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BETWEEN:

MARY BRAUN, ADMINISTRATRIX OF THE ESTATE OF JACOB G. BRAUN ..... } CLAIMANT,

AND

THE CUSTODIAN ..... RESPONDENT.

Enemy property—Claim against Custodian of enemy property—Purpose and effect of Consolidated Orders Respecting Trading with the Enemy, 1916—Orders 6 (1) and 28—Situs of company shares for purpose of determining dispute as to ownership—Treaty of Peace—The Treaty of Peace (Germany) Order, 1920, Sections 33, 34 and 41.

In October, 1919, Jacob G. Braun, a naturalized citizen of the United States, purchased in Cologne, Germany, share certificates for 470 shares of the common stock of the Canadian Pacific Railway Company. The share certificates stood in the names of alien enemies and were bought on the Berlin Stock Exchange through a German banking house. The shares were on the New York register of the Company and transfers were registrable only in New York. Share certificates had transfers on the back endorsed in blank by the registered owners. On April 23, 1919, the shares had been made the subject of a vesting order under the Consolidated Orders Respecting Trading with the Enemy, 1916. In November, 1919, Braun presented the certificates for registration in his own name at the New York office of the Company. Registration was refused on the ground that the shares had been vested in the Canadian Custodian by the Order of April 23, 1919. Share certificates were at all relevant times outside of Canada. The claimant as administratrix of the estate of Jacob G. Braun brought action for a declaration of ownership of the shares with the written consent of the Custodian of Enemy Property given under Section 41 (2) of the Treaty of Peace (Germany) Order, 1920.

Held: That Order 6 (1) of the Consolidated Orders Respecting Trading with the Enemy, 1916, had the effect of nullifying all transfers made, after the publication of the Orders, by or on behalf of an enemy of any securities issued by or on behalf of any government, municipality, or other authority or any corporation or company subject to the legislative authority of Canada, no matter where or to whom the transfer was made or where the security had been issued or where the certificate representing it was physically situate and of preventing the transferee from acquiring any rights or remedies in respect of any such sceurities. *Arpad Spitz* v. *Secretary of State of Canada* (1939) Ex.C.R. 162 followed.

2. That the situs of shares of a company for the purpose of determining a dispute as to their ownership is in the territory of incorporation of the company, for that is where the court has jurisdiction over the company in accordance with the law of its domicile and power to order a rectification of its register, where such rectification may be necessary, and to enforce such order by a personal decree against it. It is at such place that the shares can be effectively dealt with by

the court. *Jellenik* v. *Huron Copper Mining Co.*, (1899) 177 U.S. 1, followed. *Disconto-Gesellschaft* v. *U.S. Steel Co.*, (1925) 267 U.S. 22, and *Secretary of State of Canada and Custodian* v. *Alien Property Custodian for United States* (1931) S.C.R. 169 discussed. *Rex* v. *Williams* (1942) A.C. 541 discussed and distinguished.

3. That Canada has complete legislative authority over the companies of its incorporation and can confer jurisdiction upon Canadian courts to deal with the securities issued by them, wherever the certificates representing such securities may be. The shares in dispute were therefore subject to the jurisdiction of the Court when it made the vesting order of April 23, 1919, were effectively covered by it, and were made the property of Canada and vested in the respondent under The Treaty of Peace (Germany), Order, 1920.

ACTION by the claimant for a declaration as to the ownership of 470 shares of the common stock of the Canadian Pacific Railway Company, represented by certificates purchased in Cologne, Germany, in 1919.

The action was tried before the Honourable Mr. Justice Thorson, President of the Court, at Ottawa.

D. L. McCarthy, K.C., and *W. R. Wadsworth, K.C.*, for claimant.

O. M. Biggar, K.C., and *Christopher Robinson* for respondent.

The facts and questions of law raised are stated in the reasons for judgment.

THE PRESIDENT now (March 17, 1944) delivered the following judgment:

The claimant proceeds in this Court with the written consent of the Custodian of Enemy Property, given under section 41 (2) of The Treaty of Peace (Germany) Order, 1920, for a declaration as to the ownership of 470 shares of the common stock of the Canadian Pacific Railway Company, represented by certificates which the late Jacob G. Braun purchased in Cologne, Germany, on October 6, 10 and 17, 1919.

The facts which were placed before the Court in the form of a stated case are not in dispute. The late Jacob G. Braun was until his death a United States citizen, having become naturalized as such in 1886, and was domiciled in Chicago, Illinois, where he carried on an iron and steel business. He had business connections with manu-

1944

MARY BRAUN v. THE CUSTODIAN.

Thorson J.

facturers and others in Cologne, Germany, from whom he obtained supplies, and was in the habit of visiting that city about once a year.

The Government of the United States having granted its citizens a general licence to trade with the enemy, subject to certain exceptions, Braun went to Germany on business on September 5, 1919, and while in Cologne purchased the certificates for the shares in dispute, as well as others, on October 6, 10 and 17, 1919, on the Berlin Exchange through a German banking house. He received 48 share certificates, 4 standing in the name of C. Schlessinger-Trier & Co. and the remainder in the name of Nationalbank fur Deutschland. Both registered holders were German banking houses and alien enemy corporations, and the certificates which Braun acquired were delivered to him by an alien enemy.

The stated case sets out the following important facts. These certificates formed part of a group of certificates issued by the Canadian Pacific 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 exchange 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 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 back with him to the United States and shortly after his return in November, 1919, presented them for transfer and registration in his own name at the office of the Company's Registrar of Transfers in New York. Acceptance of the transfers was refused on the ground that they could not be accepted having regard to the Consolidated Orders respecting Trading with the Enemy, 1916. The certificates have since remained in the possession of Braun or the claimant and have at all relevant times been outside of Canada.

Certain steps had been taken in Canada. The Governor in Council had by Order in Council enacted the Consoli-

dated Orders respecting Trading with the Enemy, 1916. Under the authority of Order 28 of the Consolidated Orders the shares of the Canadian Pacific Railway Company standing in the names of C. Schlessinger-Trier & Co. and Nationalbank fur Deutschland, as well as other shares, were made the subject of a vesting order, dated April 23, 1919, by Mr. Justice Duclos of the Superior Court of the Province of Quebec. A copy of this order was furnished to the transfer agents of the Canadian Pacific Railway Company in New York on October 9, 1919, with instructions from the Minister of Finance, who was then the Custodian of Enemy Property, to make appropriate notations on the records, and between that date and October 24, 1919, the transfer agents placed against the accounts in the share register of each of the shareholders named in the order a note to the effect that the shares had been vested in the Custodian by virtue of the order of April 23, 1919. This was the situation that faced Braun when he presented his certificates for transfer and registration in his own name early in November, 1919.

