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THE HONOURABLE THE SECRETARY OF STATE OF CANADA AND CUSTODIAN (PLAINTIFF) APPELLANT;

AND

THE CANADIAN PACIFIC RAILWAY COMPANY

AND

THE ALIEN PROPERTY CUSTODIAN FOR THE UNITED STATES OF AMERICA (DEFENDANTS) RESPONDENTS.

*Feb. 26, 27, 28.
*Dec. 15.

THE HONOURABLE THE SECRETARY OF STATE OF CANADA AND CUSTODIAN (PLAINTIFF) APPELLANT;

AND

IMPERIAL OIL, LIMITED

AND

THE ALIEN PROPERTY CUSTODIAN FOR THE UNITED STATES OF AMERICA (DEFENDANTS) RESPONDENTS.

*PRESENT:—Duff, Newcombe, Rinfret, Lamont and Smith JJ.

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THE HONOURABLE THE SECRETARY OF STATE OF CANADA AND CUSTODIAN (PLAINTIFF) APPELLANT;

AND

TORONTO POWER COMPANY, LIMITED

AND

THE ALIEN PROPERTY CUSTODIAN FOR THE UNITED STATES OF AMERICA (DEFENDANTS) RESPONDENTS.

THE HONOURABLE THE SECRETARY OF STATE OF CANADA AND CUSTODIAN (PLAINTIFF) APPELLANT;

AND

THE CITY OF MONTREAL

AND

THE ALIEN PROPERTY CUSTODIAN FOR THE UNITED STATES OF AMERICA (DEFENDANTS) RESPONDENTS.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Companies and corporations—Ownership of shares or stock—State of war —War legislation—Canada and United States allied Powers—Seizure by Alien Property Custodian of United States of certificates of shares or stock, physically situate in United States, but issued by Canadian companies or corporations, and beneficially owned by alien enemies—Vesting orders obtained in Canada by Canadian Custodian—Conflicting claims between Canadian Custodian and United States Custodian —Consolidated Orders respecting Trading with the Enemy, 1916 (Can.)—Treaty of Peace (Germany) Order, 1920 (Can.).

The United States Alien Property Custodian, under powers conferred by Act of Congress, seized, between March 27, 1918, and April 27, 1919, certain share or stock certificates, then physically situate in New York, but issued by Canadian companies or corporations. The securities were, at the seizure dates, beneficially owned by alien enemies. The said certificates were: (1) share certificates and special investment note certificates issued by C.P.R. Co., the securities being registered in its branch registry office in New York and transferable there only; (2) bearer share warrants issued by I. Co. and transferable by delivery without anything further having to be done to perfect title; (3) certificates for City of Montreal debenture stock, transferable only on the City's books by the registered holder or by attorney duly constituted; (the certificate stated that it "shall not constitute the title to the stock, which title shall consist exclusively in registry in the Debenture Stock Register of the City"); (4) certificates for debenture stock issued by T. Co. and transferable on its books either in London (Eng.) or in Canada; the stock in question was on the Toronto

register. All said certificates (except the bearer share warrants) were transferable by assignment in writing in common form, and the registered owner had executed the usual assignment and power of attorney, in most cases in blank. The securities were listed and dealt in on recognized stock exchanges. The said Custodian had the assigned certificates presented to the issuing companies and himself or his nominee registered as owner; as to the T. Co. securities, this was not done until a time later than the vesting orders hereinafter mentioned. The Canadian Custodian, in October, 1919, under the authority of s. 28 of the Consolidated Orders respecting Trading with the Enemy, 1916 (put into force under the *War Measures Act, 1914*, Can.) obtained Canadian court orders (except as to the City of Montreal stock) purporting to vest in himself the shares and stock in question. He brought the present actions in 1926, and the question in issue was, which of the two custodians was entitled to the securities.

Held (affirming judgment of Maclean J., President of the Exchequer Court of Canada, [1930] Ex. C.R. 75), that the United States Custodian was entitled to the securities.

Per Rinfret, Lamont and Smith JJ.: The Canadian Consolidated Orders, 1916, did not intend or effect prevention of an allied Power from validly seizing shares of Canadian companies the certificates for which were physically situate in the allied country. The seizures by the United States Custodian (having regard to the terms of the authorizing U.S. law) vested in him, as against the enemy nationals, not only the possession of the paper certificates, but every property right and interest to which the beneficial owners thereof would have been entitled had a state of war not existed. Both by Canadian and by United States law, share certificates endorsed in blank by the registered owner give the right to the lawful holder thereof to be registered as owner (*Colonial Bank* v. *Cady*, 15 App. Cas., 267, at 277; *Disconto-Gesellschaft* v. *U.S. Steel Corp.*, 267 U.S. 22, affirming 300 Fed., 751); and this right existed in the United States Custodian (*Disconto* case, *supra*) and was, prior to and at the time of the Canadian court vesting orders, a "property, right or interest" in him, to the exclusion of any such in an enemy, in respect of the securities in question. (The C.P.R. Co. shares and notes, registered in the company's New York office in the name of his nominee, and the I. Co. bearer share warrants, were also property in the United States; *quaere* as to the other securities in this regard). His right to have himself or his nominee registered as the owner of the securities was subject to any assertion by Canada of her paramount legislative power over the companies which had issued the certificates. Canada did assert this power when the shares were vested in the Canadian Custodian by the courts under the Consolidated Orders, but she relinquishes her claim to all vested property which was not enemy property at the time of the vesting (Canadian Consolidated Orders, 1916, ss. 28, 33, 36 (1), and Treaty of Peace (Germany) Order, 1920, ss. 33, 34, 42 (2) (3), particularly considered in this regard).

Per Duff and Newcombe JJ.: The Canadian Consolidated Orders, 1916, had no intention or effect of nullifying in Canada proceedings taken by an allied Power to reduce into possession such securities so situated as those in question. The principle of the *Disconto* case (*supra*) applied, and the proceedings taken by the American Custodian had the effect of investing him with the rights of a transferee of the securi-

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ties, including the right to demand registration. Therefore Order 28, which authorized only the vesting of property "belonging to or held or managed for or on behalf of an enemy," had no application to any of the properties in question. Ss. 33 and 34 of the Treaty of Peace (Germany) Order, 1920, which Order was passed pursuant to the *Treaties of Peace Act, 1919,* and was for the purpose of carrying out the Treaty of Peace and giving effect to its provisions, must be read in the light, and within the limitation, of that purpose; the Treaty, while ratifying the administrative orders of Canada acting within her proper sphere, also contemplated ratification of the administrative orders of the United States acting within her proper sphere; and said s. 34 could not be read as giving such an effect to a vesting order purporting to have been made under the Consolidated Orders as would interefere with the operation of an administrative act by the United States properly done within her sphere. As to the T. Co. securities, assuming that the bare legal title of the enemy owner had not been completely extinguished at the time the Canadian court vesting order was made, yet that bare legal title, vested under the vesting order in the Canadian Custodian, was subject to be devested by the exercise of the rights which the American Custodian had acquired under his proceedings; the effect of the Treaty was that the rights so acquired became properly exercisable notwithstanding the existence of the vesting order.

