MARY BRAUN, ADMINISTRATRIX OF THE ESTATE OF JACOB G. BRAUN (CLAIMANT) } APPELLANT;

AND

THE CUSTODIAN (RESPONDENT)..... RESPONDENT.

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*June 12, 13,14.
*Oct. 3.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

International law—Companies—Contracts—Certificates of shares in Canadian company issued from an office of the company in the United States to a German corporation as registered holder—Subsequent state of war against Germany—Certificates, endorsed with transfer in blank signed by such registered holder, bought in 1919 in Germany by a United States citizen—Transfers registrable only at said United States office—Right to the shares as between the purchaser and the Canadian Custodian of enemy property—Consolidated Orders Respecting Trading with the Enemy, 1916 (and order of court thereunder)—Treaty of Versailles (signed 28th June, 1919)—Treaties of Peace Act, 1919 (Dom., 1919, 2nd Sess., c. 30)—Treaty of Peace (Germany) Order,1920—Situs of the shares—Jurisdiction of Canada.

The claimant, as administratrix of B.'s estate, claimed, as against the Canadian Custodian of enemy property, right of ownership of 470 shares of common stock of the C.P. Ry. Co., a company incorporated by special Act of the Parliament of Canada. B. was a citizen of and resident in the United States. The Government of the United States, at war with Germany from April 6, 1917, granted on July 14, 1919, a general licence (subject to exceptions) to trade with the enemy. B. went to Germany in September, 1919, and in October, 1919, purchased there the shares in question, receiving 48 certificates of shares, all in the same form and dated between 1894 and 1913, and being in the name of one or the other of two German banking houses as registered holders, which were at all relevant times enemy alien corporations. Each certificate was countersigned by the company's transfer agent and registrar of transfers in New York (U.S.A.) and on each was endorsed a transfer in blank signed by the registered holder. These certificates formed part of a group of certificates issued by the company to the said two banking houses covering a total of about 140,000 shares. They were so issued in order that the shares might be traded in on the stock exchanges in Germany and certain other European countries as bearer securities without being presented for transfer at a transfer office maintained by the company upon each transfer of ownership. The certificates covering the said 140,000 shares were registered in the company's transfer office which it had been authorized to establish and had established in New York and transfers were registrable on the books of that office and nowhere else. Dividends on shares so transferable were payable at New York in United States funds.

On April 23, 1919, the shares standing in the name of the said two banking houses (as well as other shares) had been the subject of an order of the Superior Court of Quebec made under the *Consolidated Orders Respecting Trading with the Enemy,* 1916 (enacted under

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

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the authority of the *War Measures Act*, R.S.C. 1927, c. 206); which court order in its terms vested the shares in the Custodian; and when B., in November, 1919, presented his certificates for transfer and registration in his own name at the company's New York office, that office (having received a copy of the order, with instructions) refused acceptance of the transfers. The certificattes have since remained in the possession of B. or the claimant.

Held: The shares in question were vested in the Custodian, and did not at any time belong to B. or the claimant. (Judgment of Thorson J., President of the Exchequer Court of Canada, [1944] Ex. C.R. 30, affirmed).

The *Consolidated Orders Respecting Trading with the Enemy*, 1916 (particularly ss. 6 (1) (2), 1 (1) (*d*)), *The Treaty of Versailles* (signed on June 28, 1919) (particularly paragraphs (*b*) and (*d*) of Article 297, and paragraphs 1, 3, of the Annex to Article 297), *The Treaties of Peace Act, 1919* (Dom., 1919, 2nd Sess., c. 30), *The Treaty of Peace (Germany) Order, 1920* (particularly ss. 33, 34), referred to. The court order of April 23, 1919, vested the shares in the Custodian, and that order was confirmed, and all subsequent dealings with the shares by the Custodian were authorized, by the *Treaty of Versailles* and by *The Treaty of Peace (Germany) Order, 1920.*

