

1920  
Nov. 25.

BETWEEN

No. 4018.

MARY PENISTON WIEHMAYER.. PLAINTIFF;

AND

THE SECRETARY OF STATE OF  
CANADA AS CUSTODIAN UNDER } DEFENDANT.  
THE TREATY OF PEACE (GERMANY)  
ORDER, 1920..... }

AND

BETWEEN.

No. 4006

LUCY HAMILTON NEITZKE..... PLAINTIFF;

AND

THE SECRETARY OF STATE OF  
CANADA AS CUSTODIAN UNDER } DEFENDANT.  
THE TREATY OF PEACE (GERMANY)  
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*Enemy Property, Custodian of—Treaty of Versailles, 28th June, 1919—  
Articles 296-297—"Debts"—Jurisdiction—10 Geo. V, ch. 14.*

W. and N. were British-born women, who at birth had no other nationality, and who acquired German nationality only by their marriage, the former in July, 1898, and the latter in July, 1910. Their property, rights and interests in Canada were vested in the defendant by virtue of the Treaty of Peace (Germany) Order, 1920. Under this Treaty and an Order in Council in that behalf passed, they applied to have it declared that their said property, rights and interests did not come within the provisions of Article 296 of Treaty of Peace, that they be relinquished, etc.

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*Held:* That jurisdiction to entertain such an application, and to make the declaration asked for was conferred on the Exchequer Court by 10 Geo. V, chap. 14.

2. That money on deposit in banks or with a loan and saving company; bonds of commercial and industrial companies and shares of the capital stock thereof or of banks, or of mortgage corporations; money in the hands of trust companies for investment, and moneys invested under their guaranteed trust investment receipts; money loaned and secured by mortgages on real estate in Canada; money loaned to a company upon a receipt, subject to call on 3 months' notice; could not be classed as "debts" within the meaning of Article 296 of the Treaty of Peace signed at Versailles on the 28th June, 1919, between the Allied and Associated Powers and Germany, and may be relinquished to the plaintiff.

THESE were applications to have it declared that none of the property, rights and interests of the plaintiffs which were vested in the defendant, were within the provisions of Article 296 of the Treaty of Peace with Germany, and to have the custodian relinquish the same.

Mary Peniston Wiehmayer was British-born, and in 1898 married Theodore Wiehmayer, a German, and took up residence in Germany where she was residing on the 4th August, 1914. By the death of her father and mother in Canada in years 1912 and 1916 respectively, she inherited certain properties, interests and rights in Canada which were held by her on the said 4th August, 1914, and which, by an Order of the 20th May, 1919, became vested in the Minister of Finance and Receiver General as custodian of Enemy property, and were later vested in defendant under the Treaty of Peace (Germany) Order 1920, together with interest, etc., accrued since.

In January, 1913, there was held for said plaintiff by one Fielding, at Toronto, mortgages upon and agreements respecting real estate in Canada, and in the said month she instructed him to remit the interest to her from time to time and to pay over any principal

moneys paid thereon to the National Trust Company, to be held by it for investment. On 22nd August, 1914, the Trust Company ceased to reinvest any principal sums, but held them in cash. On the 4th August, 1914, they held mortgages amounting to \$34,050 and on the 10th January, 1920, they held mortgages amounting to \$16,900. and cash \$14,220.

On the 6th May, 1915, said Fielding handed over the balance of mortgages to the Trust Company, to be dealt with by the Company as aforesaid and on the 10th January, 1920, they held investments amounting to \$32,115.14 and \$21,054.27 in cash. During the war the interest, and part of the capital was paid to one Louis S. McMurray, for said plaintiff who deposited the same, along with interest from other securities, to her credit in a saving's account in the Bank of Toronto, except such as was remitted to said plaintiff.

The money now in the hands of the custodian as regards said plaintiff amounts to the sum of \$23,285.54 under the vesting order aforesaid. Besides the above, bonds of the Wm. Davies Company, Limited, shares of the Consumer Gas Company, Dominion Bank Stock and Dominion Telegraph Company Stock, with interest accrued were vested in the Minister of Finance and Receiver General, by said vesting order, and later were vested in the defendant herein. That besides these the said plaintiff was, on the 10th of January, 1920, the owner of the following property and interest, to wit:

Bonds of the Commercial Cable Company;  
 Bonds of the Canada Locomotive Company;  
 Shares of the MacKay Companies;  
 Shares of the Canadian Pacific Railway Company,  
 all of which was vested in the defendant.