APPEAL by the plaintiff (the Honourable the Secretary of State of Canada and Custodian under the provisions of the Treaty of Peace (Germany) Order, 1920) from the judgment of Maclean J., President of the Exchequer Court of Canada (1), holding that on the 10th day of January, 1920, the right, title, property or interest in the securities in question was not vested in an enemy or in the plaintiff but was vested in the defendant, the Alien Property Custodian of the United States of America.

The material facts and the issues in question are sufficiently stated in the judgments now reported, and are indicated in the above headnote. The appeal was dismissed with costs.

W. N. Tilley K.C., A. Geoffrion K.C., and *Thomas Mulvey K.C.* for the appellant.

N. W. Rowell K.C., G. H. Montgomery K.C. and *W. F. Chipman, K.C.* for the respondent the Alien Property Custodian of the United States.

The judgment of Rinfret, Lamont and Smith JJ. was delivered by

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LAMONT J.—These are four appeals from judgments delivered by the President of the Exchequer Court in four cases tried together (1). They all contain conflicting claims to jurisdiction between the Canadian Custodian of Alien Enemy Property and the Alien Property Custodian of the United States of America.

The four cases are very similar although each in some respect differs from the others. They are test cases and they have to do with the seizure in New York by the Alien Property Custodian of certain securities issued by Canadian companies, which securities, at the date of the seizure, were beneficially owned by alien enemies. The facts are not in dispute and, as far as material in the view I take of the rights of the parties, may be stated as follows:—

On May 2, 1916, after the outbreak of the Great War, the Governor General of Canada in Council, acting under the authority of the *War Measures Act, 1914*, put into force the Consolidated Orders respecting Trading with the Enemy, section 6 of which reads:—

> 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.

Securities were defined as including stocks, shares, annuities, bonds, debentures or debenture stock, or other obligations issued by or on behalf of any government, municipality or other authority, or any corporation or company within or without Canada.

Section 28 of the Orders provided that any superior court of record within Canada or any judge thereof may, on the application of the Canadian Custodian, vest in him any real or personal property belonging to or held or managed for or on behalf of an enemy.

On April 6, 1917, the United States entered the war on the same side as Canada and the two countries were thereafter allies. After the United States entered the war, Congress enacted and the President approved of the *Trading with the Enemy Act*. That Act provided that:—

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If the President shall so require, any money or other property owing or belonging to or held for, by, on account of, or on behalf of, or for the benefit of an enemy or ally of enemy not holding a licence granted by the President hereunder, which the President after investigation shall determine is so owing or so belongs or is so held, shall be conveyed, transferred * * * or paid over to the Alien Property Custodian, or the same may be seized by the Alien Property Custodian; * * * (Sec. 7 (c)).

Acting under the authority vested in him the Alien Property Custodian (hereinafter called the United States Custodian) demanded the property represented by the certificates in question, then physically situate in New York, all of which had been issued by Canadian companies existing under Canadian law with their respective head offices in Canada.

The certificates delivered in response to the demand were certain specified,

(1) Common Stock Certificates and Special Investment Note Certificates issued by the Canadian Pacific Railway Company. Both classes of certificates were transferable only on the books of the company, but the company under its general powers maintained a registry in New York and these securities were on that register, where alone they could be transferred.

(2) Bearer Share Warrants issued by the Imperial Oil Company and transferable by delivery without anything further having to be done, either in Canada or the United States, to perfect title.

(3) Certificates for Debenture Stock issued by the City of Montreal. These were transferable only on the books of the city by the registered holder or by attorney duly authorized.

(4) Certificates for Debenture Stock issued by the Toronto Power Company and transferable on the books of the company either in London, England, or in Canada. The stock in question was on the Toronto register.

These certificates were seized, that is demanded and received, between March 27, 1918, and April 27, 1919.

As pointed out by the learned President of the Exchequer Court in his judgment (1), all these securities, except the bearer share warrants, were transferable by assignment in writing in common form either upon the certificate

(1) [1930] Ex. C.R. 75, at 84.

itself or by another separate instrument, and, in practically every case, the registered owner had executed the usual assignment and power of attorney, though in most cases in blank. After the seizure of these certificates the United States Custodian caused the assigned certificates to be presented to the companies issuing them, and had himself or his nominee registered as the owner thereof.

By an order of a superior court in Canada, dated October 14, 1919, the Canadian Custodian had vested in himself the shares of the Toronto Power Company and of the Imperial Oil Company, the certificates for which had been seized by the United States Custodian. By a similar order, dated October 17, 1919, he had likewise vested in himself the shares and notes of the Canadian Pacific Railway Company. These shares and notes at the time the vesting order was made were registered in the books of the company in the name of the nominee of the United States Custodian. No vesting order was obtained for the debenture stock of the City of Montreal.

In the early part of 1926 the Canadian Custodian brought an action against each of the said companies and made the United States Custodian a party defendant. The statement of claim alleged that the securities in question therein were, on the 10th day of January, 1920 (the date of the coming into force of the *Treaty of Versailles*), property belonging to an enemy; that the paper certificates for the securities had been seized, after war had broken out between the United States and Germany, by the "Alien Property Custodian for the United States"; that such seizure was without legal justification; that the securities were, at all material times, property within Canada, and that the plaintiff was entitled to them. The defendant companies in effect submitted their rights to the court.

The United States Custodian in his plea alleged that at the time the securities were seized they were the property in the United States of alien enemies, and that the seizure was in accordance with the law of the United States. He also set up that at the time the Canadian Custodian obtained the court orders vesting the securities in himself they had ceased to be enemy property.

The President of the Exchequer Court, in each case, held that the United States Custodian was entitled to

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the securities the certificates for which he had seized (1). The plaintiff now appeals to this court.