On July 15, 1931, an agreement was made between the Custodian and the Canadian Pacific Railway Company pursuant to which new certificates covering 5,045 shares which then still remained in the names of C. Schlessinger-Trier & Co. and Nationalbank fur Deutschland were issued to the Custodian on July 24, 1931, without the surrender of the certificates which they replaced. These included certificates for the shares, of which the ownership is now in dispute.

The Custodian has exercised the right to exchange the shares for four times the number of new shares in the Company. Of these new shares 1,880 were earmarked as representing the 470 shares upon which the claimant's claim is based and these 1,880 shares still remain in the name of the Custodian.

The Custodian has also received dividends on the shares in question. If Braun had been registered as the owner on his application of November, 1919, and had continued to hold them until 1931, when the Company ceased to pay dividends, he would have received by way of dividends the sum of $81,075 and an additional sum of $3,974.95 in respect of the sale of rights. In addition to her claim for a declaration of ownership of the shares the claimant also seeks judgment for these amounts together with interest thereon.

1944

MARY BRAUN v. THE CUSTODIAN.

Thorson J.

Braun made unsuccessful efforts to obtain a settlement of his claim almost continuously from 1920. The written consent of the Custodian for the present proceedings was finally given on March 30, 1942, and they were launched on January 28, 1943.

I am unable to distinguish this case in principle from *Arpad Spitz* v. *Secretary of State of Canada* (1). In that case, the claimant was a citizen of Czechoslovakia, which had been recognized as an independent Republic by the Allied Powers in October, 1918. In February, 1919, he purchased in Amsterdam, Holland, from the Berlin Bank 400 shares of the common stock of the Canadian Pacific Railway Company. He sold 110 shares to continental brokers and as to the remaining 290 shares sought a declaration of the Court that the Secretary of State of Canada, as Custodian of Alien Enemy Property, had no interest or right therein and that he was the owner of them. The shares were of exactly the same kind as those now in dispute. They stood in the register in the name of an enemy and the certificates were purchased from an enemy. The shares were on the New York register of the Company and were transferable on the register only in New York. The share certificates themselves had transfers on the back of them endorsed in blank by the registered owner, were in the possession of the claimant and were outside of Canada. In that case also the shares, together with others, were made the subject of a vesting order, by Mr. Justice Duclos of the Superior Court of Quebec on April 23, 1919. The difference in facts between the two cases is that in the *Spitz Case (supra)* the claimant purchased from an enemy before the date of the vesting order, whereas in the present case Braun made his purchase from an enemy after the date of the vesting order. In that respect, the case of the present claimant is even weaker than that of the claimant in the *Spitz Case (supra)*.

Counsel for the claimant contended that Mr. Justice Duclos had no jurisdiction to make the vesting order of April 23, 1919, at all, and that it was a nullity, on the ground that, since the shares in dispute were on the New York register of the Company and transfers were registrable only in New York, the situs of the shares was in New York and the shares were not property in Canada,

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

and, consequently, not subject to the jurisdiction of any Canadian court. It followed, according to this argument, that the respondent had no title to the shares either under the Consolidated Orders respecting Trading with the Enemy, 1916, or under The Treaty of Peace (Germany) Order, 1920.

While somewhat similar contentions were made on behalf of the claimant in the *Spitz Case (supra)*, the argument as to the situs of the shares was not advanced as directly in that case as in the present one and further consideration of the important principles involved seems desirable.

The Court is requested to make a declaration as to the ownership of the shares in dispute. Two questions are involved. The first one is whether Braun acquired any rights in the shares when he purchased the certificates from an enemy in Cologne in October, 1919. If he did not, no declaration of ownership in favour of the claimant can be made for if she is to succeed she must do so on the strength of her own claim. The second question is from the viewpoint of the respondent; did he become entitled to the shares under the vesting order of April 23, 1919, or under The Treaty of Peace (Germany) Order, 1920? If the answer is in the affirmative, he has a complete defence to the claim. The two questions are in a sense interlocked with one another and the issue as to ownership is between the parties, each claiming property formerly owned by an enemy, the claimant under a transfer made to Braun by or on behalf of an enemy and the respondent through the vesting order and under the provisions of The Treaty of Peace (Germany) Order, 1920.

Two sets of regulations must be considered, one, a wartime measure, namely, the Consolidated Orders respecting Trading with the Enemy, 1916, and the other, enacted after the war was over, namely, The Treaty of Peace (Germany) Order, 1920.

The situation under the wartime measure must first be dealt with. The Consolidated Orders respecting Trading with the enemy, 1916, were enacted by Order in Council, P.C. 1023, dated May 2, 1916, under the authority of the War Measures Act, and had, therefore, the force of law. They constituted war legislation. One of the purposes of the Consolidated Orders was to prevent any effective

1944

MARY BRAUN v. THE CUSTODIAN.

Thorson J.

enemy dealing with securities of a Canadian company or other body so that they could not validly be sold in neutral countries and become a source of exchange with which war supplies might be bought for enemy use. This purpose was partially served by Order 6 (1) which reads 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.

The effect of Order 6 (1) was carefully considered in the *Spitz Case (supra)*. Counsel for the claimant in that case had contended that four limitations must be read into it, namely, that the transferee must be a Canadian, that the transfer must be made in Canada, that the registration of the securities must be in Canada, and that the locus of the certificates must be in Canada. These contentions were all rejected by Maclean J., who held that Order 6 (1) effectively prevented the claimant from acquiring a legal or equitable title, or any rights or remedies, to or in the shares under the transfer made to him by the German national.

Order 6 (1) covers securities wherever issued, whether in Canada or outside of Canada, for the term "securities" is defined in Order 1 as follows:

> 1. (1) (*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.

In this case the issuing company, the Canadian Pacific Railway Company, is incorporated under Canadian law and subject to the paramount legislative authority of Canada. Canada may, therefore, validly legislate on such subjects as the validity or otherwise of the transfers of its shares wherever made, and prohibit it from recognizing any specified persons as having any rights or remedies in respect of such shares. Order 6 (1) of the Consolidated Orders respecting Trading with the Enemy, 1916, had the effect of nullifying all transfers made, after the publication of the Orders, by or on behalf of an enemy of any securi-

ties issued by or on behalf of any government, municipal or other authority or any corporation or company subject to the legislative authority of Canada, no matter where or to whom the transfer was made or where the security had been issued or where the certificate representing it was physically situate and of preventing the transferee from acquiring any rights or remedies in respect of any such securities. Under this state of the law it is clear that Jacob G. Braun did not become the owner of the shares in dispute when he acquired the share certificates. The share certificates were not the shares and his acquisition of them from an enemy gave him no rights at all in respect of the shares. As long as Order 6 (1) of the Consolidated Orders remained in effect, his share certificates were worthless documents.

