HARVARD LAW REVIEW

VOL. 62

MARCH, 1949

No. 5

JUDICIAL CONSTRUCTION OF THE TRADING WITH THE ENEMY ACT †

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THE Trading with the Enemy Act has in modern economic warfare two basic objectives: to keep an enemy from using for his own purposes any property which he owns or controls, located within the United States; and to make that same property available for the purposes of the United States. Essentially simple as are these purposes, the Act — perhaps because loosely and hastily drafted — has presented to the judiciary a collection of knotty problems which are probably not surpassed by those arising under any other statute of its size and weight. It is the aim of this article to discuss some of those problems.

The first purpose, essentially defensive, has been accomplished principally by “freezing” controls. Freezing, unlike vesting, did not change the ownership of the property affected, but simply prohibited and declared void transfers not licensed by the Treasury.¹ The constitutionality of such prohibition and nullification

† In addition to the usual warning that the opinions expressed herein are not necessarily those of the Department of Justice, the author cautions readers that he has been largely responsible for the appellate litigation of some of the cases discussed herein, particularly *Clark v. Manufacturers Trust Co.* and *Matter of Herter*, and so has a certain, perhaps inevitable, bias.

This article avoids, insofar as possible, detailed discussion of the history of the Trading with the Enemy Act. An excellent symposium on this and allied topics is contained in 11 *LAW & CONTEMP. PROB.* 1-199 (1945).

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¹ The basic statutory authority for these controls is § 5(b) of the Trading with the Enemy Act, 40 *STAT.* 415 (1917), as amended, 50 *U. S. C. APP.* § 5(b) (1946). The basic Executive Order, frequently amended to extend the controls, is

of transfers of foreign-owned property is no longer open to question, and in general the courts have accorded to freezing orders the full effect intended by the legislative and executive branches of the Government.² The freezing program, by subjecting to licensing and consequent strict scrutiny transactions affecting property in the United States in which foreign countries (allied and neutral as well as enemy) or their nationals had an interest, not only prevented the Axis from using its own property in the United States as a means of obtaining credit and foreign exchange but, more important, seriously interfered with its plans for the looting of conquered countries. Without the freezing controls, utilization of dollar assets belonging either to the Axis, its nationals, or its victims would have presented few difficulties to the acute financial intellects in the German *Devisenabteilung* of the Reich Economics Ministry and their Japanese opposite numbers. The imposition of "occupation costs" or the simple pointing of a gun could secure the transfer of interests in American property to the Axis; "evidences of ownership" so obtained could easily have been exchanged in neutral countries for "hard money." As it was, few neutrals cared to speculate in evidences of ownership which American law declared null and void.

At its peak, the program affected property valued at nearly eight billion dollars;³ but it is being terminated as rapidly as possible, the general policy being either to unfreeze the assets altogether or, if they have a genuine enemy taint, to vest them in

Exec. Order No. 8389, 3 CODE FED. REGS. 645 (Cum. Supp. 1943) (issued April 10, 1940). For a comprehensive collection of Executive Orders, General Rulings, General Licenses and other regulations under the freezing program see DOCUMENTS PERTAINING TO FOREIGN FUNDS CONTROL (U. S. Treas. Dep't 1946).

² E.g., *Silesian-American Corp. v. Clark*, 332 U. S. 469 (1947); *United States v. Von Clemm*, 136 F.2d 968 (2d Cir. 1943), *cert. denied*, 320 U. S. 769 (1943); *Clark v. Propper*, 169 F.2d 324 (2d Cir. 1948). Some question has arisen in the courts of New York as to the effect of these regulations on transfers by judicial process, such as attachment or the appointment of a receiver. Cf. *Singer v. Yokohama Specie Bank*, 293 N. Y. 542, 58 N. E.2d 726 (1944). The *Singer* case has been criticized by commentators, see Berger and Bittker, *Freezing Controls: The Effects of an Unlicensed Transaction*, 47 COL. L. REV. 398 (1947), and rejected by the Court of Appeals for the Second Circuit. *Clark v. Propper*, *supra*. See also *Clark v. Chase Nat. Bank*, S. D. N. Y., Oct. 1, 1948. The Supreme Court has granted certiorari in the *Propper* case, and it is possible that such conflict as there is between the federal courts and those of New York may be resolved.

³ See ANNUAL REPORT, OFFICE OF ALIEN PROPERTY CUSTODIAN, FISCAL YEAR ENDING JUNE 30, 1944, 14; H. R. REP. NO. 1507, 77th Cong., 1st Sess. 2-3 (1941).

the Alien Property Custodian.⁴ With the end of shooting war and the gradual return of more or less normal economic conditions, the practical significance of the freezing program to the lawyer decreases, and it will consequently not be included within the scope of this article.⁵

The vesting of property by the Alien Property Custodian achieves the second, or offensive (in the military sense), purpose of the Trading with the Enemy Act — the seizure and utilization of *enemy* property “in the interest of and for the benefit of the United States.” It accomplishes this sweeping objective by transferring the ownership of the property to the United States, there to remain unless the former owner can fit himself into one of the sections of the Act which provide for return. It will be noted that the scope of the vesting power is considerably narrower than that of the regulatory power, for the latter covers any property in which a foreign national has any interest, while the former extends only to the foreign interest itself⁶ — and, in practice, only to enemy interests.

The value of the property directly affected by the vesting program, while small by comparison to the sums frozen, can hardly be described as piddling. As of June 30, 1947, the Custodian had vested German and Japanese property valued at \$266,017,000 and had estimated the value of such property not yet vested to be somewhere between \$88,500,000 and \$103,500,000.⁷ These figures are, however, deceptively low, for they take no account of thousands of copyrights and patents — as, for example, the basic

⁴ This policy was expressed in detail in a letter from the Secretary of the Treasury to the Chairman of the Senate Committee on Foreign Affairs. See N. Y. Times, Feb. 3, 1948, p. 1, col. 6. By Exec. Order No. 9989, 13 FED. REG. 4891 (1948) (issued August 20, 1948), administration of the freezing program was transferred to the Attorney General, as successor to the Alien Property Custodian.

⁵ For a general survey of the wartime operation of the freezing program, see Reeves, *The Control of Foreign Funds by the United States Treasury*, 11 LAW & CONTEMP. PROB. 17 (1945).

⁶ See *Clark v. Edmunds*, 73 F. Supp. 390 (W. D. Va. 1947); cf. *Clark v. Uebersee Finanz-Korporation*, 332 U. S. 480 (1947), discussed pp. 749-50 *infra*.

⁷ ANNUAL REPORT, OFFICE OF ALIEN PROPERTY, DEPARTMENT OF JUSTICE, FISCAL YEAR ENDING JUNE 30, 1947, 3. The value of vested Italian property never exceeded \$18,000,000, and its return has now been authorized by Congress. *Id.*, at 8-9; Pub. L. No. 370, 80th Cong., 1st Sess. (Aug. 5, 1947). Bulgarian, Hungarian, and Rumanian property vested totaled only about \$5,000,000. ANNUAL REPORT, *supra* at 18.

patents of I. G. Farben in the synthetic rubber industry⁸ — the dollar value of which the Custodian has preferred not to estimate, but which is undoubtedly substantial.⁹

Having said so much by way of preface, we may now examine in more detail some of the more important and vexing problems which have arisen out of the Custodian's exercise of the vesting powers conferred on him by the Trading with the Enemy Act and by the executive orders issued thereunder.¹⁰ It will be convenient to divide this treatment into two major sections, one dealing with the nature of the Custodian's administrative powers, the other, with the rights of property-holders affected by the exercise of those powers.

I. THE NATURE OF THE CUSTODIAN'S POWER

The urgency of war and the political impotence of enemy aliens conduced to a gorgeous and rather unusual liberality in the Congressional grant of power to the Custodian. Section 5(b), as expanded by Title III of the First War Powers Act of 1941, provides that "any property or interest of any foreign country or national thereof shall vest, when, as, and upon the terms, directed by the President" ¹¹ There were reasons for making Section 5(b) broad. For one thing, it expanded and ratified the freezing controls which were already in effect. For another, the

⁸ For a description of these patents, see *Standard Oil Co. v. Markham*, 64 F. Supp. 656 (S. D. N. Y. 1945), *aff'd*, 163 F.2d 917 (2d Cir. 1947), *cert. denied*, 333 U. S. 873 (1948).

⁹ ANNUAL REPORT, *supra* note 7 at 3, 57, 69.

¹⁰ The Office of Alien Property Custodian was created and authority to exercise powers under the Trading with the Enemy Act was conferred upon the Custodian by Exec. Order No. 9095, 7 FED. REG. 1971 (1942) (issued March 11, 1942), later amended by Exec. Order No. 9193, 7 FED. REG. 5205 (1942) (issued July 6, 1942), and Exec. Order No. 9567, 10 FED. REG. 6917 (1945) (issued June 8, 1945). By Exec. Order No. 9788, 11 FED. REG. 11981 (1946) (issued October 14, 1946), the Attorney General succeeded to the powers and duties of the Alien Property Custodian. In this article the term "Custodian" will be employed to describe both the Alien Property Custodian and the Attorney General as his successor.

¹¹ Some idea of the sense of urgency which spurred the Congress on as it amended § 5(b) may be gathered from the bare statement that on December 18, 1941, precisely one week after the original bills were introduced in the House and Senate, it had shot through committees, been debated and passed, and been signed by the President. 87 CONG. REC. 9704, 9706, 9753, 9789, 9801, 9828, 9837-46, 9855-68, 9893-95, 9946-47 (1941); 55 STAT. 841 (1941), 50 U. S. C. APP. § 621 (1946).

legislative mind was in a state of great vagueness as to whether the World War I Trading with the Enemy Act was alive, dead, or half-dead¹² and many legislators undoubtedly regarded the amended Section 5(b) as a capsule Trading with the Enemy Act, conferring anew any of the old powers which might have lapsed and adding some new ones.

In practice the question of the extent of the survival of the old Act has not proved embarrassing. It seems to have been assumed from the first by both administrators and courts that the World War I provisions (except such of them as in terms were applicable only to that war) had not been dead but only sleeping, and that they automatically became effective upon the outbreak of World War II. The President transferred to the new Custodian the powers and functions exercised by his counterpart during the first World War;¹³ the Custodian carefully avoided any implication in his vesting orders and other pronouncements that he was limiting himself to Section 5(b); the lower courts persistently cited the sections of the old Act and cases construing it;¹⁴ and at length the Supreme Court made it official by holding that the new Section 5(b) and the holdover sections of the Act were "parts of an integrated whole" and that the old sections were to be treated as operative, so far as that could be done without defeating the purpose of the later enactment.¹⁵ Consequently, it is clear that Section 7(c),¹⁶ as construed by the courts during and after World War I, is still in force. While not so simple as Section 5(b), it is rather more explicit, for it expressly provides that the Custodian's administrative determination shall be conclusive for purposes of an initial transfer of possession: "Any money or other property including (but not thereby limiting the generality of

¹² "Title III of the bill deals with the Trading with the Enemy Act, which originally became law on October 6, 1917, during the last war. Some sections of that Act are still in effect. Some sections have terminated, and there is doubt as to the effectiveness of other sections." H. R. REP. NO. 1507, 77th Cong., 1st Sess. 2-3 (1941).

¹³ Exec. Order No. 9142, 3 CODE FED. REGS. 1148 (Cum. Supp. 1943).

¹⁴ *E.g.*, *The Pietro Campanella*, 47 F. Supp. 374 (D. Md. 1942); *Draeger Shipping Co. v. Crowley*, 49 F. Supp. 215 (S. D. N. Y. 1943); *The Aussa*, 52 F. Supp. 927 (D. N. J. 1943); *Stern v. Newton*, 180 Misc. 241, 39 N. Y. S.2d 593 (Sup. Ct. 1943).