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The plaintiff, Lucy Hamilton Neitzke was also by birth of British nationality. In 1910 she married Leo Neitzke, a German, and has ever since resided in Germany where she was on the 4th August, 1914. At that time she owned certain property, rights and interests in Canada which, by an order of the 20th May, 1919, were vested in the Minister of Finance and Receiver General as custodian of Enemy property and were later vested in the defendant under the Treaty of Peace (Germany) Order 1920.

The property, rights and interests involved in this case are given in the schedule to the case and are as follows:

First mortgage, 15 year sinking fund of the William Davies, Company, Limited, of the par value of \$10,000, bearing interest at 6 per cent per annum, the principal to mature July 1st, 1926; \$13,000 invested by National Trust Company, Limited, under its guaranteed trust investment receipts, dated the 16th of January, 1912 and the 2nd January, 1914; \$30,000 invested by the Toronto General Trusts Corporation under its guaranteed investment receipt, dated the 9th of July, 1913; 100 shares of the capital stock of the Canada Permanent Mortgage Corporation of the par value of \$10.00 each; \$20,000 in the hands of the W. B. Hamilton Shoe Company, Limited, under the terms of a receipt dated the 1st day of January, 1913; \$3,456.67 on deposit with the Central Canada Loan and Savings Company; 6 shares of the Fire Insurance Exchange Corporation Stock and Mutual, of the par value of \$60.00 per share, upon which \$30.00 per share is paid up.

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The special cases of the said Lucy Hamilton Neitzke and Mary Peniston Wiehmayer, were united for argument, being argued by the same counsel, before the PRESIDENT OF THE EXCHEQUER COURT, at Ottawa.

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Both plaintiffs by their statements of claim ask for (a) a declaration that none of their property, rights and interests vested in the defendant, as aforesaid, are within the provisions of Article 296 of the Treaty of Peace with Germany.

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(b) An order that the said property, rights and interests be returned by the defendant to them.

*R. S. Robertson K.C.* for plaintiff.

*Christopher C. Robinson K.C.* for defendant.

*Robertson K.C.* cited the following cases: *Bradford Old Bank v. Sutcliffe*; (1); *Coyne v. Broddie* (2); *re Tidd* (3); *Atkinson and Bradford Building Society* (4); *In re Brown Estate* (5); *Hart, Banking*, 2<sup>d</sup> Ed. pp. 199, 200 and 567.

*Robinson K.C.* cited: *Pott v. Clegg* (6).

The remainder of the facts and the points of law submitted are stated in the reasons for judgment.

THE PRESIDENT OF THE COURT now (November 25, 1920) delivered judgment.

(1) [1918] 2 K.B. 833.

(4) 25 Q.B.D. 377.

(2) 15 Ont. App. Rep. 159.

(5) [1893] 2 Ch. Div. 300.

(3) [1893] 3 Ch. Div. 154.

(6) 16 M. & W. 321.

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The questions raised are of considerable interest. On the 15th November, 1920, an order in council was passed which reads as follows:

"Ottawa, 15th November, 1920.

"To His Excellency,

"The Governor General in Council:

"The undersigned has the honour to observe that under the provisions of the treaty of peace with Germany, and the treaty of peace (Germany) Order, 1920, Canada has the right to retain and liquidate the property, rights and interests of certain enemies in Canada, and such property, rights and interests are vested in the custodian, but power is reserved to relinquish any of such property, rights or interests, and it is desirable to exercise the power of relinquishment with respect to property of British-born women, who at birth had no other nationality, and who acquired German nationality only by marriage. Doubt, however, arises as to the liability of Canada to Germany with respect to certain classes of such property, and it is desirable to resolve such doubt so far as possible by the decision of the Exchequer Court of Canada.