In view of the fact that the United States Custodian was the first to take any action to deprive the enemy nationals of their interest in the securities, it is convenient to inquire, in the first place, what right or interest he secured by his seizure as against the enemy beneficially entitled thereto? The securities stood in the books of the respective companies in the names of persons or corporations not shewn to have been enemies, but it is admitted that, in each case, they were held on behalf of an enemy.

In a statement of fact agreed to by all parties it is stated that, except as regards the question of jurisdiction between the United States and Canada, the formal regularity under United States law of the steps taken by the United States Custodian to obtain title to the securities is not contested by the appellant.

By an executive order made by the President of the United States, under the *Trading with the Enemy Act*, and bearing date February 26, 1918, it is declared that the Alien Property Custodian may make a demand for any money or other property in the United States belonging to, or held for, by or on account of, an enemy not holding a licence under the Act; that such demand, unless expressly qualified or limited, shall be deemed to include every right, title, interest and estate of the enemy in the money or other property so demanded, as well as every power and authority of the enemy thereover; that notice of such demand may be given to any person who, alone or jointly with others, may have the custody or control of, or may be exercising any power or authority over the money or other property, and that when such demand shall be made, and notice thereof given, such "demand and notice shall vest in the Alien Property Custodian all the estate and interest of the enemy." This estate and interest is defined as including not only that which actually existed, but also that which might or would exist if the existing state of war had not occurred.

(1) [1930] Ex. C.R. 75.

The war between Great Britain and Germany was brought to an end by the *Treaty of Versailles*. Art. 297 (*d*) of that treaty reads as follows:—

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 as defined in paragraphs 1 and 3 of the Annex hereto shall be considered as final and binding upon all persons except as regards the reservations laid down in the present Treaty.

By paragraph 1 of the Annex the validity of all vesting orders and of all other orders, directions, decisions or instructions of any court or any department of the Government of any of the High Contracting Parties made or given, in pursuance of war legislation with regard to enemy property, rights and interests, was confirmed, and it was there provided that no question should be raised as to the regularity of a transfer of any property dealt with in pursuance of such order, direction, decision or instruction.

It is true that the United States Government did not directly ratify the *Treaty of Versailles*, but, by the *Treaty of Berlin*, which ended the war between Germany and the United States, Germany gave to the United States, and the United States accepted, all the benefits which the *Treaty of Versailles* gave to the Allied Powers or their nationals. The seizure of the certificates and the agreements which put an end to the war between Germany and the United States, therefore, vested in and confirmed to the United States Custodian, as against the German nationals, not only the possession of the paper certificates, but every property right and interest to which the beneficial owners thereof would have been entitled had a state of war not existed.

For the appellant it was contended that, apart from the confirmation of the Canadian vesting orders by the *Treaty of Versailles*, the seizures of the securities by the United States Custodian, and confirmation thereof by Germany, did not in any way affect the appellant's right to the securities and that for two reasons:

(1) Because the Canadian Consolidated Orders, which were in force prior to the dates on which the seizures were made, "froze," so to speak, in the hands of the German nationals all property rights which they had in the securities and prevented any rights therein passing from them

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either by their own acquiescence or by seizure by one of the Allied Powers, and

(2) Because the paper certificates were not themselves property in the United States, but only the evidence of property situate in Canada.

The first of the above cententions cannot, in my opinion, be supported in so far as it claims that it was either the effect or intention of the Consolidated Orders to prevent an allied power from validly seizing shares of Canadian companies the certificates for which were physically situate in the allied country.

The object of the Consolidated Orders was, broadly speaking, to curtail the commercial resources of the enemy and to prevent unregulated intercourse with him altogether. It was sought to secure these objects by depriving an enemy owner of property in Canada of all beneficial interest therein during the war. It was recognized that under modern economic conditions property rights had come to consist, to a considerable extent, of intangible choses in action, evidenced by debentures, bonds, and share certificates, many of which found their way into countries other than that in which the company was domiciled. When duly assigned in blank these securities were traded on the international exchanges, and passed from one person to another as property. As in the present case the shares might be standing in the books of the companies issuing them in the names of persons who were not, or were not known to be, enemies. In such cases the only mode of ascertaining what shares were enemy held, was for the Government of the country, in which the share certificates were physically situate, to require all persons holding any such certificates to furnish a list thereof. Under these circumstances it cannot, in my opinion, be held that the Consolidated Orders, which were directed solely against the enemy, were intended to prevent the only allied country which could discover what shares were in reality enemy owned, from taking the steps necessary to effectively deprive the enemy of the power to dispose of them. By his action the United States Custodian brought about the very state of affairs which the Consolidated Orders were intended to secure.

Again, that which is prohibited by the Consolidated Orders is the transfer of enemy property. A "transfer" within the meaning of this prohibition, in my opinion, implies an act plus an intention to pass the property, something done with acquiescence of the enemy owner, or for his benefit. A seizure of enemy property by the United States Custodian against the enemy's will and contrary to his interests, does not, as I read the Orders, come within the mischief which it was the purpose of the Orders to prevent. A reference to the definition of "securities" shews that the framers of the Orders considered that shares in a company or corporation *without Canada* would, if the certificates therefor were in Canada, be considered enemy property here.

The next question is, were the certificates seized property rights or interests in the United States? It has been said that the law of the place where the certificates actually are, determines who shall be the owner thereof, while the law of the company's domicile determines what interest in the company's stock the possession of these certificates confers upon a holder who has lawfully acquired them. *Colonial Bank* v. *Cady* (1). Under United States law the United States Custodian became, by his seizure, the lawful owner of the certificates and of the entire beneficial interest of the enemy in the shares they represented, and he became such owner before the Canadian Custodian had applied to the court for an order vesting the securities in himself. It is pertinent, therefore, to inquire if, on October 14 and October 17, 1919, when the Canadian Custodian applied to the courts for vesting orders, there was any property, right or interest in an enemy in respect of the securities in question. Under section 28 of the Consolidated Orders, all the court was authorized to vest was the property real or personal (including legal and equitable rights arising therefrom) "belonging to or held or managed for or on behalf of an enemy." If section 28 stood alone it would seem reasonably clear that when the vesting orders were obtained there was no property right or interest belonging to an enemy which could be vested in the Canadian Cus-

(1) (1890) 15 App. Cas. 267.

