Maurice Feuchtwanger and Sylvan Gotshal Oct. 3, 1944
vs
The Custodian, the Bank of Montreal
and
Etienne Feuchtwanger
vs
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- reasons for judgment

I N T H E E X C H E Q U E R C O U R T O F C A N A D A

BETWEEN:

MAURICE FEUCHTWANGER, gentleman, of the City of New York, United States of America,

Plaintiff (Deceased),

and

SYLVAN GOTSHAL, administrator of the estate of the said Maurice Feuchtwanger,

Added Plaintiff in continuance of suit,

- and -

THE CUSTODIAN, the Bank of Montreal, a corporation duly incorporated under the Bank Act, having its head office in the City and District of Montreal and Banque Jordaan, S.A., a corporation of Paris, France,

Defendants.

and

BETWEEN:

ETIENNE FEUCHTWANGER, gentleman, of the City of New York, United States of America,

Plaintiff,

- and -

THE CUSTODIAN and SYLVAN GOTSHAL, administrator of the estate of the late Maurice Feuchtwanger, of the City of New York, United States of America,

Defendants.

THORSON, J.

These two actions, which were tried together, were brought to obtain declarations from the Court relating to the following securities:

230 common shares in the American Telephone & Telegraph Company, represented by certificates QC40940-41 and A 221884,

350 common shares in the International Nickel Company of Canada, Limited, represented by certificates MA35089-91 and MB92030,

250 common shares in the General Electric Company, represented by certificates NYC420283 - 4 and NYE 96004, and

50 preferred shares in the United States Steel Corporation, represented by certificate C771204.

The certificates for these shares are in the custody of the Bank of Montreal at Montreal, and are held by it in a block account to the order of the Custodian for Banque Jordaan, Paris, France, favour Maurice Feuchtwanger. On December 2, 1940, the Bank of Montreal reported the securities to the Custodian as being enemy property.

The first action has been discontinued as against the defendant, the Bank of Montreal, and as against the defendant, Banque Jordaan.

The plaintiff in the second action claims the following securities, included in the total already described:

30 common shares in the American Telephone & Telegraph Company,

50 common shares in the International Nickel Company of Canada, Limited, and

50 common shares in the General Electric Company.

The remaining securities are claimed by the added plaintiff in continuance of suit in the first action, as the administrator of the estate of Maurice Feuchtwanger, who died in New York shortly after he had commenced his action. Maurice Feuchtwanger was the father of Etienne Feuchtwanger. Both were nationals of France and residents of Paris prior to the invasion of France by the Germans.

The first action was commenced on January 4, 1943. At that time the Consolidated Regulations respecting Trading with the Enemy (1939), hereinafter called the Consolidated Regulations, enacted by Order in Council, P.C. 3959, dated August 21, 1940, as amended by Order in Council, P.C. 5353, dated October 3, 1940, were in force, and section 27 provided as follows:

> "27. (1) In case of a dispute or question as to whether or not any property belongs to an enemy or is subject to these Regulations 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 or as to whether or not such property is subject to these Regulations.
>
> (2) 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) No mandamus proceedings shall be taken against the Custodian to obtain his consent, nor shall any proceedings by way of petition of right be instituted by any claimant where the Custodian has, under paragraph (1) hereof, refused a consent."

A consent under this section was given in writing by the Custodian on January 13, 1943.

The second action was commenced on May 30, 1944. At this time the Revised Regulations respecting Trading with the Enemy (1943) hereinafter called the Revised Regulations, enacted by Order in Council, P.C. 8526, dated November 13, 1943, were in force, and section 27 provided as follows:

> "27.(1) Where a dispute or question arises as to whether property is subject to these Regulations, the Custodian may proceed in the Exchequer Court of Canada or in any superior court of record for a declaration as to whether the property is subject to these Regulations.
>
> (2) Any person may, not less than ninety days after giving the Custodian notice of his claim, proceed in the Exchequer Court of Canada for a declaration that he is not an enemy and
> (a) that property held or controlled by the Custodian is not subject to these Regulations and he is the owner thereof or of an interest therein; or

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(b) that he was the owner of property or an interest in property immediately prior to its vesting in the Custodian under these Regulations."