"The undersigned therefore recommends that the property, rights and interests of British-born women who at birth had no other nationality, and who have acquired German nationality only by marriage, be relinquished, provided such relinquishment shall not include any property, rights or interests for or in respect of which Canada is or may be liable to Germany under the provisions of the treaty of peace; that any such woman may make an application under the treaty of peace (Germany) Order, 1920, to the Exchequer Court of Canada for a declaration as to what

property, rights or interests formerly owned by her may be relinquished hereunder having regard to the foregoing proviso, and that the order in council approved by Your Excellency on the 29th of July, 1920, P.C. 1760, be rescinded."

A statute was enacted by the parliament of Canada Cap. 14, 10 Geo. V, assented to the 10th November, 1919, which reads as follows:

"His Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:—

"1. Section twenty of the *Exchequer Court Act*, Revised Statutes of Canada, 1906, chapter one hundred and forty, is amended by adding thereto the following:—

"(i) Every claim, demand, set off, counter claim, dispute, or question with respect to any debt, property right or interest mentioned in section three or section four of Part X of the treaty of peace with Germany, or in any similar section or provision which may be included in the treaties of peace with Austria, Bulgaria or Turkey, or in any statute or order in council passed for the purpose of carrying into effect the said section three or section four or any such similar section or provision.

"(2) Nothing in paragraph (i) shall affect the jurisdiction of any other court to hear and determine any matter now pending before such court."

By the treaty of peace between the allied and associate powers and Germany, signed at Versailles, June 28th, 1919, it is provided by section 3, article 296, as follows:

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“There shall be settled through the intervention of clearing offices to be established by each of the high contracting parties within three months of the notification referred to in paragraph (e) hereafter the following *classes* of pecuniary obligations:

“(1) Debts payable before the war and due by a national of one of the contracting powers, residing within its territory, to a national of an opposing power, residing within its territory;

“(2) Debts which became payable during the war to nationals of one contracting power residing within its territory and arose out of transactions or contracts with the nationals of an opposing power, resident within its territory, of which the total or partial execution was suspended on account of the declaration of war”.

“(4) \* \* \* \* The proceeds of liquidation of enemy property, rights and interests mentioned in section IV and in the annex thereto will be accounted for through the clearing offices, in the currency and at the rate of exchange hereinafter provided in paragraph(d), and disposed of by them under the conditions provided by the said section and annex. The settlements provided for in this article shall be effected according to the following principles and in accordance with the annex to this section:

“(b) Each of the high contracting parties shall be respectively responsible for the payment of such debts due by its nationals, except in the cases where before the war the debtor was in a state of bankruptcy or failure, or had been given formal indication of insolvency or where the debt was due by a company whose business has been liquidated under emergency legis-



lation during the war. Nevertheless, debts due by the inhabitants of territory invaded or occupied by the enemy before the armistice will not be guaranteed by the states of which those territories form part:

“(c) The sums due to the nationals of one of the high contracting parties by the nationals of an opposing state will be debited to the clearing office of the country of the debtor, and paid to the creditor by the clearing office of the country of the creditor;

“(d) Debts shall be paid or credited in the currency of such one of the allied and associated powers, their colonies or protectorates, or the British Dominions or India, as may be concerned. If the debts are payable in some other currency they shall be paid or credited in the currency of the country concerned, whether an allied or associated power, colony, protectorate, British dominion or India, at the pre-war rate of exchange.

“For the purpose of this provision the pre-war rate of exchange shall be defined as the average cable transfer rate prevailing in the allied or associated country concerned during the month immediately preceding the outbreak of war between the said country concerned and Germany.

“If a contract provides for a fixed rate of exchange governing the conversion of the currency in which the debt is stated into the currency of the allied or associated country concerned, then the above provisions concerning the rate of exchange shall not apply.”

The first question that arises is whether or not the classes of property mentioned in the stated cases, in both actions, are “debts” within the meaning of this article 296 which I have quoted.

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The case was very fully and ably argued by counsel for both parties. It is conceded that all the various classes of property referred to in both of the actions are now vested in the custodian by order of the Supreme Court of Ontario.