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todian. With section 28, however, must be read section 33 of the same Orders:—

33. Where a vesting order has been made under these orders and regulations as respects any property belonging to or held or managed for or on behalf of a person who appeared to the Court making the order to be an enemy or enemy subject, the order shall not nor shall any proceedings thereunder or in consequence thereof be invalidated or affected by reason only of such person having prior to the date of the order, died or ceased to be an enemy or enemy subject or subsequently dying or ceasing to be an enemy or enemy subject, or by reason of its being subsequently ascertained that he was not an enemy or an enemy subject as the case may be.

This section envisages the probability of vesting orders being made covering property belonging to a person not in fact an enemy although appearing to the court making the order to be so, and provides that such an order shall be valid and the property vested in the Canadian Custodian, notwithstanding that it was not in fact enemy property at the time of the vesting.

Then section 36 reads:—

36 (1). The Custodian shall, subject to all other provisions of these orders and regulations, hold any money paid to and any property vested in him under authority of any of these orders and regulations until the termination of the present war, and shall thereafter deal with the same as the Governor General in Council may by Order in Council direct.

* * *

In view of these provisions the intention, in my opinion, was that the title of all property covered by the vesting orders should remain in the Canadian Custodian until after the close of the war when the rights of non-enemy owners would be provided for and justice done by an Order in Council. That Order in Council was passed and is known as the Treaty of Peace (Germany) Order, 1920. Section 33 of that Order is as follows:

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 interests vested in him by this Order.

and the material part of section 34 reads:—

34. All vesting orders * * * 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, * * * 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.

By this section the vesting orders of October 14 and October 17, 1919, which covered all the securities in question (except the debenture stock of the City of Montreal) were validated and confirmed and made binding upon all persons, subject to section 41.

Section 41 (2) and (3) reads as follows:—

(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 * * * 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 * * *.

(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 * * *.

It does not seem to me to be material whether we consider all the securities vested in the appellant by the orders of the court as being property heretofore belonging to enemies and in the possession of the Custodian at the date the Treaty of Peace (Germany) Order came into force (April 14, 1920), under section 33, or as coming within the vesting orders mentioned in section 34. If the former they come expressly within the language of section 41; if the latter the vesting was confirmed subject to section 41. In either case section 41 (2) and (3) applies.

The position taken by the Canadian authorities in enacting section 41 appears to me to be this: They say: "The war is now over, there are certain properties vested in our Custodian by orders of the court, which, it is claimed, were not enemy properties in Canada either when the vesting orders were made or when the Treaty of Peace (Germany) Order, 1920, came into force, we will, therefore, leave it to the Exchequer Court to say whether or not such is the case. If it is, our Custodian will relinquish all his claims to these properties." Leaving the determination of these disputes to the Exchequer Court necessarily implies that the court would determine the rights of the parties in cases in which vesting orders were made as of the date of the vesting and in cases in which no vesting order was made, as of the 14th of April, 1920.

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As section 41 was enacted for the purpose of doing full justice to any person, not an enemy, whose property had been vested in the appellant, the intention, in my opinion, was that the rights of the contending parties were to be determined as though the vesting orders had not been made and, in light of those considerations which should, and undoubtedly would, have guided the superior courts in making the vesting orders had all the facts relevant to the ownership of the securities, which are now before us, been before those courts. There would be no object in referring the question to the Exchequer Court if that court was bound to maintain the vesting orders.

What were the rights of the parties when the applications for the vesting orders were made? Would the securities have been recognized by Canadian law as property rights or interests in the United States if the facts had all been before the Canadian courts? In so far as the Canadian Pacific Railway shares and notes are concerned there can, in my opinion, be no doubt. At the time of the application to vest these shares and notes in the Canadian Custodian the nominee of the United States Custodian had already been registered as the owner thereof in the books of the company in the United States. They were, therefore, property in the United States. The share warrants of the Imperial Oil Company, being payable to bearer, were property wherever they were physically situate, for they could be effectively dealt with there. *Brassard* v. *Smith* (1). The debenture stocks of the Toronto Power Company and of the City of Montreal stand in a somewhat different position, as the transfers of these stocks were required to be registered in Canada. In my opinion, however, we do not in this appeal have to resort to rules more or less artificial in character which have been adopted to determine the local situation to be attributed to the various assets of a deceased person, in order to determine who would be entitled under Canadian law to be registered as owner of the securities. I think the question may be determined as to all the securities on the ground that, both by Canadian law and the law of the United States, share certificates indorsed in blank by the registered owner are,

(1) [1925] A.C. 371.

in the hands of a lawful holder, recognized as "property, rights, or interests" which entitles the possessor to be registered as owner. In *Colonial Bank* v. *Cady* (1), Lord Watson used this language:—

> When the indorsed transfer has been duly executed by the registered owner of the shares, the name of the transferee being left blank, delivery of the certificate in that condition by him, or by his authority, transmits his title to the shares both legal and equitable. The person to whom it is delivered can effectually transfer his interest by handing his certificate to another, and the document may thus pass from hand to hand until it comes into the possession of a holder who thinks fit to insert his own name as transferee, and to present the document to the company for the purpose of having his name entered in the register of shareholders and obtaining a new certificate in his own favour.

His Lordship goes on to point out that "delivery" does not invest him with the ownership of the shares in the sense that no further act is required in order to perfect his right, and farther on he says:—

> It would, therefore, be more accurate to say that such delivery passes, not the property of the shares, but a title, legal and equitable, which will enable the holder to vest himself with the shares without risk of his right being defeated by any other person deriving title from the registered owner.

The demand of the United States Custodian for the certificates, and their delivery to him by the agent or trustee of the enemy, although in pursuance of a compelling statute, was, in my opinion, "delivery" within the meaning of Lord Watson's judgment. *Disconto-Gesellschaft* v. *U.S. Steel Corporation* (2), affirmed by the Supreme Court of the United States (3).

In this latter case the Public Trustee as English Custodian had seized in England certificates indorsed in blank representing certain shares in the United States Steel Co., a New Jersey corporation, which were beneficially owned by German companies. After the close of the war these enemy companies brought an action in the United States, against the U.S. Steel Co. and the Public Trustee, claiming that the seizure of certificates in England did not constitute a seizure of the shares of the New Jersey corporation represented thereby. It was held that the seizure in England transferred the title to the certificates to the Public Trustee by English law, and, by the law of New Jersey and the law of England the owner of such certificates may

(1) (1890) 15 App. Cas. 267, at 277. (2) 300 Fed. 751.
(3) (1925) 267 U.S.R. 22.