While the Governor in Council (enacting the said *Consolidated Orders Respecting Trading with the Enemy*, 1916, and *The Treaty of Peace (Germany) Order, 1920*) could not prevent the share certificates from being physically endorsed by the holder and handed over to a purchaser, he could provide that no transfer should confer on the transferee any rights or remedies in respect of such securities. The situs of the shares, as distinguished from that of the certificates, was in Canada; and the conditions under which title to the company's shares might be acquired was exclusively matter for the law-making authority of Canada. The fact that the company was authorized to, and did in fact, establish a transfer office in the State of New York where, only, transfers of the shares in question were registrable, could not make any difference; this was a mere matter of convenience and did not detract from the power of Canada to deal with the title to the shares of the Canadian company. (*Spitz* v. *Secretary of State of Canada*, [1939] Ex. C.R. 162, approved. *The King* v. *Cutting* (dealing with a different problem), [1932] S.C.R. 410, at 414, 418, referred to. The considerations which applied in *Rex.* v. *Williams*, [1942] A.C. 541, cannot affect the matter for consideration in the present case). Even assuming that a transfer of the certificates to B. (in Germany) was valid by German law, yet such transfer did not, in the language of s. 6 (1) of said Consolidated Orders of 1916, "confer on the transferee any rights or remedies in respect thereof".

APPEAL by the claimant from the judgment of Thorson J., President of the Exchequer Court of Canada (1), dismissing her action, in which action (brought by

(1) [1944] Ex. C.R. 30; [1944] 3 D.L.R. 412.

consent of the Custodian under s. 41 (2) of *The Treaty of Peace (Germany) Order, 1920*) she claimed a declaration that she, as the administratrix of the estate of Jacob G. Braun, deceased, was (as against the Custodian, respondent) the owner of certain shares of the common stock of the Canadian Pacific Railway Company, and for further relief.

The material facts, and relevant enactments, are stated in the reasons for judgment in this Court now reported and in the reasons for judgment in the Exchequer Court (above cited).

Thorson J. dismissed the action, holding that the shares in dispute never at any time belonged to the late Jacob G. Braun or the claimant but as at January 10, 1920, and since that date belonged to Canada and were vested in the Custodian.

D. L. McCarthy K.C. and *W. R. Wadsworth K.C.* for the appellant.

Aimé Geoffrion K.C. and *C. Robinson* for the respondent.

The judgment of the Court was delivered by

KERWIN J.—The circumstances giving rise to the present dispute are set forth in a statement of facts agreed to by the parties. The appellant is the administratrix of the estate of Jacob G. Braun, and the respondent is charged with the administration of enemy property under the Canadian *Treaty of Peace (Germany) Order* (P.C. 755 of 1920) and amendments thereto. Braun, born a German subject, was naturalized in the United States of America in 1886 and was thereafter until his death a citizen thereof. The United States was at war with Germany from April 6th, 1917, and until July 14th, 1919, United States citizens were forbidden by statute to enter into any business relations with residents in Germany. On that date the government of the United States granted to its citizens general licences to trade with the enemy, subject to certain immaterial exceptions.

On September 5th, 1919, Braun went to Germany where he purchased, between the sixth and seventeenth days of October, 1919, 470 shares of common stock of the Canadian Pacific Railway Company, a company incorporated by

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special Act of the Parliament of Canada. In consideration of this payment Braun received 48 certificates of shares of the common stock of the Company, all in the same form and dated between 1894 and 1913. Four of them were in the name of C. Schlessinger-Trier & Co. as registered holders and the remainder in the name of the National-bank fur Deutschland. Both registered holders were German banking houses and at all relevant times enemy alien corporations. Each of the certificates was countersigned by the Bank of Montreal as the Canadian Pacific Railway Company's transfer agent in New York and by the Central Trust Company of New York as its Registrar of Transfers, and on each there was endorsed a transfer in blank signed by the registered holder.

