1942
Dec. 9 & 10.
1944
Apr. 24.

BETWEEN:

EDWARD BITTER ..... CLAIMANT,

AND

THE SECRETARY OF STATE OF CANADA, AS CUSTODIAN OF ALIEN ENEMY PROPERTY ..... } RESPONDENT.

Enemy property—Claim against Custodian of Enemy Property—Consolidated Orders respecting Trading with the Enemy, 1916—Order 28—Definition of enemy—Situs of company obligations and debts—Treaty of Versailles, Part X, Section IV Annex para. 10—The Treaty of Peace (Germany) Order, 1920, Sections 32, 33, 34 & 41.

The action is for the proceeds of note-certificates issued by the Canadian Pacific Railway Company on March 2, 1914, payable on March 2, 1924. The note-certificates were issued from the New York register of the Company and were transferable only on such register until discharged therefrom. They were bought in the name of the Deutsche Bank (Berlin) London Agency for the claimant who then resided in London, England, and remained in the custody of the Bank until after the claimant had left for Germany. On January 4, 1917, the claimant went to Berlin, Germany, where he resided and worked for the head office of the Deutsche Bank until he returned to England in June, 1920. On January 5, 1917, the note-certificates were delivered to the Guaranty Trust Company of New York (London Office) who held them for the claimant subject to the instructions of the Public Trustee of the United Kingdom. They were endorsed by the registered owner to nominees or employees of the Trust Company. On November 6, 1919, the note-certificates were made the subject of a vesting order under the Consolidated Orders respecting Trading with the Enemy, 1916. Possession of them was not obtained by the respondent until November 30, 1925, when they were delivered to the London representative of the respondent by the Guaranty Trust Company of New York (London Office) with a transfer thereof. Payment of the note-certificates and interest was made to the respondent in New York in December, 1925, the note-certificates being payable at Montreal, London or New York. The action is brought by the claimant for the proceeds with the written consent of the Custodian of Enemy Property under section 41 (2) of The Treaty of Peace (Germany) Order, 1920.

Held: That while the claimant was the real and beneficial owner of the note-certificates on November 6, 1919, he was on that date an enemy within the meaning of the Consolidated Orders respecting Trading with the Enemy, 1916, and on January 10, 1920, he was an enemy within the meaning of The Treaty of Peace (Germany) Order, 1920.

2. That the situs of a simple contract debt is in the country where the debtor resides for that is where the debtor is subject to the jurisdiction of the Court and where the debt is properly recoverable or payment of it can be enforced.

3. That for the purposes of the Treaty of Versailles and as between an "enemy" and the Canadian Custodian of Alien Enemy Property the

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term "all property, rights and interests in Canada", contained in section 33 of The Treaty of Peace (Germany) Order, 1920, includes any shares, stock, debentures, debenture stock, or other obligations of any company incorporated in accordance with the laws of Canada.

4. That Canada has complete legislative authority over the companies of its incorporation and can confer jurisdiction on Canadian courts to deal with the securities issued by them, wherever the certificates representing such securities may be. When the vesting order of November 6, 1919, was made, Canada asserted her paramount power over the Canadian Pacific Railway Company which had issued the note-certificates and in effect ordered the Company to pay the obligation or debt represented by them to the Custodian instead of the enemy owner. The obligation or debt was thus, by valid and effective Canadian war legislation, localized in Canada. The assertion by Canada of her paramount power over the company was confirmed by the Treaty of Peace and section 34 of The Treaty of Peace (Germany) Order, 1920.

ACTION by the claimant for the proceeds of certain note-certificates issued by the Canadian Pacific Railway Company.

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

Auguste Lemieux, K.C. for claimant.

Aimé Geoffrion, K.C. and *Aldous Aylen, K.C.* for respondent.

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

THE PRESIDENT now (April 24, 1944) delivered the following judgment:

The claimant seeks to recover from the respondent the proceeds of certain note-certificates of the Canadian Pacific Railway Company of the face value of $3,500, issued on March 2, 1914, and payable on March 2, 1924.

The note-certificates, usually referred to as 6 per cent Special Investment Fund Notes, were issued in the name of Deutsche Bank (Berlin) London Agency, the London Branch of the Deutsche Bank, whose head office was in Berlin, Germany, from the New York register of the company, and delivered soon after their issue to the registered owner in London, England, in whose custody they remained until January 5, 1917. On that date they were delivered by a clerk in its employ to the Guaranty Trust Company

of New York (London Office), which received them for the account of the claimant and held them subject to the instructions of the Public Trustee of the United Kingdom.

All the 6 per cent Special Investment Fund Notes of the company standing in the names of Deutsche Bank (Berlin) London Agency and other alien enemies on the stock and transfer books of the company or its transfer agents in New York were made the subject of a vesting order, dated November 6, 1919, by Mr. Justice Duclos of the Superior Court of Quebec under the authority of Order 28 of the Consolidated Orders respecting Trading with the Enemy, 1916, by which they were vested in the Custodian of Alien Enemy Property appointed by the Consolidated Orders. The evidence establishes that the note-certificates in question in this action were included in this vesting order.

No formal action to obtain physical possession of the note-certificates was taken by the respondent, who was the Custodian of Alien Enemy Property under The Treaty of Peace (Germany) Order, 1920, until October 26, 1925, when his London representative demanded delivery of them from the Guaranty Trust Company of New York, with the result that they were delivered into his possession on November 30, 1925.