Under this amended section no consent of the Custodian is required but a consent was requested and given by the Custodian in writing on May 22, 1944. No notice of the claim was given as required by section 27 (2), but it was agreed by counsel that, since a consent had been given, the requirement of notice was waived.

One other enactment must be referred to; by Order in Council, P.C. 3515, dated July 31, 1940, the provisions of the Regulations respecting Trading with the Enemy (1939) were extended to and deemed to apply to France and other French territories, as and from June 21, 1940. This is the date on which France became proscribed territory.

The facts relating to the departure of Maurice Feuchtwanger from France are that he received authority to leave France on June 22, 1940, and that he crossed the border into Spain during the night of June 22/23, 1940. Etienne Feuchtwanger, on the other hand, was an officer in the French Army at the time of the invasion of France. He was taken prisoner by the Germans on June 17, 1940, but escaped from them to Paris and later to Vichy where he was demobilized on August 13, 1940. He then went to Algeria but did not leave France until July 23, 1942. Both father and son were, therefore, actually in France beyond June 21, 1940, the date from which the proscription of French territory came into effect.

There was some discussion in the course of the argument as to whether Maurice Feuchtwanger could be regarded as a resident of France on June 21, 1940, in view of the fact that he was seeking to escape from it but the fact is that he was still in France on June 22, 1940. As to Etienne Feuchtwanger, he was in the service of France as a soldier until August 13, 1940, and remained in French territory until he went to

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Spain on July 23, 1942. Under the circumstances, I am unable to hold that either Maurice Feuchtwanger or his son Etienne Feuchtwanger was not residing in France when it became proscribed territory. In view of the amended provisions of section 21 of the Revised Regulations the residence of the Feuchtwangers appears to be immaterial in determining whether the securities were vested in the Custodian, in view of the fact that they were held by the Bank of Montreal for Banque Jordaan, whose residence and business in France is not disputed. Counsel did not seek any declaration from the Court under section 27(1) of the Revised Regulations and no declaration is, accordingly, made thereunder. It was suggested by counsel that the Court might proceed on the assumption that the securities in question in these actions became vested in the Custodian under the Revised Regulations as from June 21, 1940, when France was proscribed, and on such assumption I proceed to deal with the other issues involved in these cases.

The Court is requested to make declarations with respect to two issues. The first is whether the real and beneficial ownership of the securities in dispute lies with the Feuchtwangers or with Banque Jordaan and whether Banque Jordaan has any interest in them. If it is declared that the Feuchtwangers are the owners, and Banque Jordaan has no interest in them, the Court is asked for a declaration as to whether Maurice Feuchtwanger was an enemy from the time of the commencement of his action and up to the date of his death and whether Etienne Feuchtwanger was an enemy when he brought his action or is an enemy now. The Court was advised by counsel that declarations on these matters were desired so that on the strength of them the Custodian might determine whether he should or should not release the securities under the powers conferred by the Regulations to do so in a proper case. There is no doubt that the plaintiff, Etienne Feuchtwanger, is entitled to declarations on these matters,

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under Section 27 (2) of the Revised Regulations but the right of the plaintiff in the first action to have such declarations with regard to Maurice Feuchtwanger is not so clear under section 27 of the Consolidated Regulations, which govern that action, but since the first action could have been discontinued and a second one brought under the Revised Regulations I will deal with the matter in order to save time and expense as though section 27 (2) of the Revised Regulations were applicable to the second action as well as to the first.

I find no difficulty in coming to the conclusion that, immediately prior to the securities becoming vested in the Custodian, they were really and beneficially the property of Maurice Feuchtwanger and his son, Etienne Feuchtwanger, as against Banque Jordaan of Paris, France, and that Banque Jordaan had no interest in any of them, and that this position has remained unchanged, subject, of course, to the rights of the Custodian and the transmission of Maurice Feuchtwanger's interest in the securities on his death. This conclusion is amply warranted by the documentary evidence and the parol evidence given by Etienne Feuchtwanger who appeared as a witness at the trial. The documents show that on March 21, 1939, Lippmann, Rosenthal & Co., a banking firm of Amsterdam, Holland, wrote to Barclays Bank (Canada) at Montreal, instructing them to "withdraw the securities from our Ordinary Dossier and place them in a Special Deposit "Bernina" in our name ". This shows that the securities had been sent to Barclays Bank (Canada) at Montreal sometime before the date of the letter. The letter alsp contained the following statement:

> "Kindly note that of the values lying in this Special Deposit included the values that may be added to this later on, may, besides by us, at all time be disposed of by Mr. Maurice Feuchtwanger, and Mr. Etienne Feuchtwanger, dit Feuche each of them separately. We enclose specimens of signatures for your guidance.