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write a name in the blank indorsement and thus entitle the nominee to become registered as owner of the shares; the Trustee was, therefore, entitled to the securities. In giving the judgment of the Supreme Court of the United States, Mr. Justice Holmes said:—

> Therefore New Jersey having authorized this corporation like others to issue certificates that so far represent the stock that ordinarily at least no one can get the benefits of ownership except through and by means of the paper, it recognizes as owner anyone to whom the person declared by the paper to be owner has transferred it by the indorsement provided for, wherever it takes place. It allows an indorsement in blank, and by its law as well as by the law of England an indorsement in blank authorizes anyone who is the lawful owner of the property to write in a name, and thereby entitle the person so named to demand registration as owner in his turn upon the corporation's books.

But for the existence of war conditions the beneficial owners of the shares could have demanded the certificates representing the shares from their trustees in the United States who were the registered owners and, if the trustees failed to deliver them duly endorsed, to the beneficial owners, these latter could have obtained from the American courts an order declaring the registered owners to be trustees for them and directing that the certificates be delivered up. With such a declaratory order and the certificates the beneficial owners would, on an application to Canadian courts, have been entitled to an order directing the respective companies issuing the shares to register them in the name of the beneficial owners. This right to compel title passed to the United States Custodian on the seizure of the certificates. Even if this right could not be termed property in its strictest sense, it is, in my opinion, a right or interest in property which, under both Canadian and United States war legislation, was intended to be dealt with as property of which the beneficial enemy owner was to be deprived.

The United States Custodian having vested in him all the interest of the enemy owner in the securities in question and having in his possession the certificates representing these securities duly indorsed, was entitled, under both Canadian and United States law, to have himself or his nominee registered as the owner thereof, provided there was no assertion by Canada of her paramount legislative power over the companies which had issued the certificates. Canada, in my opinion, did assert her paramount power

when the shares were vested in the appellant by the courts under the Consolidated Orders but, as one would expect from a civilized country, she relinquishes her claim to all vested property which was not enemy property at the time of the vesting. As all the securities in question had ceased to be enemy property when vested in the appellant, the Exchequer Court, in my opinion, was right in awarding them to the United States Custodian. I would, therefore, dismiss the appeal with costs.

The judgment of Duff and Newcombe JJ. was delivered by

DUFF J.—These appeals severally concern: (1) shares and special note certificates of the Canadian Pacific Railway Company, (2) bearer share warrants of the Imperial Oil Limited, (3) debenture stock of the Toronto Power Company Limited, and (4) consolidated stock of the City of Montreal; to which the appellant claims to be entitled as Canadian Custodian of Alien Property, as against the respondent, the Alien Property Custodian for the United States of America.

The facts out of which the controversy arises can be stated very briefly. The Canadian Pacific Railway Company's securities were, at the material time, represented by certificates in the name, as to the shares, of one Lowitz, and as to the note certificates, in the name of Lowitz and others. Transfers in blank, executed by the holders named in the certificates, were endorsed upon them. The certificates were in the possession of Speyer & Company in New York. The registered holders of the shares, as well as Speyer and Company, who were the depositaries of the certificates, held them in all respects on account of the Deutsche Bank, a German national. These shares and note certificates were registered in New York in the company's branch registry office there, and were transferable there and there only. The legal title to the security was in each case in the registered owner, but the securities were regularly dealt with on the recognized stock exchanges, by means of the certificates which, with the transfers endorsed were transferable by delivery; the owner of such a certificate, so endorsed, being recognized by the company as entitled to insert a name in the

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blank transfer, and to have the person so named registered as owner. On the 28th March, 1918, the respondent, the American Custodian, acting under powers conferred upon him by Acts of Congress, determined that these securities were enemy property, and required, accordingly, delivery of the certificates to his nominee, and subsequently caused the shares and certificates to be registered in the proper registry in the name of his nominee. Subsequently, on the 17th of October, 1919, a vesting order purporting to be made under Order 28 of the Canadian Consolidated Orders of 1916, respecting trading with the enemy, was obtained by the appellant, vesting the shares and note certificates in him.

The bearer share warrants of the Imperial Oil Company are warrants declaring that the bearer is entitled to a specified number of shares in the capital stock of the Imperial Oil Company.

The Supplementary Letters Patent of the Company provide (paragraph 7): "The bearer of a share warrant shall be deemed to be a shareholder of the Company for all purposes and to the full extent, subject always to the provisions of the Companies Act and of these Supplementary Letters Patent in that behalf."

On the 14th of September, 1918, the warrants were in the custody of the Guarantee Trust Company in New York, who held them for account of one Heideman, an alien enemy; and on that date they were, pursuant to the demand of the American Custodian, delivered to his nominee as enemy property. Subsequently, on the 14th of October, 1919, the appellant obtained a vesting order, vesting these warrants in him as Custodian.

The consolidated debenture stock of the Toronto Power Company was registered in the name of one Wallach, who held it on behalf of the Verdeutch Bank, an enemy alien. The stock was represented by certificates with blank transfers endorsed executed by Wallach which, on the 13th of May, 1918, were in possession of Kuhn, Loeb & Company, in New York; on that date these certificates were, on demand of the American Custodian, delivered into the possession of his nominee as enemy property. These certificates entitled the registered holder of them to participate in the benefit of certain sums (principal and interest) pay-

able to the British Empire Trust Company of London, England, under a certain trust deed. The registry was in Toronto, and the legal title to the stock was vested in the person there registered as owner, and was transferable on the books there, but the certificates were dealt with on recognized stock exchanges, and passed, with the endorsed transfer executed in blank, by delivery; and the company recognized such transferees of certificates as entitled to be registered as the legal owners of the stock.

The consolidated stock of the City of Montreal was registered in the name of the Hartford Trust Company, a trustee for the South German Reinsurance Company, the last mentioned company being an alien enemy. On the 26th day of April, 1919, the American Custodian demanded the certificates, and on a later date the stock was transferred into the name of his nominee. In this case no vesting order was obtained. A condition governing the transfer of this stock is expressed in these words:

> This stock can be transferred on the books of the City only by the registered holder or by attorney duly constituted, and the capital thereof will be paid to whoever is the registered holder at its maturity, but this certificate shall not constitute the title to the stock, which title shall consist exclusively in registry in the Debenture Stock Register of the City.

The learned President of the Exchequer Court, before whom the action was tried, dismissed the claim of the appellant on the ground (to state it very summarily) that the respondent, the American Custodian, had, by the proceedings outlined above, acquired a title to the securities in dispute (1).

