

1927  
Feb. 18.  
Feb. 25.

LEO W. M. BAUMFELDER ET AL.....PETITIONERS;

AND

THE SECRETARY OF STATE OF CAN- }  
ADA, AS THE CUSTODIAN, UNDER } RESPONDENT.  
THE TREATY OF PEACE..... }

*Treaty of Peace (Germany) Order, 1920—"Enemy"—Interpretation*

The petitioner Leo Baumfelder was born in Germany in February, 1897. At the age of thirteen he went to England with his father and mother, and they took up residence in London. In 1910 he was sent to school, and it was intended that he should go to Oxford University, having passed his entrance examination. At the age of 18 years, he was interned in England, with his father, as an alien enemy, until July, 1919, when they were both deported, by British authorities to Germany. He, L.B., remained there until shortly after his mother's death in 1922, when he came to America, where he has since resided. The

mother and sister remained in England, visiting him in Germany in June, 1920, returning to London in the fall, and again going to Germany in 1921, where the mother died.

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*Held:* On the above facts, that the petitioner L.B. was not a resident of Germany, in the sense intended by sec. 32, ss. 1 (a) of The Treaty of Peace (Germany) Order, 1920, and was not an "enemy" within the meaning of said section.

2. That said section 32 did not contemplate the broad inclusion of a German National who did not during the period of actual war reside or do business in Germany, unless at least, subsequent to the armistice and prior to January 10, 1920, he returned to Germany with the intention of resuming his domicile or residence therein.

PETITION under the Treaty of Peace (Germany) Order, 1920, for a declaration that the petitioner Baumfelder was not an "enemy" within the meaning of the said Treaty and that certain property, etc., vested in the Custodian belonged to petitioners.

Application heard by the Honourable Mr. Justice Maclean, President of the Court, at Ottawa.

*George F. Henderson, K.C.*, for petitioner.

*G. Wilkie, K.C.*, for the custodian.

The facts are stated in the reasons for judgment.

THE PRESIDENT, now this 25th February, 1927, delivered judgment.

The petitioners, Marion Cust Macdonald and Leo W. M. Baumfelder, under the provisions of sec. 41, Part II of the Treaty of Peace (Germany) Order, 1920, which I shall refer to as the Order, ask for a declaration that certain property, rights and interest, now vested in the Custodian, belong to the petitioners; and that the petitioner Baumfelder was not at any time an "enemy," under the terms of the Order.

The petitioners are the lawful children of one Caroline Baumfelder, who died in Germany on the 20th day of July, 1922, the wife of Willie Baumfelder, a citizen of Germany, the petitioner Marion Cust Macdonald being a child by a former marriage to one John Macdonald, a Canadian citizen, and the petitioner Leo W. M. Baumfelder being the sole issue of the marriage to Baumfelder. In July, 1894, Caroline Baumfelder, then the widow of Macdonald, in

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anticipation of her marriage to Baumfelder, executed a marriage settlement by which she settled and transferred to a trustee certain assets aggregating in value about \$70,000. The settlement provided: (a) that the income should be paid to Caroline Baumfelder during her natural life for her separate use, free from the debts or control of her husband, (b) after her death, in trust for such person or persons as she should by her last will appoint, (c) in default of such appointment, to divide the trust estate equally among all her children in equal shares. Caroline Baumfelder died without exercising her power of appointment, and leaving her surviving four children, the petitioners and two others, the latter being issue of the first marriage.

The trustee I assume with the concurrence of the Custodian has paid over to the beneficiaries other than the petitioner Baumfelder, their shares of the trust estate. The petitioner Marion Cust Macdonald advanced to the petitioner Baumfelder at various times amounts of money aggregating \$11,000 and over upon the understanding with him that such advances would be returned to her out of his share of the trust estate, which advances are still owing to her, and she claims in the petition a lien on the balance of the said trust estate for such advances. Upon the hearing of this matter, however, it was agreed by counsel that no such lien in law existed, and therefore this phase of the proceeding need not be further considered, and the petitioner Baumfelder may now be regarded as the sole petitioner.

The question therefore is whether the interest of Leo Baumfelder in the trust estate, he being a German national, now belongs to the Custodian.

The petitioner was born in Dresden, Germany, in February, 1897. At the age of thirteen he came to England with his father and mother, and with them he took up residence in London. He was sent to school in 1910, and it was intended that he should go to Oxford University, having passed the entrance examination thereto. On reaching the age of eighteen years, he was interned as an alien enemy in England until July, 1919, when he was deported by the British authorities to Germany, where he remained until shortly after his mother's death in 1922, when he came to

America and has resided there ever since. The father was also interned in England, and in 1919 was deported to Germany. The petitioner made efforts to be allowed to remain in England but his efforts were unsuccessful. His mother and sister Marion Cust Macdonald meanwhile remained in England. He found employment of various kinds in Germany until he left for America. In June, 1920, his mother and sister came to Germany to visit the petitioner, and they returned in the autumn or fall of the same year to London, but they later returned to Germany in the spring of 1921. The mother died the following year in Germany.

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Sec. 33 of the Order is to the effect that all property, rights and interest in Canada belonging on the tenth day of January, 1920, to enemies, and in the possession or control of the Custodian at the date of the Order shall belong to Canada and be vested in the Custodian. Sec. 32 defines what is an "enemy" in so far as this particular matter is concerned, and is as follows:

"Enemy" means

- (a) A German national who during the war resided or carried on business within the territory of a Power at war with His Majesty;
- (b) A German national who during the war resided or carried on business within the territory of a Power which remained continuously neutral throughout the war, and with whom trading or dealing was prohibited during the war by any Statute, Proclamation or Order in Council in force in Canada;
- (c) A German national who during the war resided or carried on business within the territory of a Power allied or associated with His Majesty, and
  - (i) whose property within such territory has been treated by that Power as enemy property, or
  - (ii) who has since the fourth day of August, 1914, been deported from the territory of that Power;
- (d) A German national who since the fourth day of August, 1914, has been deported from Canada;
- (e) Any other German national who is declared by the Governor in Council to be an enemy;
- (f) A Company controlled by any of the persons mentioned in paragraphs (a), (b), (c), (d) and (e), Etc.