¹⁵ *Markham v. Cabell*, 326 U. S. 404, 411 (1945).

¹⁶ 40 STAT. 416 (1917), as amended, 40 STAT. 1020 (1918), 50 U. S. C. APP. § 7(c) (1946).

the above) . . . choses in action, and rights and claims of every character and description owing or belonging to or held for, by, on account of, or on behalf of, or for the benefit of, an enemy or ally of enemy . . . which the President after investigation shall determine is so owing or so belongs or is so held, shall be conveyed, transferred, assigned, delivered, or paid over to the Alien Property Custodian, or the same may be seized by the Alien Property Custodian"

A. *The Power of Summary Seizure*

The Supreme Court, when the World War I Custodian took to the courts to enforce his summary demands for possession,¹⁷ showed no disposition to be niggardly in honoring this grant of power, for it held in substance that the Custodian's suit to enforce his demand was tantamount to taking with a strong hand¹⁸ and "not to be defeated or delayed by defenses, its only condition . . . being the determination by the Alien Property Custodian that it was enemy property."¹⁹ The lower courts gave equally short shrift to attempts to resist or delay compliance with the Custodian's demands.²⁰

Permissible Defenses. — In the light of this legislative and judicial language, it might at first blush be supposed that resistance to the Custodian's summary demand for property which he determines to be owned by or owing to an enemy would be a waste of time and counsel fees. In practice, however, some holders of such property — especially banks and large commercial organizations — seem to have a deep-rooted, probably instinctive, aversion to the handing over of large sums of money upon the naked demand of a Government agency. In fact, the tenacity of holders of vested property and the fertile imaginations of their counsel have succeeded at least in casting doubt upon the Cus-

¹⁷ Section 17 of the Act gives the federal district courts jurisdiction to enforce the provisions of the Act. 40 STAT. 425 (1917), 50 U. S. C. APP. § 17 (1946).

¹⁸ Mr. Justice Holmes in *Central Trust Co. v. Garvan*, 254 U. S. 554, 566, 568-69 (1921).

¹⁹ Mr. Justice McKenna in *Commercial Trust Co. v. Miller*, 262 U. S. 51, 56 (1923). See also *Stoehr v. Wallace*, 255 U. S. 239 (1921).

²⁰ E.g., *American Exchange Nat. Bank v. Garvan*, 273 Fed. 43 (2d Cir. 1921), *aff'd*, 260 U. S. 706 (1922); *Columbia Brewing Co. v. Miller*, 281 Fed. 289 (5th Cir. 1922); *Hicks v. Baltimore & Ohio R. R.*, 10 F.2d 606 (D. Md. 1926), *aff'd sub nom. Baltimore & Ohio R. R. v. Sutherland*, 18 F.2d 560 (4th Cir. 1927).

todian's power of summary seizure in two rather common situations — where the holder disputes the Custodian's finding of the existence of an indebtedness to an enemy, and where the holder asserts a possessory lien on the enemy's property.

Both these questions were presented to the Court of Appeals for the Second Circuit in *Clark v. Manufacturers Trust Co.*,²¹ recently decided. The Custodian had found the Trust Company to be indebted to the Deutsche Reichsbank in the amount of \$25,000 and had demanded that that sum be paid over. The Trust Company refused to comply, asserting first, that it was not indebted in any amount, because its obligation to the German bank was more than set off by a claim against that bank; and second, that this obligation created a "banker's lien" on the Reichsbank's deposit, by virtue of which the Trust Company was entitled to retain possession of the money, under Section 8(a) of the Act.²² The district court had, without opinion, ordered the Trust Company to pay over the sum demanded, with interest at 6 per cent from the date of the demand.

The court of appeals, remarking that the appeal presented "several interesting questions upon which there is surprisingly little direct authority," itself created but little new authority on the two principal questions. By holding that a setoff is "technically . . . a money demand independent of and unconnected with the plaintiff's cause of action,"²³ the Court felt able to fall back on the well settled proposition that a debtor must pay to the Custodian an undisputed debt.²⁴ But, by way of dictum, the court said that it would "hesitate" to hold that the Custodian's power to seize money which he determines to be owing to an enemy

²¹ 169 F.2d 932 (2d Cir. 1948), *cert. denied*, 335 U. S. 910 (1949).

²² 40 STAT. 418 (1917), 50 U. S. C. APP. § 8(a) (1946).

²³ *Clark v. Manufacturers Trust Co.*, 169 F.2d 932, 934, 935 (2d Cir. 1948), *cert. denied*, 335 U. S. 910 (1949). The court distinguished New York cases which had stated that where a bank asserts a setoff against a depositor's claim, "it is only the balance which is the real or just sum owing . . ." *Long Beach Trust Co. v. Warshaw*, 264 N. Y. 331, 334, 190 N. E. 659, 660 (1934); *Kress v. Central Trust Co.*, 246 App. Div. 76, 79, 283 N. Y. Supp. 467, 471 (4th Dep't 1935), *aff'd*, 272 N. Y. 629, 5 N. E.2d 365 (1936), on the ground that "this language is appropriate to the cases where it was used but would seem to have little bearing on the question now before us." *Clark v. Manufacturers Trust Co.*, *supra* at 935.

²⁴ *American Exchange Nat. Bank v. Garvan*, 273 Fed. 43 (2d Cir. 1921), *aff'd*, 260 U. S. 706 (1922); *Kohn v. Jacob & Josef Kohn*, 264 Fed. 253 (S. D. N. Y. 1920).

extends to a debt the validity or extent of which the debtor does not acknowledge.²⁵ What seemed to stick in the judicial craw were the "exceedingly drastic" consequences which such a power might entail, and specifically the possibility that one who was in fact not indebted might be compelled hastily to liquidate property in order to satisfy the Custodian's demand and might thereby suffer damage for which the Act provides no remedy. All this may be conceded, but there are certain factors — aside from the rather plain language of the statute²⁶ — which may make the Custodian's position morally as well as legally tenable. In the first place, it must be assumed that the Custodian will, as he has in the past, exercise reasonably the sweeping discretion which Congress has given him. After all — as a judge of the second circuit once pointed out — he could, if he were so minded, "capture enemy property with a sergeant and file or otherwise *vi et armis*,"²⁷ although in practice the Custodian has never called on the Military Police to reason with recalcitrants. Neither would he be likely to compel a small debtor to sell his home in order to comply with a summary demand under Section 5(b) or 7(c). And indeed, in the *Manufacturers Trust Co.* case, it is reasonable to assume that the Trust Company was in a position to raise \$25,000 without recourse to the auction block.

More important from the Custodian's standpoint is the consideration that the creation — or even the adumbration — of a

²⁵ See *Clark v. Manufacturers Trust Co.*, 169 F.2d 932, 935 (2d Cir. 1948), *cert. denied*, 335 U. S. 910 (1949). The United States District Court for Hawaii has recently followed this dictum, holding that the Custodian could not summarily collect the amount of a debt which he determined to be owing to an enemy, when the respondent flatly denied the existence of any debt whatsoever. *Clark v. Nii*, Civil No. 837, D. Hawaii, Nov. 19, 1948. This judicial reluctance finds support in some World War I dicta by Judge Learned Hand. See *Simon v. Miller*, 298 Fed. 520, 523 (S. D. N. Y. 1923). However, Judge Hand did not have to face the problem squarely in the *Simon* case, for the Custodian had in fact gotten possession of the disputed property and the suit was one which the claimant could clearly maintain to recover it, under § 9(a) of the Act. See pp. 749-58 *infra*.

²⁶ "Any money . . . owing . . . to . . . an enemy . . . which the President after investigation shall determine is so owing . . . shall be . . . paid over to the Alien Property Custodian, or the same may be seized by the Alien Property Custodian . . ." 40 STAT. 416 (1917), as amended, 40 STAT. 1020 (1918), 50 U. S. C. APP. § 7(c) (1946).

²⁷ *Hough, J., concurring in American Exchange Nat. Bank. v. Garvan*, 273 Fed. 43, 48 (2d Cir. 1921); *aff'd*, 260 U. S. 706 (1922). See also *Garvan v. \$20,000 Bonds*, 265 Fed. 477, 478 (2d Cir. 1920), *aff'd sub nom. Central Trust Co. v. Garvan*, 254 U. S. 554 (1921).

ground on which to resist his demand for possession threatens to "entangle this power in incidental litigations" and thereby hinder the purpose of this part of the Act, which is to "accomplish a swift, certain, and final reduction to possession of vast quantities of property involved in incredible complication of ownership and interest";²⁸ for the grounds on which a debt may be disputed are many and complex. It may be anticipated that counsel of ordinary ingenuity will not be at a loss for grounds on which to deny indebtednesses which the Custodian has found to exist.

Moreover, while the power is drastic, it is far from the most drastic of the war powers exercised by Congress. A bank complaining of the severity of the Trading with the Enemy Act would probably receive little sympathy from an individual compelled to "comply with the immensely more grievous demand for the possible sacrifice of life and limb."²⁹ Perhaps for reasons such as these, two federal courts which have squarely faced the problem have taken the statutory language at face value and ordered the protesting debtor to pay over.³⁰

The second circuit, also in the *Manufacturers Trust Co.* case, left equally unsettled the question presented by Section 8 of the Act, which provides in substance that any nonenemy "holding a lawful mortgage, pledge, or lien, or other right in the nature of security in property of an enemy . . . may continue to hold said property . . ." The Custodian took the position that this section was designed not to protect lienors from the temporary dispossession to which all property holders are subject, but to ensure that an American holder of a possessory lien might, in a suit under Section 9(a) of the Act, recover not merely the value of his

²⁸ The quotations, like so many other lapidary phrases in current legal writing, are borrowed from Judge Learned Hand. See *Kahn v. Garvan*, 263 Fed. 909, 916-17 (S. D. N. Y. 1920). Although written in another context, they are not easy to reconcile with the reluctance to recognize this aspect of the Custodian's power which that eminent jurist displayed in *Simon v. Miller*, 298 Fed. 520, 523 (S. D. N. Y. 1923).

²⁹ Judge Learned Hand in *Silesian-American Corp. v. Markham*, 156 F.2d 793, 798 (2d Cir. 1946), *aff'd sub nom.* *Silesian-American Corp. v. Clark*, 332 U. S. 469 (1947).

³⁰ *Camp. v. Miller*, 286 Fed. 525 (5th Cir. 1923); *Clark v. E. J. Lavino & Co.*, 72 F. Supp. 497 (E. D. Pa. 1947); *cf.* *Miller v. Rouse*, 276 Fed. 715 (S. D. N. Y. 1921) (refusal to consider executor's contention that sum determined to be owed to an enemy and demanded by Custodian was really an unexecuted gift rather than a debt).

equity in the property, but actual possession of the whole of the property.³¹ In avoiding the question of the right of a lienor to resist the Custodian's summary demand for possession, the court was clearly on firm ground, for a "banker's lien" is not in fact a lien, but merely a right to setoff,³² and, *a fortiori*, could not be an interest in property of an enemy, given the elementary proposition that funds deposited in a bank cease to be the property of the depositor the moment they are deposited, so that the relationship is that of creditor and debtor rather than that of bailor and bailee. Nevertheless, it is to be regretted that the problem was not squarely presented, for the question of the right of a holder of enemy property to plead a possessory lien as a defense to a suit by the Custodian to enforce a demand for possession is left in almost total darkness. *Almost* total, but not quite: a dissenting opinion in the Court of Appeals for the First Circuit contains dicta to the effect that even holders of liens within the scope of Section 8(a) must comply with the Custodian's demand for possession, their remedy being a suit to regain possession under Section 9(a);³³ and the unqualified language of Mr. Justice Holmes in *Central Trust Co. v. Garvan*³⁴ was employed in the face of vigorous argument that the appellants were within the class of lienors protected by Section 8 and hence entitled to raise a defense against the Custodian's possessory action. Holmes ignored dicta in the unreported opinion of Judge Augustus Hand in the District Court which seemed to favor the proposition that a lienor could resist the vesting order.³⁵

The question is one which is bound, sooner or later, to be presented in such form that decision is inescapable. The court to

³¹ See *Clark v. Manufacturers Trust Co.*, 169 F.2d 932, 936 (2d Cir. 1948), *cert. denied*, 335 U. S. 910 (1949). The right to liquidate the security may in itself be important, for the lienor, being presumably more familiar with the business, may be in a better position than the Custodian to obtain the full value of the hypothecated property. See *Mayer v. Garvan*, 278 Fed. 27, 35 (1st Cir. 1922). Of course, upon liquidation of the security the lienor would be obliged to pay over to the Custodian any surplus remaining after the satisfaction of his claim against the enemy.