The rights of the respondent under the Consolidated Orders may now be considered. A further purpose of the Consolidated Orders was to give some Canadian authority exclusive power to deal with enemy-owned Canadian securities during the period of war emergency. Order 28 of the Consolidated Orders had this purpose in view. It provided as follows:

> 28. (1) Any Superior Court of Record within Canada or any judge thereof may, on the application of any person who appears to the court or judge to be a creditor of an enemy or entitled to recover damages against an enemy, or to be interested in any property, real or personal (including any rights, whether legal or equitable, in or arising out of property real or personal), belonging to or held or managed for or on behalf of an enemy, or on the application of the Custodian or any department of the Government of Canada, by order vest in the custodian any such real or personal property as aforesaid, if the court or the judge is satisfied that such vesting is expedient for the purpose of these orders and regulations, and may by the order confer on the custodian such powers of selling, managing and otherwise dealing with property as to the court or judge may seem proper.

Order 6 (1) prevented the transferee from acquiring any rights from the former enemy owner and a vesting order made under Order 28 (1) transferred all the rights of such enemy owner to the Custodian. The securities were thus frozen and immobilized as far as legislative action in Canada could accomplish such a result.

Under the authority of Order 28, Mr. Justice Duclos of the Superior Court of Quebec made an order on April 23, 1919, vesting in the Custodian 86,831 shares of the Canadian Pacific Railway Company standing in the name of

1944

MARY BRAUN v. THE CUSTODIAN.

Thorson J.

Nationalbank fur Deutschland and 50,914 standing in that of C. Schlessinger-Trier & Co. and authorizing him to cause them to be transferred into his own name as Custodian and to vote upon and manage them. The shares thus vested included the shares now in dispute.

It is contended on behalf of the claimant that this vesting order was a nullity so far as the shares in question are concerned on the grounds already stated, namely, that the situs of the shares was in New York because transfers were registrable only there, that the shares were, therefore, not property in Canada and that, consequently, no Canadian court could validly deal with them.

The strength of this contention must be examined and the authorities dealing with the question of the situs of shares must be considered. Before this question is dealt with it is necessary to consider the kind of securities that are involved. The transfers on the back of the share certificates were all endorsed in blank by the registered owners and were part of a group of certificates issued by the Company to be traded in on the stock exchanges in Germany and other European countries as bearer securities. They had, in the ordinary course of events, a sort of negotiability or currency that made them marketable and valuable documents in themselves and were the very kind of certificates and transfers that were considered by the House of Lords in *Colonial Bank* v. *Cady* (1). In that case Lord Watson said, at page 277:

> 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.

This statement of principle would ordinarily have been applicable to the certificates and transfers in this case but, of course, was no longer applicable to them after the change in the law made by Order 6 (1) of the Consolidated Orders. Lord Watson was careful, however, to make a clear dis-

(1) (1890) 15 A.C. 267.

tinction between the ownership of the certificate and the ownership of the shares represented by it for he went on to say:

> The appellants' witnesses say that the delivery of the certificate, with the transfer executed in blank, "passes the property" of the shares; but that statement must be accepted subject to the explanation by which it is qualified. The right of the holder appears from these explanations to be in the nature of a *jus ad rem* and not of a *jus in re*. Delivery does not invest him with the ownership of the shares in the sense that no further act is required to perfect his right. Notwithstanding his having parted with the certificate and transfer, 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, until the transferee or holder for the time being obtains registration in his own name. 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.

This classic statement of the fundamental difference between the share certificate and the share must be borne in mind even when the share certificate has on the back of it a transfer endorsed in blank by the registered owner. A share certificate by itself is merely evidence of ownership of the share, but when the transfer on the back of it has been endorsed in blank by the registered owner the document is something more than mere evidence of ownership for it has become a valuable and marketable document in itself because of the right of the holder of it to fill in his own name as transferee and become the registered owner of the share, but it should be noted that this peculiar quality in the nature of negotiability or currency which the document possesses is derived from the endorsement of the transfer in blank and not from the certificate itself. The certificate even with the transfer endorsed in blank is, however, not the same thing as the share. Ownership of the share certificate implies a *jus ad rem,* a right to the thing, that is, a right to obtain the property of the share, whereas ownership of the share denotes a *jus in re,* a right in the thing itself, that is, the property of the share itself. The distinction is as between the property itself and the right to obtain the property. It follows, I think, as a matter of course, that the rights of the holder of such a certificate and transfer endorsed in blank may exist in one place, whereas the share itself may be property in another. In so far as the right to obtain a particular

1944

MARY BRAUN v. THE CUSTODIAN.

Thorson J.

property is in itself property which has value and is marketable as such, a share certificate with a transfer endorsed in blank is property in that sense, but it is not the same property as the property of the share itself. The fallacy of the claimants contention as to situs of the shares now in dispute results largely from failure to observe the distinction between the share certificate and the share, so clearly pointed out by Lord Watson in *Colonial Bank* v. *Cady (supra)*.

In considering decisions as to the situs of shares it is necessary to observe certain cautions. A share is intangible property, a chose in action, a relationship between the shareholder and the company involving rights and duties. In that sense, shares have no fixed and certain physical locality such as land or a chattel would have, but for certain purposes a situs must be found for them. In *Rex* v. *Williams* (1), Viscount Maugham said:

> Shares in a company are "things in action" which have in a sense no real situs, but it is now settled law that for the purposes of taxation under such a statute as the Succession Duty Act they must be treated as having a situs which may be merely of a fictional nature.

A further caution to be observed was stated by Duff J. in *Secretary of State of Canada and Custodian* v. *Alien Property Custodian for the United States* (2) in these terms:

> 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.

The situs of shares for taxation purposes may, therefore, not be the same as their situs for other purposes. Indeed, even for taxation purposes different tests have been applied in income tax cases from those which have governed in succession duty ones. The purpose for which the situs is fixed must always be kept in mind.

A leading case on the subject of situs of shares is *Attorney-General* v. *Higgins* (3). The question before the court was whether the Crown could claim duty in Scotland in respect of shares in certain public companies in Scotland, which belonged to a testator domiciled in England. Probate of the will had been taken out in England and it was contended that no duty was payable in

(1) (1942) A.C. 541 at 549. (2) (1931) S.C.R. 170 at 195.
(3) (1857) 2 H. & N. 339.

Scotland on the Scottish shares. Pollock C.B. held that the property in Scotland must pay its duty there and Martin B. held, at page 351:

> It is clear that * * * the evidence of title to these shares is the register of shareholders, and that being in Scotland this property is located in Scotland.

In that case the companies were Scottish companies constituted under the Companies Clauses Consolidation (Scotland) Act, 1845, with their chief offices in Scotland. Where there is only one register and that is at the head office of the Company and at the place of its incorporation there is no difficulty in determining the situs of the shares. Their situs is where the register is.