The note-certificates together with a transfer, which had been obtained from the Guaranty Trust Company of New York, were forwarded to the Under-Secretary of State of Canada in Ottawa and reached him on December 15, 1925. They were then sent for payment to the Transfer Office of the company in New York, and on December 24, 1925, the Bank of Montreal at New York sent a cheque for $3,500 to the Deputy Custodian. The Custodian has also realized interest from September 1, 1914, to July 1, 1923, amounting to $1,960. The total amount of $5,460 was placed to the credit of Germany on the Custodian's books, under part II of The Treaty of Peace (Germany) Order, 1920.

Ever since the return of the claimant from Germany to England in June, 1920, he has repeatedly demanded from the respondent either the release of the securities or payment of the proceeds. Written consent for the institution of proceedings in this Court for a declaration as to the ownership of the note-certificates and their proceeds was given under Section 41 (2) of The Treaty of Peace (Germany) Order, 1920, on May 15, 1937, and the present proceedings were launched on June 3, 1937.

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Counsel for the claimant made two main contentions, first, that the claimant was the real owner of the note-certificates at the time of the vesting order, notwithstanding the fact that they stood in the name of Deutsche Bank (Berlin) London Agency, and, secondly, that since the claimant's note-certificates were, at the time of the vesting order and on January 10, 1920, in England, the situs of his property was in England and he had no property, right or interest in Canada that could be covered by the vesting order or The Treaty of Peace (Germany) Order, 1920.

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, 1914, and had, therefore, the force of law. Their purpose was to freeze and immobilize as far as possible all enemy-owned property so that it could not be used as an economic resource for enemy purposes. With that end in view, Order 6 (1) nullified 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, municipal or other authority or any corporation or company and Order 28 (1) gave jurisdiction to any Canadian Superior Court or judge thereof to vest in the Custodian of Alien Enemy Property any property belonging to or held or managed for or on behalf of an enemy.

It was not intended that a vesting order made under Order 28 should operate as a confiscation of enemy property, but only, as is shown by Order 23 (1), that the Custodian was "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", until it was determined in the light of the Treaty of Peace what final disposition should be made of it.

The Treaty of Peace between Germany and the Allied and Associated Powers was signed at Versailles on June 28, 1919, and came into force on its ratification on January 10, 1920, which date officially marked the termination of the war. The scheme of the Treaty with regard to the property, rights and interests of German nationals is outlined in Part X, Section IV, Article 297 of the Treaty. The Allied and Associated Powers reserved the right to retain and liquidate all property, rights and interests

belonging at the date of the coming into force of the Treaty to German nationals within their territories; 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, rigths or interests in Allied or Associated States. The validity of all vesting orders and other orders made in pursuance of war legislation with regard to property, rights and interests was confirmed. Under this scheme no property went back to the German national, his only recourse being against Germany; there was no suspension of his rights to the property taken from him; he lost it permanently and was left only with his claim for compensation against Germany, whose national he was.

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. Sections 33 and 34 of this Order 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 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.

The making of a vesting order under the Consolidated Orders did not fix the status of the property covered by it as enemy owned. While Order 28 authorized only the

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vesting of property "belonging to or held or managed for or on behalf of an enemy", it is clear from Order 33 that a vesting order might be made covering property belonging to a person who was in fact not an enemy although appearing to the Court making the order to be so.

It was, I think, contemplated by the Consolidated Orders that, after the period of war emergency was terminated, provision would be made by legislation for the return of non-enemy property to its non-enemy owners, leaving property that had been owned by enemies to be dealt with in accordance with the Treaty of Peace.

Provision for dealing with a dispute or question whether any property, right or interest belonged on January 10, 1920, or theretofore, to an enemy was inserted in The Treaty of Peace (Germany) Order, 1920, by section 41 as follows:

> 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 Custodian 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.

Section 41 was intended to provide machinery for several purposes. One was the restoration to its non-enemy owner of property which had come into the hands of the Custodian under a vesting order, made under the Consolidated Orders, where such property had belonged to a person who was in fact not an enemy. It was never intended that any such property should be permanently retained by the Custodian. For that reason it was provided that, although vesting orders made under the Consolidated Orders were validated and confirmed and made final and binding upon all persons by section 34, such orders were, nevertheless, made subject to section 41. Under that section the question of determining whether any property covered by a vesting order had belonged to an enemy was left to this

Court, and it was obvious that if the Court was to determine such a question it could not regard the vesting order as final and binding upon it. Another purpose to be served by section 41 was the ascertainment by the Court whether any property, right or interest was covered by section 33, which operated as a general vesting order.

Under section 41 (2) the Court is required to make a declaration as to the ownership of the note-certificates now in dispute and must determine not only whether they belonged to the claimant on January 10, 1920, or theretofore, but also whether at such times he was an enemy within the meaning of the regulations. It will not be sufficient for him to satisfy the Court that he was the real and beneficial owner of the securities, for he must also show that his property did not belong to an enemy on January 10, 1920, or theretofore. If the Court cannot make the declaration that the property in question or dispute did not belong to an enemy there is no provision in the regulations for relinquishing the proceeds to him.

The facts as to the ownership of the note-certificates are not complex.

[The learned President here deals with the evidence relating to the ownership of the note-certificates and concludes.]