³² *Furber v. Dane*, 203 Mass. 108, 117-18, 89 N. E. 227, 230 (1909). See Note, 38 HARV. L. REV. 800 (1925).

³³ See Anderson, J., dissenting on other grounds in *Mayer v. Garvan*, 278 Fed. 27, 35 (1st Cir. 1922).

³⁴ 254 U. S. 554, 566, 568-69 (1921); see p. 726 *supra*.

³⁵ See Brief for Plaintiffs in Error, Marshall, Rosen and Metz, p. 138, *Central Trust Co. v. Garvan*, 254 U. S. 554 (1921).

which this happens may well find itself in something approaching a quandary. On the one hand, it is a strain on the normal import of the phrase "continue to hold" to say that it means to surrender, and thereafter recover, possession; on the other, a Congressional intent to confer on a mere lienor an immunity from temporary dispossession, an immunity which is denied to an outright owner of property, would be, to say the least, capricious. Lacking controlling precedent, a court might well be required to delve into the legislative history of the section. The provision seems to have been added at the instigation of the New York Stock Transfer Association, which feared that otherwise the Act might be open to a construction permitting the *permanent* destruction of possessory rights of American security holders.³⁶ Such a purpose implies a recognition that the Act does require an initial surrender of possession at the Custodian's demand.

Interest on Vested Funds. — The practical significance of these questions depends in part upon the answer to another disputed point: is the Custodian entitled to recover interest on a sum demanded by him, from the date of his demand, if the holder refuses to comply until ordered to do so by a court? If the X Bank, holding a \$350,000 deposit in the name of Hans Schmidt of Berlin, knows that there is *no* defense to the Custodian's demand and knows also that the demand will bear interest at the rate of six per cent³⁷ from the date of service, it may reasonably be supposed that the Custodian's turnover directive will be obeyed with gratifying promptitude. If, on the other hand, there *are* permissible defenses, and if it costs nothing to try them, the directors of X Bank may be expected to postpone, by the most protracted litiga-

³⁶ See *Hearings before Senate Subcommittee on Commerce on H. R. 4960*, 65th Cong., 1st Sess. 59, 160 (1917); H. R. REP. No. 85, 65th Cong., 1st Sess. 3 (1917); SEN. REP. No. 113, 65th Cong., 1st Sess. 8 (1917). The hypercaution of the stock-brokers may have been founded on the somewhat loose generality that a possessory lien does not survive surrender of possession. See RESTATEMENT, SECURITY §§ 11, 80 (1941); JONES, PLEDGES & COLLATERAL SECURITIES §§ 23, 34, 40 (2d ed. 1901).

³⁷ Since the obligation to comply with the Custodian's demand is created by federal law, the rate of interest provided by state law would not be controlling. *Board of Comm'rs v. United States*, 308 U. S. 343 (1939); *Royal Indemnity Co. v. United States*, 313 U. S. 289 (1941). It is, however, a handy yardstick of fairness of which the federal courts may avail themselves. *Ibid.*; *Massachusetts Bonding & Ins. Co. v. United States*, 97 F.2d 879 (9th Cir. 1938). In most states, the legal rate of interest is in the neighborhood of 6%. *E.g.*, N. Y. GEN. BUS. LAW § 370; PA. STAT. ANN. tit. 41, § 3 (1930).

tion possible, the loss of the revenue from the \$350,000. A majority of the second circuit in the *Manufacturers Trust* case (Judge Clark dissenting) reversed the district court and resolved this question against the Custodian, principally on the grounds that the Act does not provide for the payment of interest "or any other penalty" in the event of noncompliance with the Custodian's demand and that "the summary procedure provided by Section 17 enables the Custodian, without delay if he immediately invokes it, to obtain an order directing compliance."³⁸

On the other hand, Congressional failure to provide for interest in a statute creating an obligation has been held not to preclude the courts from awarding interest on the obligation, pursuant to "the historic judicial principle that one for whose financial advantage an obligation was assumed or imposed, and who has suffered actual money damages by another's breach of that obligation, should be fairly compensated for the loss thereby sustained."³⁹ The Supreme Court, where Congress is silent on the interest question, in effect appraises the Congressional purpose to see whether the main purpose of the statute creating the obligation was to enrich the obligee or penalize the obligor. The courts will not impose interest on criminal fines,⁴⁰ nor even on non-criminal penalties such as those imposed under the Agricultural Adjustment Act.⁴¹ They will allow interest where the obligation to the United States has been created as a revenue measure.⁴² The obligation to turn over property demanded by the Alien Property Custodian is obviously not in the nature of a fine or penalty. The Act may, in fact, be analogized to a revenue measure if one recalls its purpose to compel the use of certain property in the best interests of the United States, and recalls, further, that the most recent Congressional amendment in substance provides that the proceeds of vested German and Japanese property shall be covered into the Treasury⁴³ and that the former owners shall recover neither their property nor compensation therefor. The

³⁸ 169 F.2d 932, 936 (1948).

³⁹ See *Rodgers v. United States*, 332 U. S. 371, 373 (1947); cf. *United States v. U. S. Fidelity Co.*, 236 U. S. 512 (1915); *Billings v. United States*, 232 U. S. 261 (1914); *Royal Indemnity Co. v. United States*, 313 U. S. 289 (1941).

⁴⁰ *Pierce v. United States*, 255 U. S. 398, 405-06 (1921).

⁴¹ *Rodgers v. United States*, 332 U. S. 371 (1947).

⁴² *Billings v. United States*, 232 U. S. 261 (1914).

⁴³ 62 STAT. 1246 (1948), 50 U. S. C. A. APP. § 2011 (Supp. 1949).

morals of this confiscation will be discussed below;⁴⁴ it is sufficient for the present discussion that seizures of enemy property under the Trading with the Enemy Act *do*, under the existing legislative policy, redound to the "financial advantage" of the United States.

This reasoning is not affected by the fact that the Custodian's determination may be wrong and the nonenemy possessor of the property may be enabled to recover it in a suit under Section 9(a) of the Act. The same thing is true of tax procedure, where the taxpayer is frequently required to pay first and litigate his rights thereafter.⁴⁵ In this procedure the government is given the right to possess and use the money during the interim between the administrative demand for it and the ultimate judicial review of the administrative determination.⁴⁶ Extension of the analogy from tax procedure, however, might lead to the result that if the government were ultimately proved wrong, the holder of the seized property would in his turn be entitled to interest from the time of payment. While the point has never been decided — and obviously cannot be until the courts dispose of the question whether the Custodian is entitled to interest in the first place — it might be held that a nonenemy who has paid over property to the Custodian, with interest, and who has thereafter established his right to the property, should recover not only the property itself but also at least the interest which he paid.⁴⁷

B. Vesting without Summary Seizure

So far, we have considered only the most summary type of exercise of the Custodian's vesting power — a demand for specific

⁴⁴ See p. 744 *infra*.

⁴⁵ *Phillips v. Commissioner*, 283 U. S. 589, 595 (1931). Cf. *Yakus v. United States*, 321 U. S. 414, 442-43 (1944).

⁴⁶ See *Salamandra Ins. Co. v. New York Life Ins. & Trust Co.*, 254 Fed. 852, 860-61 (S. D. N. Y. 1918), which analogizes the two procedures.

⁴⁷ The Supreme Court has held that an American whose property was seized under an erroneous determination that it was enemy property could recover not only the proceeds of the sale of such property, but also whatever interest was actually earned on the proceeds while they were in the possession of the Government. *Henkels v. Sutherland*, 271 U. S. 298 (1926). If the property is considered to have been in the constructive possession of the Government from the moment of the Custodian's demand, *Miller v. Kaliwerke Aschersleben Aktien-Gesellschaft*, 283 Fed. 746, 752 (2d Cir. 1922); *Application of Miller*, 288 Fed. 760, 767 (2d Cir. 1923), the interest awarded to the Custodian might well be regarded as "earnings" within the rule of the *Henkels* case.

property, which may take the form of a "res-vesting order," or a "turnover directive," issued subsequent to an order vesting right, title, and interest. When the Custodian issues such an order, it means that he has determined that a particular thing is enemy property; and for the purposes of immediate possession of that thing his determination is conclusive, "whether right or wrong,"⁴⁸ subject only to the qualifications indicated in the preceding paragraphs. The practical effect of this is that the Custodian has the use of the property during the interim between his administrative determination of its enemy character and ultimate judicial review of the correctness of that determination, every argument about the existence or extent of enemy interest in the property being deferred until suit is brought against the Custodian under Section 9(a) of the Act.⁴⁹

Where, however, there is no urgent need for an immediate transfer of possession, the Custodian usually follows a course calculated to minimize the dislocation of local judicial proceedings and business, vesting in himself simply the "right, title and interest" of the enemy in and to the property. Under such an order, if there be any controversy concerning the nature or extent of the enemy's interest in the property, the Custodian finds himself in much the same position that the enemy himself would have occupied — he is a litigant. As such, he participates in numbers of lawsuits differing widely from those ordinarily engaged in by the Federal Government, for they may and often do turn on questions of chemically pure state law. The Custodian, unsupported by his hypothetical sergeant and file, has about the same rights and duties as any other suitor.

To this last generalization, however, an important qualification must be appended: the Custodian can, in theory at least, choose his own time and — as between state and federal court — his own forum. It has, in fact, been flatly stated that "neither the [district] court nor any other tribunal in or of the United States [has] jurisdiction to compel the Custodian to come into court and . . . litigate or forego his demand He can use his own method of procedure; courts cannot coerce him *in limine*."⁵⁰

⁴⁸ *Central Trust Co. v. Garvan*, 254 U. S. 554, 566 (1921).

⁴⁹ *E.g.*, *Stoehr v. Wallace*, 255 U. S. 239 (1921). See pp. 749-58 *infra*.

⁵⁰ Hough, J., concurring in *American Exchange Nat. Bank v. Garvan*, 273 Fed. 43, 48 (2d Cir. 1921).

Since a suit against the Custodian is a suit against the United States,⁵¹ any action against him must be brought within the terms of Congressional consent.⁵² Section 9(a) of the Act does not authorize suit unless and until the Custodian has taken possession of the property in which the nonenemy seeks to establish an interest.⁵³ Thus, where the Custodian has vested the right, title and interest of an enemy in a piece of property, one who asserts an interest adverse to the enemy's in that piece of property cannot sue under Section 9(a).⁵⁴ Consequently, he must wait for the Custodian to initiate litigation.

