THE SECRETARY OF STATE FOR CANADA, IN HIS CAPACITY AS THE CUSTODIAN OF ENEMY PROPERTY (DEFENDANT) ..... APPELLANT;

1946
*Mar. 6, 7.
*May 3

AND

BARON EDOUARD DE ROTHSCHILD AND OTHERS (PLAINTIFFS) ..... RESPONDENTS.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Enemy property—Bearer share warrants—Owned by a citizen of France—Deposited with a bank situated in Holland—Sent to Canada in 1939 prior to war—Held by a bank in Montreal—Holland, when invaded by Germans, declared to be proscribed territory—Custodian of Enemy Property vested with the securities—Owners asking to get possession—Custodian asserting right to investigate before releasing control—Upon evidence, release allowed by Custodian subject to payment of commission on total value of assets—Whether Dutch bank an "enemy"—Whether Custodian entitled to commission—Consolidated Regulations Respecting Trading with the Enemy (1939), s.s. 28 (1) and 44 (1).

The respondents' action was brought for a declaration as to whether bearer share warrants, most of them owned by the respondent Baron de Rothschild, a citizen of France, have been at any time on or since the 2nd day of September 1939 subject to the Consolidated Regulations Respecting Trading with the Enemy (1939). These shares, being of the Royal Dutch Company, had been deposited with a bank named N. V. Commissie-en-Handelsbank, incorporated under the laws of Holland at Amsterdam; and they had been sent by that bank early in 1939 to Canada to be held for it by the Royal Bank of Canada.

*PRESENT:—Rinfret C.J. and Kerwin, Hudson, Rand and Estey JJ.

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On May 10th, 1940, Holland was invaded by the German army; on the following day, by order-in-council, the Netherlands was declared proscribed territory and the above Regulations became applicable to it. Section 28 (1) deals with the reporting, to the Custodian, of enemy property in Canada by any person who holds or manages it. Section 44 (1) provides that "the Custodian shall have power to charge against all property investigated, controlled or administered by him but which is subsequently released * * * an amount not exceeding two per centum of the value of all such property * * *". On August 1st, 1940, the respondents claimed ownership and wanted to get possession of the shares, but the Custodian insisted on getting adequate proof of the respondents' claim and that they were not enemies. Later, the Custodian, on the basis of evidence adduced, agreed to release control over these shares, subject to the payment of a commission of two per cent. on their total value. The respondents contended that they were never enemies within the meaning of the Regulations, that the shares always belonged to them and were never subject to the Regulations and that the Custodian had no right to charge any commission against them. The President of the Exchequer Court of Canada agreed with the respondents' contentions and maintained their action. On appeal to this Court.

Held, reversing the judgment of the Court below, that the respondents' property was within the time mentioned subject to both sections 28 (1) and 44 (1) of the Regulations and that, therefore, their action should be dismissed.

Held that the Custodian had power, under section 44 (1), to charge against the respondents' property "investigated, controlled or administered by him but * * * subsequently released" the amount of two per cent. of the value of such property. The language is precise to apply to the situation in this case: the property was held for an enemy; it became subject to the direction of the Custodian, and where other persons were claiming through that enemy, it must necessarily be investigated and either released or applied to the purposes contemplated by the Regulations.

Per The Chief Justice and Kerwin, Rand and Estey JJ.:—The Dutch bank was an enemy within the meaning of the Regulations and the property held by the Royal Bank of Canada was reportable to the Custodian under section 28. The residence of the bank on the 11th of May, 1940, must be deemed still to be in Amsterdam, in the absence of proof that, on the 10th, the central management and control and the seat of the bank's business had been transferred to a place outside of Holland. There was evidence that, early in 1939, the original books (duplicate remaining in Holland), securities and records had been sent to London, England, but there was still property in Amsterdam, including the premises occupied by the bank and some amount of cash; and to attribute sole residence to a corporation elsewhere than at the place of incorporation requires a more complete and collective migration of its faculties and activities.

Per Hudson J.:—The respondents' argument, that the securities, having been their property at all times, never did vest in the Custodian and as a consequence, the investigation was not done under the authority of the Regulations, is adversely answered by the fact that when

Holland was occupied the securities were in Canada held here for a bank in Amsterdam which, by reason of the order-in-council of the 11th of May and the definition of "enemy" in the Regulations, became an enemy.

APPEAL from the judgment of the President of the Exchequer Court of Canada, declaring that certain bearer share warrants belonging to the respondents were never subject to the Consolidated Regulations Respecting Trading with the Enemy (1939) and that the Custodian of Enemy Property was not justified in levying any charge against the property under the provisions of section 44 (1) of the Regulations.