The evidence, I think, amply supports his contention that he was the real and beneficial owner of the note-certificates in question at the date of the vesting order.

While I make this finding, it does not help the claimant, if he was an "enemy" within the meaning of the regulations.

Whether he was such an "enemy" is mainly a question of fact. The term "enemy" is defined by the Consolidated Orders respecting Trading with the Enemy, 1916, as follows:

1. (1) (*b*) "Enemy" shall extend to and include a person (as defined in this order) who resides or carries on business within territory of a State or Sovereign for the time being at war with His Majesty, or who resides or carries on business within territory occupied by a State or Sovereign for the time being at war with His Majesty, and as well any person wherever resident or carrying on business, who is an enemy or treated as an enemy and with whom dealing is for the time being prohibited by statute, proclamation, the following orders and regulations, or the common law, but said expression does not include a subject of His Majesty or of any State or Sovereign allied to His Majesty who is detained in enemy territory against his will, nor shall such last-mentioned person be treated as being in enemy territory.

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The term is given a narrower meaning in The Treaty of Peace (Germany) Order, 1920, where the definition, so far as relevant to this case, is as follows:

> 32. In this Part
>
> (1) "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;

Under the Peace Order only a German national could be an "enemy", whereas under the Consolidated Orders there was no such limitation.

That the claimant was a German national during the whole period of the war admits of no doubt.

[The learned President here deals with the evidence relating to the nationality of the claimant and concludes.]

The claimant's own evidence establishes beyond dispute that on January 10, 1920, the claimant was, and had been during the whole period of the war, a German national.

That being so, the determination of whether he was an "enemy" depends upon whether during the war he resided or carried on business within the territory of a Power at war with His Majesty. Under Section 2 (*c*) of The Treaty of Peace (Germany) Order, 1920, the term "during the war" means at any time between August 4, 1914, and January 10, 1920. The fact is undisputed that the claimant was in Germany from early in January, 1917, to June, 1920, and that during that time he worked for his employer, the Deutsche Bank, at its head office in Berlin.

[The learned President here deals with the evidence relating to whether the claimant was an enemy and concludes.]

There is nothing to indicate that he went to Berlin under compulsion or that his residence in Berlin was otherwise than voluntary. This case is clearly distinguishable from that of *Baumfelder* v. *Secretary of State of Canada* (1). The evidence is conclusive that the claimant, a German national, during the war resided and carried on business within Germany, a Power at war with His Majesty. This makes him an enemy within the meaning of the definitions above referred to. The Court cannot, therefore, make a declaration that the property in dispute in this action did not belong to an enemy. On the contrary, the Court finds that while the claimant was the real and beneficial owner of the note-certificates in dispute on November 6, 1919, he

(1) (1927) Ex. C.R. 86.

was on that date an enemy within the meaning of the Consolidated Orders respecting Trading with the Enemy, 1916, and that on January 10, 1920, he was an enemy within the meaning of The Treaty of Peace (Germany) Order, 1920.

The second contention of counsel for the claimant was that since the claimant's note-certificates were in England at the date of the vesting order of November 6, 1919, and at January 10, 1920, the situs of his property was in England, and he had no property, right or interest "in Canada" that could be covered by the vesting order or The Treaty of Peace (Germany) Order, 1920.

While the adoption of this contention would not result in the release of the proceeds of the claimant's property to him since he was an enemy, it does not follow that he is barred from contesting the right of the respondent to retain such proceeds. If he loses his rights to his property under the Peace Treaty and is left only with his claim for compensation against Germany, he does so only if his property has been retained and liquidated in accordance with the Treaty. Each Allied or Associated Power reserved the right to retain and liquidate all property, rights and interests belonging to German nationals within its territory; and it was only with respect to the sale and retention of such property that Germany undertook to compensate her nationals. There was no right given to any Allied or Associated Power to retain or liquidate property that was not within its territory and no undertaking by Germany to compensate her nationals for the loss of such property. The claimant, even though an enemy, is, I think, entitled to have his property dealt with by the Associated or Allied Power that has the right under the Treaty to deal with it. If the situs of his property was in England, he has the right to have it dealt with by the proper authorities in England.

The matter of situs cannot, therefore, be brushed aside as irrelevant. Moreover, the Court, if it is to make a declaration as to the ownership of the property in dispute, must deal with such question from the point of view of the respondent as well as that of the claimant.

Whether the claimant's property, rights or interests were within the territory of Canada is a question of law.

In the recent case of *Mary Braun* v. *Custodian* (1), this Court dealt with the situs of certain shares of the Canadian

(1) (1944) Ex. C.R. 30.

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Pacific Railway Company and rejected contentions somewhat similar to the one now under discussion. In the present case the securities involved are not shares, but obligations of the company evidenced by note-certificates, and, while much of what I said in the *Braun Case* is applicable here, there are considerations governing the situs of company obligations that do not apply to the situs of company shares.