The Custodian's possession of the initiative may not be complete, however. Section 17 of the Act gives to federal district courts plenary jurisdiction "to enforce the provisions of this Act," and in at least one case this grant has been held (by Judge Learned Hand, reasoning on a "sauce-for-the-gander" basis) to empower the court to entertain a trustee's suit to determine the beneficial interests in the trust, where the Custodian had vested the unascertained interest of some of the beneficiaries, but not the trust *res* itself.⁵⁵ Moreover, many proceedings in state courts affecting property in which the Custodian has vested an interest, notably probate proceedings, are *in rem*. Since a decree in such a suit is binding upon all the world, including persons not within reach of the court's process, the fact that the state court could not compel the appearance of the Custodian⁵⁶ loses some of its significance, for practical considerations will compel him to come into court and make the most of the interest which he has vested.⁵⁷

⁵¹ *Banco Mexicano v. Deutsche Bank*, 263 U. S. 591 (1924); *Cummings v. Deutsche Bank*, 300 U. S. 115 (1937). See *Cummings v. Societe Suisse pour Valeurs de Metaux*, 85 F.2d 287, 289 (D. C. Cir. 1936), *cert. denied*, 306 U. S. 631 (1939).

⁵² *Stanley v. Schwalby*, 162 U. S. 255, 269 (1896); *United States v. Alabama*, 313 U. S. 274, 282 (1941).

⁵³ *Sigg-Fehr v. White*, 285 Fed. 949, 954 (D. C. Cir. 1923); *cf. Hunter v. Central Union Trust Co.*, 17 F.2d 174 (S. D. N. Y. 1926); *Koehler v. Clark*, 170 F.2d 179 (9th Cir. 1948).

⁵⁴ *Ibid.*

⁵⁵ *Kahn v. Garvan*, 263 Fed. 909 (S. D. N. Y. 1920). It should be noted, however, that the trustee himself asserted no interest adverse to the Custodian, for he paid the money into court and simply requested instructions as to its disposition.

⁵⁶ *Cf. Propper v. Taylor*, 270 App. Div. 890, 62 N. Y. S.2d 601 (1st Dep't 1946), *reversing pro tanto* 186 Misc. 72, 58 N. Y. S.2d 821 (Sup. Ct. 1945).

⁵⁷ See, e.g., *Von Hennig v. Clark*, 191 Misc. 261, 76 N. Y. S.2d 350 (Sup. Ct. 1948), *aff'd mem.*, 274 App. Div. 759, 80 N. Y. S.2d 727 (1st Dep't 1948). The

The Supreme Court has finally placed beyond question the right of the Custodian, at least at any time prior to an adjudication *in rem* by a state tribunal, to resort to the federal courts to quiet his title against other claimants.⁵⁸ For example, in a recent proceeding under Section 17, a federal court determined that property in administration in a state surrogate's court was impressed with a constructive trust in favor of an enemy to whose interest the Custodian had succeeded.⁵⁹ Such an exercise of federal jurisdiction requires neither control over the property nor interference with the local tribunal's possession thereof; yet the state court is bound to recognize the right adjudicated by the federal court.⁶⁰ Even in his role as private litigant, therefore, the Custodian may, if he so desires, avail himself of certain legal advantages accorded to the sovereign.

C. Interests Subject to the Vesting Power

Adequate consideration of the limits upon the types of enemy interests which are capable of being vested by the Custodian entails an appraisal of the purposes of the Act. If an interest is not within the scope of the Trading with the Enemy Act, a court in which the Custodian seeks to assert it may not recognize his title; or, if he vests by summary process the *res* to which the interest attaches, he cannot retain it.

Custodian is authorized to seize property even if it is in the possession of a court. Section 2(f), Exec. Order No. 9193, 7 FED. REG. 5205 (1942). *Cf. In re Miller's Estate*, 193 F.2d 539 (1948) (holding that the Custodian's vesting order divested a state probate court of jurisdiction over the subject matter of the vesting order). *But cf. Miller v. Clausen*, 299 Fed. 723 (8th Cir. 1924), *appeal dismissed*, 269 U. S. 595 (1925). It must be borne in mind that the Custodian may be able to foreclose litigation in the state court by the somewhat draconic method of administratively determining the extent of the enemy's interest in the property and "res-vesting" that amount. If he thus gains possession of the bone of contention, persons asserting interests adverse to the enemy's are relegated to suit in a federal court, under § 9(a) of the Trading with the Enemy Act, to establish those interests.

⁵⁸ *Markham v. Allen*, 326 U. S. 490 (1946). Specifically, the decision affirmed federal jurisdiction over a suit by the Custodian to determine the extent of the rights which he had vested in a decedent's estate in administration before a state court. *Cf. Clark v. Propper*, 169 F.2d 324 (2d Cir. 1948).

⁵⁹ *Clark v. Tibbetts*, 167 F.2d 397 (2d Cir. 1948).

⁶⁰ *Markham v. Allen*, 326 U. S. 490, 494 (1946). *Cf. Commonwealth Co. v. Bradford*, 297 U. S. 613 (1936) (affirming federal jurisdiction over suit by receiver of national bank to establish interest in mortgage pool administered by state court trustee).

A recent New York decision, *Matter of Herter*,⁶¹ graphically presents the problem. An enemy owned property in New York. Before the Custodian got around to vesting it, the enemy died, leaving a widow, also an enemy national, and a will. The will left to the widow a sum much less than the share she would have taken in the event of intestacy, and the bulk of the property to certain nonenemy cousins of the testator. In these circumstances, New York law gives to a widow a "personal" right to elect to take her intestate share, in derogation of the will.⁶² The Custodian promptly vested all the right, title and interest of the widow in the New York estate of her husband, including specifically her right of election.⁶³ The surrogate held, in substance, that since the right of election was "personal" to the widow, it could not be vested or exercised by the Custodian, or by any person "acting in hostility" to her, and that the action of the Custodian was in consequence a nullity.

The decision presents certain difficulties. The Act, as we have seen, gives to the Custodian the broadest imaginable powers with respect to enemy property — it speaks of "any property or interest"⁶⁴ and "chooses in action, and rights and claims of every character and description."⁶⁵ Of course, some very pretty questions might be posed as to what is "property." (Suppose, for example, a German film company had contracted for the exclusive services of a talented and glamorous actress, on very advantageous terms, for a period of years: could the Custodian vest the enemy's right to performance? So far, to the regret of his legal staff, that official has encountered no such intriguing questions.) But no such question can rationally be raised as to the nature of the right of election

⁶¹ 193 Misc. 602, 83 N. Y. S.2d 36 (Surr. Ct. 1948), *aff'd*, 84 N. Y. S.2d 913 (App. Div. 1st Dep't 1948).

⁶² N. Y. DEC. EST. LAW § 18.

⁶³ Vesting Order No. 8407, 12 FED. REG. 1828 (1947), as amended, 12 FED. REG. 2966 (1947).

⁶⁴ 55 STAT. 839 (1941), 50 U. S. C. APP. § 5(b) (1946).

⁶⁵ 40 STAT. 1020 (1918), 50 U. S. C. APP. § 7(c) (1946). It is clear that the Custodian may vest and litigate an unliquidated claim for breach of contract. *E.g.*, *Mutzenbecher v. Ballard*, 16 F.2d 173 (S. D. N. Y. 1925), *aff'd*, 16 F.2d 174 (2d Cir. 1926), *cert. denied*, 273 U. S. 766 (1927); *Nord Deutsche Ins. Co. v. J. L. Dudley, Jr., Co.*, 169 N. Y. Supp. 303 (Sup. Ct. 1918) (not officially reported), *aff'd*, 183 App. Div. 887, 169 N. Y. Supp. 1106 (1st Dep't 1918); *Rothbarth v. Herzfeld*, 179 App. Div. 865, 167 N. Y. Supp. 199 (1st Dep't 1917), *aff'd*, 223 N. Y. 578, 119 N. E. 1075 (1918).

conferred by the New York Decedent Estate Law. It is, in effect, an option to acquire an intestate share of an estate and as such would seem to be within the scope of the Trading with the Enemy Act.

It is well settled, at least, that restraints imposed by state law on the alienability of more prosaic interests in property cannot defeat the Custodian's power to vest⁶⁶ and, in particular, the New York courts have sustained the Custodian's power to vest the beneficial interest in a spendthrift trust, notwithstanding the facts that under New York law the spendthrift himself could not have alienated his interest, and his creditors could have reached only the portion, if any, in excess of what was required to support him in suitable style.⁶⁷ The New York Court of Appeals has held that an enemy's inchoate right of dower (for which the right of election is a statutory substitute) could be divested by the Custodian.⁶⁸ But there remains unsettled the question whether an interest in property can be so "personal" that the Custodian cannot be substituted for an enemy owner.

A closely allied question is the right of an individual testator or settlor to condition a bequest or gift to an enemy upon the enemy's capacity personally to take and enjoy the property. Thus, a New York testatrix provided that if, in her executor's opinion; "the transferring of this money to my beloved relatives," who were residents and nationals of Germany, "shall be frustrated by political conditions and laws which substantially deprive my beloved relatives of the full use and fruit of such bequests," the executor should hold the funds in trust until such time as the beloved relatives *could* enjoy the full use and fruit of the bequests.

⁶⁶ *Great Northern Ry. v. Sutherland*, 273 U. S. 182, 193-94 (1927); *Miller v. Kaliwerke Aschersleben Aktien-Gesellschaft*, 283 Fed. 746, 751 (2d Cir. 1922).

⁶⁷ *Matter of Bendit*, 214 App. Div. 446, 212 N. Y. Supp. 526 (1st Dep't 1925); *accord*, *Central Hanover Bank & Trust Co. v. Markham*, 68 F. Supp. 829 (S. D. N. Y. 1946). The court reasoned that the Custodian was not merely a transferee, but was actually substituted for the enemy beneficiary in every respect concerning the trust. *Cf. Great Northern Ry. v. Sutherland*, 273 U. S. 182, 193-94 (1927); *Keppelmann v. Palmer*, 91 N. J. Eq. 67, 108 Atl. 432 (Ct. Err. & App. 1919) (state legislation in conflict with the Trading with the Enemy Act must give way before the federal exercise of the war power).

⁶⁸ *Miller v. Lautenburg*, 239 N. Y. 132, 145 N. E. 907 (1924). The common law right of dower was "personal" to precisely the same extent as the statutory substitute. *Flynn v. McDermott*, 183 N. Y. 62, 75 N. E. 931 (1905); *Camardella v. Schwartz*, 126 App. Div. 334, 110 N. Y. Supp. 611 (2d Dep't 1908); *see Matter of Zalewski*, 292 N. Y. 332, 337, 55 N. E.2d 184, 186 (1944).

In such a situation as this the Custodian, when he has vested the right, title and interest of the enemy legatee or beneficiary, may make two arguments. In the first place he may contend that a sort of statutory transubstantiation has taken place — that to all legal intents he has become identified with the enemy, so that payment to him satisfies the provisions of the will or trust instrument.⁶⁹ A less conceptual and more practical approach is embodied in the contention that such provisions are simply attempts to evade the Trading with the Enemy Act and hence are void as against public policy.⁷⁰ The Custodian must of course contend further that if the condition is considered void, the bequest operates as though the condition had been fulfilled, a rather questionable contention in those jurisdictions which treat gifts on void conditions according to the presumed intent of the testator.

Rather surprisingly, considering how frequently some such device might have been expected to suggest itself to lawyers drawing wills for testators with relatives in enemy (or potential enemy) countries, research reveals but two reported cases, both in lower courts.⁷¹ Each involved the sort of artless testamentary provision quoted above, and in each case the court ordered immediate distribution to the Alien Property Custodian. The moral would seem to be that testators, unless filled with natural love and affection for the Alien Property Custodian, should not attempt to leave their property, directly or indirectly, to persons who are, or are likely to become, enemies within the meaning of the Trading with the Enemy Act. Such devices *may* eventually be upheld by appellate courts; but the question is at least doubtful, and — until such time as it is definitely laid to rest — such provisions are pretty likely to entail complex and costly litigation.⁷²

⁶⁹ Cf. *Matter of Bendit*, 214 App. Div. 446, 212 N. Y. Supp. 526 (1st Dep't 1925).