D. L. McCarthy K.C. and *W. G. C. Howland* for the appellant.

Gustave Monette K.C. and *Kenneth Archibald K.C.* for the respondents.

The judgment of the Chief Justice and of Kerwin, Rand and Estey JJ. was delivered by

RAND J:—The question in these proceedings is whether or not certain property consisting of bearer share warrants, in part owned by the respondent, Baron de Rothschild, a citizen of France, (whose status and rights may be taken as representing those of the other respondents) has been at any time on or since the 2nd day of September, 1939 subject to the Consolidated Regulations Respecting Trading with the Enemy (1939).

The shares were of the Royal Dutch Company. The warrants had been deposited with a bank named N. V. Commissie-en-Handelsbank, incorporated under the laws of Holland at Amsterdam. By that bank they, with others, had been sent early in 1939 to Canada to be held for it by the Royal Bank of Canada at Montreal. An account was opened, and from time to time dividend coupons were sent to the Dutch Bank and service charges entered against cash remitted. Letters had been signed and given to the respondents as early as August, 1939, directing the Royal Bank to hold certain of the warrants for each, but these letters were retained until some time in July, 1940 when they were presented to the London branch of the

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Royal Bank and copies forwarded to Montreal. The respondent was unknown to the Canadian bank.

On May 10th, 1940 Holland was invaded by the German army. On the following day, by Order-in-Council P.C. 1936 the Netherlands was declared proscribed territory, and the Regulations made applicable to it in these terms:

> Whereas the Secretary of State of Canada, with the concurrence of the Minister of Finance, reports that, in consequence of the invasion of the Netherlands, Belgium and Luxembourg by enemy forces, it is necessary and expedient, with the view of preventing any of the resources in Canada of residents of the Netherlands, Belgium and Luxembourg from falling under the control of the invading enemy or agents of the invading enemy, to place, temporarily, under protective custody all property, rights and interests in Canada of persons residing in the Netherlands, Belgium and Luxembourg and to regulate trading with such persons; and
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> That the most expedient measure which can be adopted to ensure such custody and regulation is to use the machinery of the Custodian's Office established under the Regulations respecting Trading with the Enemy (1939) and to confer on the Secretary of State the powers of regulation and control in respect to such property, rights and interests in Canada of persons residing in the Netherlands, Belgium and Luxembourg which are exercisable by him as Secretary of State and as Custodian under the Trading with the Enemy Regulations in respect to proscribed territory;
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> Now, therefore His Excellency The Administrator In Council, on the recommendation of the Secretary of State of Canada, with the concurrence of the Minister of Finance, and under and by virtue of the *War Measures Act* (R.S.C. 1927, chapter 206) is pleased to order as follows:
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> From and including the tenth day of May, 1940, the provisions of the Regulations respecting Trading with the Enemy (1939) are hereby extended to and deemed to apply to the territories of the Netherlands, Belgium and Luxembourg as proscribed territory;
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> Provided that any transaction or act permitted by the Secretary of State of Canada, with the concurrence of the Minister of Finance, shall not be deemed to come within the provisions of this Order.

Section 28 (1) of the Regulations deals with the reporting of enemy property in Canada, and is as follows:—

> Any person who holds or manages any property for or on behalf of an enemy shall within thirty days after the commencement of the present war, or if the property comes into his possession or custody or under his control after the commencement of the present war, then within thirty days after the time when it comes into his possession or custody or under his control, by notice in writing communicate the fact to the Custodian, and shall furnish the Custodian with such particulars in relation thereto as the Custodian may prescribe and require and shall, on the Custodian's written request, deliver to him all documents or other evidence of title relating to such property.

The word "enemy" is defined as:—

(ii) any person who resides or carries on business within territory of a State or Sovereign for the time being at war with His Majesty, or who resides or carries on business within territory occupied by a State or Sovereign for the time being at war with His Majesty, and as well a person wherever resident or carrying on business who is an enemy or treated as an enemy and with whom dealing is for the time being prohibited by these Regulations or by statute or proclamation of His Majesty by and with the advice of His Majesty's Privy Council for Canada or by the common law.

Whether or not Holland was on May 11th, 1940 a territory occupied by a State or Sovereign for the time being at war with His Majesty, it must, I think, be taken that that was the situation some time before July, 1940. From this it follows that the Regulations of their own force became applicable before the disclosure of ownership of the property to the Royal Bank in London. If P.C. 1936 modifies that application, then so far it controls. But its preamble seems to me simply to express in relation to the property of persons residing or doing business in proscribed territory what otherwise would be the effect of the Regulations; and I take the question then to be, what is that effect on the facts before us?