Before the question of situs can be dealt with it is necessary to ascertain the exact nature of the property in dispute. Each note-certificate is described as a "note-certificate of participation in a loan to the company of $52,000,000". A special investment fund of $55,000,000 was set up, of which The Royal Trust Company was the Trustee. The Trustee certifies that the registered owner is a participant in the loan to the amount named and that he is entitled to receive payment in gold at the Canadian Pacific Railway Company's bankers in Montreal, London or New York on March 2, 1924, with interest payable half yearly at 6 per cent per annum, and the company promises to pay the amount thus certified both as to principal and interest. The note-certificate is signed by both the Trustee and the company. It is not under seal and the company's debt is, therefore, not a debt by specialty, but a simple contract debt. It is specified on the face of the note-certificate that it shall not be valid until countersigned by the Transfer Agent and also by the Registrar of Transfers and that it shall be transferable upon the books of the Trustee in the Transfer Office of the company in Montreal, London or New York in person or by attorney upon the surrender of the note-certificates. The note-certificates in question show that they were countersigned, under date of March 2, 1914, by the Transfer Agent in New York, and countersigned and registered, under date of March 31, 1914, by the Registrar of Transfers in New York. Mr. Aljoe, the Vice-President of the Bank of Montreal Trust Company of New York which took over the duties of the Transfer Agent of the company in New York, stated that the note-certificates were on the New York register of the company and were transferable only on that register; that the certificates were not interchangeable and that once they were on a particular register they

remained on such register until discharged from it. I accept his evidence on the matter. The transfers on the back were not endorsed by the registered owners in blank, but to specified persons, namely, J. P. Earnshaw and S. J. Murley, employees or nominees of the Guaranty Trust Company of New York (London Office). The note-certificates could not pass by mere delivery but required a transfer which was registrable only in New York as long as they remained on the New York Register. The securities were, therefore, of a different nature from the share-certificates and transfers endorsed in blank referred to in the *Braun Case*. They did not have the qualities of negotiability and currency that were possessed by the share-certificates and transfers in that case. They were not valuable and marketable documents in themselves but mere evidence of the obligation of the company and of the simple contract debt owed by it. That is the kind of property the situs of which is said by the claimant to be in England and not in Canada.

In the *Braun Case* (*supra*) I pointed out that the courts in fixing the situs of company shares had not adopted a uniform standard for all purposes and that decisions on the question must be applied with great care and always with due regard to the purpose for which the situs was fixed.

There has been much less difficulty in fixing the situs of obligation or debts, such as simple contract debts or debts by specialty, and the basic principles of the common law on the subject are firmly established. The authorities go back to the time of Elizabeth. At first they were confined to cases where it was necessary to ascertain the situs of assets for probate or probate duty purposes, since the probate courts could deal only with personal property that was situate within their jurisdiction. Where the assets were of an intangible nature such as debts or other choses in action, which could not be physically situated in any place, a situs had to be ascribed to them.

The earliest authority that need be referred to is the leading case of *Attorney-General* v. *Bouvens* (1). In that case the test as to the situs of personal property for probate duty purposes was laid down by Lord Abinger C.B., at page 191, as follows:

> Whatever may have been the origin of the jurisdiction of the ordinary to grant probate, it is clear that it is a limited jurisdiction, and can

(1) (1838) 4 M. & W. 171.

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be exercised in respect of those effects only, which he would have had himself to administer in case of intestacy, and which must therefore have been so situated as that he could have disposed of them in *pios usus*.

Then the Chief Baron proceeds with the following well-known and frequently-cited statement:

> As to the locality of many descriptions of effects, household and moveable goods, for instance, there never could be any dispute; but to prevent conflicting jurisdictions between different ordinaries, with respect to choses in action and titles to property, it was established as law, that judgment debts were assets for the purposes of jurisdiction, where the judgment is recorded; leases, where the land lies; specialty debts, where the instrument happens to be; and simple contract debts, where the debtor resides at the time of the testator's death: and it was also decided, that as bills of exchange and promissory notes do not alter the nature of the simple contract debts, but are merely evidences of title, the debts due on these instruments were assets where the debtor lived, and not where the instrument was found.

It is clear from this case that the test as to whether an asset had a situs within the jurisdiction was whether the ordinary could administer it there. He could not administer a debt owed by a debtor resident outside his jurisdiction, for he could do nothing with regard to such a debtor, and it followed that an ordinary could administer a debt within his jurisdiction only if the debtor was resident there. This led to the rule that for probate duty purposes the situs of a simple contract debt is where the debtor resides at the time of the death of the testator, for that is the only place where an ordinary can administer the debt within his jurisdiction.

This is the situation which Duff J. referred to in *Smith* v. *Levesque* (1), when he said that the Chief Baron's judgment pointed to the essential element in determining situs in the case of intangible chattels for the purpose of probate jurisdiction as "the circumstance that the subjects in question could be effectively dealt with within the jurisdiction".

The actual decision in *Attorney-General* v. *Bouvens* (*supra*) is not applicable to the securities of the claimant. In that case the court had to determine the situs of certain foreign government bonds for probate duty purposes. They were all payable to bearer, were transferable by delivery and nothing had to be done by the holder outside of England in order to make the transfer valid. They were marketable and saleable within the jurisdiction and had value there.

(1) (1923) S.C.R. 578 at 586.

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The court held that the instruments were of the nature of valuable chattels, saleable and capable of administration within the jurisdiction and that probate duty was payable on their value. In the present case the claimant's note-certificates were of quite a different nature, not payable to bearer and not transferable by delivery.