The judgment is attacked in two ways: first, it is said that the Consolidated Orders of 1916 made absolutely inoperative any transfer of any security issued or managed by any Canadian "company or municipal authority, or other body" after the publication of these Orders, and that consequently, the American Custodian could not by the proceedings mentioned acquire the securities in question. Second, it is said that these securities were, within the meaning of s. 33 of the Treaty of Peace Order, 1920, "property" or "rights" or "interests," "in Canada" which, prior to the date of the Order, 14th April, 1920, belonged to enemies, and, at the date of the Order, were in "pos-

(1) [1930] Ex. C.R. 75.

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session or control of the Canadian Custodian," and that by force of s. 33, they became "vested in and subject to the control of the Custodian"; and furthermore, that, by force of s. 34 of the same Order, the vesting orders which had been obtained in respect of three of the groups of securities, as above explained, are, in point of law, "final and binding upon all persons," and that the designation "all persons," includes the respondent, the American Custodian. These contentions can most conveniently be considered in the order in which I have stated them.

And first, of the effect of the Consolidated Orders of 1916. There can be no doubt that Order 6 of the Consolidated Orders, which deals specifically with securities of the kind we are concerned with, is sweeping in its scope, and is absolute in its terms. It applies to securities issued by all Canadian companies, municipal and other corporations and bodies, and, read literally, it nullifies any unlicensed transfer of any such security "by or on behalf of an enemy" made after the publication of the Consolidated Orders, and prohibits all such companies, corporations and other bodies taking notice of any such transfer. No exception is made in favour of securities transferable by delivery or in favour of persons acquiring such securities for value, without notice of the enemy interest. The point in controversy is whether or not this Order, as well as other Orders dealing with other phases of trading with the enemy, had the effect of nullifying, in Canada, proceedings taken by allied and associated powers for the purpose of reducing into possession securities of the character here in question. If the contention of the appellant is right, then, quite independently of the intervention of the appellant, it was the duty of the companies and corporations concerned to refuse to recognize the application of the alien custodian of the United States to be registered as the holder of the securities, of which he had taken possession. Not only was it the duty of the company or corporation so to refuse, but, by taking notice of and acceding to such an application, the company or corporation which did so exposed itself to the penalties of Orders 45 and 46.

The learned President of the Exchequer Court has decided this point adversely to the appellant upon his con-

struction of the Consolidated Orders as well as upon the authority of the decision of the Supreme Court of the United States, in *Disconto-Gesellschaft* v. *U. S. Steel Corp.* (1). The issues there concerned the right of the Public Trustee of the United Kingdom, as Custodian of Alien Property, to be registered as the owner of certain shares of the United States Steel Company, which were represented by certificates in the name of a broker domiciled in England with a transfer endorsed executed in blank by the broker, and held by the appellants, a German corporation and an alien enemy; which certificates, together with the right of the appellant to the shares, had been vested in the Public Trustee by an order of the Board of Trade. As regards certificates of the character described, the court said:

> Therefore New Jersey having authorized this corporation like others to issue certificates that so far represent the stock that ordinarily at least no one can get the benefits of ownership except through and by means of the paper, it recognizes as owner any one to whom the person declared by the paper to be owner has transferred by the endorsement provided for, wherever it takes place. It allows an endorsement in blank, and by its law as well as by the law of England an endorsement in blank authorizes anyone who is the lawful owner of the paper to write in a name, and thereby entitle the person so named to demand registration as owner in his turn upon the corporation's books.

This statement applies *mutatis mutandis* to the securities in question here, with the exception of the bearer share warrants, the ownership to which passes by delivery, without registration.

I must here advert to an argument advanced regarding the City of Montreal consolidated stock and the Toronto Power Company stock. There can be no doubt that in both these cases the legal title to the stock could be transferred only upon the books of the corporation; but in that respect the securities adverted to do not differ from the securities under discussion in the judgment just quoted, or from those which are the subject of Lord Watson's observation in *Colonial Bank* v. *Cady* (2):

> The original transferor, who is entered as owner in the certificate and register, continues to be the only shareholder recognized by the Company as entitled to vote and draw dividends in respect of the shares.

The important point is that, in the case of the securities of the City of Montreal and of the Toronto Power Com-

(1) (1925) 267 U.S. R. 22. (2) (1890) 15 App. Cas. 267, at 277.

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pany as in other cases (including the case of the Canadian Pacific Railway Company), the corporation, having presented to it a certificate bearing the name of the registered owner, together with a transfer executed by him, will register, and is bound by law to register as owner the transferee named in the transfer, notwithstanding the fact that the transfer may have been originally executed in blank, and may have passed through numerous hands before the name of the transferee was inserted. The law of this country as applicable to the corporations with which we are concerned, recognizes that shares, and particularly those which are regularly the subjects of trading on stock exchanges, are sold and bought by the delivery of a certificate accompanied by a transfer executed in blank, and that the market price of the shares is paid upon delivery, which is treated as the execution of the sale, because it confers upon the person receiving the document a title, as Lord Watson says, in the case already cited (1), "legal and equitable, which will enable the holder to vest himself with the shares without risk of his right being defeated by any other person deriving title from the registered owner."

There is no doubt, I repeat, that the terms of Order 6 are quite comprehensive enough to reach any such transfer of the securities of a Canadian corporation made by or on behalf of an alien enemy, and, if effect be given to the *ex facie* sense of its terms, to "strike it with sterility." But the Supreme Court of the United States, in the *Disconto* case (2), took the view that scrip and certificates, which, in the degree manifested by the practice described, stand for the securities which they evidence, may be subject, not only as pieces of paper, but as representing those securities, to appropriation in time of war by a sovereign power exercising its right to appropriate enemy property, and that such appropriation will invest such sovereign power with the title legal and equitable against the corporation which has issued the security, which in ordinary times would have passed to a transferee by delivery. That is the view which the Supreme Court of the United States took in the *Disconto* case (2) of an appropriation

(1) *Colonial Bank* v. *Cady*, (1890) 15 App. Cas. 267, at 277-278.
(2) (1925) 267 U.S.R. 22.

by the Public Trustee in England of certificates of shares in an American company. The rule was applied in favour of the Public Trustee, that the law of the place where the certificate was must determine whether or not the transaction had the effect of investing the Public Trustee with the rights of a transferee of the shares, including the right to demand registration.