The construction of sec. 32, Part II, of the Order is therefore to be considered. I think it is quite clear, in fact it was conceded on the hearing, that unless the petitioner Baumfelder falls within the definition of "enemy" under subsec. 1 (a) of sec. 32, he does not fall within any other of the provisions of that section. The question therefore

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for determination is, whether Baumfelder, during the war, "resided or carried on business within the territory of a Power at war with His Majesty."

Subject to any legislation to the contrary, or anything to the contrary contained in the treaty of peace when peace came, enemy property in this country would be restored to its owners after the war. Parker L.J. in *Daimler Company v. Continental Tyre and Rubber Company* (1). Was this common law principle modified by legislation? Article 297 (b) of the Treaty of Peace provided that the Allied or Associated Powers reserved the right to retain and liquidate all property, rights and interests belonging to German nationals at the date of the coming into force of the Treaty. It was not therefore the property, rights and interests of all German nationals that might be retained and liquidated, but only such of the same as the Allied and Associated Powers should decide to retain under the treaty reservation. Apparently, under the Order it was here decided to retain only the property of such German nationals as fell within the classes of enemy nationals described in sec. 32. That section clearly places a limitation upon the expression "enemy"; otherwise I think "enemy" would have been defined as "a German national" without further limiting or descriptive words. The common law principle being therefore departed from, and the Custodian proceeding under legislation of a penal or confiscatory nature, the same must be strictly construed.

I do not think that Baumfelder can be said to have been a resident of Germany in the sense intended by sec. 32, ss. 1 (a) of the Order. His residence was in England before and at the outbreak of the war. It came out in the evidence, that his father was unable to return to Germany, without being there subject to arrest, in consequence of some financial misfortune which overtook him while living in that country. I have no doubt the petitioner's parents had adopted England as their domicile, and the son was being educated with a view to an extended residence there. His mother resided in England "during the war," which means from August 4, 1914, up until January 10, 1920. The petitioner Baumfelder it is true was deported to Germany, in

(1) [1916] 2 A.C. 307, at p. 347.

fact he was conducted and placed under British military escort on German soil just over the boundary line between Holland and Germany. His residence in Germany was therefore an enforced and involuntary one of six or seven months prior to January 10, 1920. Owing to the difficulties in the way of German nationals obtaining passports to go to countries allied or associated with His Majesty, and owing also to his indigent circumstances, Baumfelder was unable to get out of Germany for quite a time, but I am quite sure it never was his intention to resume permanently his domicile of origin. Up to the time of the armistice at least, no one would think of saying that either the petitioner or his parents were residents of Germany, while of course they were German nationals. England was the place of their permanent home, and that was their domicile. An excellent definition of an acquired domicile is given by Kindersley V.C. in *Lord v. Colvin* (1).

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That place is properly the domicile of a person in which he has voluntarily fixed the habitation of himself and his family, not for a mere special and temporary purpose, but with a present intention of making it his permanent home, unless and until something (which is unexpected, or the happening of which is uncertain) shall occur to induce him to adopt some other permanent home.

The tests of an acquired personal domicile are, (1) the voluntariness of the residence; (2) the fact of residence; and (3) the intention to reside there either permanently or for an indefinite time. An involuntary residence in another country cannot create a domicile therein, *Bromley v. Hesselstine* (2); and therefore I think an involuntary residence of a national in his domicile of origin, does not mean an abandonment of his domicile or residence of choice, unless that as a fact is established. A man's residence is the place or country where he in fact is habitually present. Where it is that a man is ordinarily present is a matter which is determined not by legal rules, but is ascertained in the same way as any other physical fact. A man may be domiciled in one country and may be ordinarily resident in another. Dicey's Conflict of Laws, 4th ed., p. 258. Whatever distinction there is here between domicile and residence does not operate to the disadvantage of

(1) [1859] 4 Drew. 366, at p. 376. (2) [1807] 1 Camp. 75 at p. 77.

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the petitioner Baumfelder. It does not appear to me that sec. 32 (b) contemplated the broad inclusion of a German national who did not during the period of actual war reside or do business in Germany, unless at least subsequent to the armistice and prior to January 10, 1920, he returned to Germany with the intention of resuming his domicile or residence there. That view would not be in harmony with the other provisions of that section. If the Order was intended to apply to the facts of this case, then it is an instance of *casus omissus*. There is a limitation to the expression "enemy," as defined by sec. 32, ss. 1, of the Order, and there is not to be found any provision covering the case of a German national resident in Great Britain, or any Dominion other than Canada, and holding "property, rights and interests" in Canada. A German national residing in Canada during the war and not deported, or declared by the Governor in Council to be an "enemy" is clearly not an enemy within the terms of Part II of the Order, and I think as a matter of public policy such was not intended. Possibly it was intended also that a German national, resident in Great Britain, or any other Dominion other than Canada, should be accorded the same treatment in respect of property in Canada.

I am of the opinion, therefore, that on construction and in fact, Baumfelder was not an "enemy" at the times material here, under the provisions of the Order, and that the property, rights and interest in question is owned by the petitioner Baumfelder, and I so declare the same to be owned by him. This petitioner will also have his costs of this proceeding.

*Judgment accordingly.*