In *Commissioner of Stamps* v. *Hope* (1) the Judicial Committee had to deal with the situs of a debt for probate duty purposes and held that it had been long established that a debt by contract could have no other local existence than the personal residence of the debtor, and was *bona notabilia* within the area of the local jurisdiction within which he resided; whereas a debt under seal or specialty was *bona notabilia* where it was "conspicuous", i.e., within the jurisdiction where the specialty was found at the time of death. The reason assigned for holding that a simple contract debt was located where the debtor resided was that that was the place "where the assets to satisfy it would presumably be". Where the assets of the debtor are, there the debt can be effectively dealt with within the jurisdiction by seizure of the assets if necessary to satisfy the debt.

The rule has been expressed as a general maxim in Dicey's Conflict of Laws, 5th Edition, at page 341, in the following terms:

> whilst lands, and generally, though not invariably, goods, must be held situate at the place where they at a given moment actually lie, debts, choses in action, and claims of any kind must be held situate where the debtor or other person against whom a claim exists resides; or, in other words, debts or choses in action are generally to be looked upon as situate in the country where they are properly recoverable or can be enforced.

The rule has also been applied in succession duty cases.—*The King* v. *Lovitt* (2); and in cases where no taxation purpose was involved—*New York Life Insurance Co.* v. *Public Trustee* (3).

It was finally established beyond dispute by the House of Lords in *English Scottish and Australian Bank, Limited* v. *Commissioners of Inland Revenue* (4) that the rule as to the situs of simple contract debts was not confined to probate duty cases but was of general application. The leading authorities are there referred to. They are also cited in Dicey's Conflict of Laws, 5th Edition, at page 341 note (*e*).

(1) (1891) A.C. 476.
(2) (1912) A.C. 212.
(3) (1924) 2 Ch. 101.
(4) (1932) A.C. 238.

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It is established law that the situs of a simple contract debt is in the country where the debtor resides for that is where the debtor is subject to the jurisdiction of the court and where the debt is properly recoverable or payment of it can be enforced.

The rule is usually a simple one to apply where the debtor is an individual, but its application is more difficult when the debtor is a corporation, for it is well settled that a corporation may have more than one residence. Indeed, it may be said to reside wherever it carries on business.

In *The King* v. *Lovitt* (*supra*) the question before the Judicial Committee was whether the executors of the will of a person who was domiciled in Nova Scotia and died there were liable to pay succession duty to the Province of New Brunswick in respect of a sum of money which had been deposited by the testator in the branch of the Bank of British North America at Saint John, New Brunswick. The bank had its head office in London, England. The decision depended upon whether the debt of the bank was property situate within the province of New Brunswick. The Judicial Committee, reversing the judgment of the Supreme Court of Canada, *Lovitt* v. *The King* (1), held that it was and that succession duty was payable to the Province of New Brunswick. The controversy was whether the situs of the debt owed by the bank was at the branch where the deposit had been made or at its head office or elsewhere. The Board held that, having regard to the necessary course of business between the parties, the bank had localized its obligation to its customer or creditor so as to confine it, primarily at all events, to the branch at Saint John and that the debts were "property situate within the Province of New Brunswick".

The King v. *Lovitt* (*supra*) was followed in *New York Life Insurance Co.* v. *Public Trustee* (*supra*). In that case the plaintiffs sought a declaration that certain sums due and payable on January 10, 1920, to various German nationals under policies of assurance issued to them in England were not "property, rights and interests within His Majesty's Dominions" belonging to German nationals on January 10, 1920, and subject to the charge created by the Treaty of Peace Order, 1919. The Court of Appeal, unanimously reversing the judgment of the court below

(1) (1910) 43 Can. S.C.R. 106.

on this aspect of the case, declared that the debts due under the policies were within His Majesty's Dominions and subject to the charge. The line of reasoning was clear; the rule laid down by Lord Abinger C.B. in *Attorney-General* v. *Bouvens* (*supra*) that simple contract debts are assets "where the debtor resides at the time of the testator's death" was followed; and the statement of Dicey that "debts or choses in action are generally to be looked upon as situate in the country where they are properly recoverable or can be enforced" was approved. The plaintiff corporation since it did business in England as well as in New York resided in both places. Under the circumstances it was permissible and necessary to look at the terms of the contract to determine at what place the debts were recoverable. The reasoning adopted in *Rex* v. *Lovitt* (*supra*) was applied and the conclusion was arrived at that since by the contracts the debts were recoverable in London where they were expressed to be payable the debts were situate within His Majesty's Dominion and subject to the charge.

The ratio of these two judgments is that where a corporation has more than one residence, and the payment of a simple contract debt owed by it has been localized either by the course of business between the parties or by the express terms of the contract, the situs of such debt is in the country where the payment of it has thus been localized.

The fact that the claimant's note-certificates were transferable on the register only at New York has no bearing on the situs of the debt represented by them. This is, I think, established by *The King* v. *National Trust Co.* (1), where Duff C.J. speaking of a specialty debt said there was nothing in the judgment in *Brassard* v. *Smith* (2) or in *Attorney-General* v. *Bouvens* (*supra*) to justify the conclusion that a specialty debt had its situs at a place where some formality had to be observed in order effectually to transfer it. The same remarks are equally applicable to a simple contract debt.

In the present case the obligation or debt of the company was payable at Montreal, London or New York. At each of these places the company could be said to have a residence since it did business there. There was nothing

(1) (1933) S.C.R. 670 at 677. (2) (1925) A.C. 371.