⁷⁰ Cf. *Commissioner v. Procter*, 142 F.2d 824 (4th Cir. 1944), *cert. denied*, 323 U. S. 756 (1944) (holding void as against public policy a condition subsequent that a transfer should be deemed to be revoked if it were determined that the federal gift tax was applicable); *Matter of Rosenberg*, 269 N. Y. 247, 199 N. E. 206 (1935) (holding that, regardless of the state's policy on reaching the income of a spendthrift trust, a federal tax lien could be imposed).

⁷¹ *Matter of Reiner*, 44 N. Y. S.2d 282 (Surr. Ct. 1943); *Thee's Estate*, 49 Pa. D. & C. 362 (Orphans Ct. 1942). *But cf. In re Thramm's Estate*, 183 P.2d 97 (Cal. App. 1947).

⁷² Much more difficult problems from the Custodian's standpoint are presented by a testamentary provision that, if the alien is unable to take personally at the time of distribution, the property shall be paid over to an alternate, nonenemy,

D. "Revenue" Aspects of the Vesting Power

The *Herter* case suggests another interesting problem, and one which colors strongly the judicial approach to construction and enforcement of the Act. The lower court pointed out that the effect of his holding was to place the property in the hands of American citizens and said that if that were the consequence, "no wrong to the United States is done."⁷³ But this reasoning is not easy to reconcile with one of the basic purposes of the Trading with the Enemy Act. Carried to its logical conclusion, it would mean that, so long as the property is prevented from being used by an enemy government in aid of its war effort against the United States — whether by being awarded to the Custodian or to some deserving American or left with the enemy subject to certain restraints — the essential purpose of the Act is achieved. A court with such a view of the statute cannot be expected to display much enthusiasm when asked to help the Custodian scoop up the scattered assets of enemies, some of them widows and orphans, long after the defeat of Germany and Japan. The jaundiced judicial eye sees the Custodian as combining the least attractive qualities of Shylock, Uriah Heep, and the unreformed Ebenezer Scrooge, and tends to construe the Act narrowly against this unamiable character.

This sort of judicial approach was taken by a majority of the Court of Appeals for the Second Circuit in *Josephberg v. Markham*.⁷⁴ X, a naturalized American citizen of Italian birth, returned to Italy in 1931 for the sake of his mental health. He never came back to the United States and, apparently, never fully regained his sanity. In 1937 he inherited property of substantial value located in New York, and in 1939 a New York court, determining him to be an incompetent, appointed Josephberg as his committee. In 1943 the Alien Property Custodian, determining X to be an enemy, vested his property. Josephberg brought suit, under Section 9(a) of the Trading with the Enemy Act, to recover

beneficiary, rather than held indefinitely by the executor or trustee until such time as the enemy's disability shall be removed. Although there seems to be no reported case involving such a provision, several state probate courts have sanctioned distribution to the alternate legatee in such cases.

⁷³ 193 Misc. 602, 605, 83 N. Y. S.2d 36, 40 (Surr. Ct. 1948), *aff'd*, 84 N. Y. S.2d 913 (App. Div. 1st Dep't 1948); *Stoehr v. Miller*, 296 Fed. 414, 425 (2d Cir. 1923).

⁷⁴ 152 F.2d 644 (1945).

the property. Strictly, the sole question before the Court was the correctness of the Custodian's determination that *X* was an enemy. Since, under the statute and the executive orders, enemy character normally depends upon residence at the time of vesting,⁷⁵ the ultimate question was whether *X* was a resident of Italy. The majority held that he was not, and backed up its conclusion with the following considerations: ⁷⁶

In determining whether [*X*] falls within the provisions of the statute . . . , his physical presence . . . is not decisive. . . . [*X*'s] property in New York was in no way threatened with subjection to enemy uses by reason of his presence in Italy. He had no control over it himself since it was being administered by a committee appointed by the New York court; and, consequently, Italy could exercise no control over it through the control of him. Furthermore, the New York court would not have permitted its use for the benefit of an enemy. . . . Such use could also have been prevented by a freezing order issued by the Treasury. . . .

The property being in cash and securities its confiscation was not required, as, for instance, is the case of assets consisting of, or controlling, manufacturing facilities usable to secure production of materials to aid this government in the prosecution of the war; and, as a means for the purchase of such materials, it was comparatively negligible.

The purpose of confiscation under the Trading with the Enemy Act is either to lessen the ability of the enemy government to make war upon the United States by depriving it of the means so to do which would otherwise be within its reach or to enhance the ability of this country to prosecute the war. . . .

When this significance is, as it should be, given to term "resident" in the Trading with the Enemy Act . . . and in the Executive Orders promulgated thereunder, it does not include a citizen in [*X*'s] situation.

Judge Clark dissented, saying that "the whole purpose of the legislation may be frustrated if courts attempt to decide the validity of seizure upon the equities of individual cases."⁷⁷

The majority opinion amounts to a holding that an owner of property is a "resident" of an enemy country only if there is a possibility that the enemy government can exercise control of the

⁷⁵ 40 STAT. 411 (1917), 50 U. S. C. APP. § 2(a) (1946); Exec. Order No. 8389, 6 FED. REG. 2897 (1941); Exec. Order No. 9193, § 10(a), 7 FED. REG. 5205 (1942).

⁷⁶ 152 F.2d 644, 648 (1945).

⁷⁷ *Id.* at 650.

property through him, or if the United States (in the opinion of the court) really needs the property for its war effort. The upshot is that the enemy's beneficial interest in the property is left undisturbed. The *result* may be defended upon the ground, sketchily indicated by the court, that *X*'s insanity deprived his physical presence of the element of intent requisite to "residence" — although it is, as Judge Clark suggested, doubtful whether there is any such requirement, if the physical presence be not positively against the will of the individual.⁷⁸ At least one district court, in another circuit, has "preferred" to treat the cited language as dictum.⁷⁹ Whatever the possibility of distinguishing the case out of existence, it is evident that the quoted considerations were fundamental to the court's decision.

If the court's basic premise were correct — that the Act has no other purposes than to deprive enemy governments of the sinews of war and to enhance the war-making ability of the United States by making those sinews available to it — its decision would be more defensible, although still open to the charge that the court substituted its discretion for that of Congress and that of the President in deciding what property is needed by the United States for its war effort. (The argument that *X*'s property, as a means for purchasing war material, was "comparatively negligible" has not much force in any case — on such reasoning many a citizen would be justified in refusing to pay his income tax.) But if the Act had no other purposes than these, the vesting provisions of the Trading with the Enemy Act would now be quite obsolete, for the freezing program — as the court pointed out — adequately achieved the first purpose, and the war against Germany and Japan has been won.

In fact, as has been indicated, the purposes of the Act are now much broader. Simply stated, one purpose is to help the United

⁷⁸ An American prisoner of war (to select an extreme example adduced by the majority opinion) would evidently not be a "resident" for purposes of vesting under the Act. *Cf. Stadtmuller v. Miller*, 11 F.2d 732 (2d Cir. 1926); *Vandyke v. Adams*, [1942] All Eng. 139 (Ch.). The Custodian has, of course, never attempted to vest the property of such persons. On the other hand, a British court has held under the similar British Trading with the Enemy Act of 1939 that a British subject, temporarily visiting Jersey and trapped there by the German occupation, was a resident in enemy territory within the meaning of the Act. However, the question was presented only collaterally. *In re Hatch* (deceased), [1948] 2 All Eng. 288 (Ch.).

⁷⁹ See *Blank v. Clark*, 79 F. Supp. 373, 377 (E. D. Pa. 1948).

States defray some of the expenses which, although caused by the war, did not really begin to accrue until actual hostilities had ended. Moreover, in signing the Final Act of the Paris Conference on Reparations from Germany,⁸⁰ the United States agreed in substance that German enemy property within its jurisdiction should constitute a charge against reparations which might otherwise be claimed from Germany.

There may properly be included among these expenses the cost of putting the conquered populations back on their feet, through Marshall Plan aid and otherwise, and the satisfaction of war claims of American citizens against the Axis powers. In fact, the vested German and Japanese property which the most recent amendment to the Trading with the Enemy Act directs to be turned over to the Treasury (instead of being returned to its former owners), is to be used to create "a trust fund to be known as the War Claims Fund," from which some (although not all) types of war claims are authorized to be paid.⁸¹ The act, known as the War Claims Act of 1948, of which this amendment is a part creates a War Claims Commission with authority to receive and adjudicate various classes of claims and to make recommendations to Congress as to the payment of war claims not provided for by the War Claims Act itself.⁸² Any surplus would presumably be available for the general purposes of the United States, including the defrayment of occupation costs and Marshall Plan aid.

This is a logical implementation of the general legislative intent to use vested property "in the interest of and for the benefit of the United States."⁸³ There is no doubt that the seizure and use of enemy property in the United States is sanctioned not only by the Constitution of the United States,⁸⁴ but by international law.⁸⁵

⁸⁰ U. S. TREATY SER., No. 1655 (Dep't State 1946).

⁸¹ 62 STAT. 1247 (1948), 50 U. S. C. A. APP. § 2012 (Supp. 1949).

⁸² It should be noted that the decision in the *Josephberg* case antedated this unequivocal expression of Congressional intent.

⁸³ H. R. REP. No. 1507, 77th Cong., 1st Sess. 2-3 (1941); 55 STAT. 839 (1941), 50 U. S. C. APP. § 5(b)(1) (1946).

⁸⁴ *Miller v. United States*, 11 Wall. 268, 305 (U. S. 1870). See McNulty, *Constitutionality of Alien Property Controls*, 11 LAW & CONTEMP. PROB. 135 (1945). The author suggests that, even without Congressional sanction, the war powers of the president might include the power to seize enemy property. *Id.* at 137.

⁸⁵ See Rubin, "Inviolability" of Enemy Private Property, 11 LAW & CONTEMP. PROB. 166 (1945). But cf. Sommerich, *A Brief against Confiscation*, *id.* at 152 et seq.

Not less important, it seems justified according to the canons of international morality, despite the lawyer's instinctive reaction against confiscating the property of private persons who may not fairly be chargeable with the misconduct of their governments. Perhaps the most persuasive argument advanced is that which starts from the premise that the war has compelled allied nations, notably France and Great Britain, to seize and liquidate the dollar assets of their nationals in the United States in order partially to cover essential purchases. It would be an anomaly if German and Japanese private citizens should emerge from the war with their dollar assets intact.⁸⁶ Of course, friendly nationals have been compensated — after a fashion — by their own governments, in that they have received soft local currency, often at an arbitrary and inadequate rate of exchange, for their hard dollars; but there is no reason why the German and Japanese governments should not do as much after the peace treaties have been signed; and, indeed, the treaties might so provide.

Giving due weight to all these considerations, the courts might well regard the Trading with the Enemy Act, in its present phase, as a revenue measure, and enforce it accordingly. Preoccupation with the purely defensive aspects of the Act is likely to make many current cases seem hard; and every lawyer knows the traditional effect of hard cases.

II. THE RIGHTS OF THE PROPERTY HOLDER

A. Exculpatory Provisions of the Act

A natural and necessary complement to the summary powers conferred on the Custodian is a provision exculpating persons who obey or act in reliance upon his orders. Section 7(e), enacted during World War I, provides that "No person shall be held liable in any court for or in respect of anything done or omitted in pursuance of any order, rule, or regulation made by the President under the authority of this Act."⁸⁷ This seems both broad and plain, and the courts repeatedly implemented it fully.⁸⁸ This

⁸⁶ See Rubin, *supra* note 85, at 178.

⁸⁷ 40 STAT. 416 (1917), 50 U. S. C. APP. § 7(e) (1946).