This authority was followed in *Brassard* v. *Smith* (1), where the Judicial Committee had to fix the situs of certain shares of the Royal Bank of Canada for succession duty purposes. The Bank had power by statute to maintain in any province a registry office at which alone shares held by residents in that province were to be registered and could validly be transferred. A person resident and domiciled in Halifax, Nova Scotia, died there leaving shares registered at the office maintained by the Bank at Halifax under its statutory power. Succession duty in respect of these shares was claimed by the Province of Quebec under its Succession Duty Act, on the ground that the head office of the Bank was in Montreal and the shares were, therefore, actually situated in the Province of Quebec. Lord Dunedin quoted with approval the following words of Duff J. in *Smith* v. *Levesque* (2):

> And the Chief Baron's judgment, I think, points to the essential element in determining *situs* in the case of intangible assets for the purpose of probate jurisdiction as "the circumstance that the subjects in question could be effectively dealt with within the jurisdiction."

and then said, at page 376:

> This is, in their Lordships' opinion, the true test. Where could the shares be effectively dealt with? The answer in the case of these shares is in Nova Scotia only, and that answer solves the question.

The situs of shares for succession duty purposes was thus fixed at the place where the shares could be effectively dealt with. In a subsequent case, *Rex* v. *Williams (infra)*, it was explained that this phrase meant "where the shares can be effectively dealt with as between the shareholder and the company".

(1) (1925) A.C., 371.
(2) (1923) S.C.R. 578 at 586.

1944

MARY BRAUN v. THE CUSTODIAN.

Thorson J.

Rex v. *Williams* (1) was another succession duty case. There the shares in dispute were those of Lake Shore Mines Ltd., a company incorporated by Letters Patent under the Ontario Companies Act. The company had its head office in Ontario and had two agency offices, one in Toronto, Ontario, 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 the State of New York; the share certificates themselves were physically located in that State; and the transfers on the back had been endorsed in blank by the testator. The question before the Judicial Committee was whether the Province of Ontario had the right under its Succession Duty Act to collect succession duty on the shares on the ground that at the date of death they were situate in Ontario. The shares were transferable on the register either in Buffalo or in Toronto irrespective of where the certificates had been issued. There were, therefore, two places where the shares could be effectively dealt with as between the shareholder and the company. Since the case was a succession duty one the Board had to select one or other of these places as the situs of the shares. The problem was a practical one. The Board recognized that there are special considerations that govern in succession duty cases and approved the statement of Duff J. in *The King* v. *National Trust Co.* (2), where he formulated certain propositions pertinent to the question of the situs of shares for succession duty purposes, one of which is as follows:

> First, property, whether moveable or immoveable, can, for the purposes of determining situs as among the different provinces of Canada in relation to the incidence of a tax imposed by a provincial law upon property transmitted owing to death, have only one local situation.

The Board also made it plain that it must deal with the problem in the same way as if there were competing claims for succession duty by two Canadian provinces. If the sole test of the situs of the shares for succession duty purposes were the presence of a register at which the shares could be effectively dealt with as between the shareholder and the company, the Ontario court could have found the situs in Ontario quite as easily as in New York, and, like-

(1) (1942) A.C. 541. (2) (1933) S.C.R. 670 at 673.

wise, there would be nothing to prevent the New York court from fixing the situs in New York. In the result, this might have meant a situs of the shares for succession duty in two places. It was essential to avoid such a result, since for succession duty purposes as between two provinces shares can have only one situs. It was obvious, therefore, that the place of the register could not be the determining factor. It should be noted that the will had been probated in New York and succession duty had been paid there without protest. If a double situs for succession duty purposes was to be avoided an additional test had to be found. At page 559, Viscount Maugham said:

> One or other of the two possible places where the shares can be effectively transferred must therefore be selected on a rational ground.

The Board found this rational ground in the facts that the certificates with transfers endorsed in blank were valuable documents situate in Buffalo and marketable there and that the lawful holder of them could be registered as owner of the shares without leaving New York, whereas in Ontario no transfer could be registered without production of the certificates and the legal personal representatives of the testator in New York could not be compelled to part with them in order to enable the transfers to be effected in Ontario. Therefore, as Viscount Maugham put it, at page 560:

> In a business sense the shares at the date of the death could effectively be dealt with in Buffalo and not in Ontario.

A practical solution of the problem which resulted in only one situs for succession duty purposes was thus found. The decision is a special one depending upon the peculiar circumstances of the case and the particular considerations that govern succession duty cases. It cannot be regarded as an authority of general application on the subject of the situs of shares.

In other taxation cases, the situs of shares has been fixed without regard either to the place of incorporation of the company or the place of register. In *Bradbury* v. *English Sewing Cotton Co.* (1), for example, the House of Lords held that for the purpose of the Income Tax Acts the locality of shares of stock of a company was to be determined not by its place of incorporation or registration but by its place of residence and trading. For income tax

(1) (1923) A.C. 744.

1944

MARY BRAUN
v.
THE CUSTODIAN.

Thorson J.

purposes, the test is not where the shares can be effectively dealt with as between the shareholder and the company but where are the shares to be regarded as a source of income for income tax purposes. *Swedish Central Railway Co.* v. *Thompson* (1).

It is apparent that, in fixing the situs of shares, the courts have not adopted a uniform standard for all purposes. Decisions on the subject must be applied with great care and always with due regard to the purpose for which the situs was fixed.

The Court is not now concerned with the situs of the shares for taxation purposes. Furthermore, the test as to where the shares can effectively be dealt with "as between the shareholder and the company" is not applicable at all, in view of the fact that under Order 6 (1) of the Consolidated Orders the shares in dispute cannot be effectively dealt with anywhere as between the shareholder and the company. In the present case, the Court must ascertain the situs of the shares for the purpose of determining the dispute as to their ownership between the claimant and the respondent. For this purpose, even apart from the provisions of Order 6 (1) of the Consolidated Orders, the test is not where the shares can be effectively dealt with "as between the shareholder and the company", but rather, where the dispute as to their ownership can be effectively dealt with; that is, where can the shares be effectively dealt with "by the court" in the sense that it can enforce its judgment as to their ownership and the answer is that the court can effectively deal with the shares where it has jurisdiction over the company which issued them, in accordance with the law of the domicile of the company under which it was created and to which it is subject.

This view as to the situs of shares is, I think, within the authority of *Attorney-General* v. *Higgins (supra)*, and within the real meaning of the statement of Duff J. in *Smith* v. *Levesque (supra)*, when he said that the essential element in determining situs in the case of intangible assets for the purpose of probate jurisdiction was "the circumstance that the subjects could be effectively dealt with within the jurisdiction". It is also in accord with the principle laid down by Lord Watson in *Colonial Bank* v. *Cady (supra)*, at page 275, where he said of the company, which was incorporated in New York:

(1) (1925) A.C. 495 at 504.

The Company and its undertaking are American, and the rights of its shareholders, as well as the effect of its stock certificates, are admittedly governed by the law of the State of New York.

