

BETWEEN:

ERNST KELLER.....PLAINTIFF;

AND

THE HONOURABLE THE SECRETARY OF STATE OF CANADA,
AS CUSTODIAN OF ENEMY PROPERTY.. DEFENDANT.

1938
Oct. 4.
1939
April 5.

Crown—Alien enemy—Nationality—German-born subject—Loss of German nationality by residence abroad—Treaty of Peace (Germany) Order 1920, Par. 41—Exchequer Court Act, R.S.C., 1927, c. 34, s. 30 (c)—Motion to strike out statement of claim because of lack of jurisdiction of the Court to entertain the action allowed.

Plaintiff, a German-born subject, emigrated to the United States of America in 1898, where he resided until 1902. He applied for and obtained First Letters of Citizenship in the United States, but did not acquire full citizenship in that country. From 1902 to 1909 he resided in Montreal, Quebec. In 1909 he returned to the United States where he resided until 1914 when he returned to Germany, where he has since resided.

Plaintiff, while a resident of Montreal, purchased through a brokerage firm certain securities of a United States corporation. These securities were deposited for his account in the Agency of the Bank of Montreal in New York City. In April, 1921, the defendant as Custodian of Enemy Property, demanded that the brokerage firm which had purchased the securities, deliver them to him. This was done and they were sold by the Custodian. The plaintiff now claims the sum realized from such sale, together with any interest derived therefrom.

Plaintiff alleges that he had lost his German nationality through absence from that country and was treated by the German Authorities as having no nationality. He had never acquired any other nationality.

The Custodian declined to treat plaintiff as being stateless and declared him an enemy national. The Custodian further refused to proceed in the Exchequer Court for a declaration as to ownership of the money and also refused to consent to the plaintiff proceeding in this Court.

The present action is for a mandamus commanding the defendant, as Custodian, to refer the plaintiff's claim to this Court, for trial, under paragraph 41 of the Treaty of Peace (Germany) Order, 1920. The plaintiff bases his action on s. 30 (c) of The Exchequer Court Act, R.S.C., 1927, c. 34, which provides that the Exchequer Court shall have concurrent original jurisdiction in Canada "in all cases in which demand is made or relief sought against any officer of the Crown for anything done or omitted to be done, in the performance of his duty as such officer."

The defendant now moves for an order striking out the statement of claim upon the ground that this Court is without jurisdiction to deal with the claim.

Held: That the claim of the plaintiff did not constitute a "dispute" within the meaning of Paragraph 41 of The Treaty of Peace (Germany) Order, 1920.

1939

ERNST
KELLER
v.

SECRETARY
OF STATE.

Maclean J.

2. That no occasion arose for the Custodian to exercise the power given to him to proceed in the Exchequer Court, or to consent to the plaintiff so proceeding, after the Custodian had determined that the plaintiff was an enemy national.

MOTION by defendant to strike out the statement of claim herein, on the ground that the Court was without jurisdiction to entertain the action.

The motion was argued before the Honourable Mr. Justice Maclean, President of the Court, at Ottawa.

H. Aldous Aylen, K.C. for the motion.

R. V. Sinclair, K.C. contra.

THE PRESIDENT, now (April 5, 1939) delivered the following judgment:

The plaintiff herein lays claim to certain moneys in the hands of the defendant, as Custodian of Enemy Property, which claim the Custodian does not concede. The Custodian refused to proceed in the Exchequer Court of Canada for a declaration as to the ownership of the said moneys, and he refused to give his consent to the plaintiff so proceeding in such Court, contrary, it is claimed, to the provisions of paragraph 41 of The Treaty of Peace (Germany) Order, 1920, hereafter to be referred to as "the 1920 Peace Order." This action is for a mandamus commanding the defendant, as Custodian, to refer the plaintiff's claim to this Court, for trial, under the said paragraph 41 of The Treaty of Peace (Germany) Order, 1920.

The plaintiff's action is based upon s. 30 (c) of the Exchequer Court Act, R.S.C., 1927, c. 34, which provides that the Exchequer Court shall have concurrent original jurisdiction in Canada:

(c) in all cases in which demand is made or relief sought against any officer of the Crown for anything done or omitted to be done, in the performance of his duty as such officer.

The Custodian now moves for an Order striking out the statement of claim upon the ground that this Court was without jurisdiction in the premises, and that is the matter before me for decision. The only material before me on the motion was the plaintiff's statement of claim, a letter from the Deputy Custodian to the plaintiff, and a letter from the solicitor of the Custodian to the solicitor of the plaintiff.