The question we have to consider is whether the Consolidated Orders, as the appellant contends, displace this principle, or rather whether, in the system set up by the Consolidated Orders, there is room for the operation of this principle. We must not overlook the fact, I think, that this method of dealing with enemy securities, by seizing, that is to say, the document of title, was practised freely, and, we may assume, wherever possible. Obviously, a security which can be transferred by delivery of a document in such a way as to leave no trace of the hands through which it passes, can be most effectively immobilized by taking possession of the document. It was, no doubt, within the power of Canada, and, it may be assumed that such is the effect of Order 6, to nullify transfers so effected of the securities of Canadian companies at whatever undeserved injury to innocent and friendly persons, by prohibiting the recognition by Canadian companies of any claim originating or depending upon a transfer by or on behalf of an alien enemy to a transferee however innocent, after the publication of the Consolidated Orders. But this would offer no sure guarantee against the alien enemy, whose interest was concealed under the name of an agent or trustee, realizing upon his security to the disadvantage of the subjects of the British Empire or of friendly powers, and the more direct procedure was plainly the preferable one. The Consolidated Orders themselves recognize it, and it was, no doubt, but into practice whenever the opportunity occurred in the countries engaged in the war.

The primary object of these Orders, as sufficiently appears from them, was to cripple the enemy, by depriving him of the benefit of property which could be taken possession of. Primarily that was the purpose of these Orders, and I do not find in them any evidence of an intent to repudiate proceedings taken by other governments associated with us in

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the prosecution of the war to take possession of the class of property in which German investments would most likely be found, namely, corporation securities. The argument as put on behalf of the appellant would lead to the rather singular result that a proceeding by the Public Trustee in England, which would be recognized in the United States as effective to entitle him to be registered as a shareholder in a New Jersey company, would be ineffective in the case of a Canadian company. It is true that the provisions of the Consolidated Orders as to the licensing of particular transactions are not entirely free from obscurity, but the exception in Order 6, "unless upon licence duly granted exempting the particular transaction from the provisions of this section," could hardly apply to the statutory provisions under which the Public Trustee acted in the United Kingdom; and it seems clear that this exception does not contemplate something done under public authority in any other part of the British Empire. Indeed, it seems beyond question that the very words of Order 6 themselves "by or on behalf of an enemy," exclude such compulsory proceedings from the scope of the Order.

My conclusion is that compulsory proceedings by the public authorities of a country associated with Canada in the prosecution of the war are not within the contemplation of Orders 2, 3, 4 and 6. It follows from this, that Order 28, which authorizes only the vesting of property "belonging to or held or managed for or on behalf of an enemy," had no application to any of the properties in question here. The validating Orders, 32 and 33, do not appear to affect the matter. Indeed, it is expressly stated in the supplementary memorandum filed on behalf of the appellant that, except in cases under Order 17, which does not concern us, "the evident purpose of the Consolidated Orders and the vesting orders issued under authority thereof was to deal only with enemy interest in property," and again, "the vesting order as such, aside from identifying the property interest involved, had nothing to do with fixing the status of the property as enemy owned, but was merely an administrative measure to be used to reduce such property to possession when deemed 'expedient for the purposes of these orders and regulations'". The memorandum, I

think, in this sentence admirably states the true view of the vesting orders.

I now come to the consideration of the second ground of attack, which has its basis in sections 33 and 34 of the Treaty of Peace Order of April, 1920. In the view I take of the considerations governing this phase of the controversy, it is not necessary to analyze strictly the language of these sections. It may, however, conduce to lucidity to reproduce them textually in so far as they are pertinent. The material parts of them are as follows:

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. (P.C. 267, 1924).

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.

Order 33, in the view advanced by the appellant, applies to the groups of securities in controversy for two reasons. First, they were at the critical date, the 10th of January, 1920, property in Canada, and had always been property in Canada. In each case, it is said, every interest in the unit of intangible property described as a share or deben-

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ture stock, had its situs where the head office of the corporation was, which must be regarded as the centre of the mass of its assets, and consequently, no order made under the authority of the United States, and no proceeding taken by the respondent, the American Custodian, could affect prejudicially to the government of this country, in other words, prejudicially to the appellant, the enemy character or status of any such interest. Such being the case, it follows, the argument proceeds, that the property became by force of s. 33 vested in, and subject to the control of, the Custodian. That argument, presented with a great deal of ability by counsel on behalf of the appellant, is answered mainly by invoking the doctrine above indicated as the doctrine in the *Disconto* case (1), and nothing, as far as I can see, can usefully be added to what I have said on that point.

A supplementary argument is put forward in relation to the City of Montreal securities, as to which counsel insist that, owing to the terms of conditions attached to the certificates quoted above, the property in the Montreal consolidated stock must be held to have its seat in Montreal. This argument I have really dealt with, but there is perhaps an additional point which ought to be mentioned. This debenture stock stood in the name of the Hartford Trust Company, an American corporation, as trustee for the German company. Now it is quite clear that the trust would not be recognized by the City of Montreal, and it is, I think, also clear that as a trust it would not be recognized by the law of Quebec. The Hartford company might under that law be under a personal obligation, and possibly stand in the relation of mandatary to the German company, but the German company would possess according to the law of Quebec no *jus in re*. On the other hand, the Hartford company in its own domicile, would be under the obligations of a trustee, and there is much, I think, to be said for the view that the seat of the equity, as well as of the personal obligation, would be at the Hartford company's domicile. If that is so, then the United States was the proper sovereignty to appropriate the enemy rights.

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

On the question of the situs of two other groups of securities, those of the Canadian Pacific Railway Company and of the Imperial Oil Limited, special points are made which are not without their weight. As to the Imperial Oil Limited, the provision quoted from the Supplementary Letters Patent makes it perfectly clear that the benefit of the obligation passes with the delivery of the instrument. The analogy of negotiable instruments, strictly so called, is pertinent, and indeed, seems to be almost, if not quite, complete. Such instruments have their situs where they are physically situated. There also is the situs of the obligation.