The view thus expressed is the settled rule in the United States, as laid down by the Supreme Court of the United States in the leading case of *Jellenik* v. *Huron Copper Mining Co.* (1). In that case, a suit was brought in Michigan against a Michigan mining corporation and certain individual defendants, who were citizens of Massachusetts. The plaintiffs, who were not citizens of Michigan, claimed that they were the real owners of certain shares of stock of the corporation, the certificates of which were held by the Massachusetts defendants, and sought a decree that they were entitled to them. The defendant corporation pleaded to the jurisdiction of the court that the stock in dispute was not personal property within the district in which the suit was brought. This plea was sustained by the Circuit Court of the United States which held that the proper forum for the litigation of the question involved would be in the State of which the individual defendants were citizens. On appeal to the Supreme Court of the United States this judgment was reversed. Mr. Justice Harlan, giving the opinion of the Supreme Court of the United States, said, at page 13:

> Whether the stock is in Michigan so as to authorize that State to subject it to taxation as against individuals domiciled in another State, is a question not presented in this case and we express no opinion upon it. But we are of opinion that it is within Michigan for the purposes of a suit brought there against the Company—such shareholders being made parties to the suit—to determine whether the stock is rightfully held by them. The certificates are only evidence of the ownership of the shares, and the interest represented by the shares is held by the Company for the benefit of the true owner. As the habitation or domicile of the company is and must be in the State that created it, the property represented by its certificates of stock may be deemed to be held by the Company within the State whose creature it is, whenever it is sought by suit to determine who is its real owner. This principle is not affected by the fact that the defendant is authorized by the laws of Michigan to have an office in another State, at which a book showing the transfers of stock may be kept.

The Court also held that the Michigan corporation, being subject personally to the jurisdiction of the court might be required by decree to cancel the certificates held by persons outside of the State and regard the plaintiffs as the real owners of the property interest represented by them.

(1) (1899) 177 U.S. 1.

1944

MARY BRAUN v. THE CUSTODIAN.

Thorson J

The *Jellenik Case (supra)* has been applied and uniformly followed by the federal courts of the United States in determining the validity of the seizure of shares of stock by the Alien Property Custodian of the United States under the provisions of the Trading with the Enemy Act. *Columbia Brewing Co.* v. *Miller* (1); *Garvan* v. *Marconi Wireless Telegraph Co.* (2), and *Miller* v. *Kaliwerke* (3).

In *Miller* v. *Kaliwerke Aschersleben Aktien-Gesellschaft et al. (supra)* it was held that as between the Alien Property Custodian of the United States and the former enemy owner the situs of the shares in dispute was in the State which created the corporation and in which it resides, notwithstanding the location of the share certificates elsewhere and the prior claim of the British Public Trustee, as custodian of enemy property in Great Britain, based upon his seizure in Great Britain of the certificates with transfers endorsed in blank and a vesting order made by the Board of Trade before any steps had been taken by the Alien Property Custodian in the United States.

In England, a similar view was held in *Baelz* v. *Public Trustee* (4). The plaintiff claimed that he was the beneficial owner of certain preference shares and ordinary shares standing in the name of his father in the books of a trading corporation registered in England under the Companies Act and having its register in England. Subsequently all meetings of the members and directors were held in Holland and all the administration and business of the company was conducted by directors domiciled and resident in Holland. The defendant was sued as custodian of enemy property under the Trading with the Enemy Amendment Act 1914 and a declaration was sought by the plaintiff that the shares claimed by him were not on January 10, 1920, a property, right or interest within His Majesty's Dominions or subject to the charge imposed by the Treaty of Peace Orders, 1919-1921, made pursuant to the Treaty of Peace Act, 1919, on the ground that the location of the shares was in Holland, where the company's principal place of business was. The plaintiff's action was dismissed. It was held by Eve J. that there was nothing to support the view that a change of residence by the company would operate to transplant the

(1) (1922) 281 Fed. 289.
(2) (1921) 275 Fed. 486.
(3) (1922) 283 Fed. 746.
(4) (1926) Ch. D. 863.

interest of the individual as a shareholder to the locality of the new residence. At page 869, he said:

> For the contributory's title to his shares, his status as a shareholder and the enforcement of his rights, recourse must be had to the statutory register, which remains localized at the registered office; and to the Court, with which alone, under s. 32 of the Companies (Consolidation) Act, 1908, abides the power to rectify the register.

There were thus two reasons assigned for the decision that the shares were in England, one, the presence of the register there, and the other, that the court had power to rectify the register under the law that governed the company because of its incorporation under such law. It was not merely the presence of the register in England, but also the jurisdiction of the court there over the company and its register, that fixed the situs of the shares in England for the purposes of the case.

It is, I think, a sound rule of law that the situs of shares of a company for the purpose of determining a dispute as to their ownership is in the territory of incorporation of the company, for that is where the court has jurisdiction over the company in accordance with the law of its domicile and power to order a rectification of its register, where such rectification may be necessary, and to enforce such order by a personal decree against it. It is at such place that the shares can be effectively dealt with by the court.

The Canadian Pacific Railway Company was incorporated in Canada under the law of Canada and is governed by it and, under such law, is subject to the jurisdiction of the Canadian courts. The situs of the shares in dispute for the purposes of the present case is, therefore, in Canada and they constitute property in Canada. It was within the jurisdiction of the Superior Court of Quebec to make the vesting order of April 23, 1919, and such order effectively vested the shares in the Custodian and transferred the rights of the former enemy owners therein to him, so that, even apart from Order 6 (1), no rights passed to Braun when he acquired the share certificates.

The result is that under the Consolidated Orders respecting Trading with the Enemy, 1916, Braun had no rights in the shares at all and the Custodian had a valid title to them.

Although the Custodian thus became entitled to the shares, his ownership of them was not absolute for no con-

1944

MARY BRAUN
v.
THE CUSTODIAN.

Thorson J

fiscation of enemy property was contemplated by the Consolidated Orders. The Custodian was appointed, as Order 23 (1) shows, "to receive, hold, preserve and deal with such property as may be paid to or vested in him in pursuance of these orders and regulations"; and he was to hold and preserve the shares with full power of control and management of them as trustee for Canada until it was determined in the light of the Treaty of Peace what final disposition should be made of enemy property.

The Treaty of Peace between Germany and the Allied and Associated Powers was signed at Versailles on June 28, 1919, and ratified on January 10, 1920. By the Treaties of Peace Act, 1919, Statutes of Canada, 1919, Second Session, Chap. 30, it was provided that the Governor in Council might make Orders in Council for carrying out the peace treaties and giving effect to their provisions. Under this authority The Treaty of Peace (Germany) Order, 1920, was passed by Order in Council, P.C. 755, dated April 14, 1920. This Order superseded the Consolidated Orders respecting Trading with the Enemy, 1916.