After considering the various sections of the treaty and also the authorities cited by counsel, I am of the opinion that none of the property, rights or interest set out in the special case and the schedules thereto, can be classed as debts within the meaning of section 296. I think this is manifest from a consideration of the different sections of the treaty, 296 and 297. For instance, article 296 starts by stating that: "There shall be settled through the intervention of clearing offices to be established by each of the high contracting parties within three months of the notification referred to in paragraph (e) hereafter the following classes of pecuniary obligations:"

And then follows the clauses defining the debts. The debts are manifestly not all classes of pecuniary obligations. If we turn over to sub-section 4, there is the provision that the proceeds of liquidation of enemy property rights and interests mentioned in section 4, and in the annex thereto will be accounted for through the clearing offices, etc.

In the annex of section 296, it is provided that in this annex, the pecuniary obligations referred to in the first paragraph of Article 296 are described as "enemy debts;" the persons from whom the same are due as "enemy debtors."

Article 297 is of importance as bearing on the meaning of the word "debts." It provides in sub-section (b): "Subject to any contrary stipulations which may be provided for in the present treaty, the

allied and associated powers reserve the right to retain and liquidate all property, rights and interests belonging at the date of the coming into force of the present treaty to German nationals, or companies controlled by them, within their territories, colonies, possessions and protectorates, including territories ceded to them by the present treaty.

“The liquidation shall be carried out in accordance with the laws of the allied or associated state concerned, and the German owner shall not be able to dispose of such property, rights or interests nor to subject them to any charge without the consent of that state.”

This would answer all the matters argued before me as to which I have any jurisdiction. I am asked, however, to give my opinion on another matter as to which any views that I express would merely be a matter of personal opinion.

By the order in council, which I have set out in full, the Crown is willing to relinquish their claims on all of these properties and assets which are now vested in the custodian, to the two ladies, the plaintiffs in the different actions; but, they would like to be advised as to whether in case of their so doing there might be any liability to Germany by reason of their so relinquishing. The German government is not represented before the court, and any personal views of my own would have no binding authority, and would be of no more value than the opinion of the Justice Department. There can be no doubt that if the Crown so chooses, they can relinquish for the benefit of these ladies the properties in question, and it is difficult to see how any liability is likely to arise by reason of their so doing.

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The only question that might arise is one of very remote probability, and it is this: By sub-section 4 of article 296, it is provided that "the proceeds of liquidation of enemy property, rights and interests mentioned in section IV and in the annex thereto will be accounted for through the clearing offices."

Sub-section (b) of article 297, provides that "Subject to any contrary stipulations which may be provided for in the present treaty, the allied and associated powers reserve the right to retain and liquidate all property, etc.

Sub-section 4 of the annex to article 298, reads as follows: "All property, rights and interests of German nationals within the territory of any allied or associated power and the net proceeds of their sale, liquidation or other dealing therewith may be charged by that Allied or associated power in the first place with payment of amounts due in respect of claims by the nationals of that allied or associated power with regard to their property, rights and interests, including companies and associations in which they are interested, in German territory, or debts owing to them by German nationals, and with payment of claims growing out of acts committed by the German Government or by any German authorities since July 31, 1914, and before that allied or associated power entered into the war. The amount of such claims may be assessed by an arbitrator appointed by Mr. Gustave Ador, if he is willing, or if no such appointment is made by him, by an arbitrator appointed by the mixed arbitral tribunal provided for in section VI. They may be charged in the second place with payment of the amounts due in respect of claims by

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the nationals of such allied or associated power with regard to their property, rights and interests in the territory of other enemy powers, in so far as those claims are otherwise unsatisfied."

A question might arise if the German government retained assets belonging to Canadian subjects and failed to pay them over, in which case a claim might be put forward on the part of the Canadian government to have these monies paid by Germany. Germany might retort, if you had not relinquished the assets in question you might have set them off against any claims that you have against us. This is a remote contingency, and I should think not worth while taking into account.

I have gone out of my way as I have said in expressing any opinion on this latter question, but as I have been asked by counsel I have done so.

These are not cases in which costs should be given to either party. I presume that the Crown would be entitled to recoup themselves for any costs and expenses out of the properties in question.

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