⁸⁸ E.g., *Commercial Trust Co. v. Miller*, 262 U. S. 51 (1923); *Great Northern Ry. v. Sutherland*, 273 U. S. 182 (1927); *Columbia Brewing Co. v. Miller*, 281 Fed. 289 (5th Cir. 1922); *Miller v. Kaliwerke Aschersleben Aktien-Gesellschaft*, 283 Fed. 746 (2d Cir. 1922).

provision was substantially re-enacted in the World War II amendment of Section 5(b)⁸⁹ with the addition of the words "in good faith" after "done or omitted."⁹⁰ While, in general, the courts have not discriminated between the World War II provision and Section 7(e),⁹¹ the words "in good faith," undoubtedly somewhat ambiguous in the context, have led one federal court of appeals to hold that the failure of the Japanese officials of a Japanese bank in Hawaii to apply for the reissuance of their license to operate — which had been revoked immediately after Pearl Harbor — showed such a lack of good faith as to render the bank liable to its depositors for losses incurred through the bank's suspension of operations.⁹² The net effect of the decision was to reduce to the vanishing point the bank's surplus, which would otherwise have gone to American minority stockholders and to the Custodian. A mild comment upon this holding, on the facts, is that it is unrealistic. It contains the mischievous implication that it is the bounden duty of every person affected by a regulation or order under the Trading with the Enemy Act to seek to evade or resist it by every lawful means, administrative or judicial, no matter how dim his prospects of success. Such a result would do considerable violence to the fundamental scheme of the Act, which is to facilitate the swift and summary conduct of economic warfare.

⁸⁹ Any re-enactment would seem to have been rather unnecessary, in the light of *Markham v. Cabell*, 326 U. S. 404 (1945).

⁹⁰ Section 5(b)(2) provides that "no person shall be held liable in any court for or in respect to anything done or omitted in good faith in connection with the administration of, or in pursuance of and reliance on, this subdivision, or any rule, regulation, instruction, or direction issued hereunder." 55 STAT. 839 (1941), 50 U. S. C. APP. § 5(b)(2) (1946). Both this subsection and § 7(e) also provide in substance that payment in compliance with the Act or an order of the Custodian shall operate as a full acquittance of the obligation of the payor.

⁹¹ See, e.g., *Silesian-American Corp. v. Clark*, 332 U. S. 469 (1947) (§§ 5(b)(2) and 7(e) protected a corporation from liability to existing holders of its stock certificates arising out of compliance with the Custodian's demand for the issuance to him of new certificates); *Alexewicz v. General Aniline & Film Corp.*, 181 Misc. 181, 43 N. Y. S.2d 713 (Sup. Ct. 1943) (the section exonerated an employer who discharged an employee pursuant to an order issued under the Act).

⁹² *Fujikawa v. Sunrise Soda Works Co.*, 158 F.2d 490 (9th Cir. 1946), *cert. denied*, 331 U. S. 832 (1946); *cf. Dezsofi v. Jacoby*, 178 Misc. 851, 36 N. Y. S.2d 672 (Sup. Ct. 1942).

B. Representation in Actions to Which the Custodian Is a Party

A knottier problem — or, at any rate, one as to which there is some lack of judicial harmony — is the right of the Custodian to be the exclusive representative in litigation of interests which he has vested, or, as judicial latinists like to put it, *dominus litis*. The divested property holder may well desire to be personally represented in the litigation, in the hope that the property will eventually be returned to him. It is inevitable that enemies whose interests have been vested will remember the generous attitude of Congress after World War I,⁹³ despite the cold, unsympathetic attitude of the post-World War II Congress.⁹⁴ A person nursing such hopes with respect to interests which have been vested may fear lest the Custodian's defense of them in litigation be insufficiently solicitous — especially where the United States, in some other capacity, has interests adverse to those vested.⁹⁵ It is also conceivable that a divested enemy, not so sanguine about the chances of Congressional return, might prefer to have the property awarded to an American relative or business associate with a claim adverse to his own, rather than to the Government. Such a person might regard vigorous litigation of the interest by the Custodian as nothing short of officious — might, in brief, desire

⁹³ In 1923 Congress authorized the return to enemies of a maximum of \$10,000 of their seized property. 42 STAT. 1511 (1923). The Settlement of War Claims Act of 1928 authorized the return of 80% of such property, and would have permitted the return of it all, had not Germany welshed on her own obligations to Americans. 45 STAT. 254, 50 U. S. C. APP. § 9, *et seq.* (1946). The Joint Resolution of June 27, 1934, suspended returns of German property vested during World War I. 48 STAT. 1267 (1934).

⁹⁴ The latest amendment to the Act declares that "No property or interest therein of Germany, Japan, or any national of either such country vested in or transferred to any officer or agent of the Government at any time after December 17, 1941, pursuant to the provisions of this Act, shall be returned to former owners thereof or their successors in interest, and the United States shall not pay compensation for any such property or interest therein." 62 STAT. 1246 (1948), 50 U. S. C. A. APP. § 2011 (Supp. 1949).

⁹⁵ *E.g.*, *Hamburg-American Line v. United States*, 71 F. Supp. 314 (D. Puerto Rico, 1947), *aff'd*, 168 F.2d 47 (1st Cir. 1948). Prior to the outbreak of war, the United States filed in admiralty a libel for salvage against a German ship, in which proceeding the German owners appeared as claimants. Thereafter the Custodian vested the right, title, and interest of the owners in and to the vessel. The district court, in a curious and somewhat inconsistent order, substituted the Custodian as a party in all respects in place of the German owner, but nonetheless permitted counsel for the enemy to appear and defend against the libel.

an opportunity to present his former interest in its worst light. From another viewpoint, restrictions on easy intervention may be desirable. Thus, it may occur to a suspicious mind that American counsel for enemy former owners are not averse to appearing in proceedings *in rem* and performing services compensable out of the *res*, on the comfortable reasoning that no one save the Government will be the poorer thereby.

Despite these considerations, or perhaps because of them, the Custodian has been intolerant of the presence in court of representatives of enemies whose interests have been vested. Prior to vesting, while the Custodian is entitled to represent an enemy in judicial or administrative proceedings concerning the enemy's property interests,⁹⁶ and while his discretion in such a case is absolute,⁹⁷ he cannot properly object to an appearance by an authorized representative of the enemy owner.⁹⁸ Where, however, the Custodian has vested the enemy's interest, the appearance of the enemy in court seems at least anomalous.

This is so not because the enemy is an enemy,⁹⁹ but simply because he no longer owns any interest in the property which is the subject of the suit, any more than if he had sold or assigned his interest.¹⁰⁰ It is a familiar and self-evident principle that one who has no interest in property cannot ordinarily participate in litigation concerning it,¹⁰¹ and there seems to be no special reason for according to enemies any more favorable treatment than to anyone else. The only federal appellate court which has squarely considered this problem held that the mere hope nourished by a

⁹⁶ Exec. Order No. 9193, § 5, 7 FED. REG. 5205 (1942).

⁹⁷ See *Petschek v. American Enka Corp.*, 182 Misc. 503, 504, 49 N. Y. S.2d 49 (Sup. Ct. 1944); *Farmers & Merchants Nat. Bank v. Superior Court*, 150 P.2d 241, 250 (Cal. App. 1944), *aff'd*, 25 Cal.2d 823 (1945); *Estate of Ferraro, Orphans Ct., Allegheny County, Pa.*, No. 6165 (1941).

⁹⁸ Cf. *Matter of Renard*, 179 Misc. 885, 39 N. Y. S.2d 968 (Surr. Ct. 1943).

⁹⁹ The Trading with the Enemy Act expressly provides that an enemy may *defend* by counsel any action brought against him, although he may not prosecute one. 40 STAT. 416 (1917), 50 U. S. C. APP. § 7(b) (1946). Cf. *McVeigh v. United States*, 11 Wall. 259 (U. S. 1870); *Watts, Watts & Co. v. Unione Austriaca de Navigazione*, 248 U. S. 9, 22 (1918).

¹⁰⁰ See *Commercial Trust Co. v. Miller*, 262 U. S. 51, 56 (1923); *Cummings v. Deutsche Bank*, 300 U. S. 115, 121 (1937).

¹⁰¹ Cf., e.g., *United States v. 422 Casks of Wine*, 1 Pet. 547, 549 (U. S. 1828); *White v. Hardy*, 180 Misc. 63, 39 N. Y. S.2d 911 (Sup. Ct. 1943), *aff'd mem.*, 266 App. Div. 660, 41 N. Y. S.2d 210 (1st Dep't 1943).

divested enemy is not a sufficient interest to give him standing in court.¹⁰² On the other hand, two district courts in other circuits, drawing from the true premise that an enemy may defend a suit against himself or his property¹⁰³ the fallacious conclusion that he may defend an interest in property which he no longer owns, have permitted enemy former owners to participate in proceedings after the Alien Property Custodian had vested their interests and intervened.¹⁰⁴ Similarly, the New York appellate division has sanctioned the appointment of a guardian *ad litem* for infant beneficiaries (in a trustee's suit for an accounting), despite the fact that the infants' interest in the trust *res* had been vested and was being actively represented by the Custodian.¹⁰⁵ On the whole, it is probable that the last word on this question has not yet been spoken. In one situation at least, the former owner of the property would seem in fairness entitled to a hearing — where he either has commenced or is about to commence proceedings under the Act to recover the interest vested by the Custodian. It might not normally be practicable to postpone the proceedings concerning the extent of the interest to await the outcome of the litigation concerning its ownership; but in such a case it is suggested that the claimant should be allowed to appear as *amicus curiae*.

¹⁰² *The Antoinetta*, 49 F. Supp. 148, 150-51 (E. D. Pa. 1943), *aff'd*, 153 F.2d 138, 143 (3d Cir. 1945), *cert. denied*, 328 U. S. 863 (1946).

¹⁰³ See note 99 *supra*.

¹⁰⁴ *The Pietro Campanella*, 47 F. Supp. 374 (D. Md. 1942); *United States v. The San Leonardo*, 51 F. Supp. 107 (E. D. N. Y. 1942).

¹⁰⁵ *Matter of von der Decken*, 274 App. Div. 764, 80 N. Y. S.2d 109 (1st Dep't 1948). Neither the supreme court nor the appellate division wrote an opinion, and the ground of the decision is consequently obscure. No motion had been made to drop the infants as parties, and the appellate court may have believed that, since they were named as parties, the Civil Practice Act made mandatory the appointment of a guardian. N. Y. CIV. PRAC. ACT § 1313. A recent opinion of the New York Supreme Court indicates that in some cases a guardian *ad litem* may be regarded as necessary for the protection of *unborn* members (whose interests the Custodian has not vested) of the class of which the enemies are the representatives *in esse*. *In re Bank of New York*, 85 N. Y. S.2d 413, 414 (Sup. Ct. 1948). Where the interests of the enemies are vested (in the ordinary legal sense of the term) and presently payable, the same court has held that vesting by the Custodian deprives the enemies of any interest in the property so that they cease to be necessary or proper parties and may be excluded. *Matter of Title Guarantee & Trust Co. (Winnegge)*, N. Y. L. J., Dec. 15, 1948, p. 1540; *cf. Matter of Winburn*, N. Y. L. J., Feb. 5, 1948, p. 468.

*C. Actions to Recover Vested Property: Judicial Review
of the Administrative Seizure*

Unlike the proceedings which have so far been discussed, proceedings to *recover* or establish an interest in property which the Custodian has vested properly call into question the correctness of his administrative determination. Such a proceeding can be brought only under Section 9 of the Act. Congress was explicit on this point,¹⁰⁶ and the courts have consistently refused to entertain suits which could not be fitted within the framework of that section.¹⁰⁷ In effect, the plaintiff in such a suit must establish that property seized by the Custodian (whether an interest or a *res*), and which the plaintiff claims, is not enemy property. For example, the Custodian, determining that Blackacre is the property of Hans Fritz and that Hans is an enemy, vests Blackacre. Hans Fritz may allege that in fact he was a loyal resident of the United States and bring suit to recover his property. Or John Smith, concededly a resident of the United States, may bring suit alleging that Hans Fritz conveyed Blackacre to him in 1939, or, perhaps, that he has a mortgage on Blackacre to secure a past due loan to Hans Fritz. Under a recent decision of the Supreme Court, *Clark v. Uebersee Finanz-Korporation*,¹⁰⁸ in fact, *any* person who comes within the requirement of Section 9(a) that he be "not an enemy or ally of enemy,"¹⁰⁹ say a Swiss corporation, may bring such a suit.