Was the Dutch bank residing or carrying on business in Holland on May 11th, 1940? Its issued shares were owned solely by the respondent and his brothers. There was carried on a general banking as well as brokerage business, including the deposit and management of securities. Many months before, early in 1939, steps had been taken to meet the eventuality of invasion. Duplicate books had been set up and the originals sent to London, and new pages were sent over from week to week as transactions took place: these with securities were kept in a strong room. Instructions had been given to burn all records in Amsterdam on the outbreak of hostilities. On May 10th, powers of attorney to Polock and Jansen to sign on behalf of the bank were revoked and notice by cable given to correspondents in America and elsewhere. Of the members of the Managing Board and the Board of Directors, one, Geyer, had gone to London in 1939, another, Gans, managing director, to Paris in March, 1940, and Messrs. Van Straaten, managing director for Holland, and Esser, director, had remained in Amsterdam. We have no evidence of what

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took place in that city after the invasion, but under these officers holding some degree of managing powers there was a staff of nine or ten employees.

No doubt every effort was made to bring the active business of the bank in Holland to an end. I will assume that those efforts were successful and also the termination as between the bank and the respondent, of its agency in respect of the share warrants; but there remains the question of residence. That term is to be interpreted according to the law of this country. So long as a corporation continues with assets and organization, residence must be attributed to it; and in the absence of proof that on the 10th day of May the central management and control and the seat of the company's business had been transferred to a place outside of Holland, the residence of the bank on the 11th must, I think, be deemed still to be in Amsterdam. Such a transfer was, in fact, never intended; the cessation of business and the scattering of corporate authority were the objects of the steps taken. The preservation of records and property must continue, but there was property in Amsterdam, including the premises occupied by the bank and some amount of cash. To attribute sole residence to a corporation elsewhere than at the place of incorporation requires, in my opinion, a more complete and collective migration of its faculties and activities than that; and I cannot agree that a residence did not continue in Holland.

The bank was, therefore, an enemy within the meaning of the Regulations, and the property held by the Royal Bank of Canada was reportable to the Custodian under section 28.

There is next section 44, which is in these words:—

(1) The Custodian shall have power to charge against all property investigated, controlled or administered by him but which is subsequently released, in addition to any other charges authorized under these Regulations, an amount not exceeding two per centum of the value of all such property, including the income if any.

It is argued that the word "investigated" harks back to section 7.

7. If the Secretary of State is satisfied that there is reasonable ground for suspecting that an offence under any of Regulations 2 to 5 inclusive has been or is about to be committed by any person he may, by written order, authorize a specified person to inspect all books or documents

belonging to or under the control of the person named in the order, and to require any person able to give any information with respect to the business or trade of the suspected person, to give that information and if accompanied by a police officer to enter and search any premises used in connection with the business or trade and to seize any such books or documents as aforesaid.

But there what is investigated is a person suspected of an offence; here the investigation is of property. The language is precise to apply to the situation before us: the property was held for an enemy; it became subject to the direction of the Custodian; and where other persons were claiming through that enemy, it must necessarily be investigated and either released or applied to the purposes contemplated by the Regulations. Here it was found to belong to a citizen of France and its release is in order.

As we are not concerned with the quantum of charge made or to be made by the Custodian, the answer to the question submitted must be that the property was within the time mentioned subject to both sections 28 and 44 of the Regulations.

I would, therefore, allow the appeal and dismiss the petition with costs in both Courts.

HUDSON J.:—The matter here in controversy is a claim by the Custodian of Enemy Property to a commission of two per cent. on the value of certain securities which were finally released by the Custodian to the respondents.

The claim was made under the authority of section 44 of the Consolidated Regulations respecting Trading with the Enemy which is as follows:

> 44. (1) The Custodian shall have power to charge against all property investigated, controlled or administered by him but which is subsequently released, in addition to any other charges authorized under these Regulations, an amount not exceeding two per centum of the value of all such property, including the income if any.
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> (2) The Custodian shall have power to retain out of the proceeds of all property vested in him under these Regulations sufficient moneys to pay the expenses incurred in the administration of such Regulations.

The facts giving rise to the controversy are fully stated in the judgment of the President in the court below.

It appears that early in 1939 a Netherlands bank known as N. V. Commissie-en-Handelsbank, and hereafter for convenience called "Coha", deposited with the Royal Bank of Canada in Montreal securities in the form of share war-

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rants payable to bearer. There was nothing said or done at the time of such deposit to indicate any ownership or interest in such securities other than that of the bank itself. These securities remained in the possession of the Royal Bank who collected and paid the income therefrom to, or to the order of, "Coha" until the Netherlands was occupied by German forces on the 10th of May 1940. Meanwhile, Canada had declared war on Germany and Regulations respecting Trading with the Enemy had been made by Order-in-Council under the authority of the *War Measures Act*. On the 11th of May 1940, these Regulations were made applicable to the Netherlands, Belgium and Luxembourg.