Now as to the preliminary facts which I extract from the plaintiff's statement of claim. The plaintiff resides near the City of Munich, in Germany, in which country he was born in September, 1867. In 1898 he emigrated to the United States where he resided until 1902 and during which time he there applied for and obtained what is called First Letters of Citizenship, but no further step was ever taken by him towards acquiring United States citizenship. Between the years 1902 and 1909 the plaintiff resided in Montreal, Canada, and, while there he purchased through a brokerage firm five Southern Pacific Railway Company's four per cent convertible bonds, the obligations of a United States Corporation, and he directed the brokerage firm to deposit the said bonds in the Agency of the Bank of Montreal in the City of New York, for his account, which was done. In 1909 the plaintiff returned to the United States where he resided until 1914 when he returned to his native country, Germany, where he has since resided. In April, 1921, upon the demand of the defendant as Custodian of Enemy Property, the brokerage firm through whom the plaintiff purchased the bonds in question, withdrew the same from the New York Agency of the Bank of Montreal and delivered them over to the Custodian. After the bonds came into the possession of the Custodian, they were by him sold, realizing the sum of \$4,891.25, and it is that sum, together with any interest since derived therefrom, that is now claimed by the plaintiff.

In due course the plaintiff appears to have made a formal demand upon the Custodian for the relinquishment to him of the proceeds of the bonds in question. There then arose the question of the nationality of the plaintiff. The statement of claim states that in Germany the plaintiff was treated by the German Authorities as possessing no nationality, having lost his German citizenship through absence from Germany, and through his failure to take the necessary steps during that time to retain it. It is not suggested that he ever acquired any other nationality. The claim to "statelessness" was evidently advanced to the Custodian by the plaintiff and the former took the matter into consideration and ultimately he decided that the plaintiff was an enemy national, that is, that his nationality was that of his country of origin, and upon

1939

ERNST
KELLER

v.

SECRETARY
OF STATE.

Macleay J.

1939
 ERNST
 KELLER
 v.
 SECRETARY
 OF STATE.
 Maclean J.

that ground he declined to relinquish to the plaintiff the proceeds of the bonds. In May, 1929, the Deputy Custodian advised the plaintiff, by letter, of his decision, and that letter in part reads as follows:

Sir,—

I have the honour to refer to my letter to you of the 24th October last, in which I advised you that the reply of the London Representative of the German Clearing Office to my enquiry of him would enable me to decide definitely on your contention of "statelessness." I am now in a position to advise that on the 27th February last the German representative submitted a certain document to my London Representative, who in turn submitted it to the Nationality Section of the British Clearing Office. The latter advised that such document would not be considered by them as sufficient to support a claim to "statelessness." In these circumstances, I have no alternative, of course, but to regard you definitely as an enemy national.

Having made that decision the Custodian concluded that it was not a case where there was a "dispute" regarding any property, right or interest, in the proceeds of the bonds, that should be referred to this Court, or a case where he should give his consent to the plaintiff taking proceedings in this Court under the terms of paragraph 41 of the 1920 Peace Order. The contention advanced on behalf of the plaintiff is that if he were "stateless" he was no longer an enemy national, and was therefore competent to assert a right of property in the proceeds of the bonds, just as would any national of an Allied or Associated Power.

The same contention apparently arose in certain cases in England and I would refer to *Rex v. Vine Street Police Station Superintendent* (1), *Ex parte Weber* (2), and *Hahn v. Public Trustee* (3). These cases arose in circumstances different from the one before me, and so far as I can see there is no provision in the English Treaty of Peace Order, 1919, corresponding to paragraph 41 of our own 1920 Peace Order.

Thereupon the plaintiff instituted this proceeding, by way of a statement of claim, claiming (1) a declaration that the Custodian, under The Treaty of Peace (Germany) Order, 1920, was an officer of the Crown within the meaning of sec. 30, ss. (c) of the Exchequer Court Act, Chap. 34, R.S.C., 1927, and that his refusal to refer the plaintiff's claim to the Exchequer Court of Canada for trial, was

(1) (1916) 1 K.B. 268 at 280. (2) (1916) 1 A.C. 421.
 (3) (1925) Ch. Div. 715.

something omitted to be done by him in the performance of his duty as such officer, and ordering him to refer the plaintiff's claim to the said Court for trial, and (2) for a mandamus commanding the Custodian to refer the plaintiff's claim to this Court for trial, and (3) for a declaration that in paragraph 41 (2) of the Treaty of Peace (Germany) Order, 1920, the word "may" is imperative, and that, thereby, the Custodian is obliged to refer the plaintiff's claim to this Court for trial.

Paragraph 41, sub-paragraphs (2) and (3) of the 1920 Peace Order, are as follows:

(2) In case of dispute or question whether any property, right or interest belonged on the tenth day of January, 1920, or theretofore, to an enemy, the Custodian 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.