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in the course of business between the parties or in the contract between them that localized the obligation or debt exclusively in any of these places. At common law the situs of the debt or obligation could be at any one of them. The claimant cannot, therefore, rely upon the common law authorities in support of his contention that the situs of his property was exclusively in England, for according to them it could just as well be in Canada. Since no aid is to be found in the principles of the common law in fixing the situs of the property assistance must be sought elsewhere.

There are some dicta which are helpful. In *Lovitt* v. *The King* (1) Duff J., whose dissenting judgment was substantially approved by the Judicial Committee, recognized that there might be situations where the situs of a company obligation could not be exclusively in one place and suggested that, where the obligation was such that performance of it could be exacted at more than one place at the option of the creditor, it might be that the preference ought to be given to the place where the principal business was carried on. According to this view, which was, of course, purely obiter, the situs of the obligations now under review was in Canada.

The Treaty of Peace itself contains provisions relating to the situs of certain kinds of property, which have a bearing on the question before the Court. What legal effect should be given to the terms of a Treaty of Peace is an interesting question. In *Secretary of State of Canada and Custodian* v. *Alien Property Custodian for the United States* (2), Duff J. made the following striking statement:

> The Treaty, it is to be observed, being a Treaty of Peace, had the effect of law quite independently of legislation.

With the utmost respect, I venture the opinion that there is no authority for this statement and that it cannot be accepted without important qualifications. While a Treaty of Peace can be made only by the Crown, it still remains an act of the Crown. While it is binding upon the subjects of the Crown without legislation in the sense that it terminates the state of war, it has never, so far as I have been able to ascertain, been decided or admitted that the Crown could by its own act in agreeing to the terms of a treaty alter the law of the land or affect the private rights of

(1) (1910) 43 Can. S.C.R. 106. at 140 (2) 1931) S.C.R. 169 at 198.

individuals. In *Walker* v. *Baird* (1) the defendant sought to justify a certain act of trespass alleged against him on the ground that it had been done by the authority of the Crown for the purpose of carrying out a treaty. The Judicial Committee held that the act could not be justified on such a ground but declined to express any opinion with regard to the contention made in the case that since the power of making treaties of peace was vested by the constitution in the Crown, the power of compelling its subjects to obey the provisions of such a treaty must also reside in the Crown. The question is discussed in Anson's Law and Custom of the Constitution, 4th Edition, Vol. II, Part II p. 136. At page 142, the author suggests that there is a limit on the treaty making power of the Crown and that, where a treaty involves a charge upon the people, or a change in the general law of the land, it may be made, and be internationally valid, but it cannot be carried into effect without the consent of Parliament. It has been the practice in such cases to give legislative approval to the Treaty. This view appears more consistent with the general concepts of English law than the statement under discussion, but no decision on the subject need be made for both in England and in Canada parliamentary approval of the Treaty of Peace was given.

In England, it was expressly provided by the Treaty of Peace Order, 1919, that sections III, IV, V, VI and VII of Part X of the Treaty of Peace shall have full force and effect as law. The sections referred to thus became part of the municipal law of England—*Stoeck* v. *Public Trustee* (2). It has already been noted that under the scheme of the Peace Treaty the rights which a German national previously had by law in his property were extinguished when such property was retained and liquidated by the Allied and Associated Power entitled to do so. The Treaty itself recognizes, in my opinion, which Allied or Associated Power is entitled to retain and liquidate company securities and obligations, for paragraph 10 of the Annex to Section IV of Part X of the Treaty of Versailles provides as follows:

> Germany will, within six months from the coming into force of the present Treaty, deliver to each Allied or Associated Power all securities, certificates, deeds or other documents of title held by its nationals and relating to property, rights or interests situated in the territory of that

(1) (1892) A.C. 491.

(2) (1921) 2 Ch. 67 at 71.

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Allied or Associated Power, including any shares, stock, debentures, debenture stock, or other obligations of any company incorporated in accordance with the laws of that Power.

The securities in question come within the provisions of this paragraph since they are obligations of the Canadian Pacific Railway Company, a company incorporated in accordance with the laws of Canada and subject to them. If the claimants note-certificates had been in Germany, there can be no doubt that under the Treaty they would have been deliverable to Canada, which would be the Allied or Associated Power entitled under the Treaty to retain and liquidate them. He cannot successfully claim that merely because they were in England the situs of the obligation or debt represented by them was different from that of precisely the same kind of obligation or debt, represented by note-certificates that happened to be in Germany. The physical location of the claimant's note-certificates, which are merely evidence of a simple contract debt, has according to the authorities referred to, nothing to do with the situs of the debt. Since the only right which the enemy claimant can have under the Treaty is to have his property retained and liquidated by the Allied or Associated Power entitled to do so, he cannot complain if his property was retained and liquidated in accordance with its terms. It was, I think, clearly intended by the Treaty of Peace that Canadian company obligations of the kind in question belonging to German nationals when the Treaty came into force might be retained and liquidated by Canada. By the terms of the Treaty, the situs of such property for the purpose of the Treaty was fixed in Canada.