This last proposition, apparently so clearly required by the language of Section 9(a), was decided by the Supreme Court, not without some difficulty. The trouble was caused by the apparent conflict between the quoted language of Section 9(a) and the authority, conferred by the First War Powers Act of 1941,¹¹⁰ to vest "any property or interest of any *foreign* country or national

¹⁰⁶ Section 7(c) of the Act provides in substance that the "sole relief and remedy of any person having any claim" to any property seized by the Custodian shall be that provided by the Act. Section 9 of the Act is the only one which authorizes suit against the Custodian to recover or establish an interest in vested property.

¹⁰⁷ *E.g.*, *Banco Mexicano v. Deutsche Bank*, 263 U. S. 591 (1924); *Sigg-Fehr v. White*, 285 Fed. 949 (D. C. Cir. 1923); *Crone v. Sutherland*, 63 F.2d 895 (D. C. Cir. 1933); *Von Hennig v. Clark*, 191 Misc. 261, 76 N. Y. S.2d 350 (Sup. Ct. 1947), *aff'd*, 274 App. Div. 759, 80 N. Y. S.2d 727 (1st Dep't 1948).

¹⁰⁸ 332 U. S. 480 (1947).

¹⁰⁹ 40 STAT. 419 (1917), 50 U. S. C. APP. § 9(a) (1946).

¹¹⁰ 55 STAT. 839 (1941), 50 U. S. C. APP. § 5(b) (1946).

thereof," including friendly and neutral foreign countries. There seemed to be little substance to such authority if a friendly or neutral owner could recover his property as soon as vested, and the Government in effect argued that the later enactment must be construed to have amended Section 9(a) to require that plaintiffs show that they are not foreigners.

The Court avoided the difficulty by substantially rewriting Section 2 of the statute. Since Section 2 defines the term enemy as used in Section 9(a), a broadening of this definition enabled the Court to reach the desired result without ignoring the fact that Section 9(a) was limited to an "enemy or ally of enemy." Section 2 defined "enemy" in substance as any individual (regardless of nationality) resident (or corporation incorporated) in enemy territory; or resident (or incorporated) outside the United States and doing business within enemy territory. Under this section, the Court had previously held that the ownership and control of a corporation were irrelevant: so long as it was neither incorporated nor doing business within enemy territory, it was not an "enemy or ally of enemy."¹¹¹ Such "rigidity and inflexibility"¹¹² was, of course, a standing invitation to adroit German and Japanese financial experts, particularly the Germans, who were conveniently near Switzerland and Sweden. The concealment of German interests in the United States was frequently attempted through the medium of neutral or American corporations, whose German affiliations were more or less camouflaged.¹¹³ The Court recognized that Section 5(b), as amended, was intended to plug this breach in the nation's economic defenses. But it could hardly have that effect unless the phrase "enemy or ally of enemy" were either given a meaning broad enough to prevent recovery of property by Axis associates in neutral territory or were read out of Section 9(a) altogether. Thus, in effect the Court had either to rewrite Section 2 or Section 9(a).

Recognizing that "the problem is not without its difficulties

¹¹¹ *Behn, Meyer & Co. v. Miller*, 266 U. S. 457 (1925); *Hamburg-American Line v. United States*, 277 U. S. 138 (1928).

¹¹² See *Clark v. Uebersee Finanz-Korporation*, 332 U. S. 480, 484 (1947).

¹¹³ See ADMINISTRATION OF WARTIME FINANCIAL AND PROPERTY CONTROLS OF THE UNITED STATES GOVERNMENT 29-31 (U. S. Treas. Dep't 1942); *Hearings before a Subcommittee of the Senate Committee on Military Affairs Pursuant to S. Res. 107 and S. Res. 146*, 79th Cong., 1st Sess. 49, 52, 68-69, 564-85, 969-77, 1063, 1203-21 (1945); H. R. REP. No. 2398, 79th Cong., 2d Sess. 3 (1946).

whichever way we turn,"¹¹⁴ a unanimous Court decided that revision of Section 2 to harmonize with Section 5(b), as amended by the Act of 1941, was the less drastic operation. Accordingly, it held the definitions contained in that section to be "merely illustrative, not exclusionary";¹¹⁵ an "enemy taint" would be enough to make a neutral, friendly or American corporation an "enemy or ally of enemy" for the purposes of the Trading with the Enemy Act. Prudently, if tantalizingly, the Court refrained from defining "enemy taint," for the procedural posture of the *Uebersee* case was such that the plaintiff was assumed to be free of any enemy interest whatsoever.¹¹⁶

It may at least be supposed that enemy control would constitute an "enemy taint." The federal courts have in other contexts given some provocative definitions of "control," which will probably not be lost upon the Custodian. Thus, it has been remarked that "under some circumstances controlling influence may spring as readily from advice constantly sought as from command arbitrarily imposed";¹¹⁷ and under the Public Utility Holding Company Act "control" and "controlling influence" have been held to "include the power to control and the power to exert a controlling influence as well as the actual exercise of such power."¹¹⁸ And the Supreme Court has emphasized that questions of control turn upon "actualities" rather than upon any "artificial test"

¹¹⁴ *Clark v. Uebersee Finanz-Korporation*, 332 U. S. 480, 488 (1947).

¹¹⁵ *Id.* at 488-89.

¹¹⁶ On remand to the district court, however, it was held that various factors, including a "usufructuary" interest in the property by German nationals and a certain fishiness in the claimed neutral (*Liechtensteinean*) status of the owner of the remaining interest, constituted a sufficient "enemy taint." *Uebersee Finanz-Korporation v. Clark*, 17 U. S. L. WEEK 2394 (D. D. C. Feb. 21, 1949). A curious contrast to the *Uebersee* case is furnished by the Court's opinion, handed down the same day in *Silesian-American Corp. v. Clark*, 332 U. S. 469 (1947). Although not actually inconsistent with the *Uebersee* case, for it holds only that the Custodian may summarily reduce to possession neutral or friendly alien property, it speaks of the nonenemy alien's right to "just compensation" for the taking of his property. *Id.* at pp. 479-80. But such a right would seem not to exist, or at least to be redundant, if he may recover the property itself in a suit under Section 9(a) of the Trading with the Enemy Act, for in that case there would be no "taking."

¹¹⁷ See *American Gas & Elec. Co. v. SEC*, 134 F.2d 633, 642 (D. C. Cir. 1943), cert. denied, 319 U. S. 763 (1943).

¹¹⁸ *Public Serv. Corp. v. SEC*, 129 F.2d 899, 903 (3d Cir. 1942); *Detroit Edison Co. v. SEC*, 119 F.2d 730, 739 (6th Cir. 1941), cert. denied, 314 U. S. 618 (1941).

and are issues "of fact to be determined by the special circumstances of each case."¹¹⁹

At any rate, the *Uebersee* decision insures that the property of genuinely friendly or neutral aliens will not be confiscated. The Court's reluctance to find such a Congressional intent seems justified in the light of recent amendments to the Act which authorize (although they do not compel) the return of vested property to "technical enemies" such as nationals and residents of allied or neutral countries whose "enemy" status was involuntarily acquired via German or Japanese occupation;¹²⁰ victims of Nazi racial, religious, and political persecution who were similarly enemies in name only; and Italians, who are considered to have restored themselves to the friendship of the United States.¹²¹

A new twist to the problem of eligibility for return has been given by the most recent amendment of the Act.¹²² That section expressly forbids return of any vested property to any "national" (*i.e.*, citizen) of Germany or Japan. But, it will be recalled, the test of enemy status under Sections 2 and 9(a) of the Act has normally been residence rather than citizenship. Thus, a case recently decided by the United States District Court for the Southern District of New York presented facts virtually identical with those of *Josephberg v. Markham*¹²³ except that the incompetent whose property had been vested was admittedly a citizen of Germany. There was no doubt that the Custodian had been authorized to *vest* the property, for Section 5(b) authorizes the vesting of the property of any "foreign national;" the question,

¹¹⁹ *Rochester Tel. Corp. v. United States*, 309 U. S. 125, 145 (1939).

¹²⁰ "Enemy" status is fixed as of the time of vesting, and would not be affected by any subsequent change of nationality, residence, or international relations. *Swiss Ins. Co. v. Miller*, 267 U. S. 42, 44 (1925). In that case, the Custodian had vested the property of a Swiss corporation, after finding that it was doing business in Germany and was consequently an "enemy." The corporation attempted to recover its property under § 9(a), arguing that it was no longer an enemy because, in the first place, it had ceased to do business in Germany and, in the second place, a treaty of peace had been concluded between the United States and Germany. The Supreme Court rejected both arguments.

¹²¹ 60 STAT. 784 (1947), 50 U. S. C. APP. § 32 (Supp. 1948). Although § 32 is cast in discretionary language, one district court has recently held that return thereunder is a matter of right, so that the Custodian's denial of a claim under the section is subject to judicial review under the Administrative Procedure Act. *Zander v. Clark*, 80 F. Supp. 453 (D. D. C. 1948). The Custodian has appealed.

¹²² 62 STAT. 1246 (1948), 50 U. S. C. A. APP. § 39 (Supp. 1949).

¹²³ See pp. 740-42 *supra*.

as in the *Uebersee* case, was whether he could *retain* it in the face of an action under Section 9(a). In a curt opinion, the district court held that, regardless of the incompetent's residence, Section 39 forbade the return of his property, and dismissed the complaint.¹²⁴ In effect, Section 39 was held to have amended Section 9(a) by adding to the category of "enemies" not only those who are enemies under Section 2 (as construed by the *Uebersee* case) but those who are nationals of enemy countries. Technically, the holding would seem to make possible the taking and retention of the property of German and Japanese nationals resident in the United States; in practice, it may safely be predicted that the Custodian will not embark upon any such campaign.

The Court's decision in the *Uebersee* case, by permitting the Government to look behind the corporate veil, opens new vistas of "cloaking" litigation. "Cloaking" may be concisely defined as an attempt to cover enemy property in the United States with a cloak of apparent nonenemy ownership; and its forms are as various as the ingenuity of enemy financial and economic experts would allow—which is very various indeed. For example, real ownership has been concealed by the use of nominees and the elaboration of complex holding company structures; and the stock of the top holding companies is often in the form of bearer shares, the ownership of which is obviously not easy to trace. Control was often divorced from ownership and exercised through options, contractual relationships, possession of vital technical information, and loyalty (or family relationship) of key personnel.¹²⁵ Despite the variations of technique, the general pattern is always the same; the Custodian, having determined that certain property or interest therein is really beneficially owned or controlled by an enemy, vests it, and is presently sued under Section 9(a) by a virtuous and fearfully indignant American citizen (Swiss corporation, Swedish bank) who alleges acquisition of all the enemy interest, with no strings attached, long before the war; and further that the Custodian is arbitrarily, unlawfully, and unconstitutionally attempting to confiscate the hard won property of this same virtuous and indignant American citizen (Swiss corporation, Swedish bank).

¹²⁴ *Bellman v. Clark*, S. D. N. Y., 1948.

¹²⁵ See Brief for Petitioner, pp. 14-15, *Clark v. Uebersee Finanz-Korporation*, 332 U. S. 480 (1947).