The construction of sub-paragraphs 2 and 3 of paragraph 41 is, I think, plain. Sub-paragraph (2) was not, I think, designed to provide an opportunity for an enemy national to assert a claim against the Custodian for property retained or liquidated by an Allied or Associated Power, which property on or before the tenth day of January, 1920, belonged to an enemy national, but which had become vested in the Custodian by exceptional war measures. For the retention or liquidation of such enemy property in Allied or Associated States, the enemy national was to be compensated by his own country, Germany, in this case. There is no second party here disputing the title of the plaintiff to the property in question before the tenth day of January, 1920, when the Treaty of Versailles was ratified. This provision was intended to meet the case of a national of an Allied or Associated Power, or probably any national other than an enemy national, who claimed that on the tenth day of January, 1920, or theretofore, property in the hands of the Custodian as enemy national property, did not belong to the enemy national,

1939
 ERNST
 KELLER
 v.
 SECRETARY
 OF STATE.
 Maclean J.

1939

ERNST
KELLER
v.
SECRETARY
OF STATE.
Maclean J.

but belonged to him, the claimant, notwithstanding that the property had been vested in the Custodian as enemy property. In that case the Custodian might take proceedings in the Exchequer Court, or he might allow the claimant to do so by giving his consent in writing. That is the case which paragraph 41 of the 1920 Peace Order provides for. But the claimant could not be an enemy national whose property was retained under the provisions of the Treaty of Versailles and the Treaty of Peace (Germany) Order, 1920. There could be no reason for entertaining such a claim by an enemy national. His property had been taken from him and he was to look to his own country for compensation. Sub-paragraph (3) makes plain what is the question to be determined by the Court, in such cases; it is whether the property did not belong to some one else other than the enemy national on the tenth day of January, 1920, and if that were found to be the case then the Custodian was to relinquish the same, or its proceeds, to the owner. It was to be expected that it might occur that some one would come forward and claim that property in the hands of the Custodian as enemy national property, belonged in fact and in law to some one not an enemy national, and that, I think, was the purpose of this paragraph of the 1920 Peace Order.

That was the construction the Deputy Custodian evidently placed on paragraph 41 of the 1920 Peace Order because when he reached the considered opinion that the plaintiff was an enemy national he concluded the plaintiff's claim could not be further entertained, and he declined to proceed in the Exchequer Court, or to consent to the plaintiff himself so proceeding. I do not say that the Custodian could not take proceedings in the Court if he were reasonably in doubt as to the enemy nationality of a claimant. He exercised his discretion here in deciding after due consideration, that the plaintiff still retained his nationality of origin, it not being suggested that he had acquired any other nationality; the plaintiff being therefore held by the Custodian to be an enemy national I think the Custodian was right in refusing to take proceedings in the Exchequer Court. This action was begun nine years after the plaintiff was advised by the Custodian that his claim to "statelessness" could not be recognized, and that he must be regarded definitely as an enemy national, and there is nothing before me suggesting that in the

interval of nine years the plaintiff moved in any way to establish the validity of his contention as to "statelessness." That, however, is perhaps of no importance on this motion. Assuming that the Custodian was required to exercise a discretionary power under paragraph 41 of the 1920 Peace Order, as contended for on behalf of the plaintiff, then, I think, it may be said that he did exercise that discretionary power when he decided that the plaintiff's claim did not constitute a "dispute" within the meaning of paragraph 41 of the 1920 Peace Order as to the ownership of property, which might be referred to the Exchequer Court for determination, because of the enemy nationality of the plaintiff. The occasion for proceeding in the Exchequer Court did not arise because of the enemy nationality of the plaintiff. As is stated in Maxwell on the Interpretation of Statutes, 7th Edition, at page 215, there is a distinction between a discretion to exercise a power and a discretion to determine only whether the occasion for it has arisen, and illustrations of such a distinction are there given. In cases of this kind it was imperative that a very wide discretion should be bestowed on the Custodian, and I think a very wide discretion was given him. Exceptional war measures must, I think, be given a liberal construction. The Custodian might, under paragraph 46 of the 1920 Peace Order, relinquish at his discretion the property of an enemy national and in fact a certain payment was made as a matter of grace to the plaintiff out of the proceeds of the bonds in question, but the Custodian could not, I think, be compelled to do this.

Upon the facts here, and the provisions of The Treaty of Versailles and the 1920 Peace Order, I do not think that the plaintiff is entitled to proceed as he has done. No occasion arose for the Custodian exercising the power given to him to proceed in the Exchequer Court himself, or to consenting to the plaintiff doing so, after having determined that the plaintiff was an enemy national, and I do not think the Custodian can be compelled so to proceed. The motion of the defendant must therefore succeed.

As a practical question here it matters not, I assume, whether an order as to costs is made or not, and I make none. This is the first proceeding of its kind so far as I know, under paragraph 41 of the 1920 Peace Order, and that is perhaps a ground for making no order as to costs on this occasion.

Order accordingly.

1939

ERNST
KELLER
v.
SECRETARY
OF STATE.
Maclean J.