As to the Canadian Pacific Railway shares, it is pointed out that by the law of the province of Quebec, which is the law of the head office of the Canadian Pacific Railway Company, these shares, for the purpose of determining the incidence of succession duty, have their situs at the branch office at which they are registered and can only be validly transferred; *Brassard* v. *Smith* (1). The litigation there related to shares in a bank, but there is no pertinent distinction. True it is, that the considerations determining the situs of an intangible item of property, for one purpose, may not be conclusive where it may be necessary to ascribe to it a constructive situs in some other connection, or for some other purpose, but in the judgment just referred to, Lord Dunedin proceeded upon the view that for the purposes of succession duty and probate, the determining factor must be the answer to the question, where can the subjects be effectively dealt with? In addition to everything that has been said as to the importance for the purposes of war measures of getting at the document, which in ignorance of its enemy character could itself be circulated as a valuable asset, there is the circumstance that, in the case of the Canadian Pacific Railway Company's shares, the place for perfecting the legal title and thereby completing the disposition was New York. This also is not without its application to the Imperial Oil securities. The place of effective disposition was the place where the warrant was.

(1) [1925] A.C. 371.

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The appellant, however, in this branch of his argument does not rest entirely upon this. As regards three of the groups of securities, namely, those for which vesting orders were obtained by him, he invokes s. 34 and affirms that under that section the vesting orders were valid and binding on all persons, which he says includes the respondent, the American Custodian, and these groups of securities, he says, therefore, were under his control by virtue of the vesting orders, and since they fall within the category of "property, rights and interests in Canada * * * heretofore belonging to enemies," they became by force of s. 33 vested in him subject to his control. The argument is that, recognizing to the fullest extent the doctrine of the *Disconto* case (1), first, legislative authority over all these securities rested in Canada by virtue of the fact that the corporations were here, and that this fact in itself is sufficient to establish the existence of an interest having a situs here; then secondly, or rather, perhaps, in the alternative, it is said that since in every case except in the case of the Canadian Pacific Railway Company's shares, the legal title to the shares could only be transferred in Canada, there was in respect of these securities, an interest having a constructive situs in Canada, prior to the passing of the Treaty of Peace Order, over which the appellant had acquired control by virtue of the vesting orders, the validity of which, by reason of s. 34, could not be impugned.

To all this, the answer, I think, rests upon broad considerations. The Treaty of Peace Order was passed pursuant to the *Treaties of Peace Act, 1919,* by which it was provided that the Governor in Council might make such Orders in Council as might appear to him to be necessary to carry out the Treaty and for giving effect to any of the provisions of the Treaty. That is the purpose of the Treaty of Peace Order with which we are concerned. By the Treaty, it was provided that all property rights and interests belonging to German nationals at the date of the coming into force of the Treaty might be detained by the allied and associated powers within their territory. And it was also provided that, as between Germany and German nationals and the governments of allied and associ-

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

ated powers, all vesting orders and other administrative acts by the several powers dealing with the property of German nationals should be ratified and confirmed. Order 34 is obviously intended to give effect in Canada to this ratifying provision. Indeed, the Governor in Council under the statute had no authority to go beyond the Treaty. The Orders in Council authorized were Orders in Council framed for the purpose of carrying into effect the provisions of the Treaty. The scope of ss. 33 and 34 must be limited by the scope of that purpose. The Treaty, while ratifying the administrative orders of Canada acting within her proper sphere, also contemplated ratification of the administrative orders of the United States acting within her proper sphere. S. 34 therefore cannot be read as giving such an effect to a vesting order purporting to have been made under the Consolidated Orders as would interfere with the operation of an administrative act by the United States properly done within her sphere. The function of the section is not to determine the respective spheres of Canada and the United States as between themselves. This follows from a consideration of the genesis and purpose of the Order. The language of the Order also comports with this view. The words of s. 34 are not the words one would expect to find in an Order in Council dealing with competing claims between Canada and a sovereign power which had been associated with us in waging the war. The phrase "all persons" in s. 34 does not include the United States of America as a nation.

The controversy, therefore, must be determined by reference to the principles indicated above in the consideration of the Consolidated Orders. In none of the groups of securities, it follows, was there anything on which a vesting order could take effect except in the case of the securities of the Toronto Power Company. There it may be assumed, for the purpose of the argument, that the legal title, that is to say, the bare legal title, of the enemy owner, had not been completely extinguished at the time the Canadian vesting order was made, but the bare legal title, vested under the vesting order in the Canadian Custodian, was subject to be devested by the exercise of the rights which the American Custodian had acquired under his

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proceedings. The effect of the Treaty would appear to be that the right so acquired became properly exercisable notwithstanding the existence of the Canadian vesting order. The Treaty, it is to be observed, being a Treaty of Peace, had the effect of law quite independently of legislation.

One or two points have been made on behalf of the appellant, which require separate notice.

It is said that the Orders must be construed in such a way as to apply to transactions in neutral countries in the same manner as to transactions in the countries of the allied and associated powers. The point has really no significance here, because the real issue now before us is whether or not a proceeding by which the government of an allied or associated power acquires an enemy property is, for the purpose of the Consolidated Orders or the Treaty of Peace Order, to be regarded as in the same category as a voluntary transaction by an alien enemy for his own benefit.

The compulsory proceedings of the American Custodian which are in question could in purpose and substance have no proper analogue in a neutral country.

Then, an important argument is advanced to the effect that, allowing full play to the principle of the *Disconto* case (1), in cases where the Canadian Custodian has not intervened, the doctrine of that decision stops short at that point, and does not apply here, because the contest is one between the Canadian Custodian and the American Custodian. The difficulty confronting the appellant under this head is this: The core of his argument, as his supplementary memorandum demonstrates, consists in denying the applicability of the principle of the *Disconto* case (1) to public proceedings in the United States or in other allied countries in respect of enemy owned securities of Canadian companies. If he is wrong in this, his argument necessarily fails, and in truth, the appellant does not represent the "paramount power" of Canada, to quote the phrase of the *Disconto* case (1), except in so far as the Consolidated Orders and the Peace Treaty Order permit him to do so. The doctrine of that case gives legal force to a practice necessary for the effectual immobilization of enemy securities of the character here in question, and,

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

for the reasons already given, the Orders do not contemplate a repudiation of that doctrine.

For these reasons, the appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitor for the appellant: *Aimé Geoffrion.*

Solicitors for the respondent, the Alien Property Custodian for the United States: *Brown, Montgomery & McMichael.*

Solicitor for the respondent, Canadian Pacific Railway Company: *Rodolphe Paradis.*

Solicitors for the respondent, Imperial Oil, Limited: *Osler, Hoskin & Harcourt.*

Solicitor for the respondent, Toronto Power Company, Limited: *I. B. Lucas.*

Solicitors for the respondent, the City of Montreal: *Damphousse, Butler & Saint Pierre.*