A highly typical cloaking case was *Kind v. Clark*, decided by the Court of Appeals for the Second Circuit.¹²⁶ A large and long-established German manufacturer owned a subsidiary in the United States, nominally operated by a closely knit group of descendants of an agent of the German company who had settled in the United States, but actually controlled by a director of the German company whose instructions the Americans invariably followed to the letter. The German company owed the Americans a sum of money, secured by a pledge of the stock of the American corporation, which stock was worth much more than the amount of the debt. In 1939, shortly after the outbreak of war in Europe, the Germans purported to transfer all the stock outright to the Americans in exchange for the release of the indebtedness. But correspondence between the parties showed plainly a secret understanding (which they called a "gentlemen's agreement") that the Americans would hold for and eventually pay over to the Germans the difference between the true value of the stocks and the amount of the debt: in other words, that the Germans should retain their equity in the pledged shares. As the German director expressed it in one of his letters, the shares were to be transferred to ostensible American ownership "in order that the enterprises over there could be saved from a foreign seizure." Unfortunately — from the standpoint of the American cloaks — the Germans, who had the national taste for comprehensive records, who did not foresee the result of the war, and who did not, perhaps, wholly trust their American confederates, preserved all this interesting correspondence in files which eventually became available to American occupation forces. In the light of these records, and having regard to certain unbusinesslike aspects of the deal considered as an ordinary commercial transaction, the court of appeals had little difficulty in deciding that the ostensible transfer was a nullity, because neither party had the intent necessary to validate the "sale." Consequently the stock was still enemy property and fair game for the Custodian. The same result would have been reached by a slightly different route had the Court decided that the Germans' continued *control* over the property left it still enemy property, for the purposes of the Trading with the Enemy Act. It is noteworthy that prize cases invariably make

¹²⁶ 161 F.2d 36 (2d Cir. 1947), *cert. denied*, 332 U. S. 808 (1947).

control, rather than common law rules as to passage of title, the test of the enemy character of property.¹²⁷

All this, of course, was almost a pure question of fact — the true intent of the parties — and so, in essence, are most of the reported cloaking cases.¹²⁸ But the Government, by petition for certiorari from the opinion of the court of appeals in the *Kind* case,¹²⁹ attempted to raise a significant question of law. The court of appeals, while holding the transfer to be a nullity, held further that the Americans consequently retained their secured claim against the Germans and hence retained and could enforce a lien on the property vested by the Custodian.¹³⁰ The Government sought to contend, in substance, that the American cloaks had lost even the right to enforce their original lien. Moreover, there were fairly strong grounds for this position.

In the first place, suits under Section 9(a) are, by the terms of that section, "in equity." One who has been engaged in a sincere and industrious effort fraudulently to circumvent an important federal statute may well be thought to have dirtied his hands in the process. There is a solidly established corollary of the clean-hands doctrine, applied in a variety of situations, that one who has misused his property in the attempted perpetration of a fraud cannot invoke the aid of equity to enforce his rights in that property¹³¹ — a doctrine which is applied with particular breadth and vigor where the public (or the Government) is the intended victim of the misconduct, so that "the financial element of the transaction is not the sole or principal thing involved."¹³² In *Standard Oil Co. v. Clark*,¹³³ however, the second

¹²⁷ See, e.g., *The Benito Estenger*, 176 U. S. 568, 578-79 (1900). Judicial use of control as the test of taxability also affords a parallel. Cf. *Helvering v. Clifford*, 309 U. S. 331 (1940).

¹²⁸ For other typical cloaking cases, see *Standard Oil Co. v. Markham*, 64 F. Supp. 656 (S. D. N. Y. 1945), *aff'd sub nom. Standard Oil Co. v. Clark*, 163 F.2d 917 (2d Cir. 1947), *cert. denied*, 333 U. S. 873 (1948); *Brassert v. Clark*, 162 F.2d 967 (2d Cir. 1947).

¹²⁹ *Clark v. Kind*, 332 U. S. 808 (1947).

¹³⁰ *Clark v. Kind*, 161 F.2d 36, 47 (2d Cir. 1947).

¹³¹ Cf., e.g., *Milwaukee & Minn. R. R. v. Soutter*, 13 Wall. 517, 523 (U. S. 1871); *Commonwealth Finance Corp. v. McHarg*, 242 Fed. 560, 571 (2d Cir. 1922); *Baldwin v. Short*, 125 N. Y. 553, 560, 26 N. E. 928, 929 (1891).

¹³² *Pan American Co. v. United States*, 273 U. S. 456, 509 (1927); *Worden v. California Fig Syrup Co.*, 187 U. S. 516 (1903); *Morton Salt Co. v. G. S. Suppiger Co.*, 314 U. S. 488, 493-94 (1942).

¹³³ 163 F.2d 917 (2d Cir. 1947), *cert. denied*, 333 U. S. 873 (1948).

circuit rejected a contention that the plaintiff's unclean hands deprived it of the right to sue under Section 9(a), pointing out that "nowhere in the statute is there written any restriction of the right to the return of property or any enlargement of the Government's power of seizure because of violation of law in the claimant's original acquisition of it."¹³⁴ But this language referred to a contention that, even if Standard had genuinely become the owner of some of the property in suit, through agreements made long before the war, it had done so as part of a conspiracy to violate the antitrust laws. In the *Standard* case, it was not necessary for the court to consider the effect of unclean hands acquired in the attempt to cloak enemy property, for, having found that this transaction was a nullity, it could not in any event return to Standard property of which that corporation had never become the true owner. A rough analogy to the situation in the *Kind* case would have been presented if, for example, Standard — in order to provide corroborative detail lending verisimilitude to an otherwise bald and unconvincing transaction — had purported, in exchange for I. G. Farben's property, to assign to I. G. valuable patents, and if the Custodian had vested those patents. If the transaction were a sham, equitable ownership would remain in Standard; but could it have invoked equitable process to reassert that ownership? There appears to be no definitive answer to this question, but one is suggested by an aspect of the court's decision in the *Standard* case.

As part of a prior consent decree, the Standard companies had been ordered to place certain of their patents in an American corporation, Jasco, Inc., which was declared in the consent decree to be wholly owned by Standard. In the Section 9(a) suit, Jasco was found to have been half owned by I. G. Farben, and hence by the Custodian through his vesting order. Standard thereupon asked the 9(a) court to direct that the Custodian should not get any of the royalties from the Standard patents which had been placed in Jasco by the consent decree. The court of appeals denied any relief on the ground that Standard's predicament was the result of its own attempted fraud on the Government. The hypothetical situation is perhaps more favorable to the Government's contention than is the situation in the *Kind* case, however, since in the former Standard is attempting to assert the nullity of

¹³⁴ 163 F.2d 917, 926 (2d Cir. 1947).

its own transaction, whereas in the latter it is the Government which is asserting that the transfer is void.

This clean-hands principle interlocks neatly with an ancient rule of prize law — a closely related field — that one who has misused his name and property in order to cloak enemy property cannot, when the cloak has been thrust aside and the property seized, recover his own property employed in the “iniquitous adventure.”¹³⁵ There seems good reason to deal with the subtler financial blockade runners of modern war in much the same manner. Indeed, Section 16 of the Act¹³⁶ provides that any property — presumably including American property — “concerned” in a willful violation of the Act or of the regulations issued thereunder shall be forfeited to the United States. Apparently this sweeping sanction has never been invoked, but it offers intriguing possibilities. How much of the property of the Standard Oil Company of New Jersey, for example, might have been held to be “concerned” in its unsuccessful efforts to cloak the American assets of I. G. Farben? The subject is one on which attorneys for cartel-minded corporations may well pause to ponder.

A collateral question, adumbrated by the decision in the *Standard* case, is the status of a nonenemy who has, in effect, been the agent of an enemy in a cloaking transaction. The executive order implementing the Act defines “national of a designated enemy country” to include any person whom the Custodian determines to be “controlled by or acting for or on behalf of [including cloaks for] a designated enemy country or a person within such country.”¹³⁷ Thus, Judge Clark indicated,¹³⁸ Standard’s concealment of I. G. assets after Germany’s declaration of war, might have made it an “enemy” for the purposes of Section 9(a). The court’s view of the case made the question academic, for to the extent that Standard genuinely acquired the ownership of

¹³⁵ See, e.g., *The Saint Nicholas*, 1 Wheat. 417, 431 (U. S. 1816); *The Fortuna*, 3 Wheat. 236, 245 (U. S. 1818); *Carrington v. Merchants Ins. Co.*, 8 Pet. 495, 520-21 (U. S. 1834).

¹³⁶ 40 STAT. 425 (1917), 50 U. S. C. APP. § 16 (1946).

¹³⁷ Exec. Order No. 9193, par. 10(a)(i), 7 FED. REG. 5205 (1942); cf. Exec. Order No. 8785, par. 5E(iii), 6 FED. REG. 2897 (1941), which, for the purposes of the freezing regulations, in substance defines “foreign national” to include any person to the extent that he has been acting directly or indirectly for the benefit of or on behalf of a national of a foreign country.

¹³⁸ See *Standard Oil Co. v. Clark*, 163 F.2d 917, 925 (2d Cir. 1947), *cert. denied*, 333 U. S. 873 (1948).

I. G.'s property, it was acting for itself. But, as above indicated, if its concealment of I. G. assets had been accomplished in part through a colorable transfer to I. G. of some of its own United States property, as was the case in *Kind v. Clark*, this question, as well as the problem of the effect of unclean hands, would have been squarely presented. In at least one case, it has been held that the Custodian was authorized to seize the stock of an American corporation, owned by an American citizen, but operated by him in the interest of a German concern.¹³⁹

Section 9(a) raises, or has raised, a number of other questions, some of which have been laid to rest within the year or so by legislation. Thus, for example, Section 34 now affords an exclusive method whereby American creditors may reach the vested assets of enemy debtors, thereby obviating the World War I provisions of Section 9(a), which authorized suit by such creditors.¹⁴⁰ Secured creditors, who may be said to have an interest in the vested property, have still a cause of action under Section 9(a), and hence there may be anticipated a rash of suits under that section alleging the existence of various species of liens on vested property.¹⁴¹

CONCLUSION

It has been the purpose of this article briefly to outline some of the intricacies of judicial construction of the Act as it now stands, rather than to consider potential amendatory legislation. There is a temptation to end the discussion in facile fashion by briefly recommending legislation designed to cure all the ills of the world, or at least that portion of them which arises from the ambiguities and inconsistencies of the Trading with the Enemy Act, as amended and judicially construed. Perhaps some such

¹³⁹ *Draeger Shipping Co. v. Crowley*, 55 F. Supp. 906 (S. D. N. Y. 1944).

¹⁴⁰ Prior to the enactment of § 34, Pub. L. No. 671, 79th Cong., 2d Sess. (1946), the Supreme Court had held that these provisions of § 9(a) had continued vitality, despite a time limitation contained in § 9(e), which limited claims thereunder to those owed to or owned by the claimant prior to October 6, 1917. *Markham v. Cabell*, 326 U. S. 404 (1945). After the enactment of § 34, Cabell's suit under § 9(a) was dismissed on the ground that the new section was the exclusive remedy for American creditors. *Cabell v. Markham*, 69 F. Supp. 640 (S. D. N. Y. 1946), *aff'd sub nom. Cabell v. Clark*, 162 F.2d 153 (2d Cir. 1947). For a comprehensive description of the new remedy, see Mason and Efron, *The Payment of American Creditors from Vested Assets*, 9 FED. BAR J. 233 (1948).

¹⁴¹ Cf. *Cabell v. Clark*, *supra* note 140.

legislation is or may be desirable, but I am beginning to suspect that the complexity and unpredictability of the situations and tactics with which the Act is designed to deal make the filling up of its interstices a job more suitable to the judicial than to the legislative process. Certainly, a little more judicial uniformity would be desirable. Judicial interpretation in ten circuits and eighty-odd districts (not to speak of occasional swipes at the statute by the courts of the forty-eight states) has proved the hard way to forge a sword of economic warfare; but it may be the best.