953
 KIEFFER
 v.
 SECRETARY
 OF STATE OF
 CANADA
 Kerwin J.

The words "theretofore" in P.C. 755 and "heretofore" in P.C. 267 have the same effect. If the shares in question in this action belonged to an enemy on January 10, 1920, (the date of coming into force of the Treaty of Versailles) or theretofore and were in the possession or control of the Custodian, they thereby became vested in and subject to his control. Not only was there the earlier prohibition in Order 6(1) of P.C. 1023 of 1916 but there was the later vesting order of Mr. Justice Duclos of April 23, 1919.

This action was brought by the consent of the Custodian granted under paragraph 41 of The Treaty of Peace (Germany) Order 1920 as amended, permitting the appellant to proceed in the Exchequer Court for a declaration as to the ownership of the shares. The onus is on the appellant to show that the shares purchased by him in 1918 were not owned by an enemy but, even if that were not so, there is evidence in the record that the shares were owned by an enemy. In such a case not only must paragraph 1 of Order 6 of P.C. 1023 of May 2, 1916, and the vesting order of Mr. Justice Duclos be kept in mind but also sections 34 and 39 of The Treaty of Peace (Germany) Order, 1920. These are as follows:—

34. All vesting orders and all orders for the winding up of businesses or companies, and all other orders, directions, decisions and instructions of any Court in Canada or any Department of the Government of Canada made or given or purporting to be made or given in pursuance of the Consolidated Orders respecting Trading with the Enemy, 1916, or in pursuance of any other Canadian war legislation with regard to the property, rights and interests of enemies, and all actions taken with regard to any property, business or company, whether as regards its investigation, sequestration, compulsory administration, use, requisition, supervision or winding up, the sale or management of property, rights or interests, the collection or discharge of debts, the payment of costs, charges or expenses, or any other matter whatsoever in pursuance of any such order, direction, decision or instruction, and in general all exceptional war measures or measures of transfer or acts done or to be done in the execution of any such measures are hereby validated and confirmed and shall be considered as final and binding upon all persons, subject to the provisions of sections 33 and 41.

(2) The interests of all persons shall be regarded as having been effectively dealt with by any such order, direction, decision or instruction dealing with property, rights or interests in which they may be interested, whether or not their interests are specifically mentioned therein.

(3) No question shall be raised as to the regularity of a transfer of any property, rights or interests dealt with in pursuance of any such order, direction, decision or instruction.

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

39. No transfer, whether for valuable consideration or not, made after the sixth day of May, 1916, without the leave of some competent authority in Canada, by or on behalf of an enemy as defined in paragraphs (a) and (b) of Section 32 of any securities shall confer on the transfer any rights or remedies in respect thereof and no company or municipality or other body by whom the securities were issued or are managed shall take any cognizance of or otherwise act upon any notice of such transfer.

So far as s-s. 4 of s. 34 is concerned, when the appellant purchased the shares in May and October, 1918, he was a German national and, in any event, his acquired French nationality dated only from November 11, 1918. Furthermore, he did not acquire any title in good faith and for value *in accordance with Canadian law*.

For the reasons given, the shares may not be taken out of the custody and control of the Custodian and the action fails. However, in view of the alteration in the wording of paragraph 33 of The Treaty of Peace (Germany) Order, 1920, as effected by P.C. 267 of 1924, whereby the words "shall belong to Canada" were omitted so as to comply with the Treaty of Versailles, the judgment appealed from should be amended by striking out the words "belong to Canada and". With this variation, the appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitor for the claimant: *Auguste Lemieux.*

Solicitors for the respondent: *McLaren, Laidlaw, Corlett & Sherwood.*

1953
 KIEFFER
 v.
 SECRETARY
 OF STATE OF
 CANADA
 Kerwin J.