Under the provisions of the Treaty of Peace the Allied and Associated Powers (of whom Canada was one) reserved the right to retain and liquidate all property, rights and interests belonging to German nationals within their territories; the validity of all vesting orders and other orders made in pursuance of war legislation with regard to enemy property, rights and interests was confirmed; the liquidation of such property was to be carried out in accordance with the laws of the Allied or Associated State concerned and the proceeds were to be credited by it on its claim against Germany; Germany, on the other hand, undertook to compensate her nationals in respect of the sale or retention of their property, rights or interests in Allied or Associated States. Under this scheme, no property went back to the German national; his only recourse was against Germany.

The effect of The Treaty of Peace (Germany) Order, 1920, upon the issues in this case must now be considered.

In the first place, it should be noted that section 39 of The Treaty of Peace Order contained the following provision:

> 39. No transfer, whether for valuable consideration or not, made after the sixth day of May, 1916, without the leave of some competent

authority in Canada. by or on behalf of an enemy as defined in paragraphs (*a*) and (*b*) of Section 32 of any securities shall confer on the transferee any rights or remedies in respect thereof and no company or municipality or other body by whom the securities were issued or are managed shall take any cognizance of or otherwise act upon any notice of such transfer.

Order 6 (1) of the Consolidated Orders was thus carried forward into the Treaty of Peace Order. Even if it be assumed that Order 6 (1) of the Consolidated Orders contemplated only a suspension of rights or remedies in respect of a transfer of securities made by or on behalf of an enemy, the suspension was made permanent by the Treaty of Peace Order. From the point of view of Braun, he was left without any rights or remedies in respect of the shares in dispute. He was in the same position under the Treaty of Peace Order as he had been under the Consolidated Orders. That being so, and the rights of the claimant being dependent upon those of Braun, she cannot be declared to be the owner of the shares and her action must fail on that ground alone.

The question should, however, also be considered from the standpoint of the respondent. In what position did the Treaty of Peace Order leave the Custodian with regard to the shares which had been vested in him by the vesting order of April 23, 1919?

The relevant sections of The Treaty of Peace (Germany) Order, 1920, read as follows:

33. All property, rights and interests in Canada belonging on the tenth day of January, 1920, to enemies, or theretofore belonging to enemies and in the possession or control of the Custodian at the date of this Order shall belong to Canada and are hereby vested in the Custodian.

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

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 purported 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.

1944

MARY BRAUN
v.
THE CUSTODIAN.

Thorson J

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

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

It was under the terms of section 41 (2) that the present proceedings for a declaration of ownership of the shares in dispute were brought.

Under section 34 the vesting order of April 23, 1919, was validated and confirmed and made final and binding upon all persons, subject to the provisions of sections 33 and 41.

The vesting order did not settle the status of the property covered by it as being enemy owned. Section 41 safeguards the rights of persons to property that was not enemy property and was not intended to be retained by the Custodian. The question as to whether any property, right or interest, on January 10, 1920, or theretofore, belonged to an enemy is left by section 41 (2) for this Court to determine and it is obvious that if the Court is to deal with such a question the vesting order cannot be binding upon it. No question of this sort arises in the present case, for at the time of the vesting order the shares stood in the names of enemies and the certificates were held by enemies.

Section 33 had the effect of a general vesting order. Under it all property, rights and interests in Canada that belonged to enemies on January 10, 1920, were declared to belong to Canada and were vested in the Custodian. This covered property, rights and interests that had not been made the subject of any vesting order under the Consolidated Orders. A similar declaration was made in respect of all property, rights and interests in Canada that had belonged to enemies before January 10, 1920, and were in the possession or control of the Custodian on

April 20, 1920, even if such property, rights and interests had been covered by a vesting order under the Consolidated Orders.

Then section 33 (2) made it clear that, although property, rights and interests formerly belonging to an enemy had been vested in the Custodian by vesting orders under the Consolidated Orders and such orders were final and binding upon all persons under section 34, the title of the Custodian was not absolute, for such property, rights and interests belonging to Canada, and when vested in the Custodian by section 33, were held by him in the right of Canada.

It may be argued that the words 'in Canada" in section 33 have the effect that a vesting order is validated and confirmed and made final and binding upon all persons under section 34 only in so far as it covers enemy property, rights and interests "in Canada". While I am not inclined to agree with this view, it is not necessary to decide the point in this case in view of the fact that the shares in dispute come within the terms "property, rights and interests in Canada".

The result is that under The Treaty of Peace (Germany) Order, 1920, the shares in dispute belonged to Canada and were lawfully vested in the respondent. The respondent has by this entitlement a complete defence to the claim made herein.

In view of the argument put forward on behalf of the claimant, it is, I think, desirable to review briefly certain important decisions, other than those already examined.

In *Disconto-Gesellschaft* v. *U.S. Steel Co.* (1), the Supreme Court of the United States had to consider conflicting claims regarding certain shares of the defendant corporation, incorporated in New Jersey. The plaintiff German corporation sought a declaration that they were the owners. The Public Trustee of the United Kingdom, one of the defendants, claimed that he was entitled to be registered as owner, on the ground that the share certificates with transfers endorsed in blank had been in London, England, and had been vested in him as custodian of enemy property in the United Kingdom under a vesting order made by the Board of Trade and that he had seized the share certificates under such vesting order. The Court

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

1944

MARY BRAUN
v.
THE CUSTODIAN.

Thorson J

upheld the claim of the Public Trustee as against that of the alien enemies. At page 28, 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 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. But the question who is the owner of the paper depends upon the law of the place where the paper is. It does not depend upon the holder's having given value or taking without notice of outstanding claims but upon the things being done by the law of the place to transfer the title * * * *. The things done in England transferred the title to the Public Trustee by English law.

There is nothing in this judgment inconsistent with the *Jellenik Case (supra)*. The judgment does not decide that the situs of the shares was in England, but only that the share certificates with transfers endorsed in blank entitled the owner, both by the law of New Jersey and that of England, to become registered as owner of the shares; that the ownership of the certificate must be determined by the law of England, since the certificate was there; and that the Public Trustee, having validly acquired the ownership of the certificate according to the law of England, was entitled as against the alien enemies, in the absence of a claim by the United States under its paramount power, to be registered as owner of the shares. That the case does not turn upon the situs of the shares, and that, if the United States had asserted its paramount power and claimed the shares as property in the United States, the decision would have been otherwise, is clearly indicated by Mr. Justice Holmes at page 29, as follows:

> If the United States had taken steps to assert its paramount power, as in *Miller* v. *Kaliwerke Aschersleben Aktien-Gesellschaft*, 283 Fed. 746, a different question would arise that we have no occasion to deal with. The United States has taken no such steps. It therefore stands in its usual attitude of indifference when title to the certificate is lawfully obtained.

The judgment, in my opinion, is not an authority on the question of the situs of shares at all.

Counsel for the claimant relied strongly upon the decision of the Supreme Court of Canada in *Secretary of State*

1944

MARY BRAUN v. THE CUSTODIAN.