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> Kindly also note that the above mentioned persons are authorized to give you telegraphic instructions with regard to the Special Deposit "Bernina" in which case they will add the code-word "Bern" to their cables."

These instructions were rescinded on April 27, 1939, and special instructions given on April 28, 1939, as follows:

> "We herewith enclose sealed envelope marked "Special Account Bern" which contains specimens of the signatures of the persons who can dispose of this Special Account.
>
> If one of these persons communicates with you, he will have to hand you a letter from us authorizing you to deliver to him all the securities, cash money, gold, etc. you may hold for us under the said Special Account.
>
> It is understood that until one of these persons disposes of the Special Account Bern, this Special Account remains in our name and at our free disposal.
>
> Until they, jointly or separately, dispose we beg you not to open the sealed envelope."

Then on October 7, 1939, Lippmann, Rosenthal & Co. cabled instructions as follows:

> "Test . . . Please deliver Bank of Montreal Montreal Account Banque Jordaan Paris ex our Special Deposit Bern 230 shares American Telephone & Telegraph 350 shares International Nickel 250 shares General Electric $81,500 Banknotes $5,000 preferred United States Steel favour Maurice Feuchtwanger."

On October 11, 1939, Barclays Bank (Canada) forwarded the securities as directed to the Montreal branch of the Bank of Montreal " for account of Banque Jordaan, Paris, favour Maurice Feuchtwanger". The reason for the transfer to the Bank of Montreal was that while Barclays Bank (Canada) were acting for Lippmann, Rosenthal & Co., the Bank of Montreal was the agent of Banque Jordaan, a French bank with its office in Paris, France. A further letter from Barclays Bank (Canada) to the Bank of Montreal, dated October 29, 1940, contained the following:

> "This letter will serve to introduce to you Mr. Maurice Feuchtwanger who has identified himself to us as being a person who was at one time authorized by our customers Lippmann, Rosenthal & Co., Amsterdam, to dispose of the undermentioned cash and securities

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when they were previously deposited with us to the order of Lippmann,Rosenthal & Co. -

230 shares American Telephone & Telegraph Company, Capital
350 shares The International Nickel Co. of Canada Ltd., common
250 shares General Electric Company, common
50 shares United States Steel Corp., par value $100, Preferred
$81,500 United States Federal Reserve Notes.

The cash and securities were delivered by us to your good selves on the 11th October, 1939, by order of Lippmann, Rosenthal & Co., Amsterdam, for account of Banque Jordaan, Paris, in favour of Maurice Feuchtwanger.

Mr. Feuchtwanger will explain to you his present position and wishes."

Counsel for the plaintiffs also filed 4 Deposit Receipts (Exhibits 7A-D) in the first action and 3 Deposit Receipts (Exhibits 12 A-C) in the second, as receipts from Banque Jordaan, dated November 4, 1939. The first four receipts cover the number of shares claimed by the plaintiff in the first action and acknowledge their deposit by Maurice Feuchtwanger; the second three acknowledge deposits by Etienne Feuchtwanger and cover the number of shares claimed by him in the second action. Each receipt carries an endorsement on the back thereof, meaning, "Certificates in our file at the Bank of Montreal, Montreal." Etienne Feuchtwanger gave evidence at the trial that when he was on leave from the front line he went to Banque Jordaan with his father, that Banque Jordaan gave these receipts to him and that he brought them with him when he came to Montreal. Counsel for the plaintiffs also filed in the first action a letter from Banque Jordaan, dated January 15, 1940, and addressed to Maurice Feuchtwanger while he was still in Paris, reading, in translation, as follows:

> "We have the honour to send you today a list of securities being on your file in our special branch " The Keeping of Titles" up to 31/12/39."

to which was attached a list including the securities claimed in the first action and a letter from Banque Jordaan, dated September 6, 1941, addressed to Maurice Feuchtwanger, at 125

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East 63rd Street, New York, in which the following acknowledgement is made, as translated:

> "We beg to confirm you herewith that from our books it appears that you are creditor of
> - 200 (two hundred) shares American Tel. Tel.
> - 200 (two hundred) shares General Electric common.
> - 300 (three hundred) shares International Nickel common
> - 50 (fifty) shares United States Steel Corp. Pref.
>
> Said securities are on deposit in our name with our correspondents at Montreal: "The Bank of Montreal".
>
> Beside, we certify that you have neither liabilities nor indebtedness whatever to us."