Since the paragraph of the Peace Treaty under discussion is expressly made part of the law of England it would seem that by the law of that country the situs of the property in dispute was in Canada. The authorities in England seem to have acted upon that assumption. It appears from the evidence that while considerable property of the claimant was taken by the Public Trustee of the United Kingdom as Custodian of Alien Enemy Property there, and made subject to charge as enemy property, but subsequently released to him on special grounds which do not affect his legal position in these proceedings, no similar action was taken with regard to his Canadian securities. The note-certificates in question were never made the sub-

ject of any Order of the High Court of Justice in England under section 4 of the Trading with the Enemy Amendment Act, 1914, or of the Board of Trade under section 4 of the Trading with the Enemy Act, 1916, and no claim to them has been made by the Public Trustee in the United Kingdom or his successor, the Administrator of German Property. Indeed, the contrary is the case. When the London representative of the Canadian Custodian and Clearing House on October 26, 1925, wrote to the Guaranty Trust Company of New York (London Office), demanding the delivery of the note-certificates as the property of the Canadian Government, the Trust Company notified the claimant of the request and also wrote to the Public Trustee, informing him of the demand made and enquiring whether, in view of the fact that the notes had been held to the order of the Public Trustee, it would be in order to deliver the notes to the Canadian Custodian. On November 7, 1925, a reply was sent to the Trust Company by the secretary of the Public Trustee in which the following statement appears: "Inasmuch as the 3,500 dollars Canadian Pacific Railway 6 per cent notes, the property of Mr. E. Bitter, are subject to the control of the Canadian Custodian, the Administrator has no objection to your delivering the notes in question to the Canadian Custodian in accordance with that gentleman's request." This attitude of the English authorities with regard to the claimant's Canadian securities is consistent with the view that, under the English legislation on the subject, the claimant could not support his contention that the situs of his property was in England and that he had a right to have it dealt with there. Furthermore, it may be noted that, when the London representative of the respondent noticed that the note-certificates were endorsed on the back to Messrs. Earnshaw and Murley, nominees or employees of the Guaranty Trust Company of New York, and requested a stock transfer from the Trust Company, it was freely given. The Canadian Custodian, therefore, when he presented the note-certificates for payment had not only such rights as were vested in him by law but transfers of the note-certificates in his name as well.

The rights of the claimant, if any, are to be determined, however, not by the law of England, but by that of Canada. In Canada, the provisions of the Treaty of Peace

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relating to property, rights and interests were not expressly made part of The Treaty of Peace (Germany) Order, 1920, as was done in the case of the similar order in England, but the effect is, I think, the same. The Treaty of Peace Act, 1919, was enacted for the purpose of giving the Governor in Council the power to "do such things as appear to him to be necessary for carrying out the said Treaties, and for giving effect to any of the provisions of the said Treaties", and The Treaty of Peace (Germany) Order, 1920, was passed by Order in Council under this statutory authority and had by it the effect of law. In that view, the expression "property, rights and interests in Canada", contained in section 33, may properly be interpreted in the light of the provisions of the Treaty of Peace and a particular property, right or interest may be held to be in Canada if such an interpretation is not inconsistent with the Treaty of Peace. It was, as has been seen, contemplated by paragraph 10 of the Annex to Section IV of Part X of the Treaty of Peace, that as between Germany and the Allied and Associated Powers (of which Canada was one) the property, rights and interests of a German national situated within the territory of an Allied or Associated Power should include "any shares, stock, debentures, debenture stock, or other obligations of any company incorporated in accordance with the laws of that Power". Since the Treaty of Peace (Germany) Order, 1920, was passed to give effect to the provisions of the Peace Treaties, it must be read in the light of such provisions and the conclusion may be arrived at that for the purposes of the Treaty of Versailles and as between an "enemy" and the Canadian Custodian of Alien Enemy Property the term "all property, rights and interests in Canada" contained in section 33 of The Treaty of Peace (Germany) Order, 1920, includes any shares, stock, debentures, debenture stock, or other obligations of any company incorporated in accordance with the laws of Canada. I hold, therefore, that the claimant's property was in Canada within the meaning of section 33 of The Treaty of Peace (Germany) Order, 1920.

There is a further important reason for rejecting the claimant's contention that his property could not be subject to the vesting order of November 6, 1919, or The Treaty of Peace (Germany) Order, 1920. In the *Braun Case* (*supra*) I held that Canada had complete legislative

authority over the companies of its incorporation and could confer jurisdiction upon Canadian courts to deal with the securities issued by them, wherever the certificates representing such securities might be. I had reference in that case to the validity of the Consolidated Orders respecting Trading with the Enemy, 1916, passed under the authority of the War Measures Act, which by Order 28 conferred jurisdiction upon the Canadian Superior Courts to vest in the Custodian all property belonging to or held or managed for or on behalf of an enemy. Such property would, in my opinion, include the securities of companies subject to Canadian legislative authority. When the vesting order of November 6, 1919, was made, covering as it did the claimant's note-certificates, Canada asserted her paramount power over the Canadian Pacific Railway Company which had issued the note-certificates and in effect ordered the company to pay the obligation or debt represented by them to the Custodian instead of the enemy owner. That was the view taken by the Supreme Court of Canada with regard to the Canadian vesting orders covering Canadian company securities made under Order 28 of the Consolidated Orders in the case of *Secretary of State of Canada and Custodian* v. *Alien Property Custodian for the United States* (1). Lamont J., speaking for the majority of the Court, 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.