Thorson J

of Canada and Custodian v. *Alien Property Custodian for the United States* (1), (known as the *Alien Property Custodian Case*) in support of his main contention. I find no such support in the decision and nothing that weakens in any way the authority of the *Spitz Case (supra)*. Both cases were decided in this Court by Maclean J., the *Alien Property Custodian Case* 10 years before the *Spitz Case*. In the former case his judgment was affirmed unanimously by the Supreme Court of Canada, and in the latter no appeal was taken. The two cases deal with fundamentally different facts. In the *Alien Property Custodian Case*, there was a contest between the United States Custodian and the Canadian Custodian as to which was entitled to certain securities which had belonged to enemies. The United States Custodian, acting under the authority of an Act of Congress, the Trading with the Enemy Act, had demanded the property represented by certain certificates, which were physically situate in New York, issued by Canadian Companies existing under Canadian law with their respective head offices in Canada, and the certificates had all been delivered to him pursuant to such demand between March 27, 1918, and April 27, 1919, and were in his hands before the Canadian vesting orders, under which the Canadian Custodian claimed, were made. It was held that the United States Custodian was entitled to the securities in dispute. The fact that the contest was between the Custodian of two nations, associated with one another in the prosecution of the war and having the same purpose in mind, namely, preventing the enemy from making effective use of securities formerly belonging to enemy nationals, was a dominating fact in the case.

The decision in the *Disconto Case (supra)* carried great weight with the Supreme Court of Canada. There were two important facts which appeared to distinguish the case from the *Disconto Case*, namely, the existence in Canada of the Consolidated Orders respecting Trading with the Enemy, 1916, with no counterpart thereof in the United States case, and the assertion by Canada of her paramount power by the making of the Canadian vesting orders, whereas no steps to assert the paramount power of the United States had been taken in the United States case, but, when both Lamont J. and Duff J. held that

(1) (1931) S.C.R. 169.

1944

MARY BRAUN v. THE CUSTODIAN.

THORSON J

Order 6 (1) of the Consolidated Orders had no application in the case before them, and Duff J. held, in effect, that there had been no assertion by Canada of her paramount power and Lamont J., speaking for the majority of the Court, held that Canada under The Treaty of Peace (Germany) Order, 1920, had relinquished her paramount claim, the two facts which appeared to distinguish the case from the *Disconto Case* disappeared, and the Supreme Court of Canada was able to apply precisely the same principles as had been adopted by the Supreme Court of the United States in the *Disconto Case*.

The validity of the Consolidated Orders respecting Trading with the Enemy, 1916, was not questioned, and the effectiveness of Order 6 (1), where an allied nation was not involved, was fully recognized. Indeed, it was strongly asserted, particularly by Duff J. when, at page 191, he said:

> 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 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.

Both Lamont J. and Duff J. were agreed that, while Order 6 (1) was valid and effective legislation, it did not apply to the proceedings taken by the United States Custodian under his statutory powers. They both held that the seizure of the certificates made by the United States Custodian, or, as Duff J. put it, the "compulsory proceedings" taken by him could not be regarded as a "transfer made by or on behalf of an enemy" within the meaning of Order 6 (1) and was therefore excluded from its scope. The second ground taken was that the Consolidated Orders were directed solely at the enemy and were not intended to apply to the actions of allied countries.

Having eliminated Order 6 (1), both Lamont J. and Duff J. were agreed that the principles of *Colonial Bank* v. *Cady (supra)* and the *Disconto Case (supra)* should apply, unless there were reasons to the contrary. Lamont J. held that under United States law the United States Custodian became, by his seizure, the lawful owner of the certificates, that the rights of the former enemy owners had been lawfully extinguished and vested in the United States Cus-

todian before the Canadian vesting orders were made, and that at the date of such orders there was no property, right or interest in the securities that belonged to an enemy. Duff J., expressed similar views.

Thus far there is no difference of opinion between the two members of the Court, but there is a divergence of view between them as to the effect of the vesting orders and The Treaty of Peace (Germany) Order, 1920. Duff J. held that, since Order 28 of the Consolidated Orders authorized only the vesting of property "belonging to or held or managed for or on behalf of an enemy", it had no application to any of the properties in question. From this it would follow that the vesting orders made under it did not cover them since they were not enemy property. In answer to the argument that the vesting orders were validated and confirmed by section 34 of the Treaty of Peace (Germany) Order, 1920, and made binding on all persons including the United States Custodian, he held that the United States could not be bound by section 34 since the phrase "all persons" in that section did not include the United States of America as a nation. He also held that the Canadian Custodian, under the circumstances, did not represent the "paramount power" of Canada. Lamont J. took a different view and, since he spoke for the majority of the Court, it should, I assume, be regarded as the view of the Court. He held that, even although there was no enemy interest in the securities at the time of the Canadian vesting orders, nevertheless, the securities were validly covered by the vesting orders, since Canada had paramount legislative power over the companies which had issued the certificates and had asserted such power when the shares were vested in the Canadian Custodian by the Courts under the Consolidated Orders but that, under the terms of the Treaty of Peace Order, Canada had relinquished her claim to all vested property that was not enemy property at the time of the vesting orders and that since all the securities had ceased to be enemy property when vested in the Canadian Custodian, the United States Custodian was entitled to them.

It is important to determine not only what the *Alien Property Custodian Case* did decide but also what it did not decide. It does not support the claimant's main contention that the situs of the shares was in New York

1944

MARY BRAUN v. THE CUSTODIAN.

Thorson J

because transfers were registrable only in New York, for it should be remembered that the United States Custodian was held entitled to all the securities involved in the case, even although in respect of some of them transfers were registrable only in Canada. The place of registration of transfers had nothing to do with the decision.

Nor did the case decide that the situs of the securities involved was not in Canada. The case did not turn upon the situs of the securities at all but upon the existence of rights in the United States flowing from the ownership by the United States Custodian, according to the law of the United States, of the certificates with transfers endorsed in blank and the question was whether such rights constituted "property, rights or interests" in the United States, which could be validly acquired there by the United States Custodian. Lamont J. held that they did. At page 182, he said:

> 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 endorsed in blank by the registered owner are, in the hands of a lawful holder, recognized as "property, rights or interests" which entitles the possessor to be registered as owner.

The situs of the rights involved in the ownership of certificates with transfers endorsed in blank was held to be in the United States, but this did not mean that the shares themselves were in the United States or that they did not constitute property in Canada.

And, most certainly, the case did not decide that the shares and the share certificates even with transfers endorsed in blank are the same thing. Lamont J., after the passage just quoted, cited *Colonial Bank* v. *Cady (supra)* and referred to the distinction made by Lord Watson in that case between the "property of the shares" and "the title which will enable the holder" of the certificate "to vest himself with the shares", and recognizing, as clearly as Lord Watson did, the difference between the property of the shares themselves and the rights of the lawful holder of the certificates, the former a *jus in re* and the latter only a *jus ad rem,* he said, at page 184:

> 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 the strict 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.