No question arises as to the validity of these Regulations but their application to the securities claimed by the plaintiffs is denied.

The purpose of the Trading with the Enemy Regulations was to supplement, strengthen and regulate the common law restraint on commercial dealings with alien enemies and the inhabitants of the enemy countries as well as to secure and control property in Canada belonging to enemies.

By the first section of the Regulations, clause (*b*), it is provided that:

> "Enemy" shall extend to and include—
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> * * *
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> (ii) Any person who resides or carries on business within enemy territory or proscribed territory and, as well, a person wherever resident or carrying on business who is an enemy or treated as an enemy and with whom trading is, for the time being, prohibited by these Regulations or by statute or proclamation by His Majesty or by the common law.
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> * * *
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> (*d*) "Enemy territory" means any area which is under the sovereignty of, or in the occupation of, a State or Sovereign for the time being at war with His Majesty.
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> (*e*) "Proscribed territory" means any area in respect of which the Governor in Council by reason of real or apprehended hostilities or otherwise, may order the protective custody of property of persons residing in that area and the regulating of trade with such persons.
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> (*h*) "Property" as used in these Regulations shall extend to and include all real and personal property of every description, and all rights and interests therein, whether legal or equitable, and without restricting the generality of the foregoing, including securities, debts, credits, accounts and choses in action.

Section 28 (1) reads as follows:

> Any person who holds or manages any property for or on behalf of an enemy shall within thirty days after the commencement of the present war, or if the property comes into his possession or custody or under his control after the commencement of the present war, then within thirty days after the time when it comes into his possession or custody or under his control, by notice in writing communicate the fact to the Custodian, and shall furnish the Custodian with such particulars in relation thereto as the Custodian may prescribe and require and shall, on the Custodian's written request, deliver to him all documents or other evidence of title relating to such property.

By the Order-in-Council of the 11th of May resources in Canada of the Netherlands, Belgium and Luxembourg were placed under protective custody and it was further provided:

> From and including the 10th May, 1940, the provisions of the Regulations respecting Trading with the Enemy, 1939, are hereby extended to and deemed to apply to the territories of the Netherlands, Belgium and Luxembourg as proscribed territory.

On the 31st of July, 1940, an order to the same effect was passed, extending the Regulations to French territory in Europe and Africa.

The Royal Bank did not formally notify the Custodian of the securities held by them in "Coha" until the 20th of August, when a return was made in Form B, as prescribed by section 28 of the Regulations. It showed that the securities were held for "N. V. Commissie-en-Handelsbank, Amsterdam, Holland." But meanwhile, on or about the 31st of July, the manager of the Royal Bank had advised the Custodian that Baron and Baroness Edouard Rothschild claimed ownership and wished to get possession of the securities in question.

The Custodian then insisted on getting adequate proof of the claims of the plaintiffs and that they were not enemies.

After a prolonged interchange of correspondence, verification of statements and many personal interviews the Custodian wrote a letter to the Royal Bank as follows:

> I have to advise you that on the basis of the evidence submitted the Custodian would not now appear to be interested in the shares of the Royal Dutch Company claimed by these parties. He is accordingly releasing control over them. However, since the shares become vested in the Custodian on the 10th of May, 1940, the date fixed in Order-in-Council No. 1936 proscribing the Netherlands, the release is subject to a commission of 2% on the total value of the assets released.

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The plaintiffs refused to pay the 2% claimed. Their position was fully stated in a memorandum submitted to the Custodian by their solicitor on the 13th of September, 1941, and summed up as follows:

> The question at issue therefore is, whether the Custodian has a right, under the law, to investigate, control or administer the property of persons in general, and after proof of non-enemy status, to charge of percentage for doing so.
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> The scope of the regulations covers only enemies or persons dealing with the enemy. In order to prove who is an enemy or a person dealing with the enemy, it is naturally necessary to make an investigation. The general law permits this in all cases, but when a person is proved not to have merited suspicion, he resumes his place as an unsuspected person, and is in no case required to pay the cost of the investigation.

The Custodian replied to this memorandum stating that the Custodian has not and does not now consider these applicants as having been enemies under The Consolidated Regulations respecting Trading with the Enemy.