By that statement the majority of the Court expressly recognized the jurisdiction of the Canadian courts to make the vesting orders in that case because of Canada's paramount power over the companies which had issued the certificates and the validity and effectiveness of the legislation under which the jurisdiction had been conferred. Lamont J. went on to hold that Canada relinquished her claim to all vested property which was not enemy property at the time of the vesting and that, as all the securities in question had ceased to be enemy property when vested in the Canadian Custodian, the United States Custodian was entitled to them. This final disposition of the matter has, of course, no bearing on the facts of the present case. The vesting order of November 6, 1919, operated as a statutory

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

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transfer or assignment of the rights of the enemy owner to the Custodian. The only person who could recover and enforce payment of the obligation or debt evidenced by the note-certificates was the Custodian. Payment of the company's obligation or debt to the Custodian was made obligatory upon the company, and the obligation or debt was thus, by valid and effective Canadian war legislation, localized in Canada, in the sense that the rights of the former enemy owner were transferred to the Custodian. As between the Custodian and the company no question of situs arises. The assertion by Canada of her paramount power over the company by the vesting order of November 6, 1919, under war legislation was confirmed by the Treaty of Peace itself and the vesting order was validated and confirmed and made final and binding upon all persons by section 34 of The Treaty of Peace (Germany) Order, 1920. There is nothing in section 33 which affects this aspect of the matter except that by section 33 (2) it is declared that what was vested in the Custodian shall belong to Canada. Whatever temporary title or title in suspense the Custodian had under the vesting order became a permanent title of Canada and vested in the Custodian in the right of Canada.

The declaration of the Court is that the note-certificates in question in this action belonged on January 10, 1920, or theretofore, to an enemy and that under The Treaty of Peace (Germany) Order, 1920, they belonged to Canada and were vested in the respondent free from any claim of the claimant to them or any of the proceeds thereof.

Counsel for the claimant relied upon the decision of the Supreme Court of Canada in *Secretary of State of Canada and Custodian* v. *Alien Property Custodian for the United States* (*supra*), sometimes called the *Alien Property Custodian Case,* as the main support for his contention that the situs of the claimant's property was in England. That case was discussed at some length in the *Braun Case* (*supra*) and I need do no more than refer to such discussion and incorporate it in these reasons for judgment, in so far as it deals with contentions similar to those made in the present case, but a brief comment may be made with regard to some of the particular contentions now put forward.

The *Alien Property Custodian Case* dealt with the competing claims of two Custodians, representing allied nations

associated with one another in the prosecution of the war, in a contest as to which was entitled to certain securities of Canadian companies formerly belonging to alien enemies. The fact that two nations were involved in the contest was the dominating feature of the case. The rights of the former enemy owners as against either Custodian were not in issue. It was held that the United States Custodian had under United States law validly extinguished and acquired the rights of the former enemy owners before the Canadian vesting orders were made, and that, since there was no enemy interest in the securities at the date of such vesting orders, Canada relinquished whatever claims she had under the vesting orders. That was the judgment of the majority of the Court delivered by Lamont J. It is implicit in that 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.

Counsel for the claimant argued that the *Alien Property Custodian Case* decided that the situs of a company security was where the certificate was and that the certificate was not merely evidence of title to the property represented by it but was the property itself. I cannot see how any such deduction could possibly be drawn from the judgment in that case. As I pointed out in the *Braun Case* (*supra*), the decision did not turn on the situs of the securities at all, but upon the existence in the United States of rights flowing from the ownership by the United States Custodian, according to the law of the United States, of the certificates endorsed in blank, which could be validly acquired in the United States. This did not mean that there was no property in Canada which could have been validly acquired by the Canadian Custodian. In fact, as has been seen, Lamont J. held that the Canadian company securities involved in that case were validly vested in the Canadian Custodian, but that Canada relinquished her claim to them in favour of the United States Custodian, because there was no enemy interest in them at the date of the Canadian vesting orders, such interest having been validly acquired by the United States Custodian. Nor is there any justification for the contention that the case decided that a company security certificate was one and the

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same thing as the property represented by it. It decided no such thing. Lamont J., as I pointed out in the *Braun Case* (*supra*), recognized, as clearly as Lord Watson did in *Colonial Bank* v. *Cady* (1), the difference between the property of a share and the rights of the lawful holder of a share-certificate, even where such share-certificate had a transfer on the back endorsed in blank. It is elementary that the rights flowing from the ownership of a share-certificate even with a transfer endorsed in blank are not the same thing as the property of the share itself. As Lord Watson put it, the former is a *jus ad rem* and the latter a *jus in re*. There is even less ground, if that is possible, for the contention that the claimant's note-certificates, which had no transfers endorsed in blank, were the same thing as the obligation or debt of which they were merely evidence.

Counsel's contention that the claimant had no property which could be subject to the vesting order of November 6, 1919, is completely answered by the statement of Lamont J., to which I have referred, relating to the paramount power of Canada over Canadian companies and the validity of the Canadian vesting orders and the legislation under which they were made. *The Alien Property Custodian Case,* as I read it, far from giving any support to the claimant is a strong authority against him.

The result is that the claimant's case must be dismissed with costs. In view of the fact that counsel for the claimant has informed the Court that the claimant has died since the close of the argument herein the Court directs that this judgment be dated as of December 10, 1942, the date when the trial was concluded and the judgment of the Court was reserved and that it be entered *nunc pro tunc,* but in order that the right of appeal may not be prejudiced by such direction the time for appeal from this judgment is extended to thirty days from the date hereof.

Judgment accordingly.

(1) (1890) 15 A.C. 267 at 277.