In the second action counsel filed a statement of account for Etienne Feuchtwanger from Banque Jordaan dated September 4, 1941, showing " position of securities in your file at our " conservation service"." This statement includes the securities claimed in the second action and shows that they are with the Bank of Montreal,at Montreal. There was also filed a letter from Banque Jordaan, dated May 18, 1942, and addressed to Maître Bresard, at Lyon, France, in which the following appears, as translated:

> "On the written request of our client Mr. Etienne Feuchtwanger, 2 Boulevard Michelet at Marseille, under Account no. 32426 in our books, we confirm to you that the position of the securities of this gentleman in our conservation service was on May 4, 1942, as follows:
>
> 1. 100 shares common British American Tobacco,
> 50 shares Union Corporation
>
> 2. 30 American Tel. Tel.
> 50 International Nickel of Canada.
> 50 General Electric common
>
> Titles in our file with the Bank of Montreal of Montreal.
>
> For your information all the foreign titles are blocked by D.S.K."

Etienne Feuchtwanger says he got this letter from his attorney in Algiers. The documents from Banque Jordaan indicate clearly that it merely held the securities for its clients, and had itself no interest in them. This state of affairs is confirmed by the evidence of Etienne Feuchtwanger who explained that the securities had been purchased about 1934 by his fatheraand himself

through Lippmann, Rosenthal & Co., bankers at Amsterdam, with money put up by his father and himself in proportions of four to one. The securities were transferred to Banque Jordaan from Lippmann, Rosenthal & Co., to meet the requirements of French fiscal legislation enacted after the outbreak of war, whereby the French people were obliged to declare their securities and under which income from securities was taxed at a lower rate if they were held by a French bank than if they were held outside France. The securities were held by Banque Jordaan to comply with this requirement, although it is clear that the certificates themselves had already been sent to Montreal. According to Etienne Feuchtwanger, Banque Jordaan had no interest in the securities, had made no advance in respect of them and neither he nor his father were indebted to it. He says that he and his father were the only persons who had ever had any interest in the securities from the time of their purchase and that he and his father were the owners of them. He is specific and definite in his statement that the Banque Jordaan never had any interest of any kind in the securities, and that no one other than his father and himself ever had any interest of any kind in them. They had always remained the sole property of his father and himself. I formed a favourable impression of the witness as he was giving his evidence and am satisfied that he was telling the truth. His positive statements are corroborated by the documentary evidence. The defendant Sylvan Gotshal in the second action admits the claim of the plaintiff in that action to the securities claimed by him. Under the circumstances, even although Banque Jordaan was not heard, I think it is clearly established by the evidence that Maurice Feuchtwanger and his son Etienne Feuchtwanger were the real and beneficial owners of the securities in question in these actions respectively claimed therein immediately prior to their being vested in the Custodian and, apart from such

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vesting, remained such owners, in the case of Maurice Feuchtwanger, up to his death, and in the case of Etienne Feuchtwanger up to the present time and that Banque Jordaan never had any interest in any of them and the Court declares accordingly.

The other question on which a declaration of the Court is sought is whether the Feuchtwangers were enemies at the time they brought their actions. Section 1 (d) of the Revised Regulations provides for the manner in which the expression "enemy" shall be construed for the purpose of the regulations. The pertinent paragraphs of the definition are as follows:

> "1. For the purpose of these Regulations, the following expressions shall be construed so that -
> (d) "enemy" shall extend to and include -
> (ii) Any person who resides within enemy territory or proscribed territory;
> (iii) Any person who carries on business within enemy territory or proscribed territory;"