These certificates formed part of a group of certificates issued by the Railway Company to the two banking houses mentioned covering a total of about 140,000 shares. They were so issued in order that the shares might be traded in on the stock exchanges in Germany and certain other European countries as bearer securities without being presented for transfer at a transfer office maintained by the company under each transfer of ownership. The certificates covering the 140,000 shares issued to the two banking houses were registered in the company's transfer office which it had been authorized to establish and had in fact established in New York City and transfers were registrable on the books of that office and nowhere else. Dividends on shares so transferable were payable at New York in United States funds.

Braun brought the 48 certificates with him from Germany to the United States and in November, 1919, presented them for transfer and registration in his own name at the office of the Central Trust Company of New York. The acceptance of the transfers was refused on the ground that they could not be accepted having regard to the Canadian *Consolidated Orders Respecting Trading with the Enemy,* 1916, and an order of the Superior Court of Quebec made thereunder. The certificates have since remained in the possession of Braun or the claimant.

On April 23rd, 1919, the shares standing in the name of C. Schlessinger-Trier & Company and the Nationalbank fur Deutschland as well as other shares had been the sub-

ject of the order of the Superior Court of Quebec referred to. A copy of this order had been furnished to the Central Trust Company of New York on October 9th, 1919, with instructions from the Minister of Finance, who was then Custodian of Enemy Property, to make appropriate notations on the records, and between October 9th and October 24th the transfer agents placed against the accounts in the share register of each of the shareholders named in the order a note in the following terms:

> Vested in the custodian appointed under Consolidated Orders respecting Trading with the Enemy by virtue of the judgment of the Superior Court of the Province of Quebec, Canada, made in the matter of Consolidated Orders respecting Trading with the Enemy, and the Secretary of State of Canada, Petitioner, and the Canadian Pacific Railway Company, Respondent, and dated April 23rd, 1919.

In view of the result of this appeal, we are not concerned with various agreements made between the respondent and the Railway Company or with what was done by the Custodian with the shares standing in the name of the two banking houses. The claim advanced by Braun, and by the appellant after his death, was always disputed by the Custodian and after certain litigation in the United States had been allowed to lapse, this action, by the consent of the respondent under section 41 (2) of *The Treaty of Peace (Germany) Order, 1920,* was brought by the appellant in the Exchequer Court of Canada. The relief sought is a declaration that the claimant is the owner of the certificates of shares obtained by Braun and of the shares themselves; judgment against the respondent for the amount of the quarterly dividends declared upon the said shares in United States funds with interest from the respective due dates of the dividends; and for a certain sum in United States funds stated to have been received by the respondent in respect of the sale by him of "rights" declared to attach to the shares with interest.

The question submitted by the parties for the decision of the Court by the agreed statement of facts was as to what remedy or relief, if any, the claimant was entitled. The President of the Exchequer Court decided that the shares in question never at any time belonged to Braun or the claimant but as at January 10th, 1920, and since that date belonged to Canada and were vested in the

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respondent, and that the claimant was not entitled to the declaration of ownership asked by her statement of claim. The action was accordingly dismissed.

The crux of the matter is the proper interpretation of subsections 1 and 2 of section 6 of the *Consolidated Orders Respecting Trading with the Enemy,* 1916, enacted by the Governor General in Council under the authority of the *War Measures Act,* R.S.C. 1927, c. 206. These subsections read as follows:—

> 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), by or on behalf of an enemy of any securities shall confer on the transferee 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.
>
> (2) No entry shall hereafter, during the continuance of the present war, be made in any register or branch register or other book kept within Canada of any transfer of any securities therein registered, inscribed or standing in the name of an enemy, except by leave of a court of competent jurisdiction or of the Secretary of State.

With these should be read clause (*d*) of subsection 1 of section 1 whereby:—

> (1) For the purposes of these orders and regulations, the following expressions shall be construed so that—
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> * * *
>
> (*d*) "Securities" shall extend to and include stock, shares, annuities, bonds, debentures or debenture stock or other obligations issued by or on behalf of any government, municipal or other authority, or any corporation or company whether within or without Canada.