He also stated:

> The Custodian's claim to commission in this case is not based upon whether the property in question vested in him under section 21 of the Regulations, but upon the fact that on the 10th May, 1940, the property claimed was held in Canada for the account of a person whose address was in Holland.
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> * * *
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> It is admitted by you and cannot be gainsaid that the property claimed was in the name of a bank in a country which was under the provisions of these Regulations "proscribed territory". Once these facts were brought to the attention of the Custodian by the Royal Bank of Canada, it was his obvious duty to place himself in control of that property as Custodian. Further, it is the Custodian's conclusion that the Regulations were established to cover such cases as the one now under discussion. The Royal Bank of Canada having reported the account to the Custodian, as it was bound to do, the Custodian was required under the Regulations to administer and control the property, and consequently, he is entitled to charge against this property when released by him, the commission already levied.
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> To sum up the Custodian's position, I would point out that it is not dependent in any sense upon the position of the applicants themselves under the Regulations, but entirely upon the status of the property under the Regulations on the 10th May, 1940.

No agreement having been reached the Custodian gave his consent to an action to decide this issue. The learned President who tried the case agreed with the plaintiff's contention and judgment was entered declaring that the property in dispute was never subject to the Consolidated Regulations respecting Trading with the Enemy 1939, and that the Custodian was not entitled to charge any amount against the said property.

After much consideration, I have come to the conclusion that the Custodian has taken the right view. Section 44 (1) gives the Custodian a right to make a charge "against all property investigated, controlled or administered by him." The fact that the property was investigated by him is not open to serious question.

The real argument on behalf of the plaintiffs is that, once it was established that the securities belonged to them at all relevant times, it must be held that such property never did vest in the Custodian and that, as a consequence, what was done in the interim was not done under the authority of the Regulations. This argument is answered, I think, by the fact that when Holland was occupied the securities were in Canada held here for a bank in Amsterdam which, by reason of the Order-in-Council of the 11th of May and the definition of "enemy" in the Regulations, became an enemy.

Under section 21 (1) and (2) of the Regulations it is provided:

> 21. (1) All property in Canada belonging to enemies at or subsequent to the commencement of the present war, and whether or not such property has been disclosed to the Custodian as required by these Regulations, is hereby vested in and subject to the control of the Custodian.
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> (2) This regulation shall be a vesting order and shall confer upon the Custodian all the rights of such enemies, including the power of dealing with such property in such manner, as he may in his sole discretion decide.

By reason of this section nobody could effectually deal with the property without the authority of the Custodian. When, as here, a claim was made by a third person, the onus was on such person to prove his title under section 58 (1):

> 58. (1) The onus of proof in every instance shall rest upon the person who asserts that he or any property claimed or held by him is not within the provisions of these Regulations.

This, of course, was recognized by the Royal Bank. As a consequence, the plaintiffs themselves applied to the Custodian for a release and he rightly insisted on proof of their title beyond their mere assertion of ownership. This proof was furnished only after many inquiries and much delay.

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It may be that there was not such a complete vesting as would entitle the Custodian, after notice of plaintiffs' claim, to deal with the property without getting an order from the Exchequer Court of Canada under section 25 which reads as follows:

> 25. (1) The Exchequer Court of Canada or any judge thereof, on the application of the Custodian, or any one acting on his behalf, may by order vest in the Custodian any property suspected of belonging to or of being held or managed for or on behalf of an enemy, and may by such order confer on the Custodian such powers of dealing with the property vested as to the court or judge may seem proper.
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> (2) It shall not be necessary to give any notices of such application to the suspected enemy unless notice or notices shall be ordered by the court or judge before whom the application is made.

But here there was no immediate need to deal with the securities. They were held by the Royal Bank and could be left there with assurance of safety until the claim of the plaintiff could be investigated and determined. The primary object of section 25 is to give the Custodian an opportunity to prevent disposal of property which may be so placed as to create a risk of its transfer or loss.

Section 27 under which the present action is taken was always available to the plaintiffs but they did not seek to take advantage of it until after the investigation had been carried on, and had an acknowledgment from the Custodian of their ownership of the property. It seems to me that the securities here fell well within the ambit of the Regulations and that the investigation made by the Custodian was such an investigation as falls within section 44 (1). It will be noted that section 44 (1) does not deal exclusively with the property *vested in the Custodian* as is mentioned in subsection 2.

I am, therefore, of the opinion that the Custodian is entitled to charge such fee as he deems proper within the limits prescribed by section 44 and would allow the appeal and dismiss the action with costs here and below.

Appeal allowed and petition dismissed with costs.

Solicitor for the appellant: *D. L. McCarthy.*

Solicitors for the respondents: *Archibald & Cain.*