As I understood counsel, the Court is not asked for a declaration that either Maurice Feuchtwanger or Etienne Feuchtwanger was on June 21, 1940, an enemy on the ground that on that date he was a resident of France or was carrying on business there. That question is being left to one side and it may be that it has no bearing on the question of vesting for the reasons already indicated. The status of the Feuchtwangers since the vesting is,however, of importance as a factor for the Custodian to consider in determining whether the securities should be released to their real and beneficial owners. It is, I think, clear that the status of being an enemy is not a continuous one. The definition speaks of an enemy as a person who " resides", or "carries on business" within enemy or proscribed territory, and differs from the definition of an enemy appearing in The Treaty of Peace (Germany) Order, 1920, in which one of the meanings of the term " enemy" was " a German National who during the war resided or carried on business within the territory of a Power

at war with His Majesty". A person may be an enemy within the meaning of the present regulations while resident within proscribed territory but may cease to be such on his escape therefrom. The plaintiff Etienne Feuchtwanger is clearly entitled under section 27 (1) of the Revised Regulations to have a declaration as to whether he is an enemy now and the plaintiff in the first action is entitled to have a declaration as to the enemy or non-enemy status of Maurice Feuchtwanger at the time he commenced his action and up to the time of his death, on the assumption that the Revised Regulations apply to the first action and I proceed on such assumption for the reasons already indicated. In each case the decision is, I think, an easy one. Both father and son were citizens of France. Maurice Feuchtwanger crossed from France into Spain on the night of June 22/23, 1940. From there he went to Portugal. He left Lisbon on August 2, 1940, and arrived in the United States at New York on August 10, 1940, with a temporary visa. He could not get an immigrant visa in the United States and went to Montreal for that purpose. There he obtained an immigrant visa on November 1, 1940, and entered the United States thereon. His passport corroborates these facts. On August 29, 1941, he declared his intention of becoming a citizen of the United States. From the time of his arrival in the United States and up to the date of his death after the commencement of his action he was lawfully a resident of the United States, and was, in my judgment, not an enemy within the meaning of the Revised Regulations and the Court so declares. As to Etienne Feuchtwanger, the facts are that during the present war, as in the first one, he was an officer serving in the French Army. On June 17, 1940, he was captured by the Germans but escaped from them, first to Paris and later to Vichy. There he was demobilized on August 15, 1940, under the name Feuche, which had been given to him during the first war. He then went to Algeria

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where he remained some time. On June 22, 1942, he received authority to leave France and crossed over into Spain on June 23, 1942. From there he went to Cuba. At Cuba he obtained his immigrant visa for entry into the United States on April 9, 1943, and arrived in the United States at Miami, Florida, on May 11, 1943. These facts as given by Etienne Feuchtwanger are corroborated by his passport. Since May 11, 1943, Etienne Feuchtwanger has been lawfully resident in the United States and the Court declares that he is not now and has not, since May 11, 1943, been an enemy within the meaning of the Revised Regulations.

If counsel cannot agree as to the form of the declarations, the matter may be further spoken to.

This disposes of the matter, in so far as the Court was requested to deal with it. The declarations made by the Court do not, of course, entitle the plaintiffs as a matter of right to the release of the securities from the Custodian, but dispose of issues on which the decision of the Court may assist the Custodian in determining his course of action on an application for their release .

The plaintiffs having succeeded in obtaining declarations in their favour on the important questions of their ownership of the securities and their status as non-enemies should have their costs.

Judgment accordingly.

PRESIDENT

Ottawa,
October 3, 1944

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IN THE EXCHEQUER COURT OF C[illegible]DA

BETWEEN:

MAURICE FEUCHTWANGER, gentleman of the City of New York, United States of America,

Plaintiff (deceased),

and

SYLVAN GOTSHAL, administrator of the estate of the said Maurice Feuchtwanger,

Added Plaintiff in continuance of suit,

- and -

THE CUSTODIAN, the Bank of Montreal, a corporation duly incorporated under the Bank Act, having its head office in the City and District of Montreal and Banque Jordaan, S.A., a corporation of Paris, France,

Defendants.

and

BETWEEN:

ETIENNE FEUCHTWANGER, gentleman, of the City of New York, United States of America,

Plaintiff,

- and -

THE CUSTODIAN and SYLVAN GOTSHAL, administrator of the estate of the late Maurice Feuchtwanger, of the City of New York, United States of America,

Defendants.

REASONS FOR JUDGMENT

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