It is inherent in the distinction thus drawn that the rights of the holders of the certificate may be in one place, whereas the "property of the shares" may be in another.

Far from supporting the contention of the claimant that the situs of the shares was outside of Canada and, therefore, beyond the jurisdiction of the Canadian Courts, the judgment of the majority of the Court completely repudiates such a contention, for Lamont J. expressly recognized that the securities were subject to the jurisdiction of the Canadian courts because of Canada's paramount legislative authority over the company issuing the certificates, when he said, at page 184:

> Canada, in my opinion, did assert her paramount power when the shares were vested in the appellant by the Courts under the Consolidated Orders.

This, in my opinion, amounts to a holding that the situs of the shares themselves was in Canada, although the rights of the holders of the certificates were in the United States. The case can be put briefly. The United States Custodian, being the lawful holder of the certificates with transfers endorsed in blank, had rights in the United States to property in Canada.

The judgment of the majority of the Court (Rinfret, Lamont and Smith JJ.) is, in my opinion, a strong authority against the contention of counsel for the claimant. Nor can he derive any real comfort from the judgment of Duff J. (for himself and Newcombe J.) upon which he relied. In a supplementary argument in writing, he laid special stress upon the remarks of Duff J., at page 195:

> 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.

as though the Court had thus decided that the shares were beyond the territorial boundaries of Canada and, therefore, outside the jurisdiction of the Canadian Courts to make a vesting order in respect of them. If these remarks were to have such a meaning they would be at variance with the views of the majority of the Court as expressed by Lamont J., but no such construction is reasonably possible. Duff J. did not have to deal with the situs of the shares themselves at all but only with the existence

1944

MARY BRAUN v. THE CUSTODIAN.

Thorson J

of rights in the United States which could be appropriated there by public authority acting under United States war measures. It is implicit in the majority judgment that, if the Canadian vesting orders had been made before any action had been taken by the United States Custodian, the Canadian Custodian would have held the securities which had been vested in him by the courts, as against the former enemy owners or an individual claiming through them, for the jurisdiction of the courts to make the vesting orders in respect of the securities was expressly recognized. Duff J. did not say that it was beyond the jurisdiction of the Canadian courts to deal with the securities. He did not touch that subject at all, but merely held that Order 28 had no application to any of the properties in question, because it authorized only the vesting of property "belonging to or held or managed for or on behalf of an enemy". Nor did he deny the validity of Order 28; on the contrary, it is implied in the very grounds assigned by him for its non-applicability to the securities that, if no action had been taken by the United States Custodian and they were still held by enemies or claimed by an individual through enemies, Order 28 would have applied and a vesting order made under it would have been recognized as valid. In any event the majority judgment recognizes the jurisdiction of the court to make the vesting order and the minority judgment, although silent on the subject, is reasonably capable of the same inferences.

The jurisdiction of the Canadian courts under the Consolidated Orders to make a vesting order covering shares of a Canadian company, even although they were transferable on a register in the United States and the share certificates with endorsed transfers were held there, and the validity of such an order as against a United States company claiming under a transfer from an enemy was fully recognized by the United States Circuit Court of Appeals in *United Cigarette Machine Co.* v. *Canadian Pacific Railway Co.* (1).

There remains only the contention of counsel for the claimant that the *Spitz Case (supra)* is no longer an authority in view of the decision of the Judicial Committee in *Rex* v. *Williams (supra)*. In my view, that decision has no applicability to the case under review either on the facts or in principle.

(1) (1926) 12 Fed. (2nd) 634.

1944

MARY BRAUN v. THE CUSTODIAN.

Thorson J

It is clear from such cases as *Colonial Bank* v. *Cady (supra)*, the *Disconto Case (supra)* and the *Alien Property Custodian Case (supra)* that the property of a share may be in one place, and the rights of the holder of the share certificate may be in another. If the rights of the holder are in themselves property, then there may be "property, rights or interests" in respect of shares in more than one place. In that sense, it is unsound to assign only one situs for all purposes to such tangible property as a share or other chose in action involving a relation between two parties. This view is well put by Learned Hand J. in the judgment of the District Court of the United States in *Direction der Disconto-Gesellschaft* v. *United States Steel Corporation* (1), where he says:

> a share, if we do not wish to call it a chose in action, is at least a legal relation, and can have no special character except by virtue of the parties to the relation. Wherever either party is, there is the property as respects such parts of the relation as touch that party.

It is quite logical, therefore, to say that shares may have a situs in two places, in the sense that a shareholder has rights in one place to shares held by the company for him in another, and that is why it is so necessary in fixing the situs of shares to keep constantly in mind the purpose for which the situs is fixed. For succession duty purposes no such division of a share into a *jus ad rem* and a *jus in re* is possible for everything related to it must be found in one place since the share for such purposes can have only one locus. A succession duty decision such as *Rex* v. *Williams* is not applicable, therefore, in a suit to determine the ownership of the share for that question vitally affects the company part of the relation, since the decision of the court imposes a duty upon the company to recognize as shareholder the person found by the court to be the owner. This, I think, was implied by the Supreme Court of the United States in the *Jellenik Case (supra)* when it said "that the interest represented by the shares is held by the Company for the benefit of the true owner" and "the property represented by its certificates of stock may be deemed to be held by the Company within the State whose creature it is, whenever it is sought by suit to determine who is its real owner".

(1) (1924) 300 Fed. 741 at 746.

1944

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On the facts, *Williams* v. *Rex* cannot help the claimant, for she is not in the position of the legal personal representative of the testator in that case. She cannot show that her share certificates with transfers endorsed in blank are marketable and valuable documents in themselves; under Order 6 (1) of the Consolidated Orders they were worthless documents and there were no rights of any kind in the shares in the United States, and the shares could not be effectively dealt with there.

The acceptance of counsel's contention would mean that a Canadian company, by establishing a register for its securities outside of Canada, could put all its securities beyond the legislative authority of Canada. The mere statement of the proposition, as counsel for the respondent put it, carries its own contradiction. The argument is quite untenable. Canada has complete legislative authority over the companies of its incorporation and can confer jurisdiction upon Canadian courts to deal with the securities issued by them, wherever the certificates representing such securities may be.

The shares in dispute were therefore subject to the jurisdiction of the Court when it made the vesting order of April 23, 1919, were effectively covered by it, and were made the property of Canada and vested in the respondent under The Treaty of Peace (Germany) Order, 1920.

The declaration of the Court as to the ownership of the shares in dispute is that they 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 respondent.

The claims for judgment for the amounts received by the Custodian by way of dividends and in respect of the sale of rights are also dismissed.

In view of the terms of the written consent given by the Custodian that no costs should be awarded against either of the parties, the dismissal of the claim herein will be without costs to either party.

Judgment accordingly.