The appellant contends that these provisions apply only to persons, property and transactions within the territorial boundaries of Canada and have neither authority nor effect to restrain persons, property or transactions of foreigners in foreign countries. So far as the Exchequer Court is concerned that argument was disposed of by the decision of the late President in *Spitz* v. *Secretary of State of Canada* (1). I may say at once that I approve that judgment and the reasons therefor but add the following to emphasize some of the matters dealt with therein and to cover any new arguments that have been adduced.

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

While undoubtedly the Governor in Council could not prevent the share certificates from being physically endorsed by the holder and handed over to a purchaser, he could provide that no transfer should confer on the transferee any rights or remedies in respect of such securities. Such a power was necessary to attain the desired object of preventing any material aid being secured by the enemy. While ordinarily (in the present instance) the law of Germany would determine the effect of the contract to transfer the certificates, "the distinction", as Professor Beale points out in volume 1 of his Conflict of Laws, page 446, "between the certificate of stock and the stock itself is an important one. The latter has its situs at the domicile of the corporation and there only".

We are not concerned with disputes between the Custodians of Enemy Property of allied countries as was this Court in *Secretary of State of Canada* v. *Alien Property Custodian (U.S.)* (1), and the Supreme Court of the United States in *Disconto-Gesellschaft* v. *U.S. Steel Co.* (2). Nor is the problem the same as that considered in *The King* v. *Cutting* (3), but in the opinions delivered in that case are two statements that are not without significance and bearing upon the present appeal. The first appears at page 414 in the judgments of Duff and Smith JJ., delivered by the former:—

> But there is nothing in the *Bank Act* to prevent a purchaser or creditor acquiring by contract a right legal and equitable to require the vendor or debtor to do whatever is necessary in order to effect a legal transfer of such share; and the question whether such is the effect of the contract will depend upon the law of the place where the contract is made—*Colonial Bank* v. *Cady* (4), nor I apprehend—is there any doubt that the conditions under which title to its shares may be acquired is exclusively matter for the law making authority of the jurisdiction where the Corporation has its proper domicile.

The present Chief Justice of this Court agreed with that judgment and also with the judgments of Lamont and Cannon JJ., delivered by the former. At page 418, Lamont J. said something to the same effect:—

> The effect of a contract to transfer shares made in another country must depend upon the laws of that country. But, subject to that law, it is within the competence of the Parliament of Canada in legislating on the subject of banks and banking—a matter over which it is given

(1) [1931] S.C.R. 169.
(2) (1925) 267 U.S. 22.
(3) [1932] S.C.R. 410.
(4) (1890) 15 App. Cas. 267.

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exclusive jurisdiction by section 91 of the *British North America Act*, 1867,—to compel a bank, its own creature, to recognize as valid a lawful transfer made outside of Canada, when made in the manner prescribed by the Act. *Secretary of State of Canada* v. *Alien Property Custodian (U.S.)* (1).

Here the situs of the shares, as distinguished from that of the certificates, was in Canada and the New York Uniform Stock Transfer Law, relied upon by the appellant, has no bearing upon the question. The fact that the Railway Company was authorized to, and did in fact, establish a transfer office in the State of New York where, only, transfers of the shares in question were registrable, cannot make any difference. This was a mere matter of convenience and did not detract from the power of Canada to deal with the title to the shares of the Canadian company.

The appellant also relied on the decision of the Privy Council in *Rex* v. *Williams* (2). There the Province of Ontario attempted to collect succession duty upon shares of a mining company incorporated by letters patent under the Ontario *Companies Act* and which had two transfer offices, one in Toronto and the other in Buffalo, New York, at either of which shareholders might have their shares registered and transferred in the books of the company. The shares in question were those of a testator who died domiciled in New York and the share certificates themselves were physically located there. Viscount Maughan pointed out that "One or other of the two possible places where the shares can be effectively transferred must therefore be selected on a rational ground" (p. 559); and further: "In a business sense the shares at the date of the death could effectively be dealt with in Buffalo and not in Ontario" (p. 560). The considerations which apply to a discussion as to the situs of shares for provincial succession duty purposes where a provincial legislature is restricted to direct taxation within the province cannot affect the matter at present under review.

The respondent contended that at the relevant time the law of Germany, so far as it could be ascertained, prohibited in that country the transfer of the certificates and of any interest in the shares. It is unnecessary to deal with this contention because, assuming a transfer to

(1) [1931] S.C.R. 169. (2) [1942] A.C. 541.

Braun of the certificates valid by German law, such transfer did not, in the language of subsection 1 of section 6 of the *Consolidated Orders Respecting Trading with the Enemy* "confer on the transferee any rights or remedies in respect thereof"; and furthermore "no company * * * shall * * * take any cognizance of or otherwise act upon any notice of such a transfer". Subsection 1 by itself is sufficient to justify the conclusion that when Braun bought the certificates, he actually secured nothing that would enable him to claim title to the shares. Clause (*d*) of subsection 1 of section 1 and subsection 2 of section 6 may be considered as having been included for extra precaution or to cover cases with which we are not concerned.

The *Treaty of Versailles* was signed on June 28th, 1919, and by para. (*d*) of Article 297 (contained in Section IV), as between the Allied and Associated Powers or their nationals, on the one hand, and Germany or her nationals, on the other hand, all the exceptional war measures or measures of transfer, or acts done or to be done in execution of such measures shall be considered as final and binding upon all persons. The definition of these measures in paragraphs 1 and 3 of the Annex to Article 297 is wide enough to include *Consolidated Orders Respecting Trading with the Enemy,* 1916, and the order of the Superior Court of Quebec of April 23rd, 1919. Furthermore, by paragraph (*b*) of Article 297 of the Treaty, the Allied and Associated Powers reserve the right to retain and liquidate all the property, rights and interests belonging at the date of the coming into force of the Treaty to German nationals. By *The Treaties of Peace Act, 1919,* being chapter 30 of the Dominion statutes of that year (2nd Sess.), the Governor in Council was authorized to make such appointments, establish such offices, make such Orders in Council and do such things as would appear to him to be necessary for carrying out the *Treaty of Versailles* and for giving effect to any of the provisions thereof.

The Treaty of Peace (Germany) Order, 1920, was accordingly enacted by the Governor in Council and subsequently amended. By this Order—"During the war" means "at any time between six o'clock (eastern standard

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time) in the afternoon of the fourth day of August, 1914, and midnight (eastern standard time) of the tenth-eleventh day of January, 1920". Section 33 provides that all property, rights and interests in Canada belonging on the tenth day of January, 1920, to enemies or heretofore belonging to enemies and in the possession or control of the Custodian at the date of the Order are vested in and subject to the control of the Custodian, and 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 interests vested in him by this Order. By section 34, all vesting orders made or given or purporting to be made or given in pursuance of the *Consolidated Orders Respecting Trading with the Enemy,* 1916, 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.

The order of the Superior Court of Quebec of April 23rd, 1919, was such an order and it is not necessary to refer further to it except to state that it vested the shares in question in the Minister of Finance and Receiver-General of Canada as the Custodian appointed by the *Consolidated Orders Respecting Trading with the Enemy.* The shares were subsequently dealt with by the Minister of Finance or his successor as Custodian. The order of the Superior Court was confirmed, and all such dealings were authorized, by the *Treaty of Versailles* and by *The Treaty of Peace (Germany) Order, 1920.*

The appeal should be dismissed. In accordance with the terms of the consent of the Custodian to the bringing of this action, such dismissal is without costs.

Appeal dismissed.

Solicitor for the appellant: *W. R. Wadsworth.*

Solicitors for the respondent: *Smart & Biggar.*